



# **ANNUAL REPORT**

**2015/16**

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**FOREWORD BY LORD DYSON, MASTER OF THE ROLLS,  
CHAIRMAN OF THE CIVIL JUSTICE COUNCIL (CJC)**

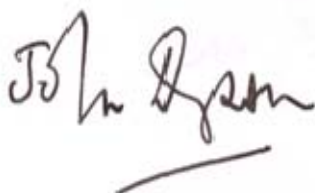
This Annual Report captures the range and depth of the Council's activities in 2015/16. The Council has a broad statutory remit of keeping the civil justice system under review and making suggestions to improve it. It has fulfilled that responsibility in a number of important areas, as set out in this report.

The Council's work is always a balance between projects which it proactively pursues when its members see an issue which needs addressing; and work which is more reactive, responding to Government policy reforms.

There has been plenty of work in both categories in the period covered by this report. The HMCTS reform programme will have a major impact on the delivery of civil justice, and investment in digitisation will see a transformation and modernisation of services. The CJC is where it needs to be on that issue - both progressively advocating reform (the CJC's Advisory Group was inspirational in the Online Court proposal), but concerned that the new system is not at the expense of access to justice for the unrepresented.

The Council's skill in bringing together a wider pool of experts to wrestle with technical and complex problems has been shown this year with working groups tackling property disputes and boundary disputes. Of particular note is the excellent work of the group chaired by Professor Rachael Mulheron, which delivered a report suggesting some much needed amendments to the regulations for Damages-Based Agreements. I commended them to the Government without hesitation, and we await news of their implementation.

As ever, I am immensely grateful to all Council members for their selfless devotion of their own time and expertise to enable the Council to be the informed and influential voice it has become in civil justice matters.

A handwritten signature in black ink, appearing to read 'J B Dyson', with a horizontal line underneath.

**Rt Hon Lord Dyson**

**Master of the Rolls and Chairman of the Civil Justice Council**

## Overview of the year

The Council continues to consider a range of different issues relating to the civil justice system during the course of the year. While the Council is willing to spend time investigating and making recommendations on any area of civil justice that its members consider worthwhile, it balances this wide ranging role with responses on areas of Government policy where the provision of early and well-considered advice can help to shape the form policy-making and consultations take.

Much of the Council's work is undertaken by dedicated working groups utilising the skills and expertise of practitioners who give freely of their time and considerable subject expertise.

*Review of civil litigation.* One example of this during the course of this year was the establishment of the *Civil Justice review working group* under the chairmanship of Professor Rachael Mulheron. The purpose of that group has been to put together a short list of topics that might usefully be considered over periods of months by a small group of core members and the addition of further specialist members depending on the topic under consideration. While flexible in its approach to subject areas and happy to adapt its work programme as the exigencies facing the justice system continue to change, initial thoughts have centred on the use of concurrent evidence giving or hot-tubbing in complex civil litigation – and plans for future topics include areas such as the use of BTE insurance as a source of possible funding for civil claims as the impact of the implementation of Parts 1 and 2 of LASPO<sup>1</sup> and the shrinking of civil legal aid continued to be felt.

*Triennial review.* During the course of the year, the Council underwent its first triennial review. That process had taken over a year and had gathered views from stakeholders in the civil justice system on whether the purpose of the Council was one that still needed to be fulfilled, and if so whether the Council was equipped to carry out those functions. A number of favourable points were made by stakeholders on the work of the Council, and its continued utility endorsed. There were, however, a number of action points arising from the review – including the need to increase diversity among its members, and those action points are being carried forward.

*Small businesses.* During the course of the year, the Council hosted a meeting with the Federation of Small Businesses in an effort to get insights and comments in the operation of the civil justice system from a small business perspective. For many such enterprises the experience is akin to that of litigants in person in terms of lack of familiarity and the daunting nature of costs and legal systems.

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<sup>1</sup> Legal aid, Sentencing & Punishment of Offenders Act 2012

## Responses to consultation papers

The full CJC consultation responses summarised briefly below can be found on the Council's website (<https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/>).

The CJC always seeks to offer constructive responses that assist the policy making process, and provide insights from practitioners and other stakeholders into the likely effects and impact of proposals on civil justice. The CJC published a number of responses to consultations during the period.

- In its response to HM Treasury's interim report on the *Insurance Fraud Taskforce* dated May 2015, the CJC welcomed an initiative to combat insurance fraud, and noted the higher costs in insurance premiums and society more general that resulted. It considered the wider impact to be in the suspicion with which legitimate claims could be considered as a result, and in making some insurance products too expensive or unavailable to consumers. The Council thought that motor claims and offers being made to claimants before medical evidence. It also thought that claimant and defendant behaviour should be addressed.
- In September 2015, in its response to the BIS consultation on its Enterprise Bill and the creation of a *Small Business Commissioner*, the Council noted the number of good schemes already in place to help small businesses resolve their disputes and drew parallels between the difficulties encountered by small businesses acting without legal representation and those faced by individuals, or litigants in person. In particular those problems were the speed and cost of resolving those disputes and the complexity of the substantive law and its procedures. The CJC welcomed the proposal that legal advice ought to relate to the negotiation of contracts- long before any disputes has arisen and in relying on the application of good practice principles, rather than that is legally allowable. It drew attention to its own work on Online disputes resolution as a method of resolving lower level value civil claims.
- In the same month, the Ministry of Justice's Consultation, *Reform of judicial Review: Proposals for the provision and use of financial information* included a series of proposals that followed up measures in the Criminal Justice and Courts Act 2015. The comments from the Council were confined to the detail of implementing the reforms and touched on areas such as the new financial information requirements, (which the Council did not support) as an exception of the general rule that the provision of such detail should be left to the court's discretion. The Council backed a more discretionary approach.
- CJC Response to Ministry of Justice Consultation: *Consultation on further fee proposals* (September 2015), which represented the fourth set of civil court fee increase proposals in the previous two years. The response built on the concerns expressed by the Council in its responses to previous consultations. They were broadly centred around the inhibition of access to justice, and in particular on individuals and small businesses. There were also concerns about the strength of the evidence base on which further increases were based - both of the likely effect of the

new increases and the impact of the previous changes. Other points raised were the risk to the competitiveness of the civil court system both internationally and domestically, where arbitration services had started to actively cite court fees as a reason not to use the courts.

- In October 2015, the Council responded to the Ministry of Justice's consultation on *Proposals on the provision of court and tribunal estate in England and Wales*. While it understood the proposal fitted into the aim of making the court system more efficient (as part of the HMCTS reform programme), an aim supported by the Council, the fear was the scale of closures was proposed. There was also concern that it should be based on accurate data on utilisation rates. The response emphasised that each decision was one to be taken with the clear advice and knowledge of the local community and their detailed understanding of geographic and public transport factors, as well as capacity at nearby courts.
- CJC response to MoJ consultation paper on *Costs protection in Environmental cases* (December 2015) – this welcomed a return to consideration of how greater costs protection could be afforded to parties in environmental cases. However, the Council was concerned about whether the specific proposals would work, as they imposed additional demands (and thus costs) on parties. Another concern was private nuisance claims falling outside the scope of the regime.
- CJC response to the further Civil Procedure Rule Committee consultation on a *Pre Action Protocol for Debt Claims* (January 2016) – the Council welcomed the revised proposals as reasonable and proportionate, and responsive to the consultation's comments.
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- CJC response to the *Interim Report for the Civil Courts Structure Review (CCSR)* (March 2016) – the Council welcomed Lord Justice Briggs' comprehensive analysis of the civil justice system. The modernisation and digitisation of services were essential to courts efficiency and ability to meet the needs and expectations of users. The response commented on the need for care on implementation, to ensure the essence of the review was not diluted - for example the need for investment in training and supervision of case officers. The Council's ODR Advisory Group of experts submitted a separate response on the Online Court proposals. While this wholeheartedly welcomed the core proposal of the Online Court, it set out a number of refinements and suggestions, including the need for incremental development of the proposal by managed stages.

## **CJC Committees and working parties**

### **Executive Committee**

The Executive Committee's role is to help provide strategic direction and focus the CJC's work programme and priorities. The Committee met on four occasions during the course of the year – each time two weeks before and in preparation for the full CJC meeting. During the year under report, the period of office of Alistair Kinley came to an end, and expressions of interest in joining the Executive Committee were invited from the remaining members. As a result, Matthew Smerdon was appointed as his replacement.

The Executive Committee is also chaired by the Master of the Rolls and its deputy chairman is Lord Justice Briggs. At 31 March 2016 its members were:

Professor Rachael Mulheron

Andrew Parker

Matthew Smerdon

John Spencer

### **Boundary disputes**

The Council started to consider the possibility of establishing a new one-off discussion of the problems inherent in the resolution of these notoriously emotionally fraught and disproportionately costly disputes. There had been a Private Member's Bill on the subject, and it was agreed that the Council might play a role in considering what the respective roles of courts, adjudication or some other form of ADR might be. The discussion group's work will be the subject of a report in the next Annual report.

### **DBAs (Damages-Based Agreements)**

In October 2014, Justice Minister Lord Faulks wrote to the CJC, requesting its assistance in relation to DBAs, and particularly in relation to certain drafting points in relation to amending the DBA Regulations 2014.

A working group was set up under the chairmanship of Rachael Mulheron and continued its work during the period under report. The group tackle the subject in two phases – first, to discuss and make recommendations on the 20 or so specific drafting points raised in the letter from the Minister, but in a second phase, and as part of its role to review the civil justice system, to look more widely at some of the policy issues relating to DBAs.

In July 2015, after six meetings of the group, Professor Mulheron presented its final report to the Council, which endorsed its recommendations to the Ministry of Justice. The report is available on the CJC's website. While members' views had differed on some of the topics

under consideration, the discussion had allowed new insights to this technical subject, on areas such as the treatment of recoverable costs, the ongoing application of the indemnity principle and the absence of any requirement for independent advice before the DBA is entered into.

The terms of reference for the group can be found on the CJC's website. The members were:

- Professor Rachael Mulheron (Chair) (CJC member)
- Andrew Parker (CJC member)
- Peter Smith (CJC member)
- Stuart Kightley (APIL)
- Nick Parsons (FOIL)
- Mark Friston (Bar Council)
- David Greene (Law Society)
- Maura McIntosh (commercial litigator)
- Hardeep Nahal (Commercial Litigation Forum)
- David Taylor (Employment law specialist)

### **Impact of Jackson**

This working group had been set up in April 2014, in the light of the discussion at the Impact of Jackson conference held by the CJC in March 2014 and described in previous Annual Reports. The group sent its final report to the Ministry of Justice in March 2016. In the event, its recommendations focussed on the extension of the system of costs protection known as qualified one way costs shifting (QOCS) to other areas, such as certain actions against the police.

The terms of reference for the group can be found on the CJC's website. The members were:

- Alistair Kinley (Chairman)
- District Judge Ayers
- Steven Green
- Mark Harvey
- David Johnson
- David Marshall



- Maura McIntosh
- John Mead
- Professor Rachael Mulheron
- Jenny Screech
- Peter Smith

### **Litigants in Person (LiPs)**

This continued to be an area of particular interest and of great activity for the Council.

Some of the work related to complementing Mrs Justice Asplin's group (put together at the request of the Master of the Rolls) with the aim of co-ordinating and developing the judiciary's work on LiPs. That work included:

- The creation of a new training module for judges on handling such cases, and plans for more in the series.
- The publication of joint guidance for the professions on litigants in person.
- Preparation for a judicial consultation on McKenzie friends.

In the meantime, the work of the Council's LIP working group continued to culminate in the annual National Forum for access to justice, an event that has grown to be a key date in the calendar for all those involved in the provision of legal advice and services for those without the means to pay for a lawyer.

The fourth Forum was held at the end of 2015 and heard a particular call for a more strategic and long term approach, and greater prioritisation of topics and co-ordination of effort.

### **Noise-induced Hearing Loss (NIHL) claims**

In the summer of 2015 a new working group was set up under the chairmanship of Andrew Parker to consider an improved process a fixed recoverable costs process for NIHL cases. The group met four times during the period under report. The group had been set up in response to a letter from the MoJ asking the CJC to consider ways of improve the process and behaviours of claimants and defendants and to consider what a new fixed costs regime might look like. The terms of reference are available on the CJC's website. The work of the group fell into two phases, with the first phase focusing on the building blocks of a new process for the resolution of these claims, with an emphasis on the early exchange of information between claimant and defendants. That process was the subject of an interim report to the Council in January 2016.

Membership of the group was:

Andrew Parker, Partner, DAC Beachcroft - *Chairman*

David Marshall, Partner, Anthony Gold Solicitors - *Deputy chairman*

Cenric Clement-Evans, Solicitor, NewLaw Cardiff

Bridget Collier, Principal Lawyer, Fentons Solicitors (part of Slater & Gordon)

Ian Harvey, Senior Claims Manager, Aviva plc

Karen Jackson, Chief Executive, Roberts Jackson

Roland Jackson, Head of Legacy Exposures, UKGI – Technical Claims Services

John Latter, Director of Technical Centre, Zurich Insurance plc

Nick Parsons, Partner and Head of Insurance & Public Risk, Browne Jacobson

Dominic Weir, Principal Lawyer. Leo Abse & Cohen (part of Slater & Gordon)

The group will also have a district judge member.

Robert Wright, Ministry of Justice

Heather Atkinson, Ministry of Justice

### **Property disputes**

In April 2015, it was agreed that Siobhan McGrath, President of the property Chamber of the First-tier Tribunal should be asked to chair a new group on property disputes, and in particular to examine the allocation of property disputes between courts and tribunals with a view to improving the process by which those disputes are resolved. The terms of reference for that group can be found on the CJC's website.

Initial discussion circulated around a specific list of types of case, principally in the areas of residential property and the Land Registry, in which the jurisdictions of the county court and the First-tier Tribunal overlapped or ran in parallel, and where it was suggested that use of the deployment of judges between those two jurisdictions (all FTT judges being judges of the county court and vice versa under the Crime and Courts Act 2013 and Tribunal Courts and Enforcement Act 2007 respectively) would allow the smoother and more efficient and rational resolution of specific disputes, generally by the tribunal.

The group produced a discussion paper which was circulated to a group of 40 interested individuals and organisations who were invited to submit their thoughts, and to attend a half day workshop in March 2016. That workshop was structured around four case studies, designed to dig a little deeper into some of the procedural implications – and possible unintended consequences – of the employment of deployment in this way. The results of that discussion (which are available on the CJC's website) were then to help further inform

the production of a series of detailed recommendations later in 2016. The membership of the group was:

Siobhan McGrath (President, First-tier Tribunal (Property Chamber) (Chair)

Professor Helen Carr

Elizabeth Cooke (Principal Judge, Land Registration Division)

Marc Dight (HHJ Central London Civil Justice Centre)

Anthony Essien

Graham French

Kerry Glanville

Professor Caroline Hunter

William Jackson (District Judge)

Professor Martin Partington

Tim Powell (London Regional Judge)

Philip Rainey QC

Martin Rodger QC

## CJC membership at 31 March 2016

Category	Member	Appointment Started	Term of office
<b>(1) Judiciary</b>			
(a) Court of Appeal	The Master of the Rolls (Chairman)		Ex officio
	The Deputy Head of Civil Justice		Ex officio
(b) High Court	The Hon Mr Justice Knowles CBE	4 <sup>th</sup> January 2016	3 <sup>rd</sup> January 2019
(c) County Court	Vacant		
	District Judge William Jackson	6 <sup>th</sup> September 2012	4 <sup>th</sup> September 2018
<b>(2) Legal Profession</b>			
(a) Solicitor	Andrew Parker	31 <sup>st</sup> July 2014	30 <sup>th</sup> July 2017
	John Spencer	1 <sup>st</sup> October 2013	30 <sup>th</sup> September 2016
(b) Barrister	Vacant		
(c) Legal Executive	Craig Budsworth	16 <sup>th</sup> April 2012	16 <sup>th</sup> April 2018
<b>(3) Civil servant concerned with administration of justice</b>			
Ministry of Justice	Richard Mason		Ex officio
<b>(4) Consumer Affairs</b>			
	Christopher Warner	1 <sup>st</sup> January 2013	31 <sup>st</sup> December 2018
<b>(5) Lay Advice Sector</b>			
	Rebecca Scott	1 <sup>st</sup> January 2013	31 <sup>st</sup> December 2018
<b>(6) Specific Interests</b>			
(a) Insurance	Vacant		
	Vacant		
(b) Trade Union	Vacant		
(c) Business	Elizabeth Silver	1 <sup>st</sup> October 2013	30 <sup>th</sup> September 2016
<b>(7) Other</b>			
(a) Policy Director in a Solicitors' Practice	Vacant		
(b) ADR Provider	William Wood	1 <sup>st</sup> July 2014	30 June 2017
(c) Legal Academic	Rachael Mulheron	1 <sup>st</sup> May 2009	30 April 2018
(d) Lay Member	Matthew Smerdon	1 <sup>st</sup> October 2013	30 <sup>th</sup> September 2016

## CJC Business Plan 2014/16

<b>2015/16 Strategic Objective: 1</b>				
<b>To consider areas for improvement in the operation and delivery of the civil justice system, and to make recommendations for improvements</b>				
<b>Supporting activity</b>	<b>Body Responsible</b>	<b>Aim</b>	<b>Target Date</b>	<b>Outcome</b>
To review the operation of the civil justice system, highlight problems and make recommendations for improvements	CJC Council and Executive Committee	To ensure the CJC is fulfilling its statutory role and drawing on the expertise and experience of members and other professionals	Ongoing	To identify areas for review and to take steps to assess and report on possible reforms to improve the system in areas, such as the pressures on law firms of conducting larger litigation.
To commission a piece of research to find out more about the impediments people face in accessing the civil justice system	CJC Council and Executive Committee	As above, and to bring to the surface previously unidentified issues of concern	March 16	As above, identifying areas of work for the Council
To publish a series of recommendations based on the outcomes of the March 2014 'Jackson' conference	Working group	To arrange a second 'Impact of Jackson' event	Oct 15	To identify the next round of specific pieces of work to be carried out by the CJC in the light of discussion at the Oct 15 event