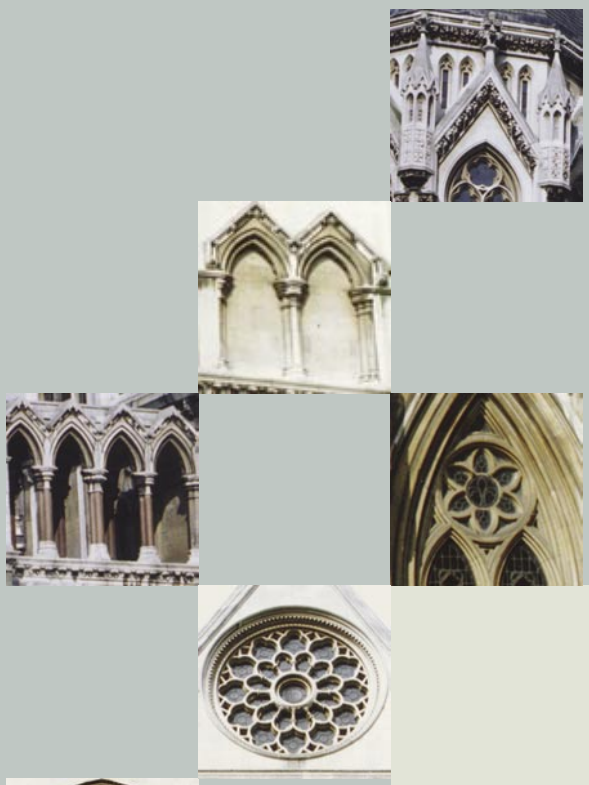

Civil Justice Council

Annual Report 2003

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Foreword

The past year has been one of considerable achievement for the Civil Justice Council. The re-alignment of our Committee and management structure in late 2002 provided an effective platform to focus more effectively on the key areas of the civil justice system that required critical attention or recommendation for reform.

Last year I wrote that the Council had an opportunity to ''reflect on the effectiveness of the civil justice reforms''. This year I can report that we have acted on those reflections.

Costs law rightly dominated our worksheets in 2003, and I believe the achievement of an industry agreement to establish a fixed recoverable cost scheme for pre issue Road Traffic Accident (RTA) cases below £10,000 in value is a major step in bringing an end to the costs war that has blighted the civil justice system for far too long a time. I read with interest the Department for Constitutional Affairs Press Release which announced that the agreement ''Heralds revolution in legal costs''. I do not believe that to be an over-statement.

The fixed recoverable costs agreement was followed promptly by a further, equally notable, mediated agreement, this time fixing Success Fees for both solicitors and Counsel across all RTA cases. Further mediations are planned hopefully to extend agreements into employer's liability and public liability cases. I congratulate all those who took part in these exacting series of meetings, and welcome the success of your achievement.

Although a priority, the Civil Justice Council has exerted its influence well beyond the scope of costs. An Experts Committee has been created, which has managed to foster an environment that I hope will lead to the publication of a single code of guidance for experts in the near future. The Courts Act has also recognised the authority of the Civil Justice Council by nominating it as the Consultative Panel for any proposed increases in court fees. The Access to Justice Committee has already provided helpful advice to the Lord Chancellor on the structure of court fees, and emphasised the Council's opposition to the Treasury policy of full costs recovery.

The Alternative Dispute Resolution Committee ran a well organised and highly successful event bringing together those who have designed court-annexed ADR schemes to share their practical experiences with those dipping their toes in the water. It was, I believe, the first time a broad cross-section of the judiciary has been brought together with administrative managers from the courts for a joint educational event.

I believe that the Civil Justice Council is now a vigorous, and highly respected advisory body, that provides the expertise to assist Government with an increasing number of highly challenging justice issues. It is able to prove such assistance for two reasons; the excellent relationships it has established with progressive thinking civil servants who are prepared to work in partnership and listen to constructive criticism; and because of the quality, innovation, and sheer hard work of our membership. Membership, including the Committees, now exceeds 120, and it should be recognised that all members give their time without charge. This is all done with little call for individual recognition. I would like to take this opportunity to thank them all.

Lord Phillips of Worth Matravers

How the Council Works

In his report Access to Justice (1996), Lord Woolf recommended 'the establishment of a Civil Justice Council as a continuing body with responsibility for overseeing and co-ordinating the implementation of my proposals'. The Lord Chancellor accepted this recommendation and the Council was formed in March 1998[1] alongside the provisions that introduced the most extensive civil justice reforms for over a century.

At the Council's inaugural meeting on 20 March 1998, Lord Woolf commented:

'The Civil Justice Council is the first body of its kind. Never before has a body been set up, comprising of members with such a wide range of interest in all parts of the civil justice system to advise the Lord Chancellor on ensuring that the system is fair, accessible and efficient. This presents an unprecedented opportunity to safeguard the future of civil justice and ensure that it meets the needs of the public in the twenty-first century.''

The Primary Role of the Civil Justice Council

The primary role of the Council is to promote the needs of civil justice and to monitor the system to ensure that progress to modernise it continues. It advises the Lord Chancellor on how the civil justice system can be continuously improved, building on the fundamental changes brought about by the civil justice reforms introduced from April 1999.

Statutory Provision

Under Section 6 of the Civil Procedure Act, the Council is charged with:

- keeping the civil justice system under **review**;
- considering how to make the civil justice system more **accessible, fair and efficient**;
- **advising the Lord Chancellor** and the Judiciary on the development of the civil justice system;
- referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee, and making proposals for research.

Government Status of the Civil Justice Council

The Civil Justice Council is a Non-Departmental Public Body, sponsored by the Department for Constitutional Affairs.

[1] Section 6 of the Civil Procedure Act 1997

Constitution

The Civil Justice Council provides a diverse and representative cross section of views from who use, or have an interest in, the civil justice system. The majority of members serve fixed terms limited to two years. Appointments and re-appointments are made by the Lord Chancellor, following recommendation by the Chair of the Civil Justice Council. All appointments are non-remunerative, and accord with guidelines provided for ministerial appointments by the Office of the Commissioner for Public Appointments.

To ensure an appropriate spectrum of experience and skills, the Civil Procedure Act enshrines in legislation a requirement that membership of the Council must include:

- members of the **judiciary**;
- members of the **legal professions**;
- **civil servants** concerned with the administration of the courts;
- persons with experience in and knowledge of **consumer affairs**;
- persons with experience and knowledge of the **lay advice sector**;
- persons able to represent the interests of particular kinds of litigants (for example business or employees).

Ex Officio and Preferred Memberships

The Head and Deputy Head of Civil Justice are ex officio members of the Civil Justice Council. The Head of Civil Justice is the Chair.

Preferred members are; The Chair of the Judicial Studies Board, a High Court judge, a circuit judge (preferably a Designated Civil Judge), a district judge, a barrister (on recommendation of the Bar Council), a solicitor representing claimants interests, a solicitor representing defendants interests, an official of the Law Society, a senior civil servant representing the interests of the Department for Constitutional Affairs or Court Service, a representative of the insurance industry, an advice service provider, and a representative of consumer interests.

Structure of the Civil Justice Council

The Civil Justice Council comprises of a full Council of twenty-three members (including those ex officio). An Executive Committee of; the Chair, Deputy Head of Civil Justice, three Council members, and the Secretary to the Council make the management and planning decisions. Seven committees undertake the Council's day-to-day activities. The Committees are; Alternative Dispute Resolution, Access to Justice (including responsibility for the Fees Consultative Panel, and Court Funding), Housing and Land, Civil Justice Advisory Group (stakeholder group for the Courts and Tribunals Modernisation Programme), Clinical Negligence and Serious Injury, Experts, and Costs.

All Committees of the Civil Justice Council are standing committees whose roles are; to monitor and provide advice to the Lord Chancellor on the effectiveness of existing procedures; provide representative opinion of those who use the civil justice system; and to make informed recommendations on Government proposals for reform of the civil justice system. The value and terms of reference of each committee is reviewed every two years.

The Council and its committees are supported by a secretariat of civil servants. The Secretary to the Civil Justice Council is the senior executive and budget holder.

Civil Justice Council Activities

The Civil Justice Council will undertake activities commensurate with its statutory provision (Section 6 of the Civil Procedure Act) as above.

Civil Justice Council activities are in the main dependent on the achievement of the Department for Constitutional Affairs in delivering its public sector agreement targets, and the success, as perceived by civil justice ''stakeholders'', of the department's policy, procedures, and systems.

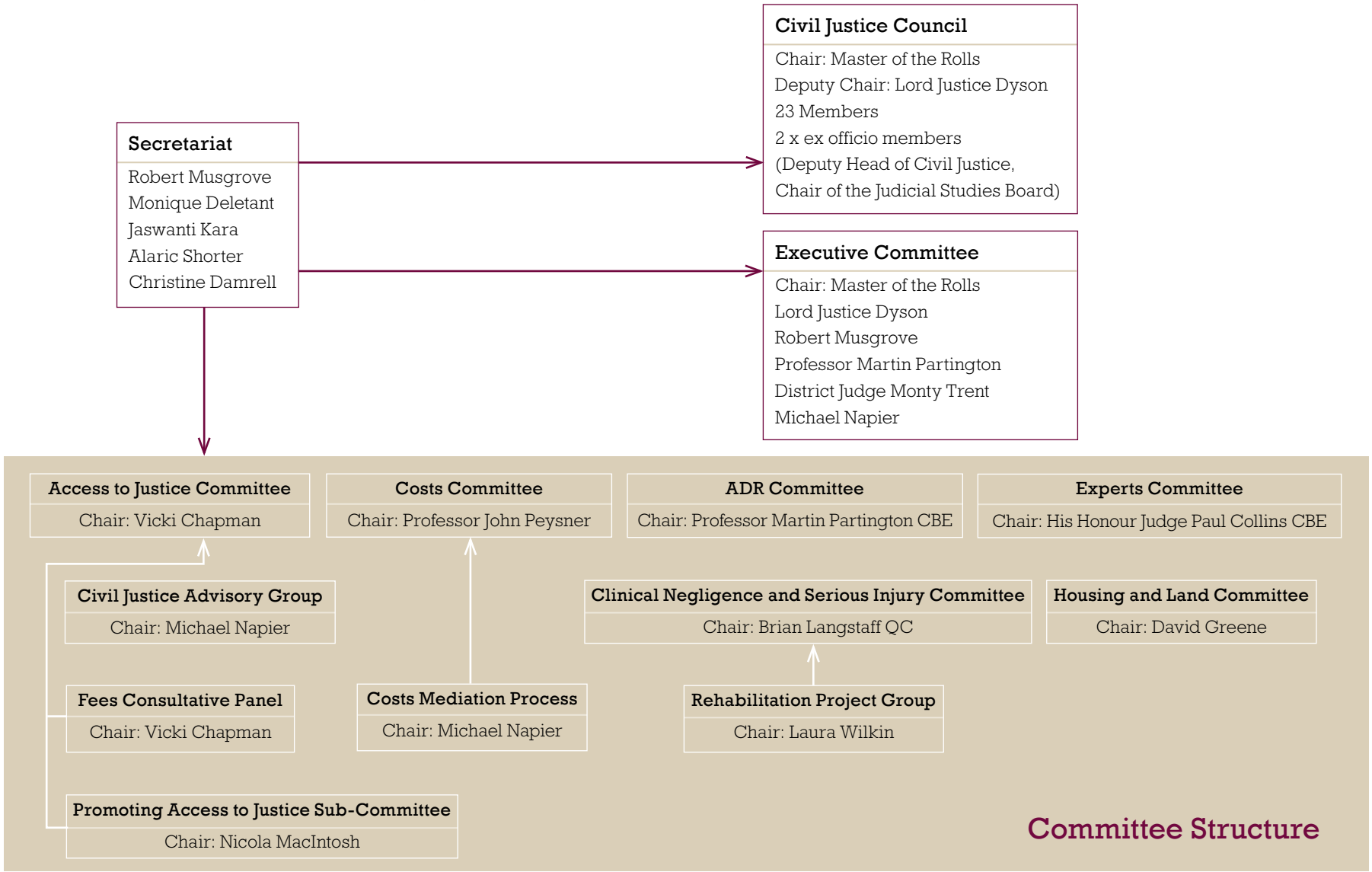
Top Level Objectives

At top level, the Civil Justice Council will achieve the following outcomes:

- Advice to the Lord Chancellor on Consultation Papers issued by his department on civil justice related matters
- Advice to the Lord Chancellor on areas of concern, legal or policy, identified by the civil justice community through the Civil Justice Council

Assistance in developing research ideas and policy solutions relating to civil justice issues of concern, and providing a representative view of civil justice ''stakeholders'' views during the development of policy or programmes.

Civil Justice Council Organisational Structure



Reports from the Civil Justice Council Committees

Committee Members

Professor Martin Partington CBE (Chair)	Colin Stutt
Professor Hazel Genn CBE	Heather Bradbury (DCA)
Tim Wallis	Bridget Doherty (DCA)
District Judge Terence John	His Honour Judge Paul Collins CBE
Professor Geraint Howells	Stephen Ruttle QC
Michel Kalipetis QC	

Alternative Dispute Resolution (ADR)

Terms of Reference

To undertake activities relating to support for the use of ADR in the Civil Justice system

To promote such conferences, seminars and other meetings as seem appropriate and can be resourced designed to develop the use of ADR in the Civil Justice system

To provide a forum for the consideration by the judiciary and ADR providers of new initiatives relating to the use of ADR

To provide advice to Government and other agencies, through the Civil Justice Council, about developments relating to ADR which the Committee thinks should be advanced

To draft responses to papers coming from Government both in the UK and Europe and from other bodies about the development of ADR

To provide assistance to Government and other bodies about issues – including training – relating to the use of ADR

As indicated in last year's Annual Report, membership of the ADR Committee has changed dramatically. We have welcomed as new members: HH Judge Paul Collins; Colin Stutt from the Legal Services Commission; Stephen Ruttle QC and Michel Kapellitis QC, both involved in the Bar's ADR Committee; and Professor Geraint Howells from the University of Sheffield.

The Committee has in recent months been engaged in three major initiatives:

1. At the invitation of the Civil Procedure Rule Committee, it has been examining whether – four years on from the introduction of the Civil Procedure Rules – the rules and Practice Directions relating to ADR need revision. Given that there have been important developments in the law – particularly decisions of the Court of Appeal – the Committee has concluded that modest changes would be desirable. A memorandum setting out its views will shortly be forwarded to the Rule Committee and also be published on the Civil Justice Council website.

2. It has returned to the question of whether use of ADR should be mandatory. This is an issue that divides those who provide ADR services. The committee has considered a paper on an extremely important initiative that took place in Ontario a couple of years ago. There a pilot project was launched under which an 'opt-out' ADR scheme was made a requirement for all defended civil actions in Ontario. (Details are on the Attorney-General for Ontario's website.) The essence of the scheme was that parties were required to try mediation unless they could persuade a case management judge that it would not be appropriate in the particular case. The mediation was time limited (to three hours) and also cost-limited.

This pilot project was evaluated very thoroughly by an independent research team. The results of the evaluation subsequently led the Ontario Attorney-General to convert the pilot scheme into a permanent one.

The ADR Committee has considered this development and has unanimously decided to recommend that the Secretary of State should consider introducing a similar experiment in England and Wales. The Committee is hopeful of a positive response to this proposal. Indeed the scheme will be launched at Central London County Court in March 2004.

3. The ADR Committee planned a major Forum on the development of ADR in the County Court. It was held towards the end of 2003. It successfully brought together representatives from courts where schemes are running with their colleagues who would be interested in starting a scheme but have yet to do so.

The forum examined what needs to be done to get a scheme off the ground. Those with experience of doing this shared that experience with those who do not have it. For the longer term, the forum may become the basis for a short note of guidance on how to establish new court-based ADR schemes.

A note of the meeting will be published on the Civil Justice Council website.

In addition to these specific initiatives, the Committee seeks to keep abreast of developments on ADR, both in England and Wales, and abroad, particularly in Europe.

One very significant development has been the adoption, by the Department for Constitutional Affairs, of Public Service Agreement 3 which was previously the responsibility of the former Lord Chancellor's Department. All main Whitehall departments have a Public Service Agreement with the Treasury which comprise a number of high level targets which are set as part of Spending Review settlements. PSA 3 focuses in particular on the reduction in the number of cases going through the civil courts. The purpose behind this target is to ensure that disputes are resolved quickly, effectively and in a manner and at a cost proportionate to the issue at stake, without compromising access to justice. It is Government policy that the courts should be the dispute resolution method of last resort.

This has given a new emphasis to the potential importance of ADR as a mechanism for diverting at least some cases away from the courts.

Finally, as Chair of the Committee I would like publicly to thank the Civil Justice Council Secretariat, particularly Monique Deletant, for the enormous amount of support they give to the committee. Their contribution is crucial to our work.

Martin Partington
Chair

Committee Members

Vicki Chapman (Chair)
Vicki Ling
Ashley Holmes
Joy Julien
Nicola Mackintosh
Professor Margaret Griffiths
John Cook
Philip Bowden
Professor Kim Economides
District Judge Michael Walker
Richard Woolfson
Susan Bucknall

Access to Justice

Terms of Reference

To promote awareness of civil justice including making recommendations for improving service delivery, and improving access to advice, information and representation

To consider existing practice and procedure in the civil justice system and make proposals to the Council for improvement

To monitor and comment on the effectiveness of existing practice and procedure in the civil justice system, including the provision of advice, and to make proposals for improvement

To take forward research undertaken on behalf of the Civil Justice Council into the operation of the civil justice system

To monitor and keep abreast of developments, and respond to proposals as appropriate

The Access to Justice Committee held its first meeting in January 2003, to discuss the remit of its work and agreed draft terms of reference. There were five presentations looking at different aspects of access to justice. These provoked a lively and interesting discussion on different aspects of access, including access to legal advice, funding of cases, and access to the court and court services. The committee then discussed specific issues the Council would wish to take forward.

Clearly, some of the work of the committee will overlap with others, in particular on costs, which is a major access to justice issue, and in relation to the modernisation of the civil courts programme, which will overlap on issues concerning resources for the civil courts.

The Council was very pleased to note that the Courts Act contains a provision which requires the Lord Chancellor to consult with the Civil Justice Council before setting civil fees. In view of this the Council asked the Access to Justice Committee to form a Fees Consultative Panel to take forward the Council's work on court fees.

The Council was also pleased to note that the Act requires the Lord Chancellor when setting fees, to have regard to the principle that access to the courts must not be denied. The Council continues to call on the Government to abandon the policy of seeking to raise almost the full cost of the civil court through fees levied on users.

The Committee is also working on a project aimed at increasing awareness within Government and amongst senior policy makers of the importance of civil justice. Information and advice about legal rights and responsibilities, coupled with timely intervention, are crucial to the effective operation of the civil justice system. A working group, the Financial and Social Costs Group, was established to gather evidence and write a brief paper, with the short-term aim of encouraging in-depth research by others. The longer-term aim is to persuade policy makers to fund information and advice services at adequate levels. The working group has been exploring the costs of social exclusion and looking at the costs of failure to provide adequate remedies through civil justice. There is, in our view, a crucial role for information and advice in promoting access to justice. Timely access to advice can play a major role in reducing social exclusion and improving people's lives.

The Committee is keen to work with others to encourage awareness of the civil justice system and considering access issues, including exploring ways of promoting awareness of civil justice to a wide audience and raising awareness amongst younger people about civil justice and the importance of the civil justice system. A working group, Promoting Awareness of Civil Justice, has been exploring with others, and in particular the Citizenship Foundation ways to promote awareness and knowledge of civil justice amongst young people.

Vicki Chapman
Chair

Committee Members

His Honour Judge Paul Collins CBE (Chair)
Robin Oppenheim
Tony Cherry
Simon Davis
John Cowan
Michael Cohen
Dr Robert Watt
His Honour Judge Graham Jones
Paul Docker
Simon Morgans
Claire McKinney
Mark Harvey
District Judge Godfrey Gypps

Experts

Terms of Reference

To evaluate the operation of the civil justice system in its approach to and utilisation of expert evidence

To make recommendations for the modification and improvement of the civil justice system in relation to expert evidence, including Civil Procedure Rules and Practice Directions, with a view to furthering the overriding objective

To consider and make recommendations as to the rôle and status of expert witnesses, including in relation to alternative dispute resolution

To consider and make recommendations as to the accreditation, training, professional discipline and court control of and communication with expert witnesses

To consider and make recommendations as to the fees and expenses of expert witnesses

The committee has met three times since its inception in early 2003. Its membership is broadly based; representatives of experts' organisations, the legal professions, the Legal Services Commission, government and the judiciary. Although the range of topics is wide, a number of areas have presented themselves as candidates for early consideration.

The success of the fixed costs negotiations under the auspices of the Council has encouraged the committee to believe that a similar exercise might benchmark typical experts' fees in a wide range of cases. A great deal of information is available from which figures may be drawn. Members of the committee together with Professor John Peysner have met representatives of some of the medical reporting agencies and other interested parties to discuss the way forward.

The Expert Witness Institute and the Academy of Experts, under the aegis of the committee, have almost finalised an amalgamation of the two existing Codes Of Guidance for experts witnesses. It is proposed that it should be published with the Council's authority.

Good relations between the different experts' organisations make possible a variety of initiatives which they are taking forward under the aegis of the committee. The committee will be considering the accreditation of experts and the extent to which it should be a pre-requisite for giving expert evidence and standards and content of training. This is a large area which will require wide consultation.

The committee is also seeking information from professional bodies about disciplinary rules and practice to consider the desirability of promoting a model code which would apply to those giving expert evidence. The success of the single joint expert in fast track cases will prompt an examination to see if the institution is more widely appropriate. There are clearly opposed opinions on this question. It is too early in the life of this committee to make sensible predictions, but there is powerful motivation to promote valuable change in this area of civil practice.

Paul Collins
Chair

Committee Members

Michael Napier (Co Chair; Civil Justice Council)	Vicky Ling
Louise Lawrence (Co Chair; DCA)	John Tanner
District Judge Monty Trent	Robert Musgrove
Ashton West	Ashley Holmes
Brian Havercroft	Stuart Blake
Alan Lakin	Richard Wilson QC

Civil Justice Advisory Group (CJAG)

Terms of Reference

To play an active role in the modernisation of the civil courts by:

1. Articulating the needs of court users in the civil justice system. This will be both at a strategic level and in relation to individual projects.
2. Ensuring that access to justice and diversity issues are raised throughout the development of Courts and Tribunals Modernisation Programme (CTMP) projects, including in their early stages. This will include scrutinising and where necessary, challenging project briefs and project initiation documents, which are important parts of project planning.
3. Acting as a forum for ideas about modernisation. This could include recommendations for research, comparisons with other organisations, proposals for events to focus on particular issues emerging from the CTMP programme.
4. Helping the Court Service to identify individuals who could contribute to projects, where direct and detailed stakeholder input is required.
5. As projects develop, monitoring the direction and the benefits which were predicted and holding the Court Service to account for them. In the jargon, ensuring that there is ''benefits realisation''.
6. Communicating and promoting the modernisation programme across the community of court users.

The Civil Justice Advisory Group met on four occasions through 2003 to undertake an important role in guiding the Courts and Tribunals Modernisation Programme through a difficult year. It contributed fully on key issues affecting the programme, in particular articulating the needs of a wide range of civil justice stakeholders on the particular priorities of the programme, in light of the funding made available.

The CTMP plans from May 2002 were always recognised as ambitious, and those plans required substantial further investment from central Government. A bid was made to the Treasury for funding as part of the 2002 comprehensive spending review. This bid was unsuccessful, and no additional funding was made available for civil and family modernisation. The Department underwent a lengthy period in which the funding available for civil and family modernisation was reviewed.

The intention was to fund as much as possible of the modernisation programme from within existing budgets. The Civil Justice Advisory Group contributed to a series of difficult decisions about what parts of the programme could be delivered from within existing budgets, and what would deliver best value for money.

A new role for the Civil Justice Advisory Group

Now that the amount of money available and the scope of the programme has been settled, the main duties of the Civil Justice Advisory Group have been completed. The next phase of the programme will require a different kind of stakeholder input; feasibility, technical testing, and encouragement for court user take up. This changes stakeholder management requirements and the way in which the Department engages court users, judges and staff in the programme.

The Civil Justice Advisory Group, in its current form, was wound up in November 2003, and discussions continue as to the future shape of stakeholder input.

Robert Musgrove

Committee Members

Brian Langstaff QC (Chair)
Suzanne Burn
Adrian Whitfield QC
Russell Levy
John Pickering
Janet Howe
Steve Walker
Dr Christine Tompkins
Bertie Leigh
Master John Ungley
District Judge David Oldham

Clinical Negligence and Serious Injury

Terms of Reference

To consider and monitor current problems and proposals in the law and practice of clinical negligence and serious injury claims

To make comments and proposals to the Council on the law and practice of clinical negligence and serious injury claims that are focused, practical and deliverable

Not to duplicate work being carried out by others on aspects of clinical negligence and serious injury claims

Although a ''new kid on the block'' (the committee was formed only in mid-summer) the workload of the Committee has been heavy.

On 4th July the members of the Committee met at Minster Lovell to draft Terms of Reference, and to establish a short term action programme: to respond to the Chief Medical Officer's report on clinical negligence issues, and to provide views as to whether Part 36 could appropriately be applied or adapted for use with periodical payments. Longer term work was identified as including a consideration of the proposed abolition of Section 2(4) of the Law Reform Personal Injury Act 1948; and questions relating to Claimant costs, in particular whether estimates and budgets were feasible.

The short-term programme has been fully addressed. On 16th October, the Committee provided a detailed response to the Chief Medical Officer's report ''Making Amends''. As part of that response, it considered and discussed proposed amendment to Section 2(4) of the 1948 Act, concluding that whether it remained or was repealed was of less practical significance than generally realised, but that if it were to be repealed it should be for all cases, and not just those relating to clinical negligence.

In a separate paper, the Committee considered what might be achieved in relation to Parts 36/44 so far as costs in cases resolved by a periodical payments order were concerned. It liased on this issue with Civil Law Development Division at the Department for Constitutional Affairs.

The Committee considered and responded to proposed draft Rules and a proposed draft Practice Direction relating to the forthcoming implementation of the power to impose an order for periodical payments upon an unsuccessful Defendant in an injury action.

The Committee continues to monitor practice in relation to periodical payments, is currently examining the interface between local authority provision and the award of damages, and the extent to which Rules of Court and practice can, and should encourage the wider use of rehabilitation.

Quite apart from the specialist expertise which its members bring to the Committee from different viewpoints – those of insurers, medical defence organisations, the DOH, the NHSLA, the DCA, claimants' and defendants' solicitors, senior members of the Bar, High Court Masters, the district judiciary, and academia – individual members of the Committee have maintained and developed links with other bodies who consider potential developments in the law, such as the Clinical Disputes Forum.

Brian Langstaff QC
Chair

Committee Members

Professor John Peysner and Mike Napier (Chairs)
Robert Musgrove
Kevin Rousell (DCA)
Toby Hooper QC

Costs Committee and Working Groups

Terms of Reference

To monitor and comment on the effectiveness of existing costs practice and procedure in the civil justice system, including the provision of advice, and to make proposals for improvement

To work in partnership with Government officials, academics, and appropriate stakeholders to develop workable solutions to the areas of costs identified as requiring priority attention at the Costs Forum

To work in partnership with representatives of the costs "industry" to develop effective solutions to costs problems that may affect adversely access to justice, and the efficient operation of the courts or those who provide litigation services

To contribute stakeholder views to proposed changes in costs law and procedure

The reform of costs law has taken the vast majority of the Civil Justice Council's time over the past year. Considerable activity has taken place throughout the various forums, consultations, and mediation meetings. I provide below a very truncated history of achievements to date. These are supported in more detail by copies of articles and press releases later in the report. The Civil Justice Council's interactive website **www.costsdebate.civiljusticecouncil.gov.uk** has proved invaluable as a means of consultation with a large number of stakeholders, and as a way in which the legal and insurance industries have been able to keep up to date with developments.

Summary

At the end of 2001 the Civil Justice Council set up a Costs Working Group to consider options and data required for introducing fixed recoverable costs for personal injury disputes. A "Big Tent" was established to provide a forum for all key stakeholders to input to this process and this met three times to analyse the problem and devise a suitable model that could achieve a broad degree of consensus.

The ''Big Tent'' defined the key area of concern to be simple, low value, RTA claims and work focused on achieving consensus on a fixed costs regime for these types of cases. This proposal directly addressed the high volume area of the market where the apparent disproportionate nature of costs attracts considerable attention generally and has been the focus of the defendant insurer challenges. It was also an area where data could be obtained and research carried out. Around 350,000 came into the category of low value RTA cases and the numbers are growing. Arguments over the right level of costs were tying up the court system and causing extensive delays. The Civil Justice Council identified that this was a vital problem of access to justice which it could help to solve and a solution would help in the creation of a more rational predictable and accessible cost system.

The Civil Justice Council's second Costs Forum took place at Milton Hill House, Oxfordshire on 12-14th December 2002. Participants managed to achieve consensus on the shape of a scheme that will bring predictability to the level of costs payable by insurers to claimant solicitors, in relation to the vast majority of road accident claims that settle before legal proceedings. The agreement (known as the Milton Hill House Agreement) contained the principal elements of a predictable costs scheme, but left outstanding a small number of issues of detail relating to the practical implementation of the scheme.

A smaller implementation group met in January 2003 to further narrow down the outstanding issues. Following this meeting there remained four principal concerns; the appropriate date for implementation; the threshold for escape from the scheme; London weighting; and the pre-issue success fee. The first three of these issues have been the subject of a Civil Justice Council consultation exercise, the fourth issue has been remitted to the on-going costs mediation process.

Consultation

A consultation exercise was conducted in May 2003 using the Civil Justice Council's Costs Answerbank, an internet based service that has provided an opportunity for any individual or representative body to keep up with costs developments, and allowed them to contribute their views throughout the development of costs solutions, complete a questionnaire, and provide their views. These views became a vital part of the process.

A total of 184 written responses were received. Of these 160 (87%) were from claimant lawyers, 9 (5%) from Defendant lawyers, and 11 (6%) from insurers (representing 70+% share of RTA insurance market).

The outcome of the consultation exercise, together with the framework agreed at Milton Hill House provided an ''industry agreed'' scheme that was agreed by the Lord Chancellor and laid before Parliament on 13th August 2003. The scheme became operational on 1st January 2004.

The success of the agreement caused representatives of claimant lawyer and insurance industry groups to extend their invitation to the Civil Justice Council to conduct a further series of costs mediations, looking at fixing recoverable success fees in RTA cases.

Many cases now are on a 'no win no fee' basis (conditional fee). If the case is won a success fee of up to 100% of the lawyers costs is added to the bill that the loser must pay. Arguments about the amount of the success fee have been a cause of considerable delay and extra expense to lawyers and clients. A series of mediation events took place between February 2003 and April 2003. During the summer further research and data analysis was prepared, and the process resumed in October. In the early hours of 3rd October, following a 19 hour mediation at Theobalds Park in Hertfordshire, an agreement was achieved so that in road traffic cases the success fee was fixed. Barrister's success fees were brought into the finalised scheme at a meeting at Hunton Park in Hertfordshire in December 2003, and draft rules are currently before the Civil Procedure Rule Committee.

The schemes agreed to date should help reduce significantly the satellite litigation that has delayed the settlement of costs in hundreds of thousands of cases and act as a building block for further agreements in other costs areas. The Civil Justice Council intends to continue with the mediation process throughout 2004, with the continued co-operation of claimant lawyer and insurance representative groups.

Conditional Fee Agreement Forum

In July 2003, the Civil Justice Council held a forum to hold an open debate on the Department for Constitutional Affairs' Consultation Paper ''Simplifying Conditional Fee Agreements''. Departmental officials were present to hear expansive and constructive debate, and recommendations for improvements to the way in which CFAs operate. The main outcome was a near unanimous agreement to recommend the removal of client care elements to the Law Society regulations from the CFA agreement. This will ensure that these agreements are easier to use and to understand so that access to justice is improved without client's interests being prejudiced.

Future Work

Continuing efforts are being made to make success fees more predictable and it is hoped that efforts will be made to make the system of after the event insurance (which protects clients against the costs of losing cases) more predictable and transparent. The council will continue to monitor the introduction of fixed fees and, if appropriate, assist parties in their extension to suitable areas.

Large and complex cases may not suit a fixed fees solution. The Council has opened a debate on whether budgeting pro-active cost control by the court rather than the existing system of control at the end of the case may be helpful. Our website offers an opportunity to join in this debate.

Professor John Peysner
Chair

Committee Members

David Greene (Chair)
David Watkinson
David Carter
David Cowan
John Gallagher
Jon Hands
Derek McConnell
District Judge Nic Madge
Celia Tierney
District Judge Jane Wright

Housing and Land

Terms of Reference

To consider and respond to proposals relating to civil procedure specific to housing and land cases

To consider existing court rules and practice relating to housing and land cases and make proposals to the Council for improvement

To monitor proposed and existing housing legislation for its impact on procedure and make such response as appropriate

The Committee meets regularly during the course of the year. It has discussed and initiated action on a wide range of topics relating to civil process for housing and land cases including:

- Alterations to the court forms relating to housing cases and suggesting changes to the jurisdiction of the district judges for injunctions.
- Submitting our views on the relevant aspects of the Housing Bill.
- Making submissions in relation to the Housing Pre-Action Protocol which was published in June 2003 and which now forms the basis of pre-action process in housing cases.
- Working on a monitoring network of concerned organisations. The Committee is hoping to set up a meeting under the auspices of the Civil Justice Council of all stakeholders in the early part of 2004.
- Working with the Law Commission on its review of relevant law. In particular, the Committee made submissions to the Law Commission in response to its consultation papers on Renting Homes and the consultation on the future of the tribunal system. In addition, the Committee has responded to various consultation papers in the area of housing law including:
  - Towards a Compulsory Purchase Code;
  - Renting Homes Consultation Paper on Status and Security;
  - Renting Homes Consultation Paper on Sharing Homes.

Work Plan 2003/04

The Committee is working towards holding a forum for stakeholders in the early part of 2004. The Committee will also be monitoring the workings of the Pre-Action Protocol for Disrepair. The Committee will be monitoring:

- the effect on court proceedings of the payment of stamp duty on leases and will continue to monitor the position;
- the process of suspended possession orders;
- trying to generate greater efficiency in the court process for all parties to housing cases.

The Committee expects to continue its work with the Law Commission.

Celia Tierney is leaving the Committee as a result of a change in her employment responsibilities. She has been a very active member of the Committee and it has benefited greatly from her participation over the last two years.

David Greene
Chair

Research and Data Analysis

Practical research is essential to enable the Civil Justice Council to undertake its statutory monitoring role effectively. Although limited in the resources we can devote to research, small focused projects, backed up with practical qualitative studies have benefited the Council considerably in the scope and quality of advice it can provide on the operation of the civil justice system.

In 2003, our main focus has been on the acquisition and analysis of data to support the costs mediation process. The Costs Committee, under the chairmanship of Professor John Peysner, have investigated the practical operation by lawyers and procedural judges of fixed costs systems in Northern Ireland, Scotland, and Germany. This study provided invaluable practical background for the development of the fixed recoverable costs schemes for Road Traffic Accidents.

The major contributor to the success of the two series of costs mediations, was the economic analysis of costs data, acquired from insurance, legal, costs negotiator and the Compensation Recovery Unit databases, by Professor Paul Fenn (University of Nottingham) and Dr Neil Rickman (University of Surrey).

Professor Fenn and Dr Rickman published two major costs reports for the Civil Justice Council in 2003; ''The Costs of Low Value RTA Claims'' (February 2003), and ''Calculating Reasonable Success Fees for RTA Claims'' (October 2003). Both these pieces of research were commissioned by the Civil Justice Council, and funded by the Department for Constitutional Affairs. A sister piece of research ''Costs of Low Value EL Claims 1997-2002'' was prepared for the Department for Constitutional Affairs in July 2003.

Both pieces of Civil Justice Council Research are published on the Costs Answerbank site: **www.costsdebate.civiljusticecouncil.gov.uk**

Articles and Publications on Civil Justice Council Issues

ADR IN THE COUNTY COURT

By Martin Partington

Chair, ADR Committee of the Civil Justice Council

Extract from
Law Bulletin
Summer 2003

Introduction

I am most grateful to Gordon Ashton for inviting me to contribute this article. I must start by emphasising that it has been written in a personal capacity only. It does not represent the collective view of either the Civil Justice Council as a whole or its ADR Committee. Nonetheless I hope it will provoke comment from readers; all such comments will be forwarded to and inform the future work of the ADR Committee. Contact details are provided at the end.

This article is divided into the following sections:

- A description of the ADR Committee and its work
- Judicial and government statements on ADR
- Difficulties in promoting the use of ADR in the court
- Increasing the use of ADR in the work of the county court?
- Some concluding remarks

The ADR Committee and its work

The ADR Committee was one of the first to be established, following the creation of the Civil Justice Council. Lord Woolf made it clear in Access to Justice that he saw ADR as having an important role to play in a reformed civil justice system. Although the precise contribution ADR might make to the realisation of the new civil justice system his proposed reforms were designed to introduce was initially unclear, Lord Woolf nevertheless wanted the ADR Committee to monitor developments, make proposals and generally fly the flag for ADR.

The Committee has now completed the first phase of its work. It spent a good deal of time receiving briefings from providers and funders about how they saw the provision of ADR progressing. We were also briefed on the research findings, particularly of the limited use of ADR in the West London County Court. We have considered the potential role for the use of ADR in particular contexts, e.g. personal injury litigation.

The major outcomes of the first phase of the committee's work were:

- The development of proposals for an in-court ADR scheme
- Submissions to the Lord Chancellor's Discussion paper on ADR
- The running of a prize essay competition on ADR for law students and those in professional legal training
- A workshop, held in December 2001, and run jointly with the Judicial Studies Board. This brought together ADR providers and judges to discuss the scope for the use of ADR, particularly in the county court.

The constituent members of the ADR committee were revised during 2002, and the first two meetings of the new committee have been held. The committee thinks that, while there is unlikely to be a mass increase in the use of ADR, certainly not in the short-term, it is likely to become an increasingly significant presence in the litigation landscape. There will be a continuing need to encourage dialogue, particularly between judiciary and providers.

Judicial and Government statements

All judges know that, as part of the over-riding objective of the CPR, the court has been given a duty to actively manage cases. This includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure" (CPR Part 1). A power to stay proceedings is provided in Part 26.

Over the past couple of years, these rules have been reinforced by a number of well-known judicial and ministerial pronouncements. The judgements of the Court of Appeal in Dunnett v Railtrack and Cowl v Plymouth and of the Commercial Court in Cable and Wireless v IBM have all stressed the importance of the appropriate use of ADR, and that unreasonable failure to use ADR may be subject to cost sanctions.

There has also been a number of significant ministerial statements supporting greater use of ADR, notably the Lord Chancellor's pledge to encourage the use of ADR by Government departments, and the remarks he made at the launch of the Law Society's Civil and Commercial Mediation Panel in May 2002.

Thus the climate in which ADR might be expected to grow is a favourable one. Nonetheless, the extent to which growth has occurred is less certain.

Difficulties in promoting the use of in-court ADR

Most of the research into the use of ADR in courts tells a similar story; take-up is very limited. Why?

There is a whole range of possibilities, some within the control of the court, others not.

External factors include:

- The parties do not know about ADR
- If they do, do not wish to use it
- The lawyers involved in the case are not keen on the use of ADR
- The type of case is not suitable for ADR

Other procedural changes in the civil justice system are also likely to have discouraged the use of ADR. In particular, many think that the impact of the protocols has done much to encourage early settlement of cases, thus reducing the number of cases where the use of ADR would be helpful.

But some of the reasons why the use of in-court ADR has been less than some might have anticipated derive from the courts themselves. Although there has been no national research into the issue, the following factors usually emerge in discussion of the low-level of use of ADR.

1. *Judicial attitudes to ADR*. Although all the existing court-based ADR initiatives have occurred because of local judicial enthusiasm and support, a number of judges still resist the use of ADR as a matter of principle. They argue that the courts are there to resolve disputes brought to them by litigants. That is their constitutional function; they have no business diverting people away from their day in court.

2. *Lack of understanding about ADR.* Most judges know that ADR exists, but many still lack a real understanding of how, for example, mediation differs from negotiation or arbitration, or what early neutral evaluation involves.

3. *Who should provide ADR.* Many judges say they would be more willing to encourage parties to use ADR if they know more about the abilities and qualifications of ADR providers, particularly those operating in their local area. They are reluctant to urge parties to take advantage of services whose standards of professionalism are unclear.

4. *The cost of ADR.* A fourth worry judges have is that, if they exercise their powers under the CPR to encourage a mediation or other form of ADR that fails, they will be seen as having added to the costs of the litigation, quite contrary to the spirit and intent of the CPR.

5. *What types of case are suitable for ADR.* Even if judges are in principle in favour of encouraging ADR, they remain uncertain about the types of case which are suitable for ADR.

6. *Physical resources.* Another inhibiting factor in the use of ADR is the difficulty of providing the physical facilities for mediation. Use of court facilities has been provided in some of the in-court initiatives, but there can be difficulties in providing suitable rooms, particularly outside normal court hours.

Increasing use of ADR in the work of the county court?

Individual judges cannot address all the factors that might inhibit appropriate use of ADR. However, insofar as use is inhibited by the courts, the diagnosis of these issues above suggests a number of questions need to be taken forward:

1. *Addressing the constitutional principle.* This is an important challenge. Judges in the High Court and Court of Appeal, together with the Lord Chancellor, have started the process. But there should be more debate about the appropriateness of the use of ADR as a legitimate constituent of the civil justice system.

2. *Training.* For judges willing to encourage use of ADR in principle, more training should be offered to give them confidence about the circumstances in which use of ADR would be likely to be helpful. The Judicial Studies Board is unlikely to have the resource to do this; can other ways be found?

3. *Amendments to the CPR?* Another question is whether the current CPR and practice directions are adequate or whether, some four years after their introduction, they should be reviewed. One suggestion that has been made is that a strong attempt to encourage ADR in all multi-track cases; would this be workable?

4. *The costs and benefits of ADR.* If the sole justification for the use of ADR in the courts is to limit costs, this is likely to be a severely limiting factor on the use of ADR. Advocates of ADR point to benefits other than financial ones for the use of ADR; in particular, the fact that parties are assisted to come to their own dispute resolution rather than having one imposed by the court is said to be of great advantage. How can judges take these wider benefits into account?

5. *The availability of physical resources.* Resources in the county court, particularly human resources, are under great strain. Can local agreements be made with the Court Service that would result in court accommodation being used for ADR procedures, particularly out of normal office hours? Or is this out of the question?

Some concluding remarks

1. An important question has not so far been addressed. Is the frequent assumption that use of ADR is too low in fact correct? Accounts of the use of ADR in other jurisdictions, particularly the USA and Australia, often suggest that ADR is used much more there than here. But there are those who argue that closer analysis of what goes on in practice indicates that actual usage of ADR is more modest. My hunch is that while use of in-court ADR in England and Wales could be greater than it currently is, growth will be slow rather than dramatic. Its use will reflect the changing litigation culture brought about by Woolf.

2. In the meantime, local experimental initiatives continue to be worth encouraging. Opportunities for different courts to learn about the successes and failures in other courts should be created. It should be possible for courts where there is currently no scheme to build on the experience of courts where there is, so that the wheel is not endlessly reinvented.

3. More opportunities should be made available for judges to learn about ADR and what it can offer parties. This is not advocating the training of judges as mediators. But there is a lot of evidence to suggest that merely receiving a lecture on ADR or reading a booklet about ADR or even watching a video does not give adequate insight into the power of ADR techniques.

4. There needs to be more opportunity for communication between the judiciary and providers of ADR. The creation of the Civil Mediation Council should help in this.

5. The ADR Committee of the Civil Justice Council has modest resources, both financial and personnel. But it does provide a mechanism to bring together those who might otherwise find it difficult to meet. The December 2001 workshop is the example. We are beginning to plan further workshops. Suggestions for themes, speakers, practical demonstrations or other exercises would be gratefully received.

CIVIL JUSTICE COUNCIL

PRESS NOTICE

For Immediate Release 7th October 2003

FURTHER SUCCESS FOR THE CIVIL JUSTICE COUNCIL IN BRINGING AN END TO THE "COSTS WAR"

The Civil Justice Council has achieved a further industry agreement to extend the predictable costs scheme to include the level of success fee payable under a conditional fee agreement in road traffic accident cases.

The agreement is the result of a mediation conducted by the Civil Justice Council and involving the Law Society, the Association of British Insurers (ABI), and main solicitors' organisations such as, APIL, FOIL and MASS.

The agreement sets out the success fee that an insurer will pay the claimant's solicitor in a third party motor claim. The success fee will be 12.5% of base costs recoverable for all successful claims that are settled pre or post issue at court. Cases where a trial is conducted will attract a 100% success fee.

Welcoming the agreement, the Chairman of the Civil Justice Council, Lord Phillips of Worth Matravers, Master of the Rolls, said:

"This agreement demonstrates a welcome momentum that extends the predictable costs scheme for road traffic cases beyond issue. Once again senior representatives of both claimant and defendant interests have come together, facilitated by the Civil Justice Council's effective mediation techniques, to develop a workable solution to another highly sensitive and contentious area of litigation.

This agreement, which affects up to half a million claims per year, should remove another major chunk of nugatory satellite litigation. Once again some of the decisions that have had to be made in the course of this negotiation, have been difficult ones. But I believe that certainty and prompt settlement brings considerable benefits to all participants, and will lead to better service for those seeking compensation. I congratulate again all those who have contributed to the process, and hope that the spirit of co-operation may continue with further extensions to this scheme."

The agreement will now be referred to the Rule Committee for consideration and drafting of the appropriate rules of court. It is hoped that the agreement will be implemented very early in the new year.

Department for Constitutional Affairs
Press Notice

377/03 6 October 2003

SCHEME FOR ROAD TRAFFIC ACCIDENT CLAIMS HERALDS REVOLUTION IN LEGAL COSTS

The vast majority of consumers seeking redress for personal injury in road traffic accident (RTA) claims will benefit from speedier and more predictable settlements following the introduction today of a scheme to fix legal costs recoverable from defendants, usually insurance companies.

Solicitors, insurance companies and the legal system as a whole should also gain from the new scheme which applies to RTA cases which are settled before court proceedings are instituted and where the value of the claim does not exceed £10,000.

The scheme will operate in a simple ''swings and roundabouts'' manner and apply to all cases unless there is an exceptional reason for it not to. The rules will formally apply only to cases where the accident takes place on or after 6 October 2003, although solicitors and insurers are being encouraged to use them as a basis for settling existing cases.

In summary, the scheme involves a formula for fixing the amount of fees that lawyers' can recover from losing defendants. It is expected that up to 90% of RTA claims will fall under the £10,000 ceiling for the scheme – there are some 400,000 RTA claims involving personal injury made every year and around 700,000 personal injury claims in total.

David Lammy, Minister for Civil Justice at the Department for Constitutional Affairs, said:

''The scheme is a significant step towards bringing stability and certainty to the personal injury claims market following extensive litigation round legal costs that delayed settlement of hundreds of thousands of cases. The scheme will help ensure that solicitors and liability insurance companies deal with genuine RTA claims efficiently and effectively and that legal costs are reasonable and predictable.

Most importantly most claimants in these straightforward cases will have no need to go anywhere near the courts and can obtain access to justice quickly. It is rare that I can announce something that should prove to be a win for all sides.''

The scheme will be brought into effect by the new rules of court developed by the Department for Constitutional Affairs in conjunction with the Civil Procedure Rules Committee and based on an agreement brokered with key legal and insurance organisations by the Civil Justice Council in December 2002.

Lord Phillips of Worth Matravers, Master of the Rolls, Head of the Civil Justice Council and Chairman of the Civil Justice Council, commented that:

"I congratulate those who took part in this difficult and highly demanding negotiation. Both claimant representatives and the insurance industry have conducted themselves in a mature and co-operative way to resolve a highly sensitive commercial problem, one which has overspilled into the courts, resulting in complex and expensive satellite litigation which must inevitably have increased both legal and insurance costs.

This agreement makes sound commercial sense, and is for the good of the legal system and all involved in road traffic accident claims. I hope that the spirit of co-operation that has resulted in this agreement will be reflected by an end to the sterile litigation about costs. I urge both claimant and defendant representatives to continue this spirit of co-operation. I draw to the attention of my judicial colleagues the need rigorously to enforce the new Civil Procedure Rules which give effect to this agreement."

CIVIL JUSTICE COUNCIL

Extract from
Law Bulletin
Spring 2003

THE BEGINNING OF THE END OF COSTS SKIRMISHING? THE OUTCOME OF COSTS FORUM II

The Civil Justice Council's second Costs Forum took place at Milton Hill House, Oxfordshire on 12-14th December. The event brought together participants drawn from all the major interests involved in personal injury and road accident claims, and was informed by cost data analysis of over 100,000 claims from 1997 to 2002, conducted by economists from Surrey and Nottingham Universities.

It is a pleasure to report that representatives at the forum were able to achieve consensus on the shape of a scheme that will bring predictability to the level of costs payable by insurers to claimant solicitors, in relation to that vast majority of road accident claims that settle before legal proceedings. The event also provided an opportunity for a drafting group to work in partnership with the LCD to help shape forthcoming CPR amendments to the indemnity principle, and CFA Regulations.

Reviewing an outstandingly successful weekend for the Civil Justice Council, Lord Phillips Master of the Rolls and Chair of the Civil Justice Council reported:

''The maturity and co-operation of everyone, not least those belonging to representative bodies, coming to this negotiation has assisted the Civil Justice Council in providing an environment of trust where parties have been able to identify common issues and to discuss more contentious ones. I am grateful for the parties' determination to succeed in the interests of both commercial sense and the good of the legal system.

I am confident that much of the unproductive skirmishing created by problems with costs which has threatened to undermine effective reform and ultimately access to justice should soon be a thing of the past, and I welcome the return of the spirit of co-operation so much a part of Lord Woolf's original vision.

Some of the decisions made this weekend have been very difficult ones. There are still final details to be settled, but I believe that one of the most contentious areas of costs disputes can now be brought under control.

This forum concludes a hard, but productive, year of consultation and discussion. It has produced a constructive, mature, and workable solution with the broad agreement of those represented. I congratulate all those who have contributed to the process.''

Following the Forum, key stakeholder groups discussed or polled their respective members, and reported back to the Civil Justice Council meeting on 6th February, where the agreement was finally ratified. The agreement will now be forwarded to the Lord Chancellor as formal advice, and we hope that work will shortly commence on drafting the Practice Direction to bring it in.

The Milton Hill House Agreement

The Table of Costs

Damages	Costs	Description
Up to £1,000	£1,000	£800 + 20% (of damages)
£2,000	£1,200	£800 + 20%
£3,000	£1,400	£800 + 20%
£4,000	£1,600	£800 + 20%
£5,000	£1,800	£800 + 20%
£6,000	£1,950	£800 + 20% to £5k, 15% thereafter
£7,000	£2,100	£800 + 20% to £5k, 15% thereafter
£8,000	£2,250	£800 + 20% to £5k, 15% thereafter
£9,000	£2,400	£800 + 20% to £5k, 15% thereafter
£10,000	£2,550	£800 + 20% to £5k, 15% thereafter

The Predictable Costs Scheme

- The scheme will apply only to Road Traffic Accident cases up to £10,000 where they exceed the relevant small claims limit

The monetary limit relates to agreed damages, where they exceed the appropriate small claims limits. The sum includes General, Special, and Interest but excludes VAT.

- The scheme will be restricted to pre-issue cases only

- There will be no additional payments for exceptional cases except that Children, Patient, and multiple party actions should be excluded from the scheme

- There should be a ''Weighting'' factor to reflect higher costs in the London area

Further work would be needed to agree figures, and importantly to include protection to ensure regional solicitors' do not establish London ''post boxes'' to claim London costs.

- The Success Fee uplift should be fixed at 5% of costs

This will effectively become a simple additional payment within the scheme where the case was run under a CFA with a success fee.

- Disbursements and Counsel's fees are not included

It was agreed that careful and specific wording in the Practice Direction should aim to avoid ''out-sourcing'' or possible shifting of costs into disbursements.

- The ATE Premium is not included

- The scheme will apply to all cases unless there is an exceptional reason to opt out

It was agreed that the criteria for opting out should be strict and laid out in the new rule or PD.

If a party ''opts out'' of the scheme they will use Part 8 (the usual Part 36 and 47 offers continue to apply).

If that party does not beat the scale fee by more than a a significant amount (there was considerable support for a stated 20% threshold) they will be deemed to have been unsuccessful. In such a case the party will lose their own costs (of the Part 8 action) and pay the other party's costs. Judges may also award less than the original scale fee if they consider appropriate.

- The scheme should be reviewed in two years

The Civil Justice Council was invited unanimously to undertake the review.

- Figures should be uprated annually by an index

It was agreed that the first uprating should take place after two years. If the review is not conducted within the two year period costs should be uprated by the rate of inflation.

- The Predictable Costs Scheme should be introduced by Rule and Practice Direction

As advised by the Rule Committee.

The Forum warned that great care would be needed in the drafting of the PD and Protocol. There was considerable feeling that the protocol should be specific and definitive, to avoid potential further satellite litigation on technical points, and slippage of costs into disbursements.

Not Quite an End to the Skirmishing

Whilst the Milton Hill House Agreement signifies the most important progress to date in settling the ''costs war'', there is still some way to go. There continue to be a large number of technical challenges in the system, mostly surrounding the operation of conditional fee agreements, and the nature of referral mechanisms where claims management companies are involved.

The next tranche of cases are due to come before the Court of Appeal during the week of 18th March. These raise issues as to the compliance of the particular conditional fee agreement with the Conditional Fee Agreements Regulations 2000 and as to enforceability of the agreement in the event of non-compliance.

But the End is in Sight – Costs Mediation

Following the success of the forum the Civil Justice Council have been invited by APIL and the legal liability insurers to act as mediators to resolve the major outstanding technical costs issues.

Since the forum, three meetings have taken place; a top level meeting between the Master of the Rolls and leaders for the claimant and insurer groups; a planning/strategy meeting with claimant and insurer representatives; and a preliminary mediation meeting. Further mediation meetings are due to be conducted in the next few weeks. The mediators are Frances McCarthy and Tim Wallis (former presidents of APIL and FOIL), acting under the chairmanship of Michael Napier (CJC Executive).

ROBERT MUSGROVE
Secretary to the Civil Justice Council

THE GOSPEL ACCORDING TO CFAs

Extract from
Litigation Funding
February 2003

The agreement on pre-issue predictable costs is not a sell-out to insurers but a broad consensus, John Peysner argues

In the beginning, there were conditional fees. Although they were complicated and their success fees required careful calculation, and they needed to be matched with tailor-made, after-the-event insurance policies, the minister looked upon them and decided they were good. In fact, though they were so good that he decided to abolish legal aid and replace it with conditional fees. And those who laboured in the fields of credit hire also looked upon them and decided they were good (particularly, the bit about recovering the success fee and insurance premium), so they decided to tell the people about them. Indeed, they preached their gospel even so far as the market place where, like the Ancient Mariner or Sheffield Wednesday's goalkeeper, the stoppeth one in three and told them of the good news, enquiring after the interviewee's health and whether or not they had had an accident. And so the good news was spread and many availed themselves.

As it turned out, the headlines story that emerged was not these complicated conditional fees but good old fashioned 'speccing', particularly in road traffic cases. Complex calculation of success fees and tailor-made premiums were an unnecessary complication grafted on to this 'eat what you kill culture', producing the chaotic cost situation that the Civil Justice Council's costs forum in Oxfordshire has recently addressed.

If we were to believe some recent press statements and some letters to the legal press, the 'deal' struck at Milton House represents a sell-out of Munich proportions to the interests of the liability insurers, organised by the Civil Justice Council, at the behest of the government and the judiciary. However, this analysis neglects two vital considerations.

Firstly, the critics of the predictable costs approach seem to forget that liability insurers have the right under our costs rules to be bloody minded if they so wish. Prior to the Access to Justice Act 1999, 'speccing' cases were often resolved in a speedy settlement followed by a cheque. This made sense for payers and receivers. Why niggle about costs? Just get on with the next case and reduce administration costs.

However, the choice made more recently by liability insurers to niggle over costs was always open to them. That this has produced unprecedented pandemonium in the cost assessment system was an unfortunate by-product of the payers exercising their rights. The fact that they chose not to make generous offers on costs and that some insurers took unhelpful technical points was just another exercise of their rights and a symptom that the system was breaking down.

Many claimants' lawyers cried foul and that is understandable, but unless the right of assessment is removed from the payer or the requirement of ensuring proportionality is removed from the assessing judge (neither of which is likely), it is hard to see how this issue could have been resolved in the short term without agreement. The option, of course, would have been a government diktat along the lines of the legal aid rates. How many anguished letters might there have been then?

The second consideration is that the two costs forums and the intervening big tents were consultative bodies widely representative of all the constituencies in the personal injury debate. They included large numbers of delegates who were agnostic or openly hostile to predictable costs. The year-long process was, in effect, an extended mediation and, at any point, individuals or representatives of interests could have walked away. In fact, the group remained virtually intact through to the concluding session, when a widely acceptable agreement was finally made.

This position is reflected not in the rumbles of criticism in the press but by the fact that the major representative bodies on all sides of the debate are expressing a degree of contentment with the outcome. In my view, the success of this mediation effort, contrasted with the failure of the representative parties to agree levels of success fees or insurance premiums in 2001, offers hope that the remaining difficulties of the new cost and recoverability regime can be resolved by further discussion and agreement.

Professor John Peysner of Nottingham Law School is chairman of the Civil Justice Council's predictable costs working party.

Priorities for 2004

Over the next few years the Civil Justice Council will continue to focus keenly on both the major reforming initiatives being taken forward by Government, and seek to raise the profile of the civil justice system. We intend to provide informed and practical input into the development of the Government's policy in key areas, and balance that advice with considered independent evidence that will allow us to evaluate the real success of civil justice reforms. We will continue to offer our technical and professional skills in partnership with Government and other major justice bodies to resolve highly complex problems in the civil justice system, such as the law of costs. Our main themes for the coming year are likely to be; continuing the costs reform and mediation programme; the promotion of court-annexed Alternative Dispute Resolution schemes; the development of practical committed rehabilitation schemes to support those who have been injured in accidents; and the promotion of civil justice awareness as part of citizenship.

Costs Reform and Mediation

The Civil Justice Council will continue the programme of costs mediations with representatives of claimant and defendant lawyers; the Bar and the insurance industry. The next series will address success fees in employment liability and public liability cases. We will also be undertaking a study that will examine the feasibility of a costs budgeting system.

The council will also be developing a short, medium and long term strategy to guide overall costs reform.

Court-annexed ADR schemes

Following the success of the ADR forum in November 2003, the ADR Committee will offer advice and assistance to judges and administrators of those courts wishing to pilot a court-annexed ADR scheme. A research study will be commissioned to examine the operation of the Exeter court scheme, and an interactive website will be established to communicate best practice, and helpful advice to those designing their own schemes.

Rehabilitation

To identify in practical terms a framework of commitment for the development of rehabilitation services. The Council will work to identify how rehabilitation fits into the overall civil justice system, audit what is currently available, and make recommendations for rule or policy changes to facilitate or ensure the active development of effective rehabilitation services.

Civil Justice and Citizenship

The Council hopes to work with the Citizenship Foundation to promote civil justice as an important element of the citizenship programme, and consider whether civil justice should be included in the Citizenship Programme in schools.

The Civil Justice Council Members

Lord Phillips of Worth Matravers is the Master of the Rolls and President of the Court of Appeal Civil Division, taking responsibility for the deployment and organisation of the work of the judges of the Division as well as sitting judicially in one of its courts. He is also Head of Civil Justice, chairing the Civil Procedure Rule Committee. He was called to the Bar in 1967, appointed Queen's Counsel in 1979 and became a High Court Judge of the Queen's Bench Division in 1991. He was promoted to the position of Lord Justice of Appeal in 1995 and elevated to a Lord of Appeal in Ordinary in 1999.

Lord Justice Dyson was appointed Deputy Head of Civil Justice in September 2003. He was called to the Bar in 1968 and appointed Queen's Counsel in 1982. He became a High Court Judge of the Queen's Bench Division in 1993, was a member of the Judicial Studies Board (1994-1998) and judge in charge of the Technology and Construction Court (1998-2000). He has been a Lord Justice of Appeal since 2001.

Lord Justice Keene is a judge of the Court of Appeal of England and Wales. He has held this position since 2000, having been a High Court judge since 1994. He was educated at Hampton Grammar School and Balliol College, Oxford where he obtained a First in Law. He then spent nearly 30 years as a barrister, specialising in town planning inquiries and judicial review. He is Chairman of the Judicial Studies Board, which is responsible for training judges throughout England and Wales. He was for some years the Visitor to Brunel University and holds an Hon. LL.D awarded by Brunel.

David Bean QC is a barrister practicing with Matrix Chambers and a former Chair of the Bar Council (2002). He worked on the original Fast Track proposals advising Lord Woolf. He works as a Recorder and sits on Employment Tribunals.

Suzanne Burn is a litigation solicitor, a Deputy District Judge, an experienced trainer (including as a Senior Consultant to the College of Law, CLT, APIL and for Bond Solon who train expert witnesses). She chairs the Clinical Disputes Forum and is a member of the management Committee of the Legal Action Group. Since being appointed to the CJC Suzanne has been particularly involved in the Council's work on lump sum damages and periodical payments and is vice chair of the committee on serious injury and clinical negligence.

Vicki Chapman is a solicitor and Head of Law Reform at the Law Society, and a member of the Civil Justice Council since March 1998. Formerly Policy Director of the Legal Action Group, she was a policy officer at the National Association of Citizens Advice Bureaux 1994-1996, and a solicitor at the Child Poverty Action Group 1988-1992, in charge of CPAG's test case strategy.

Paul Collins has been a circuit judge since 1992. He was Director of Studies, Judicial Studies Board from1997-1999 where he was responsible for training the judiciary for the implementation of the civil justice reforms and received a CBE in recognition of this work in 1999. Since October 1991 he has been senior judge at the Central London Civil Justice Centre and Designated Civil Judge for the London Group of County Courts. He is a contributor to Jordan's Civil Court Service.

Nigel Cooksley QC's principal areas of practice are personal injury and professional negligence. He is the Chairman of the Bar Council's CFA Panel and a joint author of the Bar council's Guidance on CFAs. He is also a member of the Bar Council's Remuneration Committee and an elected member of the Personal Injuries Bar Association's Executive Committee.

David Greene is a solicitor. He qualified in 1980. He was a member of the Civil Procedure Rule Committee between 1997 and 2002. He then joined the Civil Justice Council in 2002. He is Chair of the Housing and Land Committee of the Civil Justice Council.

Joy Julian is the Director of the Citizens Advice Bureau at the Royal Courts of Justice. She has broad experience of the consumer/advice sector and has even appeared on the radio giving advice. She served on the Litigant Information committee before becoming a full Council member and sits on the Access to Justice Committee.

Vicky Ling has almost twenty years experience in the advice sector as an adviser, manager and currently as a management committee member of Lewisham Citizens Advice Bureaux Service. Vicky was amongst the first staff appointed by the then Legal Aid Board to implement its Quality Assurance Standard. Since 1995 she has worked as a consultant on different aspects of quality management and LSC contract requirements with voluntary organisations (including Citizens Advice) and over 60 firms of solicitors.

Nicola Mackintosh is a partner at Mackintosh Duncan solicitors, established in 1999 which specialises in these niche areas. She has been involved in many of the test cases in the field of public law, community care/health law and incapacity law. She is regularly involved in 'best interests' cases concerning vulnerable adults and cases concerning access to health and community care services for disabled people and their carers, including hospital and care home closures.

Nicholas Madge, District Judge, sitting at West London County Court. Recorder. Formerly partner with Bindman and Partners, solicitors, heading their Housing Department. An editor of *Civil Procedure (The White Book)* he writes regularly on law and procedure. He was a member of Joint Working Party of the Bar and Law Society on Civil Procedure (Heilbron/Hodge) and of Lord Woolf's Housing Working Party. He is a member of Judicial Studies Board tutor team and has been a member of the Civil Justice Housing and Land Committee since 2001.

Frances McCarthy is a Partner with Pattinson & Brewer where she heads the personal injury department. She is the former President of the Association of Personal Injury Lawyers. She is the co-chair of the International Practice Section of the American Trial Lawyers Association and a former member of the steering group of the Environmental Law Foundation. She is a member of the Woolf working party formulating pre-action protocols. She is on the Editorial Board of the Journal of Personal Injury Litigation and is the co-author of 'Knowhow for Personal Injury Lawyers' and a contributor to Jordan's Civil Court Service. She lectures and publishes regularly.

Michael Napier is a solicitor and senior partner of national law firm Irwin Mitchell. In 2000 he was President of the Law Society and is currently the Attorney General's envoy for the national co-ordination of pro bono work. As a practitioner, after several years as an advocate in crime, mental health, employment and human rights law he has specialised in personal injury law and is a former president of APIL. He has been closely involved in the civil justice reforms particularly conditional fees and the access to justice legislation. He is an accredited mediator.

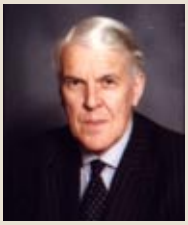
Martin Partington is currently on a 5 year secondment from the University of Bristol – where he is a Professor of Law – to the Law Commission. As Law Commissioner he is leading a major reform of housing law and other administrative justice projects. He has recently published the 2nd edition of his Introduction to the English Legal System (Oxford University Press).

Monty Trent has been a District Judge since 1992. He practised as a sole practitioner and later in partnership as a senior partner in Barnett Alexander Chart, specialising in construction and family law. He has a keen interest in IT and has been closely involved in training and supporting judges in the use of Information Technology. He is a founder member of the CJC and now sits on its Executive Committee.

Laura Wilkin is a Partner with Weightmans where she heads the Best Practice division. She has 14 years experience in defendant litigation practice and is the chair of the Federation of Insurance Lawyers (FOIL) Rules Special Interest Group and a member of FOIL's Costs Group. She was on the Editorial Board of the Journal of Personal Injury Litigation.

Mark Sefton is Policy Manager at the Advice Services Alliance, the umbrella organisation for independent advice services in the UK. He was Policy and Development Officer at the Alliance with responsibility for civil justice issues from 1996-2001. He previously worked at Hodge Jones & Allen solicitors and as a volunteer adviser at Camden Community Law Centre. He has served on the Civil Justice Council's Enforcement Sub-Committee since January 2000.

Ashton West has been in the insurance industry for over 30 years actively involved in the management of claims. He is presently employed as Chief Executive Officer of the Motor Insurer's Bureau, which manages the UK Guarantee Fund providing compensation to the victims of negligent uninsured and untraced motorists. He has been involved with the negotiation and operation of agreements to assist in the resolution of large scale industrial disease claims problems such as noise induced hearing loss and vibration white finger and the development of the Code of Best Practice on Rehabilitation. He is currently a member of the ABI Strategic Claims Committee. He is a Law Graduate, Chartered Insurer and member of the Institute of Management.



Sir Peter Cresswell is a High Court Judge, Queen's Bench Division, and is a nominated Commercial List Judge. He was called to the Bar in 1966 and was appointed Queen's Counsel in 1983. He was appointed to the High Court bench in 1991 and was the Judge in Charge of the Commercial List from 1993-1994. He is the Chair of the Information Technology and the Courts (ITAC) Working Group on Civil Litigation and a member of the Judicial Technology Group. He is also the Chair of the Judicial Working Group involved in the Modernising the Civil Courts Project.

John Peysner is a Solicitor and Professor of Civil Justice at Nottingham Law School. He has edited 'The Litigator' and was founding Course Leader of the LLM in Advanced Litigation. He has seventeen years experience in litigation practice, including Law Centres, Legal Aid and latterly, defendant Medical Negligence. He writes on conditional fees, the civil justice changes, litigation skills and funding, risk management and assessment and clinical negligence. He has conducted research on case management, costs, civil procedural systems, consumer attitudes to solicitor's services and testing in house against contracted legal services. He was a member of the Lord Chancellor's Committee on Claims Assessors (The Blackwell Committee) and wrote the first draft of the report. He is a member of the Civil Justice Council. He is editor of the Law Society's 'Civil Litigation Handbook'.

Photograph not supplied

District Judge Godfrey Gypps was appointed as a District Judge in 1991 having previously been a Principal Lecturer at the College of Law. He has served as a member of the Civil Procedure Rule Committee (including its Costs Sub-committee), the District Judges' Tutor Team of the Judicial Studies Board and as a Visiting Fellow at the University of Essex. He is a member of the Association of District Judges National Committee, the Joint DTI/LCD Personal Insolvency Project Board and the Judicial Advisory Group concerned with the IT training of judges for MCTP. He lectures widely on civil litigation and family law topics for the JSB and on courses for practising lawyers.

The Secretariat

Robert Musgrove is Private Secretary to the Master of the Rolls, and Secretary of the Civil Justice Council. He has worked in the administration of the civil justice system for nearly twenty years and has practical experience of the operation, planning and financing of the court system. He has been Head of Project Management for the Access to Justice Reforms in the Lord Chancellor's Department, and also the Civil Justice Reform Research and Evaluation Programme Manager.

Monique Deletant is Assistant Secretary to the Civil Justice Council. She worked for the Lord Chancellor's Department evaluating the impact of the Woolf reforms and wrote 'Emerging Findings: An early evaluation of the Civil Justice Reforms'. Prior to this she worked as a researcher for an MP.

Jaswanti Kara joined the Civil Justice Council Secretariat in June 2003. She previously worked in Barnet and Central London County Courts. She is responsible for ensuring the compliance of the Civil Justice Council to regulations governing NDPBs. She also works with committees and the secretariat on policy and recruitment matters.

Alaric Shorter has been Executive Assistant to the Civil Justice Council since January 2002. This is his first job since completing a History degree at UCL. He works with the committees and is also responsible for ensuring the Civil Justice Council website has information on the latest issues the Council is focusing on. His ambition is to pursue his musical career and he is a member of a successful band.

Contacting the Council

"Your Voice in the Civil Justice System"

The Council is **your voice** in the civil justice debate. It needs to hear the views of anyone that uses the system to make sure that the recommendations it makes to the Department for Constitutional Affairs are the best way of modernising the system. The Council therefore wants to hear your views about the effectiveness of the reforms, whether the procedures are meeting their aims of making civil justice quicker cheaper and fairer, or any suggestions you have for improvement or further development. Are there particular problems that you think that the Council should be addressing? How are the reforms working in practice? What are the good and bad aspects of the reforms?

It is important to note that although the Council welcomes and indeed encourages your general comments on using the civil courts, it cannot comment on any individual court action or dispute, the conduct of any legal practitioner, and is unable to provide procedural advice.

Contacting the Council

Write to the **Secretariat, Room E214, Royal Courts of Justice, London, WC2A 2LL** or email to **cjc@courtservice.gov.uk**. You can also email direct to the Council Secretariat from the Council's website.

How can I find out more about the Council?

Information on:

- the latest issues that the Council is focussing on and current events
- summaries of Council meetings and Committee meetings
- the membership of the Council and its Committees
- copies of responses to consultation papers and other documents
- copies of the Council's annual reports

is available on the Council's newly updated website: **www.civiljusticecouncil.gov.uk**

The Costs Debate

If you would like to visit our brand new website on Costs and take part in the on-going debate please visit: **www.costsdebate.civiljusticecouncil.gov.uk**