Civil Justice Council

Annual Report 2004

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Foreword

The past year has been one of considerable achievement for the Civil Justice Council. It has been allowed to reflect on the effectiveness of the civil justice reforms to date, and has provided an opportunity to develop and plan for the shape of further crucial reform.

The Experts committee ran a well-organised and highly successful forum in November. The forum revealed strong differences of views among experts on the issue of predictable fees and those instructing them and a further forum dedicated solely to the issues raised on accreditation has followed. The Committee is still in the process of drafting a single code of guidance for experts and hope to have it published in the near future.

The Housing and Land Committee ran a successful forum and it highlighted several problem areas, which they will be taking forward. The committee will be continuing work on the rent arrears protocol, increase training given to deputy district judges on housing cases, and also giving guidance to judges about the use of sanctions in Anti Social Behaviour Orders.

I look forward to the coming year hoping that the Civil Justice Council with its expertise and enthusiasm makes further important contributions to the task of ensuring that this country retains a fair and effective civil justice system.

I believe that the Civil Justice Council is a highly respected advisory body that provides the expertise to assist Government with an increasing number of highly challenging justice issues. The Council is able to assist due to the excellent relationship it has established with progressive thinking civil servants who are prepared to work in partnership and listen to constructive criticism and also because of the quality, innovation and sheer hard work of the Civil Justice Council members. Membership, including the committees 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 and I would like to take this opportunity to thank them all. I would like to thank Paul Collins and Brian Langstaff for their hard work as chairs of committees.

Lord Phillips of Worth Matravers

How the Council Works

The Civil Justice Council is a Non Departmental Public Body, sponsored by the Department for Constitutional Affairs (DCA). It was established under the Civil Justice Act 1997 along side the provisions that paved the way for the most extensive reforms in the civil justice system for over a century. It was intended that the Council be more than a mere consultative body but rather should be a 'high powered body representative of all of the relevant interests which monitors the effects of the new rules in practice'.

The Primary role of the Civil Justice Council

The primary task 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 and his officials on how the civil justice system can be improved to provide a better justice system, tests policy and procedures to ensure it improves access to justice, and monitors system procedures to assess whether they achieve their stated policy aims.

Statutory provision

The Civil Justice Council was established under the Section 6 of the Civil Procedure Act 1997 and 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.

Constitution

The Civil Justice Council, to fulfil its purpose effectively provides a diverse and representative cross section of views from those who use, or have an interest in, the civil justice system.

The Civil Procedure Act requires that membership of the Council must include:

- members of the judiciary;
- members of the legal profession;
- 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 kind of litigants (for example businesses or employees).

Ex Officio and Preferred Memberships

Majority of the members serve fixed terms limited to two years. The Lord Chancellor, following recommendation by the Chair of the Civil Justice Council, makes appointments and re-appointments. All appointments are non remunerative, and accord with guidelines provided for ministerial appointments by the Office of the Commissioner of Public Appointments.

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 DCA and 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-four members (including those ex officio). An Executive Committee comprises of the Chair, Deputy Head of Civil Justice, three Council members, and the Chief Executive of the Council who make the management and planning decisions. Eight 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 Public Legal Education Working Group), Housing and Land, Clinical Negligence and Serious Injury, Experts, Costs, Rehabilitation Rules Group and Access to Rehabilitation.

The Council and its committees are supported by a secretariat of civil servants. The Chief Executive of the Council is the senior executive and budget holder.

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

Civil Justice Council Activities

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

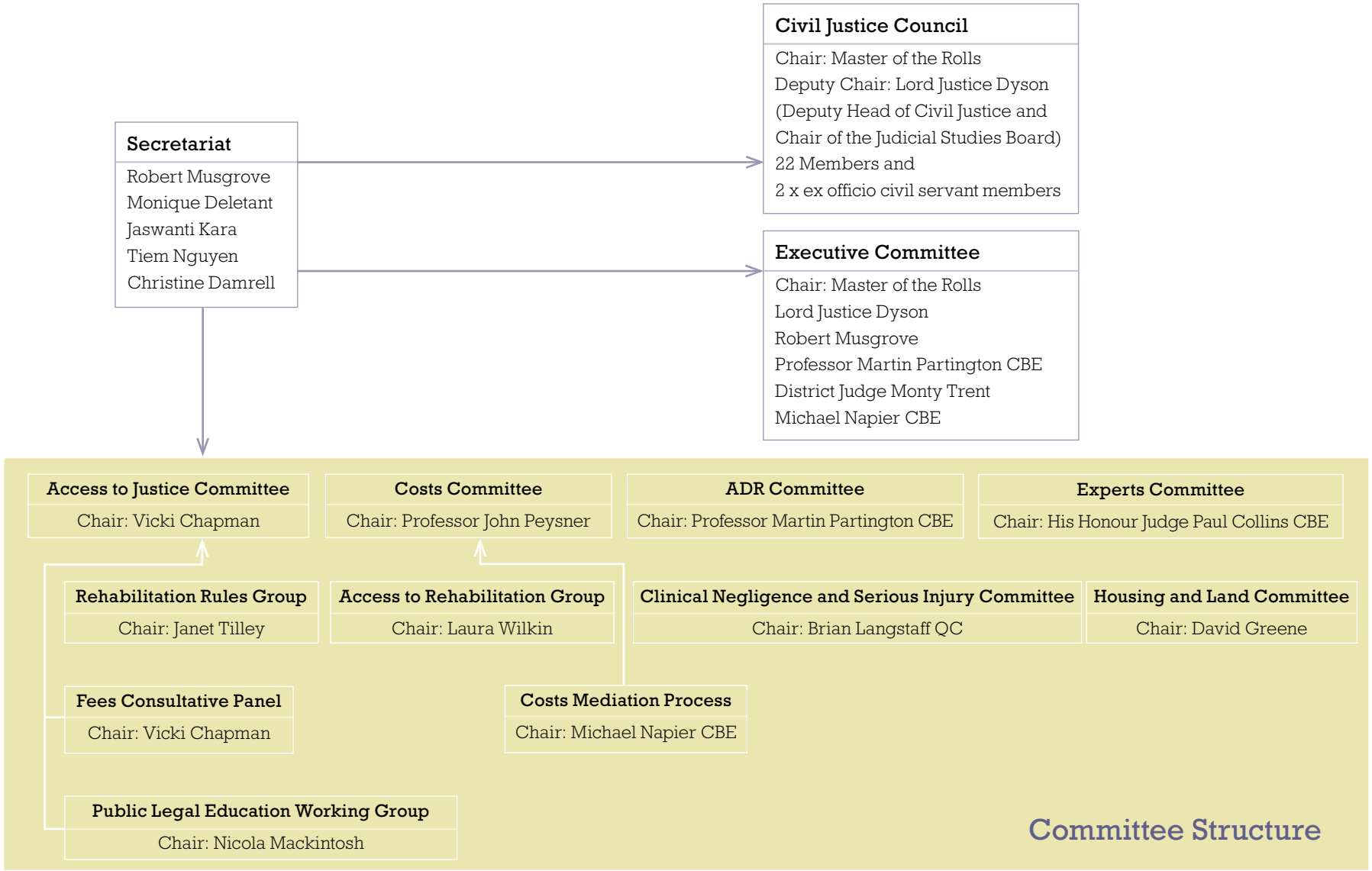
At top level the Civil Justice Council will achieve the following outcomes:

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)

Professor Hazel Genn CBE
Professor Geraint Howells
District Judge Terence John
Michel Kalipetis QC
Robert Nicholas
Stephen Ruttle QC
Colin Stutt
Tim Wallis

Alternative Dispute Resolution (ADR)

Terms of Reference

To undertake activities relating to supporting 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

The past year has been one of progress and consolidation.

The ADR Forum – outcomes

We reported last year on the ADR Forum, which brought together both judiciary and members of court staff to consider whether and if so how in-court mediation schemes might best be developed. There were a number of important outcomes which arose from the forum:

1. The Civil Justice Council (CJC) sponsored a research project into the working of the small-claims mediation scheme, operating in the Exeter County Court. It had long been assumed that there was little point in using ADR in small-claims track cases. The Exeter experiment suggested otherwise. We engaged Dr Sue Prince of the University of Exeter to conduct a pilot study into its operation. She discovered that, in fact, the scheme worked surprisingly well, was liked by court users, and seemed to lead to savings in judicial time. She presented her results to the ADR Committee in May 2004. A larger follow-up study, sponsored by the Research Unit at the DCA, is currently in progress.

2. In response to comments made at the Forum, the Committee has now launched a new website, featuring a question and answer facility. Considerable effort was devoted by two members of the Secretariat, Alaric Shorter (who has now left the CJC) and Chloe Smythe, in getting this up and running. The Committee is most grateful to both of them.

Readers are invited to visit the website at http://www.adr.civiljusticecouncil.gov.uk We would be very pleased to receive feed-back on the site.

3. The experience of those who had set up in-court mediation schemes suggested that there was scope for identifying the steps that should sensibly be taken when courts were contemplating the establishment of new schemes. It was thought that we might be able to develop a 'template' of good practice which would prevent courts from constantly reinventing the wheel. This has not moved forward as quickly as we had hoped but we continue to work with officials from the DCA to ensure that appropriate guidance can be provided.

4. Discussion at the forum also influenced the final drafting of the paper submitted by the ADR Committee to the Civil Procedure Rules Committee, which recommends a number of detailed changes to the Civil Procedure Rules, the Practice Directions and the Allocation Questionnaire. We expect to receive the response of the Rule Committee early in 2005.

Policy developments

As reported last year, the DCA's Public Service Agreement requires policy makers to continue to find ways to encourage the resolution of disputes without the necessity of a full court hearing. DCA has launched a number of initiatives including:

- The Central London County Court 'opt-out' scheme (which the ADR Committee had proposed last year);
- a new Mediation Adviser scheme in Manchester County Court; and a
- leaflet scheme, advising people about ADR, in a larger number of county courts.

These initiatives are currently being evaluated. We will receive further reports on them in the coming year and will work with DCA to see how we can assist in spreading the word on good practice.

Response to consultation

Undoubtedly the most important consultation to come our way this year is the consultation arising out of the Fundamental Review of Legal Aid. This attracted a number of submissions from different committees of the CJC. We broadly welcomed proposals for greater use of ADR in cases funded by the legal aid scheme, though we stressed that the use of ADR must be founded in the added value it gives to those in dispute, not simply in any cost savings it may yield to the legal aid budget. The full text of our response can be found at www.civiljusticecouncil.gov.uk

Visitors to the Committee

We have received a number of presentations from organisations and others involved in the provision of ADR services. These have included:

- Lawworks Mediation – a free mediation programme sponsored by the Solicitors Pro Bono Group;
- Centre for Effective Dispute Resolution and DLA group, on their new mediation scheme for Personal Injuries claims;
- District Judge Langley, from Central London County Court, who gave us a preliminary account of the working of the CLCC 'opt out' scheme (see above).

For the first time, we have held a joint meeting with the ADR Committee of the Law Society, an experiment which was well received and will be repeated next year.

Future projects

Two projects are likely to engage the Committee in the months ahead.

First, we shall be doing more work on the need for judicial training in ADR with a view to providing additional support for members of the judiciary in their understanding of the relevance and application of ADR to dispute resolution.

Second, we need to gain improved understanding of important developments in the use of ADR in Europe, both at the level of practical dispute resolution and at the policy level.

Acknowledgements

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

Martin Partington
Chair

Committee Members

Vicki Chapman (Chair)

Philip Bowden
Susan Bucknall
John Cook
Professor Kim Economides
Professor Margaret Griffiths
Joy Julien
Vicki Ling
Nicola Mackintosh
District Judge Michael Walker
Richard Woolfson

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

At its meeting in May the Access to Justice Committee agreed to take forward work on a project basis, only meeting as a whole committee if the need arose.

Court Fees

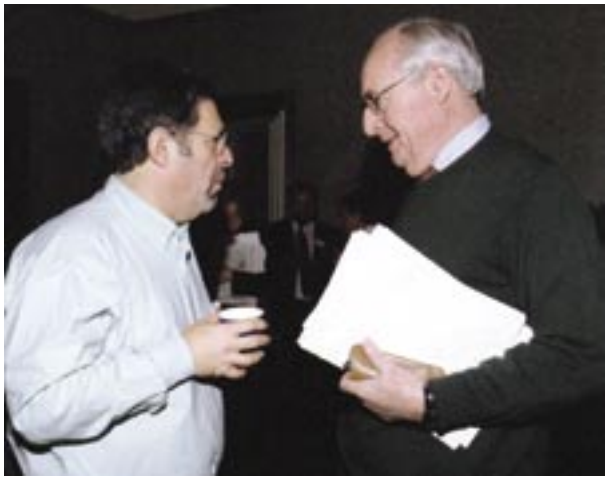
The Civil Justice Council Fees Consultative Panel met with the Department for Constitutional Affairs representatives to discuss the Department's consultation on Court Fees. Although the consultation paper made it clear that Government's policy of full costs recovery was not open for discussion, in responding the Council emphasised its continuing opposition to this policy. The Council noted that the constant increase in court fees could lead to a situation where certain groups in the population may no longer be able to afford to undertake litigation, and commented that the current exemption and remission scheme is insufficient to guarantee access to justice. We were very pleased to note that the Department has now agreed to review the policy and will be working with the Fees Consultative Panel on this.

We were also pleased to note that a number of the concerns expressed in our response were acknowledged by the Department. These include opposition to a single fee for judicial review applications (the current fee structure will remain); opposition to a fee per claimant for personal injury claims; concerns about the operation of the hourly hearing fee, which the Department has said will require further consideration; and opposition to an allocation fee for claims under £1,500.

A copy of the full response can be obtained from the Civil Justice Council website at www.civiljusticecouncil.gov.uk

Promoting awareness of access to justice

We identified a need to increase awareness of the crucial contribution that information and advice about legal rights and responsibilities can make 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. We received numerous examples which demonstrated the positive impact that early intervention can make to improving people's lives and reducing public expenditure overall. We hope that in the longer-term, policy-makers may be persuaded to fund information and advice services at adequate levels.



The paper was submitted to the House of Commons Constitutional Affairs Committee as part of their enquiry into civil legal aid and access to legal services.

The Council also responded to the DCA's consultation 'A Choice of Paths'. We felt as debt is an increasing problem in society it was an appropriate time to review the existing framework. We welcomed the proposals, which considered the issue of debt within a wide framework including the regulation of lending and the promotion of financial education. We suggested that a combination of responsible lending with a realistic position on debt collection, was essential if policy is to be developed successfully in relation to debt management. We welcomed the recognition that many people become indebted through no fault of their own. However, we felt that the proposals related most directly to consumer debts and that business debts should be treated differently. We also noted that the vast majority of housing possession cases arise due to rent arrears, which were not covered in the proposals, and would welcome similar developments in respect of housing debt.

Public Legal Education Working Group

Members of the Access to Justice Committee held a Citizenship Forum which looked at building links between the Civil Justice Council, the Citizenship Foundation, the DCA, Department for Education and Skills, lawyers, schools and others, to help to assist in supporting teachers in delivering the Citizenship programme to young people. We hope to identify funding and a lead agency to set up a pilot project involving urban and rural schools. It is intended that the scheme should be evaluated for its effectiveness and benefit to teachers, schools and the young people concerned.

We also hope to develop a second project to bring together existing research regarding the need for a cohesive programme of public legal education in England and Wales. We believe there is the need for an umbrella organisation to oversee the direction of public legal education to include people of all ages and backgrounds, and would be aimed at promoting inclusion in society and greater understanding of civil legal issues.

The Access to Justice Committee also contributed to the Council's response to the Legal Services Commission consultation paper 'A New Focus for Civil Legal Aid' which contained proposals for a wide range of restrictions on the scope of public funding available for individuals seeking legal advice and representation and on financial eligibility for such services. A copy of the Council's response can be seen on the website at www.civiljusticecouncil.gov.uk

Vicki Chapman
Chair

Committee Members

His Honour Judge Paul Collins CBE (Chair)

Michael Cohen
John Cowan
Simon Davis
Richard Fairclough
Mark Harvey
His Honour Judge Graham Jones
Claire McKinney
Simon Morgans
Robin Oppenheim
Andrea Scotland
Dr Robert Watt

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's instigation of the debate on guideline fees for typical experts' reports has stimulated very promising further work. The Council held a forum in November 2004 which laid the basis for agreement in this complex and important area, limited at this stage to low value personal injury claims.

Accreditation and registration of experts, together with appraisal and training, have become more prominent issues as a result of cases in the criminal courts, which attracted much publicity. The November forum revealed strong differences of views among other experts and those instructing them. It is likely that a further forum dedicated solely to these issues will be required before a clear way forward can recommend itself.

The committee proposed a minor but useful change in the Part 35 Practice Direction, which has been effected. If an order requires an expert to do anything or affects his work, the solicitor instructing him is required to serve a copy of the order upon him.

The extent to which an expert may claim privilege on behalf of his client for facts which may have come to his knowledge before being instructed as the expert witness or earlier non-disclosed reports remains an unclear area despite some recent Court of Appeal authority. The committee is still considering this issue although it may be one solely for resolution by the court.

Notwithstanding the success of the use of the single joint expert in the Fast Track, the committee has failed to detect any great enthusiasm for extending the practice up through the Multi-Track. This may perhaps be bound up with attitudes to litigation which are still dictated by pre-1999 notions. If the Fast Track limit should ever be raised, the extended use of the single joint expert may well go unremarked.

Paul Collins
Chair

Committee Members

Brian Langstaff QC (Chair)

Suzanne Burn
Janet Howe
Alistair Kinley
Bertie Leigh
Russell Levy
William Norris
District Judge David Oldham
John Pickering
Steve Thomas
Dr Christine Tompkins
Master John Ungley
Steve Walker
Adrian Whitfield QC
Laura Wilkin

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

Report of the work of the Clinical Negligence and Serious Injury Committee: 2004

As last year, the workload of the Committee has been heavy.

Dominating discussions earlier this year were the details of proposals to introduce a power to award periodical payments, as provided for by the recent amendments to the Damages Act. The Committee responded to consultation in respect of the draft rules, draft Variation Order, and draft Practice Direction (in April). They were gratified to see that many of their suggestions appeared to have been taken on board in the result (which emerged towards the end of the year).

They then responded to consultation in respect of the way in which Part 36 payments would operate in relation to periodical payments.

Other Consultation which was responded to, at short notice, related to Interim Payments (September).

Proposals to amend the scope of legal aid provision for clinical negligence claims formed the subject matter of one lengthy meeting in October – as a result of which an agreed position was determined on, and a further printed response published (October).

Facilitating rehabilitation has been a central concern of members of the committee this year: most of us participated in a CJC forum on the subject, and are keen to see renewed impetus towards the goals – generally shared – to promote earlier, more active, rehabilitation in its fullest (i.e. not just medical, but also social and employment) sense.

A particular interest of the Committee has been to urge the introduction of a power in the Court to order one party to provide an indemnity in respect of potential losses which may be incurred, or claimed against, the other party: the power to do so would, in our collective view, facilitate many settlements, and advance certainty in the recovery of damages in place of more speculative awards.

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.

A programme of work for the coming year has evolved, which threatens to make the third year of the Committee's work the most intensive yet. It has briefly examined group actions; intends to spend time discussing how best to improve the formulation of care claims, in particular with a view to aiding certainty and saving costs; will keep the difficult inter-relationship between damages awards and local authority and state provision in kind under review, will examine whether Roberts v Johnstone awards may be simplified – and their relationship with periodical payments clarified – quite apart from continuing to offer advice on practice relating to periodical payments awards and in respect of measures to encourage rehabilitation initiatives.

The members of the Committee bring specialist expertise to its deliberations from different viewpoints – those of insurers, medical defence organisations, the DOH, the Department of Health and National Health Service Litigation Authority, the DCA, claimants' and defendants' solicitors, senior members of the Bar, High Court Masters, the district judiciary, and academia. In addition, 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: and the Chairman has accepted invitations to speak about the work of the Committee to bodies such as the Institute of Actuaries.

Brian Langstaff QC
Chair

Committee Members

David Greene (Chair)

David Carter
David Cowan
John Gallagher
Jon Hands
District Judge Nic Madge
Derek McConnell
Celia Tierney
David Watkinson
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

This has been an active year for the Housing and Land Committee.

In June we held a forum of stakeholders on the civil process for housing cases. The forum met on 9/10 July in Minster Lovell. In the time available three principal subjects were discussed – representation of tenants, the management of court process including the consistency of decisions and the manner in which the courts now deal with allegations of anti social behaviour.

The deliberations of those attending gave rise to a number of suggestions for future action and investigation by the Civil Justice Council. As a result the Committee is currently considering a Pre-Action Protocol for Housing Possession cases.

The Committee is also working with a Working Party formed by the Department for Constitutional Affairs. The Working Party is considering court process for housing cases including developing further alternatives to court process and improving the process for all participants.

The Committee has also been looking at the training of Judges for housing cases and is in correspondence with the Judicial Studies Board, particularly in relation to training for procedures relating to anti social behaviour.

The Committee made submissions to the House of Commons Select Committee Investigation into ''legal advice deserts''. The Select Committee has recently reported. The Government's response is awaited.

Work Plan 2004/2005

The Committee is considering a Pre-Action Protocol for Housing Possession cases.

The Committee will continue to work with the DCA Working Party on initiatives to improve the process for all participants in housing cases.

The Committee will continue to monitor the training of Judges, particularly in relation to anti social behaviour process.

The Committee will also continue its work with the Legal Services Commission and other stakeholders on ensuring the availability of advice and representation for tenants in housing claims.

David Greene
Chair

Committee Members

Mike Napier CBE and Professor John Peysner (Chairs)

Senior Costs Judge Peter Hurst
Robert Musgrove
Kevin Rousell

Costs Committee and Working Groups

Terms of Reference

To monitor and comment on the effectiveness of existing costs practice and procedure in 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

During 2004 the costs sub committee of the Civil Justice Council has continued its programme by:

- mediating between claimant lawyer organisations and insurers to achieve agreement on success fees in conditional fee cases;
- researching access to justice issues in other jurisdictions in relation to the funding of litigation and recovery of costs;
- working towards simplification of conditional fees;
- examining the cost of expert fees.

Success Fees

Building on the 2003 agreement of fixed success fees in RTA cases the Civil Justice Council has chaired a number of meetings which have led to a mediated agreement of success fees in employers liability cases where the cause of action arises from a workplace accident. The agreement includes a special arrangement to cater for accident claims brought by members of trade unions under a collective conditional fee agreement. The agreement also includes the Bar applying similar principles to the fixed success fee scheme agreed for road traffic cases. These new arrangements were approved by Ministers and following approval of the Rules Committee came into force on 1st October 2004. Further meetings during the year continued the Civil Justice Council's work towards agreement of fixed success fees in employers liability cases where the cause of action arises from the contraction of an industrial disease.

The remaining area of accident claims where the cause of action arises against a public authority (known generically as public liability claims) has also been addressed so far at one preliminary meeting, also with a view towards fixed success fees being agreed.

The work of the Civil Justice Council in mediating the agreement of fixed success fees in personal injury cases has been widely recognised. During 2004 this led to a request from lawyers on both sides of publishing proceedings (defamation/libel) that the Civil Justice Council should assist towards an agreement of success fees in this area of law that had special problems considered by the Court of Appeal in King v Telegraph. A preliminary meeting and a forum have been held prior to the proposed gathering of data that is always an essential ingredient to facilitate the mediation process.

Litigation Funding and Access to Justice

From the outset of its involvement in working towards greater predictability in costs in civil cases, the Civil Justice Council has examined systems in other jurisdictions. In previous years members of the costs sub committee have visited other countries for meetings with lawyers, insurers, members of the judiciary, civil servants, ministers and others, including Germany, Scotland, Northern Ireland, the Republic of Ireland, Canada and the U.S. During 2004 this programme of work was continued by a visit led by the Master of the Rolls to Singapore, New Zealand (the International Bar Association Conference at Auckland), Australia (New South Wales and Victoria) and Hong Kong. Knowledge from these visits and responses to the consultation on costs budgeting will inform the paper to be produced by the Civil Justice Council in the Spring of 2005 containing recommendations for a future costs framework to promote access to justice for consumers, providing fair, proportional and reasonably predictable costs between the parties to a civil dispute.

Conditional Fees

The Civil Justice Council has continued to work with the Department for Constitutional Affairs and the Law Society on the delivery of a reformed and simplified mechanism for regulating the consumer protection aspects of a conditional fee agreement, due to be introduced in 2005.

Experts Fees

As part of a forum of expert witnesses involving members of the costs sub committee and experts committee of the Civil Justice Council preliminary steps have been taken to establish a scheme of fixed fees for medical experts in road traffic cases. The forum reached agreement on four principles:

- There should be a rebuttable presumption that in non-litigated traffic claims under £10,000 medical evidence should be obtained from a general practitioner;
- Predictable fees for the cost of obtaining such medical evidence should be the subject of an industry agreement facilitated by the CJC;
- These provisions should, after review, be extended to all fast track cases;
- There should be no enquiry by the paying party into the breakdown of the cost of obtaining a medical report (GP presumption) where the clinician does not provide the report directly.

Further work to implement these proposals will continue into 2005.

The Future

As will be clear from the above analysis of costs issues addressed in 2004 the costs sub committee and the full Civil Justice Council can expect much work in this pivotal area of access to justice in 2005. Continuing development of costs case law and government initiatives such as the Better Regulations Task Force and the Department of Work and Pensions pilot scheme for low value accident claims mean that the work of the Civil Justice Council is not taking place in a vacuum. However, the benefit of ''industry'' acceptance of the role of the Civil Justice Council in mediating people and organisations towards consensus agreement has again in 2004 placed it at the centre of efforts to improve and simplify the costs system that three years ago was showing worrying signs of breakdown.

Mike Napier CBE
Chair

Articles and Publications on Civil Justice Council Issues

Unified Civil Jurisdiction

By Robert Musgrove
Chief Executive, Civil Justice Council

The headline in The Gazette on 1st July was bold enough to catch the eye ''Woolf and Phillips – Scrap the High Court''. The headline was stark indeed, but not neccesarily a herald of something shockingly new or novel.

Lord Woolf addressed the issue on a unified civil jurisdiction as long ago as his interim Access to Justice report in 1995. Whilst he fell short of recommending unification then, citing constitutional reasons and issues surrounding rights of audience, he did lay out the fundamental principles of aligning the procedures of the civil courts, and the allocation of workload by level of judge rather than forum. He wrote (in extracted form):

''As a result of the recommendations of the Civil Justice Review, as implemented by the Courts and Legal Services Act 1990 and by the High Court and County Courts Jurisdiction Order 1991, the jurisdictions of the High Courts and county courts have converged. However, they still do not entirely correspond and they have separate but overlapping administrations. The present arrangements hinder the easy transfer of cases and the allocation of cases to the appropriate level of judge… To make the system less complicated, more flexible and more accessible, I am recommending the proceedings can be commenced at any court and the system should take responsibility for ensuring that the proceedings arrive at the appropriate court… In addition, if my recommendations are accepted and the rules of the High Court and county courts are combined, the procedure in the High Court and county courts will be basically the same… However, the further alignment of the jurisdictions of the High Court and the county courts should continue, both as to subject matter and as to powers…''

The civil procedure reforms have been very successful in consolidating lower value, lower complexity work in the county court. A combination of the effect of Part 36 offers to settle, an increase in the monetary jurisdiction of county courts, and a minimum limit under which you may not commence proceedings beyond the county courts, has resulted in a remarkable drop in the level of initiating work in the High Court. It is commonly reported that the work of the Queen's Bench Division has fallen by more than 80%, and it only takes a cursory visit to the Bear Garden in the Royal Courts of Justice to observe the reality of the effect the Civil Procedure Rules have had on workload.

Returning to the headline ''Scrap the High Court'', it needs to be recognised that the recent proposals made by the Lord Chief Justice and the Master of the Rolls are in reality more concerned with developing and extending the legal excellence of our top tier, than wishing to abolish it.

Consolidating the High Court and county courts would allow much greater flexibility in the way in which we used our courts and judiciary. It would ensure that the right level of judge managed or heard the right case at the right level. It is not intended as just a post Civil Procedure Rules tidying exercise, but a sustainable plan to improve the use and effectiveness of judicial and court resources.

The judges' proposals are however not yet cut and dried. Consolidating the civil jurisdiction will rely on strong and persuasive argument to Government, and to be persuasive they must necessarily convince the Department for Constitutional Affairs that there are sustainable

efficiencies and savings to be made. The DCA is, of course, committed to putting the needs of the citizen first, but proposals for reform must inevitably carry a practical bottom line – if it doesn't save resources, it is unlikely to get done. It should also be noted that as the civil courts are largely funded through fees, any long term savings would ultimately benefit the user.

In terms of the legislation that is likely to be practical and constitutionally acceptable, ''Scrap the High Court'' is simply not an option.

But I believe there is a practical solution; in order to ''abolish'' the High Court, you effectively have to do the reverse and ''abolish'' the county courts. This sounds a rather unconventional way to achieve a legislative end, and perhaps it is, but the reality is that county courts have considerably less unique jurisdiction, and so present a much easier target for legislative re-consolidation. The Courts and Legal Services Act 1990 (S1) provides a vehicle for the Lord Chancellor to make a new High Court and County Courts Jurisdiction Order to confer full jurisdiction on all matters where county courts have exclusive jurisdiction. Some observers have pointed out that this effectively re-creates the position prior to the county Courts Act of 1846.

But what would a unified civil jurisdiction look like? People have already started to speculate, and this has inevitably brought concerns from those who believe they will be most affected by the change.

Some early, but by no means definitive, thinking is predicated on a presumption that civil work should be allocated solely by the type or level of judiciary that should hear it, and not more rigidly by forum.

How the unified civil court is to be structured may be determined by the consideration of three main factors; whether a unified civil court based on the existing High Court is viable (importing the work of the county courts, and the circuit and district benches into a single unified civil court); whether categories of work should be allocated to each level, tier or type of judge; and how judges should be deployed to improve the flexibility, efficiency and lay understanding of the system.

Leaving aside the family courts, which in all likelihood we can present a persuasive argument that they should form an entirely separate jurisdiction, the terms Queen's Bench and Chancery are unlikely to have any great meaning to the public they serve (lawyers are sometimes seen to struggle, as demonstrated by the regular traffic of cases transferring between divisions). It may be argued that the natural evolution of the divisions has blurred jurisdictional boundaries in some areas, and that lawyers now choose the forum where blurring arises. Hong Kong has recently published the findings of the Chief Justice's Working Party on Civil Justice Reform. These are Woolf facing, as you might expect, and support the operation of specialist lists, enhancing current arrangements to provide lists for Commercial, Personal Injury, Construction and Arbitration, Constitution and Administrative Law, and Intellectual Property and IT.

The extension of specialist lists, if their nomenclature is clear to those who use them, are an attractive proposition. They would help to define better the types of cases they handle, and may also provide a clearer career path for the specialist bar, and in particular attract those who are seeking to become specialist judiciary. Deciding how many specialist lists however is likely to be difficult. An increased number of lists may provide a greater opportunity in terms of cross-civil deployment, but possibly may create a problem for cross-jurisdictional deployment. Keeping the higher end criminal cases sufficiently populated judicially might be more complicated, as may be accommodating the civil judge who would like to straddle civil and family work. This in turn may call for more judicial management or leadership posts.

The allocation of judicial business goes hand in hand with the powers required to restrict certain types of work to senior or specialist judges. There is an obvious, and I hope unopposed, credo that work should be allocated to each tier of the judiciary based on complexity, specialist knowledge, and/or overriding public interest. At the top end there should be certain types of generic work that must be retained at High Court judge level, for example judicial review citizen versus state disputes, or actions seeking Human Rights declarations.

A clearer grading of cases could bring considerable benefits. Some cases, as described above, should be designated ''High Court Judge only'' and not be able to be delegated. This maintains the excellence (and the perception of excellence) of our senior judiciary, and also ensures that our most experienced judges are getting only the most demanding work, which is more resource efficient. To maintain flexibility and efficiency there may be scope for a grade of work that is identified as ''High Court Judge only'' due to its legal specialty, that under exceptional circumstances may be delegated to a specialist Recorder with an appropriate qualification or ''ticket''. Similarly there may be a level of work that might be graded ''High Court judge desirable'' due to complexity or public interest, and may be delegated to what we commonly recognise as a Section 9 judge, in the absence of an available High court judge. These delegation principles may be distilled throughout the tiers of the judicial system, developing ''ticketing'' throughout, and including ''star'' Recorders from the specialist Bar.

The next consideration, and certainly one for this readership, is who should provide advocacy services in the unified civil court? In recent years, rights of audience have been increased to allow appropriately qualified Solicitors and Legal Executives an opportunity to present argument in higher courts. A unified civil jurisdiction will inevitably create further opportunity, and it is hoped that many more solicitors will qualify with advocacy rights. From the barristers I have spoken to, there is no great resistance to this, the proposals provide greater competition, but ultimately advocacy should be recognized as a matter of quality and choice. I cannot see that the Bar should have any legitimate cause to be concerned about this, it would require no change to the legislative framework, and would be a matter for the professions to develop proposals together, in particular minimum quality standards. Personally, I would be delighted by the sight of advocate solicitors being welcomed into the Inns of Court.

Further advocacy rights would require some changes in the way in which Solicitors are trained, providing an earlier opportunity to consider advocacy as a career option. Procedural training would also require some change, but with considerable resource benefits to firms, as it would only need to support a single system. As a rather obvious illustration, there are currently over 1,000 standard procedural forms in use in the county courts, and many of these have their High Court equivalents. This illustration may be extended as a way of contemplating much wider IT implications. Fewer forms, procedures, and practices would provide an opportunity to simplify greatly the IT required by both the courts and practitioners to support the civil court system. This would inevitably produce cost savings, as well as provide better opportunities to develop court/practitioner communication.

Finally, perhaps the most difficult question of all is; what do we call the unified civil court? Perhaps that is best left to the consultation.

The views expressed by the writer are his own, and do not seek to reflect any collective or individual views of the senior judiciary or any Government body

Resolving Housing Disputes: A new Law Commission Project

By Martin Partington
Law Commisioner

Introduction

As the second phase in its major programme of the reform of housing law, the Law Commission has just started an important new project on the resolution of housing disputes. This is a topic central to the interests of large numbers of advice workers. Although we are only at the first stages of our work, I am delighted to have been asked to contribute this article to the Adviser. I hope to engage readers' interest and encourage you to get involved in helping to shape its ideas, particularly after publication of the Consultation Paper on the subject next summer, before then if possible. Contact details can be found at the end of the piece.

Here I consider three questions:

- Why now?
- What are housing disputes?
- What do users want from a housing dispute resolution system?

Why now?

There has long been criticism about the ways in which housing disputes are resolved in this country. Calls for the creation of a specialist housing court or tribunal go back well over 25 years.

Even though the Law Commission did not formally seek comment on the issue in the first stage of its work on the reform of housing law, many of those who responded to our earlier consultation exercise criticised current methods of housing dispute resolution. The issue came up repeatedly, particularly at the public meetings we attended.

When the Law Commission published *Renting Homes* in November 2003, it set out their recommendations for the reform of Housing Law. But, in the light of consultation responses, the Commission also recommended that it should undertake more work on the resolution of housing disputes. We recognised that whatever legal rules we might suggest there would always be the potential for dispute. Modernisation of the ways in which problems were sorted out should be closely linked to modernisation of the law.

Quite independently of the Commission's work, other important developments have also been occurring within Government. These include:

- The development of a user perspective for civil justice;
- Publication of the Administrative Justice White Paper;
- Proposals for community justice and local courts;
- New proposals for the development of the Community Legal Service.

A user perspective for civil justice

Since 2003, when the Department for Constitutional Affairs was created, and Lord Falconer was appointed Secretary of State and Lord Chancellor, there has been a quite new emphasis on the importance of the civil justice system developing a much more user-focussed approach to the services it provides. Of course, the courts are used by many people; but Ministerial statements have made clear their view that the Court Service must respond more to the needs of those who might take cases to court, less to the judges and lawyers who work in the courts.

The implications of such statements have not yet been wholly worked through. But the DCA is working on a 5-year strategy to put Ministerial aspiration into effect. Reform of the structure and procedures for housing dispute resolution should be an important part of that strategy.

The Administrative Justice White Paper

The White Paper *Transforming Public Services: Complaints, Redress and Tribunals* (July, 2004)[1] sets out the government's plans for the reform of tribunals and administrative justice. Building on Sir Andrew Leggatt's proposals for the creation of a unified Tribunal System, the White Paper envisages a new unified tribunals system that will "not just [...] process cases according to law. Its mission will be to help to prevent and resolve disputes, using any appropriate method and working with its partners in and out of government, and to help to improve administrative justice and justice in the workplace so that the need for disputes is reduced".[2]

The Administrative Justice White Paper also lays considerable emphasis on "proportionate dispute resolution", by which it means helping people to avoid legal disputes in the first place and where they cannot, providing solutions that are tailored to resolve disputes quickly and cost-effectively. One key element of this is that disputes should not be handled by courts and tribunals where this is not necessary. This ties in with the recent emphasis on mediation and other non court-based dispute resolution techniques.

The White Paper specifically refers to the new Law Commission housing disputes project. This raises the question: what lessons can be extracted from the White Paper which can be applied to the resolution of housing disputes?

Community justice and local courts

The government is piloting a Community Justice Centre in Liverpool to deal with anti-social behaviour. This concept is based on community justice courts operating in the USA, most notably the court at Red Hook in New York.[3] This is an innovative court system set up to deal with "neighbourhood problems", including landlord and tenant disputes as well as problems to do with drugs, crime and domestic violence. One way in which this court differs from other courts is that it offers a co-ordinated approach to disputes that would usually be heard in different courts. The Red Hook website comments that "the Justice Center recognises that neighbourhood problems do not conform to the arbitrary jurisdictional boundaries of the modern court system".

The aim of the Liverpool pilot is that it should be closely linked to the local community and be able to provide alternatives to custody such as drug treatment, restorative justice and debt counselling. Although currently focused exclusively on alternatives to the use of criminal courts, it provides an interesting and innovative model for local community courts which, if successful, could move beyond dealing with criminal cases. They could potentially deal with a range of housing disputes. They might also provide an example of how services such as debt counselling could be integrated into the operation of courts and tribunals.

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1 It can be found at http:/www.dca.gov.uk/pubs/adminjust/adminjust.htm

2 Transforming Public Services: Complaints, Redress and Tribunals p.5

3 The website is at www.courtinnovation.org

New developments with the Community Legal Service

The Community Legal Service (CLS) is also undergoing fundamental review. A Consultation Paper, *A New Focus for Civil Legal Aid*, was published by the Legal Services Commission (LSC) in July 2004.[4] Policy makers within the LSC are examining how the current system may prevent parties choosing appropriate modes of dispute resolution with a view to developing ways to encourage use of more appropriate modes of dispute resolution. There will be those who will think that any changes proposed by the LSC are simply to save money. But I think this is too narrow a view; it is not self-evident that the current ways in which housing disputes are funded by the CLS are necessarily the best or most cost-effective. The recent launch of CLSDirect is an example of how innovation in service delivery can lead to more and better provision of advice, more cost-effectively.

The Law Commission project

The formal terms of reference for the new project have been widely drawn. They are:

> To review the law and procedure relating to the resolution of housing disputes, and how in practice they serve landlords, tenants and other users, and to make such recommendations for reform as are necessary to secure a simple, effective and fair system.

The Commission's task is to go beyond narrow questions such as whether there should be a housing court or tribunal. We have been asked to consider housing disputes much more generally: how they arise; how they might be resolved; and the balance between formal and informal modes of dispute resolution. With further significant reforms to the civil, administrative and criminal justice systems in contemplation, together with those likely to affect the CLS, the context is one of great change. The project offers a singular opportunity for those interested in housing issues to put forward their ideas to reshape the ways in which housing disputes are dealt with.

What are housing disputes?

Lawyers tend to think of housing disputes, indeed any sort of dispute, as matters which typically end up in court, e.g possession or disrepair. A number of recent research reports stress that this is too narrow a perspective.

For example, Genn's *Paths to Justice* research found that 8% of people in the survey sample experienced problems relating to owning residential property and a further 7% experienced problems relating to living in rented accommodation.[5] Notwithstanding this, the research also showed that, of the sample of people who had problems to do with rented property, there were court or tribunal proceedings in only about two per cent of cases, and in no cases was there a mediation or had cases been taken to an ombudsman.

More recently, the Legal Services Research Centre of the Legal Services Commission has developed the idea that legal problems do not arise in isolation; certain types of problem tend to occur in combination. For example there is a broad ''cluster'' of problem types including those relating to rented housing, welfare benefits, and debt (among other things).[6] Again, though, many of those with problems take only a small number of steps to resolve them, and only rarely consider the use of lawyers.

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[4] See http://www.legalservices.gov.uk/devel/civil.htm

[5] Hazel Genn with National Centre for Social Research, *Paths to Justice: What People Do* and *Think About Going to Law* 1999, at p 24.

[6] *Causes of Action: Civil Law and Civil Justice*, (2004) p 40.

Even these research reports do not present a complete picture of all types of housing dispute. In particular, there is little analysis of the problems experienced by landlords of tenanted properties. There is only limited account of public administration type issues such as those relating to housing benefit or the allocation of 'suitable' housing to the homeless.

Any proposals for a new framework for resolving housing disputes must, to be effective, be based on an understanding of the processes of dispute formation just as much as those of dispute resolution. Advisers with front-line experience will have the answers to a number of key questions about the nature of housing disputes.

- What are the problems which arise most commonly in the housing context?
- How should they be classified?
- Do they 'cluster'?
- Is it possible to classify housing disputes in terms of their complexity?
- Are they all equally difficult? Or are some easier to resolve than others?
- To what extent is the complex state of the law a factor in creating housing disputes?
- Do particular sections of the community face particular housing problems – e.g. the disabled? the elderly? members of ethnic minorities?
- Who are in dispute with whom?

Advisers will also be able to identify other issues not indicated in this list. The Law Commission wants to ensure that its understanding of 'housing dispute' or 'housing problem' is one that reflects the experience of ordinary people with problems, not just what lawyers or judges or text-book writers may perceive them to be.

What do users want from a housing dispute resolution system?

Given a better understanding of the wide variety of housing problems and disputes that exist, the question that then arises is: what system(s) or structure(s) should be available for the solution of those problems and the resolution of those disputes?

A traditional approach to answering these questions might focus on existing institutions. There are plenty to choose from, including: the civil and criminal courts; specialist tribunals, in particular the Residential Property Tribunal Service; ombudsmen, such as the Independent Housing Ombudsman Service, and the Local Government Ombudsman. There would then be a consultation on how these varied bodies might be reshaped into a more rational structure. Indeed the Law Commission initially thought that it too should focus on the existing institutional set-up and consider how it might be changed and reformed.

On reflection, and given the other initiatives that are currently occurring, mentioned above, the Commission has come to the view that, before it starts to think about any institutional framework, it should ask the logically prior question: what do users want from any dispute resolution system? Here the answers are much less clear. It may be assumed that people would want a system that is: cheap; easy to use; fair; speedy; and delivers consistent outcomes. Are these assumptions correct? These are not necessarily consistent objectives; so what should be traded off against what?

We know that, at present, the majority of people with potential housing problems do not use formal procedures to resolve them. Some try informal negotiation; others try mediation; some use internal review processes; a few may use private forms of dispute resolution such as the Association of Residential Lettings adjudication scheme for the resolution of disputes relating to tenancy deposits. We also know that many people just give up; they decide to 'lump it'.

This is likely to present a confusing picture to users, who may not know where to go for help to get disputes resolved. There is good evidence that many who might be helped do not in fact seek assistance. This raises concerns about access to justice. It all suggests that the present system is not as effective or accessible as it should be, and is not able respond to the housing problems that people experience on a day to day basis. Any new structure must try to address these failings.

This general approach will raise more specific questions, including:

- What part can public education play in the prevention of housing disputes?
- How far can people be assisted to resolve problems for themselves?
- What should be the role of housing and other advisers in the resolution of housing disputes?
- Is the supply of housing advice adequate and of the right level of expertise?
- By whom and how should investment in the provision of both generalist and specialist housing advice be made?
- What should be the relationship between advice provided by qualified lawyers, and that provided by others either with other professional qualifications or with no specific housing-related qualifications?
- When are forms of assisted dispute resolution (including ADR, mediation, etc) required? What types of ADR are appropriate for housing disputes?
- What role should the courts or tribunals play? Are there persons, other than judges, who should be able to provide authoritative interpretations on disputed questions of housing law? How 'expert' should those who formally resolve housing disputes be?
- Where should any court/tribunal be located? Should 'on-line' adjudication/dispute resolution be possible?
- How can the most vulnerable be assisted?
- How important is consistency of outcome?
- What is the potential for the use of IT – the internet, the telephone – in the resolution of housing disputes?
- How far should housing dispute resolution processes be integrated into other dispute resolution systems? Can there be an effective 'one-stop shop'?
- How can the resolution of a problem be turned into effective action?

Again answers to these questions and others provoked by these questions will be of considerable assistance with thinking about developing proposals for a system of housing dispute resolution that is focussed on the needs of the users of that system.

Experience overseas

We think there will be much to learn from experience overseas. For example, In Australia and New Zealand there has been a significant move away from use of courts and towards adjudication of housing disputes in specialist housing tribunals. The establishment of these residential tenancy tribunals was led by the desire for systems that could resolve disputes quickly, cheaply and fairly. Tenancy tribunals in Australia and New Zealand are notable for their design as relatively informal and accessible forums for users. They provide a large amount of user-friendly information. In New Zealand a Tenancy Services telephone helpline is available to all. There is a strong emphasis in all of these systems on the use of mediation, especially in New Zealand.

In the Republic of Ireland, a Private Residential Tenancies Board has recently been set up to replace the courts in disputes between landlords and tenants in private rented accommodation. It is said that the process will be more efficient and cost effective and will free up the civil courts, which are overloaded with cases. Again, there is a central role for mediation before the tribunal hearing, and the hearing will be less adversarial.

Conclusion

This is a challenging project, but one that could bring considerable social benefit to all those involved in the rented sector of the housing market. Getting the structure right will not be easy. Not all ideas will be suitable for or capable of implementation. However, the Law Commission will be particularly hoping for assistance from those in the front-line of advice service delivery. We look forward to hearing from you.

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In For a Penny – the Case for Legal Help Fixed Fees

Extract from Legal Aid Review September 2003

By Vicky Ling

Solicitors are beginning to turn their backs on the Community Legal Service (CLS). They cite the extremely low rates of remuneration and excessive bureaucracy as two key issues. In addition, the implementation of the Costs Compliance assessment process has seriously undermined the relationship between the Legal Services Commission (LSC) and its suppliers.

The fundamental changes in the Legal Aid system have coincided with the implementation of Lord Woolf's Civil Justice reforms; but the LSC does not seem to have engaged with the reforms in the same way as the insurance industry and others funding advice, assistance and litigation. There is a risk of publicly funded legal services becoming isolated from developments in the wider legal community in respect of costs.

There is evidence that the traditional system of billable time encourages lawyers to work longer rather than smarter. At current Legal Aid rates this can result in many practitioners working excessive hours at personal cost to themselves and their families. In the USA, 55% of respondents to an American Bar Association survey had used fixed fees in an attempt to break away form the tyranny of hourly rates.

Outside public funding, there are indications that legal costs could be moving towards a system of fixed fees. For example, the Civil Justice Council has been exploring costs issues with all stakeholders in personal injury cases and a framework has been developed for fixed fees in Road Traffic Accidents (RTAs) that settle prior to the issue of proceedings. Another pilot project run jointly by the NHS Litigation Authority and resolution service resolve, to deal with small clinical negligence claims (less than £15,000) in six months at a fixed fee (£1,500) was endorsed by those participating, with the caveat that the level of the fixed fee needed to be re-considered.

The LSC could pilot a fixed fee system for most Family and Civil Legal Help work. These cases are (with some exceptions) relatively inexpensive and straightforward in terms of law and procedure. They have similarities to the pre-issue RTA cases, which the Civil Justice Council costs forum has identified as appropriate for fixed fees. The key to its success is that all stakeholders participated in a lengthy consultation to establish the level at which fees should be set. For example, fixed fees might need to be calculated on a regional basis, in order to reflect the difference in the costs of running a practice.

Fixed fees must represent a fair payment for the work undertaken and must not be used as a crude way of cutting remuneration rates. In addition, such a scheme should envisage that some types of Legal Help case may be unsuitable for fixed fees and provide an 'opt out' provision for exceptional cases.

There is evidence from the Institute of Advanced Legal Studies 'Quality and Cost' study that a reasonable amount of time is needed if a positive outcome is to be achieved for the client. Cynics fear that a fixed fee scheme might encourage solicitors to skimp on cases and provide a limited service. The research indicated that the solicitors in Group 3, who were paid a fixed sum for a specified number of matters, actually took about the same amount of time as those in the control group, operating under the old 'Green Form' model.

Unfortunately, Group 3 did not seem to achieve the same level of positive outcomes as other participants in the research; but this was not identified as a clear difference between solicitor groups. Further, the outcomes recorded were limited, similar to those required by the LSC on Consolidated Matter Report Forms under the current contracting scheme. It is generally acknowledged that more work needs to be done on measuring outcomes.

Fees must be set at a realistic level. The LSC and the solicitors' profession would have to invest time in working together to ensure that a fixed fee scheme was both realistic and acceptable. It is worth noting that the Civil Justice Council Costs Forum took a year to establish its framework for pre-issue RTA fees. In the past, the LSC has justified failing to raise legal aid rates by arguing that costs per case were increasing and so practitioners were in fact receiving pay rises. There is a strong argument that if solicitors were voluntarily to give up the relative flexibility of hourly billing, a formal fee review mechanism would need to be established. The Civil Justice Council Costs Forum has suggested that an independent Regulator could be established to set and review fees. The greater volume and scope of fees subject to regulation, the more viable it would be to establish such a function.

Fixed fees would help solicitors forecast profitability and make meaningful business plans. The LSC's system of Contract Compliance Assessments is bureaucratic and does not seem to be able to distinguish between the inefficient and the fraudulent. Their effect is that good firms of solicitors do not know how much they will be paid for their General Civil or Criminal Contract work until after the next audit result is known, which could be in the following financial year.

Fixed fees could assist the LSC control its budget and reduce audit overheads. Instead of the blunt instrument of Contract Compliance Audits, applied universally, the LSC could monitor value for money through random peer reviews of a number of suppliers each year. The results would only be used to assess whether the fixed fees were set at an appropriate level and no sanctions would be applied to the firms involved (except if fraud was uncovered). If the peer review exercise identified that practice in general had changed and this should have an impact on the level of the fixed fee (upward or downward), then a new rate would be applied generally. If suppliers found a way of producing acceptable quality in a shorter time, they could keep the higher profits. It would only be at the point where practices generally reduced their costs that any reduction would be applied to the price paid.

Suppliers would continue to report time taken and disbursements at the end of cases. The LSC could use this data to monitor the appropriateness of the fixed fee system. Highly atypical claiming patterns might also be used to indicate fraudulent claims, and trigger fraud investigations.

There would undoubtedly be a need for a serious commitment by all concerned to establish a fixed fee scheme in practice. The experience of the Civil Justice Council Costs Forum is available to inform the development of a scheme of fixed fees for Legal Help. Joint working would allow the LSC and practitioners to demonstrate that they are not bound by narrow considerations arising from their own positions; but are prepared to create systems that meet the needs of all stakeholders in public funding for legal advice.

You Wait Forever...

By Professor John Peysner

Isn't it strange that you wait for ever for a reference to Dame Edna Everage and then two come along at once, or at least in this edition of 'Litigation Funding' and the previous one (October 2004). The previous reference and a rather fetching photograph was a mere device to illustrate that the accompanying article was about Australia and, presumably, pictures of Sydney Opera House and kangaroos would have done just as well. You will not be surprised to read that my homage to the Ozzie comedic genius is much more rigorous: it's her gladdies I'm interested in…

The Civil Justice Council has just returned from a fact-finding visit to the Far East and Australasia and a major event at the IBA annual conference. This visit will form the basis of a significant discussion paper on access to justice issues but at this stage some clear issues emerged in New South Wales and they add to the information in the previous article.

Sydney is a big bustling cosmopolitan city that feels very much like a British city (with lots more water and sun). One difference is that personal injury lawyers are an endangered species. How has this come about? A number of factors came together to produce the present situation. In 2001 the HIH Insurance Company collapsed in the largest corporate bankruptcy in Australian history. The key reason for the collapse was under pricing and under reserving on retail insurance products as well as low margin high-risk areas such as insuring film productions in California. The result was a hole of several billion Australian dollars and chaos in the insurance market in Australasia and across the Far East. (HIH was the professional indemnity insurer for the legal profession in Hong Kong, which even now is struggling with the consequences). This was a major scandal in Australia and the media was full of photographs of girls weeping into the manes of their ponies, which they were unable to ride because their pony clubs couldn't buy insurance cover. Crucially, the government got the blame: not for the collapse of HIH but because the government was identified with insurance. Many years ago a Labour government had tried unsuccessfully to nationalise insurance generally but the Federal, State and Territorial governments remain responsible for a complex web of state supported workman compensation scheme and motor cover schemes and seen as, virtually, an insurer of last resort. As such when premiums rose in the wake of the HIH collapse the politicians were criticised and just as in the USA under the Bush regime they transferred the blame for that crisis – and no doubt almost everything else – to the lawyers and the 'compensation culture'. The personal injury bar were characterised as grasping and forcing up damage levels. (In Australia it was damages not costs that exercised people.) In turn the courts responded by reining back tort litigation. Ultimately, in legislation that was promoted by a report from Justice Ipp tort, 'reform' and damages capping have spread across the country.

The current situation in New South Wales is parlous and a serious warning to us. One senior judge graphically illustrated by pointing out that to lose one arm would not be sufficiently serious to get over the threshold to bring a claim: a couple of fingers from the other hand would also have to be lost. Across the Tasman Sea in New Zealand there is an alternative: no fault compensation. After a bumpy period that scheme seems to have settled down and attracts consensus support. However, it only works because New Zealand is a small, homogenous, sparsely populated country with a shared feeling that victims are entitled to a 'fair go'. In larger and more complex economies and societies such as New South Wales or Britain no fault is a non-starter.

This suggests that unless we can maintain the consensus in this country – developed by the trade unions and kick started by the post war Labour Government – that victims are entitled to reasonable compensation the option may not be a rigid government run benefit scheme but no compensation at all. Nothing…nada. Individuals will be left to cover their own risks through first party insurance and if they are too poor or feckless to do this then hard luck.

A final point. Social commentators talk about 'tipping points' incidents, moments or inventions that mark a crucial change in social trends. In New South Wales we heard about one case that involved that emblem of Australia: Dame Edna. One of the lawyers we talked to had acted for a member of the audience at one of her shows who suffered an injury when, it was alleged, a gladioli hurled into the crowd by those muscular yet elegant arms hit him in the eye. The lawyer was heavily criticised for bringing the case against such an icon of the Antipodes. Could this have been the tipping point that turned the population against the personal injury bar? Well... What do you think possums?

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Priorities for 2005/6

The Civil Justice Council has raised its profile over the past year with events such as the Experts Forum, Housing Forum, Citizenship Forum and introducing an interactive ADR website. Over the next few years the Civil Justice Council will continue to focus keenly on the major reforming initiatives being taken forward by Government. The Council will provide informed and practical input into the development of the Government's key policy in key areas and gather balanced and independent evidence to allow us to evaluate the real success of civil justice reforms. The Civil Justice Council will continue to offer technical and professional skills in partnership with Government and other major justice bodies to resolve highly complex problems in the civil justice system.

Our main themes for the year ahead are likely to be: ongoing work with Public Liability Mediation, Employers Liability Mediation, Defamation Mediation and Alternative Dispute Resolution (ADR)/Civil Mediation. The Council will also be concentrating on Rehabilitation, Legal Aid Funding and promoting civil justice awareness as part of citizenship.

Costs Reform and Mediation

The Civil Justice Council will continue the programme of cost mediations with representatives of claimant and defendant lawyers; the Bar and the insurance industry. The future work of the Costs committee will be to evaluate the fixed cost scheme in Road Traffic Cases that was introduced in 2003 to see if the scheme is working well, and if so, whether it should be extended. It will also examine the outgoings charged by lawyers in addition to their own costs in particular the cost of obtaining medical evidence to see if this is proportionate and predictable. For cases that do not fit into a fixed cost scheme the committee will be examining what advantages there might be in the parties to litigation submitting budgets to the court before expenditure is incurred so that the court can give broad approval. Finally Michael Napier CBE will continue his mediation effort to find industry wide agreements on conditional fee success fees.

Court Annexed ADR Schemes

Following the success of a pilot study into the working of the small claims mediation scheme a further and larger follow up study is currently in progress and we expect to receive the response mid 2005. The ADR committee has launched an interactive website to promote best practice and to give helpful advice to those designing their own schemes. The ADR committee will continue to ensure and enhance mutual understanding of the place of ADR in the civil justice system by bringing together all major interested stakeholders including providers.

Rehabilitation

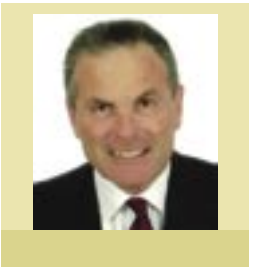
The Civil Justice Council has set up working groups for rehabilitation rules and policy changes. It is working to identify how rehabilitation fits into the overall civil justice system, audit what is currently available and to facilitate or ensure the active development of effective rehabilitation services.

Citizenship

A Public Legal Education Working Group has been established to promote civil justice awareness. There are two projects in progression; the first involves the development of a pilot scheme matching individual volunteer lawyers with schools to assist in supporting teachers in delivering the citizenship programme to young people. The second project is a longer-term initiative and it's aimed at promoting inclusion in society and greater understanding of civil legal issues affecting the population.

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.

Mr Justice Bean
was appointed a High Court judge in July 2004 and assigned to the Queen's Bench Division. He was in practice at the Bar from 1976 to 2004 and was Chairman of the Bar in 2002. He worked on the original Access to Justice proposals as a member of Lord Woolf's Fast Track Working Group.

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 is a past member of two Civil Justice Council Sub Committees, and now of the full Council. 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.

Mr Justice Stanley Burnton
was educated at Hackney Downs Grammar School and St Edmund's Hall Oxford, where he read Jurisprudence. He graduated in 1964 and was called to the Bar in 1965. He practised as a commercial lawyer, took silk in 1982, was a recorder and sat as a deputy High Court judge in the Chancery Division from 1994. He was appointed to the High Court bench in July 2000. He was nominated to the Administrative Court shortly afterwards, and most of his judicial work is now in that Court.

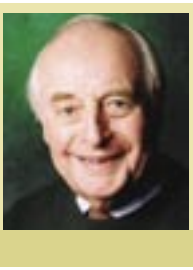
Vicki Chapman
is a solicitor and Head of Law Reform and Legal Policy at the Law Society, and a member of the Civil Justice Council since March 1998. Formerly Policy Director of the Legal Action Group. She was a policy officer at the National Association of Citizens Advice Bureaux 1994-1996, and a solicitor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

Paul Collins CBE
has been a circuit judge since 1992. He was Director of Studies, Judicial Studies Board from 1997-1999 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.

Graham Gibson
is the Director of Claims at Groupama Insurances. Graham joined the Group in 1995 as Head Office Claims Controller dealing with major and complex losses. He has since held a number of senior claims management positions and, in 2004, was appointed to the position of Director of Claims. His key responsibilities include the technical integrity and service delivery within the Groups' claims centres. Graham has participated in a number of market initiatives and is currently a member of the ABI Strategic Claims Committee. In addition he has already served on Civil Justice Council Sub Committees particularly in the area of costs.

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. He is on the Housing Dispute Resolution Working Group established by DAC. He is on the editorial board of the Green Book ('Civil Court Practice' Butterworths), author of titles in the Atkins Court Forms series, contributor to Civil Litigation Handbook (Law Society), author of 'The Civil Procedure Rules' (Butterworths).



Graham Jones
is a Designated Civil Judge for South and West Wales. He was educated at Porth County Grammar School and St John's College Cambridge. He was admitted as a solicitor in 1961 and was in private practice until 1985. He was President of Associated Law Societies of Wales from 1982-1984. Graham was a member of the Lord Chancellor's Legal Aid Advisory Committee. He was appointed Deputy Circuit Judge in 1975, Recorder 1978 and Circuit Judge (assigned to Wales and Chester Circuit) 1985. Resident and Designated Judge Cardiff County Court 1994-1998; Designated Civil Judge Cardiff 1998-2000, South and West Wales 2000-; authorised since 1993 to hear TCC cases and Mercantile cases since 2000 and to sit as Judge of High Court Senior Circuit Judge since 2002.

Photograph not supplied

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.

Karl King
is a Barrister practicing from Hardwicke Chambers where he is head of Housing. He is Vice-Chairman of the Bar Councils Race and Religion Committee. He is a past member of the Bar's Professional Conduct and Complaints Committee, is chair of the South Eastern Circuit Minorities Committee and has been appointed as a Recorder.

Vicky Ling
has over 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; She is a member of the Law Society's Mental Health and Disability Committee. 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. She was Legal Aid Lawyer of the Year (Social Welfare Law) 2003.

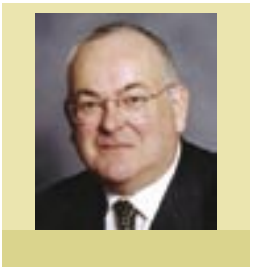
Nic Madge
is a Circuit Judge sitting at Harrow Crown Court. Formerly District Judge, sitting at West London County Court, and partner with Bindman and Partners, solicitors, heading their Housing Department. Member of Senior Editorial Board of Civil Procedure (The White Book), he writes regularly on law 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 the 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 and Brewer where she is the head of the personal injury department. She is a former president of the Association of Personal Injury Lawyers. She is a member of Lord Woolf's working party which developed the personal injury pre-action protocols. She was co-chair of the International Practice section of the Association of Trial Lawyers of America and was on the initial executive committee of the Environmental Law Foundation. She is on the Editorial Board of the Journal of Personal Injury Law and is the co-author of 'Know-how for Personal Injury Lawyers' and contributes to Jordan's 'Civil Court Service'.

Michael Napier CBE
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 CBE
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).

Professor 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 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 is editor of the Law Society's 'Civil Litigation Handbook'.



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 Knowhow and Best Practice Division. She has 15 years experience in defendant litigation practice and is Lobby Officer for FOIL, the Federation of Insurance Lawyers. Laura has recently been appointed to the Courts Board and was formerly a member of the Editorial Board of the Journal of Personal Injury Litigation.

The Secretariat

Robert Musgrove
is Chief Executive 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.

Tiem Nguyen
has been Executive Assistant to the Civil Justice Council since November 2004. She previously worked for the Department for Constitutional Affairs in Judicial Competition (Courts) Division. She works with the committees and is also responsible for ensuring the Civil Justice Council website is up to date.

Christine Damrell
has worked for the Civil Justice Council since July 2002. She previously worked in the Civil Appeals Office where she first started working for the Department for Constitutional Affairs. Christine provides admin support to the CJC and its committees as well as the Master of the Rolls Private Office Team. She also assists with the Council's recruitment and publicity.

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?

Remember 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 following matters is available on the Council's newly updated website

www.civiljusticecouncil.gov.uk

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

The Costs Debate

If you would like to visit our website on Costs and take part in the on-going debate please visit:

www.costsdebate.civiljusticecouncil.gov.uk

The ADR website

If you would like to visit our brand new website on ADR please visit:

www.adr.civiljusticecouncil.gov.uk