



**CIVIL JUSTICE COUNCIL**

**Thursday 31 January 2013 at 10.30am,**

**MINUTES**

**Room E200, Royal Courts of Justice**

Present:

Master of the Rolls *Chairman*  
Lord Justice Richards *Deputy Chairman*

Amanda Finlay CBE  
Mr Justice Foskett  
John Hall (MOJ)

Mark Harvey  
District Judge William Jackson  
Alistair Kinley  
Robin Knowles QC CBE  
Kate Lotts  
Prof Rachael Mulheron

Rebecca Scott  
Peter Smith  
John Usher  
Tim Wallis  
Christopher Warner

Peter Farr *Secretary*  
Andrea Dowsett *Assistant Secretary*  
Andy Caton  
Graham Hutchens  
John Sorabji  
Jo Gordon

Martin Heskins *Observer (Law Society)*  
Gregory Jones QC *Observer (Bar Council)*

**1) Apologies and welcome**

The Chairman welcomed Lord Justice Richards to his first meeting as Deputy Head of Civil Justice. He also welcomed the two new members of the Council: Rebecca Scott, representing the lay advice sector, and Chris Warner the consumer advice sector. Apologies had been received from Craig Budsworth, HH Judge David Grant and John Pickering.

**2) Minutes of the last meeting**

The minutes of the 19 October 2012 meeting were confirmed as an accurate record, with two minor amendments:

- a) Paragraph 4.4 should be amended to read: '... where cross-examination was limited...'
- b) Paragraph 5.4 should be amended to read: 'were no so critical'

Paragraphs 6.6 and 6.7 of the minutes had referred to the general issues about the operation of the civil justice system, for example 'principles and practices for financing litigation for law firms' and it had been suggested that the Council would receive a paper on how to take this forward. John Sorabji noted that this touched on some fundamental issues to which he was giving detailed thought, with a view to producing a paper for a future meeting.

### **3) Minutes of Executive Committee meeting of 24 January 2013**

The meeting noted the minutes of the previous week's meeting. All items covered then also appeared on the agenda for this meeting.

### **4) Draft Business Plan**

The meeting considered the draft Business Plan that had been circulated with the papers for the meeting. The draft had also been considered by the Executive Committee meeting at its January meeting and amended slightly in the light of their comments. The discussion of the meeting then centred on:

- a) Objective 2 ('To establish a new Costs Committee') – see item 6 below.
- b) Objective 7 ('To respond to Government and other consultation papers that affect the civil justice system'). It was agreed that a response should be considered to all government consultations touching on civil justice, but a response not necessarily made to each.
- c) Objective 8 ('To review and report on ADR training in further education institutions'). TW noted that the ADR Handbook was still planned for April 2013.

### **5) SRL update, to include discussion of National Forum on 30 November 2013**

Robin Knowles updated the meeting on the work of this working party, concentrating on six points:

- a) The National Forum for Implementation of the Report on Access to Justice for Self-Represented Litigants on 30 November 2012 had been generally considered a success; not only as a result of the spirit with which the discussions had been approached, but also as an example of what the Council could achieve. There was a general feeling that a follow up event should be held in November 2013.
- b) Work in the immediate future was focussed on encouraging what could be achieved before 1 April
- c) Taking further actions to implement the Council's original report e.g. the publication of the user guide to Court 37 applications. RK had been involved in discussions with the MoJ relating to their channel strategy, with a view to supporting this as much as feasible by pointing users no longer getting legal aid in the direction of pro bono assistance and written guidance. The Department for Business, Innovation and Skills had announced the day before that any unclaimed sums from the proposed new collective actions regime would be allocated to the Access to Justice Foundation. Such sums would be considerable, but sporadic. It demonstrated, however, the government's confidence in the work of the advice sector.

- d) RK and the Secretariat were agreeing ways in which the £5,000 currently held in the budget would be best spent on small projects before the end of March 2013. Publication of the Guide to the small claims court was being expedited using this money and consideration was being given to a further regional workshop in Bristol before 1 April. The meeting was content to leave it to RK and the Secretariat to agree how best to deploy these resources for this purpose.
- e) There was a strong body of opinion at the national Forum that the event should be repeated, and October/November 2013 would be a good time – one year on, but critically 6-7 months on from the watershed reforms when effects would be felt and visible.
- f) Finally, the decision of the Legal Services Commission to cut grants from the key players in the advice sector, namely the Advice Services Alliance, Law Centres Network and the RCJ CAB from 1 April 2013 was an important development, and the Council had a role to play in limiting the damage. However, all was not lost, particularly in relation to the RCJ CAB and efforts were being made to put together a specific proposal for the MoJ on what is most important in the work that they do might be conserved.

AF noted that work was underway more broadly to look at the area of social welfare advice and legal support and the likely impact and costs of changes taking place. Other public and private sources of help in areas such as housing, debt, employment and immigration were being sought as service providers (e.g. NHS Trusts) came to realise that clients would need support for advice that legal aid had previously funded.

The chairman reported that he had taken the opportunity presented by his meeting with the Lord Chancellor the previous evening to mention his concern about the withdrawal of funding to these bodies, and to highlight the possible consequences in the light of the likely increase in the number of SRLs appearing before the courts. The Lord Chancellor had agreed to look seriously at the issue. The chairman stressed that evidence-based material would be required to make an effective case – he was happy to write letters of support at a future stage.

RS noted that the chairman's expression of concern, along with other comments, such as Lord Bach's question in the House of Lords two days before, all helped in the efforts being made to sustain advice services to SRLs. She believed that the November 2013 forum would be particularly timely, and would allow the effects of the reforms to be felt. The RCJ CAB were developing a strategy to submit a bid for continued core funding from the MoJ.

## **6) Costs Committee**

The chairman summarised the background to the establishment of this new committee. The CJC had been asked to take on the role previously carried out by the Advisory Committee on Civil Costs (ACCC), namely to advise the MR on the guidelines hourly rates (GHR) for solicitors. He was grateful to Foskett J for agreeing to chair this new committee. The MR had written to the minister, Helen Grant,

suggesting the terms of reference and membership for the committee, and that letter had been circulated with the papers for this meeting. He had since received a reply, which had also been circulated, in which the minister had expressed concern about the size of the committee, but acknowledged that that was a matter for the MR.

More significantly, she had suggested an amendment to the third term of reference, which related to the new committee's wider role in monitoring the operation of the costs rules and where necessary making recommendations for reform. The wording of that term of reference had also been the subject of debate at the Executive Committee meeting the previous week when it was believed that a revision that was likely to be satisfactory to all parties and which simply reflected the statutory function of the CJC had been found. However, possibly as a result of that discussion not having been relayed to the Minister in time, the revised term of reference laid out in the letter was unacceptable to the Council as it seemed to suggest that any such work would be agreed in advance with the department or, to put it another way, be subject to the department's veto.

The meeting endorsed the unanimous view of the Executive Committee that it was the role of the CJC, as outlined in Objective 1 of its Business Plan to review the operation of the costs rules and that it was within its ambit to ask this subgroup of experts to help it exercise this function. No-one disagreed that the independence of the Council must not be fettered, although there was some debate about whether the time of the Council was best spent considering areas of civil justice that the government had already considered and on which it had stated a firm view. There was some feeling that at a time when there was a sea change in the area of costs, it was an area on which the Council should consider.

The Council's monitoring role meant that it could review how any costs changes were working in practice, including any unforeseen consequences or difficulties. The Council sought a healthy exchange with government that was sensible but unflinching. This issue should neither be played out in correspondence, nor over the establishment of the new costs committee. The chairman was inclined to agree that a meeting with the minister was the best way forward.

However, the immediate and important work of the new committee was in relation to GHR, and the chairman did not want that to be held up by any extended discussion relating to this point. It was possible that the debate was inadvertently taking place simply because it had emerged at a time when the government was working on its plans for fixed fees. An extended discussion had not been intended by either party.

There followed some discussion about the representation of different groups on the new committee, particularly defendant insurers. It was noted that there was a substantial judicial representation, and the place for a Circuit Judge was questioned. It was felt that the many different views needed to be represented on the committee by individual members, and it was not a matter of headcount but rather

of the quality of representation for those with vested and non-vested interests. Much of the work was likely to take place in smaller groups, and it would be up to the chairman of each meeting to ensure all the various voices were heard. It was also pointed out that the committee's remit was civil costs – not costs in PI cases only.

The chairman concluded that if in practice the committee was found to be unwieldy, Foskett J could suggest that its membership be revisited. Many of the members were entirely neutral.

Foskett J was concerned that the membership should have a good geographical spread. The next stage was for PF to draft a letter to representative bodies asking for their nominations. He would make it clear in that letter that nominations from outside London would be welcome.

## **7) Working Group updates**

- a) *ADR*. TW reported that the ADR Handbook would be published in April 2013 with the endorsement of the CJC, CMC and, it was hoped, the Judicial College. In an effort to keep the length of the book down, it would be cross-referenced to a set of online legal resources. The editorial advisory board would continue to gather views on the text in order to feed them back to the authors and publishers.
- b) *Defamation costs*. The minutes of the first meeting of this group and a brief summary of the second had been circulated to the meeting. There had been a strong debate about costs protection in this area, and the expert members of the working group were now being commissioned to write different contributions. The report would be published by 31 March 2013.
- c) *Defamation awards*. The Executive Committee had agreed that a small working group should be established to consider recommendation 70 of the Leveson Report, in which he had proposed that the Council call for evidence and make recommendations on the level of damages for distress in privacy, breach of confidence and data protection cases, based largely on the membership of the Defamation Costs Working Group and supplemented by specialist judges. John Pickering had agreed to chair this group, on the understanding that its work would start in April, after the work on defamation costs has completed, with the aim of completing the exercise by October 2013. Members of the meeting were invited to express their interest in joining that group within the next month. The work would tie in with the Defamation Bill as well as government initiatives on data protection and would have an October 2013 deadline. CW mentioned that greater Governmental moves in data sharing may see data protection cases rise.
- d) *Projects and planning*. The meeting endorsed the decision of the Executive Committee that this Committee should be disbanded on the basis that its work now largely overlapped with that of the Executive, and that the Council had expanded its oversight activities.
- e) *Pre-Action Protocols (PAPs)*. As noted in the minutes of the Executive Committee meeting, work on pre-action protocols was to be transferred to the Civil Procedure Rule Committee with the intention of allowing closer

alignment and the use of specialist expertise in the drafting of all aspects of the secondary legislation and supporting material. The PAPs on PI, debt and defamation were currently being revised. The CPRC would bring in expertise from the Council as required. There was some discussion about whether or not PAPs had had their day, having created lengthy exchanges of letters in some cases that simply rehearsed the various issues. AF reminded the meeting of the reasons for their introduction as part of the Woolf reforms, and of their initial success in breaking the logjam of expensive correspondence and lack of disclosure that had characterised so much litigation before then.

## **8) Consultation responses**

- a) *Fixed fees.* The response to this consultation was sent to the MoJ on 10 January and had been circulated to Council members. The government had received around 760 responses to the consultation. The meeting discussed the problems that were being created by the continuing uncertainty over the implementation of the new regime. The controversy was not with the principle of fixed costs, but at the level at which they were fixed. The government had not yet reached a final view, and was unlikely to do so before the 8 February meeting of the CPRC. It was hoped that the government would have reached a final conclusion before the next meeting of that committee, on 8 March. It was in the interest of both parties to a claim to have certainty as the new 'proportionality' test came into force. The meeting discussed issues and some members felt the Council might once again provide a useful role in negotiating the setting of fixed fees, although it had not been asked to assist in this. The chairman expressed the view that despite the strength of views around the table, the Council would have to bide its time and wait for the government's decision.
- b) *Whiplash claims.* The first meeting of this Group would take place after this meeting. The chairman was grateful to the members who had volunteered to help with the response to this consultation. The closing date for the consultation was 8 March 2013. The draft response will be circulated to the Council in the usual way.
- c) *Judicial Review.* The response to this consultation was sent to the Lord Chancellor on 28 January and had been circulated to the Council. The chairman was grateful for contributions from members on this.

## **9) Civil justice reforms – general**

JH updated the meeting on progress on new Rules, Regulations and PDS and described them as on track. Many Council members expressed their frustration with the continuing uncertainty and short timescale between publication and implementation, with different dates relating to different elements of the reforms. They gave examples of the impact it was having on clients and businesses and that it was likely to have on the court system. It was also felt the transitional provisions were very complicated. The MR acknowledged the anger felt by many members, and emphasised that he had relayed those frustrations to the Lord Chancellor.

**10) Recruitment update.**

The Council needed to recruit a new business representative as Duncan Campbell's term had come to an end, and as he had left the CBI and so could not be appointed for a second term. Amanda Finlay had also come to the end of her term, and the Secretariat was actively seeking the renewal of her appointment so she could continue her valuable work for the Council.

**11) Date of next meeting**


The date of the next meeting was 25<sup>th</sup> April 2013.

**12) Any other business**

There was no other business.

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