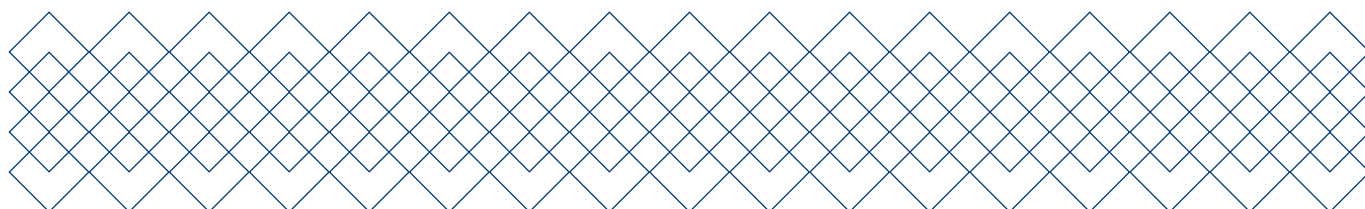


# **Review of the Civil Justice Council**

## Responding to the needs of users

**Report of an independent review by Jonathan Spencer CB**

**July 2008**





# **Review of the Civil Justice Council**

## **Responding to the needs of users**

**Report of an independent review by Jonathan Spencer CB**

## **Acknowledgements**

I should like to thank Evdokia Zyrtidou for assisting me in this review and for marshalling all the material generated; the Chief Executive of the CJC, Robert Musgrove, for his helpful comments on earlier drafts, and for his unfailing courtesy in dealing with my requests for advice and information; Andrew Frazer for helpful comments on an earlier draft; and all those interviewed for their time and interest in the project. Any errors of omission or commission are my own

## **About the Author**

Dr Jonathan Spencer CB is a member of several public bodies, a non-executive company director, and a public policy consultant. He was the Director General for Clients and Policy at the DCA from 2002-5, responsible for a wide range of constitutional and justice system reform programmes, and before that worked for many years at the DTI. He also carried out a review of the Family Justice Council in 2006.

## **Disclaimer**

The views expressed in this document, are those of the author, not necessarily those of the Ministry of Justice (nor do they reflect Government Policy)

## Contents

Executive Summary	3
1. Introduction	9
2. Assessment of Performance	11
3. Purpose, Vision, Values and Objectives	13
4. Work Programme	16
5. Content of the future work programme	22
6. Working Methods	25
7. Committee Structure	32
8. Composition	35
9. Appointments	39
10. Communications	44
11. The Secretariat	47
Conclusions	51
Annex 1: List of contributors to the review	52
Annex 2: Summary of CJC work areas	55
Annex 3: Possible role for research assistants at the CJC	60



## Executive Summary

### Chapter 2

- E1 The main findings of the review can be summarised as follows
- The concept of the Civil Justice Council (CJC) was sound, and had been proved to be so over the last ten years.
  - A significant strength of the CJC was its extensive and diverse practitioner expertise, which meant that its proposals were generally well grounded and practical.
  - Another strength was the neutral environment it provided for contacts between the judiciary and other civil justice stakeholders.
  - Another important strength was the Council's ability to get different interests - including very divergent ones - to sit down together and engage in constructive dialogue.
  - The Council had played an essential mediating role in resolving the 'costs wars' - the satellite litigation spawned by the passage of the legislation on Conditional Fee Arrangements - and subsequently on a range of other issues, mostly connected to costs issues.
  - It had broadened its range in recent years, rightly, but with mixed initial success in terms of influence. This is partly because there has been less close collaboration with the Ministry of Justice than there might have been, and partly because it has not broadened its range of stakeholder interests as much as it might. See Annex 2 for a summary of the areas in which the Council has worked in recent years.
  - Communications had for some time been a weak link, both internally with members, and more significantly with external interests.
  - There was now an opportunity to give the Council's work programme a sharper and more strategic focus on the needs of users, rather than what has sometimes been seen to be essentially a compilation of committee chairs' personal enthusiasms, and including a further move away from the historic central focus on personal injury cases.
  - This might necessitate some shift in the balance of the Council's membership towards the 'user' interest.
- E2 Some stakeholder interests, in particular major consumer groups, felt that the CJC did not address the wider public policy issues of most interest to citizens and so added little value, despite its considerable legal experience and expertise. These views come from significant stakeholders and give some cause for concern. The recommendations in this report should help

address them. The CJC needs to make a conscious effort to engage more with major consumer interests and to increase the user and consumer voice on the Council (see chapter 8 below).

- E3 Nonetheless, the clear conclusion of this review is that the CJC continues to have a distinctive contribution to make to the civil justice scene; that an arms length body chaired by the Master of the Rolls is the right form to discharge the set of functions laid down in the Civil Procedure Act 1997; but that there is scope for improved performance, greater authority in its advice, and increased influence with government. The CJC should be retained as an advisory NDPB, subject to the changes recommended in this report.

### **Chapter 3**

- E4 The CJC should agree a new set of statements covering its purpose, vision, values and strategic objectives, taking the statutory functions set out in the Civil Procedure Act 1997 as the starting point, and taking account of suggestions made in this report.

### **Chapters 4 and 5**

- E5 The CJC's annual work programme should advance the achievement of the Council's overall purpose and strategic objectives in the interest of users, taking account of the selection criteria, the types of project, and the specific suggestions for new projects, set out in the report.
- E6 Each project in the work programme should specify the outcome sought; where feasible the timed milestones for getting there; the intended means for translating the CJC's advice into deliverables on the ground; and the committee or working group responsible (if any).
- E7 The CJC should take a more strategic view of its work programme, through periodic surveys of user concerns about civil justice, use of gap analysis techniques, discussion of priorities in full Council, and invitations to stakeholders to comment on or contribute to its development. The work programme should be published.
- E8 A revised arrangement should be agreed between the CJC and the MoJ on the ways in which the CJC work programme takes into account MoJ priorities. Appropriate consultation should take place with the MoJ to ensure that unnecessary duplication of work is eliminated in areas where both the Ministry and the Council are active, and that suitable collaboration occurs; while maintaining the necessary independence of CJC decision making.

## Chapter 6

- E9 The Council should exercise a more explicit oversight of all the Council's work, including a more structured contribution to the setting and maintenance of priorities. Committees and other events should remain the place where most of the detailed work of the Council gets done.
- E10 Care should be taken to ensure that CJC sponsored or facilitated events or other projects are not, and are not seen as being, weighted towards any particular interest or point of view, while recognising that the Council's role is to consider reform.
- E11 Where necessary, and in particular when the Council has a policy lead, or is considering proposing major policy change to government, the Council should undertake formal public consultations in line with current good practice as a standard method of working.

## Chapter 7

- E12 The CJC should bring to a conclusion in 2008 its review of committees, in parallel with completion of work on its forward work programme, taking account of suggestions made in this report, and with a view to ensuring that:
- The structure of committees reflects the priorities of the revised 2008 forward work programme and the CJC's overall objectives;
  - The number and composition of committees and of time limited working groups does not overstretch the resources of members and the Secretariat;
  - All committees are chaired by a CJC member, include at least one and normally no less than two other Council members; include other members with relevant expertise; are serviced by the CJC Secretariat; and normally have a relevant MoJ official in attendance;
  - They operate within terms of reference agreed by the full CJC, to an annual work programme approved by the Council, and supporting an overall CJC work programme, and subject to regular progress reports to the full CJC (in particular where a CJC steer or decision is needed);
  - The Committee structure is reviewed at least every two years to determine which if any should be wound up; to ensure that time limited working groups have been closed down in accordance with original plans unless there are strong grounds to retain them; and in all cases that the Terms of Reference remain up to date.

## Chapter 8

- E13 The Council should remain at around its present size of 25, to ensure that it retains and extends the diversity of its membership.
- E14 Council members should come from two broad categories. The first category, which should form approximately fifty percent of the Council, should be members of the judiciary and legal practitioners. The other half, forming the second category, should be representatives of the other - mainly user - groups identified in the Civil Procedure Act 1997.
- E15 The number of judicial members should be reduced to 5 or 6. Seven or 8 should be legal practitioners (solicitors or barristers working in law firms or chambers, and also staff of legal representative bodies).
- E16 The other 12-13 members should be drawn widely from user, consumer, and advice interests and from academia. In some areas this will involve active steps to stimulate applications.
- E17 In order to ensure that the user and consumer sector has a more involved role in the decision making process, at least one and potentially two members from those groups should be appointed to the Executive Committee.

## Chapter 9

- E18 No changes should be made to the formal system for appointing members of the CJC itself, except that the normal term of appointment should become three years, as against the present two. Within the requirements laid down in advance by the minister on composition under the Act, and subject to the requirements of balance, appointments should be made on merit on the recommendation of a panel constituted in line with OCPA guidance.
- E19 The CJC, with the approval of the minister (who is ultimately responsible for non-judicial appointments) should develop a published policy setting out the method by which CJC appointments are made, the duration of appointments, the requirements for a diverse composition, the basis on which reappointments may be made (a presumption of one reappointment subject to good performance, but subject to the overriding needs of the Council at the time), and the arrangements for appraisal of members.
- E20 Interest from potential candidates should be canvassed directly, especially from user interests; and in order to encourage applicants from a wide variety of expertise and backgrounds, the CJC should periodically issue invitations for expressions of interest, as part of the appointment process for membership of both the Council and the committees.

- E21 A formal induction process should be introduced for new Council members, together with continuing support for each member during their first year in the post.
- E22 The appointment of members to the committees should continue to be carried out by the Chief Executive on behalf of the Master of the Rolls in consultation with the Committee chair, and with the Council Chair as appropriate.

## Chapter 10

- E23 A series of steps need to be taken to improve the visibility and understanding of the CJC; improve the position of the CJC as an authoritative, independent and influential source of advice to government on civil justice; enable the CJC to communicate effectively with stakeholders within the civil justice system and beyond; and to enable the Council to communicate effectively with its own members and committee/working group members.
- E24 The CJC Secretariat should devote some dedicated resource to a major and sustained improvement in its internal and external communications.
- E25 The CJC should develop a style of communication that is generally open, clear, consistent, constructive, well informed and responsive; and seeks input and collaboration with its main stakeholders.
- E26 The CJC should substantially improve its website, to include an informative home page with direct links to its membership; its appointments processes; its structure; its current work plan; its recent publications; agendas, minutes, papers for recent Council and committee meetings, reports of recent conferences and seminars, except where there is a genuine need for confidentiality. The website should be badged independently of the MoJ. Its FoI publication scheme should be revised to support this approach.
- E27 Consideration should be given to the production of a regular (say 4 or 6 times per year) electronic newsletter for both Council and committee members, and for wider civil justice stakeholders, drawing together information about current and prospective CJC activities, opportunities for involvement, and articles or speeches on current issues (either specially written or linked to original sources with a summary), on the model - suitably adapted - of the AJTC newsletter 'ADJUST'. This would help to develop the CJC as a central hub for information and debate on developments in civil justice.
- E28 Council and committee members should be consulted on ways in which they would like to see internal communications improved.

- E29 Plans should be drawn up to improve the quality, attractiveness and relevance of the Council's 2-way communications generally with its wider stakeholder community, probably involving additional publications, press briefings and interviews, invitations to attend meetings, bilateral discussions, inclusion on the circulation of any electronic newsletter.

## Chapter 11

- E30 The secretariat (apart from the Chief Executive) has been designed and recruited to provide basic administrative support, and does not have the policy and communications skills to enable it to support the substantive work of the Council. This coupled with the volume of work and the lack of a fully structured work plan has led to the secretariat being less effective than might be expected.
- E31 Consideration should be given to a reinforcement of the Secretariat's capacity to support the Council, in order to help ensure that CJC advice is authoritative and evidence based. In addition to strengthening the resource devoted to communications, careful consideration should be given to the options for strengthening the policy capability of the secretariat in support of the work of the Council itself and its committees, both through the redefinition of job specifications, and/or through the recruitment of relatively inexpensive support staff as research assistants or interns.
- E32 If the recommendations in this report are accepted and implemented during the rest of 2008, the Civil Justice Council should then:
- Have a clear sense of future direction
  - Have a forward work programme that commands the support of its members, reflects its overall objectives, and concentrates on the priority areas of the civil justice system, in the interests of users, and where it can make a difference
  - Have a membership that balances legal and judicial expertise with a wide range of user and consumer insight
  - Have a set of committees that reflect the Council's priorities
  - Be able to communicate effectively, through a variety of means including a much improved website as well as conferences, published papers, contributions to revisions of the CPR and the media, with its own members, with stakeholders in the legal profession and beyond
  - Have a fully staffed and expert secretariat capable of supporting the whole of the Council's business in a timely and effective manner
  - Use the expertise of its members to best effect in the limited amount of time most of them are able to devote to CJC business
  - Reinforce its reputation as an authoritative, rigorous and relevant source of practical proposals and advice in the civil justice field, exploiting the wide range of skills and experience among its members.

# 1. Introduction

1.1 The Civil Justice Council ('the CJC' or 'the Council') was created under the terms of the Civil Procedure Act 1997, and as a consequence of Lord Woolf's review of the Civil Justice System in the mid 1990s. The intention was to create a widely based institution to advise ministers and the senior judiciary of any further changes needed to the civil justice system, in order to ensure that the modernisation impulse released by the Woolf reforms did not itself become entrenched and outdated. As the 1997 Act puts it, the functions of the Council are to include (*but are not limited to*):

- Keeping the civil justice system under review
- Considering how to make the civil justice system more accessible, fair and efficient
- Advising the Secretary of State and the Judiciary on the development of the civil justice system
- Referring proposals for changes in the civil justice system to the Secretary of State and the Civil Procedure Rules Committee, and
- Making proposals for research

1.2 Ten years on Ministers decided that the time was ripe to review how the Council itself had performed during its first decade, and the present review was set up. Its terms of reference were set out in the written Ministerial Statement by the Parliamentary Under-Secretary of State for Justice, Bridget Prentice on 04 February 2008, and are as follows:

To conduct a review of the role and performance of the Civil Justice Council ('the CJC' or 'the Council') and to make recommendations.

*This will involve:*

- *Evaluating the continuing need for body to perform the role and functions of the Council as set out in the Civil Procedure Act 1997;*
- *Reviewing whether a non-departmental body like the Council remains the most appropriate form of body to carry out those functions;*
- *Assessing the past effectiveness of the Council; and*
- *Considering ways in which the Council could be made more effective.*
- *In considering how the effectiveness of the Council might be improved, the review will consider in particular:*
  - *The Council's working methods, particularly the process of setting its priorities and planning future work;*
  - *Its organisational structure, particularly the sub-committee system and executive board;*

- *The composition of the Council and whether it strikes the right representative balance;*
- *The effectiveness and openness of the process of making appointments to the Council;*
- *The arrangements for providing administrative support to the Council and its financial management;*
- *How the Council and its work is perceived by its stakeholders (including the legal profession, advice providers, consumers, business, judiciary and other Government departments); and*
- *The views of the Chair, members and staff of the Council.*

- 1.3 In carrying out this review, over 70 interviews have been undertaken, with the minister and a number of Ministry of Justice (MoJ) officials who have dealings with the Council; with the Chair of the Council, the Chief Executive, and most of its current members; with the Lord Chief Justice (and a former chair of the Council); with a number of members past and present of its committees and working groups, and others with a knowledge of its work; and with a number of stakeholder interests both from the legal profession and from wider user, consumer and advice interests, some of whom work closely with the Council, others who observe it from further afield. I am grateful for their assistance. I have toured the Council's website, and read a selection of Council papers, meeting minutes etc; and have received five written submissions. The review was also publicised on the MoJ website, which led to some of the written and oral contributions. Annex 1 lists all the contributors to the review.
- 1.4 I have been assisted in this review by Ms Evdokia Zyrtidou, for whose help, diligence and cheerfulness I am very grateful. The conclusions and recommendations are however my own.

## 2. Assessment of Performance

- 2.1 Out of some 70 people interviewed, the great majority were strongly in favour of retention of the Council broadly in its present form ('if it did not exist, it would be necessary to invent it'). A small minority, mostly drawn from organisations with less contact with Council, regarded it as irrelevant or undesirable, would prefer to see it abolished, and would rather deal directly with the Ministry of Justice (MoJ) instead.
- 2.2 Subject to these important but minority views, the main findings can be summarised as follows

### Summary

- The concept of the CJC was sound, and had been proved to be so over the last ten years.
- A significant strength of the CJC was its extensive and diverse practitioner expertise, which meant that its proposals were generally well grounded and practical.
- Another strength was the neutral environment it provided for contacts between the judiciary and other civil justice stakeholders.
- Another important strength was the Council's ability to get different interests - including very divergent ones - to sit down together and engage in constructive dialogue.
- The Council had played an essential mediating role in resolving the 'costs wars' - the satellite litigation spawned by the passage of the legislation on Conditional Fee Arrangements - and subsequently on a range of other issues, mostly connected to costs issues.
- It had broadened its range in recent years, rightly, but with mixed initial success in terms of influence. This is partly because there has been less close collaboration with the Ministry of Justice than there might have been, and partly because it has not broadened its range of stakeholder interests as much as it might. See Annex 2 for a summary of the areas in which the Council has worked in recent years.
- Communications had for some time been a weak link, both internally with members, and more significantly with external interests.
- There was now an opportunity to give the Council's work programme a sharper and more strategic focus on the needs of users, rather than what has sometimes been seen to be essentially a compilation of committee chairs' personal enthusiasms, and including a further move away from the historic central focus on personal injury cases.

- This might necessitate some shift in the balance of the Council's membership towards the 'user' interest.
- 2.3 The minority of stakeholders with less current interest in the CJC included some major consumer groups such as Citizens' Advice nationally, and Which? They felt that the CJC did not funnel its expertise into areas where it could make a real difference. Its agenda was driven by members and not by objective evidence. It was too oriented towards court procedure rather than concerned with ways to improve the civil justice system as a whole. As a result, the CJC did not address the wider public policy issues of most interest to citizens and so added little value, despite its considerable legal experience and expertise.
- 2.4 These views come from significant stakeholders, albeit in a minority, and give some cause for concern. The recommendations in this report, particularly those in sections 4, 8 and 10, should help address them. The CJC needs to make a conscious effort to engage more with major consumer interests and to increase the user and consumer voice on the Council (see chapter 8 below).
- 2.5 Nonetheless, the clear conclusion that emerges from this review taken as a whole - the outcomes of the interviews and an informal assessment of the quality and relevance of the Council's work - is that the CJC continues to have a distinctive contribution to make to the civil justice scene; that an arms length body chaired by the Master of the Rolls was the right form to discharge the set of functions laid down in the Civil Procedure Act 1997 and the fundamental concept remains sound; but that there is scope for improved performance, greater authority in the Council's advice, and increased influence with government.
- 2.6 The contributions received during the review are set out in more detail in the following chapters.

**Recommendation 1.** The Civil Justice Council should be retained as an advisory NDPB, subject to the changes recommended below.

### 3. Purpose, Vision, Values and Objectives

- 3.1 The functions of the Civil Justice Council are set out in paragraph 1.1 above. The Civil Justice System is nowhere defined in statute, but clearly extends beyond the work of the civil courts as such. For the purposes of this review, the system is taken as being the totality of the means by which civil disputes (i.e. non-family disputes which would ultimately fall to be determined by the county and High courts) are prevented or resolved, including the relevant law, procedure, and techniques for dispute prevention, avoidance and resolution. In addition it is taken that consideration of ways of making the system more accessible, fair and efficient is to be done primarily in the interests of users and potential users of all kinds.
- 3.2 Successive CJC annual reports also set out a now-hallowed 'primary role' for the Council comprising promotion of the needs of civil justice; monitoring the system with a view to continuing modernisation and to assess whether system procedures achieve their stated policy aims; advising government on scope for improvement; and reviewing policy and procedures to ensure they improve access to justice. They also set out three top level outcomes for the Council to achieve:
- Advice to the Secretary of State on consultation papers on civil justice related matters;
  - Advice to the Secretary of State on areas of concern, legal or policy, identified by the civil justice community through the CJC;
  - Assistance in developing research ideas and policy solutions relating to policy issues of concern, and providing a representative view of civil justice stakeholders' view during the development of policy or programmes.
- 3.3 What is missing at present is a single coherent set of statements of the kind that most advisory and executive public sector bodies now have, that set out concisely and clearly the purpose, vision, values and strategic objectives of the organisation. Such a set of statements must have the support and understanding of the members of the organisation. They should provide a clear sense of direction and a longer term framework within which successive work programmes can then be developed - projects undertaken must demonstrably contribute to the delivery of the vision and one or more of the strategic objectives. Such statements can at times appear to be merely commonplace; but in practice they do embody choices; and they have a real role in defining the place of the organisation in the overall scheme of things ('why bother to keep the CJC?').

- 3.4 It must be primarily for the CJC itself to devise an up to date set of statements of this kind, since they are much better home grown than imposed externally. But the following suggestions may be of some assistance in developing them.
- 3.5 First, the *purpose* of the CJC must inevitably and rightly reflect the statutory position, along the lines of 'The CJC's purpose is to help make civil justice increasingly accessible, fair and efficient...and ensuring that the interests of users and potential users are paramount'.
- 3.6 Second, the *vision* for the civil justice system needs to be expressed in terms of the longer term outcomes being sought for the system - e.g. a civil justice system that enables disputes to be prevented where possible, and resolved as early as possible if not; ensures that users have access to appropriate advice and information, including on alternatives to court based remedies; minimises unnecessary delay; maximises cost efficiency of process; enables the resolution of disputes in ways that are fair, open, and proportionate; and facilitates continuous improvement at every stage in the process.
- 3.7 The *values* for the Council itself should set out concisely how the CJC anticipates conducting its work, for example
- Consults with interested parties and give due weight to all submissions
  - Conducts its business in a visible and open and manner
  - Investigates examples of good practice at home and overseas
  - Has regard to the interests of all stakeholders
  - Takes account of changes in society, in expectations of the justice system, and technologies
  - Produces reports and recommendations based on careful analysis of all the evidence
  - Works in partnership with Government to achieve what is practical and achievable, while retaining its independent voice.
- 3.8 Finally, the *Strategic Objectives* should indicate the main ways in which the central purpose will be delivered, and should also indicate that the Council operates both through work it initiates itself, and by responding to initiatives taken by others. They should also rationalise the existing primary role and top level outcome statements. Possible strategic objectives could include keeping the civil justice system under review and making proposals to government and the Judiciary for research and for changes in policy and procedure; responding authoritatively to proposals for policy change initiated by others; and exploring and promoting the scope for new approaches to dispute prevention and resolution.

**Recommendation 2.** The CJC should agree a new set of statements covering its purpose, vision, values and strategic objectives, taking the statutory functions set out in the Civil Procedure Act 1997 as the starting point, and drawing on the suggestions in paragraphs 3.5 - 3.8 above.

## 4. Work Programme

- 4.1 Most members of the CJC, and almost all the others, who were interviewed for this review, said they knew little about the way in which the overall CJC work programme is developed. It is rarely discussed in meetings of the full Council, and is not the subject of external consultation. Nor is it available to stakeholders in published form, or via the CJC website.
- 4.2 The CJC work programme is in practice developed on a rolling three year basis, in the form of a 'business and activity plan'. It is essentially a compilation of proposals from the chairs of the main CJC committees, informed by knowledge of some MoJ plans and by representations from some stakeholder bodies. The chairs also circulate the request for bids to their committee members. A meeting of the chairs of committees with the Chief Executive then discusses coverage and priorities, the outcome of which goes to the Executive Committee and thence to the full Council. That said there appears to be relatively little top down prioritisation of the programme, or of inclusion of major crosscutting issues. Prioritisation derives as much from the rather indirect process of gradual shifts in the committee structure towards new priority areas, which then results in a shift in topics for attention.
- 4.3 This approach ensures that the CJC's activities remain in touch with perceived issues requiring attention, as seen by committee chairs through their day to day contact with the civil justice system as practitioners: this is an important connection which needs to be maintained. It allows the Council to respond rapidly and flexibly to emerging issues. And it allows the Chair and Chief Executive to exercise some indirect control over the forward agenda through the creation of new committees and the closure of existing ones (though this is inevitably a fairly slow evolution in practice), and through dialogue with the chairs of committees.
- 4.4 The actual work undertaken by the Council over the last decade, once it had found its stride, first focussed heavily on personal injury issues, and in particular defusing the satellite litigation on costs bedevilling this field through the facilitation of a series of negotiated outcomes on fixed and predictable costs. Its range is now considerably broader, including for example oversight and development of the extensive set of pre-action protocols; the role and treatment of expert witnesses; alternative dispute resolution; alternative funding mechanisms for litigation (including options for contingency fees and third party funding). In some cases, the Council both identifies a policy problem and finds and delivers a solution (in some cases backed by adjustments to the CPR), as with the work on predictable

costs, or the practice direction on mesothelioma cases; in others it puts forward ideas for consideration by government and others; and it responds to government consultation papers which have implications for civil justice.

- 4.5 This relatively ad hoc approach to programme development does however have disadvantages. There is little top down or systematic assessment of priorities against the objectives for the Council, no clear criteria for the selection of projects, no explicit gap analysis against perceived problems in civil justice, no review of the prospective programme by the Council as a whole, and no external consultation on the programme with stakeholders (as occurs e.g. with the Law Commission's triennial programmes). Furthermore, the research that the Council commissions or otherwise procures is usually very specific to projects being undertaken, and does not give much insight into user views on progress towards the achievement of CJC objectives.
- 4.6 As a consequence, many Council and committee members say they have only a hazy idea of what is being done, stakeholders can feel disenfranchised and it is hard to be sure whether the Council's effort is deployed to best effect. A number of those interviewed felt that a more open, transparent and systematic approach was now needed, which would also make the Council more visible and achieve more support for its work. This should be done in ways, which do not detract from the Council's ability to respond quickly and informally to urgent problems.
- 4.7 Separately, a number of interviewees were unclear on the demarcation, both in general and in some specifics, between the CJC and the Ministry of Justice. While there is bound to be some overlap between the two in terms of subjects of interest and concern, there is also scope for a clearer articulation of roles. In particular, the Ministry will naturally lead on issues, which give rise to significant political or parliamentary controversy, or where changes in legislation are at stake, or where delivery of programmes by the executive is involved. The CJC is more likely to lead in developing ideas and advice on subjects where the Ministry is not currently envisaging action, where solutions to problems or challenges lie mainly in changes to the Civil Procedure Rules (CPR), practice directions or judicial guidance; and generally where executive action lies with the judiciary. It is important that the lead MoJ official for the CJC (and his/her colleagues) has a good, trusting and open working relationship with the CJC Chief Executive (and vice versa) that results in a two way flow of information and ideas, and a collaborative approach to issues on which both are active.
- 4.8 There are also interfaces with the Civil Procedure Rule Committee (CPRC) and the Law Commission, but these seem in general to be unproblematic. The CJC has a wider policy focus than the CPRC, but can and does refer policy proposals to the CPRC where the solution to a policy problem is

a change in the procedure rules. And the Council's focus on accessibility, fairness and efficiency means that it will rarely wish to tackle issues of substantive (as opposed to procedural) law, where the lead lies with government departments in general, and the Law Commission on substantive law reform - though the CJC will often wish to comment on Commission consultations from its specific perspective.

- 4.9 Against this background, there are a number of potential remedies to the challenges identified. First, the establishment of a comprehensive set of statements of purpose, vision, values and objectives, as proposed in chapter 3, will help to provide a consistent medium term framework for decisions on which subjects to include in forward work programmes, which should continue to be developed on a rolling three year basis, though necessarily with more detail for year 1 than for the later years.
- 4.10 Second, consideration should be given to the conduct of a periodic survey of user views on the performance of the civil justice system, together with some more focussed research, to facilitate a gap analysis of current work programmes.
- 4.11 Third, and subject to the outcomes of any gap analysis, there are some very general criteria that can be used to guide selection of subjects emerging in the usual bottom up way for inclusion in the work programme:
- Is the issue important (by reference to achievement of the CJC's strategic objectives once in place)?
  - Is the issue one where the CJC should be able to add value in the light of its membership and/or its positioning as an independent advisory body to government, and, ideally, uniquely well placed to do so?
  - What if any previous or other current work has been/is being done elsewhere? Would the CJC's role cut across this other work to no useful purpose, or would it complement it, or add a new dimension previously overlooked?
  - Does the CJC (and its secretariat) have the necessary skills, knowledge and capacity to allow it to make a genuinely authoritative contribution? And over a suitable timescale?
  - Is it timely? Subjects can either be current urgently, or issues which are emerging over the horizon, but not yet seen as urgent by decision makers.
- 4.12 It was apparent from the interview programme that there is an element of tension - probably not entirely avoidable - between the first two bullet points above. At least as the Council's membership currently stands, and with the levers of influence at its disposal, the subject areas where the Council has historically been most likely to be able to add value are ones which relate to the more procedural aspects of the civil justice system, and within that the aspects most closely linked to the courts. But a

number of commentators felt that the consequence was that the Council failed to focus on the bigger civil justice picture and in particular failed to have a sufficiently explicit user focus - i.e. it traded off tackling the more important issues for users against value added. Part of the solution to this conundrum lies in broadening the membership of the Council, part in improving the Council's external communications, part in developing a more externally consultative process for updating the work programme; and part in using the full Council to greater effect in reviewing the totality of the work programme. These possibilities are discussed further at paragraphs 4.19, 6.4-5 and 10.2-8 below.

- 4.13 The CJC, as a diverse arms length independent advisory body, is capable of adding value - criterion 2 in paragraph 4.11 above - in a number of modes:
- Problem solving and trouble shooting against the background of the CPR, and with the support of the Master of the Rolls as Head of Civil Justice and Chair of the Council;
  - Providing oversight and generic guidance to the civil justice system as a whole through the identification and dissemination of best practice, and where necessary through its embodiment in procedure rules, practice directions or other protocols;
  - Horizon scanning for emerging problems or challenges;
  - Initiating development projects leading to evidence-based advice to government for policy changes which the Council cannot execute itself (eg because changes to legislation are needed) - this can involve 'thinking the unthinkable', for which the CJC provides a 'safe' environment, but should not involve campaigning or lobbying activity;
  - Responding to requests for advice from Ministers, the senior judiciary, or to consultation papers published by government and others which impact civil justice, or working in collaborative projects led by others;
  - Providing a neutral but informed forum for civil justice stakeholders to exchange information and ideas, whether or not tangible results follow (a number of interviewees placed significant store on this mode of CJC operation, even where it does not lead, or lead directly, to as tangible results as in other modes of operation).
- 4.14 A well balanced work programme is likely to include elements of working in all these modes, though the responsive work is less predictable far in advance, so some capacity needs to be allocated for that in looking at other priorities for own-initiative work.
- 4.15 Fourth, the natural bottom up approach to developing the work programme should be complemented not only by review by the Chief Executive and Executive Committee, and by the gap analysis suggested above, but also by the full Council. This might usefully take a two stage

form - an initial discussion about recent civil justice developments, and any pointers thrown up that warranted CJC attention; and a near-final review in the light of the detailed work done by the committees etc. If the Council is rebalanced as is proposed later, this would provide opportunities for a stronger user input to be made.

- 4.16 Fifth, a strengthened and clearly defined and timetabled process needs to be agreed with the MOJ on how the CJC work programme will take account of MOJ priorities. The CJC needs to consider Government priorities and concerns in drafting its work programme before it is put to the minister. The process should involve regular communication with MoJ officials on developments in the relevant areas. There should also be an informal consultation with MOJ officials (in practice, the ex officio MOJ Member of the executive committee) on the work programme before it is submitted for the designated Ministry of Justice minister to note (although this could not preclude the minister from commenting if he or she wished to do so).
- 4.17 This process - which builds on what is already in place - needs to enable the MoJ as paymaster to satisfy itself that the programme is reasonably aligned with overall departmental priorities; allows the minister and/or the department to feed in any topics on which they would especially wish to receive CJC advice. It also allows the department and the Council the opportunity to resolve any unnecessary duplication between CJC work and Ministry work plans, and/or to update the collaborative working arrangements which will be needed in some areas, including wherever possible good two way exchange of information and ideas, and proper consideration by the Ministry of CJC proposals. This exchange should normally be completed by December each year, along with determination of the budgetary allocation for the Council for the financial year beginning the following April. It goes without saying that the Council will be more influential if its work broadly goes with the grain of wider medium/long term government policy.
- 4.18 This process is designed to ensure that there is reasonable alignment between the parent Ministry and the Council over future plans, while preserving the essential and visible aspects of the independence of the Council. These are that the Council has the last word on the content of its work programme (including where necessary the inclusion of some items which it regards as important, even if the MoJ does not); and (more critically) that it has complete independence in the content of the advice it gives to government, however welcome or unwelcome this may prove to be in individual cases.

- 4.19 Sixth, the work programme should be published each year, placed on the CJC website, and drawn to the attention of a wide set of stakeholders in the civil justice system with an invitation to comment. Comments could be used to make in year adjustments to the programme if appropriate; but would perhaps be used more commonly to drive changes in subsequent years' plans. This would provide an opportunity for the CJC to strengthen its links with a wider range of interests than have hitherto engaged with it.
- 4.20 Seventh and finally, the work programme as adopted each year should make clear (as now) which committee or working group has lead responsibility for a particular topic, and (as is not always the case at present) should set out the anticipated milestones to completion of each piece of work together with a delivery plan wherever possible for translating the CJC's advice into reality. This will inevitably have to take account of the reality that CJC members are all unpaid volunteers, whose day jobs on occasion take precedence.

**Recommendation 3.** The CJC's annual work programme should advance the achievement of the Council's overall purpose and strategic objectives in the interest of users, taking account of the selection criteria at para 4.11 above, the types of project at para 4.13 above, and the specific suggestions at para 5.2 below.

**Recommendation 4.** Each project in the work programme should specify the outcome sought; where feasible the timed milestones for getting there; the intended means for translating the CJC's advice into deliverables on the ground; and the committee or working group responsible (if any).

**Recommendation 5.** The CJC should take a more strategic view of its work programme, through periodic surveys of user concerns about civil justice, use of gap analysis techniques, discussion of priorities in full Council, and invitations to stakeholders to comment on or contribute to its development. The work programme should be published.

**Recommendation 6.** A revised arrangement should be agreed between the CJC and the MoJ on the ways in which the CJC work programme takes into account MoJ priorities. Appropriate consultation should take place with the MoJ to ensure that unnecessary duplication of work is eliminated in areas where both the Ministry and the Council are active, and that suitable collaboration occurs; while maintaining the necessary independence of CJC decision making, as outlined in paras 4.16-18.

## 5. Content of the future work programme

- 5.1 Those interviewed had relatively few suggestions for specific changes (additions or deletions) to the current work programme, in part because very few had any comprehensive view of what the programme did currently contain (and others had some notable misconceptions). There was however general support for the already visible shift away from the recent heavy focus on Personal Injury (P.I.) related issues, and for greater attention to be given to the other heavy caseload areas of county court business (i.e. housing and debt). It is less apparent that other areas of civil court caseload warrant regular CJC attention - for example the specialist commercial, chancery, mercantile, technology and construction jurisdictions.
- 5.2 From a user standpoint, there are also a number of horizontal issues of actual or potential concern that cut across the individual dispute categories, in addition to the current pattern of activity. Examples include:
- Early/Alternative Dispute Resolution and prevention - a field where the Council has been active for a number of years and has collaborated with MoJ, with the Civil Mediation Council, and could in future collaborate with the Administrative Justice and Tribunals Council (AJTC - which also has an interest in this field). The Council is well placed to provide guidance to the judiciary through the CPR and otherwise, but needs also to be alert to the scope for early intervention leading to non-court based or indeed non-legal resolution (drawing on experience in other jurisdictions); for ADR at the case management stage; and to identify those aspects of dispute resolution/prevention where the Council can add positive value;
  - A review of the scope for more civil dispute resolution by ombudsmen. Disputes between citizens and financial services providers are now very largely dealt with by the Financial Services Ombudsman - on the substance as well as administration/service quality. Does this version of arbitration - free to the user, and normally binding on the provider - offer a model for other classes of dispute, especially in regulated sectors, and if so what are the implications for the role of the courts and the regulators?
  - Another look at possible improvements in case management and procedure both to improve the user friendliness of the court experience, and to bear down further on costs both pre-trial and at trial, - including the optimum use of IT in the civil courts (within the ever present MoJ funding constraints, but taking account of the greater flexibility that may arise as the civil courts move further towards full cost recovery),

and any wider read across from the work of the Aikens review of long commercial court cases;

- Further work on alternative funding mechanisms for civil disputes, building on the achievements of recent years, and possibly including consideration of the future of the cost shifting rule in civil cases (and which for example applies only rarely in tribunal jurisdictions, including party and party areas such as employment), drawing on experience in other jurisdictions;
- Work on the possible benefits (and drawbacks) of moves towards a more inquisitorial form of court hearing in civil cases, especially in areas where litigants in person have become commonplace (again possibly in collaboration with the AJTC);
- Possible work on a consumer rights programme, developing from the current work on collective redress/multi-party actions (this would need initial scoping to establish whether there was a longer term project here);
- Enforcement of court decisions, and of outcomes of disputes resolved without a court hearing, in the light of the legislative changes introduced by the Courts, Tribunals and Enforcement Act 2007 (both during the extended period during which these changes will be brought into effect, and in relation to the effectiveness of the regime that then results);
- In addition, some interviewees suggested that ten years on, there could be benefits in undertaking a comprehensive review of the outcome of the Woolf reforms. This would consider the extent of implementation of Lord Woolf's specific proposals; how successful they have been in delivering the goals set; the extent of compliance with the CPR as they now exist; which if any of the original goals have been either sidelined, unsuccessful or overtaken by other developments; and drawing conclusions both on the continuing appropriateness of the objectives then set, and the further measures that should now be taken to improve delivery. It would also be necessary to undertake some careful research on the success or otherwise of the reforms - for example, one of the central goals was to reduce the cost of civil litigation through better pre-hearing preparation and reduced complexity. Research on this would need to cover cases that settle before proceedings are ever issued as well as those that settle before trial and those that go the whole way to a judicial decision.

5.3 Several of these ideas, in particular (but not only) the last, would potentially give rise to very large projects. It would be necessary to do some careful scoping work to determine whether to go ahead, and if so, in what priority order; and also to determine whether the CJC, the MoJ, or a third party (or some form of collaborative approach), would be best placed to take the lead.

- 5.4 It must be for the Council itself to decide which if any of these suggestions to follow up, taking account of the criteria set out in para 4.11 above, along with the continuation of some other existing work streams, and other initiatives arising from proposals from the wider circle of stakeholders envisaged elsewhere in this report.

## 6. Working Methods

- 6.1 The Civil Justice Council itself is a large body (around 25 strong, plus supporting secretariat) of unpaid volunteers, and meets three or four times per year for a short half day, usually in the morning, and followed by lunch which permits more informal contacts. Given the size and diversity of membership, it is clearly not a suitable body in which to conduct detailed work. In practice it is used mainly as a forum for the committees and working groups to report back on their recent activities, with some opportunity for discussion; and for oral reports on other issues of current interest from members of the Council. Papers for publication in the Council's name, or responses to consultations, are either cleared through the Executive Committee and then tabled for the full Council to note; or are presented to the full Council and approved directly (typically after a formal consultation or extensive stakeholder engagement).
- 6.2 (In passing, it should be noted that the Council has of necessity met in the Master of the Rolls' courtroom over the last year, the conference room used hitherto being unavailable. This was subject to extensive critical comment by members of the Council, and it is to be hoped that meetings will now revert to the normal conference room (or an equivalent) as soon as possible. A number of members of the Council are somewhat daunted by the presence of a number of senior judges, and the use of a large RCJ courtroom has apparently exacerbated this feeling).
- 6.3 The Council will therefore naturally operate in a range of modes, as indeed it does now - through its quarterly meetings, through its committees and working groups, through conferences and big/small tent gatherings, through work done for it by its secretariat or external research, and in correspondence. The quarterly meetings of the full Council should therefore be seen as but one tool among several, but potentially the most powerful for securing full cross specialism/cross disciplinary understanding of issues, for driving forward the Council's overall agenda, and for resolving disagreements not capable of resolution elsewhere (if any).

## The full Council

- 6.4 From this perspective, the present organisation of Council meetings tends to under use the potential of the full Council to exercise a strategic overview both of the civil justice system itself, and of the work of the Council in all its forms. In particular, the full Council should with benefit:
- Play an active and strategic part in determining priorities for inclusion in the rolling three year work programmes, informed by its assessment of the aspects of civil justice particularly warranting attention, as discussed in chapter 4 above;
  - Oversee the execution of the programme of work to time and agreed objectives - partly through the current system of oral updates from committee chairs, but also through short written reports on achievement against objectives, and with the opportunity to provide a steer as projects progress;
  - Undertake orientation debates on new and emerging issues before remitting them to the relevant committee for detailed work, typically setting the wider civil justice/user scene before embarking on more technical development, and sometimes with the benefit of a presentation from a guest speaker;
  - Be consulted on proposals and the reasoning behind them where the Council is producing advice to ministers, or to the CPRC, or is publishing a discussion paper - through discussion at a Council meeting, especially where the issues are controversial within the Council; or for uncontentious issues, or where time is of the essence, in correspondence. It is important that the results of the Council's work, and presented in the name of the Council, should be properly owned by the full Council. The Council does not proceed by votes, but rather through the conclusions drawn by the Chair. This is perfectly appropriate for a body such as the Council; it means that discussion has to continue until any dissenting minority either gives way to the majority view, or is somehow accommodated.
- 6.5 An important feature of this approach would be to enable the orientation of the Council's work to be influenced by a larger user input (including for these purposes consumer and lay advice); and for the more detailed work done in committee or through other Council activities to be reviewed at a later stage by this larger user component. For this to be fully effective, the user element on the Council would need to be increased, as is proposed in chapter 8 below.
- 6.6 It would be for the Chair and the Chief Executive in the first instance to work out the implications of these proposals for the management of Council meetings. But it should be possible to accommodate this wider remit within a full half day, quarterly, meeting - possibly with the addition

of an annual or biennial awayday to help the Council take stock, and to decide collectively on strategic next steps. It would be important to retain the opportunity for networking over lunch, and to continue to ensure that meetings were enjoyable and worthwhile for the members. And the style of chairmanship needs to encourage the relatively less articulate, and any new members, to contribute to debate along with those who are more confident in larger groups.

## Committees

- 6.7 The committees are, and should remain, the place where most of the detailed work of the Council gets done. Chapter 7 below discusses the future pattern of the committee structure. It does however follow that the committees, and shorter term working groups, should be firmly tied into the role of the full Council (some interviewees said that it was not clear how the work of the committees related to the work of the Council as a whole and its objectives, and vice versa). This means as now that committee chairs should be full members of the Council. To reinforce that connection, it should also be the norm that committees - with typical memberships of between 6 and 10 - should have at least one and normally two or more other Council members in membership; and that all Council members (except possibly those from the senior judiciary) should be members of at least one committee or working group.
- 6.8 Other members of the committees should continue to be drawn from outside the Council membership. Chapter 9 below discusses how these members should be appointed, and concludes that the present informal approach should be retained. The essential test for membership, apart from willingness to serve, is that members must be in a position to contribute knowledge and expertise in the field concerned. It is also essential that members of committees, as with the Council itself, should see themselves as acting in the public interest, in pursuit of the overall objectives of the Council, and not as delegates or representatives of particular interest groups. Where individuals are nonetheless associated with particular interests - as will legitimately occur - it is important that committees are, and can be seen to be, balanced in their membership, so that for example there is good understanding of the interests of different classes of users on a housing and land committee, or good understanding of both claimant and defendant positions on a personal injury committee.
- 6.9 Much committee work can in practice be dealt with via email correspondence. But for committees to be effective, they need to meet face to face (including by video link if necessary) with reasonable regularity. If there is insufficient agenda to warrant meetings, or if (as is the case with some committees) attendance is poor, this gives a signal that the committee in question may have outlived its usefulness.

- 6.10 The Executive Committee at present has a specific role of approving papers and publications that do not need to go to the full Council, or have to be approved between Council meetings; agreeing which papers should go to the full Council, and advising the Chair and Chief Executive on plans, priorities and structures. It also receives regular reports on progress against the work programme. While it is necessary to have a body to keep business moving between meetings of the full Council, the role of the Executive Committee should contract somewhat if the proposals elsewhere for more involvement of the whole Council (including in correspondence) are accepted. The composition of the Executive Committee is discussed in Chapter 8 below.

## Events

- 6.11 The Council has also used to good effect the technique of 'big tent' roundtable conferences, typically spread over a 24 hour period, at which all the different interests in a specific topic (for example predictable costs in low value Road Traffic Accident cases, or the use of mediation pre-hearing) are brought together face to face to debate issues in a structured and facilitated way. Such events have often brought about better mutual understanding of the issues, and in a number of cases led to flexibility in previously entrenched and irreconcilable positions. An essential part of the success of such events is to invite the most appropriate participants, who will often be both expert, and influential within their own constituency - i.e. they will often be able to take on some representative role for an interest group. Where this is the case, the organisers of the event - typically the Chief Executive and a relevant committee chair - have an important responsibility to ensure that all relevant interests are heard. Where a negotiated agreement results - as in a number of costs issues in recent years - it has been normal for the outcome to be reported to Ministers by MoJ officials, who will assess the evidence used, the methods used, and whether the agreement is fair and in the interests of access to justice; if this is not done, it is important that the relevant CJC committee and/or the full Council reviews the outcome to ensure that it is within the wider public/user interest, and not just a compromise that suits a particular set of partisan interests.
- 6.12 In this connection, interviewees made two other points which merit discussion here. First, some interviewees emphasised the benefits that can arise simply from bringing people from different, and on occasion opposed, positions together in a neutral setting; better mutual understanding has a value of its own, whether or not it leads immediately or directly to improved arrangements for dispute resolution. And the CJC, with its access to a wide range of stakeholders, can reach well beyond those organisations with the clout to make their views heard by government regardless.

But second, others (typically organisations with good direct access to government) pointed to the substantial opportunity costs a big tent event represents - typically much greater than the tangible cost to the CJC - and went on to say that in their experience little value came of some such events. They nonetheless felt obliged to be present if only to defend their legitimate interest.

- 6.13 The conclusion must be that big tent and similar events should not be undertaken at all lightly; they need a clear purpose that supports the overall objectives (though this can legitimately be of an exploratory or ice-breaking kind), and that meets the value added criterion at para 4.12 above. They also need to be well prepared and structured with prior circulation of suitable papers and good quality chairing/facilitation, though interviewees generally were appreciative of the standards achieved by the CJC in these respects.
- 6.14 While there are some areas of CJC activity in which the outcome is advice to government which government can accept or not (and where acceptance e.g. of recommendations for statutory change would normally be preceded by a round of government led consultation), there are other areas where in effect the CJC has the policy lead, for example in the establishment of new pre-action protocols, new practice directions and other guidance to parties in civil proceedings, and in recommendations (in more or less detail) for changes in the CPR (including those cases where an adjustment to the CPR is needed to give effect to a wider negotiated deal).
- 6.15 In such cases, where implementation does not involve a major government role, it is especially important that all relevant interest groups can have their voice heard and taken into account before decisions are reached. In such instances, it will be desirable to allow all interests to have their voice heard at a pre-consultative stage; and for a more formal consultation exercise to be undertaken in line with current good practice, to allow formal representations to be made; and for the Council's communications to be improved to make this process transparent and accessible (see chapter 10 below). This will ensure that all interested parties have the opportunity to express their views. It will also help improve stakeholders' perception about the Council being open and inclusive. All consultations should be advertised on the CJC website.
- 6.16 This does not invariably happen at present; the reviewers' attention was drawn, both by some Committee chairs and by a few aggrieved external interests, to occasional examples where a major interest had not been involved until late in the day, or not at all. This could occur because they had not been involved in a working group, or had their voice heard by it, or had responded late to a consultation because they were unaware that any work was proceeding, due to earlier non-involvement coupled with

poor external communications (see chapter 10 below). In some cases, this outcome results from inadvertent oversight by CJC and or MoJ officials (as well as weak external communications); in others from a conscious view that involvement of a particular interest would be unhelpfully unconstructive. This last is not a valid reason to exclude a particular interest group from the deliberative process. It is also the kind of point which should be picked up by an enhanced oversight of and publicity for the overall work programme by the full Council.

- 6.17 Ten years on from the Council's creation, there is also, inevitably, a tendency for Council committees and big tent events to be dominated by 'the usual suspects' - people who have legitimately become known as expert or influential in a particular field. Such a tendency can become self-perpetuating, and the Chief Executive and the Committee chairs must be constantly on their guard to ensure that events are reflective of all the relevant interests, that new blood and fresh thinking are regularly introduced, and that the Council retains an effective oversight.

## Papers

- 6.18 At present most papers for the Council and its committees are prepared by Council and committee members themselves, with a limited contribution from the Secretariat. This is in turn a consequence of the Secretariat's small size and limited capacity. A consequence has been the reinforcement of the Council's tendency to undertake projects for which individual Council members have the appetite and time, rather than the more systematic approach advocated elsewhere in this report. This can be handled partly by careful choice of Council and Committee members, but the need to keep Council members interested and enthused has to be kept in mind.
- 6.19 There is another more general point. The Council's focus has tended to be on process, and its effective use of leading judges and lawyers to draft papers and other materials means that its proposals are usually of a high standard of technical competence (i.e. would operate as intended in a technical sense if put into practice). The Council also needs to take care to ensure that proposals for change are properly evidence based, at least to the extent of evidence of a problem going to the CJC's objectives (eg access to justice), and evidence or analysis that demonstrates that any *solution* being proposed can reasonably be expected to lead to an *improvement* in relation to achievement of the objective. Some of the CJC's significant successes are evidence based in this way (e.g. the Fenn and Rickman economic analysis played a real part in the CJC's resolution of the 'costs wars'). But it needs to be done in a more consistent way in future. This can be achieved partly through research (including desk research/literature searches, or by work commissioned by the CJC, or on its behalf from the MoJ research budget).

But it would not be reasonable to expect busy practitioners to undertake as much of this type of work as may be required in future. There is a case for some - limited - augmentation of the Secretariat's capacity to undertake this type of work together with horizon scanning, circulation of relevant papers to Council and Committee members, and the preparation of synthesis papers/draft reports on current CJC projects. The implications of this are discussed further in chapter 11 below.

**Recommendation 7.** The Council should exercise a more explicit oversight of all the Council's work, including a more structured contribution to the setting and maintenance of priorities, taking account of the proposals set out in paragraphs 6.4 - 6.6 above.

**Recommendation 8.** Care should be taken to ensure that CJC sponsored or facilitated events or other projects are not, and are not seen as being, weighted towards any particular interest or point of view, while recognising that the Council's role is to consider reform.

**Recommendation 9.** Where necessary, and in particular when the Council has a policy lead, or is considering proposing major policy change to government, the Council should undertake formal public consultations in line with current good practice as a standard method of working.

## 7. Committee Structure

- 7.1 As noted above (para 4.3), the committee structure underpinning the CJC is reviewed periodically to ensure that the balance of effort required in different areas is in kilter with the Council's priority areas of work. The present structure comprises committees on:
- Access to justice (supported by a panel on court fees and a working group on public legal education)
  - Costs
  - Alternative Dispute Resolution
  - Experts
  - Clinical Negligence and Serious Injury
  - Access to Rehabilitation
  - Pre-action Protocols
  - Housing and Land
  - Comparative Law.
- 7.2 The Chief Executive had begun a review of the committee structure shortly before this review was announced, the work on which has been taken into account in what follows; it should be brought to a conclusion in the course of 2008 in parallel with the work proposed to give the CJC's work programme a more strategic overview, to ensure that the twin outcomes are fully aligned.
- 7.3 Relatively few interviewees had much to say on the committee structure: most were aware only of the committees on which they themselves had served (where they had), with only a vague understanding of the wider picture; and indeed some were unexpectedly uncertain as to which if any of the committees they were or had been members.
- 7.4 That said a number of conclusions could be drawn from the principles established earlier in this report. First, it will continue to make sense to have standing committees in areas where the Council is likely to continue to be active in the long term. These committees should probably be rather more broadly based than is always the case now. On the basis of the material seen during this review, candidates might be three of the four main areas of civil disputes, i.e.
- Personal injury (subsuming clinical negligence and rehabilitation, and relevant pre-action protocols)
  - Property (principally housing issues, including possible follow up to

the final Law Commission report on Proportionate Dispute Resolution in this field, possibly in cooperation with the Dispute Resolution Committee, see below)

- Debt, including consideration of consumer claims (an area to which insufficient attention has arguably been given in recent years), probably brigaded with enforcement, and with consumer and SME rights (most of which are in practice about debts or other small financial claims)

but not at present the fourth main area of civil disputes - commercial disputes, in particular those dealt with by the specialist divisions of the High Court and County Courts (nor the work of the Administrative Court). In this latter case, there was no appetite for substantive CJC involvement, because the issues are quite localised and specialised, and/or are being dealt with elsewhere (e.g. the Aikens working party on reducing the length of very long civil cases). The Council should keep this area under review, and should continue its present practice of keeping in touch with City and Commercial interests.

7.5 Two other areas that probably continue to warrant standing committees are:

- Dispute Resolution, with a focus on Alternative Dispute Resolution (ADR), prevention, and public legal education. These issues are important from the user perspective, but decisions here depend also on the outcome of discussion with the MoJ and the Civil Mediation Council about who should do/lead on what, in what is bound to a collaborative area of work. Obvious topics on which the CJC might lead, in addition to its long standing focus on judicial training; and development of proposals for CPR amendments to encourage/mandate ADR as a routine part of the court process;
- Public and private funding (including costs to the extent not remitted to the Costs Advisory Committee, any follow on work to the Claims Process Review that might be requested by the MoJ, alternative funding mechanisms including third party funding, any contribution on legal aid, and responding to consultations on court fees, perhaps jointly with the Family Justice Council where appropriate).

7.6 It is less clear that a separate committee is needed on comparative law - comparisons with practice in other relevant jurisdictions, and alertness to the growing EU involvement in civil law, should be a natural aspect of all the work of the CJC and its committees.

7.7 Where possible, new topics should be allocated to one of the standing committees. But there will be occasions where a topic cuts across the natural boundaries of the committees, or where none of the committees has the membership expertise required. In such cases, the best approach is likely to be to set up a short term working group, chaired by a member of the Council, and with precise, time bound, terms of reference. The work

of the recent past on Experts probably falls into this category, as does the present work on collective redress. Looking ahead, a number of the topics suggested in paragraph 5.2 on the future work programme would fall into this category if pursued.

- 7.8 In some cases, the Council may want to maintain a watching brief on a topic after a specific project has been completed and a working group wound up. In such cases, the simplest solution may be to identify a lead member of the Council to monitor developments and identify any further action the Council might need to take.

**Recommendation 10.** The CJC should bring to a conclusion in 2008 its review of committees, in parallel with completion of work on its forward work programme; taking account of the suggestions made in Paras 7.4 - 7.7 above, and with a view to ensuring that:

- The structure of committees reflects the priorities of the revised 2008 forward work programme and the CJC's overall objectives;
- The number and composition of committees and of time limited working groups does not overstretch the resources of members and the Secretariat;
- All committees are chaired by a CJC member, include at least one and normally no less than two other Council members; include other members with relevant expertise; are serviced by the CJC Secretariat; and normally have a relevant MoJ official in attendance;
- They operate within terms of reference agreed by the full CJC, to an annual work programme approved by the Council, and supporting an overall CJC work programme, and subject to regular progress reports to the full CJC (in particular where a CJC steer or decision is needed);
- The Committee structure is reviewed at least every two years to determine which if any should be wound up; to ensure that time limited working groups have been closed down in accordance with original plans unless there are strong grounds to retain them; and in all cases that the Terms of Reference remain up to date.

## 8. Composition

- 8.1 The Civil Procedure Act 1997 lays down specific membership requirements for the Civil Justice Council. Under section 6(2) the Council must include [but is not limited to] members from certain categories of persons, in particular members of the judiciary; members of the legal professions; civil servants concerned with the administration of the courts; persons with experience in and knowledge of consumer affairs; persons with experience and knowledge of the lay advice sector; and persons able to represent the interests of particular kinds of litigants (for example business or employees). Under the Act, the Lord Chancellor must decide, after consulting with the Lord Chief Justice on the number and scope of judicial appointments, how many members of the Council are to be drawn from each category and how many other members the Council is to have. The CJC currently consists of 26 members. 7 are judges, 11 are legal practitioners, mainly solicitors, two are government officials and the remaining 6 are representatives of consumer organisations, business sector advisors, academics and trade union representatives.
- 8.2 Some interviewees thought that a 50% reduction in size would enable the Council to operate more effectively, more in the fashion of an executive board. At present it is too large to allow for full Council meetings to be an effective decision making forum, and as is noted above, it is used at present more for reporting back, the majority of the work being done in committees. However, on balance, the Council gains from its diverse membership, and should be kept at about its present size if it is used in future as proposed in chapter 6 above.
- 8.3 The majority - including a number of the lawyers interviewed - thought that the composition of the CJC was not balanced and that changes were necessary. The CJC did not feel very user driven and it was too much weighted towards judges and legal practitioners. There are many organisations representing consumers and they should have greater involvement with the CJC. Many interviewees also expressed concern about the lack of representation from particular groups, for example charities, people with disabilities, people with knowledge of equality and human rights. Others were surprised at the limited representation of business - no representative from the financial sector, nor one with an enforcement background.
- 8.4 Against this background, and also bearing in mind the role of the Council envisaged at para 6.4 - 6.5 above, which requires a significantly stronger user focus, there would be merit in reducing the shares of the judiciary and

legal practitioners together in the Council membership to no more than half, with user interests (including those with consumer and lay advice expertise) comprising the other half. This would have the effect of almost doubling the user representation on the Council.

- 8.5 This approach suggests that five or at most six members would be drawn from the judiciary - the Master of the Rolls and the deputy head of civil justice ex officio (the latter to maintain the close link with the CPRC), a High Court judge OR a designated civil judge from the circuit bench, and two or possibly three district judges. It is for consideration whether a High Court judge adds additional value (if more Council time went on commercial or specialist High Court business, s/he undoubtedly would), or whether a designated civil judge would better complement the roles played by the district judges. It is probably a judgement that needs to reflect the particular talents that may be available at any given time within the judiciary. At present a place is also reserved for a judge with Judicial Studies Board (JSB) involvement (at present in the name of Keene LJ as chair of the JSB, though in practice he usually sends an alternate). Although the scale of CJC/JSB activity seems set to grow, it was argued that the most benefit would be obtained if the JSB were represented on CJC committees rather than at Council level.
- 8.6 It should be added here that there was almost unanimous agreement that the Master of the Rolls should continue as the Chair, both because of the prestige this brings to the Council's work, and also because of his (correctly) perceived authority and influence over the civil justice system.
- 8.7 If 5 or 6 places go to judges, 7 or 8 are then available for legal practitioners within a limit of 13 judges or lawyers out of a 25 or 26 total membership. These need to include both barristers and solicitors, to achieve a spread of specialist expertise from the profession and to continue the gradual shift of recent years away from the personal injury field. This group should also include staff members from the Law Society or Bar Council (if any). Taking the Council and its committees together, one would expect to see people drawn from e.g. the law centres, BME groups, qualified mediators in membership.
- 8.8 Of the other 12/13 places, two would continue to go to Government officials (at present one each from the MoJ and the LSC). Although user interests, lay advice and consumer interests are represented now, some stakeholder areas are currently under- represented - for example banking/ lending institutions (insurance has always had a voice); housing (landlords, tenants and social housing); local government; enforcement interests; the main business representative organisations (CBI, FSB, ABCC etc); and in the consumer field, the larger consumer/user representative organisations such as Citizens' Advice at the national level; Which?; the Advice Services Alliance; the National Consumer Council; Disability Charities; ethnic

minority groups. There is also scope to add a second academic, and another Trade Union/user voice. Some of these organisations have not historically paid much attention to the CJC, and they would be worth courting as stakeholders (e.g. by demonstrating the relevance of the CJC's work to their concerns) in any event as well as potential sources of Council members. But in aggregate they cover a sufficiently diverse field that it should not be too hard to stimulate sufficient good quality applications from these areas to enable the balance of membership to be shifted in the ways suggested above.

- 8.9 The approach set out above for developing the user/consumer dimension of the Council's membership assumes that it should be fairly straightforward to secure a stronger voice for business and other corporate users of the civil justice system, since many will be 'regular' users. As such they will have a stake in its continued development (insurance is the most prominent example, but local government and lenders are equally apt). Getting an authentic individual citizen voice is intrinsically much harder, since most people need to use the system (or become defendants) only very rarely. For this reason the proposals set out above focus on a range of credible proxies - Trade unions, consumer and advice bodies, and single issue bodies such as disability charities.
- 8.10 At present, the Executive committee (around 7 strong) comprises entirely judges and lawyers, plus the Chief Executive and the MoJ representative. If the Council is to be rebalanced to an approximately 50/50 split of legal practitioners and others, it would be appropriate for the 'others' to have a clearer voice on the Executive.

**Recommendation 11.** The Council should remain at around its present size of 25, to ensure that it retains and extends the diversity of its membership.

**Recommendation 12.** Council members should come from two broad categories. The first category, which should form approximately fifty percent of the Council, should be members of the judiciary and legal practitioners. The other half, forming the second category, should be representative of the other - mainly user - groups identified in the 1997 Act.

**Recommendation 13.** The number of judicial members should be reduced to 5 or 6 as discussed in para 8.5 above. 7 or 8 should be legal practitioners (solicitors or barristers working in law firms or chambers, and also staff of legal representative bodies).

**Recommendation 14.** The other 12-13 members should be drawn widely from user, consumer, and advice interests and from academia along the lines discussed in para 8.8 - 8.9 above. In some areas this will involve active steps to stimulate applications.

**Recommendation 15.** In order to ensure that the user and consumer sector has a more involved role in the decision making process, at least one and potentially two members from those groups should be appointed to the Executive Committee.

## 9. Appointments

- 9.1 The Lord Chancellor appoints the non-judicial members of the CJC, the appointment of which must comply with the principles of the Code of Practice issued by the Office of the Commissioner for Public Appointments (OCPA). It is for the Lord Chief Justice (LCJ) to appoint the members of the judiciary to the Council, after consulting the Lord Chancellor.
- 9.2 The Lord Chancellor has delegated his responsibility, under section 6(2) of the Act, in relation to the appointment of non-judicial members to the Parliamentary Under Secretary of State, currently Bridget Prentice. Under the OCPA code of practice, an open and public competition must be undertaken, with appointments being made on merit on the recommendation of a panel constituted in line with the code guidance. The appointments must be publicised on the Cabinet Office Public Appointments Unit website and in the press, and a role description and person specification must be produced for each appointment. The process must promote equal opportunities and comply with the principles of probity, openness, transparency and proportionality.
- 9.3 Appointees must themselves comply with the 7 Principles of Public Life (the 'Nolan principles') - selflessness, integrity, objectivity, accountability, openness, honesty and leadership. At the selection stage, it is particularly important to have an eye to the potential ability of those selected to draw on their knowledge and experience, typically from a specific relevant stakeholder background, but to do so in an objective way in the wider public interest, and in particular without seeking to act in any way as a 'delegate' of those with a similar background.
- 9.4 Because the Council needs to have a diverse and balanced membership as discussed in chapter 8 above, it is essential that the advertisements for new members, and the management of the competition are constructed in a way that allows vacancies to be filled in line with the prior decisions on composition that Ministers will have made under the provisions of the 1997 Act, and which also allows an appropriate balance to be achieved for example between business users of the system and private citizen users. There may well be occasions in which it is necessary to leave places vacant (and re-advertise), rather than appoint so many from a particular constituency (where the applications were strong) as to unbalance the composition of the Council.
- 9.5 The Council appears not to have made very extensive efforts in recent years to attracting a wide pool of good quality candidates, in particular

from user and consumer constituencies beyond the legal profession who ought to have an interest in the CJC's work, but do not automatically see its relevance. And those interviewed said they were unclear about the nature of the appointment process. If recommendation 12 to increase substantially the user representation (including consumer groups and lay advice) on the Council is accepted, some effort beyond press advertisement will be required to attract sufficient good quality applicants. This will involve both engaging with a wider group of stakeholder interests to stimulate their general interest in the work of the Council, and also direct encouragement (without commitment to success of course) of applications from specific individuals - including those who have had involvement in CJC committees and events (as now), and those who have not. The press advertisements could also be made more inviting by use of more vernacular language, rather than the current close reflection of the language of the 1997 Act. If the Council is to be rebalanced towards user interests generally, it is likely that some initial appointments may need to be made of people who have not had a great deal of (recent) dealing with the Council.

- 9.6 At present, members are normally appointed for a minimum period of two years in the first instance, with the possibility of reappointment, subject to satisfactory past performance and provided that the maximum period in office does not exceed ten years. The decision making arrangements for reappointments (or not) are not widely understood, and current (and prospective) members need to be given more explicit guidance on this subject.
- 9.7 For an organisation that meets only three/four times per year, an initial period of appointment of two years is quite short, especially for anyone appointed without previous involvement in CJC committees or big tent events. It would be better to have a normal minimum term of appointment of three years but capable of termination after two in the event of poor attendance or weak contribution. And it would be in line with public appointments practice elsewhere, endorsed by OCPA, for a first reappointment (for a second three year term) to be seen as normal in the interests of retention of skills and experience, subject to performance; but for a second reappointment (within the maximum total length of appointment of ten years) to be rare. Such a normal expectation would have to be subject to the needs of the Council at the time as well as performance of the individual, since the balance of membership will need to change over time, and there will be a need for regular infusions of new members bringing new ideas and experience.
- 9.8 The Council is reasonably diverse from an equalities standpoint at present (8 women out of 26, and one BME member), but this is an area where eternal vigilance is required.

## Judicial appointments

- 9.9 The Lord Chief Justice (LCJ), in consultation with the Lord Chancellor, appoints all judicial members to the CJC, from District and Circuit Judges to members of the senior judiciary. The LCJ has delegated his responsibility for these appointments to the Master of the Rolls (MR).

## Appraisal

- 9.10 For all CJC appointments, it will be important to have regard to the OCPA and Cabinet Office guidance on appraisal. At present, the Chief Executive writes reports on members at the end of each two year term if renewal is in contemplation. If appointments are extended to three year terms, with removal during that term a possibility if performance or attendance is weak, and with renewal a presumption if performance is good, then it will be important for appraisals to be done regularly. The Cabinet Office Guidance envisages that appraisals are done annually, normally by the Chair, and including a discussion with the member. In the case of the CJC, an appraisal at the two-year point is likely to be the one that guides a reappointment decision after three years, unless a judgement is deferred pending a further period of activity. The Council needs to strengthen its appraisal arrangements, and should draw up a short policy statement to be agreed with the Minister and to be given to all members on appointment or reappointment covering the frequency and form of appraisals, and indicating clearly who will undertake them.

## Induction

- 9.11 On first appointment, all new members of the Council need sufficient time to acclimatise and to familiarise themselves with the work of the Council in order to make useful contributions. New members may find the experience of Council meetings quite daunting, especially if they have not previously been involved in the work of the Council or its committees etc, especially as Council meetings are infrequent and they might not be used to interacting with members of the senior judiciary. This should include a tailored induction pack possibly including a members' handbook along the lines produced for CPRC members, a discussion with the Chief Executive about which committees to join, and a series of discussions with the Chair, the Chief Executive and experienced Council members about the role of the Council and its working methods.

## **Appointments to Committees**

- 9.12 Most interviewees were unclear about the process for appointing members of the committees. They did emphasise though, the importance of having an open and transparent appointment and reappointment process. One concern expressed was that it took too long to appoint or remove members, with arguably too much discretion in the hands of the Chief Executive. Many people would be interested to get involved with the work of the committees or other events, but that was often difficult, as opportunities to join did not arise often, they were not advertised widely and some events were by invitation only.
- 9.13 There is currently no formal appointment process for members of the committees, including the Executive Committee. CJC members are appointed to committees by the Chief Executive on behalf of the Master of the Rolls as Chair. Members are usually selected after discussion with the Chair of the relevant committee (and the Master of the Rolls where the candidate is a member of the judiciary), who will often have a clear view on desirable committee members. The Chief Executive often imposes a limit on the number of members of each committee. He will also propose possible candidates. This approach applies both to members of the Council itself (who will have been appointed by open competition as described above), and to other committee members appointed by direct invitation.
- 9.14 Provided that the chair and at least two other members of each committee are also members of the Council, and therefore initially appointed through the open public appointments procedure, it is reasonable and proportionate for other committee members to be appointed by invitation. There should however be scope for people to express an interest in becoming a member of a particular committee, or committees in general (or indeed of the Council itself), though without commitment on the Council's part. And it is of critical importance that the Chair of the Council and the Chief Executive, who have the ultimate responsibility for selecting committee members continue to take great care to ensure that those invited have the respect of their peers, and collectively demonstrate a wide range of relevant knowledge and experience.

**Recommendation 16.** No changes should be made to the formal system for appointing members of the CJC itself, except that the normal minimum term should become three years, as against the present two. Within the requirements laid down in advance by the minister on composition under the Act, and subject to the requirements of balance, appointments should be made on merit on the recommendation of a panel constituted in line with OCPA guidance.

**Recommendation 17.** The CJC, with the approval of the minister (who is ultimately responsible for non-judicial appointments) should develop a published policy setting out the method by which CJC appointments are made, the duration of appointments, the requirements for a diverse composition, the basis on which reappointments may be made (a presumption of one reappointment subject to good performance, but subject to the overriding needs of the Council at the time), and the arrangements for appraisal of members.

**Recommendation 18.** Interest from potential candidates should be canvassed directly, especially from user interests; and in order to encourage applicants from a wide variety of expertise and backgrounds, the CJC should periodically issue invitations for expressions of interest, as part of the appointment process for membership of both the Council and the committees.

**Recommendation 19.** A formal induction process should be introduced for new Council members, together with continuing support for each member during their first year in the post.

**Recommendation 20.** The appointment of members to the committees should continue to be carried out by the Chief Executive on behalf of the Master of the Rolls in consultation with the Committee chair, and with the Council Chair as appropriate.

## 10. Communications

- 10.1 It was apparent from the interview programme that the biggest single weakness in the CJC's performance in recent years has been in communications - within the Council itself, with potential members, with external stakeholders including users and potential users, and with those whom the Council wishes to influence. This is essentially a consequence of the Council, and especially the Secretariat, devoting insufficient time and resource to these matters.
- 10.2 Beyond those who take part in the Council's work through the Council itself, its committees and events, the Council has reasonable visibility in the legal profession (both through the legal trade press and through attendance by the Chief Executive in particular at wider legal professional events), though it is much less visible to the Bar than to solicitors; but it has minimal visibility in the wider public world, apart for example from some coverage in the insurance trade press and occasionally in the national press. This mirrors a wider lack of visibility and understanding in society of the civil justice system. A well-known legal journalist, who is in touch with the Secretariat, sees the CJC as 'largely invisible'. Poor visibility inevitably reduces the CJC's influence, especially on issues that do not fall to be dealt with formally through civil procedure rule changes.
- 10.3 Most Council members, and all the committee members to whom we spoke, had a very poor awareness of the range of issues the Council was addressing, apart from those they were directly dealing with themselves. This means that the Council has few ambassadors in the legal profession and the judiciary or beyond; it also means that the Council is not well placed to take an overall view of its own work programme.
- 10.4 The CJC website at present is hopelessly inadequate. The homepage is remarkably uninformative, with for example no direct link to a current list of members, or to the identity of the Chief Executive and his contact details (this information is only to be found in the most recent annual report, which is therefore frequently out of date). Nor is the structure of the Council and its committees easily found, or the way in which interested individuals or organisations can seek membership of the Council or its committees. As noted in section 9, the appointments process is, and is seen to be, relatively opaque.
- 10.5 Some effort is made, mainly by the Chief Executive, but also to a lesser extent by other Council members, its chair and its Secretariat to brief the media, and to offer interviews. At present, only published reports and

press releases are put on the website. It would be normal nowadays for a public body such as the CJC to publish (via the website) its current work programme, minutes of meetings and committee meetings and reports of big tent events, and most working papers. There will be occasions (though this should be fairly rare for a body like the CJC) when a discussion needs to be kept confidential at least for a period, or where a consultation paper is being developed and it does not make sense for the iterations in draft to be made public prematurely.

- 10.6 Those individuals who take part in committee work, or in big tent events, gain a picture of their particular field of contribution, and value their involvement. But even here, they often lack a context of the Council's overall work; and the weak communications capability means that the wider stakeholder community of business, consumers and individual users rarely understands what is afoot (there are of course exceptions - for historical reasons if no others, the insurance industry is well apprised of developments). Improvements need to be developed in consultation with these stakeholder interests to ensure that they are effective.
- 10.7 A series of steps need to be taken to remedy this situation, and specifically to:
- Improve the visibility and understanding of the CJC
  - Improve the position of the CJC as an authoritative, independent and influential source of advice to government on civil justice
  - Enable the CJC to communicate effectively with stakeholders within the civil justice system and beyond
  - Enable the Council to communicate effectively with its own members and committee/working group members

**Recommendation 21.** The CJC Secretariat should devote some dedicated resource to a major and sustained improvement in its internal and external communications, to deliver the goals at para 10.7 and recommendations 22-26 below.

**Recommendation 22.** The CJC should develop a style of communication that is generally open, clear, consistent, constructive, well informed and responsive; and seeks input and collaboration with its main stakeholders.

**Recommendation 23.** The CJC should substantially improve its website, to include an informative home page with direct links to its membership; its appointments processes; its structure; its current work plan; its recent publications; agendas, minutes, papers for recent Council and committee meetings, reports of recent conferences and seminars, except where there is a genuine need for confidentiality. The website should be badged independently of the MoJ. Its FoI publication scheme should be revised to support this approach.

**Recommendation 24.** Consideration should be given to the production of a regular (say 4 or 6 times per year) electronic newsletter for both Council and committee members, and for wider civil justice stakeholders, drawing together information about current and prospective CJC activities, opportunities for involvement, and articles or speeches on current issues (either specially written or linked to original sources with a summary), on the model - suitably adapted - of the AJTC newsletter 'ADJUST'. This would help to develop the CJC as a central hub for information and debate on developments in civil justice.

**Recommendation 25.** Council and committee members should be consulted on ways in which they would like to see internal communications improved.

**Recommendation 26.** Plans should be drawn up to improve the quality, attractiveness and relevance of the Council's 2-way communications generally with its wider stakeholder community, probably involving additional publications, press briefings and interviews, invitations to attend meetings, bilateral discussions, inclusion on the circulation of any electronic newsletter. This should be done in consultation with stakeholder interests.

## 11. The Secretariat

- 11.1 The Secretariat to the CJC is small, comprising the Chief Executive and a supporting team of about 4 full time equivalents. The Chief Executive is highly influential and well regarded by all the interviewees who commented. His role mainly revolves around managing and delivering the work programme (including playing significant roles in CJC mediations), acting as the focal point for Council members, and ensuring that the Chair is well briefed. The support team arrange the generally well regarded CJC events, take minutes at committee meetings; manage the recruitment of, and day to day relations with, members; and are regarded as friendly and approachable.
- 11.2 However, the secretariat (apart from the Chief Executive) has been designed and recruited to provide basic administrative support, and does not have the policy skills to enable it to support the substantive work of the Council. This coupled with the volume of work and the lack of a fully structured work plan has led to the secretariat being less effective than might be expected. This ineffectiveness manifests itself in:
- the difficulties with maintaining the website and communications more generally;
  - the variable quality and timeliness of meeting minutes which vary from excellent and informative records of Chatham House type events to some records of committee meetings which demonstrate a real struggle on the part of the writer to understand what is being said (which can of course be quite legal/technical at times), are on occasion circulated very late, and which were the subject of complaint from some Council members;
  - limited support for members of the Council and its committees (and Chairs in particular) by way of follow-up action to decisions etc;
  - the inability of the secretariat to provide the back up in desk research and paper writing (for e.g. digests of recent developments, or specific chronologies) that other similar bodies often achieve. See paragraphs 6.18-6.19 above.

To summarise, the main two areas where the Secretariat is currently under-performing are communications and research/work requiring policy skills, for example drafting minutes and summaries of papers, follow up action points etc. Although it is not necessary that all members of the Secretariat (excluding the Chief Executive) undertake policy work, more Secretariat staff should have sufficient understanding of the policy issues involved to enable them to carry out desk research, and to draft minutes, summary papers and correspondence effectively.

- 11.3 The acute problem over communications would best be addressed by the creation of a new Secretariat function (probably around 50% of a full time post) to manage all aspects of communications, notably:
- Webmaster for the CJC site
  - Stakeholder engagement, including identification and relationship management with key stakeholders, consultations with stakeholders and the judiciary, attendance at major CJC events
  - Media relations (including press releases, press briefings and interviews by Council members and the Chief Executive, other publicity, principal contact for the media)
  - Internal communications structures with Council and committee members, including production of the electronic newsletter proposed at recommendation 24 if adopted
  - Preparation/compilation of the CJC annual report
  - Related correspondence
- 11.4 The lack of policy support for the Chief Executive and committee chairs is less acute than the communications gap, but could be quite substantially remedied by the appointment of one or two research assistants to the CJC, rather has been done for a number of years by the Law Commission and the AJTC (often recent graduates either from the UK or from commonwealth countries, usually on limited term appointments). The CJC has only done this intermittently, when there have been gaps in the normal permanent staffing; examples of the very useful work they have been able to do, or might do in the future, are listed at Annex 3 (compiled by the Chief Executive). If the CJC seeks to recruit some additional resource for these purposes, it is for their consideration whether to look to the MoJ pool of internal talent (where the CJC has historically suffered from its distance organisationally from ministers, but where the refreshed role set out in this review could prove more attractive), or to look to fixed term research assistants/interns on the Law Commission /AJTC model, or to look to secondments from law firms or other user interests - or some combination.
- 11.5 The Council has hitherto been wary of accepting secondments from law firms, with an eye to unfair advantage to the firm on the secondee's return. That problem is liable to be overstated, though it would be important to avoid any suggestion of bias *while the secondee was working for the CJC* - e.g. by avoiding a situation in which a secondee from a prominent claimant personal injury firm worked on personal injury issues, or related costs issues.

- 11.6 It is not clear to what extent the CJC budget at its present level could accommodate these two areas of desirable reinforcement, of which the communications role is the more urgent, e.g. by redeployment of existing posts, or by offsetting savings in other areas. The scope for the latter is quite small, since the total budget for the CJC is itself small, at about £330,000 per year, of which some £200,000 currently goes on staff costs. So accepting both these proposals might involve some increase in budget; but the review has consciously left this managerial working through to those charged with responding to the review.
- 11.7 The Secretariat is also responsible for the overall budgetary management of the Council's expenditure, and for the Council's compliance with the general governance requirements placed on NDPBs. The main financial control regime is MoJ mainstream IT. An additional spreadsheet is run to provide more up to date and accurate management information. This shows actual and forecast spend on a monthly basis set against the main expenditure headings; the main areas of expenditure other than direct staff costs are travel and subsistence costs for members, committee members and staff; and the costs of the events and conferences that the Council puts on.
- 11.8 The Council uses basic MoJ compliance mechanisms, full separation of authorities for commissioning budgetary expenditure, and for authorising it. Financial authority is delegated. A budget manager inputs data, and a compliance officer runs the controls. Individual profiles are maintained for members' travel and subsistence, coupled with fairly detailed predictions of the costs of all committees.
- 11.9 These arrangements, which are monitored from time to time by the MoJ budget sponsor, seem effective and proportionate to the scale of the Council's operations.
- 11.10 The Council maintains a Register of members' interests. Members are asked to complete a form on appointment, re-appointment, or if circumstances change. The Chief Executive provides advice where necessary; conflicts arise rarely, either over political memberships, or over financial interests, but are usually capable of being managed satisfactorily.
- 11.11 Finally, the Chief Executive in particular carries the main responsibility for managing the relationship between the CJC and the MoJ as sponsor department and provider of the budget. While his principal responsibility is necessarily to the Chair (and to the Council as a whole), in practice the chief executives of successful advisory bodies see managing the relationship with the parent department as central to the role. At its most basic, it concerns the negotiation of the annual budget (and accountability for it). Beyond that, it involves ensuring a good set of working relations with the range of involved officials; an open flow of information in

both directions; a broadly collaborative approach; and a 'no surprises' relationship. Getting all this right maximises the body's influence while maintaining its necessary independence.

**Recommendation 27.** In addition to strengthening the resource devoted to communications (recommendation 21), careful consideration should be given to the options for strengthening the policy capability (recommendation 11) of the secretariat in support of the work of the Council itself and its committees, both through the redefinition of job specifications, and/or through the recruitment of relatively inexpensive support staff as research assistants or interns. In particular, consideration should be given to a reinforcement of the Secretariat's capacity to support the Council, in order to help ensure that CJC advice is authoritative and evidence based.

## Conclusions

If the recommendations in this report are accepted and implemented over the rest of 2008, the Civil Justice Council should then:

- Have a clear sense of future direction
- Have a forward work programme that commands the support of its members, reflects its overall objectives, and concentrates on the priority areas of the civil justice system, in the interests of users, and where it can make a difference
- Have a membership that balances legal and judicial expertise with a wide range of user and consumer insight
- Have a set of committees that reflect the Council's priorities
- Be able to communicate effectively, through a variety of means including a much improved website as well as conferences, published papers, contributions to revisions of the CPR and the media, with its own members, with stakeholders in the legal profession and beyond
- Have a fully staffed and expert secretariat capable of supporting the whole of the Council's business in a timely and effective manner
- Use the expertise of its members to best effect in the limited amount of time most of them are able to devote to CJC business
- Reinforce its reputation as an authoritative, rigorous and relevant source of practical proposals and advice in the civil justice field, exploiting the wide range of skills and experience among its members.

Jonathan Spencer

June 2008

## Annex 1: List of contributors to the review

Tamsin Allen\* - *Bindmans LLP*  
Association of British Insurers - (*Stephen Hadrill and Justin Jacobs*)  
Association of Personal Injury Lawyers - (*Denise Kitchener*)  
His Honour Judge Bailey  
Bar Council - (*David Hobart*)  
Mr Justice Bean  
Michael Black QC\* - *Two Temple Gardens Barristers Chambers*  
BMA Medico-Legal Committee - (*Dr Jan Wise*)  
Sir Henry Brooke  
District Judge Burn\*  
Lord Justice Burnton\*  
Vicki Chapman\* - *Law Society*  
Citizens Advice - (*Teresa Perchard*)  
Civil Court Users Association - (*Brian Havercroft*)  
Alex Clark - *Secretary to the Family Justice Council*  
Sir Anthony Clarke\* - *Master of the Rolls and Head of Civil Justice*  
Dominic Clayden - *Norwich Union*  
His Honour Judge Paul Collins CBE  
Legal Services Commission - (*Crispin Passmore and Colin Stutt\**)  
Confederation of British Industry (CBI) - (*Susan Anderson and Duncan Campbell*)  
Council of Mortgage Lenders (CML) - (*Samantha Barnett*)  
His Honour Judge Dight  
Jonathan Dingle - *Civil Mediation Council*  
Lord Justice Dyson  
Enforcement Services Association - (*Vernon Phillips*)  
Amanda Finlay - *Ministry of Justice*  
Andrew Frazer\* - *Ministry of Justice*  
Graham Gibson\* - *Groupama Insurances*  
David Greene - *London Solicitors Litigation Authority*  
Tony Guise - *Guise Solicitors and London Solicitors Litigation Association*  
Mark Harvey\* - *Hugh James Solicitors*

---

\* CJC Member

Janet Howe - *Ministry of Justice*

Steve Humphreys - *Former Chief Executive of the Law Commission, and Interim Director of Judicial Offices*

High Court Enforcement Officers Association Ltd - *(Claire Sandbrook)*

His Honour Judge Graham Jones\*

District Judge Robert Jordan\*

Alan Kershaw - *former Chief Executive of the Council for the registration of Forensic Practitioners*

Alistair Kinley\* - *Berrymans Lace Mawer Solicitors*

Eral Knight - *Ministry of Justice*

Robin Knowles CBE QC - *South Square Chambers*

Law Society Civil Litigation Committee - *(Stephen Mason and Martin Heskins)*

Vicki Ling\* - *Consultant and member of the management board, Lewisham Citizens Advice*

Dan Mace - *Citizenship Foundation*

Nicola MacKintosh\* - *Mackintosh Duncan Solicitors*

Simon Margolis - *Premex Services*

Lord Justice Moore-Bick\* - *Deputy Head of Civil Justice*

Professor Richard Moorhead\* - *Cardiff University*

Jeremy Morgan QC - *39 Essex Street*

Professor Rachel Mulheron - *Queen Mary University of London*

Robert Musgrove - *Chief Executive, Civil Justice Council*

Motor Insurers' Bureau - *(Ashton West)*

Michael Napier\* - *Irwin Mitchell*

National Consumer Council - *(Steve Brooker)*

Dr Renatto Nazzini - *Office of Fair Trading*

Robert Nicholas - *Ministry of Justice*

Bob Nightingale - *London Legal Support Trust*

National Health Service Litigation Authority - *(Steve Walker)*

Mark Ormerod - *Ministry of Justice*

Professor Martin Partington

Alasdair Pepper - *Carter-Ruck*

Lord Phillips of Worth Matravers - *Lord Chief Justice of England and Wales*

Bridget Prentice M.P. - *Parliamentary Under-Secretary of State for Justice*

Brian Raincock - *Law Assist*

Pat Reed - *Ministry of Justice*

---

\* CJC Member

Neil Rose - *Journalist*  
Joshua Rozenberg - *Journalist*  
Kevin Rousell - *Ministry of Justice*  
Anna Rowland\* - *Law Society*  
Shelter - (*John Gallagher*)  
CJC Secretariat Staff  
Janet Tilley\* - *Motor Accident Solicitors Society*  
Thompsons Solicitors - (*Tom Jones and Rachel Sarfas*)  
District Judge Monty Trent\*  
UK Register of Expert Witnesses - (*Dr Chris Pamplin*)  
John Usher\* - *Trade union legal consultant*  
District Judge Michael Walker CBE (*Secretary, association of District Judges*)  
Tim Wallis\* - *Crutes Law Firm*  
Laura Wilkin\* - *Weightmans*  
Which? - (*Deborah Prince*)  
Mike Wrankmore - *Ministry of Justice*  
Robert Wright - *Ministry of Justice*

---

\* CJC Member

## Annex 2: Summary of CJC work areas

The majority of the specific business of the Council is undertaken by its various committees. Their main activities involve analysing and responding to proposals and consultation papers; consideration of current policy issues and problems; organising workshops, seminars and other events; and producing recommendations and advice to Government. A summary of the main committees' most important recent work is set out below.

### Access to Justice

The main purpose of this sub-committee is to promote awareness of civil justice, to make recommendations for improving service delivery, and to improve access to information and representation. The committee has mainly been concerned with:

- providing advice on civil court fees. A Fees Consultative Panel was formed to take forward the Council's work on that area including responses to the MOJ's consultations on court fees.
- consideration of the need to increase awareness and information about access to justice and legal rights.
- a project aimed at increasing awareness within Government of the importance of civil justice. The Financial and Social Costs Group was created to encourage research on the matter. It produced a paper, which was submitted to the House of Commons Constitutional Committee as part of their enquiry into civil legal aid access to legal services.
- the Public Legal Education Working Group, which aimed to raise the profile of access to justice issues particularly among younger people.
- the debate on the future of Civil Legal Aid, which followed Lord Carter's report on reforming the Legal Aid system.

### Access to Rehabilitation

This committee was set up to consider how to make rehabilitation play a more central role in the personal injury compensation system.

The committee has:

- considered amendments to the pre-action protocol and civil procedure rules that may help to promote early rehabilitation
- participated in rehabilitation initiatives by MoJ and Department for Work and Pensions, which aim to promote rehabilitation and embed it within the claims process

- contributed to the work of the many voluntary groups who are active in this area
- organised a forum attended by interested stakeholders to debate the future direction of rehabilitation in civil claims. The focus of the event was to examine where the CJC could add unique value and make a difference in both the perception and delivery of claims-related rehabilitation services
- begun work on a new strategy to raise awareness, positively influence party behaviours, and continue to develop early access routes to rehabilitation within the civil justice system.

## Alternative Dispute Resolution

The main role of this committee is to undertake work supporting the use of ADR in the Civil Justice system. Its main contributions have been:

- a number of amendments to the Civil Procedure Rules resulting from proposals put forward by the committee
- proposals to the Secretary of State that use of ADR should become mandatory
- hosting a forum on the development of ADR in the County Court, which brought together both judiciary and members of court staff to consider whether and if so how in-court mediation schemes might be developed
- sponsorship of a research project by Dr Sue Prince into the working of the pilot 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. Dr Prince discovered that, in fact, the scheme worked surprisingly well, was liked by court users, and seemed to lead to savings in judicial time
- organization of a successful judicial training event on the importance of ADR. The purpose of the event was to give judges a better feel for the importance of mediation as a dispute resolution method.

## Enforcement

The enforcement committee's aim was to monitor progress of the Lord Chancellor's Department Enforcement Review, which ultimately led to the *Tribunals, Courts and Enforcement Act 2007*. It responded to a number of consultation papers including proposals for reform of bailiff law, the insolvency review and the Law Commission's consultation paper on Distress for Rent.

## Experts

The Experts committee was set up to evaluate the approach to and utilization by the civil justice system of expert evidence. It was involved with

- The creation of the Protocol for the Instruction of Experts to give Evidence in the Civil Courts, and a subsequent review of the protocol (together with CPR part 35).
- Consideration of the possible Accreditation of Experts.
- A response to the Consultation Paper the Use of Experts, Quality, Price and procedures in publicly funded cases.
- Factors the courts should take into account when deciding whether to give permission for the evidence of single or separate experts
- Enforcement of rules on the use of experts.

## Clinical Negligence and serious injury

The objective of this committee is to consider and monitor current problems and proposals in the law and practice of clinical negligence and serious injury claims. Its main contributions have been:

- A detailed response to the Chief Medical Officer's report "*Making Amends*". It also considered and put forward proposals in relation to amendments to the *Law Reform Personal Injury Act 1948*.
- A contribution to a consultation about the draft rules, draft Variation Order, and draft Practice Direction. They then responded to consultation in respect of the way in which Part 36 payments would operate in relation to periodical payments.
- On the policy issues, and the drafting of the rules and practice directions arising from the April 2005 changes to section 2 of the *Damages Act* with regard to periodical payments, together with all the consequential changes to the CPR.
- A submission to the MOJ in 2006 that analysed the law and case authorities on who should bear the costs of caring for a seriously disabled accident victim who was entitled to public assistance with his needs.
- Taking forward some useful work on claims for care that had been started during the Woolf enquiry in the late 1990s by producing drafts of model instructions for care experts, a questionnaire for claimants and a model report.
- A response on behalf of CJC to the MOJ consultation on damages.

## Costs

The main purpose of this committee is 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.

The CJC set up a Costs Working Group in [2003?] to consider options and data required for introducing fixed recoverable costs for personal injury disputes. A number of forums took place to analyse the problem and devise a suitable model that could achieve a broad degree of consensus. Participants achieved consensus on the shape of a scheme that brought predictability to the level of costs payable by insurers to claimant solicitors in relation to the vast majority of road accident claims that settle before legal proceedings.

A consultation exercise was conducted in May 2003 using the Civil Justice Council's Costs Answerbank, an internet based service that has provided an opportunity for any individual or representative body to keep up with costs developments, and allowed them to contribute their views throughout the development of costs solutions, complete a questionnaire, and provide their views. These views became a vital part of the process. The outcome of the consultation exercise, together with the framework agreed at the previous forum provided an "industry agreed" scheme that became operational on 1 January 2004.

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

A series of mediation events took place resulting in agreement on a number of schemes, which have helped to reduce significantly the satellite litigation that delayed the settlement of costs in hundreds of thousands of cases, and acted as a building block for further agreements in other costs areas.

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 Civil Justice Council has examined systems in other jurisdictions. Members of the costs sub committee have visited other countries for meetings and exchange of views.

As a result of further mediation work of the Civil Justice Council an 'industry' agreement on levels of success fees to be paid in conditional fee cases in claims relating to industrial disease caused by asbestos, vibration white finger and industrial deafness among others was reached. After receiving ministerial approval the agreement was implemented by the Rules Committee in CPR Part 45 effective from October 2005.

A forum was hosted by the Civil Justice Council in July 2005 in relation to predictable after the event insurance premiums. Work was also undertaken in relation to Predictable fees for medical reports, leading to an agreed outcome. At the request of the relevant stakeholders the Civil Justice Council also hosted a series of meetings during 2005 with a view to simplifying the process of handling road traffic claims below £10,000.

More recently, the Committee has published a series of papers on alternative funding structures, including the possible application in the UK of contingency fees, and the possible operation of third party funding arrangements.

## Housing and Land

This committee has been created to consider and respond to proposals relating to civil procedure specific to housing and land cases. The committee has

- prepared a pre-action protocol for possession claims arising from arrears of rent. This work has been done in co-operation with the MOJ. The Civil Procedure Rules Committee determined that the protocol should apply only to social housing landlords and not to private landlords. In that form the protocol was approved and published in July 2006. It came into effect on 2 October 2006. The protocol was welcomed by practitioners
- developed a further protocol relating to mortgage possession claims.
- made submissions on the Law Commission's papers on proportionate dispute resolution in housing.
- followed closely and worked with the MOJ on the development of the law during the course of the year following the decisions in *Harlow District Council v Hall* and *Bristol City Council v Hassan & Another*. Those decisions have fundamentally altered the view of the court of suspended possession orders.
- discussed issues relating to civil process for housing and land cases including alteration to court forms relating to housing cases and responded to the Law Commission's consultation papers on Towards a Compulsory Purchase Code, Renting Homes Consultation Paper on Status and Security and Renting Homes Consultation Paper on Sharing Homes.

## Annex 3: Possible role for research assistants at the CJC

The CJC has employed research assistants on an occasional basis, and found them to be highly valuable. Recruitment is at HEO level, and the type of work undertaken (with specific recent examples active or planned) includes:

### Internet and other legal research

- *The history of recent case law on the costs of care, plus an analysis of academic and other articles*
- *Summaries and common features of other jurisdictions procedure (eg on class actions)*

### Legal Briefing for meetings

- *Summaries of civil justice reform papers or procedures from other jurisdictions, and commentary thereon*

### Maintaining up to date case law (including international) on specialist subjects

- *Recent satellite challenges on cases funded by after the event insurance*
- *US, Australian, Canadian, and EU antitrust claims with legal summaries*
- *US study of cy pres distribution judgments*

### Preparing draft consultation papers

- *Costs of Future Care*
- *Mortgage Arrears Possession Protocol*

### Discrete project work with council members, committee chairs, or the CEO

- *Costs of Future Care*
- *Mortgage Arrears Possession Protocol*
- *Public interest claims*

### Minute taking at technical legal events to publication standard

- *Rehabilitation*
- *Collective Redress Substantive law and procedural issues*
- *Third Party Funding*

Drafting “think pieces” to get projects underway

- *Costs of future Care*
- *Substantive law on collective redress. Do we need legislation or can we implement by court rules?*

Drafting CJC advice papers, in particular preparing the historical or citation elements

- *Collective redress (providing case law citations, and historical introduction)*





The views expressed in this document, are those of the author, not necessarily those of the Ministry of Justice (nor do they reflect Government Policy)

© Crown copyright 2008

Produced July 2008

Further information or alternative format versions can be made available upon request to Evdokia Zyrtydou, Ministry of Justice, Rule Committee and Justice Councils, Civil Law and Justice Division, 5th Floor Selborne House, 54 Victoria Street, London, SW1E 6QW

020 7210 1762

[www.justice.gov.uk](http://www.justice.gov.uk)