

## SHADOW CIVIL JUSTICE COUNCIL

**Minutes of the Eighth Meeting of the shadow Civil Justice Council held on 19<sup>th</sup> January, 2021 at 4.15 pm via Webex video conferencing.**

Attendees: Mr Justice McAlinden (Chair)  
District Judge Brownlie  
Master McCorry  
Cormac Fitzpatrick (Law Society)  
Liam McCollum QC (Bar)  
Paul Andrews (Legal Services Agency)  
Peter Luney (NICTS)  
Laurene McAlpine (DoJ)  
Mandy Kilpatrick (OLCJ)

Secretariat: Kim Elliott (OLCJ)  
Katharine McQuade (OLCJ)

In attendance: Jim O'Callaghan and Janet Hunter (Housing Rights)

1. The Chair welcomed everyone to the meeting and thanked the members for their attendance. He extended a warm welcome to Jim O'Callaghan and Janet Hunter, who were in attendance to update members on the mediation service provided by Housing Rights.

### Apologies

2. Apologies were noted from Michael Foster (DoF).

### Previous minutes - shadow Council meeting on 9<sup>th</sup> September 2020.

3. The minutes of the last meeting were agreed and should be published.

### COVID-19: Business Continuity and Recovery

4. Mrs Kilpatrick reported that the latest guidance from the Lord Chief Justice (LCJ) had issued on 15<sup>th</sup> January 2021. The courts are continuing to deal with as much business as possible, the default position being that hearings should take place remotely. The guidance reinforces the message that legal representatives and those involved in proceedings should not attend court unless the judge determines in the interests of justice that their physical attendance is absolutely necessary. The judge will make a decision based on the individual circumstances of the case taking into account the need to minimise footfall.

5. Mrs Kilpatrick also informed members that Northern Ireland Courts and Tribunals Service (NICTS) had updated their guidance on the wearing of face masks in the court estate and that the International Convention Centre in Belfast (ICC) had been officially retained to support NICTS operations. Mr Luney said that NICTS was working closely with the Public Health Agency (PHA) to ensure that the ICC is 'Covid-secure' and that scheduling and flexibility of use at the venue would allow for rigorous cleaning between sessions. The next stage in the project is the provision of consultation / waiting areas from mid-February to align with the Northern Ireland Executive's 'Stay at Home' message.
6. The Chair said he had received very positive reports from colleagues regarding the facilities available in the ICC and congratulated NICTS. He emphasised that the safety of all court users in achieving a fair hearing was the first priority, particularly in light of the transmissibility of the new variant of the virus. He noted that physical hearings should proceed with caution - those where credibility issues required witnesses to give evidence in person, may have to be delayed and a balance would need to be struck in this respect. Mr Fitzpatrick, on behalf of solicitors, welcomed NICTS efforts to ensure business continuity. Mr McCollum QC echoed this sentiment and said that from the Bar's point of view it was important that physical hearings could be accommodated where appropriate.
7. Mr McCollum QC also highlighted a positive development in cases where expert witness testimony was required. He explained that in the early stages of the pandemic cases had stalled where expert witnesses were unable to travel to present their evidence in court however experts could now be facilitated remotely. Mr Fitzpatrick advised that cases which involved multiple experts were more complex to coordinate and queried if there was a protocol in place regarding liaison with court offices to confirm witness availability. The Chair confirmed that Lord Justice McCloskey was currently revising guidance in respect of remote hearings and that this should deal with expert witnesses. The Chair also explained that he held a review list on Fridays to establish the position with Queen's Bench cases listed for hearing the following week and that this assisted with witness scheduling. He considered that some degree of choreography should be applied to ensure witnesses can be facilitated remotely and also have the opportunity to connect via Sightlink to listen to evidence provided by other experts in their case. Mrs Kilpatrick highlighted that the HR1 form was a useful tool for scheduling. The Chair advised members that there were upcoming meetings of the Medical Negligence Liaison Committee and the Queen's Bench Liaison Committee and that the legal profession should liaise with their representatives on the committees to add issues such as this to the agenda.

## Housing Rights Presentation – Jim O’Callaghan & Janet Hunter

8. The Chair invited Jim O’Callaghan and Janet Hunter to address members on the role of Housing Rights (HR) and its new mediation service for Landlords and Tenants. Mr O’Callaghan thanked the Chair for the opportunity to attend the meeting. He advised that HR have experienced a high demand for the mediation service noting a particular increase in issues in the private rental sector which covers over 12,000 households and 1,500 landlords. He gave a brief overview of their new Alternative Dispute Resolution (ADR) service funded by the Department for Communities (DfC) to provide a proportionate, effective means of resolving disputes involving registered landlords without attending court. The service is confidential, informal, cost-effective and assists with both sustaining tenancies or helping them to end in an amicable manner. The service is free at point of delivery and is available from 9am to 5pm from Monday to Friday primarily by telephone, with any face to face meetings being conducted through online-based platforms rather than in person.
9. Mr O’Callaghan said that referrals may be made through HR helplines or directly online and that consent to engage must be received from both parties. Four sessional mediators have been recruited for the purpose of the pilot (not employed by HR) who can be called upon depending on demand. These sessional mediators have undergone specialist housing training to support their own mediation skills. Mr O’Callaghan informed members that a broad range of issues are dealt with by the service including property standards, repairs, arrears, breach of tenancy terms, disputes regarding noise and anti-social behaviour. He confirmed that 186 cases had been referred to the service since April 2020 and with 100% successful outcomes in the 160 cases where both parties had engaged in mediation. Mr O’Callaghan also highlighted what he perceived to be the challenges facing the service, including that around 50% of landlords were still unregistered. He explained that the restrictions necessitated by Covid-19 have hindered the speed at which the service can be developed and that the adversarial system in NI can render it difficult to communicate to the public that mediation can be mutually beneficial for both parties. He felt that participation in mediation was higher in jurisdictions where it is mandatory and embedded in pre-action protocols (PAPs).
10. Ms Hunter addressed members on the specific context of Covid-19, and noted a 33% increase in the number of enquiries for Notice to Quit in the last four to six weeks which have prompted discussion within HR. She had attended a meeting of the Virtual Housing Recovery panel (DfC) and attendees had noted that the impact of the pandemic on the economy and housing market has not been evenly felt. Concerns were registered regarding the disproportionate effect of the pandemic on vulnerable people within the

private housing sector who were in danger of losing their homes. Ms Hunter advised she had met with Mr Justice Robin Knowles who is leading a cross-sector working group of the Civil Justice Council in England & Wales tasked with addressing concerns about the consequences of the current stay on housing possession claims ending. One of the out-workings of this sub-group is a proposal for a 6 month mediation pilot throughout all courts, catering for disputes in both the private and social rental sectors. The pilot will be tied in with the litigation process to help court capacity and recovery.

11. The Chair thanked Mr O'Callaghan and Ms Hunter for their very informative and useful presentation. Judge Brownlie thought it would be helpful if HR could supply a leaflet signposting the mediation service that could be distributed by NICTS staff when issuing listing notifications to defendants in private tenancy disputes. Ms Hunter undertook to follow this up. She confirmed that HR have been liaising with NICTS to arrange for links to the mediation service to be placed on the NICTS website. Judge Brownlie acknowledged that it had been a very difficult year in terms of housing and anti-social behaviour issues and expressed her gratitude to HR and its staff for the invaluable support provided to defendants faced with losing their homes. Judge Brownlie also reported that she had arranged a court in each division to deal with housing cases and would ensure contact was made with HR regarding the availability of their staff to attend to support those coming to court.

**Action: Ms Hunter to confirm if a HR mediation service information leaflet has been supplied to NICTS for distribution.**

12. Mr McCollum QC considered that the suggestion that mandatory mediation should be introduced was problematic and might be found to be counter-productive, as it is premised on the parties coming into mediation voluntarily. Mr Fitzpatrick advised that a sub-committee of the sCJC was tasked with reviewing the existing PAPs, and noted that the Commercial PAP sets out that parties *ought* to consider mediation and suggested that there may be merit in any High Court and County Court PAPs, which were applicable to housing cases, making a reference to mediation in similar terms. Ms Hunter said that Mr Justice Knowles had also considered the issue and opted to actively encourage mediation before the legal process reaches completion.

**Action: Sub-committee on PAPs to consider inclusion of wording to encourage mediation in High Court and County Court PAPs applicable to housing cases.**

13. Ms Hunter confirmed that this private sector pilot was funded by DfC at £80k a year and would be evaluated at the end of the extended three year period. The Chair thanked Mr O'Callaghan and Ms Hunter for attending and congratulated them on their work on the pilot to date.

**Mr O'Callaghan and Ms Hunter left the meeting at this point.**

### **LITIGANTS IN PERSON (LIP)**

14. The Chair reported that work in this area has been impeded by the pandemic. Furloughed staff, working on the University of Ulster (UU) project developing tools for LIP returned to work in September and good progress has been made with development of support materials. (It is not known if this has been again impacted by the new restrictions). Focus has been on two areas - a repository of information on family proceedings and a navigation tool to help parties to identify the most appropriate option for resolving family disputes. Material will be accessible through a website designed and maintained, at least initially, by the UU and funded by the DoJ. The Chair confirmed that data protection issues will be at the forefront of the navigation tool. Initial feedback has been positive, and there will be the potential to further develop the website over time, to include information for parties to civil proceedings.
15. The Chair informed members that following a presentation on the NICTS Modernisation Portfolio in December, a representative from the group (Professor Grainne McKeever) was invited to join the NICTS Modernisation Portfolio Stakeholder Advisory Group which aims to gather views on the plans for modernisation from a wide range of key users of court services. The Chair also said that he understood that the Contentious Business Committee of the Law Society has invited the LIP Reference Group to present to its next meeting. He confirmed that LIP should remain a priority area for the sCJC and updates on the ongoing work should be provided in due course.

### **Civil Restraint Orders**

16. Mrs McAlpine advised that DoJ colleagues are obtaining external legal advice on the issue of whether civil restraint orders are already within the power of the court or will require Court Rules changes. Mrs McAlpine agreed to share the legal advice, when obtained, with the Office of the Lord Chief Justice (OLCJ).

**Action: Mrs McAlpine to share DoJ legal advice on civil restraint orders (when received) with OLCJ.**

### **THE OVERRIDING OBJECTIVE: AN EFFICIENT AND TIMELY PROCESS**

#### **Out of court settlement of cases involving unrepresented minors**

17. The Chair noted that this issue was addressed in Mr Justice Peter Kelly's Report on the Review of the Administration of Civil Justice in Ireland which recommended that this practice should be outlawed. Mrs McAlpine

confirmed that a consultation paper on the subject had been drafted but as part of this work DoJ colleagues had further examined the numbers of cases settled without legal representation and found that in the period 2017-2019 just 65 of 794 cases involved unrepresented minors - all of which were settled at a figure below £5k (88% of these had settled at below £3k). Mrs McAlpine explained that the Department has to be satisfied that a problem exists that requires a legislative remedy. She said that a meeting had been arranged at the beginning of February with Maurece Hutchinson, solicitor and ABI representatives to discuss the issue further.

18. The Chair opined that the key issue was the lack of court approval to ensure that these awards were appropriate. Judge Brownlie referred to meetings she and the Chair had with the insurers and reiterated that it was for the court to decide whether the settlement was an appropriate figure and that funds should be lodged in court for the investment and protection of the minor or person under disability.
19. Mrs McAlpine felt there was a need for proportionality and confirmed that the Department would bear in mind the points raised. She noted that the Scottish Law Commission is also considering a consultation paper in this area where the position in both the UK & Ireland currently has no requirement for cases to come before the court for approval unless they are already the subject of litigation. Mr Fitzpatrick said that, from the Law Society perspective, even if the number of cases at stake is small a remedy would still be desirable. Mr Andrews concurred with the need for protection of funds to be used for the benefit of the minor until they come of age. **The Chair summarised the views of the majority of sCJC members and emphasised the need to ensure a system is in place to protect the vulnerable in our society, irrespective of the volume of such instances.**

#### Pre-Action Protocols (PAPs)

20. Master McCorry reported that the first meeting of the PAP sub-committee had taken place remotely on 9<sup>th</sup> December 2020 and that the minutes of this meeting had been circulated for the sCJC's information. He advised that the initial focus of the sub-committee had been on settling the Terms of Reference (TOR) as set out in the minutes. The sCJC was content to approve the TOR.
21. Master McCorry advised that an initial programme of work had been discussed, commencing with Clinical Negligence and Defamation. Members had agreed need for the input of relevant experts in drafting the protocols and requested the sCJC Chair to contact the Law Society and Bar Council seeking their approval for experts to be co-opted onto the sub-committee as required. The Chair agreed to write to both the Law Society and Bar Council in the terms requested, and seek nominations for experts initially in the field of defamation.

22. Master McCorry suggested that it would also be proper for the Bar to be represented on the sub-committee, and that a member should be sought with expertise across a number of fields. The Chair agreed that this was appropriate and Mr McCollum QC consented to join the membership of the sub-committee. Master McCorry confirmed that the next meeting of the sub-committee was scheduled on 17<sup>th</sup> February 2021.

**Action: Chair to write to both the Law Society and Bar Council seeking their approval for the PAP sub-committee to co-opt subject matter experts to assist with their programme of work. Nominations to be requested from both in the field of defamation in the first instance.**

Review of Practice Directions (PDs)

23. Mrs Elliott said that the OLCJ Legal Team, working with the Judges' Reference Library, have issued lists to the relevant High Court Masters and Presiding Judges asking them to identify which PDs are obsolete and should be revoked or updated, and those which are still active and current. The majority of responses have now been received and approximately 40 out of 250 PDs remain uncategorised. Further research will be required for these. In terms of next steps, those PDs which have been identified as obsolete will be referred to the LCJ for a decision as to whether they should be formally revoked. The team will then consider establishing a formal process for new and revised PDs to ensure that the register remains up to date and can be accessed on-line by all who may need it as per recommendation CJ27.

**ALTERNATIVE DISPUTE RESOLUTION (ADR) AND MEDIATION**

DoJ consultation on funding for intra-litigation mediation

24. Mrs McAlpine updated members on the DoJ consultation on funding for intra-litigation mediation. A draft general authority issued to key stakeholders on 13<sup>th</sup> January 2021 for informal consultation and it was proposed to issue a formal consultation in March. Mr Andrews also advised that a general authority pilot for the use of psychiatrists and psychologists as expert witnesses in public law Children Order cases in the Family Proceedings Court would take effect from 25<sup>th</sup> January 2021. He would be interested to see what demand there was for these initiatives and what is practical in the first instance.

**THE COUNTY COURT AND SMALL CLAIMS COURT**

County Court financial jurisdiction consultation paper

25. Mrs McAlpine confirmed that DoJ hope to publish the finalised proposals for 12 weeks consultation in early February and that an update would be provided at the next meeting.

**Action: Update to be provided on consultation paper at the next meeting.**

### *Other Areas - Action Points from last meeting*

#### Courtroom technology

26. Mr Luney reported that the installation of Wi-Fi in the judges' chambers in Laganside was due to be completed by the end of the week. He also advised that the new courtroom technology kit had been installed in 22 courtrooms prior to the pandemic and that 38 courtrooms in total had now been upgraded. While no courtrooms in the Royal Courts of Justice (RCJ) have been upgraded yet Mr Luney confirmed that they have access to video conferencing facilities. He also reported that the International Convention Centre (ICC) is now being utilised for court business and that NICTS is working with DoJ regarding the launch of two Remote Evidence Centres (RECs). The next focus for NICTS will be upon bringing additional courtrooms for jury trials on stream with the appropriate technology.

#### Judicial Digitalisation Steering Group

27. The Chair informed members that the LCJ had asked Mr Justice Horner to lead a Judicial Digitalisation Steering Group (JDSG) to explore judicial requirements for modernising courts, both in the short and long term, to feed into the wider NICTS Modernisation plans. Mr Justice Horner is due to report back to the LCJ in April/May 2021.
28. The Chair advised that the group had observed demonstrations of two electronic file sharing systems – the Bar's Optimised Brief and Bundle Service (**OBBS**) and **Caselines** (used by HMCTS and some other jurisdictions). The demonstrations were followed by a short presentation by PA consulting who are working with NICTS on their digital modernisation strategy and provided some information to the group on their findings of systems in use in other jurisdictions. The Chair also informed members that the Judicial Studies Board (JSB) has arranged for Professor Richard Susskind OBE, the author of 'Online Courts and the Future of Justice', to deliver a presentation early next month on 'Digitisation and the Future of the Courts'.
29. Plans are now being progressed to pilot e-bundles for specific areas of business to allow the group to explore the functionality and usability in court. **The aim of the pilots will be two-fold: to inform future judicial requirements for digitalised courts, and identify if any short-term solutions can be established during Covid-19.** Mr Luney said that prior to Covid-19



NICTS had recognised that a heavy reliance on paper processes was one of the greatest constraints on the court system. He considered that pilots being progressed would allow NICTS to test online processes in different areas, however from early feedback it was recognised that some areas were more suited to digitisation than others.

30. Mr Fitzpatrick considered that the pandemic might accelerate the need for solicitors to embrace digital solutions and invest in case management systems and that it was interesting to see the courts moving forward in this area. The Chair commented that the JDSG had the benefit of Mr Justice Huddleston's prior experience and that he was particularly conscious of the need for compatibility and accessibility. Mr Fitzpatrick also noted that the sound quality of the Sightlink system in the RCJ could be improved upon and there was discussion surrounding how poor sound quality could render review hearings problematic.

#### Online Dispute Resolution (ODR)

31. Mr Luney confirmed that modernisation was a priority for NICTS and would be taken forward by the Chief Modernisation Officer when appointed. Interviews for this post are being held in early March. He also informed members that a meeting with DoJ was scheduled the following day to explore how ODR for small claims could be moved forward.

#### Disability

32. Mr Fitzpatrick advised that the work of the Law Society 'Legally Able' group had stalled due to the pandemic. He agreed to update the sCJC at the next meeting.

**Action: Update to be provided at the next meeting.**

33. The Chair reported that a disability representative had been sought to join the sCJC Advisory Group. An approach was made to Disability Action and Patrick Malone, Head of Policy, has been nominated to join the group.

#### Clinical Negligence

34. Master McCorry explained that due to the pandemic it has not been possible to continue monitoring performance at Masters' reviews to see if any improvement of standards has resulted from the work of the Law Society's Clinical Negligence Practitioner's Group (CNPG). He considered that it should be easier to assess progress after the CNPG protocol document issues.

#### Personal Injury Discount Rate

35. The Chair informed members that four pre-action protocol letters have been served on the DoJ regarding this issue, and explained that as the matter was the subject of litigation he would not seek an update from Mrs McAlpine but

that this would not prevent any member of the sCJC from raising any issues. He noted that the Justice Committee had referred to the matter at their meeting on 14<sup>th</sup> January 2021 and agreed to consider it further when the Department had responded to the Committee's request for an update on the position on setting an interim rate. The Chair also said that it appeared that the Justice Committee was not minded to agree to accelerated passage. Mrs McAlpine advised that the question of accelerated passage was a matter for the Assembly and the **subject was due to be discussed again at the Justice Committee on 28<sup>th</sup> January.**

36. Mr McCollum QC said that the issue was causing frustration for the profession and speculation as to what the rate might be was holding up the settling of cases. Mr Fitzpatrick explained that from a solicitor perspective the matter was causing difficulties for clients facing uninsurable prospects when placing business or home insurance due to the uncertainty. **The Chair hoped that clarity and certainty could soon be brought to this area of law in the interests of plaintiffs and defendants.**

#### ICOS Case Tracking System

37. Mr Luney confirmed that the ICOS Case Tracking Online Service user guide is available on the NICTS [website](#) and that this had been sent to the Law Society. He also advised that he had asked operational colleagues to produce video guidance which would hopefully be available by the end of the business year.

#### Mr Justice Peter Kelly's Report on the Review of the Administration of Civil Justice in Ireland

38. The Chair updated members on the recommendations set out in Mr Justice Kelly's Report ('the Kelly Report') and noted that there was a large emphasis on case management, PAPs and PDs. He commented that it was encouraging that the general thrust of the [Gillen Report on Civil Justice](#) and the [Kelly Report](#) while independently reached, were in the same direction, and encouraged members to read the Kelly Report. The Chair highlighted some of the recommendations, including:
- The €1 million threshold for admission of cases into the Commercial Court should not be increased.
  - The introduction of a procedure for automatic discontinuance of cases - subject to certain exceptions - which, within 30 months of their commencement, have not been notified as ready for trial and in which no steps appearing in the court's record have been taken within that time to progress the proceedings.

- Provision for a defendant to make or increase a lodgement or tender without leave of the court upon delivery of a further medical report by a plaintiff in personal injuries proceedings.
- The establishment of a specialist list for clinical negligence actions and a dedicated list, as an adjunct to the Commercial Court, to hear and determine intellectual property disputes and disputes concerning technology.
- A model for standard production of documents.
- Legislation for a comprehensive Multi-party Action (MPA) procedure. A model along the lines of the Group Litigation Order procedure in England and Wales which would require claimants individually to institute proceedings in pursuit of their claims and join an MPA register.
- An emphasis on better provision of information for court users.

#### Consultation on Enhancing Legal Protections for Victims of Domestic Abuse

39. The Chair informed members that the sCJC had received a letter from DoJ advising of their public consultation on enhancing legal protections for victims of domestic abuse, through a proposal to establish Domestic Abuse Protection Notices and Orders. Members were invited to consider if the sCJC should issue a collective response to the consultation document, and if so responses should be sent to Katharine McQuade by 5<sup>th</sup> February.

**Action: Members to consider the consultation document and forward any responses to secretariat by 5<sup>th</sup> February for inclusion in a collective response on behalf of the sCJC.**

#### Advisory Group

40. The Chair reported that the third meeting of the Advisory Group took place remotely on 2<sup>nd</sup> December 2020, and noted that members were keen to assist with the pre-action protocols exercise, or any similar work being taken forward. He invited members to raise any issue that they considered would benefit from specific correspondence being sent to the Advisory Group. No issues were raised.

#### Next Meeting

41. The date of the next meeting was agreed as **Tuesday 27<sup>th</sup> April 2021 at 4:15pm.**