

## SHADOW CIVIL JUSTICE COUNCIL

**Minutes of the Seventh Meeting of the shadow Civil Justice Council held on 9<sup>th</sup> September, 2020 at 4.15 pm via Webex video conferencing.**

Attendees: Mr Justice McAlinden (Chair)  
His Honour Judge Devlin  
District Judge Brownlie  
Master McCorry  
Cormac Fitzpatrick (Law Society)  
Paul Andrews (Legal Services Agency)  
Michael Foster (DoF)  
Peter Luney (NICTS)  
Stephen Martin (DoJ)  
Kim Elliott (OLCJ)

Secretariat: Katharine McQuade (OLCJ)  
Ciara McFall (OLCJ)

In attendance: Sinead Mulhern (LIP Reference Group, Chair)

1. The Chair welcomed everyone to the meeting and thanked the members for their attendance. He extended a warm welcome to Sinead Mulhern, the Chair of the Litigants in Person Reference Group, who was in attendance to update members on the work of the Group.

### Apologies

2. Apologies were noted from Laurene McAlpine (DoJ) and Mandy Kilpatrick (OLCJ).

### Previous minutes - shadow Council meeting on 11<sup>th</sup> March 2020.

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

### COVID-19: Business Continuity and Recovery

4. The Chair opened by commending a recent webinar arranged by Professor McKeever, and attended by around 60 participants, which provided a good insight into, and opportunity to discuss, the difficulties being encountered by the legal profession.
5. Mr Luney updated members on the business continuity arrangements within the court estate, explaining that business had initially been consolidated into four court hubs which continued to facilitate urgent business in accordance

with the Lord Chief Justice's (LCJ) directions. Technology was quickly rolled out to support the move to homeworking, and allow more business to be dealt with through remote hearings. NICTS programme to reopen 'COVID-secure' buildings to support the move of court business out of the hubs commenced in phases on 10<sup>th</sup> and 24<sup>th</sup> August into twelve venues with a further three to open in September, at which time there will be 45 operational courtrooms each day across all but three of the smaller hearing centres. Mr Luney advised that the LCJ has requested that NICTS urgently explore the use of external venues to supplement the reduced capacity within the court estate.

6. The Chair referred to the LCJ's regular meetings with the Bar and Law Society and other key stakeholders. He noted that some criticism had been received that civil business had been afforded less priority and was disappointed at the poor take-up of the LCJ's offer of opportunities to list civil cases in the High Court over the summer months. Judge Devlin confirmed that he had worked directly with the Recorder during July to kick-start county court business by identifying short cases that could be dealt with and then listing these at appropriate intervals. Judge Brownlie also advised that the District Judges were making similar efforts to progress civil work and had dealt with a large number of interlocutory applications. Mr Fitzpatrick reported that there was a huge appetite amongst solicitors to try and progress civil justice but many firms had furloughed staff. He noted that delays created blockages in firms and also had potential cash flow implications.
7. The Chair invited Mr Fitzpatrick to bring forward any ideas from the Law Society's perspective to address the backlogs or improve business continuity arrangements. Mr Fitzpatrick suggested that the timeliness of electronic communications from NICTS regarding court lists could in some instances be improved, perhaps with a greater use of ICOS to identify specific case references and recipient email addresses. Mr Luney confirmed that these comments would be taken on board.
8. Members noted that the link to the [Civil Justice Council's report](#) on the impact of COVID-19 measures on the civil justice system and court users in England and Wales was circulated on 5th June 2020. No specific issues were identified.

## LITIGANTS IN PERSON (LIP)

9. Professor McKeever had informed the Chair that the work of the Litigant in Person (LIP) Research Advisory Group had to be paused due to COVID-19, with two of the Research Associates on furlough. The development of the website and checklist will resume on their return, as will the second aspect of the project which relies on researchers being able to observe court hearings, either hybrid/face to face/in person. The Group have requested a supplementary grant from the Nuffield foundation to conduct a survey on the impact of COVID-19 on the family justice system in NI, and hope to engage LIPs in particular in providing a response. The Chair suggested that NICTS and OLCJ should also contribute to the project.

### Sinead Mulhern – LIP Reference Group, Chair (*work update*)

10. The Chair invited Ms Mulhern to address members on the work of the LIP Reference Group. Ms Mulhern thanked the sCJC for the opportunity to attend and connect with the shadow Council, and gave a brief overview of the background and remit. The focus of the group is twofold: (i) looking at the information and support available to LIP and identifying gaps/suggesting improvements; (ii) relationship building. Ms Mulhern said that the group consisted of 16 members, eight of these were LIP and eight were from other stakeholder groups. She explained that the group was unique in this respect due to the strong representation of LIP.
11. Ms Mulhern reported that the group first met in February 2019 to prioritise the key themes arising: providing an effective vehicle in allowing LIP to be heard; identifying practical steps to make the court easier to navigate for LIP; finding ways of building a greater mutual understanding. Progress in the first year included visits to identify difficulties with navigating the courthouses, and suggest possible solutions to NICTS. Ms Mulhern also informed members that, having identified mistrust and misunderstanding between LIP and other stakeholders as an issue, a two day workshop on dealing with distressed clients was attended by around 105 practitioners who reported positive feedback.
12. Ms Mulhern envisaged that the Group would want to build upon the work already commenced and consider how to further develop this interaction with NICTS. She also noted that the impact of COVID-19 on LIP would also need to be assessed, and that priorities would be set following discussion at the upcoming meeting in September.

13. The Chair thanked Ms Mulhern for her time and valuable interaction with LIP and stated that she would have an opportunity to provide updates to the sCJC on a regular basis. Ms Mulhern welcomed Mr Fitzpatrick's suggestion for an address to the contentious business committee of the Law Society, which could be arranged through her or Eileen Ewing.
14. Mr Martin advised that DoJ would be open to funding further LIP events, and would welcome any suggestions. The Chair noted appreciation for this offer.

**Ms Mulhern left the meeting at this point.**

#### Civil Restraint Orders

15. The Chair noted discussion at the previous meeting surrounding whether to extend the introduction of civil restraint orders to Northern Ireland. He said that DoJ have taken the view that the making of such an order is already a matter within the power of the court in exercise of its inherent jurisdiction and have cited the decision [in Bhamjee \[2003\] EWCA](#). However, OLCJ legal advisors are of the opinion that the introduction of specific rules on civil restraint orders in NI, would clarify the Courts' powers for the benefit of the judiciary, legal practitioners and parties to proceedings, including personal litigants. The Chair noted the approach of European Law which favoured formalised procedures over discretion, and considered that Rules would provide a firm, clear and transparent framework within which the courts could operate – particularly in the County Court as a court of statute.
16. Master McCorry, Judge Devlin and Judge Brownlie agreed that a more structured approach that would provide a firm, clear and transparent framework, was preferable as opposed to relying on the inherent jurisdiction of the court. Mr Andrews drew to members' attention the existence of prohibitory directions powers under [Rule 30](#) of the general legal aid regulations which provide that legal aid applications will not be considered for up to 3 years where previous misconduct in making repeat applications has been determined as an abuse of the Order. He acknowledged that this provision did not contain a very fulsome description of the process but nonetheless highlighted the fact that there was a comparative power in place.
17. The Chair requested that Mr Martin feed back the views of the sCJC to the DoJ and ask that they reconsider taking forward a formalised rules-based approach.

**Action: Mr Martin to feed the discussion back to DoJ, and request that consideration be given to a more formal, structured approach through Rules, and provide an update for the next meeting.**

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

### Out of court settlement of case involving unrepresented minors

18. The Chair reported that both he and Judge Brownlie had met with representatives of DoJ on 7<sup>th</sup> May 2020 and subsequently with the insurers' representatives and Maurece Hutchinson of JMK Solicitors on 18<sup>th</sup> May and implored the insurers to progress matters of their own volition. The insurers' representatives undertook to feed back the discussion to the Executive Team at the Association of British Insurers (ABI), who then responded on 19<sup>th</sup> August confirming that their members recognised the concerns and expected their Code of Practice to be adhered to, but as a trade body it has no enforcement powers in this regard. Mr Martin advised that the subject matter for the Miscellaneous Provisions Bill is now closed and therefore this issue would have to be considered in the next Assembly mandate. He confirmed however that the DoJ planned to issue a consultation by the end of this calendar year. The Chair commented that in the absence of legislative provision, the consultation responses may help further discussions with ABI, to address this unsatisfactory position.

**Action: DoJ to provide update to sCJC following consideration of consultation responses (*expected mid 2021*)**

### Pre-Action Protocols (PAPs)

19. The Chair drew members' attention to recommendation CJ21 of the Civil Justice Report which states that "*New pre-action protocols incorporating the best features of England and Wales pre-action protocols and our own pre-action protocols be drawn up.*" He informed members that OLCJ had produced a paper setting out which PAPs currently exist in Northern Ireland, which exist in England & Wales, identifying potential gaps and reviewing these against the recommendations in the Civil Justice Report. The Chair requested nominations to participate in a sub-committee tasked with reviewing and drafting PAPs in accordance with CJ21. He noted that OLCJ have offered to engage in some initial work on behalf of the group, supported by interested Advisory Group members, and would circulate drafts to the sub-committee for comment and revision. Mr Fitzpatrick, Master McCorry, Mr Andrews and Judge Brownlie volunteered to participate in the sub-committee.

20. It was agreed that, while prioritising PAPs would be a matter for the sub-committee, it may be sensible to focus initially on the following: Clinical Negligence (subject to the content of the new Clinical Negligence Practitioners Group protocol); Personal Injury Claims; Professional Negligence and Defamation.

Review of Practice Directions

21. The Chair advised members that while not in the format of a register, all Practice directions since 2006 are available to the profession and others externally on the [JudiciaryNI](#) website. The Judges' Reference Library also maintain a manual list dating back to 1959. In accordance with recommendation CJ 27 'A composite register of all the practice directions be drawn up by the Office of the LCJ', the Library, working with the OLCJ Legal Team, have agreed to progress this work and provide an update to the sCJC at the next meeting.

**Action: Item to be included on the agenda of the next meeting.**

## ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION

DoJ consultation on funding for intra-litigation mediation

22. Mr Martin advised that the consultation document is being finalised for presentation to the Justice Committee in November, and DoJ would like to engage with key stakeholders including sCJC members in advance of the 8 week consultation period. The Chair confirmed that once received the document would be circulated to members and they would each be invited to respond in writing as this would be required before the next meeting.

**Action: Draft proposals to be circulated to members for comment once received from DoJ. To be discussed at next meeting.**

## THE COUNTY COURT AND SMALL CLAIMS COURT

DoJ consultation on County Court financial jurisdiction

23. Mr Martin explained that the original timetable for consultation had slipped to allow for inclusion of the 2019 Judicial Statistics (publication delayed until September) in the consultation paper. It is hoped this will issue by the end of December.

**Action: Item to be included on the agenda of the next meeting.**

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

### Courtroom Technology

24. Mr Luney confirmed that NICTS had commenced work on extending Wi-Fi into all chambers in Laganside and that work was being coordinated over weekends to ensure minimal disruption.
25. Video conferencing facilities had been installed in Master Sweeney's Chambers and were on order for the other Masters' Chambers as part of the technology refresh.
26. In terms of any scope to extend the Managing Digital Evidence project to civil business, Mr Luney outlined the different phases for the MDE programme in the criminal sphere, involving usage of the commercial product BOX which, if successful, could be considered for non-criminal business.
27. Mr Luney suggested the Bar Library's Optimised Brief and Bundle service (OBBS) may be a quicker, less sophisticated solution to receiving and using e-bundles for civil and family business in the short term to supplement rather than eliminate bundles. The Chair asked whether the OBBS and BOX product were compatible and if OBBS could be integrated into the BOX MDE service. Mr Luney advised that the two products were not mutually exclusive and confirmed that PDF documents can be uploaded into BOX. It was agreed that this issue would be kept under review.

### Online Dispute Resolution (ODR)

28. Mr Luney advised members of a recent presentation to NICTS, Judge Brownlie, OLCJ and DoJ and that a refined proposal was being drawn up to help determine the best way forward, working in conjunction with University of Ulster for a Small Claims pilot. He also confirmed that a Chief Modernisation Officer is to be appointed in the coming months as a dedicated resource to progress this, among other, modernisation projects. The Chair nominated DJ Brownlie to liaise with the new official, when appointed, to establish their priorities going forward and feedback her assessment of the proposed direction of travel at the next meeting.

**Action: Judge Brownlie to liaise with the new NICTS Chief Modernisation Officer, when appointed, and provide an update at the next sCJC meeting regarding their priorities and proposals.**

### Disability

29. The Chair invited Mr Luney to provide an update on when NICTS plan to consult on Estate/ICT Strategies and expect to establish a Disability sub-committee. Mr Luney explained that work in this area has been significantly impacted by the pandemic and that specialists engaged for this work have now been fully redeployed to meeting COVID-19 provisions. He stated that NICTS are still hopeful to finalise their Estate/ICT Strategies this financial year, and the Disability Strategy will form part of that paper.

#### Hearing Impaired Litigants

30. Mr Fitzpatrick reported that the Law Society had encountered similar difficulties in progressing the work of the 'Legally Able' group due to the pandemic and the resultant number of solicitors still on furlough, however he said that Sheila McGivern was now taking the lead in this area and that he would put her in touch with Mr Luney, and agreed that an update should be provided at the next meeting.

**Action: Item to be included on the agenda of the next meeting.**

#### Clinical Negligence

31. Master McCorry informed members that progress in this area will be difficult to assess due to the business continuity arrangements necessitated by the pandemic, as it would be very difficult to measure improvement in performance in the absence of live hearings.
32. Master McCorry confirmed that the Clinical Negligence Protocol has now passed through the various Law Society bodies and has recently gone to the the Queen's Bench Judge. He advised that it was likely that the judge would discuss the protocol at the next meeting of the Queen's Bench Liaison Committee.
33. Mr Fitzpatrick queried whether it would be possible under the current business continuity arrangements for NICTS to notify solicitors individually by email of cases which had been listed before the Queen's Bench judge or Master. He suggested that the statistics show that when court lists are simply published many solicitors do not register that their cases have been listed. It was clarified that, as part of the business continuity measures, certain court lists are issued to the Law Society who then forward on the lists to firms as opposed to individual solicitors.
34. Mrs Elliott advised that solicitors can access details of their own cases through the ICOS Case Tracking online system and that NICTS would encourage solicitors to return to this way of working. The Chair queried whether a

Webinar for the Law Society to explain the workings of this system would assist. Mr Fitzpatrick agreed that this would be very helpful and undertook to feed back to the Law Society that members should be encouraged to check the status of their own cases through the ICOS Case Tracking system. Mr Andrews suggested that a reasonably robust guidance document with relevant screenshots would be equally accessible. Mr Luney said that he would liaise with the ICOS team to confirm what might be possible in the way of training/guidance.

**Action: Mr Luney to make enquiries with the ICOS team regarding what training/guidance might be made available to the Law Society on the ICOS Case Tracking system.**

35. Discount rates - personal injuries

The Chair queried if any update was available from DoJ on the consultation process. Mr Martin advised that DoJ expected to publish views on the way forward in the autumn. Mr Fitzpatrick stated that it was imperative to get a new framework in place and he commended DoJ for the speed with which the consultation process has been progressed. He said that most practitioners were working around the current rate of 2.5% and that, from a personal perspective, a temporary or hybrid solution would not be welcome.

36. The Chair considered that the various workarounds all have shortcomings in terms of the risk for those involved. He suggested that Laurene McAlpine should be invited to provide an update between now and the next meeting.

**Action: Secretariat to request an interim progress update from Mrs McAlpine.**

Correspondence

37. It was noted that a response had issued to Jonathan McKeown, Chair of JMK Solicitors, in the terms agreed.

Community Justice Fund

38. District Judge Brownlie advised members that The Community Justice Fund has distributed its first Northern Irish grant of £53,000 to Housing Rights (HR). She commended the work of HR and the valuable role its representatives perform in court. She also informed members that she had met with representatives of HR today regarding the introduction of a scheme for mediation in private tenancies.

39. Judge Brownlie advised that she had approached HR representatives about the possibility of delivering a presentation to judges in the county courts dealing with these types of cases and that they were very happy to do so. The Chair suggested that a HR representative should be invited to a meeting of the sCJC to address members on the role of HR and the issues encountered.
40. Mr Andrews asked whether it would be possible to consider the scheduling of business in the county court to maximise representation from HR in both the county courts and High Court. Judge Brownlie stated that discussions regarding the scheduling of business throughout Northern Ireland are already underway.

**Action: Secretariat to invite a representative of HR to attend the next meeting of the sCJC, or the following meeting, to deliver a presentation to members.**

#### Advisory Group

41. The Chair 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

42. The date of the next meeting was agreed as **Wednesday 13<sup>th</sup> January 2021 at 4:15pm.**