

SHADOW CIVIL JUSTICE COUNCIL

Minutes of the Sixth Meeting of the shadow Civil Justice Council held on 11th March, 2020 at 4.15 pm in Judges' Assembly Room, Royal Courts of Justice, Belfast

Attendees: Mr Justice McAlinden (Chairman)
District Judge Brownlie
His Honour Judge Devlin
Master McCorry
Dermot Fee QC (Bar Council)
Cormac Fitzpatrick (Law Society)
Laurene McAlpine (DoJ)
Paul Andrews (Legal Services Agency)
Michael Foster (DoF)
Kim Elliott (OLCJ)

Secretariat: Katharine McQuade (OLCJ)

1. The Chairman welcomed everyone to the meeting and thanked the members for their attendance. He formally recorded a note of thanks to Paul Dougan who has stepped down from the shadow Council, and extended a warm welcome to Cormac Fitzpatrick who has taken over as the Law Society representative. It was noted that Dermot Fee QC was in attendance today in place of Liam McCollum QC.

Apologies

2. Apologies were noted from Peter Luney and Mandy Kilpatrick.

Previous minutes – shadow Council meeting on 17th September 2019.

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

Digitisation for & in court

4. The Chairman advised members that the rollout of the new courtroom technology and secure Wi-Fi continues, with 20 courtrooms having been upgraded to date. The intention is to commence the technology upgrade in RCJ courtrooms in summer 2020. Cabling and installation of Wi-Fi in judicial chambers in RCJ has been completed and the technology refresh in the Masters Chambers is due to be completed by Easter.
5. Members agreed that there was little more that the sCJC could do to progress the recommendations within this priority area at this stage and it should be considered as 'in progress' with an annual update until such times as more significant progress can be made. The Chair suggested that NICTS should provide an update at the next meeting on the technology refresh in the

Masters' Chambers and any plans to extend the Managing Digital Evidence (MDE) in criminal courts project to civil business.

Action: Secretariat to record 'Digitisation for & in court' as 'in progress' with annual updates to be provided.

Action: NICTS to provide update at the next meeting on the technology refresh in the Masters' Chambers and any scope to extend the MDE project to civil business.

6. Judge Brownlie said that Wi-Fi is not currently available in the judges' chambers in Laganside Courts. Mrs Elliott said that she would check the position with NICTS who were not represented at today's meeting

Action: Mrs Elliott to check the position and advise Laganside judges regarding the rollout of Wi-Fi to their chambers.

Online Dispute Resolution (ODR)

7. The Chair explained that it was expected that the NICTS Modernisation Portfolio Vision Statement would make reference to ODR as something that will be considered going forward but that it was unlikely to be given priority in the 2020/21 period. Members agreed that this area should therefore be considered as 'in progress' with an annual update until such times as more significant progress could be made.

Action: Secretariat to record ODR as 'in progress' with annual updates to be provided.

Action: NICTS to be requested to share the Vision Statement with members (via the Secretariat).

Litigants in Person (LIP)

8. The Chair advised members that the Chair of the LIP Reference Group, Sinead Mulhern, had accepted the invitation to attend the next meeting of the sCJC to provide an update on the group's work. He also confirmed that, as agreed at the previous meeting, a response had issued to the LIP Reference Group stating that it was not considered appropriate to include a representative of the Group as a member of the sCJC at this time.
9. Ms McAlpine informed members that the work of the LIP Reference Group has focused largely on practical actions such as court visits, and online advice tools. Sponsors of the LIP Reference Group had organised a workshop on 'working with distressed litigants in person' as part of a wider two day visit by the Access to Justice Foundation in February. The Chair confirmed that

members of the judiciary had also attended, and that he had then met with the speakers, Access to Justice, and DOJ representatives.

10. Matters discussed, included acceptance of a genuinely perceived view that there is an unmet need in terms of individuals with legitimate interests that require to be addressed by the court. The issue is how this need should be addressed. Discussion also included how to deal with less common instances where LIPs, or those seeking to support them became disruptive, abusive, or obstructive in court, thereby frustrating the progress of litigation. Members noted their concern that the involvement of some individuals seeking to assist or support can be counter-productive to the interests of the LIP, noting that, unlike legal representation, these individuals were uninsured, and unregulated, and there was no form of redress available to the LIP if they followed poor advice. Mr Andrews confirmed that there had been no reduction in the scope of legal aid, but some of those who may be entitled to legal representation chose to represent themselves.
11. Members acknowledged that there was a small number of vexatious or persistent repeat litigants, who at little or no cost to themselves, were bringing unmeritorious matters against both public and private organisations which subsequently incurred significant time and costs in defending these actions. While there is provision for costs orders to protect the LIP, there is no provision for those defending to recoup their costs. The Chair asked Mrs McAlpine to enquire if consideration was being given to extend the introduction of civil restraint orders to Northern Ireland.
12. Members agreed that misbehaviour should not be tolerated, and vexatious litigation should be discouraged. The Chair suggested that those developing the policy for NI take into account the experience of the judges, the Access to Justice Foundation, and wider groups involved in such proceedings, when debating the way forward for this jurisdiction.

There was an action at the last meeting regarding NICTS exemption and remission policy for civil fees. The Chair reported that the NICTS advised that they had considered the introduction of a merits test but did not take it any further due to statutory and operational constraints.

Action: Mrs McAlpine to pass on the above views to relevant policy leads, and confirm if the Department plans to give consideration to the introduction of civil restraint orders.

Commercial Hub

13. The Chair reported that Mr Justice Horner has established a Commercial Hub Liaison Committee comprising of members from the Bar, Law Society and NICTS. The inaugural meeting was held on 21 October 2019 and it was agreed that regular meetings would be convened going forward to provide a collaborative view as the Hub develops particularly in relation to digitisation. He confirmed that Mr Justice Horner aims to have the Commercial Hub operating on a paperless basis by summer 2020.
14. The Chair circulated a report from the Witness Evidence Working Group on 'Factual Witness Evidence in Trials before the Business and Property Courts' and a notice from the Judge in Charge to Users of the Commercial Court on factual witness evidence. The Chair explained that there had been a review of the efficacy of witness statements in the Commercial Court in E&W and that the sCJC should keep a watching brief on the outworking of the review's recommendations. Mrs Elliott advised that a draft Practice Direction on the use of e-discovery had issued to the Commercial Hub Liaison Committee and would be discussed at their next meeting.

Disability

15. The Chair informed members that the JSB had arranged an 'Access to Justice for Deaf and Hearing People' workshop for all judiciary on 7th November 2019 hosted by the NI Branch of the British Deaf Association (BDA). The workshop addressed issues such as barriers to communication, the deaf identity and deaf people within the court environment.
16. Mr Fee QC advised that a talk was planned for the Bar on access to justice issues for the deaf. He expressed reservations about whether sign language courses would give lawyers sufficient knowledge to enable them to properly consult with clients. Mr Fitzpatrick said that the Law Society were looking at Equality, Diversity & Inclusiveness in terms of culture, and would check what other actions were underway and report back at the next meeting.
17. There was discussion surrounding the availability and expertise of the multiple sign language interpreters needed to accommodate all parties and proceedings, and an acknowledgement that not all were comfortable in court. NICTS funds interpreters required in court. Mr Andrews highlighted that initial engagement was critical, e.g. to determine eligibility for legal aid, and confirmed that Legal Services Agency accepted the cost of required

interpreters (sign or foreign language) as a necessary expense for a first consultation.

18. The Chair reported that NICTS are committed to establishing a Disability Sub-committee, but considered to do so at this point may be premature pending a full review of their Estate and ICT Strategies in consultation with section 75 groups. The Chair suggested that this issue be revisited at the next meeting when Mr Luney should be present.

Action: Mr Fitzpatrick to provide update at the next meeting on the Law Society's strategy to address access to justice issues for the deaf.

Action: NICTS to provide an update on when they plan to consult on Estate/ICT Strategies, and expect to establish a Disability sub-committee at the next meeting.

Clinical negligence

19. Master McCorry highlighted recent difficulties in securing some experts, such as paediatric neurologists, in clinical negligence cases were also being experienced by the Trusts. In terms of improving professional standards, he explained that the primary focus of the Law Society's Clinical Negligence Practitioners Group (CNPG) is now on developing a new protocol, which will be a substantial document covering not just the pre-proceedings stage but post commencement and right up to trial. He said that the key architects of the new protocol were members of the sub-group which advised Lord Justice Gillen during the Civil and Family Justice Review (CFJR). Master McCorry confirmed that a draft of the protocol was with the Law Society Council for approval and that it was anticipated that this process should be completed by May at which stage it should hopefully be shared with the Bar Council and the sCJC. Members agreed that, on the basis that the draft protocol should be available by May, there would be merit in inviting members of the CNPG to attend the June meeting of the sCJC and address members on the protocol and its reception.

Action: Invitation to issue to CNPG for representatives to attend the June meeting of the sCJC and present / discuss the draft protocol. The CNPG to also be requested to share the draft protocol with the sCJC in advance.

Alternative Dispute Resolution and Mediation

20. Mrs McAlpine reported that the DoJ consultation on legal aid funding for intra-litigation mediation had been delayed pending receipt of further legal

advice. Mr Andrews noted that there was no particular uptake in legally aided mediation (on commercial matters).

Action: Mrs McAlpine to provide update at the next meeting.

The county court and small claims court (Civil Hearing Centres)

21. The Chair explained that the NICTS will progress their Impact Assessments in tandem with an extension of the rollout on a pilot basis of centralised civil hearing centres. They have engaged NISRA to design and undertake Exit Surveys which will inform the assessments and wider consultations with regards estates provision and potential further centralisation of civil and family business. The Chair reported that NICTS, OLCJ and the judiciary have been working to formalise the hearing centre in Armagh and to extend the pilot to Belfast. Judge Devlin advised that difficulties had been encountered regarding additional courtroom availability in Belfast and that he would be meeting with the Recorder of Belfast to find a way around this logistical problem.
22. Mrs McAlpine advised that the draft DoJ consultation paper on the financial jurisdiction of the County Court had been prepared and that it was hoped to secure approval to consult from the Minister in the next few days. She said that the Department have been unable to predict the increase in business at the lower tiers, or any consequent impact on judicial resources, but the paper reflects the need for the Civil Hearing Centres pilot to be working well in terms of efficiency for change to take effect, confirming that the proposals would not extend to the equity jurisdiction.

Action: Mrs McAlpine to share consultation with members once approved.

Refresh of Key Priority Areas

23. Members agreed that 'The Commercial Hub' should be noted as largely achieved and should be removed as a priority area for the sCJC going forward. Members also agreed that there was little more that the sCJC could do to progress the priority areas of 'Digitisation and paperless courts', 'Online Dispute Resolution' and 'Disability', and that these areas should be considered as 'in progress' with updates provided annually unless the position changes. 'Personal Litigants' was reconfirmed as an ongoing priority area for the coming year.
24. In light of the progress already being made in the following areas it was agreed that they should be recognised as new priority areas: 'The County

Court and Small Claims Court', 'The overriding objective: an efficient and timely process' and 'Alternative Dispute Resolution and Mediation'.

Action: Secretariat to record changes to priority areas as agreed.

Out of court settlements of cases involving unrepresented minors

25. At the last meeting, under 'Any other Business', members had discussed the concerns raised by District Judge Brownlie and agreed that a letter should be drafted to the Attorney General. The Chair advised that before doing so, he and Judge Brownlie had met with representatives of the insurers involved in settling such claims to discuss the extent of the problem and determine if the insurers' Code of Practice (CoP) could be refined pending legislation to address the primary concern that the rights of the minor are protected and that the financial compensation to which they are entitled is properly invested and protected. He said that the proposals put forward at the meeting regarding a requirement for representation for all minors and persons under disability, regardless of claim value, appeared to be welcomed by the representatives and they undertook to feed back the discussion to members and provide a formal response. The Chair informed members that the response since received fell very short of what had appeared to have been accepted as the agreed way forward. Members agreed upon the terms of a response to issue from the sCJC and that the sCJC should advocate for legislative intervention. It was agreed that the Department should provide an update at the next meeting on how they perceive that this might be taken forward.

Action: Response to issue to insurers' representatives from sCJC in the terms agreed.

Action: DoJ to provide update at the next meeting on how a legislative remedy can be progressed.

Discount rates – Personal injuries cases

26. Mrs McAlpine confirmed that the Minister has asked officials to undertake the statutory consultation with the Government Actuary and the Department of Finance on a proposal to change the discount rate to -1.75%. The Minister will, in due course, give consideration to reviewing how the rate in Northern Ireland is set. Mrs McAlpine advised that there was no timeframe for either process. There was discussion as to the impact this would have on the financial amounts awarded, and the need for the Government Actuary to promptly revise the Ogden Table figures once the new discount rate was implemented. Mr Fee QC asked if the Department could provide guidance that the rate of -1.75% should be used in the interim to avoid adjourning cases

further. Mrs McAlpine said that this was not appropriate for the Department to direct how Judges or the profession resolve cases in the interim.

27. The Chair noted that there was a distinction to be made between the setting of the rate and the consultation process on how it should be set, and the Minister should be given space to make her decision as to the rate as soon as possible, and when made, to be asked to give an indication as to the timescale for consultation as to how to deal with setting the rate in future. The Chair encouraged the professions to allow the Minister the time needed to do so. Mr Fitzpatrick said that transparency around the timescales for both processes would be appreciated and requested that this be communicated once there was more certainty.

Correspondence

28. The Chair referred members to correspondence received from the Chairman of JMK Solicitors, Jonathan McKeown, who had written to the Lord Chief Justice with a proposal that the current Motor Insurer's Bureau (MIB) Arbitration Panel, or an arbitration panel based upon a similar model, could be utilised to resolve quantum only disputes arising from personal injury or road traffic accident claims, in particular those involving an appeal from the county court to the High Court.
29. There was discussion surrounding this proposal, and it was felt that there was no problem to be addressed. Judge Brownlie said that in her experience there was a very quick turnaround on these cases and it was currently a very cost effective system. Members agreed that: (i) there was no reason to disagree with the findings of the CJFR that these cases were best dealt with by the county courts; (ii) there is no current route of appeal to the MIB or other arbitrators and neither has any appellate jurisdiction to deal with cases appealed from any court; (iii) MIB members would not have been subject to the selection process that NIJAC would apply to candidates for judicial office, and (iv) legislative change would be required to give effect to the proposal. It was agreed that a reply should issue to Mr McKeown in these terms.

Action: A response to issue to Mr McKeown on behalf of the sCJC in the agreed terms as outlined above.

LIP Guide for Judicial Reviews in Planning & Environmental Cases in NI

30. The Chair brought to members' attention '[Judicial Review in Planning and Environmental Cases in Northern Ireland – A Guide for Litigants in Person](#)' which had been launched by the Lord Chief Justice at an event held in the Friends of the Earth offices in Belfast on 5th December 2019.

Advisory Group

31. The Chair confirmed that the sCJC Advisory Group had held its second meeting on 8th October 2019 and that the group had been updated on the progress that the sCJC had made to date.

Next Meeting

32. The date of the next meeting was agreed as **Tuesday 16th June 2020 at 4.15pm.**