

SHADOW CIVIL JUSTICE COUNCIL

**Minutes of the Ninth Meeting of the shadow Civil Justice Council held on
27th April 2021 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)
Laurene McAlpine (DoJ)
Mandy Kilpatrick (OLCJ)
Michael Foster (DoF)

Secretariat: Kim Elliott (OLCJ)
Alistair Beare (OLCJ)

In attendance: Patrick Mullarkey (CNPG)
Mark Harvey (CNPG)

1. The Chair welcomed everyone to the meeting and thanked members for their attendance. Apologies were noted from Peter Luney, and later Liam McCollum.
2. The Chair took this opportunity to formally record that in his role as NICTS Chief Operating Officer, Peter Luney had played an invaluable and important role in leading the NICTS through many challenges over the last number of years and wished him well in his new post in The Executive Office. The Chair thanked him for his very meaningful and comprehensive contributions to shadow Council. Council members echoed the Chair's sentiments.

Previous minutes - shadow Council meeting on 19th January 2021.

3. The minutes of the last meeting were agreed and will be published in due course.

Clinical Negligence Practitioners Group (CNPG) Presentation of Revised Protocol

4. The Chair welcomed Patrick Mullarkey and Mark Harvey and thanked them for their attendance at the meeting to speak on behalf of the CNPG. The Chair recorded his sincere gratitude to the practitioners group for all the hard

work in the preparation of the detailed, comprehensive and helpful clinical negligence protocol – noting that was a testament to their dedication in this field to prepare this in such a tight time scale. The Chair invited them to address members.

5. Patrick introduced Mark as the vice chair of the CNPG of the Law Society of NI working from a defence practitioners perspective, while he works on the plaintiff side and inquests. Patrick noted that the clinical negligence sub-committee started to review the previous 2012 protocol in 2018 when it was apparent that the protocol no longer reflected best practice. Master McCorry had raised issues concerning practitioners' standards, especially in relation to expert exchange and expert meetings. The CNPG consulted their membership of over 100 lawyers, and started the drafting process in June 2020 which was undertaken by him, Mark Harvey, Roger McMillan of Carson McDowell and Marysia Kelly of John J McNally, supported by Ann McMahan at the Law Society as unofficial Secretary to the group. The updated protocol and proposed draft clinical negligence expert evidence practice direction is discrete from the overarching commercial court direction and reflects the practice specific to clinical negligence, the manner of exchange or the manner of expert evidence. The group also developed a suite of supporting documentation to be used by practitioners including template letters of claim, response, and agendas for expert meetings to be sent to the court.
6. The CNPG feel that the new protocol sets out best practice and procedure to be followed by practitioners on both sides of clinical negligence litigation, and should allow practitioners to meet the expectations of the court. The new protocol reflects much of the 2012 protocol in areas of disclosure of medical notes/records, health service complaints, alternative dispute resolution and commencement of proceedings but was silent in areas of practice and procedure after issue of proceedings. The revised protocol notes the case management responsibilities of the practitioners, better equipping them when they appear before a Master. The protocol deals with issue of directions from Masters and focusses on expert evidence, rules around this and recommendations on meetings of experts – the nub of any clinical negligence case. It is important there is some rigour applied to these meetings and consistency to avoid multiple disputes. There is much detail in the proposed expert practice direction as to the practical requirements for each of these steps, which may require amendments but are a good starting point for practitioners, who have responded positively to the draft. He stated the overriding objective is to deliver justice to both parties in a proportionate, efficient and economic way – the intention is to avoid cases going to court if this is possible. Only those cases where there is a genuine dispute on facts or points of law should reach court.

7. Mark echoed what Patrick had said, and noted it was a good example of a collaboration between plaintiff and defence representatives. They were keen to roll out a suite of Continuing Professional Development (CPD) events aimed at less experienced practitioners who delve into this complex area of work in conjunction to the protocol. From the defence perspective, he feels the protocol will greatly assist particularly where cases were opened without access to notes, records or expert reports – the revised protocol now requires they must first seek access to notes and records and carry out an investigation before producing a protocol compliant letter of claim setting out the allegations. The protocol introduces a two-tier process - defence practitioners estimate this will eliminate up to 70% of cases at an early stage, and allow them to concentrate on more legally complex or meritorious cases. The revised protocol will hopefully bring consistency and uniformity of approach to this area, and lead to speedier resolutions of claims brought by the structure. Mark noted the world of clinical negligence has changed greatly over the last 10 years, and praised the courts, particularly the Masters, for closer management of the cases. Mark echoed thanks to Roger McMillan and Marysia Kelly who were instrumental in production of these documents.
8. Master McCorry thanked the CPNG members for all their efforts, acknowledging the immense amount of work put in over the previous 2 years. He stated his support for the drafts, which together represent a procedural guide or handbook in a difficult and specialised area of litigation. He hoped they would bring particular benefit to improving practitioner standards in this field, and was content to pause discussions around accreditation recommendations, which he hoped would be unnecessary if the protocol is adhered to. Patrick Mullarkey appreciated the comments noting that CNPG members will be very grateful for this indication.
9. Patrick stated that during consultation the Bar had raised a query regarding mediation, which the sub-committee had considered, but not reflected in the draft as it could not be compelled. It was agreed to review 6 months after implementation to ascertain whether any aspects needed to be amended.
10. It was noted that formal consultation and the imprimatur of the Lord Chief Justice are required before the Practice Direction can be issued, and 2012 protocol revoked. Members agreed that the protocol and Practice Direction should be presented to LCJ for consideration and, if approved, for issue as soon as possible.
11. The Chair thanked Patrick and Mark for the informative presentation and reiterated acknowledgement of the amount of work involved in the preparation of all the documents and templates – and asked for thanks to be passed onto Roger, Marysia and Ann on behalf of the Council and Sub-Committee for their efforts. He highlighted the need for two issues to be

dealt with by the protocol – one being expert meetings particularly with clarity required in regards to procedure to reduce misunderstandings; the second is ensuring disclosure takes place within a reasonable time to allow parties to investigate the merits of the claim. The Chair believes the protocol and Practice Direction work in harmony to ensure this type of case is dealt with in a cost effective and just manner. Patrick Mullarkey and Mark Harvey left the meeting.

ACTION POINT – Mrs Elliott to progress the protocol, practice direction and associated documents for approval by the Lord Chief Justice to issue for targeted consultation.

Covid-19: Business Continuity & Recovery

12. Business is continuing to run remotely, but with in-person hearings increasing where appropriate in line with PHA guidance following the relaxation of the ‘Stay at Home’ provision. Changes have been made to the guidance on the JudiciaryNI website with particular regard to attendance at court, and will be updated as restrictions are further relaxed.
13. Waiting and consultation facilities remain available in the Inn of Court and ICC Nightingale venue (extended until the end of June 2021), for civil and family proceedings in Belfast. The first Small Claims Court hearing took place in the ICC on 12th April using courtroom technology. A review of the potential to increase consultation spaces in all court buildings is due to be completed by the end of May.
14. The Chair had visited the ICC and noted how impressive the facility is. He hoped that it could continue to be used as needed, and suggested it may be useful for witnesses to observe court proceedings via Sightlink while waiting to be called. He suggested this might be possible at little cost, perhaps with Wi-Fi free use by witnesses and their solicitors to access Sightlink using their own laptops without the need for additional screens.

ACTION POINT – Mrs Elliott to make enquires with NICTS and report back to the Chair.

15. District Judge Brownlie advised that the small claims caseload was up to date in regards to first lockdown, and major inroads have been made with 20 cases being reviewed a day, with listings now into September. Small claims are heard in ICC in Belfast for 3 days a week and 2 days a week outside Belfast and the backlog of small claims has greatly reduced.
16. Judge Devlin stated that he had no specific figures for the County Court but reviews of 15/20 hearing loss cases per day for the last 3-4 weeks are progressing well. The main problem is courtroom capacity, with civil courts

constrained to the smaller courtrooms with a maximum capacity of 12 – 14 people. The bulk of hearings are still remote, or hybrid, but there is a backlog of complex cases involving multiple parties or witnesses that cannot be accommodated in smaller courtrooms. These have been listed for in-person hearings with later dates from September, in the expectation that restrictions will be eased further.

17. The Chair noted that High Court cases are currently listed as far ahead as December, with courts competing to facilitate in-person hearings where they cannot be accommodated remotely. Capacity is limited but business is progressing, mostly with counsel and necessary witnesses attending in person, and other parties by remote means.
18. The Chair commended all efforts made by NICTS staff and the judiciary to ensure Covid has had as little impact as is possible, noting that the justice system has been able to continue while other sectors have not. He observed that backlogs had developed while many solicitor firms were closed or had staff on furlough with files not being progressed, and expected that once offices re-open this may increase pressure on demand for court hearings. He felt that generally the system has worked well due to the sterling efforts of court service staff to maintain and provide good service. These positive comments were echoed by Judge Devlin and District Judge Brownlie.

Priority Areas – Progress updates

Litigants in person (LIP)

LIP Reference Group -update

19. The Chair reported that one further personal litigant joined the reference group at the last meeting. It is hoped that further introductions will be facilitated in the near future. The group discussed a response following their presentation on the NICTS Modernisation Programme, highlighting that the involvement of LIPs was critical to ensuring modern services were inclusive. The issue that is of most concern to the group is that LIP who are not technologically able will be placed at a disadvantage as online and digital systems are developed. Assurances are being sought from NICTS in regards to the inclusion of LIP needs in the modernisation programme. The Chair noted the transfer of the LIP webpage from the DOJ website to the Law Department at Ulster University (to be called 'Litigant Voice'), will better demonstrate the independence of this group. Mrs Alpine added that DOJ will continue to provide funding for that site which is to be launched soon, and hoped it will build confidence.

20. The Chair noted with regret that Les Allamby is retiring soon, and the NI Human Rights Commission is likely to appoint a replacement on the group. He noted Mr Allamby's important work in the civil justice field, and other areas.

Civil Restraint Orders - Rules Amendments

21. Mrs Alpine advised that DOJ is still awaiting legal advice. Once received this will be shared with the Rules Committee Secretariat.

The overriding objective: an efficient and timely process

Out of court settlement of cases involving unrepresented minors

22. Mrs McAlpine stated she had a productive meeting with Maurece Hutchinson, solicitor and representatives of the ABI to ascertain the number of cases impacted. The Minister has since announced that she intends to consult on this matter in the Assembly. The draft consultation paper is now being finalised and the intention is to publish it towards the end of June or start of July.
23. The Chair raised a recent amendment to the Civil Procedure Rules and Practice Direction in England and Wales for the court to take appropriate measures for vulnerable witnesses to participate fully to ensure all parties can give the best evidence. The Chair had shared this with the secretary of the Court of Judicature Rules Committee for consideration. District Judge Brownlie stated this would also require consideration by the Rules Committee for the County Court. The Chair suggested Mrs McAlpine might wish to bring it to the attention of the Justice Minister. It was agreed that this proposal should be kept under review by sCJC.

ACTION POINT - Secretariat to note and add to agenda for review at an appropriate point.

Pre-Action Protocols (PAPs)

24. Master McCorry stated that since the last Council meeting the sub-committee on protocols met on 17th February. The Chair noted the comprehensive minutes, which had been shared in advance with members and commended the sub-committee on the amount of work to date.
25. Master McCorry summarised the meeting, and advised that an initial discussion was held on County Court pre-action protocols with the next meeting scheduled for 24th May. At the request of the Chair, the Law Society and Bar Council had nominated two subject matter experts to take the matter

forward. In regards to the defamation protocol Hugh McMahon and Emma Hunt represent the Bar Council and the Law Society, who will consider the position in England & Wales and report back to the sub-committee on the 24th May. A similar procedure will be followed upon moving to consider each protocol - nominated experts will draft a paper for consideration by the sub-committee.

Review of Practice Directions (PDs)

26. Mrs Elliott advised that this review is being taken forward as a joint exercise between the Library and the Legal Unit within OLCJ. A list of over 100 practice directions deemed to be obsolete was issued on 2nd April for targeted consultation with the Bar, the Law Society, NICTS, DOJ and Presiding Judges for each tier - this closes on 14th May. The Lord Chief Justice will then be asked to issue a Practice Direction to formally revoke those agreed as obsolete. Lists of Practice Directions available internally and externally will be updated to reflect the changes. Further research is required for those 40 directions that remain uncategorised, and to update directions, which while active, require to be updated. The process of issuing and revoking Practice Directions will also be formalised to ensure an up-to-date and accurate register is maintained moving forward.

Alternative Dispute Resolution and Mediation

27. Mrs McAlpine informed members that DOJ have been working with the Law Society, Bar and other providers of mediation services to develop an approach for general authority for mediation in legally aided cases and the fees payable and have developed a set of proposals on which to consult. The Minister referenced this work in her statement of 23 March to the Assembly on civil and family justice reform. DOJ plan to consult during May and June. Mr Andrews observed that a range of supporting materials are available to assist those who want to engage to inform their consultation responses.

The County Court and Small Claims Court

28. The Chair noted that DoJ had published their proposals for 12 weeks consultation, which closes on 30th April. Mrs McAlpine noted that some extensions have been granted, and she should be in a position to update at the next meeting.

ACTION POINT - Mrs McAlpine to share update on consultation responses at next meeting.

Digitisation for & in court

29. The Chair noted a recent Fordham Lecture given by the Deputy Head of Civil Justice in England & Wales which described the default position in their jurisdiction as being 'Digital by Default' in future civil cases - live hearings in court will be the exception rather than the rule. He felt this might have gone further than what is anticipated in NI jurisdiction. The Chair highlighted the Vision Statement for [Modernising Courts and Tribunals](#), which was launched publicly on 15 March with the joint approval of the Lord Chief Justice, Minister for Justice and Director of NICTS and sets out their high-level vision for this jurisdiction. NICTS have also issued a draft Digital Strategy 2021-2025 which is being considered by the judiciary, staff and key partners prior to full public consultation.
30. Upgrade of the new courtroom technology (providing upgraded audio and video technology and Wi-Fi connectivity) continues with 44 courtrooms now completed. Wi-Fi is now available in all courtrooms. Courtroom technology has also been installed in the Waterfront International Conference Centre (ICC) for Coroners, Tribunals and Small Claims hearings (Nightingale Courts). The ICC also provides additional staff accommodation, training facilities and waiting/consultation space. The Chair suggested it might be helpful to provide facilities for witnesses to observe hearings in other venues prior to giving their evidence. The contract for a new case management system for the Official Solicitors Office / Office of Care and Protection is due to be awarded in April 2021. The Probate Online Portal is nearing completion of user acceptance testing and implementation is being planned for the end of May to coincide with the commencement of supporting Court Rules.
31. The Chair asked whether it would be helpful in relation to the Probate Portal and rollout of the new technology if members were provided with demonstrations of the software. Mr Fitzpatrick noted the interest of practitioners to see the practical running of a trial using e-bundles and how documents may be viewed and downloaded in remote hearings. The profession would also be very interested in the proposals for new case management systems.
32. Mr Andrews advised that the legal aid LAMS system was largely a stand-alone system, and he would be keen to discuss potential for integration with future NICTS case management systems. He felt there might be benefits for practitioners who have to produce supporting documents to support a legal aid application that either come from the court, or go to the court - barristers currently have no direct access to ICOS and depend on their solicitors to provide court orders or supporting documentation required to lodge their bills. There would be benefit for LAMS to automatically receive information of court orders on disposal of the case. Mr Andrews noted that there are

likely limits to integration and information sharing under data protection, but they would be keen to be part of any conversation with NICTS.

33. Mrs Elliott advised that the Judicial Digital Steering Group (JDSG) will inform progress on digital modernisation on behalf of the judiciary, and that the NICTS has set up stakeholder groups at which the Bar, Law Society, other key stakeholders including Litigants in Person *etc.* will be represented. The Chair asked that those groups note Council members' interest in terms of integration.
34. The Chair emphasised the importance that direct communications take place between the Bar and Law Society with a view to mutual demonstrations of case management systems that are in place, or will be developed by the profession, both in relation to major solicitor's offices but also smaller practitioners firms for early identification of ideas and mutually compatible requirements.
35. Members agreed that a demonstration of the probate portal was not required at this time, but re-iterated the importance of early integration of sectors, which will need to be a key feature of any modernisation or digitisation strategy.

ACTION POINTS - Mrs Elliott to advise JDSG of the sCJC interest in integration between NICTS and LAMs case management systems, and the Bar's request to access case information.

Bar and Law Society representatives to consider how best to take forward communications between the professions around ensuring compatible case management systems.

Members to ensure their interests and concerns are shared with NICTS through their representatives on the Stakeholder Engagement Group.

Judicial Digitalisation Steering Group (JDSG)

36. The Chair encouraged practitioners to avail of the Bar Library's 'Optimised Brief and Bundle Service (OBBS)' saying it is important that solicitor representatives feed into the Law Society the learning they are acquiring with using OBBS for e-bundles. Mrs Elliott provided a progress update on the e-bundles pilot: Training had been provided to 35 participants involved in two cases in a joint session delivered by OLCJ, the Bar Library and NICTS staff on how to produce the bundles and upload them for use in court. One of the cases settled prior to hearing. The family case went ahead before Mrs Justice Keegan and the feedback from all participants was very positive. Three council appeared in court before the judge, all of whom used only the e-bundle consisting of 252 pages including hyperlinks to the legal authorities.

37. All participants felt it was more efficient compared to paper bundles, and were keen to be involved in future trials. The lessons learned will be applied to refine the process for pilot cases planned before the end of term. Mrs Elliott emphasised that the e-bundles pilot is only a small part of the overall judicial digitisation strategy that will feed into the wider NICTS strategy. The Chair noted he would be happy to take part in the e-bundle pilot, and would encourage practitioners in his courts to identify suitable cases.

ACTION POINT - Members to encourage engagement and feedback on the use of e-bundles during the pilot.

Online Dispute Resolution (ODR)

38. Mrs McAlpine stated that DOJ have been supporting the development of an Online Dispute Resolution service, which is being taken forward by external providers with the aim to offer a choice for dispute resolution without the need to bring the matter before the Small Claims court. DJ Brownlie had observed an early demonstration and was happy to advise or assist further, but had noted her concerns that the proposals may not be as expeditious or effective as the court, which had the added benefit of the judge explaining the court process and ensuring risks were understood at the start of each hearing.
39. The Chair noted that while an alternative option to resolve issues without coming to court is welcomed, it is important that it is rigorously tested, and that it would be inappropriate for any judicial office holder to promote or endorse a commercial product.
40. Mrs McAlpine advised that DOJ intends to help launch a pilot before the end of the year – subject to feasibility testing.

Disability

41. Mr Fitzpatrick advised that Sheila McGivern, in her involvement with the Legally Able group, reported that there are two sub-groups, one considering access issues for the deaf community and the other group considering access to the courts estate for clients and solicitors with mobility or mental health issues. Members of the group met with Peter Luney in April and discussed NICTS modernisation programme, review of court estates and the possibility of appointing a disability officer. Discussion touched on online participation and how the use of Sightlink could facilitate those with disabilities. This continues to be a work in progress, and Sheila will keep Mr Fitzpatrick updated.

42. Members agreed that a representative from the Legally Able group should be invited to give a presentation at a future meeting to raise awareness of general issues relating to disability and the access & availability of the courts in line with the recent changes proposed for vulnerable witnesses by the Civil Procedure Rules in England & Wales.

ACTION POINT - SECRETARIAT TO ISSUE INVITATION TO THE LEGALLY ABLE GROUP TO PRESENT AT THEIR CONVENIENCE.

Personal Injury Discount Rates

43. Mrs Alpine stated the Department would only have resolution when there is primary legislation establishing a new framework for setting a rate. The Minister introduced the Damages (Return on Investment) Bill to the Assembly on 1st March with a view to achieving accelerated passage and royal assent by the summer 2021. The Justice Committee have called for further evidence to inform their discussions, which extend their stage until the end of October, so royal assent will not be achieved before next year. Given those circumstances, the Permanent Secretary has decided to change the rate under the existing Wells & Wells framework -1.75%, which will come into operation on 31st May 2021.
44. The Chair noted his disappointment that the Bill could not have been dealt with more swiftly than is the case, as all parties were agreed that the interim rate now to be set is already out of date, and may cause defendants to delay settling cases until the new rate is brought in. It was unfortunate an earlier determination could not have been reached to ensure claimants received the compensation due.

Any Other Business

45. Mr Fitzpatrick requested apologies to be noted on behalf of Liam McCollum who experienced technology issues and was unable to join the meeting.
46. DJ Brownlie stated that she would be nominating her replacement for the next meeting as she retires in August. The Chair recalled on behalf of members a number of issues championed by DJ Brownlie during her time on the Council, which without her considerable enthusiasm, resolve and input would not have been advanced. He personally thanked her for the help, support and guidance he received from and hoped she stays within the justice sector in some role. Members echoed these sentiments. DJ Brownlie thanked the Chair for his comments saying she would very much miss her role as presider but looks forward to continuing as a deputy judge next term.

Date of next meeting

47. The date of the next meeting is **Tuesday 28th September 2021 at 4.15pm.**