

The Law Commission

**HOUSING: PROPORTIONATE DISPUTE
RESOLUTION**

An Issues Paper

ANALYSIS OF RESPONSES

PART 1

INTRODUCTION, STRUCTURE AND METHODOLOGY

- 1.1 This analysis summarises and discusses responses made to the Law Commission Issues Paper, Housing: Proportionate Dispute Resolution.
- 1.2 Sixty two responses were received by the Commission during and in the weeks following the consultation period from 20 March to 11 July 2006. These responses can be categorised into four broad categories: lawyers (including representative organisations) (n = 24); other dispute resolution practitioners (n = 6); organisations (n = 28); individuals (n = 10).¹ This categorisation broadly reflects the interest groups and organisations most concerned with the issues discussed in the paper.
- 1.3 The Commission made efforts to speak at a number of conferences, workshops and other events, as well as conducted meetings with certain organisations and persons. In particular, we were grateful to the Law Society for organising a well-attended seminar on the Issues Paper on 30 June 2006. We were again grateful to Tessa Shepperson for publicising the proposals and facilitating responses through her own website, [landlordlaw](http://landlordlaw.com).
- 1.4 As might be anticipated, there was a variety in the style of responses. A number of organisations commented on the breadth of the discussion in the Issues Paper which, according to one respondent, meant that 'it might well take a paper of the same length to respond properly' (Housing Law Practitioners' Association (HLPA)). Some organisations were able to respond fully, whereas others were unable to do so (and some expressed frustration at being unable to do so). Some respondents, such as mediators and ombudsmen, responded to the parts which most affected their service. Others had particular issues about which they were most concerned. Thus, some respondents raised particular issues of law requiring change, or, in the case of a number of landlord (organisation and individual) respondents, expressed (familiar) concerns about court delays.
- 1.5 Generally, as might be anticipated, respondents conformed to type. In other words, respondents tended to argue that the service they provided was superior to other types; or, where the Issues Paper suggests there are deficiencies, respondents disputed that those deficiencies existed by reference to the service they provide. This means that, although there were some positive responses, there were also some searching questions asked of our proposals. We were accused by some of paying too high a regard to the views of landlords, and, by others, of paying too much heed to tenants' perspectives. Whichever the case, strong opinions were often expressed, sometimes out of frustration at the system and sometimes out of frustration at our approach.

¹ Some respondents could be placed into more than one category.

- 1.6 Having said that, responses were generally both thoughtful and thought-provoking. In questioning our approach or, indeed, in supporting it, respondents made a number of valuable points, interventions, offers of assistance as well as hospitality (such as visits to certain organisations). From whichever perspective, respondents made important points which may require revision to our underlying understandings.

Methodology and contents

- 1.7 Each response has been read against the questions we asked in the Issues Paper. Comments and critiques of our approach or proposals were then documented to enable general themes to emerge. Additionally, respondents own proposals and suggestions for reform were considered.
- 1.8 In this analysis, respondents are referred to by name or, where the respondent has requested confidentiality, by a number in square brackets.
- 1.9 In Part 2, we draw on the responses to make general observations about the nature of this consultation as the publication of an Issues Paper, whilst not unknown for the Law Commission, nevertheless was innovative in style and scope (which was partly why it appeared as an Issues Paper in the first place). The responses suggest that certain lessons could be learnt for the future.
- 1.10 In Part 3, we provide a more detailed consideration of what emerged in the consultation process as the key controversial areas: our starting assumption (including the transformation of the understanding of disputes); the values underlying proportionate dispute resolution in housing; triage plus; ombudsman; the court/tribunal question/s.
- 1.11 It should be noted that certain parts of the Issues Paper proved relatively uncontroversial. In particular, the role of management responses and mediation were less controversial.
- 1.12 In Part 4, we draw attention to alternative proposals suggested by respondents.
- 1.13 Appendix B provides a statistical analysis of the responses. Care should be taken with this analysis as (for reasons discussed in Part 2), certain respondents did not seek to answer all (or, indeed, any) of the questions. Some respondents offered general thoughts on our discussion which were, of course, welcome.

PART 2

GENERAL OBSERVATIONS

THE CONSULTATION PROCESS

- 2.1 The consultation process for the Issues Paper was of a different order from that which the Law Commission usually undertakes. As the issues dealt with tended to the specialist end of the spectrum, the Law Commission adopted a reactive model more in tune with its usual practice.
- 2.2 Having said that, though, the proposals were publicised through different media in the specialist housing and legal press. We initiated and supported meetings and seminars to discuss the proposals, as well as taking part in analogous meetings (for example, concerning administrative justice). We attended a number of conferences of interested organisations, and a number of responses were received as a direct result of visits from Professor Partington.
- 2.3 We were grateful to the University of Kent for supporting an online web discussion forum. However, this proved to be of limited value to respondents and generated an insignificant level of debate, despite attempts to publicise it further. This is an experiment which might be re-tried in the future on more specific issues.

ANALYSIS

General comments

- 2.4 Before discussing the substance of the responses, attention should be drawn to certain general comments made by respondents. The Issues Paper was based on a root and branch rethink, which was theoretically informed, and which led to a considerable number of questions being asked. The consultation process itself offered general questions which, it was hoped, would stimulate discussion and enquiry. Naturally, certain respondents did not seek to answer all the questions but discussed those questions about which they could claim specialist or “insider” knowledge. Others had particular grievances about the system as it stands, which they wished to express.
- 2.5 Although it is the case that respondents generally engaged with the Issues Paper, or that part of the Paper which particular interested them, there were a number of negative comments received which we might consider.
- 2.6 Some respondents found the theoretical approach adopted in the Paper challenging. In particular, the HLPAs and Civil Justice Council’s Housing and Land Committee commented on its challenging approach “for those who are involved as practitioners in the current system. In many ways, we welcome the ‘root and branch’ approach which compels us to stand back from the preconceptions of practice”. Others, it would be fair to say, were less complimentary. For example, some respondents (such as the National Union of Students (NUS), HLPAs and the Advice Services Alliance (ASA)) found that the theoretical approach inhibited a full response. Thus, the NUS response makes the following observation:

The issues paper is very wide-ranging, touching on many different areas, making a variety of assertions and asking numerous questions, but ultimately making few substantive proposals. This makes it difficult to respond to fully. There are a number of areas where we take issue with the paper, but given the difficulties in formulating a fully comprehensive response, we have identified our key areas of disagreement. However, a failure to comment on any particular aspect of the issues paper, should not be taken as our approval of that part of the document.

- 2.7 Others felt that the theoretical approach to the idea of “disputes” as, perhaps, counterintuitive in the subject of proportionate disputes resolution in housing. In particular, the ASA made clear that they believed this was the wrong approach to take. The Law Commission, in their view, should have begun by asking how law and procedures work in practice:

We believe that the document would have benefited from establishing what kinds of housing problems people actually have, which problems have the most serious consequences for individuals and society and the extent to which existing procedures adequately deal with such problems. (para 2.3)

The issues and principal objectives set out in the paper are essentially abstract and applicable to all housing problems or disputes. They do not reflect the current legal obligations imposed by housing law, or the real world in which such obligations are intended to operate. (para 3.1)

- 2.8 Others clearly misunderstood our proposals, or were mystified by them. For example, The Federation of Private Residents’ Associations (FPRA) received a letter requesting their views on our Paper but the “letter was so technical and confusing in language and content that we found it almost impossible to understand”. The term “triage plus” also left some respondents cold, and others suggested alternatives.
- 2.9 A case might be made, then, for producing a less theoretically oriented approach. On the other hand, being upfront about theory enabled us both to demonstrate our workings and justify our conclusions. Perhaps the concern expressed by respondents was not necessarily about “theory” per se, but about the use of social theory as opposed to more conventional, lawyerly jurisprudential approaches. As discussed below, the real concern of those who expressed this view was mostly because of an assertion that it was not based on the “real-world” in which funding limitations are keenly felt.
- 2.10 Certain respondents expressed frustration, or exhaustion, by the sheer number of questions raised in the Issues Paper. Thus, respondents may have been put off by the task, or, as one respondent put it when answering the second of the 21 questions on triage plus, “At this stage I am exhausted by the range of questions in this survey” (Victor Sullivan, landlord). Others felt that they did not have sufficient resources to respond to all the questions. The Advice Services Alliance

felt that it did not have sufficient resources to respond to the large number of questions being asked of respondents and appeared weary when faced with the 45 questions on courts and tribunals. Others responded generally, rather than to specific questions.

- 2.11 The responses suggest, then, that consultees to this Paper would have preferred fewer questions in a more straightforward analysis. There is, certainly, a case to be made for asking fewer questions – in retrospect, perhaps it would have been more appropriate to ask general questions about specific issues (for example, court or tribunal?) and then add a series of prompts on which consultees might pick up.

Starting point

- 2.12 Our starting point was deliberately decentred in that, rather than focus on the lawyerly question, what are housing disputes, our analysis began with the question, how are disputes produced? Drawing on the wide range of research into disputes, we demonstrated that disputes are constructed; and they are constructed by a variety of diverse, unconnected, points and actors which also include the choices that the parties make. Our broader question enabled us to take a broader, more wide-ranging review, taking account of the consumer perspective (which has been central to the Law Commission's work on housing). This was a relatively controversial starting point, albeit one which disputing theory clearly pointed us towards.
- 2.13 For most respondents, this starting point was uncontroversial. However, some felt that it would have been more appropriate to have begun with the narrower question about housing disputes. This was the approach, for example, of the ASA and Law Centres Federation: "research is needed to establish what kinds of housing problems people have and the extent to which existing procedures are able to deal with such problems" (LCF, p 9). HLPAs' response begins with the assertion that

One difficulty with the approach is that there is no detailed discussion of different types of cases - eg homelessness cases, possession based on rent arrears, possession on other grounds, mortgage possession, succession, disrepair, anti-social behaviour etc. Different approaches may be appropriate for different types of housing cases.

Similarly, the Association of District Judges suggest that

In considering proportionate resolution of housing disputes, we think it is important to identify what actually constitutes a housing disputes, and then consider how best it can be resolved.

- 2.14 The London Housing Disrepair Forum/National Disrepair Forum together with the Law Society begin responses with an assumption about housing disputes as being focused on the housing provider:

Housing disputes arise when a provider of housing or a person who needs housing seeks to enforce a right or an obligation. (Law Society, p 3)

A system aiming to provide a range of avenues for proportionate dispute resolution in the housing sphere needs to define the particular role of the housing provider concerned, recognising clearly the specific remit and obligations applicable to each provider. A key element is the different types of landlord (ie local authority, housing association and private sector). There needs to be recognition that the private sector has no social welfare element to govern its practices in relation to the provision of housing which is in stark contrast to the provision of social housing by local authorities and the RSL. Accordingly, there are implicitly greater expectations placed on social landlords in order to provide appropriate resolutions to housing disputes. These expectations are often far broader than the presenting problem. (London Housing Disrepair Forum/National Disrepair Forum, p 1)

- 2.15 These responses tended to reflect lawyers' assertions and assumptions about housing law, as opposed to an understanding of the ambit of our project, which pioneered an understanding of proportionate dispute resolution in a discrete context, ie housing. We perhaps might have made this point clearer. However, many respondents appreciated that housing disputes were not always focused precisely on housing but could raise a variety of issues unrelated to housing. Additionally, most respondents also accepted that housing disputes on their face may also obscure more complex underpinnings.
- 2.16 Even when it was clear to the respondent, as Siobhan Magrath put it in the response of the RPTS:

The issues paper, for very understandable reasons, does not seek to identify or to classify in detail, the different types of housing disputes that might be encountered. However, we think that to take the ideas in the paper forward, at least a preliminary classification is desirable. (para 21)

The classification offered by the RPTS appears earlier in their response when it is suggested that housing disputes include:

- (1) formal landlord and tenant disputes involving the application of property law;
- (2) disputes about property rights where judicial discretion is to be exercised – in particular this is applicable in public sector possession proceedings or relief from forfeiture;
- (3) disputes about the decisions of public bodies – for example appeals against decisions on homelessness under Part VII of the Housing Act 1996;
- (4) disputes relating to conduct – these include for example anti-social behaviour matters and unlawful eviction or harassment.

Our examples

2.17 Having recognised that the Issues Paper was, as originally drafted, a theoretical exercise, we sought to illustrate our understandings by reference to what we regarded as “real life” examples. In particular, para 2.2 created an example which illustrated, by reference to a fairly simple everyday story, the range of possible responses which might have been used.

2.18 Although many respondents found our examples helpful, it is also clear that the legal advice community felt that the examples marginalized their role to producing legal disputes whereas they were, in fact, seeking to produce a more holistic service offering a range of options. Lawyer respondents felt that they were being unfairly pigeon-holed as dispute producers, rather than dispute solvers. This was best expressed in the Law Society response as follows:

Disputes do not arise because there are housing law advisers, but because affordable good quality housing is both a basic need and a scarce resource. Social landlords are unable to meet the needs of everyone. Many people are unable to afford renting or buying on the open market. The relationship between those who provide homes and those who need them is therefore often a contested terrain. Housing law provides the framework for resolving disputes because it sets out the rights and obligations of both landlords and tenants. (Law Society, p 3)

2.19 The ASA and others were concerned “that the examples given seem to blame the tenant’s adviser for transforming a problem into a dispute. It is equally arguable that landlords transform problems into disputes by taking legal action against tenants¹, or by failing to comply with their legal obligations, thus forcing tenants to turn the problem into a dispute in order to enforce their rights, eg in relation to disrepair.” Others suggested that the examples were too landlord focused (eg HLPAs, para 2.1) and were concerned with the “discomfort experienced by landlords”. The point often made is that, without legal proceedings, nothing would be done to alleviate the problems – particularly with repairs – and that legal proceedings had, therefore, been crucial in moving the position of intransigent landlords.

2.20 As regards our examples concerning disrepair, most respondents who addressed this issue noted that there had been a particular problem with “claims farmers” and “ambulance chasing”, whilst implicitly not accepting that they engaged in such activity. This type of activity by lawyers was generally deprecated. Respondents also noted that this activity had generally stopped, partly as a result of the disrepair protocol (mentioned by most) and partly also because such actions were not profitable. Some respondents did note that this work was important in obtaining action by recalcitrant landlords. One good example of this practice was provided by the Brent Private Tenants Rights Group:

one of our advisers did a walkabout on a newly built social housing estate with a staff member of our energy efficiency partner. We identified significant areas of poor detailing which are already causing problems of damp and cold penetration, but we haven’t the capacity

¹ This is recognised in the Further Analysis paper at p 121

to take this up as a group issue, and will have to wait until the tenants find their way to us (we leafleted at the same time to enable this to happen). It would be much better practice and more efficient to treat this proactively especially if we could strike within the contractor's defects liability period. The underlying problem here is poor building and procurement practice, and networking advice agencies such as ours are well placed to do something about it if funded to do so. (p 12)

2.21 Throughout the Issues Paper, we draw on an understanding of rent arrears possession proceedings as disproportionate in that most often they are used for rent collection purposes and usually involve some underlying issue with housing benefit payments. Leaving aside for the moment the (disputed) reasons for unpaid housing benefit, the following points were noted by a number of respondents:

- (1) Rent arrears possession proceedings are often a direct result of the performance culture as they occur usually in response to the targets placed on social landlords by the key performance indicators. As a result, although in our context, they may be regarded as "bad" and unnecessary, landlords who bring such proceedings may well have high performance ratings.
- (2) Whilst such proceedings often arise because of poor housing benefit administration, they are also a product of several other factors. For example, HLPAs make the point that they "often include poor education, a highly complex benefit system, poverty, supporting one 'non-dependant' member of the household who has no income, ill health etc. In practice a tenant may have to resolve their problems of income support/ incapacity benefit or jobseekers allowance before housing benefit will be paid." Tenants in these situations are often vulnerable and "have a multitude of problems, which sometimes can be overwhelming" (p 3).
- (3) Possession proceedings often offer an opportunity for vulnerable persons to be referred on to other services. In this way, courts offer a form of triage plus.
- (4) Rent arrears possession proceedings may well arise because occupiers put their heads in the sand or because they fail to produce the correct documents and information to the housing benefit authority (Association of District Judges, para 12). Although many possession proceedings could be avoided by early advice, the ostrich effect does not make this particularly easy.
- (5) A number of respondents suggest that the Civil Justice Council's rent arrears protocol is likely to result in a lower number of possession proceedings in the future.

CONCLUSION

- 2.22 It would be fair to say that many respondents found our approach challenging. That finding is not necessarily a surprise – our approach was always designed to offer such a challenge and a rethink in pioneering an understanding of proportionate dispute resolution.

PART 3

KEY AREAS

INTRODUCTION

- 3.1 In this Part, we examine what emerged in the consultation process as the key controversial areas: our working assumption (including the transformation understanding of disputes); the values underlying proportionate dispute resolution in housing; triage plus; ombudsman; the court/tribunal question/s.
- 3.2 One of our analytical starting points was an understanding that the advice and disputing system is incoherent, having grown up over time in response to different assumptions. We at least implied that incoherence is necessarily a bad thing; one of the striking points made in a number of responses is that incoherence – or diverse local provision – is one of the strengths of the current system.
- 3.3 We discussed the better uses which could be made of management responses and mediation. Whilst a number of respondents made valuable comments about these, we did not feel that these necessarily provided further information. Rather, they made similar points to the various arguments which were raised in the Issues Paper.

OUR WORKING ASSUMPTION

- 3.4 In paragraph 4.4 of the Issues Paper, we draw attention to our belief that the advice given to clients depends “on the advisers’ particular training and expertise. Not all advice givers are able to identify all the relevant options in the way we suggest should be the goal of a reformed housing problem and dispute resolution service”. Our working assumption, which we say is that “few, if any current advice providers are able to offer their clients the full range of options”, was put open to consultation.
- 3.5 For many respondents this statement was uncontroversial. This working assumption was, however, contested amongst the advice community, which generally regarded itself as fulfilling the holistic role. The ASA regard the “jump” that is made from the general observation to the working assumption as unwarranted and unsupported by evidence:

To take the most obvious example, there are currently 169 NfP agencies and 410 solicitors’ firms with specialist contracts with the Legal Services Commission to provide housing advice. Each contract-holder must demonstrate that they have specialist knowledge in the subject and comply with the Specialist Quality Mark (SQM). Providing housing advice at this level means that advisers must be able to advise clients of the full range of options available to them. Is the Commission suggesting that the SQM standard is inadequate?

- 3.6 The Law Centres Federation response begins with a series of examples which “shows the importance given to providing early diagnostic advice and information and the importance Law centres give to reaching ‘hard to reach’ groups”.

- 3.7 Lawyer responses asserted that they provide clients with a range of options, not just legal dispute resolution. They have, in the past, sought to provide education on, and information about, legal rights. However, the funding regimes of the LSC have whittled away support for these roles.
- 3.8 Two important points were made by respondents, which offer correctives to this working assumption:

The examples given throughout the paper, of the workings of advice agencies, are somewhat wooden. Most advice agencies are much more wide-ranging in their methods of delivery than the paper suggests. The multiplicity of funding streams which are necessary nowadays, will dictate a spectrum of action. The Legal Services Commission may be the biggest player in the legal advice and assistance field, but most medium to large organisations will also have local authority funding together with charitable money, donations and other streams. This will result in differing types of service delivery – they could be seeking clients at neighbourhood housing offices, in Doctor’s surgeries, during the day, in the evening etc. These services in housing terms may link in with other workers with disciplines in other fields such as welfare benefits and debt, so that one person may have a multiplicity of cases at the same time. Tools used may be a combination of advice, information advocacy and linkage with other organisations which offer perhaps a more specialised service. (HLPAs, para 2.5, p 6)

Bolton has a fairly comprehensive network that challenges the working assumption that current advice holders are not able to provide the full range of options. But only in the way that there is a ‘virtual’ comprehensive service in place but not held by a single advice provider – it is only when these work together that a comprehensive ‘service’ is achieved. As it is unlikely that a single advice provider will have the capacity/ ability to fulfil the function of an impartial one-stop shop, so the virtual team would be a workable alternative. (Bolton at Home, p 2)

- 3.9 On the other hand, the Legal Services Commission made clear that it “identified the fractured approach to dispute resolution as a significant barrier to client’s accessing advice”. They suggest that the LSC has a key role to play at a national level in an interagency working group “that analyses the national picture of problems occurring and provides feedback to public and private bodies”.

VALUES

- 3.10 In para 2.12 of the Issues Paper, we draw attention to a range of values on which any system of dispute resolution should be based. We note that one size does not fit all (para 2.14) and that the values often conflict. Further, “a proportionate dispute resolution system is one which allows appropriate balances to be struck between the core values”. We asked consultees whether we had chosen the right set of values, whether there were others we should add, and whether parties should be able to choose which values should be prioritised. We then discussed each value in greater detail by way of evaluation of the current system (paras 2.19 to 2.48) and asked specific questions about each.

- 3.11 In general, this was the least contested area of the Issues Paper. Most respondents said that they believed that we had chosen the right set of values. Other suggestions for inclusion were empowerment (CAB and HLPAs); homes (HLPAs); empathy (Council on Tribunals); response to diversity (Council on Tribunals); enforceability (ASA)¹. These additional suggestions can also be encapsulated in our listed values. For example, when discussing empowerment, respondents (including Shelter) were keen to point out that advisors sought to harness the individual complainant's self-capacity to pursue their complaints, and empowerment should be viewed from this perspective as raising the complainant's ability to participate in proceedings. It is not a separate value in its own right but an important (and neglected in the Issues Paper) aspect of participation. Reference to "homes" was a reference to the subject-matter of the dispute – ie a home, as opposed to bricks and mortar, and thus also a reference to the emotional quality of disputes which was discussed elsewhere in the Issues Paper.
- 3.12 One respondent, Jacob Langlands, who was particularly concerned with "value-based leadership", suggested that the value of participation should be termed "collaboration" and efficiency/cost replaced by "stewardship". There may be some mileage in the latter, a term which is gaining some credence, but, on the other hand, it may be wiser to use more common terminology.
- 3.13 In general, respondents did not feel it would be appropriate for parties to choose which values should be prioritised. As the NUS put it,

Clearly different parties will consider different values should have priority. For this reason, it would not seem feasible for the parties to a dispute to determine which values should be prioritised. What is disproportionate to one person, may not be to another. (para 13)

- 3.14 As regards the evaluation of the current system against each value, there were more contested concerns.

- (1) *Delay*: Respondents generally fell into one of two camps as regards delay. Lawyers and advice organisations tended to argue that delays were not as significant as is often made out, had reduced in recent times, and that they were important in ensuring that due process was maintained. From this perspective, delays are unavoidable and, indeed, an important protection. Landlords, on the other hand, expressed concern about delays in court procedures for evictions. At one end of this spectrum, the National Landlords Association recognised that some delay in the system is unavoidable, but "small measures", such as overlooking small errors in notices would assist. At the other end, Angus

¹ The Paddington Law Centre suggested three further values in their response: rules of evidence, need for representation, protection of the weak and vulnerable. We would suggest that these are included in the values listed in the Issues Paper. The response also suggests that certain of our listed values are not values at all – eg accuracy.

Bearn, a residential lettings landlord, argued that “the local county court is pitifully slow and inefficient at handling claims ... [and] waste everyone’s time with frivolous and pedantic procedural matters”. Similarly, Martin Bayntun, a lawyer and residential lettings landlord, argued that “Courts take a very rigid approach to applications – one mistake even if accidental in the paperwork results in applications being rejected causing delay, frustration and excessive cost”. It should also be noted, by contrast, that a number of lawyer respondents, including HLPAs, pointed out that the accelerated possession procedure offers one of the swiftest examples of civil justice available.

- (2) *Impact*: This value was not necessarily contested. What was contested, however, was that organisations do not already seek greater impact of their work. In particular, for example, ombudsmen noted this aspect of their work as did lawyers and advisors, by drawing attention to their proactive work.
- (3) Lack of coherence: Our assumption was that lack of coherence in the provision of advice is necessarily a bad thing – or, at least, this was how respondents read our Issues Paper. Respondents, themselves, argued that lack of coherence, by contrast, is a strength of the current system. Respondents particularly noted the importance of local provision of advice and the importance of responding to local needs. As the ASA put it, “In our view, diversity is often a strength and ensures that marginalized groups gain access to the advice they need” (para 12.4). Similarly, the NUS saw “this diversity in a positive light, as many of these agencies will target different audiences and as such serve to increase access to advice. Clearly networks between agencies are important and should be encouraged”. Several examples of networks between agencies were offered. For example:

There is a project jointly run by Southwark Law Centre and Blackfriars Advice Centre, funded through the Partnership Initiative budget that has successfully worked with Southwark Council to improve housing benefits administration, housing allocations decision making, repair request handling and tenancy management. This sort of joint working between advice providers and decision makers to learn from client's legal problems and come up with practical solutions to these should be showcased and promoted to all local authorities via the national interagency group mentioned above. (LSC)

The organisation will, if in receipt of LSC funding, be subject to a common code of standards with other centres of its like and be subject to Peer Review from time to time. In a locality it may well be part of a group of organisations who meet together to consider matters of common interest, perhaps called a “housing practitioners’ group” (it would help if local authorities held formal consultations with these groups). These groups may mix solicitor and non-solicitor agencies and may be augmented by common email communication on topical issues and to help with referrals. (HLPAs)

Local provision of services, then, was something which respondents valued. CIH – Cymru said that they had “concerns that a national system will water down the good work of local services and divert funding available for these services. ... Local advice services understand the local context – local contacts and knowledge”.

On the other hand, the Housing Corporation adverted to the “danger of ‘justice or advice by geography’ with people in similar situations with similar problems be[ing] given completely different methods of dispute resolution dependent on where they live, or the agency they were referred to”.

- (4) *Costs*: We asked whether conditional fee agreements lead to disproportionate spending on litigation. Respondents generally acknowledged that such agreements were unhelpful and also an irrelevance in housing cases. Their use in disrepair cases was said, for example, to have been “unlikely [to] have contributed to access to justice” (ASA, para 11.1). Clarke Willmott solicitors suggested that they had “been used by unscrupulous lawyers to increase disproportionate spending on litigation, especially in disrepair claims”. A number of respondents offered examples about situations where disproportionate costs occur – see, for example, the response of Shelter (pp 6-7); the Association of district Judges notes that there are “no substantial teeth” to their powers where there is a failure to comply with the pre-action protocols (p 7); Anthony Collins solicitors note that the inability to recover costs from legally aided parties at first instance means that there is “no incentive at all to reach compromises/work efficiently or to timescales, even those set by the court. Often raise technical challenges for the lawyers’ sake/interest rather than the individual’s own benefit eg human rights arguments” (at p 10).
- (5) *Equality of Arms*: Many respondents felt that we underplayed the inequality which exists as a matter of course in housing relationships. Practically, there is bound to be inequality and, “there is a danger in looking at dispute resolution as if it is a neutral holding of the scales between the parties; that way tenants will almost always lose out” (David Thomas). Inequality was particularly caused by disparities in knowledge and, for example, the Leasehold Advisory Service felt that we needed to be clearer about this (at p 10).

TRIAGE PLUS

- 3.15 We suggested that central to our understanding of the future of proportionate dispute resolution in housing should be “triage plus”, which would provide three broad roles: signposting (including a response, proactive and educational mode), oversight, and intelligence gathering. We asked a large number of questions about triage plus (n = 21), including whether a triage plus organisation should be able to challenge dispute resolution practices directly; where it should be provided and by whom; and whether its use should be compulsory.

General

- 3.16 Respondents who commented said that the label “triage plus” should not be used. Lancelot Robson suggested the following alternatives: Housing Diagnostic Clinic; First call Housing Dispute Resolution Centre.
- 3.17 Labels aside, in general, most respondents were receptive to the idea of triage plus, although concerns were expressed about its cost and whether the costs of setting it up would mean that resources were diverted from other parts of the advice/disputing sector. Some felt that it was an unrealistic objective for this reason – the Association of District Judges:

We are not convinced this is a practical proposition. It could be achieved, but would require very substantial funding, and we are not aware that such funding is likely to be available. (para 8).

Some were also concerned that it would be “very bureaucratic”. Clarke Willmott solicitors asked us strongly to reconsider the role of the LSC as this would lead to bureaucracy (“particularly if the leadership role is taken by the Legal Services Commission”).

Functions

- 3.18 The National Landlords Association felt that the roles of oversight and intelligence gathering should be undertaken by an independent ombudsman, as opposed to the triage plus organisations, if triage plus were to be carried out by advice agencies who generally only advise tenants.
- 3.19 A further concern was over potential conflicts in the role between advice and signposting. The Law Society response suggested that “there is a danger that Triage Plus will be a method of gatekeeping if the functions of advice and allocation are not separated. Further the process of allocating a case to a specific procedure (or denying access) would need to be compatible with Article 6 in that the allocation decision is potentially a bar to access to the courts” (at p 14). The NUS response also provides a thoughtful query in that, if the advice provided is confidential to the client, then it would be impossible to impose costs penalties at a subsequent stage for not following that advice (para 24). This point was also made by HLPAs, which added that “In actual fact, there is nothing in the paper which shows how a triage plus worker can enforce any of his or her actions. Why should a local authority listen to anything they say? Nor act on it?”.
- 3.20 Whilst most accepted the three roles for triage plus, were such a service created, there were suggestions for further roles: the Housing Corporation suggested that the service could also co-ordinate partnership with other agencies – “maybe it could act as a mapping agent, alerting advice givers to others that are operating in the vicinity?” SITRA, in a particularly positive response on this issue, suggested that triage plus should have five distinct functions separating out the function of signposting:

We feel that signposting indicates that a person could simply be directed to a particular option of dispute resolution but triage plus advice and information role could in itself resolve the dispute e.g. by reconciliation to the inevitable, self help or referral to support agencies. The educative role of triage plus should also be identified as a separate function to signify its importance. SITRA feel that signposting, providing advice and information, education, oversight and intelligence would be the five functions of triage plus.

Provision of triage plus in the current system

- 3.21 As discussed above, lawyers and advisers commonly argued that they were already providing a version of triage plus. This was a point made, for example, by Shelter in their response:

Most voluntary sector agencies, including Shelter's Housing Aid Centres, would maintain that we do triage work at present. The need for "holistic" services which address the underlying issues as well as the presenting problem, is not in dispute. Such wide-ranging services obviously cannot be provided by the same advisers: each of the various areas of "welfare law", such as housing law and welfare benefits law, is far too complex for any individual to have expertise in all those areas. While it may be desirable for advisers with the necessary expertise to be working on the same premises, that is not possible in many areas. The key to delivering holistic advice is that there must be sufficient advisers in each geographical area to whom effective and prompt referrals may be made. That should not mean imposing a requirement that each individual agency should offer the entire range of services: any such requirement would be to ignore the wealth of expertise that is built up by specialised agencies. (p 12)

Equally, the Social Housing Law Association noted that its members already provided the function of triage plus in relation to possession proceedings:

tenants are already provided with a "triage plus" system by their social landlord. Virtually all social landlords have an arrears procedure which involves repeated attempts to contact the tenant and assist them with their problem; many social landlords offer themselves or via other support agencies a debt advice service and great efforts are made to avoid Court proceedings. The sad reality of the situation is that it is not the lack of available advice that leads to so many possession actions being taken

- 3.22 On the other hand, the National Landlords Association expressed concern at the impartiality of the service given that "the organisations named either already turn landlords away when advice is requested or have to be convinced that the landlord has a case to be heard". Landlords would also be wary of using services which currently provide advice to tenants (such as Shelter Cymru).
- 3.23 The following examples of triage plus services in operation were provided:

- (1) An informal triage system already exists as does a referral system. For example there is an informal network of lawyers in Southwark who are part of a referral list run by Southwark Law Centre. (Law Society, p 14)
- (2) The Legal Services Commission's example of Southwark Law Centre (see above). Additionally: "We are also keen to try the idea of 'triage plus' in CLS Direct and are building in a requirement that the operator service identifies the "root causes" of client problems, looks for common themes/public or private organisations causing these problems and reports on these to the LSC." (at p 5)
- (3) Irwin Mitchell offered the example of their legal advice helpline.
- (4) Basingstoke councils Vulnerable Persons Protocol "which is jointly delivered by stakeholders which include all the main social housing providers, the housing benefit department and the main advice and support providers. There are shared targets on reducing arrears, court action and evictions, and agreed protocols and timescales for actions by all parties in order to achieve these."
- (5) Citizens Advice and Bromsgrove Citizens Advice Bureau's responses.
- (6) The National Landlords Association advice line (although not explicitly mentioned as triage plus in Appendix A to their response, we should nevertheless suggest that it is such).
- (7) The Local Government Ombudsman has an "Access and Advice Service" which will become available in two years. Further information should be found out about this service.

3.24 What such responses suggest is that respondents agreed with the basic proposal for triage plus. The only question is whether it is being provided at the moment. In all respects, we would probably be delighted if it were being provided at the moment, but there is some doubt as to whether this is the case. Although responses might suggest otherwise, it is likely that the signposting function is being provided locally in a number of locations but that the other functions are not being. Whilst the ASA argue that "we are not convinced that these proposals add anything significant to what good housing advisers should be doing and, we believe, generally are doing", it is unlikely that the oversight and intelligence gathering roles are being fulfilled, as we conceived them at any rate.

Institutional Issues

Where is triage plus to be provided?

3.25 The issue of where triage plus might be provided was hotly debated in relation to whether a call centre would be an appropriate location. For some, this would be possible and might assist with the advice desert issue – note the response from the Runcorn Tenants Federation which makes clear the lack of advice available locally on housing law issues. However, the majority of respondents were concerned about the use of call centres and telephone advice services to deal with housing problems. Some respondents accepted that initial diagnosis might be dealt with through call centres but not beyond that.

3.26 The following reasons were offered:

- (1) It would be difficult to reduce housing advice to a script, or a series of scripts given the complexity of housing law (“structured questionnaires can be too limiting in diagnosis ...” and “there may be drawbacks to an algorithm approach to diagnosing all of a client’s problem, such as that used by NHS Direct, but if all the dispute resolution mechanisms within the system were entered on a database with their characteristics, then a fairly straightforward programme could be written which would identify the various routes to solution once the problems, desired outcomes and any limitations had been taken into account” (Brent Private Tenants Rights Group, p 6).
- (2) Many clients do not (and are not able to) disclose “the real problems underlying their presenting problem until well into a face-to-face interview, and body language can provide the key with which these are unlocked” (Macclesfield Wilmslow & District CAB).
- (3) It may not be able to provide the holistic service expected.
- (4) It “would be difficult to shoehorn [the large amount of unmet need] into help lines. It would also be difficult to sufficiently train call handlers” (Lawrence Greenberg)
- (5) Call centres would need to take account of local conditions:

The ‘call centre’ strategy is an appropriate mechanism for initial diagnosis of the problem, for advice as to the issues inherent in the presenting problem and for referral to other agencies for more detailed work to be carried out. But we believe that in so many cases telephone services, however efficient and skilled, cannot be a substitute for active casework. Telephone services also suffer from the weakness that they cannot be aware of local conditions in which the problem arises, such as the practices of a particular local authority or registered social landlord, or the existence of a tenancy relations service. (Civil Justice Council, p 3)

- (6) Call centres would not have access to all the relevant paperwork: “There is no substitute for seeing original documents, and an advisor in our experience will often need to see a client to check understanding and agreement” (Paddington Law Centre, pp 6-7)

3.27 On the other hand, a number of respondents noted that, given that many people do not seek out advice until the last minute, it was essential to have some form of triage plus at centres of adjudication. A number of respondents complained about the poor quality of court staff. However, there is a need for advice at that point

One location at which a “gateway” service of some kind is badly needed is the county court itself. It is here that people may be confronting their problems for the first time. Court staff can assist with strictly procedural matters, but they cannot give legal advice, nor can they advise on the content of an application or how it is phrased. There is a need for that kind of advice within the court precinct, or nearby. We would recommend that there be an advice service – whether this be part of a ‘triage’ system or otherwise – attached to, but independent of the court office, where litigants can go for impartial advice on the nature of their disputes and the best way to resolve them. (Shelter, p 13)

Funding

- 3.28 How such a service might be paid for was also regarded by respondents as problematic. Tenancy deposit interest was regarded as inappropriate for this purpose and, in any event, likely to be insufficient. Specific taxation was, as might have been predicted, deprecated.

Uncontroversial points

- 3.29 Some points were relatively uncontroversial:
- (1) Respondents were generally agreed that the use of triage plus should not be compulsory.
 - (2) There was some agreement that a triage plus organisation should be able to challenge dispute resolution mechanisms. Indeed, this was one of the few areas of agreement between us and the ASA who argued that “This would give additional clout to the triage plus role. However, the provider would also need costs protection, eg via protective costs orders” (at para 14.4). There was also some concern about potential conflicts of interest. Judge Russell Campbell suggested that such a practice “might take the form of an application for a declaration” (para 4).

OMBUDSMAN

- 3.30 In Part 6 of the Issues Paper, we discussed the role which ombudsman could play in a proportionate dispute resolution system for housing. We noted the variety of ombudsmen in the housing system, the variety of techniques and criteria at their disposal, and their relationship with the courts. We particularly asked whether ombudsmen should be able to made adjudications on points of law, develop a more proactive role (and, if so, what that might involve), more uniformity in working practices.

3.31 The discussion of ombudsmen in the Issues Paper proved controversial amongst ombudsmen respondents (n=3).² Other respondents also discussed the role of ombudsmen. Generally, this was by way of critique of their role – they are too slow to process complaints (Anthony Collins Solicitors); they lack transparency in

their investigation practices at the early stage of complaints (ASA); they are “overly bureaucratic, and hopelessly stacked in landlords’ favour” (Roger Murphy). The Social Housing Law Association (SHLA) made the following point:

[T]he experience of many Registered Social Landlords of the Independent Housing Ombudsman is that they will often go way beyond their jurisdiction and make decisions about legal issues which they have no knowledge or understanding of. Many social landlords are therefore extremely concerned at any extension of the Independent Housing Ombudsman’s jurisdiction, unless the Ombudsman is legally qualified and has extensive knowledge of housing law. Otherwise, it leads to decisions which are not right in law or fair and gives tenants a false expectation of what they are entitled to. There is no effective appeal process against an Ombudsman’s decision and it is currently a cause for concern for many social landlords. (para 2.32)

3.32 As regards the ombudsmen respondents themselves, there was unanimity on the following points:

- (1) They were not receptive to the suggestion that they should determine points of law themselves. Such a power would lead to adversarialism and damage the flexibility of their working practices.
- (2) They were receptive to the possibility of themselves making an application to a court on a point of law. Were such a possibility available, the Local Government Ombudsman (LGO) suggested that they would only use it in a small number of cases ‘that are essentially about maladministration but which cannot be progressed satisfactorily without prior resolution of a substantial legal issue’ (at p 28).
- (3) There should be greater flexibility in the relationship between ombudsmen and the courts. According to the Housing Ombudsman:

Ombudsmen and the courts should complement each other. There should be a recognition that they are on a common dispute resolution spectrum. (at p 9)

There should be frequent and open communication between the courts and the ombudsman service.

² Public Services Ombudsman for Wales, Independent Housing Ombudsman, Local Government Ombudsman.

- (4) The LGO supported the view that there should be some relaxation to the barrier to investigations in cases where the complainant has already sought a court or tribunal adjudication (at p 13). Such a relaxation is the subject of discretion by the Housing Ombudsman, interpreted flexibly (at pp 7 to 8). Similar comments were made by the Public Service Ombudsman for Wales (PSOW) (at p 1).
- (5) Ombudsman recommendations should not be made directly enforceable. They have both moral and practical force and are hardly ever the subject of non-compliance because of the reputational risk involved in non-compliance. If their recommendations were made enforceable, this “would lead to increased costs, delay and perhaps more significantly, a more adversarial approach to investigations on the part of listed bodies: on the whole as its stands they are very co-operative” (PSOW, p 2). The Housing Ombudsman response also makes the point that a customer-focused business should respond:

In addition to recognition of moral authority, however, and at least as powerful a motivator, member landlords from both sectors who are consumer-focused recognise that access by their tenants to effective and positive complaint handling, including escalation to the Ombudsman, is good for business.

Both the RSL and the PSR landlords who have joined the Scheme know the value of high reputation (and how easy it is to lose it!), the impact of customer satisfaction on brand loyalty, lower costs, maximised revenue opportunities, and increased “bottom line” profits. (at pp 14 to 15)³

- (6) No further definition of maladministration is necessary as the concept provides flexibility. The LGO says that “what our users are telling us is that they want specific information relevant to their complaint rather than the kind of generic information which is inevitable when you start to exemplify maladministration in general terms” (at p 27).
- (7) See below regarding procedural flexibility.

3.33 In general terms, it should be said that the LGO and Housing Ombudsman felt that some of the points we made in the Issues Paper were “unintentionally misleading” or “inaccurate”. For example, we made the point that the Housing Ombudsman works to the criterion of fairness as opposed to maladministration (at paras 6.4-5). The Housing Ombudsman, however, made clear that they are concerned with maladministration – and notes that a “concept such as “service failure”” might be more appropriate. The Housing Ombudsman has four “output determinations”:

- (1) a finding of no maladministration
- (2) a finding of no maladministration but recommendations

³ The Housing Ombudsman says that this was borne out by findings from independent research: (how) are you being served?, which is available at <http://www.housingcorp.gov.uk/server/show/conWebDoc.1184> (last visited 28 June 2007).

- (3) a finding of maladministration with recommendations or orders
- (4) a finding of severe maladministration with recommendations or orders.

The breakdown of the incidence of these out-puts according to our statistics for 2004-05 and 2005-06 is as follows :

	2004-2005	2005-2006
No maladministration	54.8%	62%
No maladministration – recommendations	10.4%	17.5%
Maladministration	32.5%	19.2%
Severe maladministration	2.30%	1.2%

3.34 The LGO felt that the Issues Paper “significantly overstates the lack of procedural flexibility within our scheme” and that the “differences in working practices identified in the Issues paper are exaggerated” (at p 26). Indeed, the variety of investigatory techniques and working practices was regarded by all ombudsmen responses as one of their strengths “because it leads to greater flexibility and the ability to opt for the mechanism best suited to an individual case” (PSOW, p 3); “I also have the power and consequent, expressed strategic desire to introduce novel forms of dispute resolution as might become appropriate from time to time” (Housing Ombudsman, p 11).

3.35 The main issue on which there was some disagreement was whether there should be a housing-specific ombudsman. The PSOW and LGO did not believe that was appropriate, and argued for a generic “one stop shop” (PSOW, p 3). The LGO made a similar point by reference to the problems which would be caused by the creation of a single housing ombudsman:

We are able to deal with all aspects of a complainant's concerns including other related functions of the local authority. If housing issues were to be removed from our jurisdiction to another dispute resolution provider, this would increase the number of complainants who would need to approach more than one provider; it would also mean that councils would have to deal with more than one provider. The consequences would be bad for the complainant and bad for the authority and would not meet the values of efficiency and effectiveness. (at p 24)

On the other hand, the Housing Ombudsman made clear his preference for a single ombudsman for housing issues. Private sector landlords should be required to join his scheme. Furthermore:

- (a) if suggestions for the merger of the Housing Corporation and English Partnerships take effect⁴, there would not only be a “domain” Ombudsman in housing there would also be a “domain” regulator which would be well placed to supervise and accredit the housing sector as a whole.
- (b) the “triage plus” provider would “signpost” complainants and disputants to the Housing Ombudsman as appropriate according to guiding principles agreed between relevant parties such as the Ombudsman, the judiciary, the Residential Property Tribunal Service (RPTS), the “triage plus” provider, and the Administrative Justice Council. (at p 12 – original footnote reference)

3.36 There was wary openness to the possibility that ombudsmen should have the power to undertake proactive investigations (see eg the Housing Ombudsman, at pp 22-3, who suggests that there are some objections: cost; justification; lobbying).

COURT OR TRIBUNAL?

3.37 In the Issues Paper, we discussed whether the adjudicatory body for housing disputes should be a court or tribunal. Such a discussion has, as we pointed out, been part of the landscape since the early formation of housing law. Perhaps because the Issues Paper provided the first opportunity for such a discussion for some time, we asked a wide range of questions of both a general and specific nature. As regards general questions, in particular, we asked consultees whether there should be a specialist body for adjudicating on housing disputes and whether that should be a court or tribunal; whether there should be a link between civil and criminal jurisdictions; what expertise should be represented on the adjudication body; issues about procedure (formality, written hearings, adversarial/inquisitorial). As regards specific questions, we asked consultees whether the small claims limit for housing disrepair claims should be altered, and what case management powers should be available.

Reform of the present structure?

3.38 In general, respondents were in favour of the status quo, although there were various modifications suggested. Organisations and individuals, who were landlords, strongly argued in favour of courts but that they should be made more effective with better quality staff: For example,

There should be one system – Court – and it should be forced to act in a responsive, fast, and un-bureaucratic manner. If that happened, there would be no need to re-invent an entire system of justice and arbitration that will just confuse more. ... Just get on with properly resourcing the Courts; staff them with sensible people who can give you proper advice on what procedures to follow; and make sure your judges have the time to take each case seriously, rather than finding excuses to dismiss cases, which is what happens now. (Angus Bearn, p 1)

⁴ See, for example, The future of regulation of the affordable housing sector in England, Chartered Institute of Housing, June 2006.

we need a legal system that responds quickly and effectively to resolve problems not a revolution in the legal process itself ... In the political, social and legal realities we face, better results can be achieved by tweaking a system with which people are familiar. (British Property Federation, p 1)

Social landlords' complaint therefore about the existing system is not that we need some alternative but that the existing system needs to be more effective both in terms of the decisions that are being made by judges and the delays that are being experienced in the Court system due to insufficient resources. (SHLA, para 2.8)

Specialist or Generalist?

- 3.39 What was, perhaps, surprising was that bodies which previously have supported a specialist housing tribunal, or might have been expected to support such a proposal, were negative about the need for a specialist housing court or tribunal. Some, such as the Civil Justice Council Housing and Land Committee, made clear that were the matter to be considered entirely afresh, such a body would be desirable. However, that is not the case and adjudication is now entrenched:

If one were devising a system for the resolution of justiciable housing disputes afresh, it is unlikely that the present plethora of bodies and jurisdictions would be replicated. It is quite possible that, given the specialised nature of housing law and the overwhelming importance of the issue to the client, an original model for the primary forum would be a specialist housing court or tribunal. However, we take the view that a major restructuring of the existing court system at this time would entail capital costs of an order which makes the project infeasible. We take the view that substantial improvements can be made to the present model. (Civil Justice Council, p 16; see also Shelter, at p 22)

Others, such as the National Union of Students, were unambiguous in their support of courts:

Where problems are acute, complex or important, we consider court to be the appropriate venue. We are concerned that ultimately there is a danger that the current imperative to reduce costs within the civil court system will unduly compromise the principles of due process and the protection of fundamental rights. (para 39)

- 3.40 Fewer respondents were in favour of a specialist body. Judge Russell Campbell regarded such a body as “long overdue” (at para 5) and would produce more effective case management (para 9).⁵ The Brent Private Tenants Rights Group “strongly supported” the need for a specialist housing jurisdiction. The Bar Council repeated their response to Renting Homes, at para 16, in full, where they express support for a specialist housing court. The Law Society argue that housing law has a “special nature” as most housing disputes are not about compensation. This unique nature of housing law suggested to them that different processes are required (at p 5). Subsequently, they favour “local specialist courts” (at para 9.40(2)). TPAS support what they refer to as a “specialist Housing Tribunal”: “We have watched the development of the Community Justice centre model with interest and would like to see a sub-judicial approach to resolving housing disputes introduced in neighbourhoods” (p 2).
- 3.41 The reasons for preferring a general court ranged from the general – a preference expressed for a sovereign, already existing body – to the specific. Thus, HLPAs list seven reasons for their lack of enthusiasm for a specialist adjudicatory body: the county court and RPTS already exist; specialism is contrary to the “one stop shop” goal; specialism does not assist with ADR; current initiatives should be given time to bed in; it is incorrect that tribunals are cheaper and more user friendly; there are concerns about accessibility to tribunals; differences exist between courts and tribunals. The Legal Services Commission, which was also against a proposal for a specialist adjudicatory body, gave the reason that “the evidence from research is that people’s legal problems cluster and are usually not just housing related” (at p 27).
- 3.42 There was, however, a greater degree of consensus that there needs to be some specialism. Respondents were generally clear on the need for adjudicators who are knowledgeable about housing and housing law (see, for example, the ASA response, para 18.2; SITRA, para 9.39). Respondents such as Shelter and the Bar Council noted that non-specialists in housing are required to make about technical issues, without specialist training on those issues, and this has in the past caused some major difficulties (Shelter, for example, suggest that the “tolerated trespasser” line of authority could have been avoided were the original judges housing law specialists). Better training of judges was a feature of the HLPAs response which also suggested ticketing of judges who “could sit in “grouped” courts in turn to improve accessibility to trained judges. We understand “grouped” courts are a feature in the family jurisdiction” (para 8.5). One particular benefit of specialised housing judges is “greater consistency of decision making, particularly in relation to discretion in possession proceedings” (Shelter, p 22).
- 3.43 There was also considerable support for the use of other experts, such as surveyors as adjudicators or as assisting the courts. Many suggested that this would lead to cost reductions.

⁵ Note in this regard his helpful suggestion discussed in Part 4.

- 3.44 The lone voice against such specialisation, it seems, was the Association of District Judges which made a case for housing as a generalist jurisdiction. They argue that “the vast majority of disputes coming before the courts are routine in nature, [specialist DJs are] unnecessary. Matters of particular complexity can be, and frequently are, directed to a judge with particular experience of housing matters” (at para 17).

Court or Tribunal?

- 3.45 There was some debate over whether the adjudicatory body should be a tribunal, court, or whether there should be both. The National Landlords Association supported an extension to the jurisdiction of the Residential Property Tribunal Service (RPTS) (at p 4). The Chartered Institute of Housing supported greater use of tribunals because of their expertise and their approach (less adversarial and more customer focused). Noting that much housing work is conducted by their members, who do not have rights of audience, greater use of tribunals would assist them. Brendan Edgeworth noted that, the establishment of a tribunal system in Australia has led to “a dramatic increase in access to justice in housing matters. This increase is overwhelmingly attributable to the introduction

of an informal, inexpensive, efficient and speedy tribunal that has almost exclusive jurisdiction over housing disputes in the private market and the public tenancy sector”.

- 3.46 Most favoured the status quo in the sense that there were limits to what tribunals, as currently operationalised, could do. Respondents here generally referred to the lack of enforcement powers on the part of tribunals, as opposed to courts. The Council on Tribunals made an interesting, pragmatic, suggestion that courts could reconstitute themselves as tribunals, and vice versa, as appropriate:

Without legislation, the possibility of appointments to both court and tribunal, with power to reconstitute as one or the other according to the jurisdiction being exercised, should be explored, though there would be implications for the mechanics of the judicial appointment process, and the criteria to be applied, to facilitate such dual appointments. There should be case management powers and powers of enforcement.

- 3.47 Some questioned what they regarded as our assumption that tribunals were somehow better equipped to deal with housing disputes, and would be cheaper with a better quality justice. The Macclesfield, Wilmslow and District CAB said that their “considerable experience of welfare benefit, medical and employment tribunals does not suggest that this would be a helpful change” (at p 8). HLPAs suggested that a tribunal would be unlikely to be cheaper if one took account of the costs of three adjudicators as well as the set-up costs of any such new tribunal. Courts, it was said (for example, by the NUS), could be less formal than tribunals: “we are not certain in any event that the relaxation of rules is appropriate for a forum that is deciding matters involving possession, homelessness or serious disrepair” (NUS, para 33). In particular, the CIH drew attention to speed of decision-making.

3.48 The response of the RPTS repays careful reading. It does not argue in favour of one option or another. Rather, it offers an interpretation of the data. Noting that recent extensions to the RPTS jurisdiction “now far more closely echo those of the courts”, and the fragmentation of housing dispute resolution (para 13 to 14), the response draws attention to the fact that, discounting possession cases, the county court dealt with 577 housing cases compared with the 7000 dealt with by the RPTS (para 15). Implicitly, the argument is that the courts have no “particular skill in dispute resolution” (para 16), are inflexible (particularly when compared to the RPTS jurisdiction) (para 17 and 18), and lack the necessary specialist staff (para 20). It notes the lack of enforcement powers of tribunals and lack of powers to deal with “recalcitrant parties in cases of urgency” (paras 25 and 17 respectively). Arguing that “a proper grounding in the law is fundamental to fair adjudication”, the response notes the expertise of tribunal members. Finally, there is an argument that tribunals are more accessible, because they are less formal and “users in general feel less inhibited by the tribunal process” (at para 30). The response finishes with a flourish:

There is in our view room for Tribunals to deal with a wide range of disputes. Adjudication can take place in co-operation with the Courts. Some of the objections to the practices of Tribunals can be addressed by ensuring the quality of Tribunal members and staff. Of

the utmost importance, however, is the clear and urgent need for users to know how and where to turn for adjudication of housing problems. This must be addressed by the provision of a transparent, accessible, competent and independent system. (para 37)

Other issues

3.49 On other issues:

- (1) There was no support, it seems, for an amalgamation of civil and criminal jurisdictions.
- (2) There was some support for raising the small claims limit, although HLPAs offered strong opposition to this by reference to a letter sent to the Minister when this was mooted previously.

PART 4

SPECIFIC PROPOSALS

4.1 In this part, we briefly draw attention to some specific reform proposals raised by consultees in the course of their responses:

- (1) *Case Management*: The Civil Justice Council Housing and Land Committee suggested an enhanced role for case management powers:

What we have in mind is a process in which the court takes an interest in addressing the underlying problems, and is able to explore the background by making a range of pro-active orders. These may include: actively seeking evidence such as medical reports, which for whatever reason the parties have been unable to obtain; requiring third parties such as the chief housing benefit officer or the Department of Work and Pensions to provide information directly to the court; or referring specific questions to another person or agency such as the monitoring officer of a public body or the Ombudsman service, with a requirement that they report back to the court. (CJC, p 17 and 18)

- (2) Shelter offered some thoughts on the nature of housing problems in order “to establish benchmarks by which the system will need to measure its effectiveness. What level of assistance is appropriate for a person faced with each of those problems?” (p 18). Housing disputes were said to include the following:
 - (a) possession proceedings: rent arrears
 - (b) possession proceedings: mortgage arrears
 - (c) possession proceedings: anti-social behaviour
 - (d) possession proceedings: non-secure tenancies
 - (e) claims for disrepair (with and without order for works)
 - (f) environmental problems, eg, statutory nuisance
 - (g) harassment / illegal eviction
 - (h) neighbour problems
 - (i) claims for breach of contract
 - (j) homelessness (including community care issues)
 - (k) allocations
 - (l) succession (and other “tenants’ charter”) cases
 - (m) travellers’ cases

- (n) asylum support cases
 - (o) agricultural worker cases (Shelter, p 17)
- (3) Judge Russell Campbell suggested by analogy with the approach of family courts to ancillary relief, that issues in dispute could be narrowed (para 10). This was specifically to assist the specialist body he proposed but could be drawn on more widely, whatever the option chosen. Furthermore, he suggests that, were a tribunal chosen, a system of precedent could be created in a similar way to the practice of starring cases used by the immigration tribunals.
 - (4) Housing happiness should be a performance indicator – “need to be able to measure this” (CIH Cymru).
 - (5) The Paddington Law Centre suggested greater use of protocols and penalties for failure to use them.
 - (6) The Law Society suggested that “early neutral evaluation” might be used in housing cases.
 - (7) Alan Tunkel suggested that greater use could be made of information systems in cases of social landlords to facilitate on-line access to information.

APPENDIX A

RESPONDENTS

A.1 Respondents to the Housing: Proportionate Dispute Resolution Issues Paper were:

- (1) Jacob Langlands, Solicitor, also member of Global Leadership Interlink;
- (2) Alan Tunkel, Barrister, Lincoln's Inn;
- (3) Angus Bearn, Landlord (10 to 19 properties), Favoured Locations Ltd;
- (4) An anonymous landlord (landlord less than five properties)
- (5) Ian Wightwick, Barrister, Unity Street Chambers;
- (6) Martin Bayntun, Landlord (20 to 100 properties), Foreignmagic Ltd;
- (7) Victor Sullivan, Landlord (less than five properties);
- (8) Bromsgrove and District Citizens Advice Bureau (Penny Harrison);
- (9) Andrew Arden, Barrister, Arden Chambers;
- (10) John Hales, Supervising Solicitor, Lewisham Law Centre;
- (11) Robert Wassall, Partner, Clarke Willmott Solicitors;
- (12) Roger Murphy, Individual;
- (13) David Thomas, Thomas & Co Solicitors;
- (14) Dave Hickling, Tenancy Co-ordinator, Sheffield Council;
- (15) David Daly, Barrister and accredited mediator, Tanfield Chambers;
- (16) National Union of Students (Marie Burton, Union Solicitor);
- (17) Association of Residential Managing Agents (Berenice Seel);
- (18) Chartered Institute of Housing Cymru;
- (19) Liz Ginns, Mediator, Heartlands Mediation;
- (20) Tom Crisp, Quality and Research Officer, Genesis Housing Group;
- (21) Simeone Lewis, Individual;
- (22) Neil Hughes, Tenant Board Member, Eden Housing Association;
- (23) Advice Services Alliance (Ann Lewis);
- (24) Robert Levene, Chief Executive, Federation of Private Residents Associations;

- (25) Patrick Reddin, Reddin & Co and Association of Building Engineers;
- (26) SITRA (Eileen McMullan);
- (27) Anthony Essien, Leasehold Advisory Service;
- (28) Merseyside Housing Law Group (Simon Rahilly);
- (29) Tessa Shepperson, Solicitor, Landlord Law;
- (30) Macclesfield Wilmslow & District Citizens Advice Bureau;
- (31) Helen Tucker, Solicitor, Anthony Collins Solicitors;
- (32) Citizens Advice;
- (33) Law Reform Committee of the Bar Council (Arden Chambers);
- (34) Law Society;
- (35) Wendy Black, Housing Caseworker, Citizens Advice Bureau;
- (36) National Landlords Association;
- (37) London Housing and Disrepair Forum and National Disrepair Forum;
- (38) Paddington Law Centre (Anne McNicholas, Elizabeth George, John McLean);
- (39) Public Services Ombudsman for Wales (Elizabeth Thomas);
- (40) Brent Private Tenant's Rights Group (Kit Wilby);
- (41) Law Centres Federation;
- (42) Bolton Council and Bolton at Home (Hilary Lewis);
- (43) Legal Services Commission (Kylie Kilgour);
- (44) TPAS (Richard Warrington);
- (45) British Property Federation;
- (46) CIH (Sam Lister);
- (47) Social Housing Law Association;
- (48) Judge Russell Campbell;
- (49) Association of District Judges (Judge David Oldham);
- (50) Independent Housing Ombudsman Service (Mike Biles);
- (51) Housing Corporation (Clare Miller);

- (52) Runcorn Residents Federation;
- (53) Residential Property Tribunal Service;
- (54) Housing Law Practitioners' Association;
- (55) Local Government Ombudsmen;
- (56) Lancelot Robson (Kingston University Law School);
- (57) Irwin Mitchell;
- (58) Council on Tribunals;
- (59) Shelter (John Gallagher);
- (60) Lawrence Greenberg;
- (61) Civil Justice Council.

APPENDIX B

STATISTICAL ANALYSIS AND COMMENTARY

INTRODUCTION

- B.1 We received 62 responses, of which 10 were received on the response form we prepared, six on the response form Tessa Shepperson prepared, and the remaining 46 in narrative form. Few respondents addressed all the issues in the paper, most choosing instead to address particular issues raised by the paper that were relevant to their interests.
- B.2 In analysing all responses for yes/no answers, we also took into account narrative responses that indicated a clear stance one way or the other. “Don’t know” or unclear answers were discounted. Most questions generated between 10 and 20 “yes” or “no” answers, a very small sample size. This makes it very difficult to draw conclusions based on the statistics. Even where the majority of those who answered yes/no may be 10 to 1, that still leaves 50 responses that did not answer yes or no, even though they may have responded to the question. For each question, there will generally be at least a few responses that offer well thought out answers to each particular question, without indicating a clear yes or no response.

STATISTICAL ANALYSIS

Objectives of reform

- B.3 22 respondents agreed that the issues identified in our paragraph 2.64 should be at the heart of any programme of reform (eg increasing access to information, enabling the system to operate more flexibly etc), with only 4 disagreeing. 18 agreed with the types of issues that we said any reformed system needs to be able to accommodate (eg party-party matters; citizen-state matters etc), with only 2 disagreeing.
- B.4 Broadly speaking, this indicates a strong level of support for our objectives of reform.

Identification of options

- B.5 Views were divided as to whether our working assumption (that few, if any, current advice providers are able to offer their clients the full range of available options) was correct (8 yes, 7 no). Some advice agencies, or advice agency bodies, felt that we were downplaying the work of those organisations (eg Advice Services Alliance).

Transforming problems into disputes

- B.6 10 respondents said that our theoretical examples did reflect the practical experience of consultees, compared to 4 who said it did not. However, this doesn’t tell a full story of the responses, since those that disagreed offered well thought-out critiques of our examples (eg Shelter’s response).

Values

- B.7 21 respondents agreed with our set of values, with 6 disagreeing. Views were divided as to whether parties should be able to determine for themselves which values should be prioritised (6 “not at all”, 1 “in some cases”, 4 “always”).

Impact

- B.8 18 respondents agreed that the wider impact of individual decisions could be achieved through greater provision of feedback, with only 1 respondent disagreeing.

Effectiveness

- B.9 Only 3 respondents thought that a proportionate dispute resolution system should allow possession and homelessness applications to be decided in a single process. 11 thought this was a bad idea.

Efficiency/Cost

- B.10 12 respondents agreed that there were places where the current system imposes disproportionate costs, with only 3 respondents disagreeing. Views were more mixed however on the question of whether interest on tenancy deposits (7 yes, 8 no), legal expenses policies (10 yes, 6 no), dispute resolution insurance (6 yes, 8 no), or a tax on such insurance policies (6 yes, 7 no) could be used to fund elements of a proportionate housing dispute resolution system.

Lack of Coherence

- B.11 12 respondents felt that given the large numbers of agencies involved in providing advice or dispute resolution services, they do not all operate with an adequate degree of expertise, with only 1 suggesting that they do (Bromsgrove and District CAB). Respondents were unanimous that there are ways in which their working methods and advice might be better co-ordinated.

Delay

- B.12 18 respondents stated that delay is a problem in the current system, with only 2 saying that it is not a problem.

Triage Plus

- B.13 13 consultees agreed that triage plus should be at the centre of a reformed system of housing dispute resolution. 6 disagreed. Of those who disagreed, most accepted that triage plus was a good idea, but the suggestion that it should be at the centre of a reformed system was the sticking point.
- B.14 Consultees mostly agreed that the three main functions of triage plus should be signposting, oversight and intelligence (13 agreed, 3 disagreed).
- B.15 Consultees agreed that as part of its oversight function it would be appropriate for triage plus to be able to challenge dispute resolution practices that appear to deviate from the law or other agreed sets of principles (14 agreed, 5 disagreed); also that the triage plus provider should be able to refer cases to a court or ombudsman without itself being a party to a dispute (14 agreed, 3 disagreed).

- B.16 Views were divided as to whether triage plus should be compulsory or not (7 “yes”, 10 “no”). Slightly more indicatively, 10 felt that similar principles should apply to those who seek advice from triage plus as apply under the disrepair pre-action protocol and the draft possession protocol, with only 4 disagreeing.

Ombudsmen

- B.17 12 respondents felt that ombudsmen could play an effective role in private sector contexts, with 5 saying that they could not. Views were mixed as to whether the more detailed approach to maladministration (listing actions which may amount to it) was to be preferred to the more general one (7 yes, 4 no). Views were also mixed as to whether the recommendations of ombudsmen dealing with housing matters should be made directly enforceable (10 yes, 8 no).

Mediation

- B.18 Views were divided as to whether there were any contexts where mediation should be made compulsory (11 yes, 16 no). More consultees felt that there is a need for further judicial activism in promoting mediation and changing the attitudes of legal advisers and parties to disputes than not (10 yes, 5 no).

Court or Tribunal?

- B.19 18 consultees thought that such a court or tribunal should be specialist, with only 1 saying it should be generalist (the ADJ).
- B.20 Views were evenly divided as to whether the body should be a court (10), a tribunal (8), or a combination of both (7).
- B.21 Consultees were strongly of the view that the housing adjudication body should involve not just lawyers but also those with a wider range of professional expertise (14 yes, 1 no), though there may have been some uncertainty as to what “involvement” meant (ie sitting as Tribunal Chair’s, or simply use of expert witnesses etc).
- B.22 8 consultees felt that the level of formality should vary depending on the nature of the proceedings (2 disagreeing), with a similar majority stating that adjudication procedures could be made less adversarial (10 yes, 2 no).
- B.23 10 consultees felt that tribunals should have enhanced enforcement powers, with only 1 disagreeing.