Solving Housing Disputes

A Report by JUSTICE

Chair of the Committee
Andrew Arden QC

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The views expressed in this report are those of the Working Party members alone, and do not reflect the views of the organisations or institutions to which they belong.

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EXECUTIVE SUMMARY

Too many people in England and Wales find it difficult to enforce access to housing or other housing rights. Over the past decade, homelessness has more than doubled, putting further strain on the sector. Local authorities are struggling to discharge homelessness duties with limited housing stock. Early legal advice and intervention to address housing problems, homelessness and associated or underlying issues has been greatly attenuated by the cuts to civil legal aid. This has caused large parts of the housing advice sector to collapse, resulting in "advice deserts". Moreover, court closures have further frustrated access to justice as respondents simply cannot afford to attend possession hearings outside their own towns.

Once in the system, housing dispute resolution suffers from disaggregation: there are too many places a person might go to resolve a dispute, with adversarial processes that can be difficult to access, navigate and understand for lay people.

This Working Party builds upon the current endeavours of Government to improve the way housing disputes are resolved by presenting proposals to create a more unified and accessible housing dispute system. Key to these reforms are **greater coherence, access to legal advice and information, and conciliatory methods to resolve disputes**.

The report is set out in two parts, making the case:

- First, for a future model of dispute resolution, the **Housing Disputes Service** (HDS), and
- Second, irrespective of whether the HDS is introduced, for essential reforms to the current system.

The HDS would be an entirely new and distinct model for dispute resolution. It would fuse elements of **problem-solving, investigative, holistic and mediative models** utilised elsewhere in the justice system. It offers a new approach premised not just on dealing with individual disputes, but rather on **remedying underlying issues that give rise to housing claims** and sustaining tenant-landlord relationships beyond the life of the dispute.

However, the proposal for a fully formed HDS is bold, ambitious and will require significant time and investment. It will have to be tested and rigorously evaluated through a pilot phase. If the pilot shows positive results, in the longer term the HDS will need to be integrated with and replace elements of the current system.

The HDS is not an idea accepted by all our members and was rejected by all the tenant lawyers we consulted. Their concerns are set out in the dissent to the model at page 126. We understand and value those concerns, which have done much to shape the detail of the model we propose. Nevertheless, the majority of the Working Party consider that the HDS could offer a better outcome for all parties to housing disputes and is worth exploring – carefully, in limited scope, against relevant criteria and with advisory input from all relevant professional groups.

The second part to this report sets out recommendations which we consider necessary to improve access to and navigation through the current system. Building upon the Government's proposed Housing Complaints Resolution Service, these promote improvements in:

- **access to early legal help**, making use of the Government's Legal Action Plan;
- more accessible court and tribunal architecture through **a single point of entry** for all types of housing dispute;
- **assisted online services** and, where face-to-face alternatives are needed for people who cannot engage online, **flexible deployment of physical hearing venues** so that people can reach the courts and tribunals that will decide upon whether they can keep their home.

Once proceedings commence, our proposals are for:

- **alternative dispute resolution to be embedded pre-action**;
- case management to engage **case workers who can assist in the triaging of disputes** to the correct resolution method; and
- **cross-ticketed, specialist housing judges who can sit for both court and tribunal jurisdictions**.

Throughout the report we have highlight the need for **online and case management processes to be clearly designed so that lay people can understand and successfully use them.** These processes must also **identity and adjust to the needs of court users so that they are enabled to fully articulate their case with suitable and appropriate support.**

I. INTRODUCTION

Change your view of litigation from an adversarial dispute to a problem to be solved – Sir Ernest Ryder[1]

Background

1.1 Housing is a fundamental necessity, some would say a human right.[2] Yet too many people in England and Wales find it difficult to enforce access to housing or other housing rights.

1.2 In the current expanding rental market,[3] landlords frequently do not know or understand their legal obligations; tenants are often unaware of their rights or feel incapable of enforcing them.[4] Landlords are too often, intentionally or unwittingly, failing to discharge their obligations to make repairs or take other safety measures that are found within a complex legal and regulatory overlay.[5] At the same time, tenants fear the consequences of enforcing rights and standards in their home.[6]

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[1] Sir Ernest Ryder, 'The Modernisation of Access to Justice in Times of Austerity' (5th Annual Ryder Lecture, University of Bolton, 2016), available at https://www.judiciary.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf

[2] Adequate housing was recognised as part of the right to an adequate standard of living in the 1948 Universal Declaration of Human Rights and in the 1966 International Covenant on Economic, Social and Cultural Rights.

[3] In 2018/19, the private rented sector accounted for 4.6 million or 19% of all homes, having doubled in size since 2002, see Ministry of Housing, Communities and Local Government, 'English Housing Survey:
Headline Report, 2018-19, p. 1 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860076/2018-19_EHS_Headline_Report.pdf

[4] Poll and Rodgers, 'Getting the House in Order How to improve standards in the private rented sector' (Citizens Advice, 2019) available at https://www.citizensadvice.org.uk/Global/CitizensAdvice/Housing%20Publications/Getting%20the%20House%20in%20Order.pdf

[5] 60% of tenants surveyed by Citizens Advice reported disrepair in their home in the last 2 years, which a landlord was responsible for fixing, *ibid* p.8.

[6] Citizen's Advice surveyed over 2,000 tenants in 2018, and found that tenants who made a formal complaint to their local authority or redress scheme had a 46% chance of being issued with a reprisal

1.3 Other policies have increased pressure on the housing and dispute resolution systems. Private landlords are increasingly reluctant to rent to those on Universal Credit,[7] adding to demand on a social housing sector with limited stock. We were informed that same benefit was often a driving source of rent arrears, homelessness and possession cases before the courts. Austerity has bitten hard. Over the past decade, homelessness has more than doubled,[8] putting further strain on the sector. Local authorities are struggling to discharge homelessness duties[9] and provide enough housing, facing an influx of need with diminished resources.[10] Some have adopted gatekeeping practices that turn people at risk of homelessness away.

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eviction within 6 months, Poll and Rodgers, note 4 above p. 9 available at https://www.citizensadvice.org.uk/Global/CitizensAdvice/Housing%20Publications/Touch%20and%20go%20-%20final.pdf

[7] The Residential Landlords Association told us that an increasing majority of landlords was unwilling to let a property to someone in receipt of Universal Credit. This is primarily because most landlords with Universal Credit tenants reported rent arrears in the last 12 months (61%). The Association also told us that the number of landlords unwilling to rent to Universal Credit tenants is likely to increase in the future, with 84% of landlords set to become more restrictive in who they let to if section 21 notices are removed, https://research.rla.org.uk/wp-content/uploads/Possession-Reform-in-the-PRS-July-2019-1.pdf

[8] Between 2010 and 2018, homelessness increased by 165%, see Ministry of Housing, Communities and Local Government, *Rough Sleeping Statistics Autumn 2018, England (Revised)*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781567/Rough_Sleeping_Statistics_2018_release.pdf and *Rough Sleeping Statistics Autumn 2017, England (Revised)*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682001/Rough_Sleeping_Autumn_2017_Statistical_Release_-_revised.pdf Though homelessness decreased by an estimated 2% in 2018, it was against the background of a 15% increase in 2017.

[9] By virtue of the Homelessness Reduction Act 2017. 12% of local authorities recently surveyed said shrinking resources meant they were in danger of being unable to meet their statutory obligations, 'State of Local Government Finance Survey 2020', (Local Government Information Unit, February 2020) available at https://lgiu.org/wp-content/uploads/2020/02/LGIU-State-of-local-government-finance-2020.pdf NAO research suggests that in 2015/16, local authorities spent £1.1 billion on homelessness, with £845 million attributable to expenditure on temporary accommodation, National Audit Office (2017) Homelessness: A Report by the Comptroller and Auditor General. London: National Audit Office available at https://www.nao.org.uk/wp-content/uploads/2017/09/Homelessness.pdf

[10] There has been a 49.1% reduction in Government funding for local authorities between 2010-11 and 2017-18, a 45.6% fall in spending by local authorities on housing services overall, and a 69.2% reduction in spending on the Supporting People programme (which provides housing-related support to vulnerable people): see National Audit Office, *Financial sustainability of local authorities 2018* (8 March 2018), p. 4 and 7 respectively, available at https://www.nao.org.uk/wp-content/uploads/2018/03/Financial-sustainabilty-of-local-authorites-2018.pdf

1.4 The prospect of early legal advice and intervention to address housing problems, homelessness and associated or underlying issues (such as benefits, family or mental health issues) has been greatly attenuated by the cuts to civil legal aid introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO). The funding cuts have caused large parts of the housing advice sector to collapse, resulting in "advice deserts" across huge swathes of the country and leaving many with nowhere to go when facing a housing problem. The introduction of court closures to part-fund Her Majesty's Court and Tribunal Services (HMCTS) Reform Programme (Reform Programme) [11] has further frustrated access to justice, reducing attendance rates of respondents because they simply cannot afford to attend possession hearings outside their own towns.

1.5 While sources of advice have been reducing, ways in which disputes may be resolved or problems solved have been proliferating. Alongside this, the housing dispute resolution landscape suffers from disaggregation: there are just too many places a person might go to resolve a dispute. There is a lack of coherence in regulatory application and oversight[12] and a need for greater emphasis on early resolution, conciliatory measures and ways to navigate the dispute resolution system.

1.6 There have been several significant proposals for changes to regulation and dispute resolution in housing in recent years, including:

[11] The Reform Programme is predicated on the expanded use of technology and the development of accessible digital court and tribunal processes to extend access to justice to those who have historically been excluded, by virtue of legal cost, delay and complexity, from the justice system. Sale of the estate has so far contributed more than 22% of the total cost of the Reform Programme, National Audit Office, 'Transforming courts and tribunals – a progress update', September 2019, para 2.1 available at https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progess-in-transforming-courts-and-tribunals.pdf

[12] As discussed at length in Chapter 4, the bifurcation of housing disputes between court and tribunal remains an issue. Further, the landscape for redress for complaints against housing providers is disaggregated; the Property Redress Scheme, the Housing Ombudsman, the Local Government and Social Care Ombudsmen the Property Ombudsman, the Tenancy Deposit Scheme, the Deposit Protection Scheme and MyDeposits have distinct dispute resolution processes for disputes initiated by a tenant against a landlord. See paragraph 4.1 below.

(a) the *Strengthening Consumer Redress in the Housing Market* consultation, by the Ministry of Housing, Communities and Local Government (MHCLG) which aims to create universal coverage for housing complaints;[13]

(b) the Rented Homes Bill, which proposes the abolition of "no-fault" eviction in England;[14]

(c) the Ministry of Justice post-implementation review of LASPO, which considered shortfalls in housing advice and representation caused by legal aid cuts and evinces an intention to explore and expand new models of early advice delivery; [15]

(d) the establishment of the Regulation of Property Agents Working Group in England;[16] and

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[13] The Government response to the consultation sets out three main proposals: (1) plugging gaps in current redress schemes through the establishment of a New Homes Ombudsman and requiring all private landlords to belong to a redress scheme; (2) the establishment of a digital portal to all schemes, a one-stop shop "Housing Complaints Resolution Service": and (3) creating a single "Code of Practice" on complaint handling across all tenures. MHCLG, 'Strengthening Consumer Redress in the Housing Market: Summary of responses to the consultation and the Government's response', January 2019 p. 4-5, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/773161/Strengthening_Consumer_Redress_in_the_Housing_Market_Response.pdf

[14] The Bill sets out an intention to abolish section 21 "no-fault" eviction, historically used to evict tenants at short notice for no reason, https://publications.parliament.uk/pa/bills/lbill/58-01/051/5801051.pdf As referenced above, the Citizen's Advice survey revealed that section 21 of the Housing Act 1988 has frequently been deployed for retaliatory evictions; Rodgers note 4 above p. 9, available at https://www.citizensadvice.org.uk/Global/CitizensAdvice/Housing%20Publications/Touch%20and%20go%20-%20final.pdf However, as part of our consultation, the Residential Landlords Association challenged the statistics in this report. The Association told us that its 2019 survey of over 6,500 landlords and agents found that section 21 notices were issued for rent arrears in 83.9% of cases, damage to property by the tenant in 56.1% of cases and anti-social behaviour in 51% of cases, Clay, 'Possession Reform in the Private Rented Sector: Ensuring Landlord Confidence', (Residential Landlord Association, July 2019) p. 18 available at https://research.rla.org.uk/wp-content/uploads/Possession-Reform-in-the-PRS-July-2019-1.pdf

[15] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf

[16] Which will advise Government on a new regulatory framework for Property Agents https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818244/Regulation_of_Property_Agents_final_report.pdf

(e) the commencement of the online possession project,[17] which will digitise elements of possession claims as part of the Reform Programme.

1.7 While individually encouraging, none of these offers a holistic solution for the housing dispute resolution/problem-solving system. Nor do they offer a unified architecture in which tenants and landlords can effectively vindicate rights and interests, without recourse to eviction, conflict and financial loss.

The Working Party

1.8 The starting point for this Working Party was to develop proposals to create a more unified and accessible housing dispute system. Around the same time, in November 2018, the MHCLG called for evidence on the proposal for a Housing Court.[18] That consultation considered the current model of dispute resolution, the extent to which housing disputes are currently split between the First-tier Tribunal (Property Chamber) and the County Court and whether there was a case for consolidation into a solitary jurisdiction. It prompted us to consider not only the current landscape, but more fundamentally, whether there are potentially better methods to resolve housing disputes.[19]

1.9 Our Working Party was convened in March 2019. Over the last 12 months, we have considered evidence and ideas on how best to improve access to justice in housing disputes. We have not sought to duplicate existing exercises in reform although there are areas where we have built upon pre-existing proposals or reforms, for instance with respect to the Housing Complaints Resolution Service and cross-ticketing (see **Chapter 4** below). Instead, we set out to explore what type of housing dispute fora could best promote access to justice, whether there was a role for expanding alternative dispute resolution (ADR) mechanisms in the system and what role digitisation should have against the background of the Reform Programme. As with all JUSTICE working parties, our focus has been on procedures and processes.

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[17] The project will commence in 2020 and "will improve, automate and streamline the shorthold tenancy possession process", available at https://www.gov.uk/guidance/hmcts-reform-update-civil#possession

[18] MHCLG, 'Considering the case for a Housing Court: A Call for Evidence', November 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755326/Considering_the_case_for_a_housing_court.pdf

[19] At the time of our reporting, there was no indication as to whether the Government intended to proceed with a solitary Housing Court.

II. THE HOUSING DISPUTES SERVICE

Introduction

2.1 In **Chapters 3 and 4**, we explore how structural and practical changes to the current housing disputes system can better promote access to justice. Our recommendation is for Government to consider these proposals promptly, given the urgent need for improvement in the way housing disputes are dealt. It is not, however, our only recommendation.

2.2 One of the features that distinguishes the renting of housing, from a sale and purchase matter, for example, is that it involves a continuing relationship between landlord and tenant. In contrast to other continuing consumer relations (e.g. utility supplies, telephone lines) the housing relationship is what might be described as an all-embracing or multi-faceted one, not a "single issue" one. There is a constant risk of a housing dispute being triggered by any number of matters, not just rent or conditions, but by relations between occupiers[20] or with neighbours, loss of employment, how the property is occupied, services to the property, improvements, decoration, use of common parts and otherwise. The trigger issue may not even be one between the parties, such as incorrect or delayed benefits or enforcement activity by a local authority. Nor do disputes exist in a vacuum; when one issue reaches the point at which the parties are engaged in a dispute, it commonly pulls other matters along with it, often because, once advice is taken, rights are identified as legally enforceable for the first time.

2.3 Historically, landlords and tenants are perceived as being at odds even though their wishes and interests can align: a return on investment and a place to live. The potential is ever present for the relationship to become adversarial. Once it does so, the most commonly used dispute resolution mechanisms are adversarial. These do nothing to smooth future relations or to minimise the likely distress which will be caused by their termination. Though it is commonly in the interests of (at least) both parties to preserve the relationship,[21] adversarial proceedings commonly exacerbate tensions.

[20] For example, where domestic abuse and familial breakdown is present in a home.

[21] It is also in the interests of society, whether in terms of resources (e.g. fewer homelessness applications or Children Act 1989 assessments) or in terms of longer-term outcomes (stable family life, education, employability, etc.).

Housing cases are skirmishes, neither the beginning nor the end of strife: they may resolve an immediate issue, but they do not foster let alone bring a lasting peace. We recommend they be replaced by a mechanism which can.

2.4 There are other considerations, some of which may be common to other areas of law, others of which are peculiar to housing. Housing law is notoriously complex, even though many housing cases are not. The same system must cater for both, necessarily designed to support the weightier demands of the complex but with only limited flexibility to deal with cases which are not. The system can be unwieldy when the case is not complex but often not suited to those complex cases where specialist expertise is needed. There is also a considerable problem of consistency when disputes are heard by judges without housing expertise,[22] which only specialism and the concentration of experience can remedy.

2.5 There are issues of access, in terms of finding housing lawyers and advisers. Many people do not engage with the legal process. When asked to leave their home, they do so even though it may be costly and difficult for them. When asked for a rent increase, they pay even though it may squeeze them beyond their resources. If the landlord refuses repairs, they put up with it until they leave for somewhere else,[23] which shifts the disrepair to the next tenant and generates the costs of moving to find somewhere else to live. Many people do not qualify for legal aid[24] or do not know that they may qualify and believe that lawyers are too expensive. Many assume that the law will not help them or do not know how to go about finding a lawyer or an advice service. Many live in areas where there are no publicly-funded lawyers doing housing work.[25] For many, the legal system is alien, unfriendly and

[22] See Chapter 4.

[23] A recent report suggested that 60% of tenants experience disrepair, and of these 20% do not have the problem completely resolved within a reasonable amount of time. 22% of tenants experiencing disrepair end up spending their own time or money fixing the problem. Poll and Rodgers note 4 above, summary.

[24] Eligibility for civil legal aid is for those with monthly disposable income of below £733 and less than £8,000 in capital assets, 'Means Assessment Guidance', (Legal Aid Agency, April 2019), appendix 1 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793462/Means_Assessment_Guidance.pdf

[25] See para 3.5.

incomprehensible.[26] Moreover, there is an inbuilt imbalance in the majority of cases, since resolving a dispute for a landlord or service provider is a business matter or a professional function while for a tenant it is about their home, an emotional proposition by which they are constantly surrounded, or in the case of homelessness, the absence of a home.[27]

2.6 In housing disputes, courts are called upon to provide a legal resolution to relationships[28] that have broken down for any number of reasons. However, that resolution commonly does not resolve all the actual or potential issues between the parties, still less between parties and others who may nonetheless have a role, such as local authorities both as enforcement bodies and in relation to homelessness. In a context of diminished public funding for legal advice and financial pressures from Universal Credit on tenants, judges intervene as far as they are able; they manage possession lists by encouraging parties to pursue negotiated solutions, such as rent repayment agreements or suspended possession orders subject to certain obligations on a tenant.[29] We acknowledge these efforts and those of the overstretched advice sector and elsewhere in the report make recommendations for how the current system can consolidate developments that focus on problem solving in and out of the courts and tribunals.

2.7 However, the system as currently configured fails in several ways. Responsibility and oversight reside in too many places, preventing a coherent understanding of structural problems within housing. Disputes are submitted

[26] JUSTICE's 2019 Working Party report, *Understanding Courts*, made 41 recommendations to improve understanding of and participation in the court process for lay users, to address a culture that leads to "user dissatisfaction, confusion and exclusion", executive summary, available at https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf

[27] The loss of one's home is a traumatic experience, with long lasting effects on wellbeing and family life, "from disrupting a child's education to triggering stress and depression", with the corresponding public perception that repossession and homelessness are two of the three most serious problems a person could face, Eviction Risk Monitor, 'local rates of landlord and mortgage possession claims', in: Shelter policy library December 2011, p. 3.

[28] As described elsewhere in this report, most housing disputes in any given year are possession claims, involving relationships between a landlord, whether private or social, and a tenant.

[29] Such an approach is positively encouraged by the Pre-Action Protocol for Possession Claims by Social Landlords and the Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property - see para 3.30, below.

to a system[30] in which judges are ultimately required to adjudicate what are presented as single-issue disputes through an adversarial system.[31] At the same time, the underlying issues which are inherent to so many housing disputes remain unaddressed and cause significant pressures elsewhere.[32] Existing processes ultimately prevent the making of more meaningful interventions in the underlying interests at issue in a dispute. In this Chapter, we offer something new, inspired by models and approaches to dispute resolution elsewhere in the justice system, at home and abroad.

2.8 Across the civil justice system, novel approaches to dispute resolution have been tailored to the specific needs of users. As described in **Chapter 3**, in the family law context, the Family Drug and Alcohol Court deploys a problem-solving approach to investigate and address the underlying parental issues giving rise to the prospect of child removal.[33] ADR has developed widely across the justice landscape: mediation, online dispute resolution, early neutral evaluation and ombudsmen schemes have moved the civil justice system away from a system predicated exclusively on rights adjudication through a formal court-based adjudicative process. A number of those processes favour methods of dispute resolution that allow for ongoing relationships between the parties to be sustained, rather than approaches that entrench conflict and adversarialism.[34] There is also an emerging desire to use digital processes to take better advantage of data in order to understand systemic problems, with a view to joining up dispute resolution and regulatory intervention to make earlier and targeted interventions in problem areas.

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[30] Notwithstanding the informal shift towards encouraging negotiated solutions.

[31] The current adversarial system necessitates equality of arms but post-LASPO there has been a fundamental failure to provide it as legal aid provision dwindles.

[32] NAO research suggests that in 2015/16, local authorities spent £1.1 billion on homelessness, with £845 million attributable to expenditure on temporary accommodation, National Audit Office (2017) Homelessness: A Report by the Comptroller and Auditor General. London: National Audit Office.

[33] See para 3.52.

[34] International research suggests that mediation produces greater compliance with decisions and lower rates of re-litigation than adversarial methods of dispute resolution, 'An International Evidence Review of Mediation in Civil Justice' (Social Research: Crime and Justice, Scottish Government, 2019) availab le at: https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/pages/9/

2.9 What these developments reflect is that the traditional adversarial model has been found wanting in terms of access, unmet need, delay,[35] cost and satisfaction with outcomes. Moreover, most people do not like going to court. If we can find a more compassionate, useful way of resolving their disputes and problems, we should adopt it.[36] These developments have encouraged our Working Party's thinking and our proposal for something holistic and problem-solving, which looks to the drivers of a dispute and tries to identify, address and remedy them. **We recommend the piloting of a new Housing Disputes Service (HDS).**

The Housing Disputes Service

2.10 The HDS would not be a court, tribunal or ombudsman. It would be something entirely new. It is a proposed model for dispute resolution that would set out all the circumstances and relevant issues in a housing relationship, not confined by the parties' initial assumptions as to what the issues are, which can themselves reflect an information imbalance derived from unequal resources between the parties. The investigation would include identifying, assessing and attempting to find solutions for the underlying problems giving rise to the housing dispute and meeting participants' real interests in the outcome. The aim is to ensure that all relevant areas of dispute are brought to the surface, including compliance with notice and other contractual and regulatory requirements.

2.11 Although the HDS will need to evolve, both within a pilot period[37] and - if successful - once it starts to be rolled out nationally,[38] both geographically and in terms of the disputes it deals with, it is nonetheless worth pausing to consider the nature of housing law and therefore of the potential ambit of the

[35] The Residential Landlords Association highlighted that the current average wait time in London for certain possession claims is 30 weeks from court application to bailiff enforcement. Wood, 'The wait of justice: the slow pace of the courts in Greater London' (Residential Landlord Association Blog, 15 January 2020) available at https://research.rla.org.uk/research-blog/the-wait-of-justice-the-slow-pace-of-the-courts-in-greater-london/

[36] See the JUSTICE's *Understanding Courts*, note 26 above, which made an array of recommendations aimed at improving a court and tribunal system alien and alienating for most citizens.

[37] See para 2.31.

[38] See para 2.20.

HDS. At its widest, housing disputes may arise in relation to any law, regulation or code applicable to residential occupation. On that approach, it would include the following:

(i) property law, conveyancing, planning, compulsory purchase and compensation, matrimonial/domestic cohabitation law, neighbour disputes (boundary or otherwise), contract and tort as well as what is now a very substantial body of statutory and case law developed under the rubric housing law;

(ii) the statutory and case law which is widely recognised as comprising housing law, which includes security of tenure, terms and payment in relation to rented (including leaseholder) and mortgaged housing (including mobile homes and houseboats), enfranchisement (including right to buy) and extension of leases, harassment and eviction, anti-social behaviour, homelessness and allocations, improvement grants, management provisions, the regulation of social landlords, as well as the traditional areas of action in relation to unsatisfactory housing (individual and area, including houses in multiple occupation and selective licensing), the development of housing by local authorities, housing-related compensation, housing welfare benefits and the various housing maladministration jurisdictions.[39]

2.12 Realistically, the HDS would be likely to focus on some of the latter areas for the foreseeable future and largely disregard the former - save, of course, for landlord and tenant law itself. However, the argument in favour of the HDS could as easily be addressed to, for example, disputes about charges and conditions when new homes are sold for the first time and all types of dispute between neighbours. We would, however, expect to include neighbour disputes where one of the parties is a tenant. It is unnecessary - and would be wrong - to reach any longer-term views as to ambit of the HDS at this stage: it will be informed by the pilot and continuing experience, and will be determined by the proposed Housing Disputes Engagement Group (HDEG).[40]

[39] Cited at note 41 below. For example, the FTT (PC) holds around 140 separate jurisdictions.

[40] See para 2.73.

The reality is that the HDS would take a number of years to achieve a destination at which it is the sole dispute resolution body for housing, during which time not only will it be desirable for other dispute resolution services to be under ongoing improvement, but the continuing experiences of those services will inform the development of HDS and vice versa.

2.13 We propose that, in its final form, the HDS take on housing disputes which currently reside in the First-tier Tribunal (Property Chamber) (FTT (PC)), the County Court and Magistrates' Court, housing provider maladministration claims from redress providers,[41] and the rent officer service. We also propose that the HDS take on the dispute resolution function for pre-existing tenancy deposit schemes. Finally, we propose that the HDS take on the function of reviewing homelessness decisions under s.202 Housing Act 1996. These are commonly referred to as internal reviews but there is power to externalise the s.202 reviewing function and it is proposed that local housing authorities be required to externalise the s.202 function to the HDS. The long-term desire is to establish a single framework for housing dispute resolution, though we recognise that the piloting of the HDS and the oversight by the HDEG will tell us much about its efficacy and how pre-existing jurisdictions might evolve in response. We propose that the use of HDS would become the mandatory first step in the dispute resolution process.

2.14 The service would approach the relationship neutrally from the perspective of all its aspects and parties, finding facts, applying the relevant regulatory framework and/or any applicable codes of conduct and the law. It would absorb other considerations, including the parties' intentions in the conduct of the dispute. Disputes would be resolved through a staged approach. Following an investigation, there would be an initial and provisional assessment which would include a preliminary view of what should follow from it in terms of resolution, before what might be called an ADR stage and if need be, concluded by final determination. Appeals from the HDS would be available to a court or tribunal as of right. The intention is not to add a layer to the resolution system but to substitute HDS for the FTT (PC) and DJ stage. That being so, the HDS must be established as a powerful dispute resolution service, capable of conducting dispute resolution, actively resolving

[41] The Housing Ombudsman, the Property Ombudsman, the Property Redress Scheme and the housing function of the Local Government and Social Care Ombudsman.

individual issues and advising parties on respective rights and obligations to the highest level.

2.15 The service will need to cater for a wide range of issues.[42] It will need to take advantage of best practice in its processes, including digital case files for officers and an accessible digital page designed for lay users, full of information on substantive rights and applicable regulatory standards. It will also need to be accessible for those who experience digital exclusion,[43] so multiple methods of engaging with the service would be necessary. Looking beyond the obvious parties, local authorities have numerous regulatory functions over housing[44] and a direct interest in proceedings which might result in an eviction where they have homelessness functions. Reference to the proposed service allows all issues and all parties - including local authorities and other enforcement bodies - to come together to forge constructive solutions and ensure that valuable housing resources are put to their best use without introducing unnecessary adverse consequences.

2.16 The intention is to establish a new culture, collaborative, open and ethical, designed to allow all parties to the relationship[45] to fulfil their continuing roles otherwise than at each other's cost. The HDS would be an accessible form of dispute resolution designed to change culture not merely in dispute resolution,

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[42] From the simple to the complex, from the purely legal to the exclusively factual, from high value disputes to the smallest amounts conceivable in contention, from what are civil claims to what may be criminal prosecutions.

[43] Digital exclusion describes "those who lack access either to the internet or to a device, or the skills, ability, confidence or motivation to use it – as well as those who rely on digital assistance", JUSTICE (2018), *Preventing Digital Exclusion from Online Justice* para 1.8 available at https://justice.org.uk/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf

[44] Some of them, such as licensing issues, referable to the FTT (PC) and then to the Upper Tribunal; others, such as environmental health matters or harassment and illegal eviction, to the magistrates' court and then to the Crown Court.

[45] Here as elsewhere, parties includes external parties such as local authorities and relationships between them and others, including landlords; it could in some cases include the fire authority or, e.g., the police in cases of serious anti-social behaviour or social services where children, the elderly or the otherwise vulnerable are involved. Where there is a *prima facie* case for the exercise of powers by any such body, HDS would inform that body that it is to be a participant in the process; with one exception, it would be subject to determinations by HDS as to the use of its powers (as appealable as any other determination by HDS). The exception is where the police are prosecuting using conventional (not housing, *i.e.* Anti-social Behaviour, Crime and Policing Act 2014) criminal powers, e.g. fraud, assault, theft, etc.

but wholesale across the housing sector. Rather than housing problems, conditions and relationships festering, regulatory action - if needed - would be promptly taken, issues proactively identified and the underlying motivations and interests of parties to housing relationships explored in a mediative fashion. These are the primary objectives as distinct from punishing parties for their failings and faults. The culture must be one of substituting an examination of issues with a view to improving performance, for the allocation of blame and the imposition of penalties. This culture will need to be established from the beginning and will need to be articulated to participants and those looking to use the service. Because the investigation is not confined to strictly legal issues, parties' motives, which may well be legally irrelevant, can play a proper part. The landlord who has, through misunderstanding or mistake, failed in their duties need not be treated in the same way as the landlord who has taken the same action on a calculated basis, whether to make a greater profit and/or to harm the tenant. The aim is to find solutions and remedies which most closely match the justice of the issue and the parties' aspirations for resolution of the dispute.

2.17 The exercise might be described as one in which the housing relationship is turned over to the HDS to be brought up to standard and handed back to the parties fully compliant and functional.[46] It combines an advisory approach with active assistance, enforcement of regulatory and contractual compliance, and dispute resolution. It is not envisaged that the service would be a regulator, but that it would work closely with the various housing and property regulators. It would feed data on disputes back to regulators to create a continuing cycle of enforcement, regulatory provision and improvement of housing standards. The service must be accessible in various ways (face-to-face, over the phone, digitally), widely known to be a free service[47] to use and conduct itself in a user-friendly manner in which it is easy for people to participate. The approach would be multi-disciplinary with, so far as possible, skills embedded to contribute to a culture not dominated by any one skill and which, so far as possible, is able to effect actual solutions, rather than referring people elsewhere. It would use whatever mechanisms are appropriate to resolve the problems which have brought the matter to its attention and which

[46] Primarily, this refers to landlord and tenant, but again it includes local authorities, landlords and others.

[47] Subject to such subscription as a landlord may be required to pay for the HDS as a redress scheme, see para 2.80-2.81.

may otherwise be identified, to ensure that all matters and interests relevant to the dispute are brought to the surface. So far as is possible, any latent problems should be dealt with at the same time by the HDS, to lay the ground for better future relations.

2.18 The service would approach the relationship as a neutral, investigative arbiter, finding facts, applying the relevant legal and regulatory framework and any applicable codes of conduct. It would adopt a protective,[48] non-adversarial and investigative method to claims. Our evidence gathering revealed that a vast number of housing disputes, particularly possession claims, are currently resolved through informal negotiation process outside of the courtroom,[49] and that those approaches are the ones that produce most satisfactory outcomes for participants. The HDS would not have hearings. Instead, the method for dispute resolution would be negotiation and ADR.

2.19 The HDS would be the default mechanism for housing dispute resolution.[50] Appeals would be available to appellate courts and tribunals as of right, should

[48] Protective denotes an approach that ensures all parties are made aware of their respective rights and obligations, modifying the process for vulnerable people, conducting the process to ensure people can participate effectively and deploying internal expertise and experience to address underlying drivers behind a dispute.

[49] Harris, 'Alternative Approaches to Resolving Housing Disputes: The role and potential of alternative dispute resolution in the UK private rented sector', (UK Collaborative Centre for Housing Evidence, February 2020) p.24 (forthcoming). Tenant lawyers we spoke to told us that for the majority of clients who come to them, pre-litigation negotiation resolves the dispute, even if that negotiation is not initiated by the housing provider as required under pre-action protocols.

[50] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576 has long stood for the proposition that forcing people to participate in ADR external to the court process is a fetter on the right to a fair trial under Article 6 of the ECHR. However, there are strong caveats to *Halsey*. In August 2019, the Court of Appeal in *Lomax v Lomax* [2019] EWCA Civ 1467 held that CPR 3.1(2)(m), which refers to a court's powers as including "hearing an Early Neutral Evaluation ("ENE")", allowed for a court to order ENE notwithstanding that the parties had not consented to the process. Article 5(2) of the 2008 European Mediation Directive explicitly permits the use of mandatory mediation. Provided participants maintain an unfettered ability to access the courts, ADR merely postpones the right to a trial, rather than denying it, Creutzfeldt, N. and Gill, C. (2014) 'The Impact and Legitimacy of Ombudsman and ADR Schemes in the UK. The Foundation for Law, Justice and Society: Policy Briefing', available at: https://www.fljs.org/content/impact-and-legitimacy-ombudsman-and-adr-schemes-uk We acknowledge concerns about Article 6, but we believe the HDS is likely to be compliant. We note the British Columbia Civil Resolution Tribunal (BCCRT), which features enforceable determinations made by adjudicators as opposed to judges in apartment disputes bears many similarities to the HDS model. The BCCRT was a significant influence on the Civil Courts Structure Review and otherwise on dispute resolution system development here and there is no suggestion that model is not Article 6 complaint. While the decision in

a resolution acceptable to all parties not be achieved through the HDS. It would maintain a cadre of senior and professional officers with an array of skill sets, so that specialist, technical expertise could be applied to problems arising within a dispute.[51]

2.20 Should the HDS proceed beyond the pilot stage,[52] we propose the establishment of a national service with local offices. Currently, the FTT (PC) operates out of several regional offices.[53] Those areas could form the basis for a core of large HDS offices featuring all the distinct skill sets for a national service. However, the HDS should be a national service. Our intention is to reintroduce advice and housing dispute resolution to areas where court closures and legal aid shortfalls are currently frustrating access to justice. Smaller offices should be established with identified core staff who could call upon the specialist expertise from larger, centralised offices on an as-needed basis. Courts are a stressful place for people facing the prospect of eviction. Thus we recommend that when conducting face-to-face investigations or ADR, the HDS use venues other than courts,[54] to reduce the anxiety of those facing the prospect of homelessness.

2.21 The HDS would be distinct from traditional approaches to housing dispute resolution through its new culture and operating method.

(a) **Investigative** – the HDS would investigate all matters within a housing relationship, not merely those as presented by the parties.

Menini v Banco Poplare Societa Cooperativea (Case C-75-16) (on which the three dissenting members of the Working Party rely – see Appendix B) may be thought to raise arguments about this, in light of the very strong trend towards alternative dispute resolution, and as participation in Stage 3 is not itself mandatory (see below, para 2.54), our Working Party's view is that the establishment of the HDS as a mandatory scheme would not amount to a fetter on Article 6.

[51] This would range from the sort of expertise which would commonly be needed, e.g. environmental health or surveying, to expertise only occasionally required, e.g. fire, disease or forensic accountancy. A national service can afford to maintain a broad range of expertise, available to all local HDS centres.

[52] See further below, para 2.31 onwards.

[53] In London, the Eastern Region (Cambridge), the Midlands (Birmingham), Northern Region (Manchester) and Southern Region (Hampshire).

[54] We envisage that the HDS would be capable of conducting itself on a "pop-up" basis, travelling to towns or communities to conduct interviews on an as-needed basis.

Stage 1 of the tiered approach to dispute resolution would investigate underlying causes of the housing dispute, contractual and regulatory compliance[55] and parties' motivations. The HDS is not to be confined by any particular jurisdiction, whether between the civil jurisdictions which deal with housing disputes, or between judicial and administrative jurisdictions such as ombudsmen, or between civil and criminal jurisdictions. Part of the HDS's ongoing functions would include reports on systemic housing issues[56] and reporting to Parliament.

(b) **Holistic and multi-disciplinary** – the HDS would be capable of investigating and addressing the underlying causes of a dispute. An array of skill sets would exist within the HDS: environmental health officers, surveyors, investigators, DWP officers, advisors, as well as social and mental health workers, capable of addressing the fundamental, underlying reasons for a dispute and all other features of the housing relationship which call for attention.

(c) **Specialist and quality** – the HDS would be populated by a multi-disciplinary skill set with expertise in housing. Remuneration of the senior level must be commensurate with first-tier services currently in existence within the housing dispute system.

(d) **Ongoing relationships** – throughout the tiered approach to dispute resolution, the HDS would encourage parties to seek resolution of their dispute without recourse to adversarial methods.

(e) **Assistive and protective** – the HDS would do all in its power to appraise participants of their respective rights and obligations within a housing relationship. Identification of all relevant issues in the

[55] This could therefore extend the number of participants in the process to include, e.g. local authorities or, where the dispute is between an authority and a landlord, tenants.

[56] Akin to systemic focus reports currently produced by the Local Government and Social Care Ombudsman: https://www.lgo.org.uk/information-centre/reports/focus-reports

housing relationship would be followed by open discussion, negotiation and mediation or other ADR approach.

(f) **Digital and data** – the HDS would feature digital filing and case management systems,[57] capable of feeding data relating to dispute type to regulators to assist them to make targeted interventions where problems are arising. Digital case files should be used, capable of seamless transfer to the court/tribunal stage. The HDS process would be available to the court, thus diminishing if not eliminating the risk of information imbalance or gaps arising through inequality of arms.

(g) **Non-adversarial** – the process would be based on problem solving and resolving a broader array of interests within the housing relationship. In the HDS, there are no hearings or parties' lawyers; there are investigative interviews and ADR methods deployed but nothing akin to an adjudicative hearing. The HDS will not feature hearings with advocates taking positional approaches to a dispute. Instead, there is to be a focus on the real problems, parties' interests and potential solutions that sustain future relations. Notwithstanding, there would be an obvious need for independent legal advice outside the process to be widely available and sufficiently remunerated for participants in the HDS process.

2.22 We appreciate this is a bold proposal. We recommend the HDS be a staged pilot (discussed in more detail below), assessed against robust evaluative measures. Not all Working Party members support the proposal for a pilot of the HDS concept. Their concerns are articulated in **Annexure B** of this report. Tenant lawyers we spoke to expressed concern about equality of arms for vulnerable[58] participants in the HDS. They were also concerned about the sustainability of legal aid practices since many have become reliant on costs orders in successful cases for funding. The biggest concern was that the HDS

[57] For those lacking digital capacity, alternate methods of engagement – over the phone, through paper correspondence and face-to-face – will be available.

[58] See paras immediately below.

would not be properly funded and would therefore represent a diminution in access to justice compared to the current system.

2.23 The majority of the Working Party think that piloting the HDS should allay these concerns, and that evaluating the pilot against access to justice outcomes will tell us how effective the service can be. However, they consider that it is essential for the proper functioning of the pilot that there be a new HDS legal aid contract created and/or a panel of independent lawyers appointed to provide clients with advice throughout the process. Lawyers should be selected for the pilot from the housing law sector and offered sustainable rates[59] of remuneration to advise participants through the HDS process and, if need be, to take appeals to the court/tribunal stage. We think the pilot is an opportunity to reintroduce housing advice provision where there currently is none.

2.24 While we understand the concerns about the exclusion of legal representatives for vulnerable people,[60] from some parts of the process,[61] our proposal for the HDS is qualitatively distinct from any adversarial, court or tribunal process. The HDS would act as arbiter, investigator, advisor and problem solver, looking at all elements in a housing relationship on an inquisitorial basis. The intention is not for it to sit back and wait for relevant material to be brought to it by way of legal representations.[62] It would ascertain that information for itself and be proactive in identifying party vulnerability and making necessary adjustments to allow them to participate in the process. Accordingly, the majority of the Working Party support the recommendation for a pilot of the HDS.

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[59] A rate which is cost effective in its own right and that does not need subsidising from any other activity.

[60] That is, for those vulnerable people who manage to obtain legal representation. Recent analysis of the list of legal aid providers suggests that 52% of authorities do not have any legal aid providers within their boundaries, and London had 49% of the country's 455 providers, Heath, 'Behind the numbers: what impacts have legal aid cuts had on housing?' (Inside Housing Online, 7 February 2020) available at https://www.insidehousing.co.uk/insight/behind-the-numbers-what-impacts-have-legal-aid-cuts-had-on-housing-64986

[61] For a full description of the process, see paras 2.49-2.57 below.

[62] There is, however, no inhibition on the provision of information by parties' lawyers: see below, paras 2.68-2.69.

Vulnerability

2.25 The term "vulnerable" in the justice system denotes factors, whether inherent to a person or situational, which impede their ability to participate in a court or tribunal process.[63] **We recommend the HDS adopt best practice with respect to those who are vulnerable by either inherent or situational vulnerability.** The need to address underlying problems experienced by vulnerable people in housing disputes and to allow for their effective participation is central to the HDS.

2.26 **We recommend the HDS digital system collect information on vulnerability[64] as early as possible in the process[65] to enable reasonable adjustments to be made to its process to accommodate the vulnerability. Data should be collected on protected characteristics, to provide policy makers with information on who is using the HDS and to inform systemic interventions taking place with housing providers**. Digital or paper-based response forms should ask questions about vulnerability, including around digital capability, to allow the HDS proactively to make the adjustments necessary to ensure a person can participate effectively in the process. This could include a series of prompts in the process or a questionnaire prior to Stage 1, for example, asking a user whether they need (a) an interpreter; (b) a person to assist them in talking with the HDS; (c) a digital helper to assist them in engaging with the digital part of the process. An affirmative answer to any of these questions should see the HDS, at Stage 1, make inquiries and arrangements for adjustments as necessary, though the HDS should also make

[63] The Advocate's Gateway cites various risk factors that may bring a person within the definition of inherent vulnerability; being a child; lack of fluency in the English language; illiteracy; learning disabilities; hearing impairments; speech (or language) impairments; mental health conditions or impairments, ATC The Advocates Gateway, 2017:5. Equally, a court process itself may render a person vulnerable, by virtue of the environment being unfamiliar, anxiety-inducing or improperly adapted to the needs of ordinary people, see JUSTICE note 26 above, para 1.21.

[64] The Legal Education Foundation has previously proposed that the Reform Programme capture data points on vulnerability as early as possible in the process, although that proposal not necessarily made in order to allow for adjustments to be made, see Dr Natalie Byrom, 'Digital Justice: HMCTS data strategy and delivering access to justice: Report and Recommendations', (Legal Education Foundation, October 2019) available at https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/09/DigitalJusticeFINAL.pdf

[65] Rather than waiting, for instance, for directions questionnaires to be issued.

active inquiries as to a participant's capabilities. We propose that adjustments would include the use of an interpreter, communication intermediary, a support person akin to the Personal Support Unit, or a support person proposed by the participant (for example their carer). Where vulnerability is identified, the HDS should facilitate advice through the panel lawyer at each stage.

2.27 With respect to situational vulnerability, the approach, conduct and location of dispute resolution can do much to ameliorate the situational specific stresses and anxieties that impede a person's capacity to participate in a judicial process. In the first instance, we recommend that HDS officers have specific training on adducing information from and assisting vulnerable people.[66]

Amalgamating pre-existing schemes

2.28 We propose that the HDS operate as a first-tier, rather than pre-action, stage for housing disputes. Pitching the HDS at a pre-action stage would mean the level of skills and staffing provided would be subordinate to that of the courts and tribunals. It must be perceived as an effective first-tier of dispute resolution, at a level of equivalence and standing to the County Court (DJ) and FTT (PC). It must be sufficiently resourced to become a high quality, holistic problem-solving service.

2.29 As described in **Chapter 4**, there has long been a desire for a single forum to hear all housing disputes, rather than the division between court and tribunals, and splintering across various redress schemes. We think the HDS could be that body and sit alongside a reformed court and tribunal hierarchy, to establish a single point of call for people with a housing problem. Should the

[66] Schemes already in operation include the Advocacy and Vulnerable Training Programme: see The Inns of Court College of Advocacy (ICCA) website, https://www.icca.ac.uk/advocacy-the-vulnerable. A further option is specific training through the Judicial College. A recent Civil Justice Council consultation on vulnerability recommended that the Judicial College should consider enhancing the training of civil judges, both salaried and fee-paid, to cover, in greater depth than at present, three core elements relating to vulnerability: Civil Justice Council, 'Vulnerable witnesses and parties within civil proceedings: current position and recommendations for change' (August 2019) para 204, available at https://www.judiciary.uk/wp-content/uploads/2019/09/Vulnerable-witnesses-and-parties-consultation-September-2019.pdf We acknowledge that there are better and more informed approaches which could be adopted from elsewhere in social services, and that psychological and mental health services, for instance, are likely to offer best practice templates for communication with vulnerable people.

pilot be successful, **we recommend that, long-term, the HDS be established as the specialist housing dispute resolution body, consolidating the current, fragmented architecture into one dispute resolution service.**

2.30 In subsuming pre-existing redress schemes, we envisage the HDS would carry out the functions those bodies currently hold beyond dispute resolution. This would include working with housing providers to develop their policies, procedures and complaint handling processes, producing reports on systemic issues within housing and feeding back information and data on problem type to housing regulatory bodies. The use of a digital portal and collecting data on dispute type and repeated problems would help the HDS discharge this function.[67]

Piloting

2.31 **We recommend the HDS pilot be phased and take place in two locations, one metropolitan, one rural**. The sites selected should have a significant number of housing disputes in any given year and ideally, one site would be an advice desert, where an HDS pilot could reintroduce housing advice. The pilot site would require buy-in and oversight from the local judiciary, practitioners, advice agencies, local authorities and housing providers.

2.32 Phase 1 of the pilot would require an array of skill sets, but not all those eventually required to populate a national service. The pilot would be for an entirely new service, so resources would need to be diverted from the pre-existing institutional structure, for example with HDS officers brought on secondment from the fee paid judiciary, advice and law centre sector, local authority services, possibly from other housing providers and staff from pre-existing redress schemes.

2.33 **We recommend that multiple channels be available for parties to contact and initiate disputes with the HDS, but that any pilot should include the necessary digital elements for the service. These would include a digital case management system for HDS officers, a digital filing system and**

[67] There would be merit in transferring to and/or conferring on HDS the role of maintaining registers of, e.g. gas safety, notices on commencement of tenancy, choice of deposit scheme, database of convictions and banning orders, HMO and other licences and the register of fair rents.

dashboard for parties to upload and monitor relevant documents and the progress of their dispute.

2.34 At Phase 1, the HDEG,[68] local courts, services and housing providers should agree upon certain categories of disputes that must be directed into the pilot HDS for a pre-agreed period. A category of disputes should be identified that provides an evidence base for a Phase 1 evaluation. For example, it might be possible to identify a local authority area where possession and disrepair cases and service charge disputes are piloted for a finite period in the HDS, this could be confined to social housing or it might include privately rented.[69]

2.35 **We recommend that the pilot include independent lawyers in each pilot location to provide parties with legal advice on their rights, interests and obligations, remunerated under a discrete arrangement (based on a legal aid contract or otherwise) at a sustainable rate, capable of taking the dispute to court and tribunal if the dispute cannot be resolved through the HDS.**

2.36 Phase 1 would require an array of HDS staff capable of addressing the categories of dispute selected. The following staff would be needed at Stage 1, who could be seconded at least during the pilot phase from the advice sector, local authorities, ombudsmen services and the judiciary, drawn from local or geographically wider provision if need be:

- housing managers
- environmental health officers and/or surveyors
- lawyers
- Tenancy Relations Officers or investigators[70]
- investigators

[68] See para 2.73 below.

[69] It would not be necessary to have a single category of landlord for all areas within the pilot - different categories of landlord could be piloted for different categories of dispute. This might be particularly relevant where private possession claims are concerned if it is thought that the extent of resistance to it might render it unworkable; in that case, private disrepair cases and/or service charges could still fall within Phase 1.

[70] E.g. Ombudsman investigators.

- social workers
- DWP officers, through pre-agreement (or legislation for a pilot) capable of being directed by the lead HDS officer on a dispute to conduct an expedited initial assessment or mandatory review of a claimant's benefit entitlement and effect any changes needed[71]
- appropriate ADR expertise[72] and
- FTT (PC) or District Judges.

2.37 Phase 1 piloting should be subject to scrutiny and oversight by the HDEG (explored below). The HDEG should convene regularly over Phase 1, and be provided with regular updates on progress by HDS officers, local advice providers, the local judiciary and academics evaluating the HDS pilot.

2.38 Subject to the HDEG and actors identified at paragraph 2.34 being satisfied with the Phase 1 outcomes and evaluative measures, Phase 2 would add additional categories of disputes to the HDS and resources to the pilot, again, governed by dispute type and volume.

- **Phase 2**: new dispute types introduced here could include local authority homelessness reviews and mortgage possession claims. It may be possible to trial wider, multi-disciplinary issues such as anti-social behaviour (otherwise than as a ground for possession, which will be within the ambit of Phase 1) or harassment and illegal eviction. Additional skills, such as debt and financial advisors, could be added to the HDS cadre at this stage. Increasing the range of disputes at Phase 2 would provide for a broader evidence base to assess the service for efficacy and capacity, including whether certain disputes prove more amenable to the HDS model.

- **Phase 3:** subject to positive evaluative outcomes and satisfaction amongst local actors and the HDEG, more disputes again could be introduced. There would be a need to expand the resourcing of the HDS at this stage to meet the influx of new types of matters. The number of pilot sites might be expanded.

[71] They would also provide direct advice on benefits where appropriate.

[72] This will need to be selected with care as some forms of ADR - e.g. classic "hands off" mediation - will not be suitable for the HDS and may even impact adversely on the development of its culture as described in this chapter.

2.39 At completion of the pilot, the HDEG should produce a report for parliament on the HDS. Longer term decisions on the HDS should only take place after parliamentary and ministerial scrutiny of the outcomes of the pilot stage.

2.40 We acknowledge that through a pilot stage, there will be a need for oversight where the outcome of a dispute is the making of a possession order. We recommend that during the pilot phase, HDS possession determinations (outright or suspended) - if not appealed (see para 2.65) - should be subject to review by a District Judge who may direct a hearing, even if there is no appeal.[73] Specific arrangements will need to be made to ensure HDS digital case files are easily transferrable to the County Court, and for expedited review to take place where required. We recommend that during the pilot phase, court staff be allocated to case manage disputes from the HDS. Though we recommend that for practical reasons, district judges review HDS determinations at the pilot stage, long term, appeals should be heard by an appellate level circuit or Upper Tribunal judge[74] as befitting a first tier dispute resolution service.

HDS officers

2.41 The desire to establish a multi-disciplinary, problem-solving service of quality necessitates a range of skill sets and high-level personnel within the HDS. At its highest, we imagine that someone at the level of Circuit Judge might be the chief officer,[75] and that former FTT (PC)[76] and District Judges will feature

[73] The tenant will in any event have access - and be directed - to a lawyer under the discrete arrangements discussed at para 2.68 onwards.

[74] See para 2.66.

[75] Or a Circuit Judge on secondment. The chief officer position cannot, however, be viewed as one that is judicially ruling on matters.

[76] FTT (PC) judges are likely to be particularly well suited to the method of the HDS. District Judges are becoming increasingly disposed towards conducting hearings with LIPs, but tribunals have been designed to enable non-lawyers to participate effectively. The overriding objective requires the tribunal to avoid unnecessary formality and seek flexibility in the proceedings (see for instance Rule 32)(b) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 while the rules require that the tribunal "ensure[s], so far as practicable that the parties are able to participate fully in the proceedings", rule 3(2)(c) of the 2013 Rules and equivalent in other tribunal procedure rules. That objective is reflected in the way in which FTT judges conduct and manage housing and property dispute hearings to ensure that lay users can participate effectively in the proceedings.

within the cadres of rights of officers, alongside a range of other professions, to allow whatever expertise is needed in a dispute to be applied to it. The expectation is that, following successful piloting, the national service would itself be rolled out in stages, both as to categories of dispute and geographical areas, evolving with the benefit of experience and review by HDEG. Over time, this would alter the balance of work as between HDS, the County Court and the FTT (PC) with the potential for judges to transfer from the latter to roles within HDS.[77]

2.42 In addition to the expertise described at paragraph 2.36, other skills needed might include financial, property management and mental health expertise. At the various stages of the dispute resolution process, skill sets should be deployed that can problem solve all the issues arising within the housing relationship. So far as possible, skills should ultimately be employed in the HDS so as to contribute to a multi-disciplinary culture which is not dominated by any one skill and is able to effect solutions, such as works orders and reconsideration of benefits decisions, although some skills may need to be brought in as needed.

2.43 Funding for the HDS must be commensurate with the need to attract high quality staff to the service. We address the issue of funding and cost for the service below.

Accessing the HDS

2.44 The HDS must have a significant digital component, to promote efficiency, timeliness, convenience and accessibility for those who are digitally capable. Essential digital features of the HDS would include a digital case management system for HDS officers, an online digital filing system and dashboard for parties to upload and monitor relevant documents and the progress of their dispute.[78] Digital case files from the HDS must also be capable of being

[77] It is for this reason that we have not directed attention to the precise areas of work which would necessarily be within the ambit of HDS and those which might permanently or indefinitely remain within the current court/tribunal service. That would be dictated by experience and agreement over what is likely to be a period of some years. See para 2.12, above.

[78] Locally, the Traffic Penalty Tribunal (https://www.trafficpenaltytribunal.gov.uk/) and Tenancy Deposit Scheme (https://www.tenancydepositscheme.com/deposit-disputes.html) both feature digital case management, filing and dashboard systems. Either could form the basis for the digital system adopted for the HDS pilot.

transferred to the court and tribunal digital system, should a party wish to appeal a dispute. For those who lack digital capability, engagement with the HDS must be possible through various means – whether over the phone, through written correspondence[79] or on the basis of face-to-face approaches to initiate a dispute or at later stages, where we envisage that much of the work would be conducted on a face-to-face basis. For certain types of claims, such as tenancy deposits or low value service charge disputes, consideration should be given to establishing continuous online resolution within the HDS so far as commensurate with parties' capacity to engage.[80]

2.45 **We recommend the HDS feature a prominent landing page, which should be promoted to appear as the top result when a user types in expressions like "housing disputes" or "housing problems" into a search engine. User-facing digital components of the HDS landing page or filing system should feature design principles which make them accessible and navigable for lay users. The landing page should include prominent signposting to sources of independent advice, information and legal advice.** Geo-location tools linking users to nearest advice providers could be embedded into the landing page, or a user looking for legal advice before initiating a dispute could insert their postcode data and be signposted to their nearest housing lawyer, who we envisage would be accessible over the phone, face-to-face or digitally, based on availability and need (discussed further below).

2.46 The HDS should also be capable of offering basic initial procedural advice to those who contact it. The Property Ombudsmen (TPO) offers a 24/7 live webchat function, which offers a first point of contact to assess whether a dispute is within the TPO's jurisdiction and to guide claimants to take the necessary steps (such as exhausting internal complaint processes) before submitting a formal complaint. We were told by the provider, Yomdel, that

[79] The digital case management system should be capable of generating written correspondence to be mailed out to participants who are unable to access digital processes.

[80] A model for continuous online resolution in housing, which is likely to be suitable for financial disputes where the vast majority of participants are technically literate, could be drawn from the from either the UK Tenancy Deposit Scheme or the British Columbia Civil Resolution Tribunal, an online administrative tribunal which resolves low value money claims, strata disputes and certain motor vehicle accidents (https://civilresolutionbc.ca/). Both feature a staged approach to dispute resolution, with information and self-help at stage 1, party-party negotiation at stage 2, facilitated negotiation if party-party is not successful and then if no resolution can be reached on a consensual basis, a final adjudication stage.

the webchat fielded 9,811 live chat engagements in the full calendar year of 2019, with a 99% customer satisfaction rate.[81] The HDS should offer a similar approach to initial procedural advice, over webchat and over the phone, to encourage those who contact the service to exhaust internal complaint avenues with the housing provider, to guide users through initiating a dispute and signpost them to sources of early advice.

2.47 Many systems offer models of support for people who struggle with digital processes. Caroline Sheppard OBE, Chief Adjudicator of the Traffic Penalty Tribunal (TPT), told us that the tribunal successfully provides over the phone administrative support to people who are digitally excluded, with staff acting as proxies for callers, completing forms based on instruction, and then mailing them out for appellants to check over and sign, before submission. The HDS should offer similar support for those who are digitally excluded. This model might work for simpler claims within the HDS, such as maladministration claims, but for more complex matters, technical assistance and signposting to legal advice should be provided simultaneously. Digital Support, the technical support service accompanying the Reform Programme, should, to the extent practicable, be co-located with sources of housing advice and information,[82] so that advisors can assist claimants in filing disputes digitally. Whatever form it takes, assistance should be available for those who are digitally excluded, whether that is to help them get online, or to initiate disputes through traditional methods.[83]

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[81] The TPO webchat is administered for an annual cost equivalent to one administrative level full-time equivalent employee. Included in this cost, Yomdel provides a team of up to 10 live webchat operators and additional supervisors who are trained to the TPO standards and legal requirements such as GDPR. The service operates 24/7 and 365 days a year. The service has an average speed-to-answer of 14.5 seconds and an average chat handling time of just under 14 minutes. Only 12% of those initial contacts have involved further action from the TPO. The Property Ombudsman, Katrine Sporle, told us that over 40% of contacts are outside of business hours, and that the webchat is particularly popular amongst students, who use the service anonymously to avoid the fear of reprisal evictions.

[82] Initially, Digital Support (previously called Assisted Digital) was kept distinct from legal advice and assistance, with the consequence of low uptake. HMCTS has since changed their approach, and Digital Support can now be offered as an add on to legal advice and procedural support, Brazier, 'Helping users to access our online services', (Inside HMCTS Blog, 23 January 2020) available at https://insidehmcts.blog.gov.uk/2020/01/23/helping-users-to-access-our-online-services/

[83] As described at paragraph 2.23 questioning on vulnerability, including digital capability, would be included in forms used to initiate or respond to a dispute in the HDS. When those forms first reach any allocated HDS officer, adjustments should be arranged as soon as possible. Further, at this first point of

2.48 However, it is important to acknowledge the likely extent of digital exclusion within housing disputes. Notwithstanding adjustments to assist people with digital processes, traditional methods must be maintained. Over the phone, paper based, and face-to-face methods for approaches and initiation of disputes to the HDS must be available for those who are digitally excluded.

Staged approach to dispute resolution

2.49 The HDS takes a staged approach to dispute resolution, explored in further detail in the following sections:

(a) Stage 1: holistic, investigative, problem-solving stage;
(b) Stage 2: interim assessment;
(c) Stage 3: facilitated negotiation/ADR stage; and
(d) Stage 4: adjudication.

Stage 1 – investigative stage

2.50 On receipt of a complaint at Stage 1, the HDS would take an investigative approach to assemble all the materials, whether factual, legal or administrative, necessary to make a holistic assessment of the housing relationship. This would necessitate fact-finding of its own volition, for example, procuring information about the state of the property, arrears owed, availability of benefits and compliance with safety and other contractual and regulatory requirements.[84] This may expand the number of parties involved: a local authority may become involved if matters within its purview are identified, such as health and safety hazards, anti-social behaviour[85] or unlawful conduct such as harassment . This could be done over the phone, or digitally through online exchanges between the HDS and participants. Where vulnerability or digital exclusion is in issue, face-to-face interviews will be necessary, and participants should have the option of selecting their preferred

contact between the HDS and the parties, the HDS should make inquiries as to whether vulnerability is in issue, including whether digital assistance is necessary.

[84] Such as deposits, information required to be sent to tenants at the commencement of tenancy such as the How to Rent booklet; gas safety certificate, energy performance certificate. See generally s.21A, Housing Act 1988; Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015/1646.

[85] This could even bring in the local police.

method of communication when initiating a dispute or filing a response. At Stage 1, parties accessing the HDS digital case management system would have access to their material, the other party's initial documents, and correspondence with the HDS.

2.51 At Stage 1, the service will need to be proactive about securing the engagement of parties and their information.[86] Interviews will be necessary, but additional inquiries, e.g. with the DWP to assess benefits issues and whether the property is contractually and regulatory compliant, may also be needed.[87] As the Stage 1 investigation reveals issues within the housing relationship, the multi-disciplinary skill set of the HDS would be deployed. As an interim Stage 1, a case conference would be convened within the HDS, featuring the array of expertise necessary for a dispute, to identify the approach to be taken.[88] If rent arrears arise from benefits delays or refusals, the HDS should direct a seconded DWP officer to reconsider a respondent's eligibility. If a possession claim has underlying issues around housing conditions, outcomes at this stage would include, for example, HDS environmental health officers or a surveyor being deployed to the premises to conduct an assessment.

2.52 If technical expertise is needed to advise the parties of their rights and obligations, be it legal, regulatory or otherwise, that expertise should reside within the HDS and be called upon as necessary, although at all stages parties should be told of their right to access independent legal advice through the process. The service is intended to secure a level playing-field: an active

[86] There will be some cases where the investigation discloses early on that, e.g., the landlord is determined to recover possession and will be successful were it to come to court. In such circumstances the HDS needs to be flexible if it is not to cause unwarranted delay, e.g. curtailing investigations which will only be relevant to a continuing, long-term relationship. That is not to say that it has no role, and (i) there may be rights on the part of the tenant which still need to be vindicated, (ii) there may be issues of timing - e.g. a postponement pending - say - rehousing by the local authority, or a child's exams or something similar, to which the landlord may, fostered by the HDS culture, be amenable, and (iii) considerable costs may be saved by bringing the parties together.

[87] The 2019 Citizens Advice report noted that there were significant problems with individual regulatory compliance across surveyed properties, with issues arising around disrepair, failure to provide a carbon monoxide alarms, failure to carry out an annual gas safety checks, see Poll and Rodgers note 4 above.

[88] Similar multi-disciplinary case conferences are convened in some local authorities, such as Leeds City Council, when families in crisis are facing the prospect of eviction from social housing, and inspiration could be taken from their approach.

investigative approach by the HDS means that the service can help parties to understand their respective rights and interests within or about the relationship but must also be capable of resolving their concerns.[89]

Stage 2 – interim assessment

2.53 At Stage 2, the HDS would produce a preliminary written assessment of the relationship and what it considers ought to follow from it by way of resolution, which may be sent to the parties or, if more appropriate, disclosed to and discussed with them in person.[90] At this stage, the HDS should have identified the considerations that have brought the parties into dispute and the underlying issues within the relationship which necessarily includes identifying and vindicating all parties' legal rights.[91] At Stage 2, the HDS might also identify and make proposals in relation to structural problems within a housing provider, such as systemic problems in complaint handling or repeated failures to provide timely remedial works.

Stage 3 – ADR stage

2.54 At Stage 3, the parties would be invited to agree, correct or challenge the contents of the Stage 2 assessment and/or the resolution it proposed. This would include a challenge on fact or law, both as to what has happened and what is proposed and includes the possibility of an alternative agreement between the parties. Legal advisors should have access from Stage 2 onwards to the whole of the HDS digital case file without exception,[92] to advise parties as to their rights and obligations. Where vulnerability is an issue, particular care should be taken, and the HDS officer should strongly encourage a vulnerable party who has not yet done so to take legal advice at this point and facilitate their doing so. Any or all of the parties may decline to take part and

[89] Thus, local and other authorities may ultimately be required to use powers.

[90] A written assessment is necessary to allow people to take advice. Nonetheless, as at Stage 1, there needs to be flexibility so that no unnecessary delay is caused.

[91] Including those under relevant codes of practice or analogous schemes.

[92] Thus, it might include an HDS analysis - internal or commissioned from an external supplier - of the legal position or, it might include exchanges between HDS officers. There is no HDS "privilege" asserted: if errors have been made, better that there is an opportunity to correct them.

are free to do so; their rights to appeal the Stage 4 determination are unaffected by whether or not they do so.

2.55 Where the participants are dissatisfied with a Stage 2 proposed resolution or wish to explore the prospect of an alternative agreement, the HDS should facilitate resolution through whatever approach appears most appropriate. This could be categorised as mediation, structured negotiation or arbitration,[93] including, where a party is a big housing provider, a wider approach to address systemic problems. The key is to deploy the approach most suited to the type of dispute and the behaviour of the parties.[94] It is important that this be provided from within the HDS from the outset rather than outsourcing the function to alternate providers. HDS officers would need training in a range of ADR approaches, from interventionist to passive, to be able to deploy them, adapted as may be, depending on how the dispute is progressing. Where vulnerability is in issue, a vulnerable party should receive communication support through an intermediary[95] and be referred by the HDS to a panelled lawyer, or to their own independent advisor, for advice on the content of any negotiated agreement at Stage 3.

Stage 4 - adjudication

2.56 The conclusions of the HDS would be issued at Stage 4 through a fully reasoned, formal determination on all rights and interests at issue within the housing relationship. This may embody an outcome agreed by the parties at Stage 3, or, where agreement is not forthcoming, a final HDS determination

[93] Where disputes are binary.

[94] There may be cases where one party refuses to engage with the Stage 3 process, particularly in the early stages when the benefits of HDS are less well-known. That does not mean that it will be redundant, as the other party may wish to take issue with something in the Stage 2 assessment; furthermore, the unwillingness of the other party to engage may affect the final determination, e.g. in an illegal eviction or harassment case, or in one of anti-social behaviour, the failure to engage may colour the circumstances or the outcome, e.g. where motive is in issue.

[95] Intermediaries are communication experts, typically speech and language therapists, who are commonly used in criminal trials as a special measure to help vulnerable defendants and witnesses give evidence, see JUSTICE (2017), *Mental Health and Fair Trial*, para 2.52 available at https://justice.org.uk/wp-content/uploads/2017/11/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf

of the dispute.[96] A digital case file of the dispute should be accessible to the parties, their legal advisors and the appellate level.[97] If there is no agreement at Stage 3 and a Stage 4 adjudication is issued in a dispute that remains contested, any party can reject the outcome and require it to be referred to court or tribunal by way of appeal as of right on fact or law.[98]

2.57 Like the FTT (PC), HDS determinations will be enforceable through the courts. Ombudsmen schemes experience a high rate of compliance with their orders,[99] and we would expect the same for the HDS. Should enforcement of a Stage 4 HDS determination be necessary, we expect digital case files from the HDS to be easily transferrable to enforcement in the courts and tribunals – potentially through the digitisation project for enforcement currently being undertaken as part of the Reform Programme.[100] During the pilot phase, specific arrangements would need to be made for disputes appealed to the court/tribunal stage. Specific court and tribunal staff should be appointed to take conduct of HDS appeals during the pilot phase, and it will be desirable for those appeals to be heard on an expedited basis in order to preserve such benefits as the HDS process has been able to secure, even if there remain issues in dispute.

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[96] It may again be borne in mind that there may be more than two parties and more than one dispute: a housing relationship may give rise to disputes between the landlord and the tenant, the local authority and the landlord or the tenant, and even the police where anti-social behaviour and the use of housing powers are in issue.

[97] This will include written representations from both sides, the Stage 2 interim assessment and final Stage 4 decision with reasons and all other communications - see above, para 2.53 and 2.56. It may be that this would impose a disproportionate burden on the appellate body, and that these basic documents may be separated out from the remainder, though everything needs to be available at the appellate stage.

[98] We recognise that this could lead to unmeritorious appeals taken in order to delay, to a greater extent than currently. While this cannot wholly be avoided (any more than it can be wholly avoided now), a non-legally aided party might face either a strike out application or an application for security for costs. Where legal aid is in issue, the party's lawyer will need to be satisfied as to merits.

[99] The Housing Ombudsman has 97% compliance with orders within three months of decision making, 'The Housing Ombudsman: Annual Report and Accounts 2018-19' (Housing Ombudsman, 23 July 2019) p.7 available at https://www.housing-ombudsman.org.uk/wp-content/uploads/2019/07/Housing-Ombudsman-ARA-2018-19-Web-Accessible.pdf

[100] Digital case files remain part of the civil enforcement project as part of the HMCTS Reform Programme, though the completion date for that project has been pushed back to July 2021.

Flexibility

2.58 The stages are not necessarily exclusively sequential. Something may arise at Stage 2 or 3 which requires Stage 1 investigation or re-investigation. Likewise, though the HDS would not be part of the current court or tribunal system, that does not prevent a relationship between them. There is no reason, for example, why a court could not, having reached a decision which needed following up (e.g. repairs or application for benefits) refer to the service to supervise or perform it. If a court concluded that more work could usefully be undertaken by the HDS, there is no reason why it should not be referred back to it.

Urgency

2.59 As the first-tier dispute resolution process for housing disputes, the HDS must be capable of handling urgent issues. We recommend urgent issues be introduced at the back end of the pilot, once the HDS has satisfied itself against evaluative measures.

2.60 We recommend that the HDS portal contain a "fast track" for urgent complaints to be filed digitally by default, but with paper-based channels retained, and for the HDS to include a dedicated duty team to deal with these urgent matters 24/7. The team should be capable of conducting investigations of its own volition when contacted about an urgent matter. That team should feature officers with experience in the resolution of urgent matters (for example, local authority environmental health officers who have implemented Environmental Health and Housing Act urgency provisions, or those who have previously acted as District Judges). Receipt of an urgent complaint should see the HDS immediately assess the urgency of the dispute and speak to the parties, engaging directly with others if necessary, such as local authorities in circumstances of illegal eviction or safety hazards. Again, emphasis should be on bringing parties together to see if a solution can be reached urgently, but if none is forthcoming within a timeframe that the particular circumstances permit without adversely affecting the complainant, the HDS should issue an urgent interim determination. If that does not resolve the urgent issue and if considered necessary, the determination should be passed directly to a court, through a digital case file, potentially with a recommendation that a penal notice be issued.

Local authority homelessness review

2.61 As described in **Chapter 3**, local authorities owe duties to assist residents in circumstances where they are or face the prospect of becoming homeless.[101] Local authorities exercise what is in practice a degree of discretion when making these decisions.[102] Where a local authority decides they do not owe a person a duty to assist or provide them with housing, that person can seek an internal review of the decision.[103]

2.62 While there are no clear data on the outcome rates for internal reviews,[104] tenant lawyers we spoke to expressed frustration at the approach local authorities take to internal reviews. One described the review process as a form of "shadow boxing" between local authorities and homeless persons' solicitors before judicial review or an appeal to a Circuit Judge is commenced. Most solicitors we spoke to agreed and contended that many local authorities do not meaningfully reconsider the first instance homelessness decision.

2.63 While some of our consultees expressed concerns about how the HDS would operate, an area of universal agreement was to welcome any proposal for a fresh review of the local authority decision around homelessness.[105] Taking

[101] See para 3.56 for more details. In April-June 2019 68, 170 households were assessed by local authorities as either homeless or threatened with homelessness, MHCLG, 'Statutory Homelessness, April to June (Q2) 2019: England available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/852953/Statutory_Homelessness_Statistical_Release_Apr-Jun_2019.pdf

[102] The discretion or "subjective element" is a matter of case law. Homelessness duties arise when a local housing authority deems an applicant eligible, *i.e.* a person is homeless, in priority need, intentionally homeless, etc., depending on whether the authority "have reason to believe," or are of an opinion or are "satisfied" that an applicant qualifies. "The section is framed in a 'subjective' form - if the Secretary of State 'is satisfied'." *per* Lord Wilberforce, *Secretary of State for Education and Science Appellant v Tameside MBC* [1977] A.C. 1014, HL, at p.1047.

[103] Section 202(1) of the Housing Act 1996.

[104] The current MHCLG data on homelessness does not capture the internal review stage, see MHCLG, 'Statutory homelessness live tables 2019 Q2 (April- June), updated 18 December 2019 available at https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness

[105] Section 203 of the Housing Act 1996 confers on the Secretary of State power to make provision by regulation as to the procedure to be followed in connection with a s202 review. Authorities are entitled to delegate reviews to an external body: see Local Authorities (Contracting Out of Allocation and Homelessness Functions) Order 1996, SI 1996/3205. We acknowledge that for the HDS to take on this

over internal reviews from local authorities represents the prospect of a more fulsome assessment of a claimant's personal circumstances than might currently be provided by local authorities where a paucity of housing stock informs decision-making. It is not proposed that authorities could not still rely on the subjective element in the decision,[106] but rather that an external review would enhance authorities' decision-making in this area generally and ensure that there is a proper basis for reliance on it.[107] Authorities would enjoy the same right of appeal as any other party to an HDS determination. **We recommend the HDS take over s.202 internal review from local authorities**.

2.64 Appeals of HDS decision-making around homelessness could be facilitated using digital case files, with common systems and delivery methods developed from the local authority stage to the HDS and onward to the court.

Appeals

2.65 If the HDS is to sit at the first-tier of dispute resolution, as we recommend it should, it must be located on the same plane as the County Court and FTT (PC). It could have both former District Judges and FTT (PC) judges in its ranks and would need to develop internal skills capable of handling all types of housing disputes which come before it. Elsewhere in this report, we describe the need for there to be a ticketed cadre of specialist housing judges, capable of hearing disputes in both the FTT (PC) and County Court.[108] We also referred earlier[109] to what we envisage would be a changing balance of work between HDS, County Courts and FTT (PC) should our recommendations be accepted. We therefore hope that the HDS would ultimately be able to draw some of those judges into its work.

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function on a mandatory basis, s. 203 would require amendment, potentially through insertion into it of power allowing the SoS to make provision "as to which body conducts the review". During the pilot, it may be that an authority would be willing to contract the review function out voluntarily to HDS.

[106] Note 102 above.

[107] For example, where the authority relies on conditions generally in their area or on the capacity to cope of those with different classes of disability in the determination of whether they are vulnerable.

[108] See Chapter 4.

[109] Para 2.38.

2.66 We would expect high quality, first instance decision making by the HDS at a standard, by virtue of the use of housing specialists and its holistic approach, of that offered by FTT (PC) and District Judges currently.[110] HDS decisions, as the first-tier, would be appealable to the current appellate structure, to Circuit Judges or Upper Tribunal. Appeals would be available on fact or law as of right.[111] An appeal would normally generate an automatic stay on the HDS determination save for those parts of the determination which are not relevant to the appeal. Where the HDS conclusion suggests that a stay might be inappropriate (e.g. anti-social behaviour, re-admission of an evicted occupier) there would need to be a track which allowed it to recommend that there be no stay, for the court to review at a hearing if the parties or the court requires it.

2.67 We appreciate this would necessitate a restructuring of the court and tribunal structure, with resources shifted to the appellate level and to the HDS from the pre-existing structure. Our expectation would be that the piloting of the HDS would assess the efficacy of this restructuring and the need for a reallocation of resources across the court and tribunal estate. We recommend specialist housing judges be allocated across the appellate level.

Legal advice

2.68 As described above, the HDS is a non-adversarial dispute resolution process, where lawyers act in an advisory role, safeguarding the interests of participants externally to, albeit throughout, each stage of the HDS process. We envisage that lawyers will have a significant role through the HDS process. Fundamentally, the HDS does not feature a hearing stage where submissions are made and advocacy is needed. Instead, the HDS will explore all the issues within a dispute with the benefit of written representations from solicitors where needed. Lawyers will be needed to advise clients on the merits of their case, to engage with the other party through informal negotiation to broker a solution without recourse to the HDS[112] and to signpost

[110] Arguably better in the sense that the range of material at HDS would not be limited by pleadings or other formal statements of case, nor is the decision exclusively rights-based but problem-solving. Moreover, while FTT judges and DJs have developed a considerable ability to "investigate", they have limited resources with which to do so.

[111] Appeals of HDS determinations should be published.

[112] As is currently common practice within the context of possession cases.

to HDS where that fails. Should a claim require initiation, we expect lawyers would articulate a client's position through written representations to the HDS and advise clients on their interests following a Stage 2 adjudication, before a Stage 3 meeting and if need be, to act for a client to appeal a Stage 4 adjudication.

2.69 It is therefore critical that the HDS does not function to deplete or diminish the corps of publicly funded expert housing lawyers. They will often be the first port of call. It is essential for access to justice that parties are able to have an expert assessment of their case and desirable for them to have an opportunity to do so at Stage 2, before they participate in the Stage 3 ADR mechanism. Above all, there need to be practitioners available at Stage 4, to advise on and take appeals. This will require a Government commitment to offer sustainable funding for legal advisors in the pilot and beyond. As we explore below, a source for that funding exists.

2.70 Our Working Party considered various models of advice delivery that could be explored through a pilot. Our favoured model is for the HDS to have a panel of independent, contracted lawyers to advise clients throughout the HDS process. Panel lawyers would be drawn from specialist housing lawyers in local authorities, the legal aid, law centre or private sector. Again, those lawyers must be remunerated at a sustainable rate beyond that offered under funding for "early legal help."[113] All parties should have access to a degree of legal advice from panelled lawyers prior to or at Stage 1, perhaps one to two hours. Beyond that, advice ought to be means tested, but with much greater eligibility than under the current legal aid scheme. The default position should be that most tenants have access to a panelled lawyer throughout the process. Clients would of course still be free to take legal advice from their own choice of lawyer.

2.71 The Ministry of Justice Legal Action Plan evinces an intention to expand Government investment in early legal advice, which is welcome, considering the urgent need for sustainable funding for the advice and legal aid sector after years of cuts. In that spirit, **we recommend specific arrangements be made for independent legal advice for parties through the HDS process, with**

[113] Tenant lawyers we spoke to as part of this consultation expressed concern that the rate of funding for "early legal advice" was extremely low, and often did not meet the overheads of advice rendered.

contracts co-designed with the advice sector and Government through the HDEG. An alternative model to the HDS panel contract would be to establish an HDS legal aid contract. This could encompass an array of legal matters addressed by the HDS, potentially amalgamating existing housing, debt, community care and family contract categories into one contract.

2.72 Lawyers operating under such a contract would be offered sustainable rates through any contract for activities carried out in relation to or through the HDS process. The current funding model necessitates that many legal aid practitioners and law centres are reliant on costs in successful cases to survive. If, as we expect, the HDS significantly reduces the volume of housing disputes coming before the courts, then the rate of funding for legal advisors through the HDS must be sustainable to offset the loss of successful costs orders in court.

Housing Dispute Engagement Group

2.73 Fundamental to the success of new forms of dispute resolution is meaningful stakeholder engagement in system design.[114] Should the HDS garner support from across the legal profession, Government and relevant housing stakeholders, we recommend an engagement group be convened, to set out the parameters for a pilot and provide oversight of it. The engagement group ought to feature representation from across a broad spectrum of interest groups impacted by the new dispute resolution system. We recommend the piloting of the HDS be overseen and delivered through a newly convened Housing Dispute Engagement Group (HDEG).[115]

2.74 The HDEG should convene long before the commencement of any pilot. With the benefit of specialist academic advice, it should establish a range of evaluative parameters for the pilot, identify possible pilot sites and engage closely with on-the-ground service and housing providers and judiciary to agree on a pilot. It should work closely with the advice sector, local

[114] Smith and Martinez, 'An Analytic Framework for Dispute Systems Design', 4 Harvard Negotiation Law Review 123, Winter 2009 p. 128.

[115] The HDEG should be chaired by a High Court judge of expertise and standing and be populated by academics, representatives from relevant Government agencies (MHCLG, HMCTS, DWP and MOJ), lawyers from tenant, landlord and social housing groups, local authorities, the private rented sector, housing associations and other affected interest groups.

authorities, judiciary and others to second the necessary staff for the HDS pilot and should co-design the legal contracting for independent, empanelled lawyers. Primary legislation will be required for the HDS pilot, and we would expect that the HDEG would advise the Government on drafting and specific arrangements to empower the DWP to make benefits adjudications. Should there be support for the HDS, **we recommend a HDEG be convened to oversee the development of the pilot.**

Evaluative outcomes

2.75 The HDS pilot should be subject to robust evaluative outcomes, pre-agreed and co-designed with specialist academic input, which capture an array of procedural and access to justice metrics.[116] Below, we outline the evaluative measures which the HDS pilot ought to be subject to:

[116] An illustrative example is the October 2019 Legal Education Foundation report, which recommended that HMCTS develop and implement robust measures against which to judge the access to justice implications of the Reform Programme, Dr Natalie Byrom, 'Digital Justice: HMCTS data strategy and delivering access to justice: Report and Recommendations' (Legal Education Foundation, October 2019) available at https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/09/DigitalJusticeFINAL.pdf

Evaluative measures	Description
Timeliness	Evaluation should capture time taken from initiating to resolution of the claim through the pilot, including for dispute type. Data from the pilot should be measured against pre-existing processes within the pilot's geographic area or a control. Comparative measures could be drawn against historic completion times for disputes brought from the pilot's geographic areas to County Court, First-tier Tribunal and other redress schemes.
Procedural justice outcomes	Information on: • claimant or defendant engagement with the process and other sources of legal help and advice;[117] • nature and volume of the evidence produced; • opportunities for parties to engage effectively and meaningfully in the process; • whether the HDS is perceived as neutral; • the degree to which people trust the HDS; • understanding the instruction, method and implications of the process; and • whether people are treated with dignity and respect through the process.[118]
Substantive outcomes	Substantive outcomes achieved through the HDS should be measured against controls. For example, we would expect that the problem-solving approach would achieve a high

[117] The US Centre for Court Innovation 'Measuring Perceptions of Fairness: An Evaluation Toolkit' was collaboratively produced between the Center the, National Judicial College, and the U.S. Department of Justice's Bureau of Justice Assistance. The toolkit contains three evaluative instruments, Self-Assessment of Court practices, Courtroom Observation Instrument and Defendant Exit Interview designed to assess procedural justice and fairness within judicial processes. The toolkit assesses against measures which capture whether a process is "Ensuring Understanding", "Providing Voice" and "Demonstrating Respect" for users and would be a useful toolkit to assess procedural fairness and justice in the HDS.

[118] Byrom, 'Developing the detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice, (Legal Education Foundation, 2019) p. 19 available at https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Developing-the-Detail-Evaluating-the-Impact-of-Court-Reform-in-England-and-Wales-on-Access-to-Justice-FINAL.pdf

	degree of consensual outcomes, which would reduce the need for possession orders. Ideally, qualitative measures should also capture longer term outcomes for participants, perhaps through follow up interviews 6 months after the conclusion of the process.
User satisfaction	Capturing whether users are satisfied with the process, potentially against procedural justice metrics.[119]
Settlement percentage	The pilot should be evaluated for the percentage of disputes resolved at Stages 1-3 versus those requiring a Stage 4 adjudication. We would expect that the percentage of disputes resolved at Stage 3 would be akin to the settlement rate achieved by mediation elsewhere in the justice system.
Appeal percentage	For pilot disputes which do not feature an automatic right of review (possession claims and orders backed by penal sanctions), there should be data on the percentage of disputes which are appealed to the court or tribunal stage.
Vulnerability	Data should be captured on user "vulnerability", from self-identification through HDS forms and from identification by HDS officers. Data should also be captured on the percentage of disputes where specific adjustments have been made, such as the appointment of intermediaries, for user vulnerability.

2.76 Qualitative interviews should also be undertaken with professionals involved in the pilot, independent lawyers and HDS officers, which capture their experiences. Judges conducting reviews of HDS decisions through the pilot should also be interviewed for their impressions of decision-making by the HDS.

[119] The British Columbia Civil Resolution Tribunal Participation Satisfaction Survey captures user satisfaction against a range of metrics, including against professionalism of adjudicators, ease of use, timely resolution, accessibility and fair treatment, https://civilresolutionbc.ca/participant-satisfaction-survey-january-2020/

Cost

2.77 We acknowledge that the proposal for a national HDS is ambitious. It is a proposal for a new, first-tier dispute resolution service for housing which, if successful against evaluative outcomes through the pilot stage, we would want to see rolled out across England and Wales. The HDS will require infrastructure, real estate, digital capability and most importantly a highly skilled cadre of specialist, multi-disciplinary HDS officers, including some at the level of First-tier and District Judges. Such a service, rightly, will cost.

2.78 However, there are likely also to be significant long-term savings from such a service. The consolidation of pre-existing redress schemes into one service, the reduction in court and tribunal time, migrating local authority social services and housing functions as well as the homelessness review to the HDS will produce savings and efficiencies. There are also broader societal savings to be made from offering a system that focuses on early, targeted interventions in people's housing problems. We would expect the HDS's holistic approach to housing disputes to promote longer tenancies and relationships in the rented sector, reduce landlord costs wasted through changing tenants,[120] address the underlying problems in homelessness and alleviate pressures caused by housing problems that manifest in the courts, the NHS and on local authorities.[121]

2.79 Currently, redress providers such as the Housing and Property Ombudsmen, Property Redress and tenancy deposit schemes, are funded by housing providers, who pay for the scheme in various ways, whether through a subscription fee or unit-based cost.[122] A significant portion of those who own and rent a property do not yet pay into a redress scheme, though Government

[120] The costs of voids, advertisements, lettings agents, fresh regulatory compliance at the commencement of tenancy, some extent of works and new deposit arrangements.

[121] Social services costs, the provision of homelessness assistance and the cost associated with urgent accommodation for families facing homelessness, see note 9 above.

[122] For example, the Housing Ombudsman, which holds jurisdiction over complaints against social housing providers, charges a subscription fee of £2.16 per home, on over 5 million households, see the Business Plan 2020-21 for the HOS at https://www.housing-ombudsman.org.uk/2019/10/25/housing-ombudsman-launches-consultations-for-improved-service/ We understand from the Redress Reform Working Group that the intention is to increase the fees payable by housing providers to provide for an increased quality of redress provider.

intends for this to change. The MHCLG *Strengthening Consumer Redress in the Housing Market* report evinced an intention to "bring forward legislation to require all private landlords, including private providers of purpose-built student housing and park home site operators to belong to a redress scheme".[123] By way of context, the MHCLG *English Housing Survey for 2018/19* reported 4.6 million private and 4 million social rented sector homes.[124]

2.80 As described above, we propose that if the HDS progress beyond a pilot phase, it would take on the maladministration jurisdiction for all housing disputes.[125] It would subsume all pre-existing providers into one service and would benefit from an expanded pool of resources brought by the proposed legislative requirement that all private landlords subscribe to a redress scheme. To use a blunt metric, if all rented units subscribed to the HDS, a levy of £20 per unit per annum would give a post-pilot HDS a starting budget in excess of £160 million.[126] This is to ignore mortgaged occupation, which would also fall within the ambit of HDS and which would add substantially to that budget.

2.81 The requirement that all housing providers pay into a redress scheme provides a significant source of funding for a nationwide, holistic, investigative and alternative service for housing dispute resolution. **We recommend that if the HDS progresses from a pilot phase, it subsume pre-existing redress providers and be funded in full by subscription from housing providers.**

[123] MHCLG, 'Strengthening Consumer Redress in the Housing Market: Summary of responses to the consultation and the Government's response', available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/773161/Strengthening_Consumer_Redress_in_the_Housing_Market_Response.pdf

[124] P. 7 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860076/2018-19_EHS_Headline_Report.pdf

[125] It is arguable that it should enjoy a free-standing maladministration jurisdiction of its own.

[126] Though any funding arrangement would have to offer lower costs to those who offer social housing at thousands of units; housing associations and the ilk might pay a lower subscription rate than those who rent for profit.

III. REFORMING CURRENT PROCESSES

3.1 The proposal for a fully formed HDS is likely to be many years away and will need to be integrated within the current system. While, at present, there are many encouraging reforms and practices under consideration, we believe the system nevertheless needs to be improved further to serve people with housing problems.

3.2 Too many people find themselves unable to access a remedy for their housing issues. Court and tribunal closures and the diminution of publicly funded legal advice has frustrated access to justice and created significant hurdles for rights vindication across the sector. As we set out in the introduction, homelessness has increased drastically, with consequent pressures being placed on local authorities and other social services. People at risk of homelessness struggle to get assistance, and many local authorities find themselves under pressure to deliver on their statutory obligations.

3.3 Mediative methods are marginalised or not well joined up, notwithstanding their universally agreed benefits and the prospect that in housing, it might allow parties to reset their relationship. In addition, the current system is disaggregated. It requires greater consolidation and rationalisation. There should be greater emphasis placed on ensuring that judges and other decision takers have the requisite degree of specialism. In addition, there should be much greater ease of access from a user perspective.

3.4 The following two Chapters of this report address those challenges. This Chapter addresses how current processes could be reformed. **Chapter 4** addresses how the housing dispute system could be harmonised to create a single point of entry.

Accessing the courts and tribunals

Legal advice and representation

3.5 The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) has had a catastrophic impact upon housing advice and representation across England and Wales.[127] A 2019 parliamentary briefing by the Law Society found 37% of

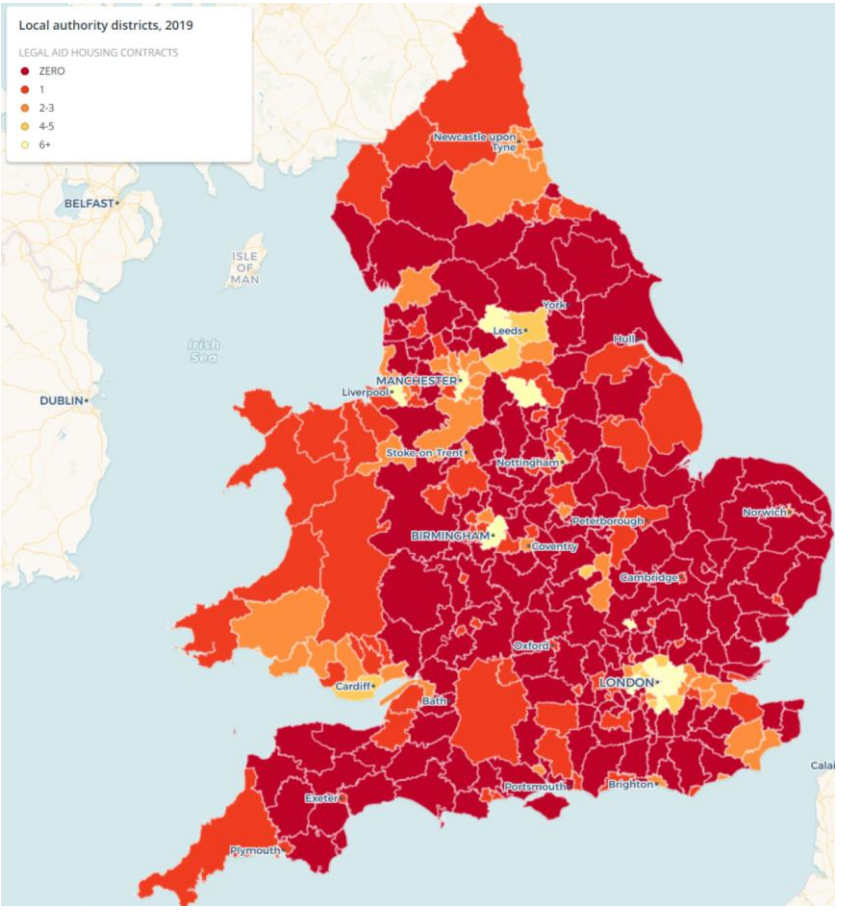
[127] The introduction of LASPO reversed the previous position under the Access to Justice Act 1999 where matters were in scope unless "excluded matters". Instead, under LASPO civil work was excluded unless a prescribed matter set out in Schedule 1 of LASPO, Pratt, Brown, Sturge, 'The future of legal aid: debate

the population live in local authority areas without a single housing legal aid provider.[128] Certain areas of housing law remain in scope of the legal aid scheme, such as homelessness assistance, but for those residing in a local authority area without advice, it is likely to be extremely difficult to access it. Outside of major cities, coverage of legal aid housing contractors is greatly diminished:[129]

pack' (Number CDP 2018/0230, 31 October 2018) p. 2 available at https://researchbriefings.files.parliament.uk/documents/CDP-2018-0230/CDP-2018-0230.pdf

[128] With 59% of the population living with one or less, the Law Society, 'Parliamentary Briefing: Housing legal aid deserts' (24 April 2019) available at https://www.lawsociety.org.uk/policy-campaigns/public-affairs/parliamentary-briefing/legal-aid-deserts/. Recent analysis suggests the situation has got worse and that as at February 2020, 52% of authorities had no provider, see note 60 above.

[129] Available at https://the-law-society.carto.com/builder/f0668e77-52e4-48c8-a3e4-c05c5546ea34/embed



3.6 Nationally, there has been a significant reduction in funding for legal aid over the past decade, far beyond what was initially foreshadowed by the Government,[130] with the impact felt most severely in civil law.[131] The reduction in funding for law

[130] Funding of civil legal aid fell from £1.1 billion in 2009/10 to £710 million in 2018/19, Ministry of Justice, 'Legal Aid Statistics table, (April to June 2019)' available at https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2019

[131] The number of applications for fully licensed civil representation has fallen from 203,329 in 2009/10 to 117,053 in 2018/19, Ministry of Justice, 'Legal Aid Statistics bulletin, England and Wales, (July to September 2019), table 6.1, available at https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-july-to-september-2019 Applications for non-family, immigration, mental health and other non-family, which captures housing, fell from 30,0375 in 2009/10 to 14,349 in in 2018/19, a reduction of over 52% over 10 years.

centres against rising operating costs and reduced capacity for local authorities to fund them, has seen the number of law centres nationally halve.[132] People are struggling to access timely legal advice, assistance and representation, even though the beneficial impact of early legal advice is widely acknowledged. In 2017, Ipsos MORI on behalf of the Law Society conducted an online survey of 8,192 participants with an array of civil legal problems, with emphasis placed on welfare benefits, homelessness and eviction proceedings. The report found early advice had a significant impact on getting issues resolved. "Participants in the survey who did *not* receive early advice were, on average, 20% less likely to have resolved their issue at a particular point in time (compared to those who did receive early advice)."[133] The Low Commission cited extensive global evidence demonstrating the economic benefit of early legal advice across housing, benefits and debt advice in reducing downstream costs[134] for other public services related to homelessness, poor health outcomes and work productivity.[135] There is an

[132] From 94 in 2013/14 to 47 as of July 2019, Bowcott, 'Legal advice centres in England and Wales halved since 2013-14', Guardian Online, 15 July 2019, available at https://www.theguardian.com/law/2019/jul/15/legal-advice-centres-in-england-and-wales-halved-since-2013-14

[133] Ipsos MORI, 'Analysis of the potential effects of early advice/intervention using data from the Survey of Legal Needs', (November 2017) p. 6 available at https://www.lawsociety.org.uk/support-services/research-trends/research-on-the-benefits-of-early-professional-legal-advice/ p.6.

[134] Research suggests that that a typical young person with a civil legal problem will cost local health, housing and social services around £13,000 if they cannot access early advice, Balmer, N.J. and Pleasence, P. *The Legal Problems and Mental Health Needs of Youth Advice Service Users*, (Youth Access, 2012) available at https://baringfoundation.org.uk/wp-content/uploads/2014/09/YAdviceMHealth.pdf

[135] A 2010 Citizens Advice report suggested that for every £1 spent on legal aid, the state saves £2.34 from housing advice; £2.98 on debt advice; and £8.80 from benefits advice. Citizens Advice, 'Towards a business case for legal aid. Paper to the Legal Services Research Centre's eighth international researc h conference', (2010) available at https://www.accesstojusticeactiongroup.co.uk/wp-content/uploads/2011/07/towards_a_business_case_for_legal_aid.pdf The largest body of evidence in the report on the economic benefits of early legal advice derives from the US, where a study into legal aid in Nebraska suggested that legal aid brings money into an area in various ways. These include national funding for a local service, via benefits awarded through successful outcomes which benefit clients and promote spending and the indirect benefits that accrue from legal aid services which might be described as downstream: improved quality of life, tax savings for the state and economic development. The ultimate benefit for Nebraska was estimated to be $13.5 million compared to the cost for Nebraska of $3.4 million – for every dollar invested the government saves $3.97, Feelhaver and Deichert, 'The economic impact of legal aid in Nebraska – 2007', (Center for Public Affairs Research, University of Nebraska, 2008)

urgent need for the Government to draw upon this work and to revisit arrangements for publicly funded legal advice and support.[136]

The Legal Support Action Plan

3.7 In 2019, the Ministry of Justice (MOJ) released the Post-Implementation Review of LASPO (PIR). The PIR was accompanied by the Legal Support Action Plan[137] (Action Plan) which sets out the MOJ's plans for publicly funded legal advice and representation.[138] The Action Plan states the Government will explore and evaluate models for early legal interventions, which includes piloting face-to-face advice for early interventions in a specific area of "social welfare law"[139] and evaluating pre-existing "co-located hubs". [140] While we welcome exploration of

[136] Lady Hale has previously described LASPO cuts as a false economy, Bowcott, 'Senior judge warns over 'shaming' impact of legal aid cuts', (Guardian Online, 13 October 2017), available at https://www.theguardian.com/law/2017/oct/13/senior-judge-warns-over-shaming-impact-of-legal-aid-cuts

[137] Part 1 of the PIR focused on funding arrangements for legal aid and advice provision, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf The Action Plan is available at https://www.gov.uk/government/publications/legal-support-action-plan

[138] The Action Plan acknowledged that resourcing constraints meant advice providers had to "reprioritise their services away from early legal advice towards supporting people once they have reached a crisis point" and that the reduction in early support has been particularly felt in housing and benefits, where demand for services remains high, Ministry of Justice, 'Legal Support: The Way Ahead. An action plan to deliver better support to people experiencing legal problems' (February 2019) p. 19 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf citing the Law Centres Network (2018), 'LASPO Act 2012 Post-Implementation Review Submission from the Law Centres Network' available at https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/briefings-and-submissions

[139] *Ibid* MOJ p.23. We met with the MOJ team responsible for these projects in October 2019, and were told that the piloting will be for early intervention for benefits problems, because they tend to lead to rent arrears, homelessness and other consequences, with the working hypothesis that early intervention in benefits problems can reduce the number of cases coming before the County Court for possession claims.

[140] *Ibid* p.24. "Co-located hubs" in the Action Plan describes co-location of multiple support services to act as a 'one-stop shop', for instance a group of third sector support providers or an advice centre that has a variety of expertise in different areas of social welfare support within health services. Recent research suggests co-location of advice in a health care setting can lead to improved outcomes for clients in mental health, housing circumstances and overall wellbeing of individuals compared to those who do not access the service, Woodhead, Khondoker, Lomas and Raine, 'Impact of co-located welfare advice in healthcare setting: prospective quasi-experimental controlled study' (2017) 211(6) The British Journal of Psychiatry pp. 388, 392, 394.

early advice and approaches that assist clients with multiple problems, the Action Plan requires a broader commitment to sustainable funding for the sector.

3.8 Tenant lawyers we spoke to explained that the current funding model for legal aid practices and the advice sector has damaged the sector. Legal funding for help delivered prior to court is not funded at a sustainable rate and many law centres rely on costs orders in successful housing cases to survive.[141] Problems were expected from the introduction of the fixed recoverable costs regime.[142] Most consultees we spoke to told us that many people facing possession for rent arrears were suffering from benefits issues, often relating to Universal Credit, and were often unable to get early advice and assistance with those issues.

3.9 Fundamentally, access to justice problems in housing disputes are in large part attributable to the collapse of the advice sector brought by LASPO. People simply cannot access legal advice and assistance for housing disputes or the underlying problems, such as benefits, that catalyse into housing issues. The diminution in value in real terms of services rendered and the reduction in local authority capacity to fund advice has greatly diminished the sector. Piloting holistic interventions is encouraging, but it is a small concession. What is needed is wide scale investment in early interventions for people's legal problems. In particular, there is an urgent need for the MOJ to reintroduce publicly funded legal services into advice deserts and to ensure that funding allows providers to address "clustered" legal problems.[143] **We recommend the Ministry of Justice Legal Action Plan urgently address the need for sustainable funding for the legal aid and advice sector. Specific attention should be directed as to how to respond to legal aid "housing deserts" and the need to provide funding for advice that addresses "clustered" legal problems.**

3.10 We understand that as part of the Action Plan, the MOJ is exploring the prospect of piloting and evaluating a pre-existing site where legal advice is co-located in a health setting.[144] We have been told this piloting might include Digital

[141] We were told that for many Law Centres, successful costs orders subsidise other essential case work and advocacy for vulnerable people which is otherwise a loss leader.

[142] See para 3.16 below.

[143] Clustering describes a client experiencing interrelated legal problems. For instance, housing, benefits, debt and relationship breakdowns are commonly associated, Moorhead, R. and Robinson, M. (2006). 'A trouble shared – legal problems clusters in solicitors' and advice agencies', available at: https://orca-mwe.cf.ac.uk/5184/1/Moorhead_et_al_2006_A_Trouble_Shared.pdf

[144] For example, the UCL Legal Advice Clinic co-locates legal advice in a clinical health setting in Newham and provides advice across welfare benefits, housing, community care and education law. The

Support,[145] which we welcome.[146] Traditionally, co-located legal advice takes place in health clinics to provide early legal intervention before a patient's problem worsens. But anecdotally, we understand that the increasing number of homeless people presenting in one London hospital has been a distinct challenge, with medical staff unfamiliar with housing and homelessness law seeing patients otherwise medically fit but without housing to be discharged to. The number of homeless people presenting in hospital settings has increased dramatically over the past decade,[147] and our Working Party think the Action Plan is an opportunity to explore whether legal advice on benefits, mental health law and housing assistance could be beneficial within a hospital setting.

3.11 **We recommend the Ministry of Justice consider piloting and evaluating co-location of legal advice in a hospital setting. Any pilot should address multiple legal problems and not be limited to single issue advice. Testing of co-located health/justice pilot schemes should assess qualitative justice and health outcomes.**

3.12 Currently, mortgage repossession represents a significant number of cases before the County Court in any given year.[148] The implications of mortgage possession claims are significant: potentially leading to the loss of the family's principal

clinic is being assessed against health outcomes for clients, JUSTICE (2019), *Innovations in Personally Delivered Advice*, para 25.

[145] "Digital Support" describes what was formally called "Assisted Digital", the technical support service accompanying the Reform Programme. JUSTICE has previously recommended that to the extent practicable, the technical support accompanying the Reform Programme, should be co-located with legal advice provision, in recognition that people are likely to need help with both the technical and legal elements of online courts, JUSTICE note 43 above Postscript from the Chair.

[146] As part of the Reform Programme, HMCTS has been trialling online appeals against DWP decisions for Personal Independence Payment and Employment Support Allowance entitlements, https://www.gov.uk/guidance/hmcts-reform-update-tribunals We welcome the co-location of legal support with technical assistance, as benefits problems are currently manifesting in possession lists.

[147] NHS digital figures show the number of homeless presenting in hospitals has increased from 1,359 to 10,259 in 2017/18, Marsh and Greenfield, 'Figures show soaring number of homeless hospital patients', (Guardian Online, 20 February 2019) available at https://www.theguardian.com/society/2019/feb/20/nhs-england-figures-show-soaring-homeless-patient-numbers

[148] The most recent statistics, for the January to March 2019 period, saw an increase in mortgage possession claims issued, up to 6,157. In all of 2018, there were 19,508 claims issued, 'Mortgage and landlord possession statistics: January to March 2019', (Ministry of Justice, 9 May 2019) available at https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-january-to-march-2019

valuable asset, repossession and the prospect of homelessness. Those facing the prospect of repossession are required to access advice through the Civil Legal Aid telephone gateway under the "debt"[149] category, where they receive legal help over the phone or online,[150] as opposed to legal aid under the housing category.[151] Tenant lawyers we spoke to and judges on our Working Party told us that many respondents who face mortgage repossession cases have a tendency to put their head in the sand, and for that reason, the pre-action requirements for lenders to negotiate with borrowers can be ineffective. Access to "legal help" only, when facing the prospect of eviction, denies the borrower the prospect of stronger advocacy on their behalf at a time when they are most vulnerable. The financial eligibility requirements for civil legal aid are strict,[152] and those facing mortgage repossession otherwise with little by way of assets ought to be able to access legal aid in times of need. **We recommend that the legal aid categorisation be changed so that mortgage possession claims sit in both "debt" and "housing" so that respondents facing repossession can get both early legal advice and representation should it be needed from a wide range of providers.**

3.13 Costs implications can also act as a fetter on access to justice and the viability of the legal aid sector. Chapter 26 of the Jackson Report related to housing claims and considered the issue that arises when landlords settle with no order as to costs.[153] Sir Rupert considered the prospect that in certain circumstances, landlords could exploit a conflict of interest between tenant and solicitor:

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[149] Legal Aid Agency, Category definitions 2018', available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738528/2018_Standard_Civil_Contract_Category_Definitions__August_2018_.pdf

[150] The requirement to go through the CLA gateway was introduced by LASPO, see Patel and Mottram, 'Civil Legal Aid mandatory gateway: Overarching research summary' (Ministry of Justice, 2014) p. 9 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384307/cla-gateway-research-summary.pdf

[151] Those facing mortgage repossession can also gain on the day access to the Housing Possession Court Duty Scheme at court https://www.gov.uk/repossession/help-with-legal-costs

[152] The legal aid eligibility criteria exclude the first £100,000 of equity and only allows £100,000 in mortgage debt. If the capital in the property is more than £8,000, a person is ineligible, the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

[153] Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report', December 2009 available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf

- a social landlord offers to settle a possession action by inviting the court to make a conditional suspended possession order, on terms that there is no order as to costs having not made such an offer in its rent arrears protocol letter or earlier in the claim; or

- where a local housing authority offers to provide housing in a homelessness appeal in the County Court on condition there is no order as to costs.

3.14 In each case, the settlement is in the interests of the client, but the legally aided solicitor is not remunerated for the work they have done. Sir Rupert accepted that this created difficulties for solicitors, who were already operating in a harsh financial environment. The Housing Law Practitioners Association (HLPA) suggested that in those circumstances, the County Court could deal with the issue of costs on the papers (in the same way that the Administrative Court does), which Sir Rupert agreed was a sensible proposal meriting consultation. Notwithstanding, as far as our Working Party is aware, this consultation never took place. **We recommend that the Ministry of Justice should consult on whether a publicly funded party should have the right to make a freestanding application for costs where the dispute has settled in their favour, in accordance with the Jackson Report recommendation.**

Disrepair claims

3.15 Housing providers are under a legal obligation to ensure property is maintained in a safe state, fit for human habitation and to conduct repairs when needed, though it is a matter of record that much of the rented stock is in poor condition, particularly in the private rented sector.[154] Where these obligations or those that arise under contractual terms of a tenancy or lease are not discharged, tenants

[154] "3 in 5 tenants experience disrepair, and of these 1 in 5 do not have the problem completely resolved within a reasonable amount of time" – Poll and Rodgers note 4 above. That report outlined a litany of problems within housing, including: that landlords are not meeting obligations on repair that they are responsible for"'; that "60% of tenants identified disrepair in their home in the last 2 years that was not caused by them and that their landlord was responsible for fixing"; that "15% said the disrepair was a major threat to their health and safety"; that "32% of tenants said their house did not have a carbon monoxide alarm despite requiring one", affecting c.900,000 homes; that "about a quarter of landlords failed to make sure there's a smoke alarm on each floor of all of their properties"; that "[t]he same number failed to carry out an annual gas safety check or make sure that smoke and carbon monoxide alarms were working; and that "31% of landlords said they find it difficult to keep up with rules and regulations, 49% did not know the potential penalty (a fine of up to £5,000) for not checking smoke and carbon monoxide alarms are in working order on the first day of the tenancy" and "[t]he same proportion didn't know the penalty for not carrying out a gas safety check".

can pursue a disrepair claim in the County Court in order to obtain damages and an injunction to compel remedial work.

3.16 Tenant lawyers we spoke to expressed frustration at the frequency with which costs arrangements for disrepair claims have been changed.[155] Under current arrangements, disrepair is in scope only where there is a serious risk of harm to the health and safety of a client or their family, and as a counterclaim to possession, but not as a standalone claim for damages. Post-LASPO, disrepair claims for damages are increasingly being provided for by practitioners acting on Conditional Fee Agreements,[156] with practitioners able to claim a percentage of the overall damages awarded, currently called an "uplift".[157] In 2019, the MOJ issued a consultation on extending the Fixed Recoverable Costs regime, to new parts of civil justice, including disrepair.[158]

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[155] LASPO changed the arrangements for disrepair claims, which had historically been funded under legal aid. Since 2010, the number of cases submitted to the Legal Aid Agency for funding for disrepair claims has reduced 92%, see note 60 above. One of the key benefits of legal aid had always been the rule that a defendant who won against a legally aided claimant would not recover their costs.

[156] Brookes and Hunter, 'Complexity, Housing and Access to Justice' in Palmer, Cornford, Marique, Guinchard (Ed), *Access to Justice: Beyond the Policies and Politics of Austerity*, (Hart Publishing, 2016).

[157] Various reforms in recent years have tinkered with the percentage of uplift payable to claimant lawyers. For instance, the Access to Justice Act 1999 removed legal aid for personal injury and substituted regulated conditional fees to operate alongside legal aid, whereby the successful claimant lawyer was entitled to be paid for work done on an hourly rate, plus a success fee up to 100%, and Legal Services Act 1990 s. 58, see also Hodges, *Delivering Dispute Resolution*, (Hart, 2019) p. 140. Success fees claimable under conditional fee agreements were considered by some to be unfair for defendants and drove a perception amongst the judiciary that the costs of civil justice were disproportionate, see J Sorabji, *English Civil Justice after the Woolf and Jackson Reforms; A Critical Analysis* (Cambridge University Press, 2014), p. 201.

[158] Fixed Recoverable Costs were a key element of the Jackson Reforms: Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report. Fixed Recoverable Costs* (Judiciary of England and Wales, 2017). The MOJ propose to extend fast track disrepair claims into a Fixed Recoverable Cost regime, which will limit costs recovery to that prescribed in a grid, under either Band 3 (intermediate) or Band 4 (complex) cases Ministry of Justice, 'Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals', (March 2019), p. 13 and 14 available at https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/supporting_documents/fixedrecoverablecostsconsultationpaper.pdf The proposal would provide for fixed costs for activities such as pre-issue or pre-defence investigation, attendance of solicitor at trial per day, drafting statement of case etc on the basis of a grid which sets out fixed costs for activities based on which "Band" of case it falls into, p. 33.

3.17 All of this is creating great uncertainty and challenges the viability of practices carrying out disrepair claims for tenants. Our Working Party thinks one way to provide certainty is to introduce Qualified One-Way Cost Shifting (QOCS) to disrepair claims.[159] QOCS were introduced into personal injuries after the Jackson Reforms, and provide cost protection against personal injury claimants in the event they are unsuccessful.[160] District Judges on our Working Party expressed the view that in the overwhelming majority of disrepair cases which come before them a claimant is successful. (Their concern was about the cases which they suspect are not reaching them, on account of difficulties accessing advice and the courts faced by people with meritorious disrepair claims.)

3.18 QOCS have the potential to be a powerful tool for access to justice in disrepair claims, though their introduction might require a robust early triage stage by judges or suitably qualified court staff, to assess unmeritorious claims.[161] **We recommend the Ministry of Justice consult on introducing Qualified One-Way Costs Shifting for housing disrepair claims.**

Online possession project

3.19 The online possession project is due to commence in 2020 and while there is little detail of what it might entail, the expressed intention is to "improve,

[159] Sir Rupert thought QOCS had merit where there were "parties who are generally in an asymmetric relationship with their opponents", which included disrepair, Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, chapter 9, para 5.11 available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf This sentiment was recently reiterated by the Law Society, *The Law Society's Response to the Ministry of Justice Post-Implementation review of Part 2 LASPO Act* (Law Society, 2018) available at https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/moj-post-implementation-review-part-2-laspo/

[160] The procedural matters relating to QOCS are set out at CPR 44.13 - 44.17 and provide cost protection by controlling or limiting the enforcement of an adverse costs order against an unsuccessful claimant. Lord Briggs, in the Civil Court Structure Review, characterised QOCS as a "powerful promoter of access to justice", Briggs LJ, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, July 2016) para 6.29 available at https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf

[161] There have been concerns that QOCS drive unmeritorious claims on the basis that lawyers, and claimants can push claims, immune from costs order unless fraud is demonstrated, submission to the LASPO review by NHS Resolution, see M Fouzder, 'LASPO ban is 'driving referral fees underground' *Law Gazette, 1 October 2018*).

automate and streamline the shorthold tenancy possession process."[162] Our Working Party was near unanimous in concern that possession is not likely to be suitable for continuous online resolution if that were to be the only form of dispute resolution available, given the significant number of social housing tenants involved, and the prospect that digital exclusion is widespread amongst potential respondents.[163] Any proposal to subject assured tenancy possession to online decision making runs the risk of excluding a significant proportion of tenants who lack digital capability and excludes the prospect of judges identifying vulnerability through physical hearings.[164]

3.20 Should HMCTS decide to proceed with continuous online resolution for possession, it would be essential to ensure that use of online processes is supported by an expansion in the availability of housing duty solicitors, who are integral to the functioning of possession lists in the physical courts. Any "virtual duty solicitors" would need to be prominently signposted to in any process, potentially with the notice of a hearing date including details of the party's duty

[162] 'HMCTS reform update – Civil' (11 July 2019), available at https://www.gov.uk/guidance/hmcts-reform-update-civil#possession A more recent MHCLG consultation paper suggested that what was being introduced was "a new online system to speed-up and simplify the process for landlords…(that will) reduce the errors that landlords can currently make when progressing a claim", which suggests filing and responses might be automated, as opposed to the introduction of continuous online resolution, MHCLG, 'A new deal for renting: resetting the balance of rights and responsibilities between landlords and tenants', July 2019 para 1.18 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819270/A_New_Deal_for_Renting_Resetting_the_Balance_of_Rights_and_Responsibilities_between_Landlords_and_Tenants.pdf

[163] Briggs LJ in the Civil Courts Structure Review agreed, noting that "there has been virtually unanimous support for the wholesale exclusion of claims for the possession of homes," Briggs LJ, note 160 above para 6.95.

[164] The Civil Justice Council recently published a report on vulnerable witnesses and parties within civil proceedings, which flagged the need for online court forms to flag up vulnerability through directions questionnaires, Civil Justice Council, 'Vulnerable witnesses and parties within civil proceedings: current position and recommendations for change', (February 2020) available at https://www.judiciary.uk/wp-content/uploads/2020/02/VulnerableWitnessesandPartiesFINALFeb2020-1.pdf JUSTICE flagged the need for there to be significant improvements in capturing data on vulnerability and adjusting for it, noting that while "the flagging of vulnerability ought to take place at the earliest possible stage … there are obvious challenges with digital processes in doing this. Some types of inherent vulnerability may be readily apparent to advocates or judges in physical courts when they first see someone in person, and adjustments can be considered at that stage. But when a person is engaging with a digital process, there is no equivalent face to-face opportunity to identify vulnerability", JUSTICE (2019), 'Civil Justice Council consultation on vulnerability in the civil justice system: JUSTICE response', para 18 available at https://justice.org.uk/wp-content/uploads/2019/10/Civil-Justice-Council-consultation-on-vulnerability-in-the-civil-justice-system-JUSTICE-response-1.pdf

scheme eligibility and instructions for accessing the scheme. Advice would need to be made accessible through a "doorway" built into the relevant online justice service, replicating the physical doorway to the duty solicitor desk in a physical court. Any moves in this direction must be carefully piloted and the results of the pilots properly evaluated. Many members of the Working Party thought that possession ought to not be subject to continuous online resolution. **We recommend that if the online possession project features a continuous online resolution process the user must have access to a virtual housing duty solicitor.**

Court closures

3.21 The last decade has seen the court and tribunal estate of England and Wales significantly reduced.[165] Closures were initiated to consolidate the estate and buildings underused and inappropriate for modern use sold off in favour of sites in better condition. Proceeds from the sale of court and tribunal buildings were to part-fund the Reform Programme. However, many argue that the sale of almost half the estate was initiated without due regard for the access to justice implications of closures at a time when the Reform Programme was years away from offering a wide array of fully functioning, end-to-end online justice processes capable of replacing face-to-face hearings. Ultimately, the closure of the estate in such a way has had a damaging impact on access to justice and the day-to-day experience of users of the justice systems.

3.22 The proportion of tenants who attend possession hearings has long been "depressingly low" [166] and our Working Party is concerned that court closures have exacerbated this problem, particularly for vulnerable respondents to possession claims who might struggle to cover travel costs to a court outside their town. For example, the submission from the Association of District Judges

[165] Between 2010 and 2018, 162 of 323 magistrates' courts closed along with 90 of 240 county courts, 28 of 83 tribunal buildings, 17 of 185 family courts and 8 of 92 Crown Court buildings, House of Commons Briefing Paper CBP 8372, Court Statistics for England and Wales, 27 November 2018.

[166] 2014 research by the University of Oxford and the University of Hull identified low attendance rates at possession hearings as attributable to people burying heads in the sand, seeing little point in attending, landlords and housing officers telling them there was no need to attend, fear or misunderstanding of the legal system, general apathy and the cost and difficulty of attending. Bright and Whitehouse, 'Information, Advice & Representation in Housing Possession Cases', (April 2014) p. 47 available at https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf

(ADJ) to the recent House of Commons Justice Select Committee Court and Tribunal Reforms inquiry[167] (Justice Select Committee Inquiry) noted that the closure of Rotherham County Court had caused a notable reduction in attendances at that possession list, which had moved to the afternoon at Sheffield County Court.[168]

3.23 At possession hearings people face the prospect of the loss of their home. As such, everything possible should be done to remove structural obstacles to their attendance. One way to do so is for the estate to be flexible and to conduct hearings in civic buildings in communities impacted by closures.[169] In May 2019, HMCTS published its new court and tribunal design guide, which, under the heading of "supplemental provision", briefly considers the use of third-party

[167] Available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/hmcts-court-and-tribunal-reforms/written/98252.html

[168] Court staff kept a record of court attendance for each list: 41.3% of Sheffield tenants attending the possession list, compared to 30.3% of Rotherham tenants in the afternoon list. The Association noted that Sheffield and Rotherham are only a 15-minute train ride away (7 miles), on the lower end of the distances travelled by virtue of court closures. 2018 research from Suffolk – where the closures left just one court house in Ipswich to serve a county of 750,000 people – demonstrated increased disengagement from the justice system as a result of court closures, with the impacts felt most acutely by those on low income, those who rely on public transport and those who have a disability. One advocate noted his clients who could not afford the journey to Ipswich had opted for waiting until they are arrested on a warrant so that the police can drive them to court. In the report, one member of judiciary noted that in a five-day Crown Court trial, "a week of travelling would mean that one would have to spend the entire DLA [Disability Living Allowance] on travel," Olumide Adisa, *Access to Justice: Assessing the impact of the Magistrates' Court Closures in Suffolk*, (July 2018), p. 4 and 18, available online at https://www.uos.ac.uk/news/access-justice

[169] The 2016 JUSTICE Working Party report, *What is a Court?*, recommended the development of courts that could service communities affected by court closure on either a peripatetic basis, where judges travel throughout the country for hearings, servicing areas that do not have a 'traditional' judicial presence or on a "pop" up basis dictated by demand. Spaces such as local council offices, libraries, community centres and schools were highlighted as suitable for pop-up venues in disputes with little need for formal security arrangements. We understand that approaches in this vein have been adopted in various places. We were told that when Bow County Court closed, a "Housing Hub" was established at Stratford Magistrates' Court, where a single hearing room was set aside for mainly possession cases, with matters heard by District Judges with a particular interest in housing. The purpose was to reduce the burden on those who did not have the resources to travel, to allow them to appear at their hearings. We also understand that the FTT (PC) is flexible in the conduct of its hearings, conducting on-site inspections for a number of cases and where the court and tribunal estate does not offer a building proximate to a property, holding hearings in hotel rooms.

premises.[170] But we understand from HMCTS that the use of civic spaces to hold "pop-up" or "peripatetic" hearings is not yet in contemplation.

3.24 The Justice Select Committee Inquiry recommended HMCTS develop a strategy for the use of supplementary venues, with a default position that they be established in communities where there has been a court closure.[171] Our Working Party agrees and thinks there is a particular need for these arrangements for possession hearings,[172] subject to there being appropriate security arrangements at the venue. For those for whom transport to the nearest court is unaffordable and costly, holding courts in civic spaces[173] can reverse the decline in respondent attendances at possession lists and provide for a less intimidating environment for those facing the loss of their home. **We recommend that, in the absence of a permanent court and tribunal presence, HMCTS should operate peripatetic or pop-up courts and tribunals to enable the resolution of housing disputes in towns and communities which no longer have a physical court or tribunal presence.**

[170] The guide refers to "the use of third-party premises to be used on a temporary or occasional basis, according to business needs", but does not explicitly reference the prospect of civic spaces being widely used to conduct hearings https://www.gov.uk/government/publications/court-and-tribunal-design-guide The First-tier Tribunal (Property Chamber) (FTT (PC)) already adopts a degree of flexibility in where hearings are held, including through site visits and has, in the past, sat on a "pop-up" basis where cases demand it.

[171] Note 167 above, para 129.

[172] At the time of this report, the Ministry of Justice was consulting on the Housing Possession Court Duty Scheme (HPCDS), which included proposals for local arrangements to allow practitioners to follow up with clients at a higher rate of remuneration than currently available. We imagine changes to the court and tribunal guide to allow for "pop-up" or "peripatetic courts" would be made in consultation with the MOJ team working on the HPCDS to allow practitioners to act as duty lawyers in "pop-up" courts with sustainable funding.

[173] The rooms used for these hearings will require certain features; modular furniture, the ability to produce orders urgently for certain hearings, a good WiFi connection, security staff (where needed) and separate doors for parties and court staff for security reasons, JUSTICE note 169 above para 4.16.

Alternative dispute resolution and pre-action process

Introduction

3.25 ADR is "a collective description of methods of resolving disputes otherwise than through the normal trial process".[174] The Woolf Report recommended ADR have a fundamental role in civil justice under the new Civil Procedure Rules (CPR),[175] under which courts are required to further the overriding objective[176] by "actively managing" cases, including by "encouraging the parties to use an alternative dispute resolution procedure."[177] Similarly, the FTT (PC) rules provide that the tribunal should, where appropriate, bring to the attention of the parties the availability of any appropriate alternative procedure to resolve the dispute.[178]

3.26 ADR offers widely acknowledged benefits to parties, the justice system and society: resolving disputes quickly and at far lower cost to litigation; maintaining relationships through a non-adversarial dispute resolution process;[179] and

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[174] CPR Glossary, available at http://www.justice.gov.uk/courts/procedure-rules/civil/glossary Traditionally ADR is conceived of as "a voluntary process in which a neutral facilitator helps the parties reach agreement", Genn, 'Court-based ADR initiatives for non-family civil disputes: the Commercial Court and Court of Appeal', (Lord Chancellors Department, 2002) p. 1 available at https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/court-based_adr_initiatives_for_non-family_civil_disputes.pdf

[175] Lord Woolf wrote that "[in future] …parties should: (i) Whenever it is reasonable for them to do so settle their disputes before resorting to the courts; (ii) Where it is not possible to resolve a dispute or an issue prior to proceedings, then they should do so at as early a stage in the proceedings as is possible. Where there exists an appropriate alternative dispute resolution mechanism which is capable of resolving a dispute more economically and efficiently than court proceedings, then the parties should be encouraged not to commence or pursue proceedings court until after they have made use of that mechanism," Lord Wolf, Access to Justice, Interim Report (Lord Chancellor's Department, June 1995) Chapter 4.7.

[176] The overriding objective is to enable the court "to deal with cases justly and at proportionate cost", CPR 1.1.

[177] CPR 1.4(2)(e).

[178] If the parties' consent and where the procedure is compatible with the overriding objective, the tribunal should facilitate the use of the procedure. Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 rule 4(1).

[179] Harris note 49 above p. 31.

providing the possibility of flexible and imaginative solutions.[180] Pre-action processes for certain housing claims[181] encourage parties to pursue ADR and negotiate prior to commencing a claim. Court and tribunal judges are encouraged to facilitate ADR and costs consequences flow from an unreasonable refusal to engage in ADR.[182] Various ombudsmen schemes have a significant role in maladministration claims and other complaints against housing providers, investigating, advising and adjudicating a significant and increasing number of cases per year.[183] Finally disputes relating to the repayment of tenancy deposits are all handled online by one of three tenancy deposit protection schemes.

3.27 Notwithstanding its expansion across the justice system and agreed benefits, uptake of ADR at all stages of housing disputes remains unreasonably low.[184] This section of the report explores how that might be changed. It takes a broad view of ADR, as including negotiation, mediation and early neutral evaluation. Quite some time is spent on consideration of pre-action ADR, engagement and negotiation, which is where a huge amount of work is currently done.

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[180] Beyond what the courts might be capable of achieving, see *Dunnett v Railtrack PL* [2002] EWCA Civ 303.

[181] Both part 2.10 of the Pre-Action Protocol for Possession Claims by Social Landlords and part 4.1 of the Pre-action protocol for housing disrepair cases provides that "the parties should consider whether it is possible to resolve the issues between them by discussion and negotiation without recourse to litigation. The parties may be required by the court to provide evidence that alternative means of resolving the dispute were considered. Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored".

[182] CPR 44.3(2) provides the general rule that the unsuccessful party should pay the costs of the successful party, but rule 44.3(5) qualifies this, allowing costs to be varied, based on the behaviour of the parties both before and during the proceedings.

[183] There are several schemes which exist within the landscape, described in chapter 4. By way of illustration of volume, in 2018 the Property Ombudsman took 29,023 customer enquiries (22% increase on 2017), for which the scheme gave advice, signposted, provided local or early resolution on, and made 4,246 adjudications (up 16% on 2017), The Property Ombudsman, 'Annual Report 2018', available at https://www.tpos.co.uk/images/documents/annual-reports/2018-annual-report.pdf

[184] At the London regional training day for the FTT (PC) in 2019 we were told that 89 cases had been listed for mediation in 2019, with a 73.8% success rate, but that figure represented only 4% of the total number of Property Chamber cases.

Pre-action engagement

3.28 Pre-action protocols were introduced by the Woolf Reforms to "build on and increase the benefits of early, but well-informed settlements which genuine satisfy both parties to a dispute."[185] However, the introduction of the protocols long pre-dated austerity and legal aid cuts and our evidence gathering revealed current problems with the protocols in housing disputes.

3.29 First, protocols can be complex, notwithstanding that disputes themselves are not always complex, or worth a significant amount in damages.[186] They also pre-suppose the availability of legal advice and assistance before commencing a claim. For many claimants, whether in disrepair or possession claims, this assumption no longer holds. More could be done to simplify the protocols and make them more user friendly.[187] For instance, the disrepair protocol contains a schedule with a template letter that tenants are required to send. One option might be to embed a PDF template letter generator in the protocol, which tenants can populate with the relevant details of their claim. More generally, protocols

[185] Lord Woolf, 'Access to Justice Final Report', Chapter 10, available at https://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm Claimants are required to notify prospective defendants of their claim and parties are expected to meaningfully exchange information to see whether disputes can be resolved without proceedings 'Practice Direction - Pre-action conduct and protocols', available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct See also Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, (Sweet and Maxwell, 3rd Edn, 2013) para 4.5.

[186] For example, pre-action protocols for disrepair claims run to over 5,000 words and explains that it is intended to cover claims brought under all of Section 11 of the Landlord and Tenant Act 1985, Section 4 of the Defective Premises Act 1972, common law nuisance and negligence, and those brought under the express terms of a tenancy agreement or lease, but that it does not cover claims brought under Section 82 of the Environmental Protection Act 1990 (which are heard in the Magistrates' Court) nor those that are counter-claims, para 3.1-3.4. Subsequent sections of the protocol require tenants to produce a letter of claim with the details of defects in the form of a schedule, the effect on the tenant, the details of any "special damages", the proposed expert and a letter of instruction to an expert, available at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_hou. The protocol has recently (January 2020) been revised to apply to fitness for human habitation claims under s.9A, Landlord and Tenant Act 1985 (as inserted by the Homes (Fitness for Human Habitation) Act 2018). Those amendments do not apply in Wales, where the previous version of the Protocol remains in force.

[187] While we acknowledge that detail may be necessary to cover all necessary elements of pre-action conduct, they have been drafted by lawyers with lawyers in mind, see JUSTICE note 26 above para 2.14.

should be revisited for clarity and accessibility for non-lawyers.[188] **We recommend the Civil Procedure Rule Committee revisit pre-action protocols for housing disputes, with view to simplifying them and making them more user friendly for both practitioners and the significant number of people who come before the courts without housing advice and representation.**

3.30 A second issue is accountability for pre-action requirements. The pre-action protocols for social housing and mortgage possession claims encourage parties to negotiate prior to commencing a claim.[189] However, claim forms used for social housing possession,[190] for example, do not require a claimant to certify whether they have actively engaged with the tenant at the pre-action stage. This ultimately means that little information on pre-action efforts comes before a judge,[191] in circumstances where the court might have little time to spend on an individual case.[192]

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[188] Lord Woolf's described the problems of the pre-CPR civil justice system as including a "lack of equality between the powerful, wealthy litigant and the under resourced litigant…and [that] it is incomprehensible to many litigants", note 185 above para 2.

[189] These include that a landlord should contacts the tenant to discuss the causes of arrears, attempt to agree affordable repayment sums, arrange through DWP for arrears to be paid from benefits, offer the tenant assistance in any claim and advise the tenant to seek assistance from advice agencies part 2.1 – 2.7 Pre-Action Protocol for Possession Claims by Social Landlords, available at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-possession-claims-by-social-landlords#2.1 Sir Rupert Jackson, at the time of his interim report, concluded that the "Rent Arrears Protocol has had a beneficial effect in reducing the number of possession claims which would otherwise have been initiated," Jackson LJ, 'Review of Civil Litigation Costs: Preliminary Report', (The Stationery Office, 2009) p. 270 available at https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf A similar process applies in the pre-action protocol for mortgage possession claims, which requires a lender or home purchase plan provider to actively engage with the borrower when they fall into arrears https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha

[190] Form N119, Particulars of claim for possession https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732257/n119_web_0818_save.pdf

[191] Bright and Whitehouse's research suggests that information on claims forms tends to be rather limited, with a judge interviewed advising that "we don't get much other than what we elicit by our own questioning really, the documents aren't going to help us," Bright and Whitehouse note 166 above DJ6. In more recent research, they found the majority of possession cases they observed were dealt with in 5 minutes or less, Whitehouse, Bright, and Dhami, 'Improving Procedural Fairness in Housing Possession Cases', (2019) 38:3 *Civil Justice Quarterly* 351, at p. 359.

[192] While we appreciate that time taken on possession lists varies geographically, 2005 research found that in some courts, up to 30 possession cases were listed in an hour, Hunter, Blandy, Cowan, Nixon,

3.31 Our evidence gathering suggests many social landlords do not engage with tenants at the pre-action stage, meaningfully or at all. While we understand that, historically, social housing providers employed housing officers to work with tenants on the drivers of rent arrears at the pre-action stage, resourcing is such that they are increasingly disposed towards dedicating resources to income recovery and using the County Court process as a mechanism to secure rent arrears repayment. Notwithstanding, it should be remembered that the court is a mechanism of last resort. It is incumbent on housing providers to engage meaningfully with tenants to resolve underlying problems, such as debt or benefits, before initiating a claim. Housing providers should be required to detail those pre-action endeavours when making a possession claim. We think the best way to ensure this material comes before a judge is to ensure pre-action engagement is clearly indicated on any claim form. **We recommend all court claim forms for possession which involve pre-action negotiation be strengthened to require applicants to adduce evidence or include details as to how they have engaged with the pre-action protocol requirement to work with a tenant or borrower to resolve the issues giving rise to the prospect of repossession.**

3.32 One consultee we spoke to expressed concern that even if possession claimants do glean significant information on a tenant's circumstances, the current drafting of court forms means that information does not necessarily make its way to the court.[193] For example, though the defence form for tenants facing eviction from rented premises asks about any event or circumstances which have led to being in arrears,[194] it does not ask questions regarding any defences or considerations under the European Convention on Human Rights (ECHR) or the Equality Act 2010,[195] a particular issue for people coming to the court without having taken

Hitching, Pantazis and Parr, 'The Exercise of Judicial Discretion in Rent Arrears Cases' *(*London: Department for Constitutional Affairs, Research Series 6/05, October 2005 available at https://lemosandcrane.co.uk/resources/DCA%20-%20Exercise%20of%20judicial%20discretion.pdf Bright and Whitehouse's research suggests that this kind of allocation results in possession hearings being allocated around 5 minutes each, Bright and Whitehouse note 166 above p. 43.

[193] Bright and Whitehouse note 166 above Chapter 3.

[194] Such as divorce, illness or bereavement, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/688414/n11r-eng.pdf

[195] There are movements towards ameliorating this issue, with the pre-action protocols being amended, part 3 of the protocol was amended in January 2020, and now includes an amendment that reads "cases

advice. A simple way to improve the situation would be to change court forms to ask questions or offer tick boxes about Equality Act or human rights concerns, such as whether a respondent has children, suffers from a disability or has mental health issues. Having those matters flagged on court forms will alert a judge, invite them to inquire as to the person's circumstances and should see them signpost that person to any form of available legal advice. Changes to forms should be developed through best practice with the disability advocacy sector, to ensure the questions asked are appropriate and presented in such a way as to ensure a person engages with the question. **We recommend the Civil Procedure Rule Committee amend defence forms for all possession claims to include specific questions or tick boxes for a defendant to complete that flags information about disability or other matters which might give rise to Equality Act 2010 or ECHR concerns or defences.**

3.33 The recent Queen's Speech evinces an intention, through the Rented Homes Bill, to abolish "no fault" evictions as part of the legislative agenda for 2020. The abolition of section 21 of the Housing Act 1988 is to be delivered by removing the assured shorthold tenancy regime, with compensatory grounds introduced into section 8 of the Housing Act 1988.[196] At the same time, the Government is exploring how to establish "longer, more secure tenancies".[197] The consultation which predated the Bill explained that changes to possession grounds will be met with parallel developments to improve court guidance "so landlords and tenants

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where human rights, public law or equality law matters are or may be raised, the necessary information is before the Court at the first hearing", https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-possession-claims-by-social-landlords

[196] 'The Queen's Speech 2019', (Prime Minister's Office, 19 December 2019) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf#page=46.com The Ministry of Housing, Communities and Local Government issued a consultation in 2019, which set out a desire for a "fair and balanced relationship between landlord and tenant". The key feature of the consultation was the proposal to abolish section 21 of the Housing Act 1988, which allows landlords to evict tenants without providing a reason or avenue for challenge, MHCLG, 'A new deal for renting: resetting the balance of rights and responsibilities between landlords and tenants', July 2019 available a t https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819270/A_New_Deal_for_Renting_Resetting_the_Balance_of_Rights_and_Responsibilities_between_Landlords_and_Tenants.pdf

[197] MHCLG, 'Overcoming the Barriers to Longer Tenancies in the Private Rented Sector: Government Response', (April 2019) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795448/Overcoming_the_Barriers_to_Longer_Tenancies_in_the_Private_Rented_Sector_-_government_response.pdf

better understand their rights and responsibilities as the case goes through the courts."[198] In our view, these developments are an opportunity to fundamentally reconsider how private landlords and tenants engage before a possession claim is initiated.

3.34 The pre-action protocol for social possession cases requires a housing provider to make good faith inquiries as to why, for example, a tenant is falling into arrears. The premise is good faith dialogue, and constructive discussion on the issues giving rise to problems in the tenancy. In our view, the desire to establish longer term, more sustainable relationships between tenant and landlord in the sector should inspire similar dialogue between private landlords and tenants before possession claims are initiated. The reform of statutory grounds for possession presents an opportunity to require that activity in pre-litigation behaviour. One way to do so would be the introduction of a simple pre-action protocol for private possession claims, designed with the needs of non-legally represented landlords in mind. This might be a protocol that amounts to a checklist, with a list of actions a landlord is required to carry out before initiating proceedings. These could include:

- a requirement to contact the tenant to find out what the cause of rent arrears is;
- a requirement to negotiate with the tenant to secure repayment; and/or
- issuing an email or letter demand for repayment within a specified timeframe.

3.35 That protocol could be issued to a tenant with the bundle of documents issued at the commencement of a tenancy, explaining the steps a landlord would have to go through before they can attempt possession. Alternatively, prior to initiating a claim, private landlords could potentially be required to engage with the problem-solving requirements set out in the social possession protocol. **We recommend that the Civil Procedures Rules Committee (CPRC) should consider whether a simple, easy to follow pre-action protocol for private possession claims should be established as part of reforms under the Rented Homes Bill. That pre-action protocol would capture the spirit of the social housing possession pre-action protocol and encourage landlords**

[198] The guidance will be delivered by HMCTS for private landlord possession cases by August 2020, MHCLG, note 196 above, para 1.19.

and tenants to work together on a solution to the dispute without recourse to a formal possession order.

3.36 Private rental possession claims are not the only area where our Working Party considers more could be done at the pre-action stage. Judges on our Working Party cited issues that arise where creditors enforce charging orders against a debtor by applying to the court to obtain possession before selling the home.[199] Where a debtor chooses to enforce a charging order, those residing in the house, as well as the debtor, are affected.[200]

3.37 Our Working Party is concerned that particular attention should be paid prior to enforcement of a charging order as to the individual circumstances of tenants and family members should the sale of the property be requested. In particular, the desire must be to minimise any hardship for those living in the house caused by the sale. For that reason, **we recommend the establishment of pre-action requirements before an application for enforcement of a charging order is brought.** Those requirements, whether under protocol or otherwise, should require a creditor to engage proactively with the debtor and those in the household, to assess whether enforcement will bring hardship and if so, to contact local authorities for assistance.

Pre-action ADR

3.38 Housing pre-action processes encourage parties to engage in ADR before initiating a claim. However, there are various factors which prevent parties doing so in a meaningful way.[201] For example, claimants for possession claims are not

[199] CPR rule 73.2 – 73.10(C). Courts are required to consider all circumstances of the case when making a charging order, including evidence before it as to the personal circumstances of the debtor, Charging Orders Act 1979 s1(5). Case law holds that this includes consideration of "hardship to the wife and children if a charging order is made", *Kremen v Agrest* [2013] EWCA Civ 41 (Moore-Bick LJ).

[200] Court Form N379 requires the creditor to include details of anyone else with an interest in the property, such as co-owners, tenants and anyone else with right of occupation.

[201] The 2015 Civil Court User Survey included questioning around action conducted before a claim. 40% of participants said they had not considered mediation prior to the claim and only 28% of respondents indicated that they took up mediation before starting a claim, Ministry of Justice, 'Civil Court User Survey', Findings from a postal survey of individual claimants and profiling of business claimants', (MOJ Analytical Series, 2015) Table 6.2 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/472483/civil-court-user-survey.pdf

required to adduce evidence or offer explanations on claim forms as to whether they have engaged with the pre-action processes, including requirements to engage with ADR.[202] Uptake of ADR is also discouraged by the current approach to legal aid funding. In housing disputes, the definition of "early legal help" captures activities outside of and prior to a dispute.[203] What is not included is the ability for practitioners to advise and act for clients through a pre-action ADR process.

3.39 The absence of legal advice and representation from pre-action ADR stymies uptake. In family disputes, the withdrawal of legal aid and lack of contact with solicitors at an early stage caused a drop in the uptake of family mediation, which risks parties entering ADR at a pre-action stage without an appraisal of their true position, with a consequent risk of under-settling.[204] Our Working Party thinks changing the definition of "legal help" to capture advising and engaging with ADR at the pre-action stage is crucial to uptake and efficacy, and should be available to encourage ADR as early as possible in the process. **We recommend that the definition of "legal help" under legal aid contracting for housing should be changed to capture and remunerate acting and advising through pre-action ADR processes.**

3.40 While the removal of practical obstacles to pre-action ADR uptake should improve the position, the biggest issue is that there is no coherent, structured method for uptake of pre-action ADR in most housing disputes. Solicitors on our Working Party explained that pre-action ADR is applied on an ad hoc basis, generally at the initiation of the wealthier party, as those who are legally aided are not funded to pay for pre-action ADR, nor act for parties through that process.

3.41 This lack of structure can be contrasted, for example, with that which is available for low value personal injury claims in road traffic accidents. The Pre-Action

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[202] One of the solicitors interviewed by Bright and Whitehouse suggested claim forms were dealt with in a rudimentary fashion, and "as far as the actual process is concerned, you put in X, Y, Z and you get the hearing date through", note 166 above Solicitor 1.

[203] In housing this tends to include diagnosing the problem, providing advice, drafting letters, advice on proceedings, negotiation (but not as part of a formal ADR process) and obtaining specialist reports Shelter, 'Legal Help and Help at Court', available at https://england.shelter.org.uk/legal/courts_and_legal_action/civil_legal_aid/Legal_Help_and_Help_at_Court

[204] Briggs LJ note 160 above para 6.35.

Protocol for Low Value Personal Injury Claims in Road Traffic Accidents[205] mandates the use of a secure online portal[206] to exchange information and evidence at the pre-action stage for road traffic accident claims worth up to £25,000. If the defendant accepts responsibility following a Stage 1 claim and exchange,[207] a dispute proceeds to Stage 2, where a claimant sends medical evidence to the defendant and the parties have a time limit to negotiate settlement.[208] While we accept this method is constrained to financial disputes, it is demonstrative of how joined up thinking by a sector can promote early resolution of disputes.

3.42 ADR at the pre-action stage in housing disputes needs to be widely available and known about for there to be uptake. The Civil Justice Council has identified lack of knowledge about ADR as an issue and recommended the establishment of an ADR website.[209] We support this and see the potential for development of a portal or landing page that offers subject-specific and accredited ADR providers.[210] Users might be able to input postcode data to link them to their nearest face-to-face mediation provider and the website could be linked to from pre-action protocols.[211] However such an approach might require the system to

[205] Available at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013

[206] Available at www.claimsportal.org.uk/

[207] If the claim is contested at Stage 1, the case exists the portal and proceeds to court in accordance with the Personal Injury Protocol, Hodges, note 157, p. 259.

[208] *Ibid*, 259-260. From commencement in April 2010 to the last available statistics in January 2020, the portal had received 7,408,962 claims and 1,933,991 claims had settled through the process https://www.claimsportal.org.uk/about/executive-dashboard/

[209] The Civil Justice Council has recommended the establishment of a new mediation/ADR website called "alternatives", which would describe the various forms of ADR available, illustrate each by video and indicate how quality guaranteed ADR providers could be accessed, Civil Justice Council, 'ADR and Civil Justice: Final Report', November 2018, para 6.11 available at https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf

[210] Expanding, for instance, on what is currently offered by the Civil Mediation Council, which offers "Civil & Commercial" and "Workplace" mediation at https://civilmediation.org/mediator-search/

[211] As is currently the case with the disrepair protocol, which links to the Civil Mediation Council website, *ibid.*

subsidise or offer ADR methods whose costs are proportionate to values in issue.[212]

3.43 We understand that the Civil Justice Council has recently convened a judicial liaison group to look broadly at the positioning of ADR within the civil justice system. There is a need for any work on ADR in civil justice to consider its role at the pre-action stage. **We recommend the Civil Justice Council consider how awareness of and uptake of ADR at the pre-action stage in housing disputes can be promoted and encouraged. Consideration ought to be given as to how court mediation services can be properly funded to allow them to reach their full potential, including the need for mediation and other ADR types to be made more widely available to the parties at the pre-action stage.**

3.44 The general position in civil disputes is that the losing party bears the winning party's costs of litigation, subject to certain qualifications. In deciding costs orders, the court must have regard to the conduct of the parties during the litigation, including compliance with relevant pre-action protocols or practice directions[213] and should not allow costs that are unreasonably incurred, unreasonable in amount[214] or disproportionate to the matters in issue.[215] Failure to respond to or engage in an invitation to engage in ADR can be viewed as unreasonable conduct and can result in costs sanctions.[216]

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[212] The CJC has noted the peculiarity that a 1-hour telephone mediation is offered free of charge for claims up to £5,000, but that there is no subsidy or offering for cases worth £50,000, CJC note 209 above para 7.4.

[213] CPR 44.2(4)(a). and CPR 44.2(5)(a). The Practice Direction on Pre-Action Conduct and Protocols explains that "if proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered".

[214] CPR 44.3(1)(b).

[215] CPR 44.3(2)(a).

[216] The Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 sets out a list of factors relevant when deciding whether a refusal to mediate is unreasonable, including (a) the nature of the dispute (b) the merits of the case (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. The recent report from the Civil Justice Council on ADR and civil justice criticised these "Halsey Guidelines" as too generous to parties and recommended the circumstances where a refusal to mediate is permissible ought to be narrowed, Civil Justice Council, note 209 above para 2.6 and recommendation 21.

3.45 The implications of a failure to engage in ADR arises at the conclusion of litigation at the costs assessment stage. Arguably, this is too late. The Civil Justice Council has suggested that there could be a form of interim sanction available to express disapproval of a refusal or failure to mediate by parties at the interim stage.[217] The intention is to influence parties' behaviour earlier in the litigation process, to encourage engagement in ADR as early as possible. We agree with this proposal, subject to the caveat that sanctions at an interim stage can only be introduced if pre-action ADR is meaningful and practical obstacles to engagement, which we have outlined above, are removed. Specialist providers must be widely available and accessible, it must be more prominently positioned in the dispute resolution process, and publicly funded advice and representation should be available. **We recommend that, subject to there being an appropriate level of funding for ADR providers and practitioners at the pre-action stage, the Civil Procedure Rule Committee should consider whether costs sanctions for failure to engage with ADR pre-action ought to be introduced earlier in the case management process.**

ADR in the court and tribunal process

3.46 Procedural processes within the courts and tribunals contain certain "nudges" or encouragement towards ADR. The FTT (PC) sends out mediation flyers to parties early in the process, and after an initial case management hearing, case officers send out a lengthier "agreement to mediate form".[218] Early in the conduct of housing disputes in the courts, parties are sent a directions questionnaire, which asks an array of questions relevant for case management.[219]

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[217] *Ibid* Civil Justice Council para 8.33-8.36.

[218] The flyers explain the advantages of mediation under various sub-headings; "cost-effective", "quick", "private", "win/win", "positive relationships". The agreement to mediate forms explains the benefits of mediation, and how it works in the tribunal, before offering parties a tick box, to express whether they want to participate in mediation or not. If the parties accept, mediation is offered by the FTT (PC) itself, as opposed to by an external provider.

[219] The directions questionnaire sent depends on which "track" the case is in, which is governed by damages claimed. Claims under £10,000 are sent the small claims directions questionnaire, the N180 form, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856374/n180-eng.pdf Fast and multi-track claims are sent the N181 form, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856374/n180-eng.pdf Questions are included regarding compliance with the relevant pre-action protocol, endeavours to settle, experts needed and case management arrangements.

3.47 The Small Claims Track Questionnaire alerts parties to the availability of mediation through a free, one-hour appointment with the Government-run Small Claims Mediation Service (SCMS)[220] and offers parties a "Yes" or "No" tick box to the question of whether they agree to the case being referred to the SCMS. Conversely, the directions questionnaire for the fast and multi-track invites parties to consider a 1 month stay to pursue the prospect of settlement through an array of ADR type strategies, which includes signposting parties to external mediation providers accredited by the Civil Mediation Council.[221] In our view, parties across all claim tracks should engage with the question of whether mediation is suitable for their case. A directions questionnaire that does not require parties to articulate why their claim is not suitable for mediation is likely to see the option disregarded by parties. Assistance for parties could be derived from a list of non-exhaustive reasons as to why mediation might not be appropriate, such as urgency, third party interests, etc. The point is to emphasise that in most cases, and particularly where the housing relationship is ongoing beyond the dispute, the matter is likely to be suitable for mediation, or another form of ADR. **We recommend the directions questionnaire for all tracks should require parties to state the reasons why they do not wish to pursue ADR. The questionnaires could include a non-exhaustive list of potentially acceptable reasons as to why certain types of disputes may not be suitable for ADR, which implicitly makes clear that most disputes are suitable for ADR.**

3.48 Practitioners on our Working Party expressed the view that the stay initiated when parties pursue mediation in the fast and multi-track can be a disincentive to uptake, as some in the profession continue to view mediation as a necessary hurdle or tool for delay before continuing to court-based adjudication. ADR is

[220] The SCMS hears somewhere in order of 10,000 mediations a year, Civil Justice Council, note 209 above p. 17.

[221] Form N181 contains an embedded link to an external provider, the Civil Mediation Council. If parties do not elect to try and settle at the directions questionnaire stage, they are asked to state the reasons why they consider it inappropriate to settle at this stage. The Civil Justice Council report on ADR described that even where parties "gave wholly inadequate reasons in the N181 for not using ADR and seeking a stay", judges were spending most of their limited judicial time at the interim stage on costs budgeting, and were spending comparatively little time interrogating compliance with ADR, *ibid* para 8.20.

most effective where the prospect of court-based adjudication looms over it.[222] Allowing a stay on proceedings risks parties failing to engage with ADR on a good faith basis. As an alternative, should parties wish to engage in mediation outside of the court process, a judge (or in the future, authorised court or tribunal staff member) should look to set down a case management timetable in advance, which sets out timetabling and deadlines, should the ADR process be unsuccessful. The approach must be one where ADR is part of an active approach which case manages a dispute to resolution. **We recommend that the Civil Procedure Rule Committee should review whether a stay for mediation disincentivises its use, and whether mediation should be ordered as part of case management timetabling with subsequent filing and case management dates post-mediation. Consideration ought also to be given to how active case management can ensure parties engage with the mediation and any subsequent deadlines.**

3.49 The standard direction for disrepair and multi-track cases provides includes that "at all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation)" and that parties "not engaging [with] means proposed by another must serve a witness statement giving reasons within 21 days of that proposal which would be shown to the trial judge should the questions of costs arise."[223] Conversely, the standard direction for the small claims track contains no reference to ADR.[224] In our view, until courts and tribunals perceive mediation or ADR as a normal step in the dispute resolution process, it is liable to be marginalised. One way to ensure the take-up of mediation is at the forefront of judicial case management is to include a stronger coercion within procedure rules. **We recommend that both the Civil Procedure Rule Committee and the Tribunal Procedure Committee should review all standard directions which involve housing disputes to include a presumption for parties to engage in ADR.**

3.50 We understand that a further structural impediment to legally aided parties engaging is that prior authority must be obtained from the Legal Aid Agency to

[222] When deployed "in the shadow of the law", first coined in Mnookin, R. H. and Kornhauser, L.1979, 'Bargaining in the shadow of the law: The case of divorce', *Yale Law Journal* 88: 950-997.

[223] Available at https://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions

[224] Practice Direction 27, Small Claims Track, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27/pd_part27#B#

advise and act for a clients through ADR in the court process.[225] If ADR is to be normalised in housing disputes and parties are to be encouraged to resolve disputes early and at proportionate cost, practical obstacles to uptake must be removed. This includes reducing the procedural steps a practitioner must complete to engage in a process the justice system is otherwise seeking to encourage. **We recommend legal aid practitioners should not have to obtain prior authority from the Legal Aid Agency to engage in ADR but should be free to pursue it as part of an ordinary legal aid certificate.**

Stronger compulsion to ADR

3.51 The historic position in England and Wales has been that court-ordered mediation, without party consent, constitutes a likely violation of the right to a fair trial under Article 6 ECHR. This approach was on the basis that mandatory mediation strips the mechanism of its voluntary character, said to be the hallmark of effective ADR.[226] Subsequent developments[227] have softened that position. In August 2019, the Court of Appeal in *Lomax*[228] held that CPR 3.1(2)(m), which refers to a court's powers as including "hearing an Early Neutral Evaluation ("ENE")", allowed for a court to order ENE without party consent. *Halsey* did not apply, on the basis that the relevant section of the CPR dealt with an ENE

[225] Through the CIVAPP8 form available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/539965/civapp8-version-19-july-2016.pdf

[226] The position has been entrenched since the Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. Lord Dyson remarked that "to oblige truly unwilling parties to refer their disputes to mediation would impose an unacceptable obstruction on their right of access to the court" para 9.

[227] Article 5(2) of the 2008 European Mediation Directive explicitly permits the use of mandatory mediation. In 2010, the Court of Justice of the European Union ruled in *Alassini and Others*, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 that an Italian law requiring an attempt to reach an out-of-court settlement within 30 days before a dispute could be heard by the court was not a fetter on the right to a fair trial under article 6. Mandatory mechanisms were said to be compliant, so long as the procedure is not binding, does not cause delays, suspends the limitation period on a claim and that interim measures are available in certain circumstances. Domestically, in September 2019 the Online Civil Money Claims service commenced piloting "opt-out" mediation for defended claims of less than £300 (extended to defended claims of less than £500 in December 2019) where parties participate in mediation unless they actively elect to remove themselves from it.

[228] *Lomax v Lomax* [2019] EWCA Civ 1467.

hearing as part of the court process,[229] and so it was permissible as "a step in the process which can assist with the fair and sensible resolution of cases."[230]

3.52 Elsewhere in the civil justice system, processes that have traditionally been called "ADR" have become normalised and are increasingly the default process for disputes where there is a need to maintain ongoing relationships between the parties. The 2011 Family Justice Review recommended that mediation or an alternate out of court mediation service be the first port of call for divorcing parents,[231] and that ADR should be rebranded as "Dispute Resolution Services" in order to minimise a deterrent to their use.[232] Family court processes now emphasise a range of dispute resolution processes that eschew adversarialism in favour of problem-solving or mediative approaches. These include:

- the use of Family Drug and Alcohol Courts (FDAC), which feature a problem solving, therapeutic approach for parents with drug and alcohol problems at risk of child removal. FDACs feature a multi-disciplinary team who carry out assessments and work with parents, to coordinate an intervention plan to engage with substance misuse, parenting and other services, facilitate additional support and update the court on progress;[233]

[229] *Ibid* per Moylan LJ para 24-26. On one argument, *Lomax* represents no great diversion from *Halsey*, as it did not disturb *Halsey* as it relates to Article 6 compliance when mandating external ADR providers. However, it permits a court to order ADR as part of the court process irrespective of whether the parties' consent, which is a substantive diversion from the traditional position.

[230] *Lomax* note 228 above,

[231] An international review of the Norgrove Review articulated the general principles as being that 'conflict should be minimised, process should be clear and simple, and administrative or non-adversarial in nature and mediation should be preferred to a legal process', Maclean, Eekelaar and Bastard (eds), *Delivering Family Justice in the 21st Century* (Hart Publishing 2015) 3, see also Hodges, note 157 above Chapter 11.

[232] 'Family Justice Review – Final Report', November 2011' (The Norgrove Review) para 115. available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf

[233] 2016 research into the efficacy of FDACs revealed great success, with a higher proportion of FDAC rather than comparison mothers reunited with their children (37% v 25%); FDAC mothers experienced less disruption to family stability over a three year period post proceedings (51% v 22%) and the cost of £560,000 saved £1.29 million for local authorities (who fund FDACs) through fewer children permanently removed from families and fewer families returned to court, Barwin, Alrouh, Ryan, McQuarrie, Golding, Broadhurst, Tunnard and Swift, 'After FDAC: outcomes 5 years later. Final Report' (Lancaster University, 2016) available at http://wp.lancs.ac.uk/cfj-fdac/files/2016/12/FDAC_FINAL_REPORT_2016.pdf See also Hodges note 157 above p. 320-322.

- the use of Settlement Conferences in the Cheshire and Merseyside Courts, which are used to facilitate discussion of the issues and identify settlement solutions outside of the purview of the family court process;[234]

- the requirement that parties participate in a Mediation Information & Assessment Meeting before making an application, save for in certain circumstances; and[235]

- the use of Financial Dispute Resolution (FDR), either privately or as part of the court process, a form of early neutral evaluation where a judge offers a preliminary view on the financial order the court would likely make, to facilitate negotiation early in the court process.[236]

3.53 Family law consultees we spoke to emphasised that what had traditionally been understood as "ADR" is now the ordinary method by which family disputes are resolved, with a very small percentage of financial remedy matters proceeding to a final, contested hearing. Fundamental to these changes has been a desire to search for a less adversarial, mediative method of resolving disputes.

3.54 The Government's desire to abolish no fault eviction and promote longer tenancies sets a framework to try a similar approach in housing disputes, where longer, healthier tenant-landlord relationships could be sustained through the normalised use of ADR techniques in court and tribunal processes. In those circumstances, we ask whether all courts and tribunals dealing with housing disputes should have ADR as the first port of call within the dispute resolution pathway and be empowered to order non-consenting parties to engage with an ADR process. Uptake of ADR generally remains tethered to party consent,

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[234] See 'Settlement Conferences Protocol as to Basic Principles', https://www.judiciary.uk/wp-content/uploads/2017/07/protocols-and-annexes.pdf Hodges research suggests that over 500 cases have been involved in Settlements Conferences, with a 70% success rate, *ibid* p. 319.

[235] Where there is domestic violence or the risk of it, Children and Families Act 2014 ss1 and 10. It must be acknowledged that there are problems with MIAMs; in 2017 the National Family Mediation (NFM) reported that, based on its research, six out of ten couples were ignoring the need for a MIAM – just 35,627 of nearly 90,000 applicants having followed the MIAM process, available at https://www.familylawweek.co.uk/site.aspx?i=ed182325

[236] Family Justice Council, 'Financial Dispute Resolution Appointments: Best Practice Guidance' (December 2012) available at https://www.judiciary.uk/wp-content/uploads/2014/10/fjc_financial_dispute_resolution.pdf

notwithstanding that this limits the capacity of judges to actively manage cases justly and at proportionate cost[237] in accordance with the overriding objective.[238] In light of *Lomax*, court or tribunal based mediation or other forms of ADR such as ENE are no fetter on access to the courts, because it remains open to parties to choose not to be bound by the mediated outcome or early evaluation and seek a judicial determination of their rights through the judicial determination.[239]

3.55 **We recommend that ADR be more strongly encouraged by amending the procedural rules which apply to the current housing disputes system. Rules committees for the civil courts and First-tier Tribunal ought to consider how the rules could more strongly favour a presumption of or direction to ADR before any formal, adjudicative process takes place. If those rules change, tribunal and court case workers and/or judges should be able to direct parties to engage in all forms of ADR, including in circumstances where parties do not consent.**

Homelessness

Introduction

3.56 The duty to assist those facing homelessness is one of the fundamental activities carried out by local authorities in England and Wales. Homelessness has risen in England and Wales by 165% since 2010[240] and local authorities owe homelessness obligations against a backdrop of diminishing resources.[241]

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[237] Briggs LJ in *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288 held that the economic virtues of ADR furthered the principle of proportionality in civil disputes by assisting the parties and the court to manage its finite resources. See also Ahmed and Arslan, 'Compelling parties to judicial early neutral evaluation but a missed opportunity for mediation: Lomax v Lomax [2019] EWCA Civ 1467', C.J.Q. 2020, 39(1), 1-11, 5.

[238] *Ibid* Ahmed p. 5.

[239] *Ibid* p. 6.

[240] See Ministry of Housing, Communities and Local Government, *Rough Sleeping Statistics Autumn 2018, England (Revised)*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781567/Rough_Sleeping_Statistics_2018_release.pdf and *Rough Sleeping Statistics Autumn 2017, England (Revised)*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682001/Rough_Sleeping_Autumn_2017_Statistical_Release_-_revised.pdf

[241] Between April and June 2018, 58,660 households were assessed as being owed a new statutory homelessness prevention duty by English local authorities, Statutory Homeless, April to June (Q2) 2018:

Homelessness remains in scope for legal aid, but advice has evaporated across large parts of the country, as outlined earlier in this chapter.

3.57 There have been recent attempts to combat the problem. The Homelessness Reduction Act 2017 (HR Act) introduced a raft of changes to homelessness law, imposing new duties to proactively address the risk of homelessness for residents.[242] While local authorities are said to generally support the legislation, many struggle for resources to pay for their new preventative duties.[243] Notwithstanding these initiatives, several tenant lawyers we spoke to expressed concern that local authorities engage in practices that "gatekeep" by preventing people from accessing assistance and the duties owed to them by local authorities when facing homelessness.

3.58 This section of the report considers homelessness. It sets out recommendations to ensure all relevant information about a person's circumstances reaches a local

England (Ministry of Housing, Communities and Local Government, 13 December 2018) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764301/Statutory_Homelessness_Statistical_Release_April_-_June_2018.pdf . At the same time, there has been a 49.1% reduction in government funding for local authorities between 2010-11 and 2017-18, a 45.6% fall in spending by local authorities on housing services overall, and a 69.2% reduction in spending on the Supporting People programme (which provides housing-related support to vulnerable people): see National Audit Office, *Financial sustainability of local authorities 2018* (8th March 2018), p. 4 and 7 respectively, available at https://www.nao.org.uk/wp-content/uploads/2018/03/Financial-sustainabilty-of-local-authorites-2018.pdf

[242] For instance, Section 1(2) of the HR Act 2017 modified s175(4) of the HA to extend the period where a person was at risk of homelessness from 28 to 56 days. S. 2 of the HR Act modified s. 179 of the Housing Act 1996 to require more expansive assistance to people facing homelessness in the local authority area irrespective of priority need status. Other duties include personal plans for those at risk of homelessness (s. 189A) and taking reasonable steps to avoid that person becoming homeless. One local authority we spoke to welcomed the HR Act as a way to "professionalise" homelessness prevention, though we have heard from some tenant lawyers that certain local authorities merely view the prevention duty as an administrative hurdle, rather than one they must proactively engage with through a Personal Housing Plan.

[243] Butler, 'Two-thirds of councils say they can't afford to comply with homelessness law', (Guardian Online, 10 April 2019) available at https://www.theguardian.com/society/2019/apr/10/homeless-reduction-act-one-year-on In addition, The MHCLG established the Rough Sleeping Initiative (RSI) in March 2018, which set aside a £30 million fund for local authorities with a high level of rough sleepers and also established a multi-disciplinary RSI Team within MHCLG to "work with local authorities to develop capability and deliver interventions to tackle rough sleeping," MHCLG, 'Impact evaluation of the Rough Sleeping Initiative 2018', para 3.2 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831133/RSI_Impact_Evaluation.pdf

authority, that the decision by the authority is properly appraised of the person's circumstances, and that where a local authority wrongly denies a person assistance or access to a duty they are lawfully entitled to, that person can more easily gain access to the courts for review of that decision.

Gatekeeping

3.59 There are various duties local authorities owe with respect to homelessness:

(a) to make inquiries to satisfy themselves whether an applicant is eligible for assistance[244] or whether they owe the person a homelessness duty;[245]

(b) when an applicant is homeless, eligible for assistance and in priority need,[246] to provide interim accommodation;[247]

(c) when satisfied a person is homeless or threatened with homelessness and is eligible for assistance, to undertake an assessment of their circumstances and agree steps the applicant and local authority should take to secure accommodation for the person.[248]

3.60 The MHCLG Homelessness Code of Guidance for Local Authorities (Homelessness Code of Guidance) provides direction for how local authorities should exercise these functions.[249] Chapter 11 sets out guidance as to how

[244] The Housing Act 1996 (HA) excludes categories of "persons from abroad" and "asylum seekers and their dependants" from housing assistance, section 185 and 186 respectively.

[245] Section 184 of the HA.

[246] Those who have priority need for accommodation are defined in section 189 of the HA as: (a) a pregnant woman or a person with whom she resides or might reasonably be expected to reside; (b) a person with whom dependent children reside or might reasonably be expected to reside; (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside; (d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.

[247] Section 188.

[248] Section 189A(4).

[249] Available at https://assets.publishing.service.gov.uk/media/5a969da940f0b67aa5087b93/Homelessness_code_of_guidance.pdf

authorities should carry out assessments to determine duties owed and the needs and circumstances of those applicants eligible for assistance and homeless or threatened with homelessness.[250] The Homelessness Code of Guidance prescribes that "every person applying for assistance from a housing authority stating that they are or are going to be homeless will require an initial interview"[251] but is silent on whether local authorities should be contactable across multiple channels (phone, face-to-face, digital). Tenant lawyers we spoke to expressed concern that some local authorities are engaging in gatekeeping practices, which prevent people at risk of homelessness from being able to contact their local authority and provide information necessary to trigger a statutorily required inquiry. Our consultation revealed that some local authorities have sought to make digital portals the mandatory method of contact for a person seeking homelessness assistance, although there is considerable doubt about the legality of doing so.

3.61 This creates several difficulties. Shelter explained to us that some portals are extremely poor and fail to retain information submitted. They have had clients submit requests for assistance through a local authority portal, only for the authority to have no record of any application being made. Making digital portals mandatory also runs the risk of excluding people who lack digital capability from accessing their local authority in times of crisis.[252] Digital exclusion is likely to be a particular challenge for homeless people,[253] or those facing the prospect, and so digital-only methods of contact risk excluding an extremely vulnerable cohort.

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[250] *Ibid* para 11.1.

[251] *Ibid* para 11.3.

[252] A significant number of people in England and Wales experience digital exclusion, with a recent report suggesting 19% of the population lack all the foundational digital skills necessary for life and work, such as use of mouse and keyboard, updating passwords, connecting to Wi-Fi and finding and opening different programmes on a device, Lloyds Bank, *UK Consumer Digital Index 2019*, (May 2019) p. 19 available at https://www.lloydsbank.com/assets/media/pdfs/banking_with_us/whats-happening/LB-Consumer-Digital-Index-2019-Report.pdf

[253] While we understand that smartphone ownership may be common amongst homeless people, an inability to pay for services such as unlimited calls or data, to charge smartphones and hostility faced when accessing services are all fetters on their ability to get online. JUSTICE note 43 above, para 2.26 2.27. See also A Little Change, *A Little Change Is Evolving* (6 November 2017), available at https://www.alittlechange.co.uk/blog/posts/2017-11-06-a-little-change-is-evolving

3.62 Requiring people to use a digital portal to contact their local authority runs the risk of turning away vulnerable and digitally excluded people in times of crisis and should not be the only method by which people can seek assistance in times of need. Local authorities should offer multiple methods for people to contact them to seek assistance when facing homelessness. An array of methods should include a face-to-face approach, over the phone, or digital, rather than being gatekept by mandatory digital processes. **We recommend the Homelessness Code of Guidance be strengthened to require local authorities to offer multiple channels for people to contact them to trigger the full legal inquiry into a person's homelessness' status.**

Digital portals

3.63 Though we have outlined the issues that arise when portals are the sole method of contact, they have the potential to be an informative, convenient and easy-to-use method to give an authority all relevant information about a person's circumstances to trigger homeless prevention or a full inquiry into a person's homelessness status. The starting point is that portals for homelessness applications - like any online justice service - should be accessible and assistive.[254] However, we have identified that many portals are clunky, have poor design features, do not include up-to-date information for parties in need of assistance, nor do they ask a sufficient array of questions to appraise the authority of all relevant information about a person's circumstances. This is an acute problem where a local authority offers a portal as the only method of contact.

3.64 What local authorities offer on their website varies greatly. Some offer general information on homelessness,[255] others offer a portal for people to make an application for assistance.[256] For those seeking early advice and need of information in times of crisis, a well-functioning portal would feature comprehensive and clear information from an authority on their obligations, the

[254] JUSTICE *ibid* para 3.36.

[255] Newham Council offers general advice on homelessness, but also provides a portal for access to homelessness prevention assistance, https://newham-self.achieveservice.com/service/Homelessness_Self_Assessment

[256] Three Rivers District Council offers a Housing Customer Portal through which people can apply for homelessness assistance, https://www.threerivers.gov.uk/egcl-page/homelessness.

assistance a person might be able to access and direct contact details for the relevant team. Ideally, portal landing pages would feature prominent signposting to authoritative sources of independent legal advice and information on homelessness.[257] Confidence and support is key. Best practice in design for portals should reassure users through easy to read screens, confirmation on receipt, information on how the application will be dealt with, and in what sort of time period.[258]

3.65 Homelessness remains within the scope of legal aid under LASPO[259] and effort should be made to co-locate Digital Support[260] with substantive legal help for people approaching a local authority for homelessness assistance.[261] As described above, anecdotal evidence suggests that smartphone usage is common amongst homeless populations and local authorities should ensure homelessness

[257] Such as Shelter, Crisis and Advicenow. *Preventing Digital Exclusion from Online Justice* emphasised the importance of online justice processes being developed as part of the Reform Programme offering users signposts to authoritative sources of legal advice and information, JUSTICE note 43 above para 3.45.

[258] Apparently minor measures, such as allowing users to see their progress through a digital system at a glance, foreshadowing the next steps, confirming information has been received by the system and providing pop-up information, guidance and prompts are all features that are likely to reassure a user, *ibid* para 3.19. For example, the Three Rivers District Council homelessness application system gives users a high degree of control, allowing a user to change language, alter font size, save their work and return to it later, available through https://www.threerivers.gov.uk/egcl-page/homelessness

[259] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1 para 34(1).

[260] The technical support services accompanying the court and tribunal reform programme. The Inside HMCTS blog sets out the commitment to provide Assisted Digital technical support services (now called "Digital Support") to help people who lack capacity to get online with digital justice processes, available online at https://insidehmcts.blog.gov.uk/2017/10/12/helping-people-access-our-services-online/ Co-location of advice with technical assistance was recommended by the *Preventing Digital Exclusion* Working Party, para 3.45 (note 43 above). In 2020, HMCTS will be trialling an increasing number of Digital Support providers co-located with advice provision.

[261] Specific approaches might be needed to consider how those who are homeless, or at risk of it, access services. A good example of a tailored service was a pilot scheme launched in Manchester in October 2017, which enabled homeless people to join libraries and access their digital facilities, a scheme introduced "due to increased demand for online applications from the Jobcentre, DWP and housing agencies" with the consequence that many people "ended up facing benefit sanctions, or have missed bidding on properties due to not being able to access the internet at the appropriate time", Barlow, "Manchester City Council and Lifeshare launch library membership scheme for people who are homeless" (About Manchester, 27 October 2017) available at https://aboutmanchester.co.uk/manchester-city-council-and-lifeshare-launch-library-membership-scheme-for-people-who-are-homeless/

portals are mobile accessible. Lessons could be learnt from the StreetLink App which allows homeless people and members of the public to report people who are sleeping rough so that they can be put in touch with a range of services.[262]

3.66 Our Working Party wants to see a standard best practice in digital design across local authority portals, to ensure people can get advice, assistance, information and easily upload necessary information on accessible and friendly digital systems. Best practice should be informed by rigorous user testing with people experiencing or at risk of homelessness and the services that support homeless people. **We recommend that user-facing digital components of local authority portals should feature design principles which make them accessible and navigable for lay users. These should include prominent signposting to sources of independent advice and information, mobile accessibility, the ability for a user to save and track their progress, as well as screens which feature white space and are easy to read for those with vision impairments and literacy problems.**

3.67 Promoting a uniform approach to best practice in digital design across local authorities requires a co-ordinated response. As we explain in **Chapter 4**, from 2020 onwards, MHCLG will be establishing an online portal through which housing disputes can be brought. It is likely to be well placed to provide governance and leadership over best practice for local authority portals. There are a few possibilities to ensure best practice. The code of guidance could set out prescriptive guidelines for best practice in digital design, or the MHCLG could establish a national working group with local authorities to develop best practice in digital design or they could establish a sole portal, which all local authorities could sign up to. The key point is that there must be a co-ordinated response that emphasises best practice in digital design. **We recommend the Ministry of Housing, Communities and Local Government take the lead on best practice through digital design across local authority homelessness portals.**

3.68 Our Working Party is also keen to ensure that to the extent practicable, data can ensure transparency and openness around homelessness decision making. While

[262] See, Liam Geraghty, *What happens when you refer a rough sleeper with StreetLink*, (25 April 2018), The Big Issue, https://www.bigissue.com/latest/what-happens-when-you-refer-a-rough-sleeper-with-streetlink/

the statutory homelessness statistics[263] include various data sets on homelessness, there is an absence of information on the internal review process being conducted by local authorities.

3.69 We think this is a notable omission. Statutory bodies elsewhere, for instance, the Department for Works and Pensions, set out very clearly the number of internal reviews they conduct and their overturn rates.[264] This provides transparency and the opportunity to identify whether those reviews are simply affirming the initial decision without due regard for an applicant's circumstances. We think it essential that the MHCLG collate similar type data on the number of internal homelessness reviews conducted by local authorities and the overturn rate to allow those decisions to be subject to a greater level of scrutiny. **We recommend that the MHCLG incorporate internal homelessness reviews into the statutory homelessness statistics data on local authority, including the number of internal reviews conducted and the overturn rate.**

Appealing homelessness decisions

3.70 Though homelessness is within legal aid scope under LASPO, there are, for obvious reasons, profound practical obstacles for many people to get access to legal representation.[265] For those refused homelessness assistance with an arguable case, a 21-day period to lodge an appeal to a Circuit Judge[266] represents a very narrow window to find a housing lawyer with capacity and expertise, to provide instruction and to lodge an appeal, particularly if they reside in an advice

[263] MHCLG, 'Statutory Homelessness, April to June (Q2) 2019: England', available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/852953/Statutory_Homelessness_Statistical_Release_Apr-Jun_2019.pdf

[264] See Department for Works and Pensions, 'Personal Independence Payment: Official Statistics' p9. Relating to claimants from April 2013 to March 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831020/pip-statistics-to-july-2019.pdf

[265] The Court of Appeal, in *Al-Ahmed v Tower Hamlets London Borough Council* [2020] EWCA Civ 51 recognised this difficulty, that the current situation "represents a bleak picture of the difficulties faced by homelessness applicants in bringing an appeal under s.204 of the 1996 Act without legal advice and representation, and of the difficulties they may face in finding someone to provide those services under legal aid, especially as a result of the post-LASPO shrinkage of the housing advice sector" (Sir Stephen Richards) para 34.

[266] Section 204(2) of the Housing Act 1996.

desert.[267] Our Working Party is therefore concerned that the time limit for homelessness appeals to the County Court is too short, given the challenges around access to advice wrought by LASPO. To our mind, the time limit pre-dates the realities of LASPO. It is not enough time for appellants given the limitations on advice provision on the ground. **We recommend the time limit for appealing a local authority internal review decision on homelessness to a Circuit Judge pursuant to section 204 of the Housing Act 1996 ought to be extended from 21 to at least 28 days, to give appellants more time to access legal aid.**

3.71 There is an associated need to ensure that where a local authority makes an internal review decision which upholds a denial of homelessness assistance, the applicant can gain access to material from which the decision has been made to appraise themselves of their legal position. **Local authorities when sending their written decision from an internal review to a person seeking homelessness assistance should offer the applicant access to the full case file from which the decision was made.**

3.72 One way to make this process easier might be through digital case files, which could then be transferred seamlessly to the courts, should the appellant elect to appeal the authority decision. The Traffic Penalty Tribunal (TPT) has had great success in working with all local authorities across England and Wales in developing digital case files and digital pins. When a motorist challenges a local authority issued traffic penalty notice, something akin to an internal review is offered by the local authority. Should the charging authority reject the person's representations, they issue a Notice of Rejection of Representations, which features a weblink and digital pin code to the TPT's digital appeal system.[268] The pin code is used to populate all relevant details from the penalty notice to the TPT system, rather than the appellant having to input those details manually.

3.73 We think it is worth exploring whether a similar approach could work within the context of local authority homelessness decisions. Applications for homelessness assistance through a local authority portal could generate a unique

[267] For example, a tenant lawyer we spoke to at a roundtable in October works in Bristol, but provides housing representation through legal aid contracting across the West Country and into Wales, on account of the paucity of face-to-face advice in those regions

[268] Available at https://www.trafficpenaltytribunal.gov.uk/accessibility-and-the-tribunal/

pin number. Subsequent authority letters could offer the same digital pin, which appellants could use to access their case file (potentially through the authority portal) and to populate the local authority case file to the appellate court stage.[269] The intention is to ensure all relevant local authority material for an appeal bundle migrates seamlessly to the appellate level and that the appellant can more easily assemble the material necessary. **We recommend MHCLG and HMCTS, in conjunction with local authorities, explore how to develop local authority digital case files that can seamlessly migrate to an appellate court level.**

[269] The digital pin could populate the case file to a housing complaints portal or to the soon to be introduced "Core Case Data" system, a putative court and tribunal wide digital case management system (see the next chapter).

IV. HARMONISING THE SYSTEM

Introduction

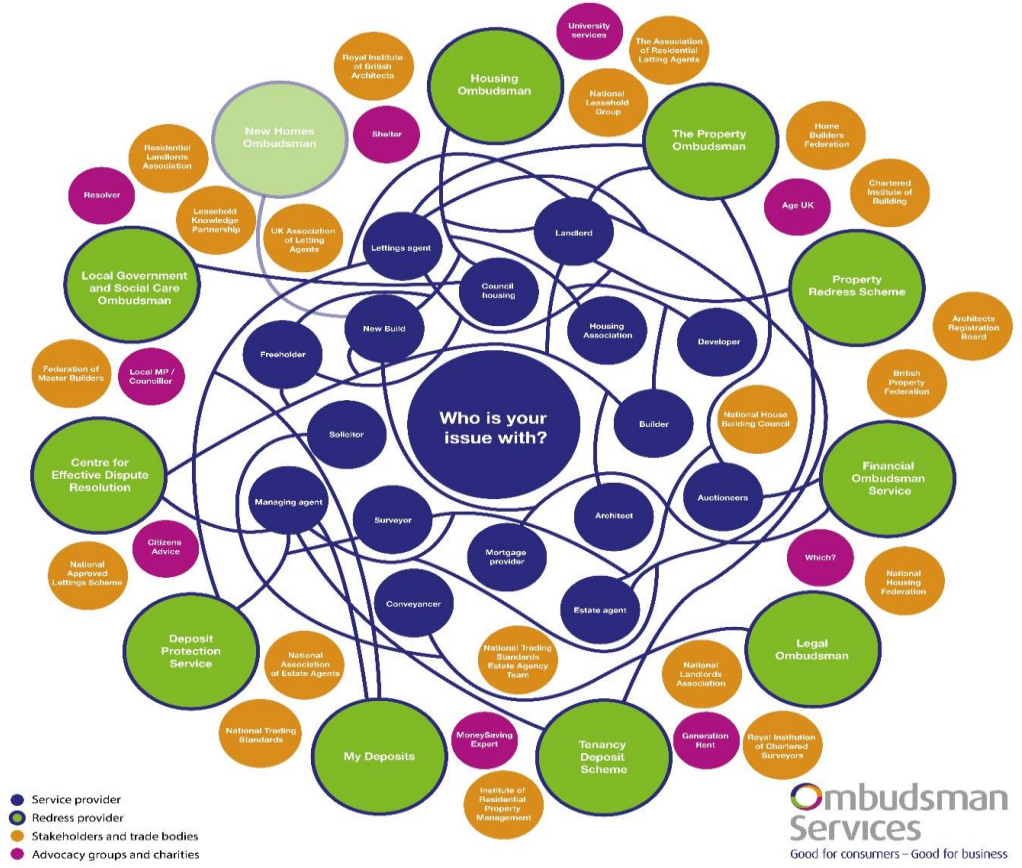
4.1 In this Chapter, we continue our proposals for reform of the current system.[270] Housing law represents a vast array of disputes, from tenancy to public law obligations, resolved across various courts, ombudsmen and tribunals. Most housing disputes in any given year are County Court possession claims,[271] while other housing disputes, as varied as service charges and local authority licensing disputes, are resolved in the FTT (PC).[272] Various redress schemes exercise jurisdiction over maladministration complaints against housing providers, including the Property Redress Scheme, the Property Ombudsmen, the Housing Ombudsmen and the Local Government and Social Care Ombudsman. The Tenancy Deposit Protection schemes all offer online dispute resolution of disputes relating to tenancy deposits. They all exercise discrete and occasionally overlapping coverage of acts of maladministration by housing providers. The redress landscape is profoundly disaggregated, as demonstrated by the graphic below from Professor Chris Hodges recent book, *Delivering Dispute Resolution*:[273]

[270] See para 3.1.

[271] In 2018, there were 121,712 landlord possession claims and 19,508 mortgage possession claims issued in the County Court, 'Mortgage and Landlord Possession statistics, July to September 2019', (Ministry of Justice, 14 November 2019) available at https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-july-to-september-2019

[272] For instance, local authorities can take action against housing providers for disrepair either where there is a hazard under Part 1 of the Housing Act 2004, or where it amounts to a statutory nuisance, pursuant to section 80 of the Environmental Protection Act 1990.

[273] Hodges note 157 above p. 341.



4.2 There are also problems arising from the "bifurcation" of jurisdiction between the FTT (PC) and the County Court. Some proceedings can be initiated in the County Court and then transferred to the FTT (PC).[274] Costs issues arise as disputes that can be heard in either jurisdiction require resolution by a District Judge as opposed to a judge in the FTT (PC), and enforcement must take place though the County Court.[275] This Chapter considers how to provide a single point of entry to housing

[274] For instance, pursuant to section 176A of the Commonhold and Leasehold Reform Act 2002.

[275] This has been described by the Chancellor of the High Court as an "illogical judicial process" which causes delay, frustration and increased costs, Sir Geoffrey Vos, 'Professionalism in Property Conference 2018', 9 May 2018 p. 1, available at https://www.judiciary.uk/wp-content/uploads/2018/05/chc-speech-property-lecture-09052018.pdf Proceedings arising from one set of facts may need to be litigated part in

dispute resolution, taking into consideration pre-existing schemes, methods and proposals for reform.

Cross ticketing

4.3 In recognition of the practical difficulties and limited political interest in creating a Housing Court, a working party convened by the Civil Justice Council recommended deploying the judiciary to ensure all issues in any given housing case are dealt with in one forum.[276] Since the end of 2016, certain property disputes that traverse both the County Court and the FTT (PC) have been subject to the Residential Property Deployment of Judges Pilot. By this process, in some cases proceedings commenced in the County Court are transferred to the FTT (PC)[277] or alternatively, a judicial case management decision is made to deploy a judge, who is both an FTT judge and County Court judge, to hold a hearing in which all aspects of a single dispute (which traverses jurisdictional lines) are solved.[278]

4.4 We understand that some 500 disputes have been dealt with using this method, and our Working Party supports its expansion. Flexible deployment of the

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the County Court and part in the FTT (PC), which runs counter to section 49(2) of the Senior Courts Act 1981, providing that "every court shall so exercise its jurisdiction in every cause or matter before it as to secure that as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided".

[276] Civil Justice Council, *Interim Report of the Working Group on Property Disputes in the Courts and Tribunals* (May 2016), available at https://www.judiciary.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf

[277] For instance, pursuant to section 176A of the Commonhold and Leasehold Reform Act 2002.

[278] Amendments to the County Courts Act 1984 and provisions of the Tribunals Court and Enforcement Act 2007 (TCEA) mean that FTT judges are now also judges of the County Court and vice versa. Cross-ticketing under the TCEA goes beyond property law and is intended to be part of a broad shift across the judiciary, to "enable the flexible deployment of judiciary to meet fluctuations in workloads and encourage greater consistency of standards and approach across previously disparate jurisdictions", House of Commons Hansard Ministerial Statements for 16 July 2009 (pt 0005) available at https://publications.parliament.uk/pa/cm200809/cmhansrd/cm090716/wmstext/90716m0005.htm See, for example, the case study about a mobile home owner described by President of the Property Chamber, Judge Siobhan McGrath at https://www.judiciary.uk/wp-content/uploads/2017/03/mcgrath-how-to-avoid-dancing-in-a-ring-spring-2017.pdf Cross-ticketing is used in cases such as service charge disputes, where a judge can also consider issues around arrears of ground rent, enfranchisement cases where the validity of a claim notice is not otherwise in the jurisdiction for the FTT (PC) and beneficial interests in land registration cases, *ibid*.

judiciary to hear disputes in one forum promotes access to justice by reducing the confusion where claims cross jurisdictional lines, by promoting collegiality, knowledge and up-skilling across the bench, and by taking advantage of judges' specialised skills without the unnecessary legislative process of conferring concurrent jurisdiction. We see great potential in using the property and housing experience of specialist FTT (PC) and District Judges across all housing disputes, irrespective of in the jurisdiction in which the dispute falls.[279]

4.5 In the first instance, it will be necessary to place "cross-ticketing", on a more robust footing.[280] Whatever mechanisms are to be put in place, our Working Party suggests cross-ticketing has the potential to ensure the greater use of housing specialism in disputes and ameliorate the problem of concurrent jurisdiction. Ultimately, judges with expertise should be hearing disputes, irrespective of the jurisdiction in which the dispute nominally resides. **We recommend that "cross-ticketing" in housing be placed on a more robust and formal footing through rule changes.**

4.6 Placing cross-ticketing on a formal footing allows for the establishment of a core cadre of specialist property and housing judges, capable of hearing disputes in either jurisdiction. Housing law is complex and everything possible should be done to support the establishment of a group of specialist judges, irrespective of whether they are originally County Court or FTT (PC) judges.[281] The use of

[279] Judge Siobhan McGrath suggested to us that judicial specialism and expertise was a key reason for the tribunal's disposal rate, with around 75% of complex cases dealt with within 20 weeks of receipt and 75% of rent cases within 10 weeks of receipt.

[280] Judge McGrath has previously proposed to the Civil Justice Council the addition of a "courts and tribunals track" under Civil Procedure Rule (CPR) 26, Judge McGrath, 'Report on Property Chamber Deployment Project for Civil Justice Council meeting 26th October 2018', p. 4 and 23 available at https://www.judiciary.uk/wp-content/uploads/2018/11/property-chamber-deployment-project-report-oct2018.pdf The precise details of this proposed change need to be worked out, including whether the CPR and/or the Tribunal rules ought to apply, but the proposal would allow for (a) parties to seek or oppose allocation to the track; (b) the track allowing for proceedings in both the County Court and FTT PC to be heard concurrently, i.e. by one judge in one sitting, most likely with the claim heard in its entirety by a tribunal judge in the tribunal; and (c) where parties elect into the "courts and tribunals track", cases would be sent by the county court to be administered by tribunal staff. To facilitate this arrangement, it is proposed that regional FTT offices are to be designated as County Court offices.

[281] Both have strengths: District Judges have experience in the managing of possession lists and are likely to have had exposure to public and equality law issues in housing disputes. Conversely, the FTT (PC) is populated with judges who are fundamentally housing and property experts.

common practices, cross-ticketing and training for this cadre will be hugely important. When cross-ticketing, a judge potentially exercises powers across both jurisdictions, thus there is a need for them to be prescriptive and clear about which power they are exercising at any given moment.[282] Ease of access of case files between formal jurisdictions will be important and we understand that the "Core Case Data" system, a court and tribunal wide digital case management system, is being rolled out across 2020, and this will assist**. Our Working Party supports the idea that a cadre of ticketed, specialised housing judges would be established, that housing cases would be heard by judges with specific housing and property expertise and that those judges receive specific training on cross-ticketed disputes and the conduct of proceedings in jurisdictions in which they do not normally sit. We recommend the establishment of a cadre of ticketed "housing judges", who would receive specific training to hear housing disputes, irrespective of which jurisdiction a dispute fall into.**

Simplifying the landscape

4.7 While cross-ticketing ensures expert judges hear a dispute, it does not address the fundamental problem of housing disputes being heard across separate jurisdictions.[283] In 2008, the Law Commission published a report following four years of consultation on the resolution of housing disputes,[284] which found

[282] In *Avon Grounds Rents Ltd v Child* [2018] UKUT 204 the Upper Tribunal (UT) considered an appeal from a first instance decision heard in the FTT (PC) by a judge exercising jurisdiction as both FTT PC and District Judge. The appeal had been brought primarily on the basis that the judge had made decisions outside the power of a Tribunal judge while purporting to exercise his FTT PC, as opposed to County Court, powers. The UT noted that "the Tribunal has no power to extend its jurisdiction, or to arrogate to itself a jurisdiction to determine questions which the County Court had no power to transfer to the Tribunal for determination". It ultimately held that the FTT PC had tried to determine the County Court costs of the dispute by treating them as a variable administration charge, which the Tribunal had not been entitled to do and that what ought to have been done was for costs to have been dealt with after the main hearing using the "County Court hat" available to the judge.

[283] The Leggat report on tribunal reforms suggested "there are confusing overlaps of jurisdiction between courts and tribunals, as well as between tribunals" and that "an expert decision-making forum, without overlapping jurisdictions, is a precondition of effective procedural reform". Sir Andrew Leggatt, 'Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users – One System, One Service', (August 2001) para 3.30 available at: https://webarchive.nationalarchives.gov.uk/20040722013223/http://www.dca.gov.uk/pubs/adminjust/adminjust.htm

[284] Housing: Proportionate Dispute Resolution', Law Commission Law Com No 309 (May 2008) avail able online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243400/7377.pdf

support amongst the profession for a specialist housing tribunal, on the basis that it would offer "greater procedural flexibility, more expertise, lower costs, and a greater commitment to the 'enabling role' said to be a distinctive feature of tribunals"[285] but acknowledged hostility to the transfer of jurisdiction over claims for possession and disrepair in respect of rented dwellings, mobile homes and caravans, to the FTT (PC).[286]

4.8 More recently, in November 2018, the MHCLG issued a Call for Evidence for a Housing Court.[287] The Civil Justice Council formed the view that the money needed to create a sole forum would be better spent elsewhere,[288] the HLPA generally opposed the proposal, on the basis that the Call for Evidence appeared motivated by a desire for speedier evictions.[289] The Chartered Institute of Legal Executives (CILEX) thought a new integrated Housing Court would benefit litigants, subject to adequate judicial specialisation, court staff and court locations so as to promote access to justice.[290]

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[285] *Ibid*, para 5.28.

[286] The Law Commission, *Housing: Proportionate Dispute Resolution – The Role of Tribunals* (Consultation Paper No 180), para 3.1, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp180_Housing_Proportionate_Dispute_Resolution_Role_of_Tribunals.pdf The FTT (PC) was established in 2013, as an amalgamation of the Residential Property Tribunal Service (within which there was a number of disparate jurisdictions), the Agricultural Lands Tribunal, and the Adjudicator to HM Land Registry, Edward Cousins, 'The Land Registration Jurisdiction: An Analysis of the First Twelve Years', in Amy Goymour, Stephen Watterson and Martin Dixon (eds.), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart Publishing, Oxford, 2018), p. 26 - 27. A 2003 Law Commission report explains the confusing arrangements prior to the introduction of the Property Chamber, see Law Commission, 'Land Valuation and Housing Tribunals: The Future' (2003), p 93 (Appendix A).

[287] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/755326/Considering_the_case_for_a_housing_court.pdf

[288] Available at https://www.lawgazette.co.uk/news/civil-justice-council-says-no-need-for-specialist-housing-court/5069016.article?utm_source=dispatch&utm_medium=email&utm_campaign=%20GAZ141016

[289] Available at http://www.hlpa.org.uk/cms/2019/01/hlpa-housing-court-consultation-response/

[290] Available at https://www.cilex.org.uk/~/media/pdf_documents/main_cilex/policy_and_governance/consultation_responses/cilex_submission_-_housing_courts_call_for_evidence.pdf?la=en

4.9 As it stands, while there may not necessarily be a principled reason for the division of disputes, there are several structural and pragmatic reasons why disputes remain split between the County Court and FTT (PC). Firstly, legal aid remains available for some matters before the courts, including certain possession, disrepair, harassment, homelessness and illegal eviction claims. Legal aid is not, however, available under the tribunal system on the basis that tribunals are more inquisitorial, less formal and intended to be more accessible than courts, ostensibly removing the need for a lawyer.[291] While tribunals are more inquisitorial and less formal, in practice landlords and freeholders are more likely to have access to advice and representation throughout the FTT (PC) process than tenants. Secondly, unlike the courts, the FTT operates under a costs-free regime. It has been argued that it would be inappropriate if, for instance, a landlord was to lose an illegal eviction case, only to benefit from a system which does not impose costs.[292] Thirdly, the County Court system is resourced to deal with a high number of possession claims, whereas the FTT (PC) currently is not. Fourthly, removing cases from the courts would have a detrimental effect on the current policy in which the fee income of the civil courts is used to subsidise the family and criminal courts.[293] Finally, a wide array of remedies and enforcement powers only reside in the courts.[294]

4.10 The idea of a single body for all housing disputes is addressed above in **Chapter 2**. However, waiting for the establishment of a sole jurisdiction for hearing all disputes and problems should not prevent greater rationalisation and coherence in where disputes are heard. While cross-ticketing is a partial panacea, there are likely to be logical reasons why certain types of housing dispute might be fit to transfer from County Court to FTT, or vice versa. The cross-ticketing pilot has

[291] However, it would be available in circumstances where a judge held a hearing in the tribunal where they exercised power as both County Court and FTT (PC) judge where legal aid was available for the County Court element of the dispute.

[292] See Peaker, 'On a Housing Court and (not) making things simpler' (March 2018), Nearly Legal: Housing Law News and Comment available at: https://nearlylegal.co.uk/2018/03/on-a-housing-court-and-not-making-things-simpler/

[293] Briggs LJ note 160 above para 5.124.

[294] The Property Chamber Bar submission to the Civil Justice Council, see Civil Justice Council, note 262 above para 19.

largely been dealing with leasehold management, leasehold enfranchisement and park homes disputes.[295] These include:

(a) instances of parallel jurisdiction requiring expertise, such as service charges;

(b) where a separate determination is required (by virtue of powers held by respective fora) but where the same facts and evidence apply to both, such as applications for lease variations (FTT) and claims for rectification (County Court);

(c) where court and tribunal have partial jurisdiction, such as enfranchisement claims where the landlord is missing; and

(d) convenience in dealing with all elements at once, such as payability of service charges.[296]

4.11 In our Working Party's view, disputes such as those identified at (a) and (c) ought to be capable of being heard in one jurisdiction only, rather than there needing to a be a mechanism to respond to concurrency. While we do not offer a view on the types of dispute which ought to migrate (save perhaps for type (d)), plainly specialism ought to inform whether a dispute is transferred from one jurisdiction to another.

4.12 Rationalising the housing disputes landscape will require ongoing diligence and oversight of the deployment of judicial resources in housing disputes. The MHCLG will be convening a Redress Reform Working Group in 2020, with an intention to promote greater rationalisation and coherence in the landscape of redress providers. This is welcome, but as we understand it, that Working Group is concerned with maladministration. There is a parallel need for leadership and oversight to ensure coherency in where court and tribunal disputes are heard, and in the rationalisation of judicial resources. **We recommend the establishment of a judge-led Working Group comprising senior courts and tribunals judiciary and senior Ministry of Justice and HMCTS staff to oversee the structure, development and evolution of the housing disputes landscape, with a view to promoting greater harmonisation across systems and**

[295] *Ibid.*

[296] *Ibid* p. 14-15.

accessibility from a user standpoint. That group should assess and make recommendations as to whether certain types of disputes ought to migrate from the County Court to the First-tier Tribunal (Property Chamber) or vice versa.

The Housing Complaints Resolution Service

4.13 In February 2018, the MHCLG released a consultation paper, *Strengthening Consumer Redress in the Housing Market.* The paper explored a range of issues in housing disputes[297] and explored how to consolidate maladministration providers but did not consider the overlapping role of courts and tribunals in disputes. A key feature of the final report was the recommendation for a "Housing Complaints Resolution Service" (HCRS). This would be a "single point of access for all the current schemes in housing that offer access to redress and alternative dispute resolution", which would ultimately become a new service to "to cover all housing consumers including tenants and leaseholders of social and private rented housing as well as purchasers of new build homes and users of all residential property agents."[298] The development of the HCRS would be overseen by a Redress Reform Working Group. Gaps in coverage would be plugged in large part through the establishment of a New Homes Ombudsman,[299] and through a legislated requirement for all private landlords to belong to a redress scheme.[300]

4.14 If there is no desire to establish a single housing court, or a single Housing or Property Ombudsman, our Working Party is of the view that an expanded version of the HCRS represents an excellent opportunity to promote access to justice, coherence in the current landscape and to consolidate housing advice providers into an easily navigable online portal. The intention is to promote convenience for users, by overcoming the complexity and disaggregation of the landscape,

[297] Including how the current redress landscape works, the case for streamlining redress services, how improvements could be made to 'in house' complaints processes and how to fill the gaps in access to redress services in housing with a particular focus on buyers of new build homes and private rented sector tenants https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684843/Stregthening_Redress_in_Housing_Consultation.pdf

[298] MHCLG, Strengthening Consumer Redress in the Housing Market, p. 9.

[299] *Ibid* p. 11.

[300] *Ibid* p. 42.

through the creation of a single online portal through which people with a housing problem can seek redress and assistance. In addition to pre-existing redress schemes, our version of the HCRS would incorporate County Court housing disputes, the FTT (PC),[301] potentially local authority or an MHCLG convened homelessness application portal[302] and tenancy deposit schemes into a single portal. This is an opportunity to create a "one stop shop" for people with a housing problem. A single portal, through which all housing disputes might pass, would have automatic triaging and signposting of disputes to the appropriate forum, removing the need for users to grapple with and choose between a bewildering array of dispute resolution services. Digital filing and assistance through legal advisors accessible through the portal and case officers[303] could ensure the HCRS process captures all relevant information at the outset and minimise the scope for errors that lead to delay. It would allow for a broader understanding of problems in housing, as more data on dispute type could be gleaned through a single doorway in order to identify and flag systemic issues emerging in housing. As the portal would incorporate digital processes under the auspices of the Reform Programme, it should be jointly established between HMCTS and MHCLG.

4.15 **We recommend the MHCLG proposal for the Housing Complaints Resolution Service be expanded, to establish a single point of entry portal for all redress providers, claims brought to the First-tier Tribunal (Property Chamber), the online possession project, pre-action ADR providers, Possession Claims Online and all tenancy deposit schemes, with the potential for other housing disputes in the County Court, which are or will be capable of being filed online, such as disrepair, to be brought into the portal. The HCRS should be established jointly between the MHCLG and HMCTS.**

[301] The idea for a single portal for all housing disputes has been identified previously; Professor Hodges, for example, proposes that County Court housing and property disputes, claims brought to the First-tier Tribunal and all tenancy deposit schemes should be brought behind a solitary portal such as the HCRS. This is part of a broad proposal for the stronger integration of dispute resolution pathways across dispute resolution see Hodges, note 157 above p. 362-3.

[302] See para 3.67 above.

[303] Including the prospect of officers providing procedural assistance early, through live chat, phone call, face-to-face etc.

Structured guidance

4.16 An expanded HCRS should be responsive to the needs of both represented and non-represented parties in housing disputes. For those who have representation, flagged during an initiating process through a tick-box, the HCRS could be an online landing page. From this page, represented parties could identify the correct jurisdiction for their dispute, and be directed straight to the section of the HCRS featuring the digital claim form of the fora they have chosen. For these represented parties and their practitioners, the intention is to offer a straightforward, user-friendly portal, that offers digital filing to any of the dispute resolution providers behind the "doorway". For urgent applications, the portal should feature an "urgent track" joined up to court services, where parties can digitally file and be before a judge later that day. **We recommend the HCRS portal feature a track for urgent applications.**

4.17 For those who lack representation or have a dispute in a redress scheme where legal representation is rarely used (such as the Housing Ombudsman), tailored guidance and structured questioning through the HCRS could take people to the correct dispute resolution pathway. There are several existing processes which could be drawn upon. Resolver, an online platform for consumer complaints, features successive "decision trees" which, combined with contextual rights guides, help to increase the accuracy of a consumer's decision about who to complain to and how.[304] The British Columbia Civil Resolution Tribunal is accessible to a user *only* after a user has completed the "Solutions Explorer", which provides them with information, draft documentation (such as a letter to send to the respondent), and information on where to find further advice.[305] As part of the Reform Programme, the Ministry of Justice is currently exploring the

[304] https://www.resolver.co.uk/ The initiation of a claim through Resolver allows a consumer to select the provider against whom they have their complaint, before tailored guidance and structured pathways assist the consumer in articulating their issues. See also JUSTICE note 43 above.

[305] https://civilresolutionbc.ca/how-the-crt-works/ HMCTS is currently piloting a "signposting" tool for disrepair claims, which features a staged walk-through with menu options for those users with a disrepair claim, as well as signposting to housing advice provision at various junctures. In the current iteration of the service, in the first instance, the signposting tool flags whether someone is at a point of emergency (i.e. homeless or at risk of serious harm) and if so, signposts the user to the Shelter urgent helpline. If the matter is not urgent, a user is then asked if they caused the problem, how to know if they caused the problem and then an option pathway at that point (fix the damage yourself or ask the landlord to).

prospect of introducing "Case Builder", an online decision tree that would provide structured guidance, and potentially produce template documents, before a person initiates a claim online.

4.18 For housing disputes, any decision tree should assist people to identify who their dispute is against, whether the dispute relates to condition or status and should structure questioning so that, at the end of the process, the person is directed to the correct dispute resolution procedure. Any decision tree should offer drop-off points at key moments to legal advice available through the portal.

Alternative dispute resolution

4.19 As discussed in the previous chapter, pre-action protocols for housing disputes encourage parties to engage in ADR prior to the initiation of a claim. Yet unlike the pre-action Road Traffic Accident portal, pre-action ADR in housing is not well joined up with the subsequent court process. There are too few ADR providers. Arrangements for housing legal aid are an impediment to engagement, there is little public knowledge about ADR and arguably inadequate or infrequently applied consequences for failure to engage with it prior to commencing a claim.

4.20 If pre-action ADR is to be encouraged by the courts, it should be part of a more structured, coherent pathway. [306] One way to make the dispute resolution process more coherent would be to incorporate ADR providers within the single point of entry for disputes. Mediators or alternate ADR providers should be incorporated within the HCRS pathway.[307] Parties could be signposted or alerted to ADR providers, or, where pre-action ADR is required under the protocol, the digital claim form through the HCRS should feature a pathway, nudge or dropoff point to accredited providers, to see whether parties are capable of resolving their disputes at the pre-action stage. This pre-action ADR could also offer users Early Neutral Evaluation (ENE) of the strengths and weaknesses of their disputes, using the experience and expertise of judges and specially trained case workers. Legal Help should be extended where necessary to cover the provision of advice and assistance for users participating in pre-action ADR, to encourage uptake

[306] Hodges, note 157 above p. 558.

[307] For instance, those conducting ENE through the Financial Ombudsmen Service, Tenancy Deposit Scheme or Ombudsmen staff responsible for negotiating with parties to disputes.

and promote early resolution of disputes at proportionate cost. **We recommend the HCRS incorporate accredited, specialist ADR providers. The HCRS pathways to disrepair, social landlord possession claims and other processes which encourage ADR at the pre-action stage ought to feature prominent signposts, nudges or "drop-off" points to ADR providers, including early neutral evaluation, as part of any digital claim form.**

Digital assistance

4.21 It is important that the HCRS exist in parallel with paper-based processes[308] for those who are digitally excluded.[309] Housing disputes can feature vulnerable tenants and forcing people online, as has been done with Universal Credit, risks further marginalising people struggling for legal help and assistance, also risking the creation of a "digital underclass" unfairly excluded from dispute resolution.[310] Paper based processes in pre-existing schemes should be maintained, but various forms of assistance should be offered for those who are digitally excluded but nevertheless want the benefit of the signposting, assistance and triage available through the portal.

4.22 For example, the TPT operates a digital interface for appeals against traffic penalty notices and provides administrative assistance to those who lack digital capability. Administrative staff answer telephone inquiries and act as "proxy users" for appellants, complete paper-based appeal forms for users,[311] which they post out to them for signature with a reply-paid envelope addressed to the TPT. For those unable to get representation, or unsure as to where their dispute ought

[308] For instance, HMCTS has undertaken to maintain paper-based channels to access courts and tribunals through the Reform Programme for those who are unable to get online, see Inside HMCTS blog, 'Helping people access our services online' (12 October 2017), available online at https://insidehmcts.blog.gov.uk/2017/10/12/helping-people-access-our-services-online/

[309] JUSTICE's 2018 Working Party, *Preventing Digital Exclusion from Online Justice*, noted that a significant proportion of the population remains "digitally excluded", though the precise extent of digital exclusion is unclear, see JUSTICE note 43 above para 1.17 and see also Lloyds Bank note 253 above.

[310] A 2016 academic study of internet non-use in the UK and Sweden suggested that digital exclusion can become concentrated over time and that "non-user populations have become more concentrated in vulnerable groups", i.e. those who are "older, less educated, more likely to be unemployed, disabled and socially isolated", E. J. Helsper and B.C. Reisdorf, 'The emergence of a "digital underclass" in Great Britain and Sweden: changing reasons for digital exclusion', (New Media and Society, 2016).

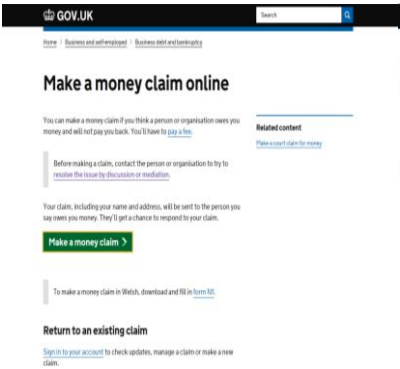
[311] https://www.trafficpenaltytribunal.gov.uk/want-to-appeal/ See also JUSTICE note 43 above para 1.24

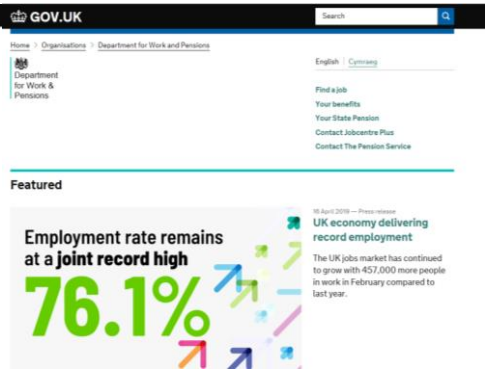
to be resolved, various options for assistance in bringing a dispute should be available:

(a) legal advice available through the portal (discussed below);
(b) case workers fielding initial inquiries, providing basic procedural advice, signposting to advice and helping people complete paper-based forms in pre-existing jurisdictions; or
(c) case workers acting as a proxy to help people complete the HCRS digital staged guidance.

Design

4.23 The HCRS should be designed to make clear that the redress providers, courts and tribunals within it are constitutionally distinct from Government.[312] The failure to demarcate online courts as constitutionally independent through design remains an ongoing issue for the Reform Programme. For example, the branding of "Make a money claim online"[313] and the Department of Work and Pensions are indistinguishable, despite them performing constitutionally distinct functions:





4.24 Trust in the independence and impartiality of the HCRS will be essential for uptake. **We recommend that the HCRS portal feature distinct design from**

[312] An identical design to Government services may blur the visible independence of courts, tribunals and redress providers, which may cause mistrust and lack of motivation, key drivers of digital exclusion, see JUSTICE note 43 above para 3.36-3.38.

[313] See Make a money claim online https://www.gov.uk/make-money-claim

"gov.uk" branding, to make clear that the dispute resolution processes within are constitutionally distinct from Government. At Annexure A, we have included a mock-up of what the HCRS portal landing page might look like: distinct from "gov.uk", designed to make clear that it offers dispute resolution and complaint handling for an array of housing issues and with images linked to distinct pathways based on problem type.

4.25 The HCRS should also feature best practice in digital design[314] and be mobile accessible, to reduce digital exclusion for people for whom mobile devices are their only means of getting online. This is likely to be particularly important for homeless people, for whom mobile phones can provide an essential survival tool and source of support.[315]

Advice and assistance

4.26 As described in Chapter 3, the diminution of civil legal advice and representation has been detrimental to access to justice in housing disputes. Large parts of the country now have no locally available advice or representation. Whatever provision exists now or in the future, there is a need to ensure people know where they can go to access advice or information about a housing problem.

4.27 To date, the Reform Programme has given inadequate consideration as to how best to signpost, accommodate and enhance legal advice delivery.[316] Currently, most online justice processes do a poor job of signposting users to sources of legal advice and information.[317] Instead, they typically feature one large green

[314] Elements of best practice in design are described at para 3.66 above.

[315] Rosie Spinks, 'Smartphones are a lifeline for homeless people' (1 October 2015), The Guardian, https://www.theguardian.com/sustainable-business/2015/oct/01/smartphones-are-lifeline-for-homeless-people Many people identify smartphones and tablets as their most important devices for accessing the internet, see Ofcom, *Adults' Media Use and Attitudes Report 2018* (25 April 2018), p. 2, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0011/113222/Adults-Media-Use-and-Attitudes-Report-2018.pdf

[316] Though the Legal Action Plan features a commitment "to explore how to deliver services remotely to those who are geographically isolated and may not have easy access to local providers", MOJ note 137 above p. 34.

[317] The Money Claims Online service provides a link to a referral portal for mediators for civil issues, and at certain points there are suggestions that users should "get legal advice" if they are not sure about certain issues – but there is no indication of where to find that advice. See https://www.gov.uk/make-money-claim

'start' button, which enables users to begin the relevant legal process – be that making a money claim, or filing for divorce.[318] Some services, such as the online plea service are much better, and offer prominent signposting to sources of legal advice.[319] Digital portals should encourage people to take up advice before initiating a claim, through prominent signposting to sources of independent advice and information. We would expect the landing page for the HCRS to feature prominent signposts to sources of independent advice and information on housing, such as Shelter, AdviceNow and Crisis.

4.28 Ideally, users of the HCRS would have access to face-to-face legal advice delivered by a specialist but, where that is not available, other methods of advice or information provision ought to be accessible. One benefit of a portal is the opportunity to embed innovative advice delivery into a one-stop location. In 2019, JUSTICE drafted a concept note and convened a roundtable on the idea for an "Online Advice Platform", for people to locate and access advice based on geographic area. This advice might be either delivered face-to-face (if available), or remotely delivered through video chat. We suggested that the key features of the platform would be:

- **Support for users to understand**: successful remote advice provision has emphasised the need for client sided assistance providing practical, technical and emotional support for those accessing remote advice,[320]

[318] *Ibid* and https://www.gov.uk/divorce/file-for-divorce

[319] The current iteration of the online plea service features a help and advice heading, located above the start button, encouraging users to seek out assistance from Citizen's Advice or a solicitor before commencing the process. Usefully, the link to "a solicitor" under the legal advice heading directs the user to the gov.uk "Find a legal adviser" portal https://www.gov.uk/find-a-legal-adviser In early 2019, at a workshop on the Single Justice Service held on the 10th of April, HMCTS stated that it intends to encourage the uptake of legal advice, at least in the context of pleading online for criminal offences

[320] See, for example Australian Pro Bono Centre, *Pro bono legal services via video conferencing: Opportunities and Challenges* (2nd – 3rd July 2015), p. 3, 13 and 16, available at https://www.probonocentre.org.au/wp-content/uploads/2015/09/ProBonoLegalServicesViaVideoConferencing-OpportunitiesAndChallenges040615.pdf LiP Network, *Setting up a Skype Clinic?* (4th July 2017), available at http://www.lipnetwork.org.uk/topics/post/skype-clinics Roger Smith and Alan Paterson also refer to a study carried out in 1996 and funded by the Nuffield Foundation, which found that self-help kiosks set up in courts "worked best when fed, watered and tendered by living people rather than just dumped and left in dark courthouse corners". The report had found that the best kiosk was one which was set up in a law library and supervised by staff. Roger Smith and Alan Paterson, *Face to Face Legal Services and their Alternatives: Global Lessons from the Digital Revolution* (2014) p.55-56 available at https://strathprints.strath.ac.uk/56496/1/Smith_Paterson_CPLS_Face_to_face_legal_services_and_their_alternatives.pdf

which might require resourcing, hardware and training for "trusted faces" in "trusted places", such as Citizens Advice or AdviceUK;

- **The primacy of quality advice provision**: while nothing should derogate from the primacy of quality, face-to-face advice provision by a specialist in a particular area of the law, where that quality advice is not available on a face-to-face basis, advice through a platform ought to feature practitioners with expertise in the relevant area of the law, whether proximate or remote to users of online justice services and whether legal aid funded or on an unbundled basis. Where a person does not have a housing law specialist in their area, they should be able to access legal advice over the phone or through video chat; and

- **Facilitated legal advice:** Advice provision must be easy for users to find, which requires prominent signposting to advice within any landing page.

4.29 The key for incorporating advice provision into a platform or portal, is to signpost a person to the best form of specialist advice and representation available to them. In England and Wales, there have been efforts to categorise and geographically locate legal resources and advice. For example, Lasa's service "advicelocal"[321] provides links to legal resources and postcode-filtered information about local advice services for issues including benefits, employment issues, financial and housing problems. One option for the HCRS might be for structured questioning or a decision tree to include pathways to advice. Users could input their postcode to local nearby services (either in-person or remotely delivered) and answer a questionnaire to assess eligibility for legal aid.[322] They might then be signposted to a discrete part of the HCRS portal with a list of available providers for their area, including various methods available for advice provision (face-to-face, telephone, digital). Whatever form it takes, the key is to establish a "one-stop shop": a portal where ADR, formal adjudication, advice, procedural assistance and quality legal advice, representation and information is all available.

[321] https://advicelocal.uk/ JustBeagle provides a search engine, through which users can find lawyers in their area, specific to their legal problem: https://justbeagle.com/ Etic Lab is also seeking to map out the provision of services on a national level as part of the Feasibility Study for its *project Routes to Affordable Justice*: https://routestojustice.co.uk/

[322] This could be embedded from https://www.gov.uk/check-legal-aid

4.30 **We recommend the HCRS has within it quality housing advice providers accessible through various means. There should be a prominent section on the HCRS portal with a list of housing providers, signposted to users as they fill out structured questions. Alternatively, an advice platform should be accessible from the HCRS landing page.**

Case workers and cross-referral

4.31 Finally, a key feature of our proposed HCRS is a well-defined role for "authorised court and tribunal staff" and for those staff and equivalents in redress schemes to offer procedural assistance, signposting to advice providers and the capacity to refer disputes to alternative pathways where needed. Some of these functions are already carried out by HMCTS administrative case officers; for example in the FTT (PC), where the current "cradle-to-grave" case management system provides users with a named individual officer responsible for their case. This officer servers as their main point of contact and can give advice and explanations about tribunal procedure throughout the lifetime of the case.[323]

4.32 JUSTICE's 2015 report, *Delivering Justice in an Age of Austerity*[324] and Lord Justice Briggs' Civil Courts Structure Review[325] recommended an expanded and assistive role for court and tribunal staff in civil disputes through the devolution of procedural functions ordinarily reserved for judges. The Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 gives effect to this aspiration, by allowing "authorised court and tribunal staff to exercise judicial functions where procedure rules so provide".[326] The precise procedural functions exercisable are at the discretion of jurisdiction-specific rules committees, though the general

[323] One of the key criticisms we received from housing lawyers was that widespread retrenchments in court staff meant it was often impossible to contact a staff member for rudimentary case management issues.

[324] JUSTICE (2015), *Delivering Justice in an Age of Austerity*, available at available at http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf

[325] Briggs, note 160.

[326] Section 3.

intention is to use authorised staff "to handle a wider range of uncontroversial and routine matters under judicial supervision."[327]

4.33 **We recommend that all court and tribunal case workers operating under the HCRS, whether in the County Court or FTT (PC) should exercise similar procedural functions.** The intention is to establish a list of similar functions to allow case workers to assist parties actively. We imagine that case workers who receive a dispute from a represented party through the HCRS portal might:

(a) clarify the nature of the dispute and whether there is jurisdiction to determine the dispute as framed;

(b) signpost parties to mediation;

(c) where legally trained, perform devolved procedural functions such as issuing directions, determining preliminary issues and granting extensions of time – all subject to judicial supervision and to an automatic right of review of any decisions made.

4.34 We envisage that the most substantial role for case workers under the HCRS would be assisting those who make their way through the portal without legal assistance. In those instances, we propose case workers take on an even more active and assistive function. For example, when a digital file compiled through the HCRS reaches a case worker, they ought to look to signpost unrepresented people to legal advice providers on the HCRS to ensure the person is fully appraised of their position, options and prospect of representation before pursuing their claim further. This might best be coined a form of "assistive triage". In certain chambers, the FTT has already devolved functions for

[327] Courts and Tribunals (Judiciary and Functions of Staff) Bill - Factsheet: Authorised Court and Tribunal Staff - legal advice and judicial functions available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/757856/CTJFS-factsheet-authorised-staff.pdf Not all jurisdictions have, as yet, defined the precise role for authorised staff, though in the First-tier Tribunal (Social Entitlement) Chamber, their powers have been drawn broadly, and they are capable of making all decisions that a judge assigned to the tribunal may make under the Tribunal Procedure (First -tier Tribunal) (Social Entitlement Chamber) Rules 2008 "save those which are substantive final decisions under judicial supervision", Senior President of Tribunals, 'Practice Statement authorising Tribunal Caseworkers First-tier Tribunal (Social Entitlement Chamber) to carry out functions of a judicial nature', para 3. available at https://www.judiciary.uk/wp-content/uploads/2018/07/ps-authorisations-tribunal-caseworkers.pdf

"authorised tribunal staff" to conduct an array of procedural functions historically the fiefdom of judges[328] but as yet, authorised court staff in the County Court have not been delegated procedural functions through practice statement. Our proposal for the HCRS will require procedural functions to be delegated to County Court staff. To give effect to the triage function of case workers under the HCRS, **the Civil Procedure Rule Committee should bring forward consideration as to what procedural functions "authorised court staff" should exercise within the County Court**.

4.35 Further, **we recommend that those staff should be able to assess whether the person's dispute is within jurisdiction and, if need be, to refer disputes which are, in fact, maladministration claims to housing redress schemes, and vice versa**.[329] Currently, the Housing Ombudsman and the Local Government & Social Care Ombudsman, which have split jurisdictions regarding complaints about local authority housing functions, have a Memorandum of Understanding to deal with disputes which have been brought to the wrong body, queries about whose jurisdiction applies and complaints where there are separate issues which engage both jurisdictions.[330] Similar cross-referring arrangements will be needed for the HCRS. Various redress providers operating within the HCRS should, to the extent practicable, look to standardise the front end, assistive role carried out by case handlers. The Redress Reform Working Group provides an opportunity to do so, and it may be that the body we propose at paragraph 4.12 could assist in that regard.

4.36 **The Redress Reform Working Group should work collaboratively to establish universal coverage of housing complaints, by making arrangements for all jurisdictions to be capable of cross-referring disputes to each other, recommending rule changes where necessary, and devolving functions to court and tribunal staff to facilitate such referrals.**

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[328] *Ibid.*

[329] On this, see Sir Ernest Ryder, 'Driving improvements: collaboration and peer learning; Ombudsman Association conference' (Belfast, 21 May 2019) p. 3 available at https://www.judiciary.uk/wp-content/uploads/2019/09/2019_09_19_SPT_Ombudsman_Conference_-Belfast_May2019_FINAL-2.pdf

[330] Available at https://www.housing-ombudsman.org.uk/wp-content/uploads/2018/03/lgsco-hos-mou.pdf

4.37 Finally, for the reasons we articulate earlier in the chapter, we are keen to ensure that a single point of entry for housing disputes takes advantage of judicial specialism. As articulated above, we think there is great potential for the establishment of ticketed, specialist housing judges, capable of hearing disputes irrespective of which jurisdiction the dispute lies in. **We recommend the HCRS portal should take advantage of cross-ticketing, to ensure the appropriate level of judicial specialism is deployed to a dispute, irrespective of whether the dispute is nominally to be heard in the FTT or County Court.**

V. CONCLUSION AND RECOMMENDATIONS

5.1 This report sets out a range of recommendations for the housing dispute system within the context of great change. The Rented Homes Bill has recently been introduced and represents a radical shakeup to renting in England and Wales. Gone will be section 21 no fault possession, and while compensatory grounds will likely be introduced, the Bill is an opportunity to forge greater stability and longer relationships between landlord and tenant in the sector.

5.2 Government's desire to improve the situation for renters will need to be met by changes to the dispute resolution system. This report sets out recommendations for how to deliver an improved system. The starting point must be recognition that the current system has many flaws, that housing rights are a nullity without the realistic prospect of enforcing them and that traditional adversarial methods for resolving housing disputes may not be the best or most effective way of dealing with housing problems.

5.3 Each chapter of this report sets out various approaches and recommendations to improve the situation, which are not mutually exclusive.

5.4 However, modifications to current processes and harmonisation of the system will not see a fundamentally different approach taken to housing dispute resolution. The broad array of interests that underpin disputes remain unresolved and mediative methods that might sustain and inform housing relationships are not common practice. It is for these reasons that the majority of the Working Party supported the recommendation to pilot the Housing Disputes Service.

5.5 The motivation for the HDS was to explore an approach which recognises that housing disputes are sustained by varied problems and interests which single issue adjudicative decision-making cannot address. The HDS would adopt an inquisitorial approach, addressing all aspects of the relationship which require resolution whether or not the particular complaint which has given rise to its involvement, as well as addressing underlying problems, such as benefits issues, mental health and family issues inherent in housing disputes. It would take a mediative approach to disputes to encourage and facilitate a new culture between tenants and landlords. Underlying issues and motivations are to be brought to the surface and reconciled in a manner which allows parties to maintain relations together after the dispute.

5.6 We appreciate the HDS is a bold recommendation. To our knowledge, nothing quite like it exists in civil justice here or abroad. For those reasons, we recommend it be introduced as a phased pilot and subject to robust evaluative outcomes. Co-design of the pilot between various stakeholders in the sector will be essential.

5.7 Should a pilot be successful, the majority of our Working Party envisage that long-term, a properly funded HDS paid for by housing providers could become the dispute resolution model for all housing disputes.

5.8 Long term, our recommendation is for a quality, first-tier dispute resolution/problem solving model capable of addressing the underlying issues giving rise to all kinds of housing disputes and resolving them in a way that allows parties to live together beyond the dispute. The quality, holistic service we envisage will be costly, but there is an obvious source of revenue to provide for a national model. The *Strengthening Consumer Redress* paper suggests that all housing providers should pay into a redress scheme. We recommend that, ultimately, such funding should go to the HDS.

5.9 Our hope is that the HDS becomes part of a more joined up, integrated housing disputes architecture. While we acknowledge that the long-term vision for the HDS is that it become the starting point for housing dispute resolution, nothing about it should be seen to derogate from recommendations elsewhere in the report. This is because we fully promote the right to appeal from the HDS, which we envisage would involve a seamless transition from the HCRS appeal process. We imagine that the introduction of the HDS into the civil justice landscape would cause other pre-existing jurisdictions and processes to evolve in response.

5.10 We must acknowledge that tenant and legal aid lawyers we consulted with were in opposition to the proposal for the HDS. Those views are captured in the dissenting chapter below. For those consultees, the problems in the current system are generally attributable to court closures and reductions in legal aid caused by austerity. These consultees were therefore generally supportive of any recommendations to address those issues within the current system.

5.11 Chapters 3 and 4 of the report therefore focus on what reforms are needed now, and irrespective of whether the HDS comes to fruition. Much could be done to reform current processes quickly, provided there were the necessary political will. The Ministry of Justice's Legal Support Action Plan is an opportunity to

reintroduce housing advice and representation meaningfull where there is none. Flexible deployment of the court and tribunal estate is needed to help vulnerable people get to hearings where they face the prospect of losing their home.

5.12 Negotiation and mediative methods of dispute resolution, which might be more successful in sustaining tenant-landlord relationships than adversarial methods, need to be encouraged more strongly. Structural obstacles to their uptake must be removed. We acknowledge local authorities are under pressure to deliver for people facing homelessness with limited resources and little housing stock. However, we were told too often that many deploy gatekeeping methods to turn people away when they are in need. Those practices need to change, and we set out several recommendations to address them, such as modification of the Homelessness Code of Guidance to prevent portals being the sole method of contact and a unified approach across the local government sector to offer best practice in digital design for portals.

5.13 The desire to promote access to justice through changes to current processes in dispute resolution should be married to the establishment of a single point of entry into the system. The *Strengthening Consumer Redress* paper published by the MHCLG in 2019 shows a desire to consolidate all pre-existing housing redress schemes into one digital portal: The Housing Complaints Resolution Service (HCRS).

5.14 We propose a more expansive version of the HCRS: a sole portal to initiate all housing disputes – whether court, tribunal, redress scheme or tenancy deposit, which would feature legal advice and representation, structured guidance, ADR and procedural assistance by case workers operating as part of a single point of entry. That proposal should be met by the establishment of a core cadre of specialist housing judges and a judicially led overview and assessment of which jurisdiction should house which disputes. Our HCRS is an opportunity to assist people with housing disputes through a single, joined up pathway. It also represents the prospect of capturing a wide array of data and information on systemic problems to feed back to regulators and legislators.

5.15 We expect these changes could be addressed by a willing government promptly. The MHCLG Redress Working Group has already convened, and we understand they will be developing a model for the HCRS in 2020, while the implementation of the Legal Support Action Plan is in its early phases.

Recommendations

Housing Disputes Service

1. We recommend the piloting of a new, Housing Disputes Service (HDS) [2.9].

2. We recommend the HDS adopt best practice with respect to those who are vulnerable by either inherent or situational vulnerability. The HDS digital system should collect information on vulnerability as early as possible in the process to enable reasonable adjustments to be made to its process to accommodate the vulnerability. Data should be collected on protected characteristics, to provide policy makers with information on who is using the HDS and to inform systemic interventions taking place with housing providers [2.25-2.26].

3. We recommend that subject to successful piloting against evaluative measures, long-term the HDS be established as the specialist housing dispute body [2.29].

4. We recommend the HDS pilot be phased and take place in two locations, one metropolitan, one rural [2.31].

5. We recommend that multiple channels be available for parties to contact and initiate disputes with the HDS, but that any pilot should include the necessary digital elements for the service. These would include a digital case management system for HDS officers, a digital filing system and dashboard for parties to upload and monitor relevant documents and the progress of their dispute [2.33].

6. During the pilot phase, where the HDS makes an outright or suspended possession determination that is not appealed it should nevertheless be subject to review by a District Judge who may direct a hearing [2.40].

7. The HDS should feature a prominent landing page, which should be promoted to appear as the top result when a user types in expressions like “housing disputes” or “housing problems” into a search engine. User-facing digital components of the HDS landing page or filing system should feature design principles which make them accessible and navigable for lay users. The

landing page should include prominent signposting to sources of independent advice, information and legal advice [2.45].

8. HDS decisions would be appealable to Circuit Judges or Upper Tribunal. Appeals would be available on fact or law as of right. An appeal would normally generate an automatic stay on the HDS determination save for those parts not relevant to the appeal [2.65-2.67].

9. The pilot should include independent lawyers in each pilot location, to provide parties with legal advice on their rights, interests and obligations, remunerated under a discrete arrangement (based on a legal aid contract or otherwise) at a sustainable rate, capable of taking the dispute to court and tribunal if the dispute cannot be resolved through the HDS [2.68].

10. We recommend specific arrangements be made for independent legal advice for parties through the HDS process, with contracts for either panelled lawyers or a new legal aid contract co-designed with the advice sector and Government through the HDEG [2.71].

11. The HDS should be a phased pilot, robustly evaluated, and subject to oversight by a Housing Dispute Service Engagement Group (HDEG), chaired by a judge of expertise and standing and populated by academics, relevant Government agencies (MHCLG, HMCT, MOJ), lawyers from tenant, landlord and social housing groups and other affected interest groups [2.73-2.74].

12. The HDS would take a staged approach to dispute resolution. The following stages would, however, need to be flexible, and allowances would have to be made for urgent issues, e.g. through a "fast-track" portal which should engage a dedicated duty team [2.49-2.58]:

    Stage 1: holistic, investigative, problem solving stage;
    Stage 2: interim assessment;
    Stage 3: facilitated negotiation/ADR stage; and
    Stage 4: adjudication.

13. The HDS should be subject to a phased pilot [2.34-2.40], against a range of robust evaluative outcomes [2.75], co-designed through the HDEG in advance of the pilot.

14. Long term, the HDS should be funded in full by subscription from housing providers [2.81].

Current processes

Legal advice and representation

15. The Ministry of Justice ("MOJ") Legal Action Plan urgently address the need for sustainable funding for the legal aid and advice sector. Specific attention should be directed as to how to respond to legal aid "housing deserts" and the need to provide funding for advice that addresses "clustered" legal problems [3.09].

16. The Ministry of Justice (MOJ) should consider piloting and evaluating co-location of legal advice in a hospital setting. Any pilot should address multiple legal problems and not be limited to single issue advice. Testing of co-located health/justice pilot schemes should assess qualitative justice and health outcomes [3.11].

17. Mortgage possession matters should sit in both "debt" and "housing" legal aid categories so that respondents facing repossession can access early legal advice as well as representation [3.12].

18. The MOJ should consult on whether a publicly funded party should have the right to make a freestanding application for costs where the dispute has settled in their favour, in accordance with the Jackson Report recommendation [3.13].

19. The MOJ should consider introducing Qualified One-Way Costs Shifting for housing disrepair claims [3.18].

Accessing the court

20. If the online possession project features a continuous online resolution process, users must have access to a virtual housing duty solicitor [3.21].

21. In the absence of a permanent court and tribunal presence, HMCTS should operate peripatetic or pop-up courts and tribunals to enable the resolution of

housing disputes in towns and communities which no longer have a physical court or tribunal presence [3.24].

Pre-action processes

22. The CPRC should revisit pre-action protocols for housing disputes, with a view to simplifying them [3.29].

23. All claim forms for possession which involve a pre-action process should be strengthened to require applicants to demonstrate that they have engaged with a tenant or borrower to attempt resolve the issues giving rise to the prospect of eviction [3.31].

24. The CPRC should ensure defence forms for all possession claims capture information about a respondent's disability or other matters which give rise to Equality Act 2010 or ECHR Article 8 concerns or defences [3.32].

25. The Civil Procedure Rule Committee (CPRC) should consider whether a simple, easy to follow pre-action protocol for private possession claims should be established [3.35].

26. Pre-action requirements for enforcement of a charging order should be introduced [3.37].

27. The definition of "legal help" under legal aid contracting for housing should be amended to capture acting and advising through pre-action ADR processes [3.39].

28. The Civil Justice Council should review how awareness of and uptake of ADR at the pre-action stage in housing disputes can be promoted and encouraged [3.43].

Alternative dispute resolution

29. Subject to there being appropriate funding for ADR providers and practitioners at the pre-action stage, the CPRC should consider whether costs sanctions for failure to engage with ADR pre-action could be brought earlier in the case management process [3.45].

30. The directions questionnaire for all tracks should require parties to state the reasons why they do not wish to pursue ADR [3.47].

31. Where a fast-track or multi-track case is stayed for mediation, the CPRC should consider the need for ongoing case management of the matter [3.48].

32. The CPRC and the Tribunal Procedure Committee should review all standard directions which involve housing disputes to include a presumption for parties to engage in ADR [3.49].

33. Legal aid practitioners should not have to obtain prior authority from the Legal Aid Agency to engage in ADR but be free to pursue it as part of an ordinary legal aid certificate [3.50].

34. ADR should be more strongly encouraged by procedure rules. The CPRC and the Tribunal Procedure Committee ought to consider how rules could more strongly favour a presumption of ADR early in the process. If those rules change, tribunal and court case workers and/or judges should be able to direct parties to engage in all forms of ADR, including in circumstances where parties do not consent [3.55].

Homelessness

35. Local authorities must be accessible across multiple channels to ensure vulnerable and digitally excluded people can get homelessness assistance. Consideration should be given to strengthening the Homelessness Code of Guidance to require a multi-channel, rather than digital by default approach for applications [3.62].

36. Local authority online homelessness portals should be accessible and navigable for lay users. They should feature prominent signposting to independent advice and information, mobile accessibility for those for whom devices are their only means of getting online, the ability to save and track application progress, and screens with white space and easy read for those with vision impairments and literacy problems [3.66].

37. The Ministry of Housing, Communities and Local Government (MHCLG) should take the lead on best practice through digital design across local authority homelessness portals [3.67].

38. The MHCLG should incorporate into the statutory homelessness statistics data on local authority internal homelessness reviews, including the number of internal reviews conducted and the overturn rate [3.68-3.69].

39. The time limit for appealing a local authority internal review decision on homelessness to a Circuit Judge pursuant to section 204 of the Housing Act 1996 ought to be extended from 21 to at least 28 days, to give appellants more time to access legal aid [3.70].

40. When local authorities provide their written decision on an internal review to a person seeking homelessness assistance, they should offer that person access to their full case file from which the decision was made [3.71].

41. MHCLG and HMCTS, in conjunction with local authorities, should explore how to develop local authority digital case files that can seamlessly migrate to an appellate court level [3.73].

The housing disputes landscape

Cross ticketing

42. "Cross-ticketing" in housing disputes ought to be placed on a more robust and formal footing through rule changes [4.5].

43. A cadre of ticketed, specialist "housing judges" should be established to hear housing disputes, irrespective of which jurisdiction a dispute falls into [4.6].

Simplifying the landscape

44. A judicially led group should be established to look over housing dispute types and to advise the Government on whether certain types of disputes ought to migrate from the County Court to the First-tier Tribunal (Property Chamber) or vice versa [4.12].

The Housing Complaints Resolution Service

45. The MHCLG proposal for the Housing Complaints Resolution Service should be expanded, to be a single point of entry portal for all redress providers, courts, tribunals and tenancy deposit schemes [4.15].

46. The HCRS portal should feature a track for urgent applications [4.16].

47. The HCRS should incorporate accredited ADR providers. The HCRS pathway to disrepair, social possession claims and other processes which encourage ADR at the pre-action stage ought to feature prominent signposts, nudges or "drop-off" points to ADR providers as part of any claim form [4.20].

48. The HCRS portal should feature distinct design from the "gov.uk" branding currently being adopted across the Reform Programme, to make clear that courts, tribunals and dispute resolution services are constitutionally distinct from Government [4.24].

49. The HCRS should signpost to quality housing advice providers, by way of a prominent section on the HCRS portal or an advice platform accessible from the HCRS landing page [4.30].

50. Where practicable, case workers performing this "triage" through courts and tribunals ought to be closely supervised by co-located court or tribunal judges, rather than by remote supervision [4.33].

51. The CPRC should swiftly determine the range of procedural powers which ought to be exercised by "authorised court staff" in the County Court as provided for by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018. Those court staff should then be the point of contact for any party seeking an update on case progression in their dispute [4.34].

52. Case workers across these courts, tribunals, redress schemes and other providers should be empowered to assist parties to identify relevant matters in their dispute and the appropriate forum for resolution. All providers should refer disputes to the correct forum, whether through memorandum of understanding or procedure rules [4.35].

53. The Redress Reform Working Group should work collaboratively to establish universal coverage of housing complaints and arrange for all jurisdictions to be cross-refer disputes [4.36].

54. The HCRS portal should take advantage of cross-ticketing, to ensure the appropriate level of judicial specialism is deployed to a dispute, irrespective of whether the dispute is nominally to be heard in the FTT or County Court [4.37].

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Adrian Shaw, Head of Service Charges, Clarion Housing Group

Victoria Sherston, Customer Liaison Director, Regal London

James Walker, Founder of Resolver

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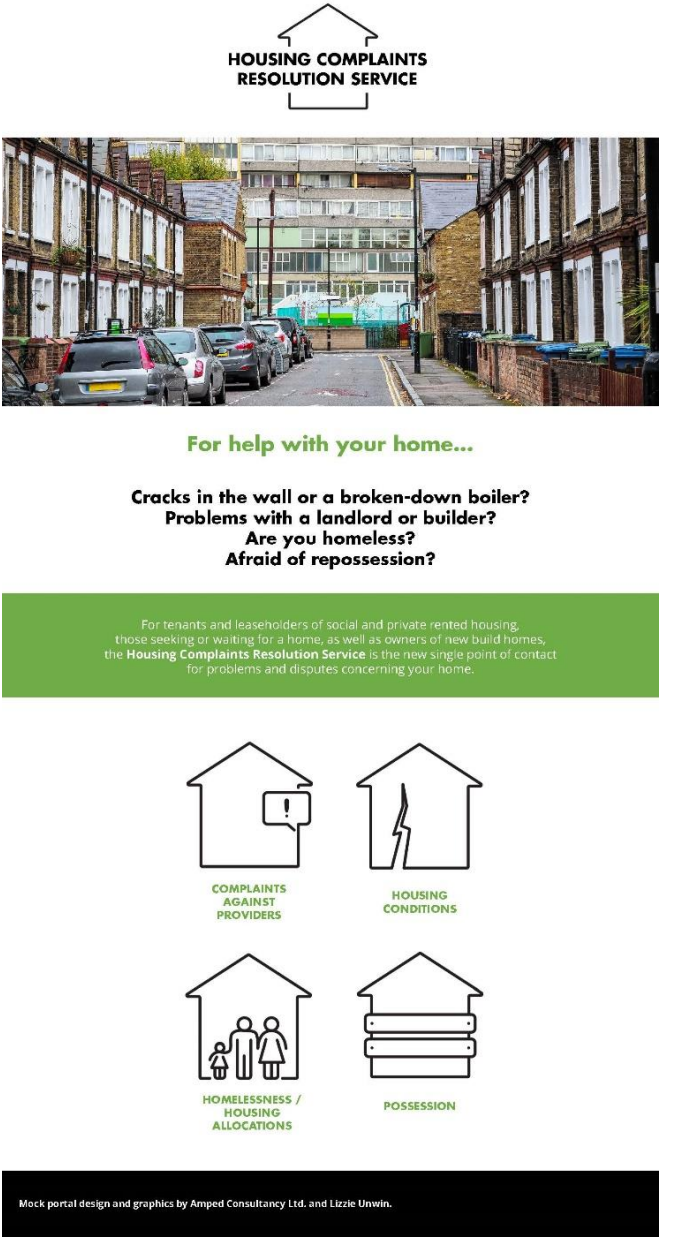
In addition to the consultees we have listed above, we took evidence from over a dozen tenant lawyers, who did not wish to be named in the report, on account of their opposition to the HDS.

Andrew Arden QC

VII. Annexure A: Housing Complaints Resolution Service landing page



VIII. Annexure B: Dissenting report of the Housing Law Practitioners Association members of the Working Party

Introduction

1. This dissenting report addresses Chapter 2 of the Solving Housing Disputes report, which proposes the establishment of a Housing Disputes Service (HDS), before briefly addressing Chapter 4. It is produced by the members of the Working Party from the Housing Law Practitioners' Association (HLPA) and is supported by Professor Helen Carr, another member of the Working Party.[331]

2. In summary, we consider that the HDS is a fundamentally misconceived proposition which is wrong in principle and unworkable in practice. To the best of our knowledge, it is not supported by a single tenant/homeless persons solicitors' firm, organisation, charity, or law centre. It does not understand or reflect the realities of representing vulnerable people with housing problems. It fails to grapple with the inherent imbalance of power in the landlord/tenant and local authority/homeless person relationship. It would, in our view, breach Article 6 ECHR. It represents not a levelling of the playing field but a race to the bottom.

Underlying principles

3. The principles underlying HLPA's consideration of the HDS proposal are as follows:

   (a) The availability and adequacy of housing is of fundamental importance to occupiers. Accordingly, any consideration of the HDS proposal must start from the principle of non-retrogression in the protection of occupiers' rights: current inequalities between litigants must be "levelled up" rather than "levelled down".[332]

[331] It draws upon views expressed to us by other members of HLPA, including by email, in person, and at a meeting for HLPA members in December 2019 convened for the purposes of considering the HDS proposal, at which opposition to the proposal was unanimous.

[332] See Articles 2(1) and 11(1) of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing and the UN OHCHR Factsheet 21 on The Right to Adequate Housing.

(b) Particular care must be taken in this regard in relation to the rights of vulnerable occupiers and "vulnerable" here must be interpreted broadly.

(c) Change as radical as that proposed with the HDS inevitably carries significant costs and significant risks. This is not to say that such change should never be undertaken. It should however, only be attempted with a clear enough basis to believe that (a) it will represent an improvement worth incurring such cost and taking such risk and (b) similar improvement cannot be achieved by less costly and/or risky means.

(d) Notwithstanding any potential scope for increased use of alternative dispute resolution, without root-and-branch reform of almost every aspect of substantive housing law (and probably also of the English legal system and housing market more generally) a substantial proportion of housing disputes (and particularly the most serious disputes, including those in relation to eviction) will necessarily end up being contested.

(e) Given this, it is essential that high quality legal advice and representation is available to occupiers where needed. In practical terms, this means ensuring a viable market of lawyers specialising in housing law who are willing and able to take instructions under legal aid.

The proposed benefits of the HDS and the current position

4. In our view, the nature and proposed benefits of the HDS have not been clearly or consistently articulated throughout the course of the Working Party and to some extent the current position and problems have not been fully understood. Taking the main proposed justifications, as we understand them to be:

5. Non-adversarial: at the heart of the proposal for the HDS is the belief that the current system is too adversarial and that this is unsuitable where there is an ongoing relationship between the parties. It is firstly necessary to distinguish between "*adversarial*" vis-à-vis inquisitorial, in terms of the nature of the justice system, and "adversarial" as in combative and antagonistic. The HDS proposal conflates these two concepts. It is correct that housing disputes are determined in an adversarial system, because that is the system which exists in this jurisdiction (and the report is remarkably casual about the implications of abandoning this centuries-old system, which still applies to virtually every

other area of law). However, it is, in our experience, not correct that housing disputes are litigated in a notably adversarial manner. One of our concerns about the HDS proposal is the limited consultation of practising lawyers upon which it is based, and we consider that if the report had been informed by more day-to-day experience of court- and casework, it would have been clear that housing lawyers are not bitterly fighting every case to the nth degree. The experience of HLPA practitioners is that housing lawyers on both sides try, in virtually every case, to resolve the matter amicably outside court. Relatively few cases go to a contested trial. It is, after all, the aim of every tenant lawyer in a possession case to keep the client in their home – and thus maintain the relationship between landlord and tenant, not dismantle it. The proposal is therefore based on a mistaken premise.

6. We are also concerned that the proposed focus on a non-adversarial approach in the HDS is to the detriment of other imperatives, such as the maximum protection of occupiers' legal rights. It is important to understand that by the time a matter reaches court (or would reach the HDS) the parties are already engaged in a dispute. Most lawyers will try to reduce, not increase, the level of conflict, but the fact remains that ultimately the role of any "dispute service" is to resolve that dispute by establishing and vindicating rights.

7. It is in any event entirely possible for non-adversarial processes to be built into and/or further reinforced within the current framework of court proceedings (as set out in Chapter 3 of the report). Indeed, it is the experience of HLPA members that it is often only the threat of adjudication by the court in an adversarial process (i.e. a trial) that makes parties engage seriously in non-adversarial modes of alternative dispute resolution. We welcome the proposals to make legal aid more readily available for mediation and we consider that this would be a more achievable and pragmatic way forward than creating a new tribunal system.

8. Holistic approach: another motivating factor for the proposal is the suggestion that the courts can only deal with whatever single issue has been brought before it, without resolving the underlying issues. Again, we consider that this is based on a lack of understanding of the realities of practice. It is quite true that housing cases are multi-faceted, but the court and lawyers understand this and the system accommodates it. For example, when a client presents with rent arrears, solicitors will enquire into other matters, such as disrepair, mental health issues, and benefits problems. Undoubtedly the removal of

welfare benefits cases from the scope of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) has made this harder and legal aid for such cases should be reinstated. However, in so far as extraneous issues are relevant, we consider that they are already accommodated within the existing system. In so far as other matters are not relevant, we struggle to see (1) how widening the scope of the dispute helps to defuse tension and preserve the parties' relationship and (2) what government will agree to fund a system which not only adjudicates upon live issues but also, at its own instigation, seeks out new ones.

9. Similarly – and particularly importantly for litigants in person, but also more generally – many district judges have become increasingly prepared to take a broader approach to housing cases, e.g. directing information to be provided by Housing Benefit departments in rent arrears cases. A further option, then, for dealing with housing issues more comprehensively and holistically, would be to formalise and extend judges' powers in this regard under the Civil Procedure Rules, as proposed below.

10. Fragmentation of housing law: it is also argued that the HDS is necessary because different types of housing dispute are dealt with in different fora. We consider that the difficulties arising from this can be overstated. There are matters which can be defined as "housing law" but which are in reality very distinct (see for example cases involving agricultural land versus homelessness appeals, both of which the government has defined as matters of housing law).[333] Dealing with these cases in different courts/tribunals does not in reality present a problem.

11. We do nevertheless agree that there are areas of crossover within housing law where divergent jurisdictions give rise to confusion and additional expense. The answer to this is cross-ticketing of judges. We would also support measures to make it easier for claims to be transferred between different courts/tribunals, as well as amendments to the jurisdiction of the County Court and Property Tribunal to allow matters which presently fall within the jurisdiction of the latter to be raised as a defence or counterclaim in the former and vice versa (provided that legal aid and inter partes costs were then made available for those matters in the Tribunal). We do not consider this justifies the creation of the HDS.

[333] *Considering the case for a housing court: call for evidence*, MHCLG, November 2018, Annex B.

12. We have concerns about the creation of a two-track (and, at least potentially, two-tier) justice system, split between such very different types of jurisdiction. There is a real risk that housing law will become de-professionalised and will fall behind other areas, perceived as a form of relationship management rather than a distinct area of jurisprudence. Moreover, it ignores the extensive cross-over between housing law and other areas of law, from contracts to discrimination to public law. We do not consider that siphoning this field off into a different system is appropriate.

13. Funding: we do not intend to suggest that we believe the current system to be perfect. It is clearly not, and we agree that there are serious problems, including access to justice, delay, and housing advice deserts. Our view, however, is that these problems arise almost entirely from the under-resourcing of the court system and legal aid as well as the shortage of social housing and the well-publicised problems with the benefits system. The HDS will inherit these problems, not fix them, and it will do so within a context of significantly fewer protections and safeguards for vulnerable parties.

14. Restoring and extending the availability, scope and hourly rates of legal aid (and indeed non-legal advice provision) – such that housing specialists could refer clients to e.g. welfare benefits, mental health, community care and/or family law specialists - would provide an alternative, less drastic way for a comprehensive approach to be taken to housing disputes. We are disappointed that, with limited exception, there seemed to be no attempt seriously to engage with such possibilities by the Working Party, which appeared to start from the assumption that "legal aid is not coming back". The potential risks and benefits of the HDS must be measured against the risks and benefits of reinstating and/or improving existing and/or previously existing provision.

Objections in principle to the HDS

15. Equality of arms: we recognise, and deplore, the fact that many people are excluded from legal aid, whether because their means are above the (extremely low) threshold, or because they live in a legal advice desert, or for whatever reason. The position of such people is extremely difficult and we would support measures to ameliorate it. But the way to achieve this is to increase the availability of public funding, not to undermine the position of

people who do currently have the benefit of legal aid. The answer to some people being without legal representation is not to deprive others of it.

16. What the HDS proposal fails to recognise is that in almost every case there is a fundamental imbalance of power between the parties in housing disputes. The tenant or homeless person will almost by definition be in a worse position. They are more likely to be poorer, more vulnerable, have more at stake, and be less able to represent themselves. For example, where a landlord is trying to evict a tenant: the landlord is likely to be more financially secure than the tenant, even if just because in most cases they will own a property, and the tenant will not; the landlord generally has less at stake than the tenant, even though the case may well be financially very important to them, because the tenant is facing the loss of their home, which the landlord is not; and the landlord often (although, of course, not always) has an easier case to bring than the tenant. Depending on the case, the landlord just has to show, for example, that the correct notice was served or that the tenant is in rent arrears. The tenant must show that, for example, the landlord has committed public law errors in bringing possession, or that to evict him or her would be unlawful disability discrimination under the Equality Act 2010, or that a possession order would be a breach of his or her rights under Article 8 ECHR. Similarly, where a homeless person is challenging the decision of a local housing authority under Part 7 of the Housing Act 1996, again the local authority is in the stronger position. The homeless person not only has far more at stake than the local authority but also has, unlike the authority, virtually no resources.

17. It is only by providing legal advice and assistance to the tenant, homeless person, or other occupier of housing that fairness can be achieved. To remove that representation is to create serious injustice.

18. It is not the case that this unfairness can be mitigated by an "informal" and "inquisitorial" process. We represent clients who have problems with substance abuse, who have mental health difficulties, who lack capacity, and who lead chaotic lives. Advising, taking instructions, gathering evidence, and representing them in court takes many hours of painstaking work. It involves trawling through plastic bags full of documents; repeatedly rebooking appointments which are missed; and working to establish trust and build a relationship. We do not believe that this will be achieved through an

inquisitorial process. The lack of importance placed on the relationship between a vulnerable client and their adviser is deeply troubling.

19. Furthermore, it is not just a small minority of people who will struggle. Almost all our clients are vulnerable in some way, even if that is just because they are at risk of losing their home. This is why the repeated comparisons with the Traffic Penalty Tribunal are, in our view, inapposite. Of course, some users of that Tribunal will be vulnerable, and will have the characteristics described above. But with housing cases such as possession, homelessness, and disrepair, the client group is almost by definition at a disadvantage.

20. These concerns are exacerbated by the fact that there is a clear emphasis on digital means of communication. We recognise the acknowledgement that other channels must exist for those who are vulnerable, but this fails to take into account the ubiquity of vulnerability in this client group. Furthermore, it is not simply a question of being able to access online services, although this is a problem for many of our clients. It is the fact that online services put the burden on the client to understand and provide the relevant information. The opportunity for engagement, clarification, and assistance presented by a face to face interview cannot be replicated.

21. Moreover, it would be fanciful to suggest that the landlord or local authority which is able to do so will not avail themselves of legal assistance. The experience of HLPA members is that, even in no-costs jurisdictions, where legal aid is unavailable the majority of landlords are represented and the majority of tenants are unrepresented. We believe this would be the case in the HDS and that the result would be a serious imbalance.

22. Role of lawyers: these concerns are not assuaged by the fact that some provision is made for a limited amount of legal assistance. It is clear that, on the whole, the HDS is itself to be a lawyer-free zone. Lawyers will be present, but on the margins, advising clients throughout the process. It appears that these lawyers will be drawn from *"a panel of independent, contracted lawyers"* (para 2.70) and the paper proposes that they be offered *"sustainable rates"* which are sufficient to offset the loss of inter partes costs orders (para 2.72). HLPA's concerns with this proposal are as follows:

23. The role of lawyers in the HDS is unclear. On the one hand, it is said that advocacy is not needed as the process is non-adversarial and inquisitorial. On the other hand, it is said that lawyers *"will have a significant role"* to play in, for example, drafting written representations, negotiating with the other side, and advising clients as to the merits of their case. Given that it is recognised that lawyers are necessary to assist with some parts of the case, it is not understood how they can be safely dispensed with for other parts. If the lawyer is needed to draft written representations, on what basis can it be said that the client can adequately represent him/herself in a face to face interview? Similarly, accepting that a lawyer is needed to advise a client on the merits of her/her case seems to be tacit acceptance that the client needs someone, beside the HDS officer, to inform him or her of his rights. If – as the report accepts – a lawyer is needed on the outskirts of the HDS, it is not logical to argue that a lawyer is not needed for the most important part of the process, namely proceedings within the HDS. It is no use providing a client with advice on his case on the periphery if he/she cannot then go on and present that case.

24. It is also wholly unclear in what capacity the panel lawyers will be acting. The report states that in addition to the panel lawyers, clients would be *"free to take legal advice from their own choice of lawyer"* (para 2.70). Presumably, therefore, this means that the panel lawyer is not there to represent the client (as to suggest that public funding might be available for two lawyers would in our view be something of a fantasy). It is not explained what duties will be owed (and to whom) by this panel lawyer, or where their obligations lie in the event of a conflict of interest between, for example, the HDS and the individual. It is not stated whether communications between the panel lawyer and the landlord/tenant will be privileged. These are not minor concerns. The right of a person to seek legal advice, knowing that what they tell their lawyer will remain confidential and that the lawyer is obliged to act in their best interests, is a sacrosanct one which is fundamental to the rule of law.

25. In our view, given the reluctance to provide public funding for lawyers in the system as it exists, it is wholly unrealistic to suggest that there could be the political will to pay for lawyers in a system where lawyers play only an *"advisory"* role. To go further and suggest that they may be paid *more* than under the current system is fanciful.

26. The HDS proposal also appears to assume that housing law is static and all that will be required of the HDS officer will be to apply clearly-established principles to facts. This is incorrect. The law is constantly developing and novel points arise frequently. For example, it was only through advocacy and judicial determinations that vital safeguards such as the ability of occupiers to rely on Article 8 ECHR were established. Our view is that a lawyer-free zone, with occasional appeals, will lead to the atrophy of this area of law.

27. Article 6 ECHR: the HDS would in our view be a breach of Article 6 ECHR. The HDS could not itself satisfy the requirements of Article 6 for *"a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*, with judgment pronounced publicly, and it is appears that the report (properly) accepts this. The argument is made (to the extent that it is made at all - the discussion is limited to a single footnote) that Article 6 is not breached because participants in the HDS retain *"unfettered access to the courts should they not agree with the outcome"* (footnote 46).

28. The starting point in respect of ADR and Article 6 remains *Halsey v Milton Keynes General NHS trust* [2004] EWCA Civ 576, in which the Court stated that (at para 9):

    We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court…it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6.

29. In support of the HDS, reliance is placed on the case of *Lomax v Lomax* [2019] EWCA Civ 1467. In this case, the Court held that there was a power to order an Early Neutral Evaluation to take place even if not all the parties consented to it. However, Moylan LJ noted that *Halsey*:

    ...was dealing with a very different situation. It was concerned with whether a court can oblige parties "to submit their disputes to mediation". It does not,

therefore, in my view assist with the interpretation of sub-paragraph (m), which is dealing with an ENE hearing as part of the court process.[334]

30. Reference is also made in the report to Article 5(2) of the Mediation Directive 2008/52/EC,[335] which provides:

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

31. This Directive, together with the Directive on Consumer ADR 2013/11/EU, was considered in the case of *Menini v Banco Popolare Societa Cooperativea* (Case C-75-16). In that case, the Court held, inter alia, that:

Mediation is defined (at Article 3(a) of the 2008 Directive) as *"a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute" (para 49).*

32. The voluntary nature of mediation lies in the fact that the parties are in charge of the process and may organise it as they wish and terminate it at any time (para 50). It was important that parties could withdraw from the procedure at any stage if they were dissatisfied with its performance or operation (para 57). Requiring parties to demonstrate a valid reason for withdrawing would restrict their access to the judicial system (para 66).

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[334] Although it is fair to note that Moylan LJ commented that the court's engagement with mediation had "*progressed significantly*" since Halsey was decided: His Lordship declined to decide whether it remained good law.

[335] This Directive has been implemented in the UK by the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015/542. It does not apply to housing cases.

33. Directive 2013/11 required that the ADR procedure be *"independent, impartial, transparent, effective, fast and fair"* (para 40).

34. If legislation introduces an additional step to be overcome before a party can access the court, that may prejudice implementation of the principle of effective judicial protection (para 53). Relevant factors for determining whether the mediation procedure is compatible with this principle include: whether the outcome of the procedure is binding on the parties; whether it causes a substantial delay for the purpose of bringing legal proceedings; whether it suspends any limitation periods; whether it gives rise to costs; whether the only means by which the procedure can be access are electronic; and whether interim measures are available for urgent situations (para 61).

35. The Court also noted the recital to Directive 2013/11 which stated that:

    The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter of Fundamental Rights of the European Union. Therefore, ADR procedures should not be designed to replace court procedures…

36. Our view is that the HDS does amount to an obstruction and/or constraint on parties' access to the Courts and would therefore be a breach of Article 6:

    - It is designed to replace an entire level of court procedures.
    - As envisaged, it is neither transparent (it does not appear that published decisions will be forthcoming) or fast (the process described is lengthy).
    - There is no provision for parties to opt out once the process starts.
    - The parties are not in charge of the process and have no control over how it is organised.
    - No provision is made for extending limitation periods.
    - Ultimately, the HDS is not a process whereby the parties are assisted to reach a settlement, although this may be one of its aims. It results in a determination of the parties' rights.

37. It is, in our view, no answer to say that the parties can then appeal to the court on an issue of fact or law as a matter of right. Firstly, we consider this right to be illusory: we cannot accept it to be remotely probable that the government will fund the HDS and then allow those disputes to be replayed

in the court forum. Secondly, allowing an appeal to the court does not displace the fact that the HDS is designed to replace the level of court at which, at present, most housing disputes are dealt.

Practical problems with the HDS

38. Resources: the HDS is proposed on the basis that it will be adequately funded. We see no evidential basis whatsoever for this assumption. Every indication of the last ten years is to the contrary. Given that a large proportion of the problems which the HDS aims to solve arise from a lack of funding, it is difficult to understand how it can be suggested in good faith that the HDS will be properly resourced. This is compounded by the fact that no attempt is made to calculate how much the HDS will cost. It is suggested that a budget of £160 million could be available by way of levies on rented units. We are doubtful that this is an appropriate way of funding an independent, impartial, quasi-judicial service but in any event, this figure is meaningless without any estimation of the running costs. Our view is that such a service would be extremely expensive, and far more expensive than the existing system.

39. Multi-disciplinary: we note the repeated references to the varying expertise upon which it is said the HDS will be able to call, including social workers, DWP officials, and environmental health officers. We entirely agree that, for many people, housing problems are related to a number of other difficulties in their lives and we welcome joined-up thinking. However, the extent to which the HDS will possibly have decision-making powers over multiple areas of a person's life is troubling. It is very unclear what the status of these very different officials will be and how they will function. Who will employ them? Will they be called upon to make decisions (for example, that a person is not entitled to receive Universal Credit or is not eligible for assistance under the Care Act 2014)? If so what status will these determinations have? If they are not decision-makers, what is their role?

40. Effect on legal aid: at present, HLPA members working under the housing legal aid contract remain viable through cross-subsidisation of their legal help housing work with inter partes costs.[336] The fees that are available for work paid at legal help rates do not cover costs. Work at legal help level includes,

[336] See *R (E) v Governing Body of JFS* [2009] UKSC 1 and *ZN (Afghanistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1059 on the importance of inter partes costs orders to public funded practices.

for example, most advice on homelessness and advice on notices seeking possession prior to issue of court proceedings. Moreover, the fees that firms earn from advising on the County Court duty desk at initial hearings of possession cases do not cover costs. HLPA members carry out this work to ensure that vulnerable tenants are represented and remain in their homes. These cases do not represent a viable financial proposition alone. HLPA members survive precariously due to fees made through costs being awarded at inter partes rates in judicial review and in possession cases, which can be more than three times higher than legal aid rates[337]. The HDS would end this cross subsidy and so – without a huge increase in rates, sufficient to compensate for both this difference in rates and the decline in volume of work – would lead to the closure of what remains of legal aid provision.

The process of the Working Party

41. A major concern which we expressed from the outset was the composition of the Working Party. The only members with recent experience of acting for tenants and people in housing need were Tessa Buchanan and Daniel Clarke, on behalf of the Housing Law Practitioners' Association, and John Gallagher, on behalf of Shelter. Such fundamental changes to the justice system as are contemplated by the proposed HDS needed to be considered both at greater length and by a Working Party that was more representative of tenants and homeless persons. We accept that JUSTICE took evidence from other practitioners, but the direction of the central idea was clearly determined in advance and the views of those consulted externally appeared to make little or no impact unless they were favourable to the proposals. This is reflected in the fact that the report does not indicate which of the persons consulted opposed the HDS and which supported it. We consider that the report should have made clear that this radical suggestion is made without the support of any (so far as we are aware) tenants' representatives or organisations.

42. The lack of adequate representation was compounded by the fact that the Working Party process did not allow anything like sufficient time for detailed consideration of something as revolutionary as the HDS. There were some six two-hour meetings of the full Working Party, and five two-hour meetings of each of the three sub-groups. The earlier meetings were largely devoted to

[337] Compare the hourly rates in the hourly rates set out in Schedule 1 to the Civil Legal Aid (Remuneration) Regulations 2013 (ranging from £46.53 for some Legal Help work to £71.55 for certificated work in the higher courts) with the Government's Solicitors' Guideline Hourly Rates of up to £317 for a Grade A fee earner in central London.

improvements in current processes, while the later meetings were mainly concerned with the HDS. Consequently, there was limited opportunity to question either of the main assumptions of the proponents of the Housing Disputes Service, namely that the adversarial system does not enable housing problems to be resolved in a satisfactory manner and should be swept away, and that improvements in the current court system are not capable of providing redress. Nor was it possible to investigate just how, on an operational level, the HDS is to be set up, staffed, funded, administered and regulated, not to mention how the "problem solving" culture of the HDS can be reconciled with the vindication of legal rights and the enforcement of norms of lawful behaviour which are what citizens look to the courts to provide.

Proposals for reform

43. In opposing the concept of the HDS, we do not seek to disguise the fact that the current system does not serve many people well and is in need of urgent reform. We are in complete agreement with the analysis at paragraphs 3.5 and 3.6 of the report, in relation to the woeful effects of LASPO on legal aid and the fact that the county courts are starved of resources and court administration is on its knees thanks to court closures and HMCTS cuts. Many people are denied access to justice because their problem is out of scope of legal aid or because they are financially ineligible for legal aid, or because they live in an advice desert with no housing law solicitor for many miles. We would support many of the recommendations in Chapter 3, although we reject the assumption that digital methods are capable of eliciting the background to a case in the way that face-to-face contact does, and we are concerned that the report appears to place no value on the relationship of trust and confidentiality that people have with a lawyer or adviser. Although the report allows for a multiplicity of channels by way of entry to the HDS, the clear imperative is towards digital conduct, which in our experience is self-evidently not appropriate to the circumstances in which a person's home is at stake or a person finds him/herself homeless.

44. We would advocate substantial changes which would address the current problems of access to justice within the present court system. Among the reforms we would suggest are the following:

(a) The solution to the advice deserts is a willingness on the part of the Ministry of Justice and HM Treasury to fund law centres, housing aid centres and advice agencies throughout the country and to extend legal aid at sustainable rates to permit the underlying issues in a case to be dealt with. The longer term benefits to individuals, families and communities, and to public funds of timely legal advice and assistance in housing cases are well documented.

(b) The Civil Procedure Rules need to be revised and simplified for certain kinds of claim, including housing. They should be concise, clear and accessible. The court should not necessarily expect documents to be "pleaded" in the traditional way. A "statement of case" should be literally that, and the emphasis should be on a clear outline of the facts and relevant law.

(c) Judges should be specialists in housing law.

(d) Housing law is complex. The Law Commission recognised this in its 2001/2 reports, which became the foundation for the new regime in Wales, under the Renting Homes (Wales) Act 2016. A rationalisation of housing law in England is long overdue.

(e) Judges should be permitted and encouraged to adapt their approach to the nature of the case and the parties. Where neither or only one party is legally represented, the judge should (without descending into the fray) adopt a more inquisitorial, facilitative style, assisting the unrepresented party where necessary in order to establish as far as possible a level playing field and ensure that all the relevant facts are before the court. That is in fact the approach that many pro-active district judges take at present. Where both parties are represented, the judge can adopt a more traditional role, but he or she should nevertheless seek to steer the parties towards a settlement and/or should assist the advocates by giving the parties an early indication of his/her views on the issues, in both cases so far as appropriate to do so.

(f) Some of the specialist services which the HDS purports to offer could and should be available under the current system. Thus, an advice service attached to the court would have welfare benefits specialists – advisers rather than DWP officials - to whom the court itself would refer cases in

which a benefits issue needed to be resolved. Some landlords illegally evict tenants with impunity, knowing that there is no likelihood of any comeback. The answer to illegal eviction, harassment and some other private landlord complaints is a Tenancy Relations Service. Many local authorities used to have such a service, but few tenancy relations officers (TROs) now survive. TROs should be funded by legal aid and attached to every court.

(g) If no solicitor is available, as court officers TROs would be able to support the evicted tenant in applying to the judge for an emergency injunction to compel the landlord to let him/her back in, and would have a continuing role in supervising the enforcement of the order. Where claims for disrepair and poor housing conditions are concerned, there is a need for an independent expert to visit the premises and advise the court about the nature and cause of the problem and what needs to be done to remedy it. There is already a cadre of surveyors attached to the Property Tribunal. That resource needs to be expanded with the addition of more experts, including environmental health officers, who are specially trained in the law of unfit housing and disrepair following the Homes (Fitness for Human Habitation) Act 2018. It should then be possible for the court to request a report from a member of this collective, acting as a single joint expert.

45. One reform which the HDS would include is welcome, namely that reviews of adverse homelessness decisions under s.202 Housing Act 1996 should be considered by an independent body rather than by the authority itself, acting in a quasi-judicial capacity in its own cause. Authorities already have power to contract out reviews, although when they do so currently, it is to private review services. Reviews should go to an independent body.

Chapter 4

46. Finally, we note that Chapter 4 contains proposals for wide-ranging reform under the mantle of the Housing Complaints Resolution Service. These were not, to our knowledge, the subject of detailed or substantive discussion in the Working Party. We have not been able to canvass the views of our members on this issue and are therefore not in a position to support it.

FEBRUARY 2020

IX. CHAIR'S RESPONSE TO DISSENT

1. As a former long-time member of HLPA, I am saddened by the opposition of its nominated members to HDS.[338] I do, however, absolutely understand how people who have struggled to help tenants and the homeless in the only way available to them are resistant to a proposal that appears to cut them out of a small part of the process, threatening the economic model by which they subsist, which is one of subsidising advisory work through higher paid litigation income. Their considerable dedication to their clients was always bound to make it difficult for them either to trust any new approach or to acknowledge that there may be other ways of achieving not merely the same ends but improved ends, for a much larger body of need.

2. It would not be appropriate, nor is there time, to respond to every proposition or opinion in HLPA's Dissent,[339] Moreover, there is much in it with which I agree, although I am sorry that HLPA has failed to recognise that the principles on which they rely are also fundamental to the HDS proposal, e.g.. fundamental importance of housing to occupiers,[340] broad interpretation of vulnerability, fundamental imbalance of power[341] and the need for a viable

[338] Recognising that they are representing HLPA's views, I refer to it here as the HLPA Dissent, or simply "Dissent".

[339] In particular, I do not propose to respond to the Art.6 discussion which has been addressed in the main report, or to the criticisms of the Working Party process or on digitalisation, though I would comment that the Working Party was alive to the difficulties the latter can pose for many, particularly the vulnerable. While I accept that vulnerability has to be given a wide meaning (Dissent, para.3(b)) it would be wrong - not to say grossly patronising - to suggest that all or even most tenants would be "digitally vulnerable" even if they, and homeless persons, are all vulnerable in the broader sense of vulnerable to their landlords or local authorities.

[340] At para.19, the Dissent notes that "[a]lmost all our clients are vulnerable in some way, even if that is just because they are at risk of losing their home". Cp. Report, para.2.5: "Moreover, there is an inbuilt imbalance as, in the majority of cases, resolving a dispute for a landlord or service provider is a business matter or a professional function while for a tenant it is about their home, an emotional proposition by which they are constantly surrounded, or in the case of homelessness, the absence of a home".

[341] The Dissent (at para.16) says that "the HDS proposal fails to recognise...that in almost every case there is a fundamental imbalance of power between the parties in housing disputes". This fails to understand that rectifying that imbalance is a central part of the investigative or inquisitorial purpose of the HDS approach: "It is a proposed model for dispute resolution that would set out to investigate and explore with the parties all the circumstances and relevant issues in a housing relationship, not confined by the parties' initial assumptions as to what the issues are, which can themselves reflect an information imbalance between them derived from unequal resources. ... The aim is to ensure that all relevant areas

market of lawyers specialising in housing, willing and able to take instructions on legal aid.[342]

3. I should add that at para.37 of the Dissent, a number of pragmatic and reasoned proposals for reform of the current system have been advanced. These are welcomed and a number had been incorporated into the report. To the extent that there are proposals which were not put before the Working Party, I expect members would have been willing to incorporate them into the recommendations for the current system. I would expect that the implementation phase of this Working Party would see JUSTICE willing to advocate for those proposals well made by the HLPA members.

4. The commitment of HLPA members to their work is as profound as it is uncompromising; no one would have it any other way. Moreover, there is no doubt that they provide a service which protects many vulnerable people. But HLPA members do not enjoy a monopoly on the representation of tenants and the homeless acting on legal aid and the vulnerable whom they serve are only those who reach them which, as we have seen, is far from all of them (see Report, para 2.23, noting that 52% of local authority areas have no legal aid housing lawyers and that 49% of legal aid housing lawyers are in London. See also Report, paras 3.5-3.6).

5. Many of those who are not served by HLPA members are as vulnerable as those who do find their way to a legal aid lawyer; they are often forgotten. As a matter of common sense, the most vulnerable are likely to be the least able to get help. Moreover, we tend to focus on the very poorest who qualify for legal aid, but we should not institutionalise low income thresholds and sparse coverage by others.

6. The vulnerable are at the very core of the HDS concept.[343] It is, as I articulated it in the two editorials in the Journal of Housing Law in which I initially

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of dispute are brought to the surface, including compliance with notice and other contractual and regulatory requirements" (Report, para.2.10).

[342] "It is therefore critical that the HDS does not function to deplete or diminish the corps of publicly funded expert housing lawyers" Report, (para.2.69).

[343] The purpose of housing law itself, as that term is now understood, when it emerged in the mid-1970s, was to seek for tenants (thus, the vulnerable party) an equal voice to that of landlords, who had been able to rely on property rights with which the courts were much more familiar, and to which it may be said

floated the idea,[344] substantially about equality of arms and of definition that means that the least able to cope for themselves must be as empowered as the best resourced. A service like the HDS - inquisitorial rather than adversarial, conscious that tenants will often be vulnerable, trained to identify and assist the vulnerable, unconstrained by what are in the real world artificial legal characteristics, charged to seek out the real causes of disputes and achieve solutions which address underlying problems, with a duty to protect parties and wherever possible to keep people in their homes - offers much more than a solicitor, Law Centre or advice agency, reeling from austerity and its cuts to legal aid[345] and untrained and unresourced in many of the underlying issues, can do.[346]

7. This is not to criticise the services that solicitors, Law Centres and advice agencies provide, but to recognise the reality that for many tenants many housing problems are not confined to the legal issues and that most vulnerable people are not concerned about legal victories but want long-term resolution of their problems and long-term provision of their needs. The HLPA Dissent asserts that their members and the system, including judges, recognise and inquire into underlying problems, illustrating disrepair, mental health and benefits, but it does not say what is done about them, failing to recognise that the HDS is intended to take an active approach to resolve problems, employing skills with which to do so, a role that the Dissent has not, I think, comprehended (see in particular its para. 32).[347]

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they and many in the profession were much more sympathetic, than the protective legislation comprised in Rent Acts and Housing Acts.

[344] Housing Dispute Resolution [2019] JHL 39; Housing Rights and Wrongs - The Beat Goes On [2019] J.H.L. 79.

[345] Even if legal aid is liberalised, limits will inevitably remain and in any event, the private sector will not enjoy the powers to effect resolutions that the HDS is intended to exercise, see, e.g., Report, para. 2.51.

[346] Law Centres - if properly funded - do often have a non-lawyer resource on staff. Much of my own concern about the adversarial system was formed early in my career by two years at Small Heath Law Centre in Birmingham, where the professional staff included a non-lawyer and a collaborative - and inquisitorial - approach was instilled between the Law Centre and the local authority towards the resolution of problems without recourse to litigation.

[347] A court cannot order a benefits reassessment or back-dating; the County Court in a housing case cannot order a Care Act 2014 assessment or similar. Whilst it is undoubtedly true that many District Judges and tenant lawyers will use pressure (including disclosure orders) to try to resolve welfare benefits

8. Perhaps one of the significant differences between us is encapsulated in the proposition that "we struggle to see...how widening the scope of the dispute helps to defuse tension and preserve the parties' relationship"; this fails to recognise that disputes are often, not merely occasionally, triggered by factors which do not see the light of day, that parties routinely misunderstand each others' motives and interests or objectives and that a holistic approach, broadening the basis for understanding, can open up common ground that is not otherwise or immediately obvious. Nor does the Dissent at any point address the objective of ensuring that all issues between the parties are resolved; nor does the Dissent appear to recognise the intention to bring the local authority - both as enforcement authority and as housing authority - into matters with which the HDS is concerned, e.g. actively bringing the issue of rehousing into a claim for possession.

9. The Dissent also alleges a confusion on the part of the Working Party between an adversarial system and actual adversariality, a confusion attributed to a lack of more day-to-day experience of court and case-work, although out of 14 members of the Working Party, 6 were practising housing lawyers rather than academics and two were full-time practising members of the judiciary while two more were part-time Tribunal judges.

10. For myself, I spent 45 years practising in housing law[348] and while it is true that for the second half of that or thereabouts I practised mainly (not exclusively) in appellate courts, I was also Head of, or latterly the most senior person at, Arden Chambers, the only set which (until its merger in 2018)[349] had housing law as its principal specialism and the only set which held itself out to act equally for all parties to the housing process (landlords, tenants and

issues, it needs to be recognised that this is a practice which, while having much to commend itself, is exercised on a dubious legal basis, see, e.g. *North British Housing Association Ltd v Matthews* [2004] EWCA Civ 1736; [2005] H.L.R. 17: if, at the first possession hearing, a mandatory ground for possession based on rent arrears is made out, the court has no power to refuse a possession order save in exceptional circumstances; maladministration by a housing benefit authority is not a sufficiently exceptional circumstance. The HDS is intended to have the ability to initiate or require benefit payments (including back-dating) or a care assessment and other such remedies.

[348] For tenants, the homeless, local authorities and social landlords.

[349] When I left.

local authorities);[350] as such, I was involved, to different degrees of closeness, in much of the work of members of Chambers.[351] The predominantly collaborative approach implied in the Dissent is not one I recognise: to the contrary, the aggressive approach not uncommonly taken in housing cases was a major stimulus for the HDS proposal.[352] The proposition (Dissent, para.34) that only three, named members of the Working Party have "recent experience of acting for tenants and people in housing need" is offensive: Justin Bates[353] routinely acts for tenants, though these days more on a pro bono basis than legally aided.

11. The concern about the development of housing law is also misplaced. Housing is one of the most political areas of law and it is predominantly about statutory law. Of course there are some issues which are developed in case-law, e.g., as the Dissent correctly illustrates, the introduction of Convention rights, and one can identify others, e.g. the meaning of "reside" and "separate dwelling" as key elements in housing law. They are perhaps more prominent because they generate appeals where the overwhelming bulk of cases turn on facts or statutes, but even the majority of appeals are on the interpretation of statutes, not case-law. In any event, the HDS does nothing to stand in the way of the development of the law in cases taken to appeal (assuming that at least one party is dissatisfied with the outcome of the HDS process).

12. The suggestion that the fragmentation of housing law "does not in reality present a problem" (Dissent, para.10) is surprising and runs counter to the broad consensus of contemporary thinking. It can pose very real problems: consider by way of example one recent case, *Adesotu v Lewisham LBC* [2019] EWCA Civ 1405; [2019] H.L.R. 48, in which it was held that a factual argument that someone is disabled for Equality Act 2010 purposes cannot be raised in a s.204 appeal but has to be the subject of free-standing proceedings

[350] This is itself a feature of the adversariality that exists in housing law, just as there are two associations, one founded for tenants and the homeless (HLPA), the other (the Social Housing Law Association - SHLA) founded by lawyers who were excluded from HLPA under its then requirement that members act predominantly for those groups.

[351] The culture was one in which all members were encouraged to discuss cases with each other (subject to conflict of interest and privilege issues) and with more senior members.

[352] While adversariality and aggression are not synonymous, one can lead to the other.

[353] Formerly of Arden Chambers.

in the county court. There are numerous other examples, both at the appellate level and in practice.

13. Where perhaps we most fundamental differ is reflected in the proposition (Dissent, para.17) that "[i]t is only by providing legal advice and assistance to the tenant, homeless person, or other occupier of housing that fairness can be achieved" (emphasis added). This doubtless underlies the principal thrust of the Dissent, that what is needed above all is more legal aid for - among other things - litigation. Litigation is not, however, the only route to fairness for the reasons we have articulated at Report, para.2.8. Litigation is the route which lawyers see, because that is our training, but there is no basis for suggesting that it is the only route.

14. Few are satisfied with the current dispute resolution system; nor is the HLPA Dissent.[354] The economics of legal aid practice are a scandal: reliant on costs in successful cases, there is an implicit conflict of interest between legal aid solicitors and their clients, who rarely want to find themselves in court, an alien, alienating and confusing experience of which they feel little part.[355] The compression of issues routinely ignores underlying problems. The bifurcation of jurisdictions is confusing enough for lawyers, never mind lay people. The delay to which an adversarial system is inevitably prone[356] continues to leave people - including the vulnerable - in unsatisfactory accommodation not only for months but sometimes for years on end. Landlords, too, want swifter remedies and, as things stand, that translates into swifter evictions rather than outcomes which are positive for tenants as much as for them.[357]

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[354] Dissent, para.36.

[355] There is no recognition anywhere in the Dissent of their clients' perspective or feelings about the system.

[356] At least two parties with different interests, tactics and goals are bound to generate delays as each manoeuvres their way towards the decision they seek, not to mention courts balancing how they provide their time to numerous cases and the vagaries of how court time is used.

[357] Save where the landlord wants to sell, there is prima facie no benefit to a landlord in an eviction, only additional cost. Of course, there are badly behaved tenants, of whom a landlord may want to be rid, but this already moves us into the terrain where recognition and understanding of the tenants' underlying problems may affect the outcome.

15. The Dissent suggests that one of the applicable principles is "non-retrogression in the protection of occupiers' rights".[358] I agree - HDS is intended positively to advance occupier's rights not reduce them. But, even if, which I doubt, there is any prospect at all of a return to the putatively halcyon legal aid days of the 1970s and continuing albeit always under pressure, there may be something of a want of institutional history amongst those who argue for it: it was never satisfactory, tenants were never comfortable, results were never consistent, cases rarely achieved a long-term end to strife, conditions were rarely good.

16. The Dissent is also, of course, concerned with the exclusion of lawyers. It should be borne in mind that the objection is to exclusion from a small part of the process (and our proposal for a pilot is to introduce the HDS to at least one location where there is currently no housing advice). The process, as outlined in the report at Report, paras 2.49-2.57, envisages that lawyers will (as now) advise and negotiate with other prospective parties before referring a client to the HDS as they will need to do given its mandatory use: if, as the Dissent implies, many disputes end there, then HDS will not come into the picture and nothing will change.[359]

17. During Stage 1, lawyers will assist clients in responding to requests for information and/or in correcting inaccurate information procured by the HDS (including that submitted by another party). At Stage 2, they will receive and consider and advise their clients - in writing or not as they may decide - on the initial, provisional assessment and on what their bottom line entitlements are for the purposes of Stage 3. If no satisfactory agreement is reached at Stage 3,[360] they will of course advise their clients on the Stage 4 adjudication and represent them in any appeal, armed with the full information secured by the HDS some or even much of which may not have been available under current arrangements, especially given constraints on legal aid. Assuming a

[358] Dissent, para.3(b).

[359] Though it is hoped that, with time, all may come to see that there are positive advantages in the HDS process which conventional "settling" does not achieve.

[360] Parties always having an opportunity to consult with their lawyers before final agreement is reached; the HDS having a positive obligation to ensure that the vulnerable are aware of this and equipped to do so and to facilitate it - see Report, paras 2.25-2.27, 2.55.

sustainable rate of legal aid for all this work, this is, on its face, a patently more satisfactory economic model.

18. What lawyers are excluded from is the ADR Stage 3. The presence of lawyers risks defeating the overarching purpose of bringing parties together to seek out the common ground that can provide a basis for sound continuing relations. While I am confident that many of the lawyers I have worked with over the years would welcome a new approach[361] and might be expected to throw themselves willingly and appropriately into the intended culture, many would not do so and would instead approach it much as they approach conventional litigation, something which is often noticeable when lawyers are present during mediations. Lawyers in this country are steeped in adversariality, they are deeply competitive, it is what they are trained to do, it is in their DNA.

19. At least in the early years of HDS, as it finds its own feet, the risk to the process of allowing lawyers to participate in the Stage 3 process is very real. Parties will almost invariably follow their lawyers rather than the other way around. The prospects for a new culture not merely of dispute resolution but as between landlords, tenants and authorities generally[362] would be severely undermined.

20. That is not to put the process above the interests of parties and, in particular, of vulnerable parties: the process has been structured to ensure protection for the vulnerable and that they cannot be taken advantage of.[363] It may be that the absence of lawyers comes to be seen as a negative; it may also be that lawyers - in particular, panel lawyers[364] - will respond to working with the

[361] As do non-dissenting lawyers on the Working Party.

[362] See Report, para. 2.16.

[363] Again, the vulnerable will have access to properly funded lawyers to ensure that they are not adversely affected which many of them may well not have now; this will apply even during a pilot.

[364] This is another area of misunderstanding. At para.22(b), the Dissent states: "The report states that in addition to the panel lawyers, clients would be *"free to take legal advice from their own choice of lawyer"* ([Report,] para 2.70). Presumably, therefore, this means that the panel lawyer is not there to represent the client (as to suggest that public funding might be available for two lawyers would in our view be something of a fantasy). It is not explained what duties will be owed (and to whom) by this panel lawyer, or where their obligations lie in the event of a conflict of interest between, for example, the HDS and the individual. It is not stated whether communications between the panel lawyer and the landlord/tenant

HDS positively and adapt their own approaches to play a useful role within it. It may be that as the HDS takes shape, as its staffing acquires more confidence, as lawyers see its benefits, the exclusion may come to be reconsidered. It is obvious, however, that to start it with lawyers embedded in the process will impact adversely on the character that it is intended to have.

21. The concern that government may cherry-pick the proposal, which is not explicit but I am sure is implicit in the Dissent, is recognised and respected; it may do so with any innovation. That cannot, however, mean that we can never seek new solutions, especially one which has the potential to bring significant benefits to all parties to a housing relationship, including tenants. Landlords will be able to turn to their own lawyers to guide them in relation to the HDS process. Government needs to understand this loud and clear: there is no point even testing it unless there are housing lawyers available and willing to do the same for tenants; it will not work.[365] That not only means that legal aid must be available before, during and after the process, but that - if there is to be no reliance on successful litigation costs - legal aid must be at a sustainable rate. It would be absurd to spend what is needed to try the process out while paying lawyers at a rate that means they have an incentive to torpedo it. This is not cant but common sense.

22. All that JUSTICE and I have sought is a pilot: it is very hard indeed to see why that should be resisted, even where there is a genuine belief that the vulnerable may be not be as well-served as under the current - universally accepted as inadequate and unfair - system for resolving housing disputes. It is very difficult indeed to understand why the Dissent should wish to block even that, but as it does not directly address this, there is nothing that can be said about it.

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will be privileged. These are not minor concerns" (emphasis in Dissent). They would not be minor if there was any basis for them: panel lawyers will advise a party as in any other case; they are merely lawyers who (i) will have the necessary experience in housing law, (ii) wish to take part in the process, and (iii) who may be paid through the HDS process, but not in any sense employed by HDS. It is not unheard of for one party to fund another's lawyer; it does not alter the duty the funded lawyer has - exclusively - to the party they represent.

[365] It will most immediately be reflected in the number of appeals.

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