INTRODUCTION

1.1 The Issues Paper sets out ideas for a more proportionate system for solving housing problems and resolving housing disputes. We want to share our preliminary ideas with policy makers and the public at large to see whether there is broad support for them, whether they go too far, or not far enough. We need to know as much as possible about what currently happens, and how those doing this work would like to see things develop.

1.2 We will be doing more work on the practical steps necessary to deliver these ideas on the ground. The importance of your responses in helping us to shape the next steps cannot be overstated. There is likely to be a further consultation on these detailed proposals later in the year.

1.3 Consultation on the Issues Paper lasts until 11 July 2006. The full text of the Paper is available on the Law Commission website.¹ This should be consulted if points made in this summary are not clear – we have included cross-references in this Paper to make it easier to do so. The questions may be answered on-line; the response form is also available on the Law Commission website.² Partial responses are as welcome as full responses; you do not have to answer all the questions. Responses should be sent

by post to:
Eleanor Cawte
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London
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by e-mail to:
public@lawcommission.gsi.gov.uk

It would be helpful if, where possible, comments sent by post could also be sent on disk, or by email to the above address, in any commonly used format.

All responses will be treated as public documents in accordance with the Freedom of Information Act 2000, and may be made available to third parties.

OBJECTIVES OF REFORM

1.4 We identify the principal objectives of reform as being to:

(1) increase people’s access to information and processes;
(2) enable the system to operate more flexibly;
(3) allow people to make fully informed choices about what process or procedure is best for them;
(4) as far as possible, seek to resolve both the presenting and any underlying problems;
(5) provide as wide a range of outcomes to people with problems as possible;
(6) provide the feedback required to improve decision making to prevent similar problems arising in future;
(7) operate in a timely and efficient way; and
(8) operate at proportionate cost.

Do consultees agree that the issues identified in this paragraph should be at the heart of any programme of reform?

[See Issues Paper paras 2.12 to 2.18]

1.5 There is a range of different types of issue which any reformed system must be able to accommodate. These include: party-party matters; citizen and state matters; matters involving third parties; factually complex matters, where housing is only a part; legally complex matters, involving several areas of law; and emotionally charged matters.

(1) Do consultees agree that these are the types of issue which any reformed system needs to be able to accommodate?
(2) Are there other classes of matter which also need to be considered?

[See Issues Paper para 3.18]

PROVISION OF INFORMATION AND ADVICE

1.6 All the relevant research shows that the key to getting problems solved and disputes resolved proportionately is getting good information and advice to those with problems or in dispute as early as possible.

1.7 The same research also reveals two perennial problems.

(1) Too often information and advice is sought too late, by which time the problem or dispute has reached crisis point.
Many groups might benefit from information and advice, but are extremely hard to reach, for example, members of minority ethnic groups, those with below average levels of educational achievement, and many young people. In the housing context, many landlords are equally uninformed about their rights and obligations.

1.8 We know that a great deal of imaginative work is undertaken by, for example, Citizens Advice, Shelter, and the bodies that represent landlords and their managing agents. We are anxious to hear from them and others whose work is less well known, particularly about providing information and advice to the hard to reach groups.

1.9 We would also like to know of any evaluations of the impact of work that has been done. Stories in the specialist housing press suggest that social landlords can cut the costs of dealing with disputes by putting resources into problem solving. Nipping a problem in the bud is cheaper than allowing a dispute to arise.

(1) Are there already examples of agencies offering information on legal rights in the local community?

(2) Is it possible to measure the impact of this work?

(3) What steps are currently taken by advice and other agencies to inform members of the public, either in general, or particular groups, about their housing rights and obligations?

(4) Are there examples where it has been demonstrated that the provision of early information and advice has reduced costs in the longer term?

(5) If so, is there any quantification of the savings achieved?

IDENTIFICATION OF OPTIONS

1.10 Currently a large range of options, both of sources of advice and dispute resolution mechanisms is available. Our working assumption though is that few, if any, current advice providers are able to offer their clients the full range of available options.

(1) Is our working assumption correct?

(2) If not, how do agencies that are able to offer a full range of options to their clients achieve this in practice?

(3) How might current good practice be developed and provided more generally through the system of triage plus?

(4) What practical assistance could be developed which would enable advisers to provide the holistic advice proposed?
(5) Do organisations use structured questionnaires or computer programmes which both help to identify the essential problems of matters in disputes and suggest appropriate and proportionate ways of dealing with them?

(6) Are there models used in particular non-housing contexts (for example financial services, or health services) that might be adapted for use in the context of housing problems and disputes?

(7) How can these options be identified and presented to members of the public in a way that is itself not bureaucratically disproportionate?

[See Issues Paper paras 4.3 to 4.4]

TRANSFORMING PROBLEMS INTO DISPUTES

1.11 Part of our analysis draws on research that investigates how problems are transformed into disputes, including those determined by a court or tribunal. The research argues that the process of transformation is affected both by the advice-giver and by the procedures and rules of the dispute-resolver. For example:

(1) A repair problem may be transformed by a law centre into a legal claim for a court. A housing aid centre may make it an issue about poor housing administration to be dealt with by a complaints process or taken to an ombudsman. Mediation may enable the parties voluntarily to come to an agreement.

(2) Aggressive landlord behaviour may be transformed into a legal action for unlawful eviction or harassment; or be seen as a tenancy relations issue, for a tenancy relations officer to resolve through negotiation or mediation.

(3) Noisy neighbours may provoke legal action to be taken to court; or be seen as an environmental health issue to be dealt with by environmental health officers; or be seen as an issue for a neighbourhood or community mediation scheme.

1.12 Given that there are differences in the ways in which individuals are advised and in the ways in which disputes are resolved, some of these may be less proportionate than others.

(1) Do these theoretical examples reflect the practical experience of consultees?

(2) If they do, how far should any reformed system of problem solving and dispute resolution seek to reduce the differences in the options that may be identified by different groups of advice giver?

(3) How might this be achieved?

[See Issues Paper paras 2.40 to 2.46 and 3.3 to 3.13]
VALUES
1.13 We identify a number of values which should underpin any reforms. They include: accuracy; impartiality and independence; fairness; equality of arms; transparency; confidentiality; participation; effectiveness; promptness, efficiency/cost; and impact. In addition, consideration must be given to principles set out in the Human Rights Act 1998.

1.14 We also noted that many of these values conflict with each other; assertion of one could lead to a diminution of another. A proportionate dispute resolution system is one built on these values and which allows appropriate balances to be struck between them.

(1) Have we identified the correct values?

(2) Are there others we should add?

(3) Are any of the values we have identified less important than we have suggested?

(4) How far should parties to housing disputes (as opposed to the system itself) determine which values should be prioritised?

[See Issues Paper paras 2.12 to 2.18]

Impact
1.15 One of the major problems with the current system is how those who deal with housing problems or disputes can give feedback to the bodies or individuals who caused them, to prevent problems arising in the future. Some agencies do offer some forms of feedback. But practice is, we understand, by no means universal.

(1) How can individual decisions have a wider impact in a reformed system of problem solving and dispute resolution?

(2) Do you agree that this wider impact could be achieved through greater provision of feedback?

(3) What incentives will be needed to ensure that those to whom feedback is offered take notice of it and act on it?

(4) Do you currently offer any feedback? If so, how, and to what effect?

[See Issues Paper paras 2.47 to 2.48]

Effectiveness
1.16 Methods of dispute resolution may be ineffective, for example, if they fail to produce a decision where one is required; if they fail to deal with the underlying problem; or if they lack comprehensiveness; or are too rigid.
**Failure to deal with the underlying problem**

1.17 The process of transforming problems into disputes can mean that the problem which comes to the attention of the adviser, court or other dispute resolution mechanism may not address the underlying problem. One example is of possession proceedings being taken for rent arrears, where the underlying problem is failure of housing benefit administration. There are limits to the extent that any system for solving problems and resolving disputes can go. Nevertheless:

(1) Are there particular types of housing problem where the current system tackles the problem presented to the adviser or court but cannot deal with the underlying problem?

(2) If so, how might a reformed system address this challenge?

[See Issues Paper paras 2.26 to 2.28]

**Lack of comprehensiveness**

1.18 A related issue is whether current mechanisms for dealing with problems and disputes are sufficiently comprehensive to address issues that arise in practice. We suggest that one deficiency is the difficulty of resolving issues on a collective as opposed to an individual basis. Another is that the present system may not be able to deal with systemic problems such as discrimination.

1.19 A rather different example arose in considering the relationship between courts making decisions on possession and local authorities making decisions on applications for accommodation by the homeless. At present these are seen as quite distinct activities.

(1) Should a proportionate dispute resolution system allow possession and homelessness applications to be decided in a single process?

(2) Are there other general concerns about the ability of the current system to deal with:

   (a) systemic or collective issues (where the same problem affects other people); or

   (b) connected issues affecting the same person, which a reformed system should properly address?

(3) If so, what are these issues?

(4) How might they be best addressed in a reformed system?

[See Issues Paper paras 2.29 to 2.30]

**Rigidity**

1.20 We are anxious to know your views on the extent to which rigidity, for example as between courts and ombudsmen, contributes to disproportionate dispute resolution, whether through ineffectiveness, delay or costs.
Are there particular rules of law or rules of procedure that inhibit proportionate dispute resolution?

[See Issues Paper paras 2.31 to 2.34]

Efficiency/cost

1.21 The relationship between the problem or the dispute and the cost of dealing with it must be looked at as part of striking an appropriate balance between the conflicting values. It is important that the costs of following a particular procedure do not get out of balance with what is at stake. There will be continuing pressure to identify potential cost savings. This consultation offers those with knowledge of the system the opportunity to identify ways in which expenditure might be redirected, rather than having cuts imposed by those who may have less understanding. Answers to these questions will be a key element in building the case for the reinvestment of savings into new forms of (proportionate) service delivery.

(1) Are there places where the current system imposes disproportionate costs?

(2) If so, on whom do these costs fall?

(3) If there are, is it possible to quantify what those disproportionate costs are?

(4) Do conditional fee agreements contribute to access to justice or simply increase disproportionate spending on litigation?

[See Issues Paper paras 2.36 to 2.37]

1.22 We are also interested in whether you think there are other sources of funding which could contribute to the cost of proportionate housing dispute resolution.

(1) Do consultees think that interest on tenancy deposits could be a source of funds for triage plus or other aspects of a proportionate housing dispute resolution system?

(2) Could an extension of legal expenses insurance policies cover the costs of legal advice for mediation and other non-court dispute resolution, as opposed to litigation?

(3) Do legal expenses policies cover non-court dispute resolution at present?

(4) If so, could more be done to encourage households to take out legal expenses insurance?

(5) Could householders be encouraged, or even required to take out “dispute resolution expenses” cover?
Alternatively could a supplement to, or tax on, the cost of the policies themselves be used to pay for elements of a housing dispute resolution system, such as triage plus providers or tribunals?

[See Issues Paper paras 4.49 to 4.54]

Lack of coherence

One reason why the identification of the range of options is so difficult is the huge number of bodies offering housing advice or dispute resolution services. We are anxious to ensure that the entrepreneurial spirit that obviously exists should not be undermined. We also know that there are a number of umbrella organisations who advise advice agencies. We want to hear their views on whether there are ways in which overall standards of advice giving need to be improved and if so how.

(1) Given the large numbers of agencies involved, do they all operate with an adequate degree of expertise?

(2) Are there ways in which their working methods and advice might be better co-ordinated?

[See Issues Paper paras 2.38 to 2.39]

Delay

It has been suggested that there is disproportionate delay in the current system for resolving disputes. It has also been suggested that experience in other jurisdictions is that matters can be resolved more speedily than they are here. Some organisations have responded by setting target deadlines for dealing with cases.

(1) Is delay a problem? If so, in what contexts?

(2) Given the need for due process (fairness, accuracy, transparency, participation and equality of arms), is there a level of delay that is unavoidable?

(3) Do target deadlines assist in delivering outcomes with less delay or do they simply shift delays to other parts of the system which are not subject to specific targets?

[See Issues Paper para 2.35]
1.25 Central to our ideas is “triage plus”. Through “signposting”, this would aim to bring greater coherence to housing advice provision and the direction of housing problems and disputes to appropriate methods of resolution. (This could include advising that there was no solution to the problem other than acceptance of it; or enabling people to solve problems themselves.) Through oversight, triage plus would enable different parts of the system to learn from each other. Through intelligence, triage plus providers would pass on concerns about systemic problems (for example, widespread disrepair, housing benefit administrative delays) apparent from the matters about which advice is sought, or from courts’ or ombudsmen’s caseloads to the decision makers responsible, with a view to altering practice.

1.26 Important questions surround who would provide triage plus, and how it would be funded. How far users should be compelled or encouraged either to use triage plus, or accept any recommended dispute resolution methods is also important.

(1) Do consultees agree that triage plus should be at the centre of a reformed system of proportionate housing dispute resolution?

(2) If so, do they agree that the three main functions of triage plus should be “signposting”, oversight and intelligence?

(3) Do you agree that oversight is a key role for triage plus?

(4) Do consultees agree that as part of its oversight function it would be appropriate for triage plus to be able to challenge dispute resolution practices that appear to deviate from the law or other agreed sets of principles?

(5) Do consultees agree that the triage plus provider should be able to refer cases to a court or ombudsman without itself being a party to a dispute?

(6) Are there other ways in which triage plus could engage in the strategic development of dispute resolution procedures?

(7) Can you provide examples of the successful use of information, either at national or local level, to change policy or practice?

(8) Do consultees agree with our view of the matters which triage plus might deal with (reconciliation to the inevitable, self-help and referral for support and advice)?

(9) What do agencies offering housing advice services currently offer?

(10) How far do they seek to deliver the kind of service we have in mind?

(11) What ideas do they have about how a future service might be shaped?

(12) Who should provide triage plus?
(13) Where is triage plus to be provided?

(14) Should use of triage plus be compulsory?

(15) Should similar principles apply to those who seek advice from triage plus (as apply under the disrepair pre-action protocol and draft possession protocol requiring certain actions before court proceedings can be started, with costs sanctions if they are not followed)?

(16) How can a scheme be kept proportionate, striking an appropriate balance between the values, if parties are wholly free to choose disproportionate options?

(17) How should triage plus be organised?

(18) How can triage plus be funded?

(19) How can the essential independence of triage plus providers be protected so that they are able to take appropriate actions against bodies (for example, local authorities) that may also be funding them?

(20) Is it possible to achieve a consensus on the other values that should underpin triage plus?

(21) If not, what are the most important values that should underpin triage plus?

[See Issues Paper Part 4]

MANAGEMENT RESPONSES

1.27 Management responses (such as performance indicators, performance review, internal or external audit of decision making, complaints handling mechanisms, internal or external review of decision making and the use of “public interest groups”) are relatively cheap to users, and they should ensure that decisions are right the first time, or that if they are not right the first time, are quickly rectified. In the specific context of housing problems, a focus on management responses could lead to better co-ordination of possession proceedings and decisions on homelessness. It could also lead to more appropriate use of possession proceedings, which would not be taken unless prior issues such as housing benefit problems had been sorted out. Another consequence could be more appropriate outcomes. For example working with “public interest groups” such as tenants’ organisations.

(1) What benefits do consultees think these methods provide?

(2) What disadvantages do they have?

(3) Are there types of housing problem to which they are particularly well-suited?

(4) Are there types of problem which they cannot effectively address?
1.28 There are a number of issues about the application of the management response model to particular housing issues.

(1) To what extent might the techniques be developed in the context of rent arrears possession proceedings?
(2) To what extent should and could private landlords be subject to these techniques?
(3) To what extent should mortgage lenders be encouraged or required to engage in these techniques prior to, or instead of, possession proceedings?

[See Issues Paper Part 5]
Are there both gaps and overlaps in service provision which need to be addressed?

Can and should there be greater uniformity of approach in their working practices?

Is the more detailed approach (listing actions which may amount to maladministration) to be preferred to the more general one?

Do they face institutional barriers which prevent them operating as effectively as they could?

What is the current relationship between ombudsmen and the courts, both in law and in practice?

What should it be?

How should this relationship be managed?

When considering housing disputes, ought ombudsmen be able to make direct decisions on points of law, or should they be given the power to apply to a court for a determination of a point of law?

What are consultees’ views on the different approaches to investigation revealed by current practice?

How might they be reformed to fit into a proportionate system of problem solving and dispute resolution?

To what extent should complainants who have agreed that one mode of investigation is appropriate be prevented from asking for another?

If there are to be limitations on the use of further processes should these be by way of direct prohibition, or achieved indirectly through a power to charge fees or impose costs?

Should the recommendations of ombudsmen dealing with housing matters be made directly enforceable, for example, by taking enforcement proceedings in court?

Or would such an approach work against the idea of proportionality by leading to increased costs and delays?

Would such an approach lead to a more legalistic approach at the expense of individual participation or equality of arms?

Can ombudsman services retain their coherence and extend their jurisdiction?

We also ask about the extent to which ombudsman services are currently able to:

liaise with housing bodies against whom significant numbers of complaints are received;
follow up promises to effect change made by housing bodies;

develop codes of practice in relation to housing disputes;

conduct investigations on their own initiative.

Do consultees think such activities are valuable?

1.31 Finally:

(1) Do consultees think there are other ways of enhancing the effectiveness of ombudsman services?

(2) In particular, should ombudsmen services be able/required to develop a proactive oversight role on housing matters?

[See Issues Paper Part 6]

MEDIATION

1.32 An agreement to settle a dispute reached by the parties to it, with the help of a neutral third party (a mediator), may include solutions which a court could not have ordered. The parties may be more likely to comply with an agreement they reached themselves than a decision imposed on them. Mediation may maintain or restore ongoing relationships (for example, between neighbours). The role of the courts in encouraging mediation can be controversial, if parties feel coerced. Some commentators have concerns about the use of mediation where there is an imbalance of power between the parties. We would particularly value personal accounts of the use of mediation processes in housing contexts.

(1) Are there particular housing contexts where mediation is particularly appropriate?

(2) Are there contexts where it is particularly inappropriate?

(3) Despite the current emphasis on the voluntary nature of mediation, are there any contexts where mediation should be made compulsory?

(4) Is community mediation more suitable for housing disputes than court based mediation?

(5) Is there a need for further judicial activism in promoting mediation and changing the attitudes of legal advisers and parties to disputes?

(6) What added value can mediation bring to housing disputes and how can that value be measured?

(7) To what extent could mediation be adopted in homelessness, private and social rental possessions cases, and mortgage cases?

[See Issues Paper Part 7]
ADJUDICATING HOUSING DISPUTES: COURT OR TRIBUNAL?

1.33 A variety of courts (civil and criminal) and tribunals currently hear housing cases. There is a need for such bodies to provide, for example, authoritative interpretations of the law, hear appeals, and comply with European Convention on Human Rights requirements for an independent and impartial tribunal. Their strengths include: independence, procedures based on transparency and fairness, and the delivery of authoritative, accurate outcomes. But they also show what some regard as weaknesses: cost, delay, inequality of arms and failure to consider underlying issues. Some have called for a specialist housing court or tribunal.

(1) Should such a body be specialist or generalist?

(2) Should it be a court or tribunal?

(3) Should current civil and criminal jurisdictions be amalgamated?

(4) Does a proportionate system of housing dispute resolution require the closer integration of criminal and civil courts?

(5) Do legal processes for dealing with matters relating to anti-social behaviour work in a proportionate way, or should they be altered?

(6) What values would be affected by any greater integration of civil and criminal procedures?

(7) What reforms are needed to enable collective issues to be better determined by a court or tribunal?

(8) Are there any types of proceedings that should be excluded from a court or tribunal?

(9) In what circumstances should legal aid be available for housing proceedings before tribunals or courts?

(10) Should there be a uniform policy relating to the fees to be paid for taking proceedings in a court or tribunal?

(11) Should the small claims limit for housing disrepair cases be altered?

(12) What should be the costs rules in a proportionate system of housing dispute resolution?

(13) Where should housing disputes that require a hearing be held?

(14) Should it be easier for hearings to be held in the premises the subject of the dispute?

(15) Should other experiments be tried, particularly in rural areas – for example a travelling court (say a converted bus) which takes the court or tribunal to the people?
(16) Would greater use of information technology be welcomed as offering users greater choice in the ways hearings are conducted?

(17) Should the housing adjudication body involve not just lawyers but also those with a wider range of professional expertise?

(18) Would such a move facilitate proportionate housing dispute resolution?

(19) If there was support for this view, would or should this have other procedural implications, for example, by reducing the need for expert witnesses?

(20) To what extent should the court/tribunal itself try to help those who want to use its services?

(21) Is such encouragement (to the parties to disputes to attend hearings) also needed in the housing context?

(22) If the answer is yes, how might that encouragement be provided?

(23) What case management powers should be available in the context of housing adjudication?

(24) What sanctions should apply where procedural rulings are ignored?

(25) What degree of formality is appropriate for adjudicating housing disputes?

(26) Should this vary depending on the nature of the proceedings?

(27) To what extent can housing disputes be adjudicated without the need for oral hearings?

(28) Can adjudication procedures be made less adversarial?

(29) Would a more inquisitorial approach improve the ability for parties to move on from their disputes?

(30) Could feedback from those who adjudicate housing disputes have the effect of preventing problems arising in future?

(31) If so, what are the best ways of providing such feedback?

(32) Should the adjudicating body itself provide, for example, guidance on best practice, or statistical information?

(33) Or would it be preferable for such information be provided to others, for example the triage plus providers, to incorporate into their feedback?

(34) Or do consultees think that the types of case that require adjudication tend to be such that it is hard to draw general inferences from them?
(35) Is there further scope to combat delay in proceedings that require adjudication?

(36) What are the appropriate time periods within which disputes should normally be adjudicated?

(37) Should current listing practices be altered?

(38) Should parties be able to choose their own hearing times?

(39) If other values (for example, cost or delay) had to be compromised, which should those be?

(40) Should courts or tribunals have a power to require persons to receive advice on money management?

(41) Should courts or tribunals have power to require persons to undergo forms of cognitive or other behaviour altering therapies?

(42) Are there particular problems involved in the enforcement of decisions relating to housing?

(43) Should tribunals have enhanced enforcement powers?

(44) Should there be restrictions on the use of legal representation (as in some housing tribunals in Australia and New Zealand)?

(45) How should the appropriate balance be struck in the provision of resources for adjudication, triage plus and the other methods of problem solving and dispute resolution identified in this Paper?

[See Issues Paper Part 8]