



The Law Commission

(LAW COM No 309)

HOUSING: PROPORTIONATE DISPUTE RESOLUTION

*Presented to the Parliament of the United Kingdom by the Lord Chancellor
and Secretary of State for Justice by Command of Her Majesty
May 2008*

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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http://www.lawcom.gov.uk/housing_disputes.htm

THE LAW COMMISSION
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To the Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice

PART 1 INTRODUCTION AND SUMMARY

INTRODUCTION

- 1.1 The Law Commission is nearing the end of its major programme of work on the reform of housing law and practice. Renting Homes¹ made recommendations for the simplification of the current law. Encouraging Responsible Letting² explores new approaches to the regulation of the private rented sector in order to improve housing management.
- 1.2 Renting Homes proposes a thorough-going reform of the existing law, an irrational, massively over-complicated mess. Our proposals would replace it with a modernised, understandable and just legal structure. In the process, a large number of existing tenancy types would be abolished, and replaced with a simple two tier system. The report has received an overwhelming (albeit not universal) level of support from those concerned with housing law and practice both in England and Wales.
- 1.3 The conclusions and recommendations in this report stand on their own. Whatever the state of the substantive law, housing problems and disputes will continue to arise. This report considers how they may be solved and resolved proportionately. However, the adoption of the proposals in Renting Homes would vastly improve the position in relation to disputes. Clearer law means fewer disputes. Simpler law makes advising easier.

¹ Renting Homes (2006) Law Com No 297, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf and http://www.lawcom.gov.uk/docs/lc297_vol2.pdf.

² Encouraging Responsible Letting (2007) Law Commission Consultation Paper No 181, <http://www.lawcom.gov.uk/docs/cp181.pdf>.

CONTEXT AND TERMS OF REFERENCE

1.4 During the consultations leading to Renting Homes,³ questions about housing dispute resolution frequently arose. Many responses contained criticism of current means of resolving housing disputes, and made suggestions for change. These responses came from a wide variety of interested people and organisations.⁴ The consultation leading to our report on Land, Valuation and Housing Tribunals raised similar issues.⁵

1.5 Renting Homes said:

We were surprised at both the level of complaint about current procedures and the degree of support for a study of alternatives, including alternative dispute resolution (ADR). We recommend that there should be a further project on the adjudication of housing disputes and how the law and practice in this area might be reformed.⁶

1.6 We therefore proposed to undertake a broad review of disputes in the housing sector. The extent of our enquiry, agreed with the (then) Department for Constitutional Affairs, was set out in the following terms of reference:

To review the law and procedure relating to the resolution of housing disputes, and how in practice they serve landlords, tenants and other users, and to make such recommendations for reform as are necessary to secure a simple, effective and fair system.

1.7 In our ninth programme of Law Reform, we described the nature of the project:

[It] is designed to go beyond narrow questions of jurisdiction and the relative advantages of courts and tribunals. Rather, the aim is to start with a consideration of how housing problems and disputes arise in the first place, how they may be linked with other problems, and whether the existing system in fact distorts problems. The project will also consider what other countries can teach us about the resolution of housing disputes. Based on this broad approach, the project will move to consider what outcomes are desirable, and how a flexible dispute resolution system can be designed to secure them.

³ Renting Homes (2006) Law Com No 297, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf and http://www.lawcom.gov.uk/docs/lc297_vol2.pdf.

⁴ Responses to Renting Homes 1: Status and Security (April 2002), Law Commission Consultation Paper No 162, <http://www.lawcom.gov.uk/docs/cp162>.

⁵ Land, Valuation and Housing Tribunals: The Future (2003) Law Com 281, <http://www.lawcom.gov.uk/docs/lc281.pdf>.

⁶ Renting Homes (2003) Law Com No 284, para 2.41, <http://www.lawcom.gov.uk/docs/lc284.pdf>.

1.8 The government's White Paper "Transforming Public Services: Complaints, Redress and Tribunals" indicated the government's intention to improve the present "one dimensional" system for the resolution of housing disputes through the development of a broader and more sophisticated understanding of housing problems.⁷ The paper also set out key issues to be investigated by the Law Commission:

- (1) The types of problems relating to housing that people have in practice.
- (2) How these problem areas break down into individual justiciable legal problems and other non-legal problems.
- (3) The best way to respond to legal problems and disputes including consideration of other methods of dispute resolution such as negotiation, mediation and so on.
- (4) For disputes that require judicial determination, the features of a suitable forum.
- (5) The links between resolution of legal problems and access to other housing and related services.⁸

1.9 We identified four broad matters to be considered in the course of our enquiry:

- (1) investigating the capacity of current modes of housing dispute resolution to solve people's housing problems;
- (2) considering how they might be adapted into a broader approach to housing problem-solving;
- (3) examining the relationship between housing problems and dispute-resolution processes; and
- (4) considering the nature of disputes and how they arise, and the social processes involved in the shaping of disputes and their resolution.⁹

⁷ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (2004) p 61, <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf> (last viewed 28 April 2008).

⁸ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (2004) p 61, <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf> (last viewed 28 April 2008).

⁹ Housing: Proportionate Dispute Resolution: An Issues Paper (2006) Law Commission Issues Paper p 10, http://www.lawcom.gov.uk/docs/issues_paper.pdf.

PUBLICATION AND CONSULTATION

Pre-consultation stage

1.10 Prior to publication of our Issues Paper (referred to below), we had discussions with an expert working group representing users and advice groups.¹⁰ We also held a seminar in September 2004, which involved about 50 people, including members of the judiciary, ombudsmen, representatives of the Government, members of the voluntary sector, and landlords' and tenants' groups.¹¹ We also had preliminary meetings with:

- (1) the Independent Housing Ombudsman and the Local Government Ombudsmen;
- (2) the Residential Property Tribunal Service;
- (3) the Association of District Judges;
- (4) the Legal Services Commission;
- (5) Citizens Advice; and
- (6) the (then) Department for Constitutional Affairs (now Ministry of Justice).

The Issues Paper – Housing: Proportionate Dispute Resolution

1.11 We published an Issues Paper in April 2006,¹² which asked how a more holistic approach to the proportionate resolution of housing problems and disputes could be developed. The paper examined how problems are transformed into disputes, and reviewed methods of resolving disputes which do not involve a court or tribunal, such as mediation, ombudsmen and managerial techniques (for example, use of complaints procedures).

1.12 We suggested that the key components of a proportionate dispute resolution system were:

- (1) an enhanced scheme for the provision of advice and assistance, which we referred to as “triage plus”;
- (2) greater use of managerial techniques;
- (3) greater use of ombudsmen services;
- (4) use of alternative dispute resolution mechanisms such as mediation; and
- (5) a system of formal (that is, court or tribunal) adjudication for disputes which could not be resolved by other means.

¹⁰ A list of members of the working group is found at Appendix A to this report.

¹¹ A review of the seminar can be found at http://www.lawcom.gov.uk/docs/report_from_090904.pdf.

¹² Housing: Proportionate Dispute Resolution: An Issues Paper (2006) Law Commission Issues Paper, http://www.lawcom.gov.uk/docs/issues_paper.pdf.

- 1.13 We also published a further paper setting out the literature on which our analysis was based.¹³

Responses to the Issues Paper

- 1.14 The consultation period for the Issues Paper ran from 20 March to 11 July 2006, and we received sixty-two responses. We also spoke at conferences, workshops and other events, and conducted meetings with stakeholders. Respondents to the Issues Paper had a wide variety of involvement and interest in the housing sector, and included advice agencies, lawyers, legal advice agencies, judges, landlords, tenants, ombudsmen, public bodies and other interested parties. An analysis of the responses was produced, and can be seen on our website.¹⁴
- 1.15 The Issues Paper provoked a mixed reaction both to its content, and to the approach taken in preparing the paper (we adopted a broad, socio-legal approach). Some responses were lengthy, whereas others dealt only with specific areas of the paper in which the respondents had a particular interest or expertise. All these responses were taken into account in the preparation of our subsequent Consultation Paper, and also in writing this report.

Consultation Paper 180 – Housing: Proportionate Dispute Resolution – The Role of Tribunals

- 1.16 We published the Consultation Paper “Housing: Proportionate Dispute Resolution – The Role of Tribunals” in June 2007. This paper focused on the specific question of which forum should formally adjudicate housing disputes that cannot be resolved in any other way.
- 1.17 It made the following provisional proposals:
- (1) Transferring jurisdiction over claims for possession and disrepair in respect of rented dwellings from the county court to the Residential Property Tribunal Service.
 - (2) Including the Residential Property Tribunal Service in the new statutory tribunal framework created by the Tribunals, Courts and Enforcement Act 2007 (involving a “First-tier Tribunal” and an “Upper Tribunal”).
 - (3) Transferring the hearing of homelessness statutory appeals (presently heard by the county court) and homelessness-related judicial review applications to the Upper Tribunal.
 - (4) Re-unifying the England and Wales systems for residential property decisions; that is, reverse devolution, so that decisions in respect of Wales could be made by the First-tier Tribunal.

¹³ Housing: Proportionate Dispute Resolution: Further Analysis (2006) Law Commission, http://www.lawcom.gov.uk/docs/further_analysis.pdf.

¹⁴ See http://www.lawcom.gov.uk/docs/issues_paper_responses.pdf.

Responses to Consultation Paper 180

- 1.18 The consultation period ran from 29 June until 28 September 2007. We received 48 responses. Again some responses were limited to a particular topic, while others addressed the full range of issues we had raised.

Further work on other issues

- 1.19 While consulting on the issues covered by the Consultation Paper, we continued to develop the other ideas discussed in the Issues Paper, particularly triage plus. As part of that work, we engaged in discussions with service providers and others, including:

- (1) the Legal Services Commission;
- (2) the Advice Services Alliance;
- (3) the Law Centres Federation;
- (4) Citizens Advice; and
- (5) the Gateshead Community Legal Advice Centre.

- 1.20 We are grateful to all who took part in the consultation process, and we acknowledge the effort put into responding to our queries on a variety of topics (particularly those consultees who provided responses to both papers). A list of respondents to the Issues Paper appears at Appendix B, and to the Consultation Paper at Appendix C.

OVERVIEW OF CONCLUSIONS

- 1.21 Unlike most Law Commission reports, this report does not focus on reform of substantive law; nor is there a draft bill to accompany it. The terms of reference for this project specifically extended beyond legal questions, and raised the broader issues of how housing problems arise, how they are related to other problems, and how they might be dealt with better.
- 1.22 It is clear from the consultation process that all those involved in providing advice and other services in the housing sector, as well as those who receive those services, feel very strongly about the importance of the issues at stake. It was also overwhelmingly clear that, notwithstanding differences of opinion as to the manner of reform, significant change is required to build a better, more user-focused system of resolving housing disputes in a proportionate and effective way.
- 1.23 **To achieve the vision for the proportionate resolution of housing problems and disputes, this Report reaches three broad conclusions:**
- (1) **Triage plus should be adopted as the basic organising principle for those providing advice and assistance with housing problems and disputes.**
 - (2) **Other means of resolving disputes, outside of formal adjudication, should be more actively encouraged and promoted.**

- (3) **There should be some rebalancing of the jurisdictions as between the courts and the First-tier and Upper Tribunals in the new Tribunals Service,¹⁵ combined with modernisation of procedural rules which affect the ability of the courts to act as efficiently as possible.**

1.24 In reaching these conclusions, we considered the present relationship between housing problems and existing dispute resolution processes, and how this could be improved. We believe that a system developed along these lines should:

- (1) prevent many housing problems from arising in the first place, because there will be better public awareness of rights and responsibilities in the housing context;
- (2) where housing problems are transformed into disputes, ensure that many more disputes should be resolved by non-formal means; and
- (3) where disputes must be adjudicated by a court or tribunal, the procedures used should, as far as possible, embrace the values set out in Part 2.

STRUCTURE OF THE REPORT

1.25 Following this Introduction, Part 2 sets out the case for change, and Part 3 considers in more detail our conclusions relating to triage plus. Part 4 considers the position of non-formal dispute resolution systems in the housing sector and how their use may be further encouraged. Part 5 discusses in detail our recommendations in relation to formal adjudication. The conclusions and recommendations we make in this Report are collected together in Part 6.

1.26 The Consultation Paper posed a number of more procedural questions about how housing matters should be dealt with. On reflection, we have concluded that these are not directly relevant to this report. We have however produced a summary of the responses on these issues. We have submitted them to government as a response to the new Tribunal Service Consultation Paper.¹⁶

¹⁵ Government proposals are set out in *Transforming Tribunals: Implementing Part 1 of the Tribunals Courts and Enforcement Act 2007* (CP 30/07, Ministry of Justice, 2007), http://www.justice.gov.uk/docs/ft_consultation_281107.pdf (last viewed 28 April 2008).

¹⁶ Above.

PART 2

THE CASE FOR CHANGE

INTRODUCTION

- 2.1 In its 2004 White Paper “Transforming Public Services: Complaints, Redress and Tribunals”, the Government argued that existing systems of dispute resolution tended to pigeon-hole individuals’ problems and their means of resolution, rather than viewing the problems as part of a larger whole.¹ The Government therefore proposed a “holistic” approach to problem-solving. In relation to problems arising in the housing sector, the Government asked that this approach be investigated by the Law Commission.
- 2.2 We believe taking the holistic approach means addressing how advice, support and information are provided to people with problems, as well as how disputes are dealt with.
- 2.3 In our Issues Paper we made proposals for reform of the present system to:
- (1) increase access to information and processes for participants;
 - (2) allow the system to operate with more flexibility;
 - (3) allow people to make their decisions about which process to use in a fully-informed manner;
 - (4) seek to address as far as possible both the problems they bring to the service and other underlying problems which they may also have;
 - (5) allow for a flexible range of outcomes;
 - (6) ensure the existence of feedback systems to improve decision-making, as a means of improving future decisions;
 - (7) work in a timely and efficient way; and
 - (8) operate at a cost which is proportionate.²
- 2.4 The Issues Paper and the Further Analysis Paper³ considered in detail the question of how disputes may arise in a social context. This was one of the matters we had agreed to investigate.⁴

¹ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (2004) p 9, <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf> (last viewed 28 April 2008).

² Housing: Proportionate Dispute Resolution: An Issues Paper (2006) Law Commission Issues Paper p 32, http://www.lawcom.gov.uk/docs/issues_paper.pdf.

³ Housing: Proportionate Dispute Resolution: Further Analysis (2006) Law Commission, http://www.lawcom.gov.uk/docs/further_analysis.pdf.

⁴ See para 1.9 of this report.

- 2.5 Having investigated the capacity of current modes of housing dispute resolution to solve people's housing problems, we concluded that there were a number of problems with the current system of dealing with housing related problems and disputes. We also sought to identify the values that should underpin any system of proportionate dispute resolution. Here we summarise the responses from consultees and our conclusions in respect of the present system.

ASSESSMENT OF THE PRESENT SYSTEM

- 2.6 In our Issues Paper the principal problems which we thought existed in the present system were:

- (1) Participation and access.
- (2) Effectiveness.
- (3) Delay.
- (4) Costs.
- (5) Lack of coherence.

Participation and access

- 2.7 Many people with housing problems find accessing assistance and legal or other advice difficult. This could be due to their geographical location, or their personal circumstances. Additionally, the number of people seeking help with housing problems is low for certain groups; for example, young people are more likely to have problems related to housing, but less likely to take action to address the problem.⁵
- 2.8 Clearly, many people do make use of the various legal and non-legal advice agencies available, as well as the Legal Services Commission's initiatives, such as CLS Direct. However, the presence (and indeed the high caseload) of those services should not be taken as a sign that all members of the community who need advice and assistance, particularly those who are most vulnerable, are able to obtain help.
- 2.9 Consultees who addressed the issue generally agreed that access to and participation in housing dispute resolution systems was important. In particular they noted that access often depends on awareness of the existence of those systems, as well as the ability to use the system (whether represented or without assistance). Several respondents referred to the existence of "advice deserts" in which it is difficult or impossible to obtain housing advice.
- 2.10 Some responses gave examples of attempts to enhance access to services. For example, the Residential Property Tribunal Service outlined the particular skill of its administrative staff to assist parties to use the Tribunal Service.

⁵ Youth Access, *Rights to Access: Meeting young people's needs for advice* (2002), <http://www.youthaccess.org.uk/publications/upload/Rights-to-Access-Meeting-young-people-s-needs-for-advice.pdf> (last viewed 28 April 2008).

2.11 However a number of respondents noted that there are some people who simply choose not to seek advice or avail themselves of dispute resolution methods when faced with a housing problem. The Association of District Judges noted that in their experience, “the range of advice currently available is not taken up until a very late stage, if at all”.

2.12 We think this is certainly true. However, we believe that the solution to this problem cannot simply be to accept it and do nothing. We note the results of a recent study of mediation programmes in the Central London County Court. This suggests that participation in mediation depends on a multi-faceted approach to encouraging participation (going beyond the existing approach of the threat of costs sanctions at a later stage⁶). Researchers in that study said:

The indications from these evaluations are that a more effective mediation policy would combine education and encouragement through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual and appropriate cases by trained judiciary, involving some assessment of contraindications for a positive outcome. The ultimate challenge in policy terms is to identify and articulate where the incentives might lie for the grass roots of the legal profession to embrace mediation on behalf of their clients.⁷

2.13 Some of these points were reflected in Shelter’s response in relation to accessing advice. Shelter said:

Bearing in mind that many of our clients are vulnerable and have limited educational abilities and in some cases fairly chaotic lifestyles, there is really no substitute in those cases for active intervention and casework to be conducted on their behalf, and for the personal support that comes from face to face contact.

2.14 That said, we also think that advice providers need to continue to experiment with (and evaluate the effectiveness of) new forms for the delivery of advice and information, including web-based systems and call centres, taking full advantage of the development of new information technologies.

⁶ A frequently cited example in this context is the Civil Procedure Rules 1998 Pre-action Protocol for Housing Disrepair Cases, under which parties must consider whether a form of alternative dispute resolution would be more suitable than litigation. See para 4.1 of the protocol.

⁷ H Genn et al, *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series 01/07, May 2007) p 205, at <http://www.justice.gov.uk/docs/Twisting-arms-mediation-report-Genn-et-al.pdf> (last viewed 28 April 2008).

Effectiveness

- 2.15 The Issues Paper suggested that several factors hamper the effectiveness of the present system. In many cases, the legal or other housing problem faced by an individual (whether a landlord, tenant or third party), and the way in which it is then transformed into a dispute, fails to address an underlying problem (such as the loss of employment, debt, or a lack of effective benefit administration). While the dispute the individual has brought in may be resolved in a legal or administrative sense, underlying problems remain. Further, we thought that the current dispute resolution model (both legal and non-legal) tends to focus on individual outcomes. It is not as good at correcting systemic problems or collective concerns.
- 2.16 Respondents who dealt with this issue indicated that it would be helpful to have a system which dealt with underlying issues as well as those which are the subject of the dispute. However, for the most part they did not offer particular suggestions for the way in which this could be achieved.
- 2.17 The Civil Justice Council's Housing and Land Committee said:
- We agree that the form in which housing disputes appear before the courts often disguises the underlying problem, which may be difficulties with benefit claims, multiple debt, other personal circumstances or simply poverty. Possession proceedings are probably the most evident example of disputes which reach the courts at the end of a process in which the underlying causes of the problem have not been addressed.
- 2.18 Some consultees described processes which involved investigation of deeper issues than those directly related to the dispute. The Civil Justice Council's example in relation to possession proceedings noted that the courts have recently been prepared to adjourn proceedings to allow time for financial and benefit issues to be investigated.
- 2.19 The responses provided by ombudsmen referred particularly to their aim to deal with underlying or systemic problems. Dr Mike Biles, the Independent Housing Ombudsman, said:
- One of the principal features of ombudsmen is that they are more than mere complaint handlers. In the process of identifying maladministration (or service failures) by acts or omissions, it is the role, and duty, of an ombudsman, in appropriate circumstances, to produce more than an answer to the limited terms in which an original complaint may be framed. Consequently, my determinations have revealed systemic issues such as homophobic and racial harassment, failure to deal properly with estate or block disrepair, and anti-social behaviour.

2.20 Sitra's⁸ response indicated that the present system's focus on individual cases and outcomes meant that a problem which affects a number of people cannot be dealt with effectively. They said:

Another problem with the current system is that it is not particularly effective in dealing with the same issue that affects several different parties. For example, in cases of ... anti-social behaviour the landlord and tenants may be parties to the dispute but other individuals or agencies such as neighbours, social services, police, and schools may want to be parties or have an interest in areas of the resolution.

2.21 Research suggests that people who have a legal problem tend to have multiple problems – sometimes referred to as “clustering”. Professor Dame Hazel Genn's study of the paths chosen by people with a problem that raised legal issues found that, for example, people with problems with rented accommodation were frequently experiencing money problems.⁹ A Legal Services Research Centre study which considered the nature of civil justice problems also found that once a person has experienced one sort of problem, he or she is more likely to experience another; and the likelihood increases as the person experiences more problems.¹⁰ Findings of a study carried out for the Department for Constitutional Affairs indicated that between 40 to 50% of clients attending legal and non-legal advice providers and local authorities had cluster problems.¹¹

2.22 We do not suggest that our proposals, in particular those relating to triage plus, can cure all these underlying problems; obviously, resolving a housing dispute may not improve a person's mental capacity, or level of income. However we think that increasing awareness of an underlying problem in the course of resolving a housing dispute helps to set the housing issue in context. This should assist those involved with the specific housing issue to address it in a way that is at least conducive to dealing with the underlying problems. At the same time, it opens up the possibility of action to deal with the underlying problems.

2.23 Also related to effectiveness, we asked whether a proportionate dispute resolution system should allow possession and homelessness applications to be decided in a single process. The majority of respondents who addressed this question did not believe this was a good idea. They felt that a judicial decision relating to possession should not be muddled with an administrative decision on homelessness.

⁸ Sitra is an umbrella organisation committed to raising standards in the housing, care and support sector. See <http://www.sitra.org.uk/> (last viewed 28 April 2008).

⁹ H Genn, *Pathways to Justice* (1991) p 34.

¹⁰ P Pleasence, *Causes of Action: Civil law and social justice* (2nd ed 2006) p 155.

¹¹ R Moorhead, M Robinson and Matrix Research and Consultancy, *A trouble shared: Legal problems clusters in solicitors' and advice agencies* (Department for Constitutional Affairs Research Series 8/06, November 2006), http://www.dca.gov.uk/research/2006/08_2006.pdf (last viewed 28 April 2008).

Delay

- 2.24 Feedback from participants in the housing system indicates that there can be significant delay involved in all dispute resolution procedures, both legal and non-legal.
- 2.25 The majority of respondents who dealt with this issue indicated that they believed delay was a problem in the present system. Landlords in particular expressed their concern at the length of time taken to resolve disputes in court. (The National Landlords Association's response to the Consultation Paper described the current court system as "often sclerotic".)
- 2.26 However, some respondents (particularly legal advisers) noted that a certain amount of delay is inherent in court process, and thought that we had unfairly criticised the delay involved in court proceedings. The Association of District Judges thought that there was no undue delay from the issue of proceedings to the hearing of possession claims; rather, that delay occurred prior to the issue of proceedings. The Advice Services Alliance commented that "a level of delay is unavoidable, given the need for due process". The Law Society, while indicating that delay can be a problem in the courts due to a lack of resources, also emphasised that delay may depend on the circumstances of the individual case, and the court has to balance competing values to reach a fair outcome.
- 2.27 It must be acknowledged that court time scales, often lengthy, are sometimes essential in ensuring that rights are protected. The significance of housing decisions to the individual (whether landlord, tenant or third party) cannot be overestimated. As Andrew Arden QC commented, housing disputes have implications "not just to the parties but also to families or dependants...not just material but social and psychological...not just financial but emotional". Some of what is complained of (delay as a result of having to comply with technical court requirements) is in fact an essential part of ensuring that people are not unfairly dispossessed.
- 2.28 Equally, though, we acknowledge the impact that delay may have on individuals. The Brent Private Tenants' Rights Group adverted to an extreme example of the potential effects of delay on landlords dealing with an unscrupulous tenant. They said :

Landlords have told us about professional "bad" tenants who have no intention of paying rent (we have not come across them ourselves). By the time the arrears case has come to court they can have lived rent free for several months. They then disappear and do the same somewhere else. This behaviour is fortunately rare, but it can put a small landlord out of business.

Costs

- 2.29 The costs (both initial and subsequent) involved in some forms of dispute resolution in the housing sector may act as a deterrent to seeking resolution of a problem. Costs may also impact upon the level and extent of assistance which different people can seek.

- 2.30 Many respondents indicated that significant (and disproportionate) costs occur in the present system. Patrick Reddin, on behalf of the Association of Building Engineers, gave the example of disrepair cases, in which he said the cost of resolving the dispute by legal process normally exceeded the value of the works. Clarke Willmott Solicitors also gave the example of claims for possession for rent arrears as a process which should be relatively straightforward, but which in practice too often resulted in disproportionate cost.

Lack of coherence

- 2.31 The present system of resolving housing disputes involves a number of different advice providers, independent agencies, local and central government agencies and departments, and courts and tribunals. Each of those entities provides their service in a different way, with different processes and expertise. This makes it difficult to find a clear path to the most effective and efficient resolution of a dispute, or a clear overall picture of available options.
- 2.32 Some respondents disagreed with our suggestion that a lack of coherence should be regarded as a negative feature of the present system. For example, the National Union of Students said “there are a number of advice and welfare services based in students’ unions. We do not have any problem with the number of agencies involved in the provision of housing advice ... we see this diversity in a positive light, as many of these agencies will target different audiences and as such serve to increase access to advice”.
- 2.33 However, the NUS and other respondents who took this approach apparently failed to understand the meaning we gave to “lack of coherence”. We were not being critical of the number of organisations available to give advice and/or resolve disputes. Rather, we think that at present, organisations operate in isolation from each other, and as such do not provide a “joined up” system for those with housing problems. The Leasehold Advisory Service highlighted the difficulties of the varied landscape of advice-providers in the housing sector:

Even in a small nation like the United Kingdom, “getting the message out” is not easy. Financial resources are limited and our systems of tenure differ. The result is that the mass marketing of information, for want of a better expression, is left to lower tier approaches eg leaflets and the Internet. Moreover, most advice providers are localised, arguably a reflection that government has yet to look at advice as a national issue. We speculate that this may be due to the excellence of the voluntary sector, historically, in providing advice. However, with the increasing complexity of housing, both in the law and the social circumstances that surround it, it is plain that a strategic approach involving the full range of advice providers would assist the public, and arguably be a better use of resources.

- 2.34 The Civil Justice Council described the variation in dispute resolution services in the following way:

We do not find it necessarily surprising that a profusion of different bodies exists. This is partly a matter of policy – for example, the enhanced jurisdiction of the Residential Property Tribunal under the Housing Act 2004 – and partly a difference in the nature of the respective functions, some organisations exercising a judicial function, others an administrative or conciliatory one, and yet others (such as the Ombudsman) elements of different functions. We agree that ideally there should be a greater uniformity of provision throughout the country, modelled on the most successful schemes or cluster of schemes.

2.35 The Housing Law Practitioners' Association considered that:

An organisation will, if in receipt of LSC funding, be subject to a common code of standards with other centres of its like and be subject to peer review from time to time. In a locality it may well be part of a group of organisations who meet together to consider matters of common interest, perhaps called a "housing practitioners' group" (it would help if local authorities held formal consultations with these groups). These groups may mix solicitor and non-solicitor agencies and may be augmented by common email communication on topical issues and to help with referrals. Thus the nature of the sector in practice is both more complex and more standardised across disciplines, than the paper gives credit for.

2.36 But the Chartered Institute of Housing thought that there was a lack of consistency in service provision, arising from the nature of funding in the sector. The Institute said:

The effectiveness of any system is dependent on resources. Part of the reason for the patchwork of provision with advice deserts is that too much Government funding is directed towards single objective initiatives (project funding). This does not encourage the growth of new centres of excellence. It also causes uncertainty and disruption to existing provision even where the service they provide is acknowledged as being excellent. Greater emphasis needs to be put on funding for core services. There is a need to ensure resources are long term and sustainable.

2.37 Notwithstanding the existence of examples of good practice, we conclude that overall there is a lack of coherence, and that this limits the ability of those who provide services to view the system as a whole and campaign for those changes in social policy that might prevent problems arising in the first place (two functions we identify as central to the triage plus concept).

Lack of impact

2.38 The Issues Paper identified a lack of emphasis in the housing sector on providing feedback designed to prevent problems arising in the future. While we noted some exceptions to this, we thought that feedback is not regarded as a central function of advisers in the housing sector in solving housing problems or disputes.

- 2.39 A number of respondents challenged our view that the present system involves a lack of feedback. As we foreshadowed in our Issues Paper, ombudsman respondents provided information about their systems of providing reports to local government. The Public Services Ombudsman for Wales indicated that one of the aims of his office is to “interact with listed bodies to improve their service delivery and to promote good administrative practice”. The Ombudsman also indicated that his office follows up earlier recommendations in respect of systemic changes, and expressed the view that the feedback is generally effective. The Local Government Ombudsman also stated that their annual reports (outlining recommendations arising from individual investigations) are considered by those at senior levels in local authorities.
- 2.40 Other respondents provided examples of feedback strategies, often in the form of partnerships with authorities. For example, the Macclesfield Wilmslow and District Citizens Advice Bureau described regular meetings between the Bureau and the local authority’s benefits section for the purpose of identifying problems. They referred to a particular example of the inadvertent use by a housing authority of an incorrect template letter, which was reported back to the authority (and the process corrected).
- 2.41 However several respondents said that their resources simply did not provide for any capacity to give feedback. Citizens Advice also said that the ability of individual bureaux to provide feedback depends on other pressures, including their advice-giving work. The Law Centres Federation, in describing some of its centres’ previous work in lobbying and raising awareness of local problems, noted that “because of the pressure to increase the number of cases taken on, this work is not so common now”. Similarly, Wendy Black, a Citizens Advice housing caseworker, said that her time and contract constraints did not allow sufficient opportunity to pursue social policy or feedback issues.
- 2.42 The National Union of Students expressed its belief that feedback mechanisms were ultimately less effective than court orders. This was also reflected in the Law Society’s response, which said “there is no substitute for formal and public judgments which set out the legal rights and obligations of people with clarity”.
- 2.43 However, Shelter, in discussing this issue, pointed out one problem with this approach: individual legal actions which do not result in a court order (that is, are resolved before getting to court) are unlikely to have any wider impact:
- For example, where a local authority has adopted unlawful “gatekeeping” practices in refusing to take applications from homeless applicants or provide temporary accommodation, it will invariably concede the issue when threatened with an action for judicial review; but because no action has been started and there is no court decision, the same practices are likely to continue unchallenged in so many other cases.
- 2.44 A strong theme in responses dealing with issue of feedback observed that attempts to provide feedback needed to be taken seriously by those to whom the feedback was provided. As the Advice Services Alliance said, “in our view however the real issue is ensuring that notice is properly taken of the feedback”.
- 2.45 Similarly the Leasehold Advisory Service noted:

the target of feedback must be receptive to it. There is little point in setting up a system of feedback which is ignored.

- 2.46 Citizens Advice said “in the absence of effective sanctions or incentives, housing providers may choose to ignore ... feedback.”
- 2.47 Respondents gave disappointing examples of attempts to provide feedback which had been ignored.
- (1) The Lewisham Law Centre gave an example in relation to a local authority’s homeless persons unit. Despite lobbying by the Law Centre, as well as court proceedings, the Law Centre considered that no changes to their practices had been made.
 - (2) The Macclesfield Wilmslow and District Citizens Advice Bureau told us about a tenant on probation with a Registered Social Landlord. The tenant had been an assured shorthold tenant for nearly two years, but had not been upgraded to an Assured Tenant. He was served with a Notice of Seeking Possession (despite having no complaints for the period of the tenancy, with the exception of a noise complaint in his first month). He and the Bureau tried to seek reasons for the notice, but no information was given, and his tenancy was ended.
 - (3) Wendy Black, a housing caseworker at a Citizens Advice Bureau, said “when attempting feedback, social policy [the social policy unit in many Bureaux] often comes up against a brick wall, ie are passed around or fobbed off”.

TRANSFORMING HOUSING PROBLEMS INTO HOUSING DISPUTES

- 2.48 One of the issues we examined was the nature of housing disputes and how they arise, including the social processes involved in the formation of the dispute and its resolution. The Issues Paper and the Further Analysis dealt with these matters at some length.¹² Our conclusions in respect of these issues have informed our views in relation to our overall recommendations, as well as specific aspects of this report (for example, why housing disputes can be well-suited to resolution by way of mediation – see paragraph 4.54).
- 2.49 For the purposes of this report, a housing dispute is any dispute related to access to, occupation of, or loss of a unit of accommodation. In considering housing disputes in their social context, we found that there were a number of characteristics peculiar to housing disputes which deserved consideration in developing a system of resolving those disputes. Some of those characteristics are:
- (1) The involvement of a third party in the dispute – in many cases, the root of the problem lies with a third party, rather than the parties to the dispute (for example, an anti-social neighbour).

¹² See Housing: Proportionate Dispute Resolution: An Issues Paper (2006) Law Commission Issues Paper p 34 to 38, http://www.lawcom.gov.uk/docs/issues_paper.pdf; and Housing: Proportionate Dispute Resolution: Further Analysis (2006) Law Commission, p 18 to 47, http://www.lawcom.gov.uk/docs/further_analysis.pdf.

- (2) The problems which lead to a housing dispute usually affect other aspects of a person's life as well, potentially leading to further disputes in different arenas (for example, money or employment problems).
- (3) The dispute which becomes the subject of adjudication may not go to the core problem; it may simply be the easiest way to achieve some sort of outcome.
- (4) Although a formal dispute may arise from one person's problem, in many cases the problem is common to several people (for example, failure to repair or poor housing benefit administration).
- (5) The parties to a housing dispute are often in a long-term relationship with each other as landlord and tenant.

2.50 Our analysis led us to the view that, when considering the introduction of new adjudicatory systems, policy makers had historically paid little attention to what other mechanisms existed, outside the immediate ambit of the problem under consideration. What has mattered has been the imperative to deal with a particular problem, rather than consideration of the range of processes available.

2.51 Thus, in considering the historical context of housing dispute resolution, we concluded in the Further Analysis paper that "attention given to the resolution of specific housing problems has been at the expense of a broader, more unified, coherent map". This lack of coherence, both in information and advice provision, and adjudication, is one of the key problems which we seek to address in this report.

VALUES

2.52 In the Issues Paper, we also sought to identify the principles or values which should be embodied in any system which deals with disputes effectively and proportionately. We listed those values as:

- (1) *Accuracy*. The system should produce the *right* answer. Where the issue is a legal one, the outcome should be a legally correct one.
- (2) *Impartiality and independence*. Those who work in the system should be able to do so independently, without having to tailor their work to some external influence.
- (3) *Fairness*. The system should treat those who use it fairly, whatever the outcome; those who use the system should feel that they have been treated fairly.
- (4) *Equality of arms*. Those in weak bargaining positions should not be unfairly treated as against those in stronger bargaining positions.
- (5) *Transparency*. Both the process of reaching decisions and the reasons for decisions should be clear.
- (6) *Confidentiality*. Where appropriate, processes should be private and avoid unnecessary publicity.

- (7) *Participation*. The person with the problem or dispute should be able to participate in the process of arriving at a decision or outcome. The system must be easily accessible by the person with the problem, must treat them with respect and must enable their voice to be heard.
- (8) *Effectiveness*. The process should result in the solution to the problem or the resolution of the dispute.
 - (a) It should *deliver a decision* when a decision is needed, and not lead to further expenditure of resources to achieve the required outcome.
 - (b) The process should deal with the *underlying causes* of a problem, and not merely its symptoms.
 - (c) The system needs to be sufficiently *comprehensive*, and able to deal with particular types of problem or dispute where intervention is justified.
 - (d) The system should not set up rigid barriers which prevent a dispute from being dealt with by the most appropriate agency.
- (9) *Promptness*. The system should not take too long to access or too long to deliver a result; the process should not be so drawn out that justice is denied.
- (10) *Efficiency/cost*. The costs of using the dispute resolution process should not deter people from accessing it and should be proportionate to the issue in question. An incoherent system, with a number of different people doing essentially the same job (whether advising or resolving problems) in different ways, without communicating with each other, may be inefficient. Duplication of effort by agencies may lead to disproportionate expenditure. Advisers' ignorance of the full range of dispute resolution options may lead to multiple and successive options being pursued, some ineffectively, at unnecessary cost to the individual. Fragmented knowledge and action may lessen the potential impact of dispute resolution methods on underlying problems.
- (11) *Impact*. The system's outcomes should not only have direct impact on the person with the problem, but also indirect impact, for example by promoting means to improve the quality of initial decision making, thus preventing similar problems arising in future. An important aspect of impact is the provision of feedback to decision makers.

2.53 Responses to the Issues Paper showed that, for the most part, people thought that we had correctly identified the values which should underpin a proportionate dispute resolution system. They also referred to a number of these values in their responses to later questions, in describing shortcomings of the present system.

- 2.54 Some respondents particularly emphasised the importance of “equality of arms”. Those respondents believed that disputes in the housing sector frequently involved a disproportionate amount of power held by one party, compared with a lack of ability to take steps in the dispute on the part of the other party. For example, David Thomas, a housing solicitor, referred to the “enormous inequality of arms between landlord and tenant”. Sitra also referred to equality of arms as a “critical” value.
- 2.55 In a different vein, the Leasehold Advisory Service suggested that the traditional understanding of equality in housing disputes (that is, that the landlord is in the stronger position because of his or her relative financial strength) is inadequate; instead, equality of arms is very much to do with knowledge and access to information. The acceptance of our recommendation in *Renting Homes*¹³ for the adoption of model agreements would do much to increase the understanding of both landlords and tenants of their rights and obligations.
- 2.56 To the extent that by “equality of arms” respondents meant the ability of each side in a housing dispute to have adequate access to legal advice and representation, then certainly it underpins our approach to proportionate housing dispute resolution. True equality of arms in this sense may include making special provision to ensure that the voice of the comparatively disadvantaged or less powerful party is properly heard within the dispute resolution process.
- 2.57 However, in some cases, it seemed to us that respondents were decrying the unequal distribution of substantive legal rights under this heading. Our view is that it is important not to confuse the values that should be embodied in a dispute resolution system with values that would find expression in the (political) reform of substantive legal rights. The former comprise the subject matter of this project. The latter do not.
- 2.58 Respondents made some suggestions for further values to be included. Those suggestions included empowerment, empathy and response to diversity. However having considered these various suggestions, we conclude that the further values suggested are in essence amplifications of one or more of the values already on our list.

¹³ *Renting Homes: The Final Report (2006) Law Com 297*, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf and http://www.lawcom.gov.uk/docs/lc297_vol2.pdf.

- 2.59 For example, some respondents suggested a missing value was “empowerment of the individual” – giving people the information and support they need to take their own decisions and deal with their own problems. We agree that empowerment is an important factor in resolving disputes, but we see it is an aspect of participation. It is also interesting to note recent research into advice-giving, which indicates that striving for empowerment may not be an effective or helpful tool for some clients. Moorhead and Robinson found that although advisers’ attempts to empower their clients were sometimes helpful and successful, many clients experienced confusion as a result of the advice they were given, and consequently did nothing to resolve their problem. They noted “whilst advisers indicated an awareness that ‘empowerment’ was not for everybody, too often clients who could not cope alone were asked to”.¹⁴
- 2.60 We believe that there are inevitably situations where different values compete. A balance must be struck between competing values to achieve a proportionate system. A frequently cited example is in the balancing of the importance of transparency in court decision-making with the need for confidentiality. The Government has recently attempted to set out a new approach to balancing the twin values of transparency and confidentiality in family court proceedings.¹⁵ The Government’s Consultation Paper (the second produced on this topic) recognises that the two values have a difficult co-existence:

Striking a balance on these issues – confidence and confidentiality – is difficult. Public confidence is essential. Without such confidence, the authority of the family courts may be diminished, and the judgments run the risk of being seen as neither fair nor just. But confidentiality is essential too. Without privacy, cases run the risk of not being properly resolved and those involved in a case risk losing the protection of the courts they both seek and rightly feel they deserve.¹⁶

- 2.61 Respondents generally agreed that sometimes values compete, particularly depending on the personal circumstances of the participants to a dispute. The Advice Services Alliance also noted that the perspective of different parties to disputes may create an internal conflict:

For example, confidentiality may be desirable for a local authority landlord that does not want public criticism, but undesirable for tenants and their advisers who are aware of a significant and widespread problem that needs to be publicly identified and remedied.

¹⁴ R Moorhead, M Robinson and Matrix Research and Consultancy, *A trouble shared: Legal problems clusters in solicitors’ and advice agencies* (Department for Constitutional Affairs Research Series 8/06, November 2006) p 94, http://www.dca.gov.uk/research/2006/08_2006.pdf (last viewed 28 April 2008).

¹⁵ Ministry of Justice, *Confidence and Confidentiality: Openness in family courts – a new approach* (Consultation Paper 10/07, 2007), <http://www.justice.gov.uk/docs/consult-family-courts.pdf> (last viewed 28 April 2008).

¹⁶ Above, p 5.

2.62 Most respondents took the view that participants to disputes should not be able to choose which values are to be prioritised or disregarded. We agree with this. It would not be appropriate to allow participants to a dispute to choose to disregard one value (for example, cost) in favour of another (for example, confidentiality) in the method chosen to resolve that dispute. However, the distinction between choice of values *within* a dispute resolution method, and choice *between methods* must be emphasised. It is important that those involved in a dispute should have as many options as possible available to resolve that dispute, and should be able to choose the option which is most appropriate to their circumstances. While we suggest that all methods of resolution in the housing sphere should embody the values we have listed, different methods place greater or less emphasis on some values. This should certainly inform the choice made by participants to a dispute.

2.63 We conclude that the values enumerated above are the building blocks of a good dispute resolution system, and must be at the heart of any reform. The different values may be given different weight depending on the circumstances of the problem.

COMMENT

2.64 With these background issues in mind, we turn to consider in more detail how a reformed system for housing problem solving and dispute resolution would address the problems identified with the current system and embrace the values which we consider should underpin proposed changes to the system.

2.65 As we indicated at the end of Part 1, we think that a more proportionate way of dealing with housing problems and disputes can be promoted by:

- (1) The adoption of the principle of triage plus by those bodies providing housing advice and assistance.
- (2) The promotion of greater use of alternative methods for resolving housing disputes.
- (3) Some adjustment of jurisdiction as between the courts and tribunals in the new Tribunals Service.

2.66 Each of these is discussed more fully in the Parts that follow.

PART 3

BETTER ADVICE AND ASSISTANCE: PROMOTING TRIAGE PLUS

INTRODUCTION

- 3.1 Many of the challenges with the present system, set out in Part 2, can be addressed by better advice and assistance, building on the concept of triage plus. We use this concept to capture both the traditional medical model of allocating a level of priority to cases to determine their order and manner of treatment, as well as promoting further activities we identify as important.
- 3.2 Although the label “trriage plus” provoked a negative reaction in several respondents, there was general agreement that the concept of triage plus was a good idea. While the particular name given to this approach is important, we were not offered any viable alternative. We therefore continue to use the label to refer to the underlying approach that should be embraced by all who provide services in the context of housing disputes.
- 3.3 Some responses clearly visualised triage plus as a separate (new) service. We stated in the Issues Paper that “it will be easier to develop the scheme by re-moulding existing services rather than by creating completely new ones”.¹ That is still our view. It is also consistent with our initial agreement to consider how existing modes of dispute resolution could be adapted into a broader approach to the resolution of housing problems.² Moreover, given the diversity of activities and strategies that we have learned about from consultees, we think that further reform in the provision of housing advice depends upon the development of a more coherent approach by all existing participants in the system.
- 3.4 Some respondents indicated that systems which embrace our concept of triage plus already exist. For example, the Brent Private Tenants’ Rights Group said:

We don’t assume that all action is a stage on the road to court, and we often use complaints procedure to Ombudsman routes, or information on medical conditions, or known trouble-shooters within statutory organisations, plus liaison meetings and partnership working. Our work with landlords which gave rise to our mediation plus service, InterSolutions, arose out of our campaigning and policy activities, as well as our observation as advisers that many private sector landlords aren’t so much bad as ill-informed. Our ReachOut project also arose from policy and campaigning activities.

¹ Housing: Proportionate Dispute Resolution: An Issues Paper (2006) Law Commission Issues Paper p 49, http://www.lawcom.gov.uk/docs/issues_paper.pdf.

² See para 1.7 of this Report.

- 3.5 However the examples provided by consultees tended to indicate that, while use of a triage plus approach may be made by a particular housing advice provider, it does not exist as an across-the-board approach adopted by housing advisers generally. Indeed, the number and diversity of the examples of triage plus which respondents told us about reinforced our view that there was an urgent need for a more uniform commitment to the triage plus approach.
- 3.6 In the Issues Paper, we recognised that triage plus may imply additional costs, at a time when we also recognised there was unlikely to be significant increase in resources. We suggested that effective triage plus could bring considerable savings, particularly where issues were diverted from expensive forums to less expensive ones. Nevertheless, many respondents were concerned that implementation of triage plus could divert resources from existing services. Citizens Advice said they were concerned that “the introduction of yet another route into advice might cause further stretching of local authority budgets, and potentially threaten funding for existing advice agencies”.
- 3.7 This is a serious issue and one which we have borne carefully in mind in reaching our conclusions. If our ideas for the creation of a more proportionate housing dispute resolution service are accepted, there needs to be serious discussion about the extent to which changes can be made within current funding levels, and the extent to which they imply increased investment.
- 3.8 This must be linked to the recommendations we made in Renting Homes designed to make it easier for people to understand their housing rights and obligations and thus to prevent problems and disputes arising in the first place. Much of the current need for advice and assistance arises from the very complexity of housing law. If the rules were clearer, people would find them easier to understand. Thus, with a reformed legal environment, more effective housing advice services could be provided even if no substantial additional funds were available.
- 3.9 One of the problems with the current “system” is that funding comes from a wide variety of sources. Funds from the Legal Services Commission, local authorities, Government departments, private charities, together with a large number of one-off project grants from various sources are just part of the picture. It is difficult, in our present state of knowledge, to estimate specifically what costs might be associated with the development of triage plus as a key element in the delivery of housing services.³
- 3.10 However, a system which reduces reliance on the use of court- and tribunal-based dispute resolution, and which addresses problems in a broader manner than just dealing with individual housing problems, should enable a better service overall to be provided for the amount invested.

³ We note, however, that the Legal Services Commission’s proposals for Community Legal Advice Centres and Networks, and the Southwark Possession Prevention Project, provide models which have not given rise or are not anticipated to give rise to significant adverse resource implications – see paras 3.40 to 3.46 and 3.115 to 3.118 below.

- 3.11 **We conclude that “triage plus” should become a central concept in a reformed system for housing problem solving and housing dispute resolution.** Below, we set out our more detailed consideration of triage plus, and our conclusions and recommendations in respect of the concept.

FUNCTIONS OF TRIAGE PLUS

- 3.12 In the Issues Paper, we suggested that a triage plus system should involve three distinct functions:

- (1) Signposting (or pathway processing).
- (2) Oversight.
- (3) Intelligence-gathering (or knowledge bank).

In relation to these, respondents provided a variety of information.

- 3.13 In general terms, the three core elements were accepted. However, having studied the responses both to the Issues Paper and the Consultation Paper, and having considered the processes which we regard as essential in achieving a proportionate dispute resolution system, we have concluded that the definition of the core components for triage plus should be clarified and amended.

- 3.14 **We now recommend that triage plus should comprise:**

- (1) **Signposting: initial diagnosis and referral.**
- (2) **Intelligence-gathering and oversight.**
- (3) **Feedback.**

Signposting: initial diagnosis and referral

- 3.15 Signposting refers to what should happen when a person takes a housing problem to a service provider. All those bodies working in the housing sector have a role to play in signposting. These include not only advice providers and solicitors, but also lobby groups,⁴ courts and tribunals, ombudsmen, as well as central and local government.

- 3.16 Although the detail of what happens depends on the body’s approach and the stage which the housing problem has reached, the signposting role means that service providers should:

- (1) use the initial contact with the individual to review the information provided about that person’s problem or problems and reach an initial diagnosis. This may include helping the individual recognise that in their case nothing can be done;

⁴ For example, Shelter, the National Landlords Association, and the Camden Federation of Private Tenants.

- (2) where possible, provide the person with an option or options for taking the matter forward, which takes into account the full range of services available and also is tailored to the needs and abilities of the individual. This may include helping the individual resolve the problem for themselves;
- (3) where necessary, refer the case on to another relevant provider or providers as appropriate to the person's problem; and
- (4) more generally, seek to educate and inform the wider community about the range of ways disputes in the housing sector can be resolved.

Initial contact and diagnosis

- 3.17 All interactions between agencies that provide advice services and members of the public start with an initial interview. In many cases, the contact is face to face in an organisation such as the Citizens Advice Bureau. Increasingly, initial contact is made by telephone though a call centre service, such as CLS Direct. In some cases, it is possible for people to ask for help through the internet.
- 3.18 The importance of this initial contact can hardly be overstated. This is where the initial diagnosis of a problem or issue may occur and where consideration is given to what the next steps should be.
- 3.19 In many cases, the first interview may result in the provision of adequate information for the problem to be resolved, or for the person to be able to take the issue forward themselves. In others, further assistance will be required.
- 3.20 One of the major consequences of introducing model occupation agreements, as we recommended in *Renting Homes*, is that it would be much easier for advice agencies to provide initial advice and assistance. There would be less need to be concerned at the initial contact stage about the detail of specific tenancy agreements.

Setting out the options

- 3.21 Where the issue cannot be resolved at initial contact, the next stage is to identify the range of options that should be considered for taking the matter forward. In the Issues Paper we suggested that agencies tended to consider the options they were familiar with, but might not be in a position to consider the full range of possible options.
- 3.22 A number of respondents thought we had over-simplified this issue and indicated that we had not fully appreciated the breadth of the advice offered by existing providers. The Housing Law Practitioners' Association said:

We consider that the paper lacks understanding of the housing practitioners' role. Law centre workers or housing solicitors do not "turn problems into disputes" or transfer the problems themselves into legal action. It is the duty of the adviser, wherever they happen to sit, to ascertain the client's position, and their wishes, and to consider all viable options and inform and advise their client.

- 3.23 However, a recent research study which examined the advice provided to clients with “clusters” of problems by firms, advice agencies and local authorities highlighted barriers to the provision of the holistic advice service we had in mind.
- 3.24 Amongst the barriers the research identified were the following very practical ones:
- the absence of comprehensive, accessible and useful information about alternative sources of legal and non-legal assistance for clients which included information on the capacity of organisations to take clients ...
- the failure of the CLS (Community Legal Service) to establish trustworthy networks of providers to whom suppliers were willing to signpost.⁵
- 3.25 Addressing these issues involves new investment. However, if such information is not available, the ability of advisers to deliver the holistic approach which this Report proposes will be significantly reduced.
- 3.26 Implicit in our approach is the idea that referral should not be limited to pointing the client towards the provision of advice that is limited to one sort of outcome. The person coming to an agency with a housing problem should be provided with as full a range of options as possible, appropriate both to the initial problem which they brought and to other problems that may have become apparent in the initial diagnostic interview. Not everyone will be able to take advantage of all the options that might be available. For example, self-help will be appropriate for those with the confidence to use this means to solve their problem; but not everyone has the skills to use this option.
- 3.27 In cases where it looks as though there is a dispute that requires some form of resolution involving a third party, then the different options – courts/tribunals, ombudsmen, use of complaints procedures – should all be considered, with the client being put in a position to make an informed choice about which way to take their case forward.

Referral

- 3.28 Cases that cannot be dealt with at the initial diagnostic interview need to be referred to other agencies. Bearing in mind that different advice agencies offer different expertise, the role of referral in fulfilling the signposting function is crucial. The referring organisation must first be aware of what other relevant bodies are available.⁶ Second, they must be able to transfer the advice-seeker to the more appropriate service in as seamless a manner as possible. The avoidance of “referral fatigue” in clients is essential to maintain their involvement in the dispute resolution system.

⁵ R Moorhead, M Robinson and Matrix Research and Consultancy, *A trouble shared: Legal problems clusters in solicitors' and advice agencies* (Department for Constitutional Affairs Research Series 8/06, November 2006) p 95, http://www.dca.gov.uk/research/2006/08_2006.pdf (last viewed 28 April 2008).

⁶ See para 3.16(2).

- 3.29 There are clearly challenges in establishing such an approach across the housing advice sector, not least because many providers have little or no financial incentive to refer an advice seeker to an alternative source. This was identified in the research by Moorhead and Robinson as one of the issues to be tackled by advice providers in addressing clients with clusters of problems. They asked, amongst other things, “what incentives and information are necessary to ensure that the client is properly and effectively signposted or referred to the provider most likely to successfully deal with their problem?”⁷
- 3.30 Although the authors were referring to the challenges faced in the publicly-funded advice sector, the question is equally relevant for private advice providers, and for other stakeholders in the sector.
- 3.31 **We conclude that identifying ways to increase the ability of organisations in the public, private and voluntary sectors, to facilitate referrals of advice seekers to the appropriate body is fundamental to ensuring the creation of a holistic approach to resolving housing problems.** Any proposals must, of course, be practicable. They must not put excessively high demands on referring advisers. This is an issue that needs to be taken forward by representatives of those working in the different advice sectors, with the support of government.

Education and information

- 3.32 Providing education and information to the wider community are also, in our view, important functions of a signposting service. When discussing our original model for triage plus, Sitra argued that two further elements should be added to the triage plus model: providing advice and information, and education. We think that they are better incorporated into the signposting element, as they represent a broader approach to the option-providing role which is an essential part of signposting.
- 3.33 Professor Dame Hazel Genn’s original study into the decisions made by people who had potential legal problems, and the driving forces behind those decisions, concluded that:

there are few programmes of public education about rights, obligations and remedies that might equip the public to take steps and avoid disputes from arising or to deal confidently and appropriately with difficulties before they have escalated into something more intractable.⁸

⁷ R Moorhead, M Robinson and Matrix Research and Consultancy, *A trouble shared: Legal problems clusters in solicitors’ and advice agencies* (Department for Constitutional Affairs Research Series 8/06, November 2006) p 95, http://www.dca.gov.uk/research/2006/08_2006.pdf (last viewed 28 April 2008).

⁸ H Genn, *Paths to Justice: What people do and think about going to law* (1999) p 255.

- 3.34 More recent research has demonstrated that there continue to be obstacles to the effective delivery of legal education to the public.⁹ While some improvements have been made since the original study was conducted, **we conclude that public education and information-provision is central to the signposting concept, and in need of further development.** This issue was also flagged recently by the Ministry of Justice in “Justice – A New Approach”, which emphasised the priority placed by the Ministry on ensuring citizens’ understanding of their rights and obligations:

An effective justice system is not just about the courts and the judges: it concerns the extent to which the public has access to that system. Access depends on understanding one’s rights and knowing how to go about enforcing them.¹⁰

- 3.35 The Legal Services Research Centre’s study into civil justice problems also concluded that there is a need for a coherent approach to increasing people’s awareness of ways to resolve their problems. The authors of the study also thought that education needed to touch on the broad range of options open to people:

However information and education is delivered, it is important that it stresses the many methods by which problems can be resolved, and states that legal processes should generally be regarded as a rare and last resort.¹¹

- 3.36 In a sense the activity we describe is intended to forestall the individual advice-seeking stage, and to resolve problems (or at least provide information about the range of options available) on a wider scale before they start to develop. Many agencies currently accept that this function is important but they argue that this is a specific activity which, without additional financial support, they are unable to undertake. We have considerable sympathy for this view. But it may be that if agencies examine the information they already have about their client groups, for example about the post-code areas from which they come, this could result in the development of targeted information-provision that would not be impossibly expensive to provide.

Conclusion: the importance of signposting

- 3.37 **We conclude that signposting is important because: it provides individuals with a means of obtaining advice about their housing problems; it provides an opportunity to engage them in the process of solving their problems or resolving their disputes; and, where it works well, it should facilitate the resolution of other problems as well.**

⁹ See Report of the Public Legal Education and Support Task Force, *Developing capable citizens: The role of public legal education* (2007), <http://www.pleas.org.uk/uploads/PLEAS%20Task%20Force%20Report.pdf> (last viewed 28 April 2008).

¹⁰ Ministry of Justice *Justice – A New Approach* (2007) p 16, <http://www.justice.gov.uk/docs/Justice-a-new-approach.pdf> (last viewed 28 April 2008).

¹¹ P Pleasence, *Causes of Action: Civil law and social justice* (2nd ed 2006) p 159.

- 3.38 We identified some strategies which we regard as important in the development of the signposting function. Other methods could also be employed. Indeed, the feedback from consultees to this project has provided us with an enormous amount of information about existing strategies for signposting-type work.
- 3.39 For example, the Law Centres Federation indicated that they are looking to alternative methods of providing information and advice such as using text messaging to contact young people. The Law Society noted that there is a network of lawyers in Southwark who are part of a referral list run by the Southwark Law Centre. The Macclesfield Wilmslow and District Citizens Advice Bureau described their specialist housing service, saying:

[The Housing Service] is staffed by one volunteer caseworker, calling on the services of other in-house specialists as required, and assisted by two volunteer generalist advisers for duty days at court. The service has been developed and expanded over a period of eleven years, and focuses heavily on creating and maintaining close working relationships with the county court, the various departments of the local authority, social services, RSLs, and the Shelter NHAS office in Chester.

DEVELOPMENT OF CLACS AND CLANS

- 3.40 One development has attracted us during the preparation of this Report. This is the Legal Service Commission's proposals for Community Legal Advice Centres and Community Legal Advice Networks. Our Consultation Paper noted:

The Legal Services Commission's proposals appear to embody many of the elements of triage plus, relating to holistic advice provision; feedback to decision makers; information gathering and sharing, so that parts of the system learn from experience, and prevent similar problems arising in the future.¹²

- 3.41 The development of the Centres and Networks was set out in the Legal Services Commission's five year strategy for the Community Legal Service entitled "Making Legal Rights a Reality". The strategy indicates:

Working jointly with local authorities and other funders we will develop Community Legal Advice Centres and Community Legal Advice Networks as models for delivery of the combined social welfare services set out in the previous section. Centres and Networks will integrate funding streams to provide a service from diagnosis and information through advice and assistance to legal representation in complex court proceedings...

¹² Housing: Proportionate Dispute Resolution: The Role of Tribunals (2007) Law Commission Consultation Paper 180 p 10, <http://www.lawcom.gov.uk/docs/cp180.pdf>.

A Centre will be a jointly-funded single legal entity that provides the whole bundle of core social welfare law services. We will use the Centre model as a way of testing easier ways to deliver those services together (for example through a combined “Money Advice” debt and welfare benefits category). The Centres will also provide services in family law as part of a pattern of family supply in the area. Over time it is intended that the Centres will expand their services to offer advice that covers education, mental health and aspects of consumer and general contract (not covered by Consumer Direct or Trading Standard services) such as discrimination in the provision of goods and services.

The Centres will not generally be expected to deliver legal advice services in the remaining civil categories or in crime but may do so if there is a specific need in the catchment area for current services to be increased or if those involved in the Centre hold a particular specialism in these areas. This may be particularly likely in relation to immigration/asylum law. Centres will in any event, link up with these other services and we will explore ways of including them. A Centre will be clearly identifiable as a CLS service, readily accessible to the community, but it could operate from a number of sites – outreach to client groups will play a particularly important role.

The Centres could be run by any appropriate provider, eg private practice solicitor, not for profit agency, etc. We will also provide opportunities for suppliers to come together to bid as consortia to provide services at the Centre under one contract.¹³

The strategy also sets out specific proposals in respect of networks. We understand that the first network will not now start to operate until 2009.

3.42 The Gateshead Community Legal Advice Centre was officially opened in May 2007 (being operational from April). Tenders were recently invited for Centres in Hull, Portsmouth and Leicester.¹⁴ The Legal Services Commission’s Corporate Plan indicates that six Community Legal Advice Centres will be open by Spring 2008.¹⁵

3.43 The Gateshead Centre provides advice services in the areas of:

- (1) debt;
- (2) welfare benefits;
- (3) housing;

¹³ Legal Services Commission *Making Legal Rights a Reality* (2006) p 8, http://www.legalservices.gov.uk/docs/civil_contracting/CLS-Strategy-final-15032006cover.pdf (last viewed 28 April 2008).

¹⁴ Legal Services Commission website, at <http://www.legalservices.gov.uk/civil/tendering/5626.asp> (last viewed 28 April 2008).

¹⁵ Legal Services Commission *Corporate Plan 2007/8 – 2009/10* (2007) p 16, http://www.legalservices.gov.uk/docs/about_us_main/LSC_corporate_plan_300307.pdf (last viewed 28 April 2008).

- (4) employment;
 - (5) family law;
 - (6) mental health; and
 - (7) community care.
- 3.44 The structure of advice-giving at the centre is based on an initial 10 to 15 minute “diagnostic” interview, after which the advice seeker may be:
- (1) referred to a specialist for further advice in the areas set out above (with the appointment arranged in the diagnostic interview);
 - (2) referred for a “general help interview” (with the appointment arranged in the diagnostic interview);
 - (3) provided with information or self-help packs; or
 - (4) advised that there are no further matters on which advice or information can be provided.
- 3.45 Community Legal Advice Networks differ from Centres in that they are formed by a variety of providers (rather than the single-entity concept of the Centre) who agree to provide a shared service for clients. A Network is planned for Cornwall. Information from Cornwall County Council indicates an intention for the Network to be formed from existing public, private and voluntary sector service providers. The Council indicated that “strengthening the links, working practices and information sharing between organisations will help guarantee that any client who contacts the network for advice can access the full range of services on offer”.¹⁶
- 3.46 Having had the opportunity of seeing the work of the Gateshead Community Legal Advice Centre at first hand, and having reviewed the policies developed by the Legal Services Commission, **we conclude that the Community Legal Advice Centre/Network models provide a strong basis on which to develop a triage plus system.** There will inevitably be teething problems in the setting up of Centres and Networks. Issues needing to be addressed include: finding suitable physical locations to meet the needs of clients; the relationships between entities who make up the Centre or Network; and practical matters like the information technology needed to transfer information about clients and appointment dates between providers. In spite of this, the emphasis on providing a holistic service for those with problems and disputes (including housing disputes) could go a long way towards the creation of a proportionate and efficient system for dealing with housing problems and disputes.

¹⁶ See Cornwall County Council, *Community Legal Advice Network – Cornwall*, <http://www.cornwall.gov.uk/index.cfm?articleid=39874> (last viewed 28 April 2008).

FORMALISATION OF OTHER EXISTING NETWORKS

- 3.47 We have outlined our views as to the roles to be played by Community Legal Advice Centres and Networks in developing the holistic provision of dispute resolution services in the housing sector. But, under current plans, they are not going to transform the provision of advice and assistance overnight. Neither will they have a monopoly of housing advice services in any given locality.
- 3.48 Thus, it is equally important to recognise the role of service providers not involved in the Centre/Network system. In this respect we refer not just to advice providers, but also adjudicatory bodies, ombudsmen, and government. (Interestingly, the responses to the Legal Services Commission's proposals in relation to the establishment of Centres and Networks indicated some concern amongst suppliers as to the loss of services from advice providers who did not become part of a Centre or Network.¹⁷)
- 3.49 In considering responses to both our Issues Paper and the Legal Services Commission's Consultation Paper, we have been struck by the wide variety of activities undertaken by service providers. Indeed, when we wrote our Issues Paper, we anticipated that we had a lot to learn from those providing services in the field, whose existence is not widely known about.
- 3.50 We are clear from these responses that all involved are committed to the solving of housing problems and the resolution of housing disputes in the manner which was relevant to their type of work. Nevertheless, the examples of good practice we have been provided with, and the development of new models for provision in the future, do not contradict the message of the research and the considerations advanced in the issues paper. **We conclude that many agencies work with what they are familiar and reveal a lack of awareness of relevant types of work conducted by other service providers.**
- 3.51 Furthermore, although some providers had initiated and maintained links with other providers to provide a more holistic service to advice-seekers, this tended to be done on an informal basis, and was often dependent on the knowledge or attitude of an individual adviser rather than being considered as an overall institutional strategy.
- 3.52 **In order to improve the links between different advice providers, we recommend, first, that all service providers in the housing sector, including advisers, advocacy groups, adjudicatory bodies and government should develop a comprehensive list of housing service providers in their local area, encompassing the range of entities which might be relevant to those engaged in housing disputes.** At the point at which a person with a housing dispute seeks information or advice from the service provider, this information should be used to provide the advice seeker with a full range of the options open to them in their area.

¹⁷ Legal Services Commission *Summary of Responses to Making Legal Rights a Reality* (2006) p 8, http://www.legalservices.gov.uk/docs/civil_contracting/ResponsestotheDraftCLSSstrategy-paperforIntranetv2_pdf.pdf (last viewed 28 April 2008).

3.53 We note that this is already recognised by some organisations. For example, the Annual Report of the Independent Housing Ombudsman Service indicates that following a review of its processes, a new strategy for providing a comprehensive and consistent service to users has been developed. In particular, the report proposes that one of the initial services provided to users (before the formal registration of a complaint to the Ombudsman) will be “signposting to advice services, advocacy services, other appropriate forms of dispute resolution, other relevant bodies such as regulators, and other Ombudsmen”.¹⁸

3.54 Similarly, the Brent Private Tenants’ Rights Group told us:

Being a non-solicitor agency we don’t assume that all action is a stage on the road to court, and we often use complaints procedure to Ombudsman routes, or information on medical conditions, or known trouble-shooters within statutory organisations, plus liaison meetings and partnership working.

3.55 **Secondly, we recommend that existing informal links between advice providers should be formalised.** Housing advisers in a particular area should develop a permanent network of organisations to whom they could refer appropriate cases (similar to the Community Legal Advice Centre/Network model). Importantly, this information should be shared throughout an organisation; all members of staff should have access to up-to-date information detailing local service providers to whom cases could be referred.

3.56 **Finally, we conclude that more could be done by courts and tribunals to provide information to litigants about local service providers.** The 2005 study conducted by Moorhead and Robinson into the experiences of self-represented litigants found that courts did not necessarily undertake signposting activity well in providing information to litigants in person about potential sources of advice. The authors concluded that:

whilst some staff were clearly encouraging litigants to use CLS directories, or local lists of providers probably derived from the directories, there was evidence of a lack of confidence and specificity about where litigants could turn to for help.

¹⁸ Housing Ombudsman Service *Annual Report and Accounts (2007)* p 7, http://www.ihos.org.uk/downloads/common/HOS_Annual_Report_2007.pdf (last viewed 28 April 2008).

Staff were uncertain about what services were provided in the locality (there was a general expectation that solicitors would give a free half hour interview for instance which may not be borne out in practice). Signposting tended to end with either a general suggestion that a litigant go and see an (unnamed) solicitor, or the “local” CABx, or with a short list of named providers (who were recognised by the court as repeat players in their locality). Some perceived the latter approach as dangerous, a form of favouritism to larger local practices, but it had the advantage of referring litigants to someone more likely to specialise in dealing with their problems.¹⁹

- 3.57 The Association of District Judges, in its response to the Issues Paper, indicated that in some, but by no means all, courts, defendants are provided with a list of firms which have a Legal Services Commission housing contract. **We recommend that the Court Service takes steps to ensure that all courts are able to offer this facility.**
- 3.58 We have considered what practical arrangements might need to be put in place to give effect to these recommendations and conclusions. Initially we had thought that the Community Legal Partnerships established by the Legal Services Commission might provide such a vehicle, though we now understand that they have not been as successful in taking such initiatives forward as was hoped. Another idea would be the creation of a broad-based user group, which would bring together those working in advice agencies, law firms, courts and tribunals in a particular area to improve the co-ordination of their service delivery. A number of ideas might need to be piloted to explore what works best. Whatever precise model emerges, strong and innovative leadership will be needed.

FURTHER DEVELOPMENT OF PHONE AND INTERNET SERVICES

- 3.59 There is greater scope for the development of phone and internet services in resolving housing disputes. Many consultees told us that although such services may be useful, the provision of face-to-face advice remained essential. To an extent we agree. But we think there are benefits in using telephone and internet services to:
- (1) provide general housing information to customers (as opposed to advice), including referrals to local advisers; and
 - (2) provide information and legal advice to customers in areas where there are few or no housing advisers.

¹⁹ R Moorhead and M Sefton, *Litigants in person: Unrepresented litigants in first instance proceedings* (Department for Constitutional Affairs Research Series 2/05, March 2005) p 65, http://www.dca.gov.uk/research/2005/2_2005.pdf (last viewed 28 April 2008).

3.60 There are several advantages in providing information by a relatively instant medium such as the telephone or internet; for example, the speed and convenience with which information can be obtained. The Law Centres Federation told us about a study conducted some years ago to ascertain the benefits to Law Centres from providing telephone advice services, and to develop a system for assessing the quality of such advice. The study sought qualitative feedback from clients (who were both agency workers, and also private clients) to whom telephone advice had been provided. Key findings were:

- (1) Agency workers who obtained advice from the Law Centre thought that seeking specialist advice from a Law Centre adviser was useful as they had obtained information that was relevant to a number of the agency worker's clients. Comments from agency workers also indicated that obtaining advice from the Law Centre provided a useful second opinion where cases were not clear cut. The accessibility of the service was also seen as an advantage.
- (2) Individual clients who sought advice commented on the convenience of phone advice; it would have been difficult to leave work or leave their children alone at home to attend an appointment, or it would have necessitated a long journey. One client indicated that because of her disability, she was not confident leaving the house, and found it useful to have an initial discussion over the phone. The ability to obtain advice immediately, rather than waiting for an appointment, was also a plus; even in cases where the client acknowledged that there was no actual urgency to the matter, it was personally reassuring for the client to be able to obtain information quickly.²⁰

3.61 Another potential benefit of telephone advice is that the ability to obtain advice quickly may help to deal with disputes before they escalate. Law firm Irwin Mitchell told us in their response to the Issues Paper about a 24-hour Legal Advice Helpline which they run for legal expenses insurance policy holders. The helpline provides general legal advice, and the firm noted that "it is our belief that legal advice delivered this way at an early stage can lead to early resolution of an issue".

3.62 The CLS Direct telephone service was launched by the Legal Services Commission in 2004, and provides telephone legal advice for people eligible for legal aid funding. The CLS Direct website also provides a search facility to find contact details of legal advisers, as well as a series of fact sheets about a variety of legal problems (for example, No 29 "I am in arrears with my rent. What are my rights?").²¹ The Legal Services Commission's strategy for the Community Legal Service indicates:

²⁰ Law Centres Federation, *Proving Your Worth* (1994).

²¹ See http://www.clsdirect.org.uk/en/legalhelp/tele_message29.jsp (last viewed 28 April 2008).

We will continue to expand CLS Direct so that it provides a comprehensive telephone service that will deliver a large proportion of LSC funded information, diagnosis and basic advice. It will also deliver a significant proportion of specialist legal advice in social welfare law. We will also seek to expand the service to offer a specialist advice service in family law and immigration and to incorporate family breakdown issues within a new triage service.

The system will be accessible at some level to everyone regardless of means. Information will be accessible to all; as may limited advice with means assessment applying after a set time period. The social welfare areas covered by specialist telephone advice will in themselves be a major filter to ensure that resources are targeted on highest priority issues.²²

- 3.63 The Advice Services Alliance also runs the AdviceNow website, which provides links to legal information websites on a wide variety of topics (including housing). Some of the links are to information kits developed by AdviceNow itself, and some links are to information from other providers (for example, other advice services and government websites).²³ The Advice Services Alliance has also conducted research into ways in which self-help for legal problems can be delivered via the internet. The report concluded that people look for the following key elements in a self help package:

Information – Basic guides to the law

“How to” materials – guiding people through a process, step by step guides (eg to a tribunal, or small claims action); when and where to find help; sample letters, forms and contracts, interactive tools and calculators

Skills material – supporting skills needed for managing your problem, eg making a call to your landlord; negotiating with your employer; diagnosing your problem and working out what you can achieve; keeping records; making the most of your adviser. This material works best using case studies as examples, interactive learning materials, and simple guides.

- 3.64 The report also found:

²² Legal Services Commission *Making Legal Rights a Reality* (2006) p 6, http://www.legalservices.gov.uk/docs/civil_contracting/CLS-Strategy-final-15032006cover.pdf (last viewed 28 April 2008).

²³ See <http://www.advicenow.org.uk/> (last viewed 28 April 2008).

... that people are interested in the idea of self help and willing to try it, but there is a fear of being “left alone”. There is a tendency to think of self help as something separate from advice services with users left to go-it-alone. We want to challenge this assumption and see support for self help as part of the work of advice services. A small input of support by phone or email when self helpers get stuck can make the difference between their success and failure. This is a cost effective approach and deserves further development.²⁴

- 3.65 We accept there are limitations on telephone and internet services. As many consultees told us, it is often necessary for an advice-seeker to have a face-to-face appointment. Alternatively, it may be necessary for a referral to another service. And, as the AdviceNow report concluded, it may also be more beneficial to provide a combination of services; for example, an internet advice service provided in conjunction with telephone or email support. Consultees also told us that often information relevant to a client’s case was only forthcoming in a personal interview. There are also questions of access; some, particularly the most vulnerable, may not have access to the internet.
- 3.66 Nonetheless, initiatives such as CLS Direct and AdviceNow provide information which assists users to clarify their legal problems and to obtain at least basic advice about their resolution. The ability to obtain contact details for advice services is another important benefit. And many consultees have told us that there are areas in which it is largely impossible to obtain face to face housing advice. Thus technology based services appear to be providing more access to appropriate advice services. For these reasons **we conclude that the development of phone and internet housing information and advice should be encouraged and where possible expanded.**

EMPHASIS ON EDUCATION AND INFORMATION

- 3.67 Activity which educates the public about housing problems, and provides information about the places to seek advice is essential in encouraging participation in dispute resolution activities when problems do arise. Such activities may also assist in preventing problems arising in the first place; for example, by encouraging discussion between a tenant and a landlord, rather than a situation where there is no communication, followed by possession proceedings being brought.
- 3.68 As a result of the consultation responses, we acknowledge that a significant amount of this work is already undertaken by service providers. Law Centres, for example, have in the past aimed to combine their case-work activities with education and awareness programmes. The Law Centres Federation response to Lord Carter’s review of legal aid funding proposals said:

²⁴ Advice Now *ISB Self Help Project Final Report* (2005) paras 1.11 to 1.12, http://www.advicenow.org.uk/fileLibrary/doc/Advicenow_final_report_to_ISB001.doc (last viewed 28 April 2008).

Law Centres believe that casework services should be combined with strategic work in the community. Working with groups and providing legal education is equally important and enables Law Centres to reach the most vulnerable and socially excluded people in society. Many vulnerable clients do not recognise that they have a legal problem and need to be encouraged to seek advice...While outcomes in terms of monetary benefit may be small, the subsequent advantage of resolving what may be perceived as a small matter could be much larger, in terms of the cascading of problems and subsequent calls upon the public purse for support. Outreach work is an effective and efficient way of assisting hard to reach communities and should be evaluated in terms of the outcome it achieves.²⁵

3.69 One example of education and information work undertaken in the housing context is the Housing Ombudsman Service, which (in addition to its casework service) provides training sessions for social landlords on effective complaint management, as part of its prevention strategy. In the context of accreditation schemes, many local authorities now offer basic training to private sector landlords.

3.70 We think there is considerable scope for this element of signposting to be developed. Of course, much of this work depends upon the ability of the service to fund such activity. Publicly funded bodies should, we believe, have this work acknowledged and provided for in their funding arrangements. **We conclude that, in determining funding for service providers in the housing sector, consideration should be given to providing resources specifically for education and information work.**

3.71 In particular, we would encourage the Community Legal Advice Centres and Networks developed by the Legal Services Commission to take an active role in providing public education programmes for the communities in which they are based. We note the documentation for the recent Portsmouth Community Legal Advice Centre tender invitation, which indicated that the Centre's aims and objectives should include taking "appropriate action to prevent common key legal problems in the target community from recurring".²⁶ In particular, the Centre must:

identify and address issues that are repeatedly causing problems for clients. This may include influencing policies and procedures of particular services or undertaking community legal education for specific client groups or geographical locations.²⁷

²⁵ Law Centres Federation, *Response to Legal Aid: A Sustainable Future* (2006) p 22, http://www.lawcentres.org.uk/uploads/LCF_Response_to_Lord_Carters_Proposals_12.10.06.doc (last viewed 28 April 2008).

²⁶ Legal Services Commission and Portsmouth City Council, *Information for applicants: Portsmouth Community Legal Advice Centre* (2007) p 5, http://www.portsmouth.gov.uk/media/Portsmouth_IFA_-_V.2.1_final_25_October_2007.doc (last viewed 13 November 2007 – as the closing date for tender applications has now passed, the document is no longer available at this website).

²⁷ Above, p 10.

We conclude that the Legal Services Commission should continue to encourage active programmes of information and community education through the development of Community Legal Advice Centres and Networks.

Intelligence-gathering and oversight

- 3.72 The second function for triage plus is intelligence-gathering and oversight. This involves gathering evidence from individual cases, and aggregating the data in order to identify systemic issues and problems. For instance, Citizens Advice use data on specific cases coming from individual bureaux to lobby for policy change; the introduction of the Tenancy Deposit protection scheme is as an example of this in practice.

Why are intelligence-gathering and oversight important?

- 3.73 Effective intelligence-gathering and oversight work are important for at least four reasons.
- 3.74 First, it enables providers to identify systemic problems which can be acted upon to reduce their recurrence. The information gleaned from individual cases can be used to prevent further cases from arising. Many respondents to our consultation said that they would like to be able to undertake such work, or in fact did undertake such work, as a means of preventing further problems in the future.²⁸
- 3.75 Second, intelligence-gathering provides a reliable basis for feedback (discussed further below). For example, the Local Government Ombudsman indicated that he and his colleagues placed considerable importance on feedback to local authorities, which was produced as a result of information gathered through the course of the year from individual cases. Their response to us described how they achieved that.
- 3.76 Third, intelligence-gathering provides a reliable basis for identifying funding needs and justifying them.
- 3.77 Fourth, and importantly, intelligence-gathering and oversight provides an efficient way of auditing service providers' operations. It can be used to identify both the good and poor features in how the service provider is functioning and any changes needed with their operation. In this sense it is "internal" oversight.
- 3.78 How should the intelligence-gathering and oversight function be developed in a proportionate dispute resolution system?

BETTER INFORMATION TECHNOLOGY

- 3.79 Responses to this consultation make clear that the key to the development of the intelligence-gathering and oversight function is the provision of better information technology and recording systems. At present there is a lack of technology capable of recording data, and a lack of standardised information technology systems (even among similar services, such as Law Centres).

²⁸ For example, the Brent Tenants' Rights Group told us it had always been a campaigning organisation – "to try and ensure that the causes of problems are tackled so that in ten years from now another client doesn't walk through the door with the identical difficulty".

- 3.80 The importance of such tools cannot be overstated. Information can be used by, in particular, advice providers, but also by other entities such as adjudication bodies, for a range of purposes. Taylor and Burt, in a paper examining voluntary sector organisations, describe how Friends of the Earth, an environment organisation, collect and use information gathered via technological means. They give the particular example of a supermarket seeking planning permission to develop one specific greenfield site; when aggregated with other similar examples, this revealed a wider programme of development proposals.²⁹
- 3.81 At present, some service providers in the housing sector do make use of information technology systems to record data and for other purposes. In particular, we are aware that Citizens Advice has developed a number of useful electronic tools to capture information in order to assist with its national campaigning work. The primary tool is CASE, its casework and information system. Currently used by about 80% of Bureaux, it will soon become universally used in the Citizens Advice network. As well as facilitating individual case work with clients, the system collects and stores extensive information on the characteristics of the problems that clients have and their outcomes. This allows Citizens Advice, at the national level, to generate statistics on, for instance, the number of clients coming to them with both housing and family problems, and the change in frequency of such problems on a quarterly basis, broken down on a regional (or even an individual bureau) basis. Citizens Advice is able to use these statistics to support its social policy work, most of which is carried on at national level.
- 3.82 Another example is the “Outcomes Toolkit” CD Rom provided for use by bureaux, which is intended to assist bureaux to collect information in a standardised form about their cases. The toolkit indicates the variety of uses for such information, including the improvement of the Citizens Advice service itself, as well as mapping issues on the national scale. The toolkit includes information and practical assistance for bureaux on a variety of topics. For example, questionnaire templates are included for surveying clients and collating; and a list of useful web resources is included.
- 3.83 However, several consultees told us that their organisations did not have adequate access to information technology systems. This was also the conclusion of Taylor and Burt, who examined the methods used by voluntary sector organisations, and concluded “there is a significant lack of ICT capability throughout the UK voluntary sector and that, moreover, this is not confined to small-scale, local VSOs [voluntary sector organisations]”.
- 3.84 For any organisation in the housing sector wishing to effect change, whether it is an advice provider, a county court or tribunal, local authority or advocacy group, the ability to produce evidence in support, particularly where there is a request for funding, is fundamental. Just as important is the need for housing service providers to use information collected to improve their own practices, so that the needs of those with housing problems or engaged in housing disputes are adequately met.

²⁹ J Taylor and E Burt, “Voluntary organisations as e-democratic actors: political identity, legitimacy and accountability and the need for new research” (2005) 33 *Policy and Politics* 601, 609.

BETTER LOCAL KNOWLEDGE

- 3.85 While data collection via information technology tools is important, it is equally important in the housing sector to capture the individual, anecdotal knowledge which locally based organisations develop. Laforest and Orsini considered the nature of voluntary sector involvement in government policy-making, and argued that there were dangers in placing too great an emphasis on evidence-based policy-making. They said:

Evidence-based practice should not be regarded as the only valuable and valued input into policy-making and the standard reference for all involved in policy. It should be seen as one of the contributions that the voluntary sector can make to policy-making. Equally important is the everyday “situated knowledge” that organisations can bring to the table.³⁰

Although the authors were largely considering the role of institutional knowledge in effecting policy change, their point applies equally to the development of a holistic dispute resolution system.

- 3.86 The Chartered Institute of Housing, in their response to the Issues Paper, warned against regarding triage plus as a single approach to providing housing advice. They noted that “the strength of many existing services is that they are based in the community and understand the local context, local contacts and knowledge”.
- 3.87 Similar points were raised by other respondents, who noted the advantages of the exchange of knowledge by professionals in the housing arena. For example, District Judge Wendy Backhouse indicated that there are frequent discussions on the Felix system (an online conferencing system for judges, provided by the Judicial Studies Board) about housing issues, as well as amongst judges in individual courts.

COMMUNICATION

- 3.88 We believe that more could be made of the knowledge held by organisations in the housing sector, by communicating such information in web forums, and through email user group lists. In this way the knowledge developed by individuals in the housing sector would not start and end with the individual or the organisation, but could be used to produce greater awareness of the system as a whole.

Conclusions

- 3.89 From this discussion, we conclude **first that housing service providers should be enabled to obtain and maintain up-to-date information technology systems. This should be included as part of their funding arrangements.** Citizens Advice CASE system may provide a template for the range of functions that such systems should be able to perform.

³⁰ R Laforest and M Orsini, “Evidence-based engagement in the voluntary sector: Lessons from Canada” (2005) 39 *Social Policy and Administration* 481, 494. By “situated knowledge”, the authors mean knowledge which results from the experience of working with particular constituencies and representing their interests.

- 3.90 **Second, we conclude that service providers should be encouraged to use local knowledge to identify issues that need addressing, particularly issues arising at the local level.**
- 3.91 **Third, we conclude that new ways of communicating the intelligence that has been gathered at local, regional and national levels should be developed, so that all those engaged in housing problem solving and dispute resolution can learn about and, where necessary, improve the services they offer.**

Feedback

- 3.92 The third function for triage plus is feedback. This means using the information gained from signposting, intelligence-gathering and oversight, to improve service delivery and where necessary change public policy. Feedback should be multi-directional. For example, feedback from local advice providers could be given to courts, tribunals and ombudsmen. But, equally, feedback from those bodies could be given to local advice providers.
- 3.93 We envisage feedback being provided:
- (1) by advice and adjudication bodies to local government agencies, for example in relation to housing benefit, or environmental health;
 - (2) to landlords, particularly larger institutional landlords in both the social and private sectors;
 - (3) to professional associations, either of landlords or letting agents;
 - (4) to tenants' organisations; and
 - (5) to central government.

This should not be regarded as a definitive list.

- 3.94 Feedback can be delivered in a variety of ways, including:
- (1) discussions at a local official level, for example with the manager of the local authority's neighbourhood office about the processing of applications for repairs;
 - (2) discussions in a more formal partnership arrangement;
 - (3) discussions in a court or tribunal users group;
 - (4) general advice and information provided in Annual Reports;
 - (5) more focused advice set out in special reports, such as those written by the Local Government Ombudsman;
 - (6) public policy work involving the making of representations to Parliament or Ministers.

- 3.95 Such public policy work is sometimes referred to as “campaigning”. For example, the National Council for Voluntary Organisations describes campaigning as activities conducted “to influence others in order to effect an identified and desired social, economic, environmental or political change”.³¹ We prefer to use the phrase public policy work. The important point is that this should be recognised and accepted as a legitimate component of triage plus.

Why is feedback important?

- 3.96 The principal importance of feedback is to benefit the organisation receiving it. In many cases, feedback allows the body to which feedback is given to become aware of problems, both those which are within its remit, and those which are not, thereby enabling it to take steps to correct the problem.
- 3.97 Feedback also allows bodies that have sought to adopt positive strategies which it has initiated to find out whether their initiatives are working. This is useful because the recognition comes from an external (and in that sense reliable) source. Whatever the reason for the feedback, it should be seen as a positive source of information designed to enable organisations to perform better.
- 3.98 The importance of feedback mechanisms which are acted upon by government was recently recognised in a government report prepared as part of its review of the voluntary sector. The report noted the views of consultees, that, although there had been an increase in government consultation, further clarity was needed to identify the action taken as a result of the consultation. Voluntary sector organisations also indicated a desire for greater collaboration amongst bodies with similar goals. The report said that:

The Government wants to promote the development of strong, active and empowered communities, where people are able to define the problems they face and, in partnership with public bodies, enable positive change. Organisations that represent the voices of their community and campaign for change are a vital part of the democratic process, articulating concerns in a way that holds statutory agencies to account and feed into and improve the policy making process.³²

- 3.99 In keeping with this strategy, the government recently launched a website designed to assist people in the public, private and voluntary sector to maximise the potential of their consultation processes. The website includes advice on how to plan consultation processes, examples of case studies which produced change, a facility to seek expert advice, and resources about participation.³³

³¹ National Council for Voluntary Organisations *Good Campaigns Guide* cited in HM Treasury and Cabinet Office *The future role of the third sector in social and economic regeneration: final report* (2007) p 17, http://www.cabinetoffice.gov.uk/third_sector/third_sector_review/~/_media/assets/www.cabinetoffice.gov.uk/third_sector/the_future_role_of_the_third_sector_in_economic_and_social_regeneration%20pdf.ashx (last viewed 28 April 2008).

³² Above, p 18.

³³ See <http://www.peopleandparticipation.net/display/Involve/Home> (last viewed 28 April 2008).

How should feedback be developed in a proportionate dispute resolution system?

RECOGNITION OF FEEDBACK ACTIVITY

3.100 Although we argue above that feedback should always be seen in a positive light, the value of feedback processes depends significantly on the ability of the receiving entity to acknowledge the feedback, and act upon it. As we outlined in the “Lack of coherence” section earlier,³⁴ respondents to this consultation provided several examples of attempts to facilitate change which were not acknowledged, or acted upon.

3.101 It must also be accepted that there are problems associated with organisations providing feedback. It may be difficult for some providers in the housing advice sector to determine how best to define their feedback role. Is it better to maintain distance from the entity to which feedback is provided, or to engage with the entity and provide feedback through internal systems? This has sometimes been referred to as the “insider” vs “outsider” debate:

The dilemma is whether to become involved in the institutionalised political process and remain key agents of transformation within this, or assert autonomy and pressure from without – which may permit under-represented sections of society a voice not possible within the political process, but may not effect change.³⁵

3.102 There are advantages and disadvantages to each approach. One problem with being an “insider” may be a threat of repercussions. Some advice providers we spoke to in consultation noted their concern that if they spoke out too strongly, there would be a reduction in funding of their activities.

3.103 In our view there is capacity for providers to engage in both “insider” and “outsider” roles. Craig, Taylor and Parkes, in reviewing the strategies adopted by voluntary and community organisations, concluded that adopting both types of policy-changing strategies (both within an organisation, and between organisations) can be most effective in achieving results. They said:

Variation in strategies used, and in the diversity of organisations attempting to create change in a policy field, can be beneficial in terms of the effectiveness of organisations in achieving commonly held aims.³⁶

³⁴ See para 2.31.

³⁵ M Carley and H Smith, cited in G Craig, M Taylor and T Parkes, “Protest or partnership? The voluntary and community sectors in the policy process” (2004) 39 *Social Policy and Administration* 221, 222.

³⁶ G Craig, M Taylor and T Parkes, “Protest or partnership? The voluntary and community sectors in the policy process” (2004) 39 *Social Policy and Administration* 221, 237.

- 3.104 The types of activities will vary widely between organisations, and must depend on the capability of the organisation. Activities might include the bringing of test cases, responses to consultations, involvement in government inquiries, the publication of policy reports, and seeking to influence the policy or practice of local and central government. There are many feedback activities which could assist in the resolution of housing problems, at a local or national level. In order for these strategies to be effective in resolving collective “housing unhappiness”, it is essential that both service providers and funders recognise the importance of this work.
- 3.105 **We conclude that the legitimacy of feedback activity in the housing advice sector should be acknowledged, and recommend that government and other funders recognise the need to fund public policy activity by service providers in the housing sector.** At the same time, we recognise that any publicly funded activity must be effective. This means such activity must be publicly accountable.

DEVELOPING THE ACCOUNTABILITY OF FEEDBACK PROVIDERS

- 3.106 The ability of service providers to conduct feedback should not be unlimited. Where organisations are responsible for spending public money, they must be accountable for how they spend it. Thus, while some public funding should be provided to undertake feedback, there must also be clear targets to be reached by the organisation.
- 3.107 One consultee pointed out that quantifying feedback targets is difficult. Housing problems may develop suddenly due to a change in local authority policy, a new case precedent or a number of other factors. Similarly, assessing the “success” of feedback is not straightforward. There will be a variety of factors which affect whether or not a change is effected in relation to a housing problem (for example, the ability of government to fund any proposed changes, and negative impacts on other sections of the community). There are also inherent difficulties where the primary subject of feedback is also the source of the funding, such as local authorities or indeed, through the Legal Services Commission, national government.
- 3.108 However, we do not consider it impossible to arrive at ways in which feedback could and should be evaluated. A starting point would be a simple assessment of the amount of information collected, the number of reports produced, and the number of agencies to whom such reports were sent. Clearly there is more work to be done in this area. **We recommend that more work should be done on how to evaluate feedback activities.**
- 3.109 We envisage that this would include:
- (1) commissioning research on the effectiveness of different forms of feedback, to inform the decision making of both organisations and funders; and
 - (2) collaborative work between representatives of advice organisations and the Legal Services Commission, local authorities and other funders aimed at arriving at means by which the effectiveness of feedback activities can be monitored.

- 3.110 The aim is to arrive at a situation in which funding arrangements for organisations in the housing sector who undertake feedback work should specifically incorporate mutually agreed forms of assessment, while allowing flexibility in the identification of the areas of feedback to be targeted by service providers.

CONCLUSION

- 3.111 **We conclude that, in the context of developing a proportionate system of housing dispute resolution, it is time for a change of approach in respect of the provision of housing advice.** As we outlined in Part 2, there are significant difficulties with the present system. Historical development has led to the emergence of different dispute resolution methods in the housing sector which are not co-ordinated. Current methods of effecting systemic change have limited impact, and are sometimes not acted upon by authorities. Users of the system feel that the costs of the current methods of resolving disputes outweigh the benefits gained. Many users are marginalised and unable to access resources in any event. Triage plus should be the cornerstone of the new approach. This conclusion follows on from our view that a reformed system of dispute resolution should embody a number of different values (set out in Part 2).
- 3.112 The fundamental elements of triage plus are: signposting – initial diagnosis and referral; intelligence-gathering and oversight; and feedback. In developing our concept of triage plus, we have identified some key areas for further development of such an approach in the housing sector.
- 3.113 We acknowledge that our conclusions and recommendations in respect of triage plus do not dot every i or cross every t. Nonetheless, we believe that developing this vision for triage plus should become the basis for a reformed holistic system of housing advice and assistance. We think that service providers – both government and non-government – should make the commitment to reforming or enhancing their service by adopting the triage plus approach, which we recommend, to the solving of housing problems and the resolution of housing disputes.

STOP PRESS

- 3.114 Just as the final drafting of this report was taking place, two significant developments came to our attention, which we refer to here.

Southwark possession prevention project

- 3.115 First, we received the evaluation report of the Southwark Possession Prevention Project, 2004-2007.³⁷ This scheme was established jointly by Southwark Law Centre and Blackfriars Advice Centre, who worked in partnership to reduce evictions by combining outreach training and policy initiatives designed as far as possible to prevent the need for possession proceedings to be taken. Although this project was designed long before the Law Commission started its work on proportionate dispute resolution, it seems to us that it is an excellent case study of how our concept of triage plus might work in practice.
- 3.116 The Project accepted the reality that there were not going to be significant increases in funds for housing advice, but was focused on ensuring that the services available were as effective as they could be. Rather it demonstrates that, by creating good working partnerships between landlords, tenants, courts and advice service providers, significant practical assistance can be offered.
- 3.117 Among the project's achievements were:
- (1) Improved training for advice workers;
 - (2) Better operation of the court duty solicitor scheme;
 - (3) Effective policy work, particularly with the local authority;
 - (4) Enhanced networking between different advice providers;
 - (5) The development of a holistic approach to advice giving.
- 3.118 The report highlights the positive impact that the project had locally, and the value of funding preventative services. We are of the view that projects such as this would go a long way to transform our vision of triage plus into an operational reality.

Housing options advice pilots

- 3.119 Second, on 12 December 2007, in a major speech to the Housing Corporation and the Chartered Institute of Housing, the Minister of Housing, Yvette Cooper, MP, announced that she was proposing to establish new housing "options and advice services" in five pilot areas. The purpose of these services will be to give those seeking advice a "more varied 'menu' of housing options". Further, "Jobless tenants will be offered joined-up housing services and employment advice". This builds on an initiative already operating in Sheffield.
- 3.120 Although the full details are not currently available to us, these suggestions also embrace the holistic approach we advocate, and the need to deal with related clusters of problems. If the pilots are successful, they would also contribute to the delivery of our vision of triage plus.

³⁷ The report may be found at http://www.lawcentres.org.uk/uploads/Possession_Prevention_Project_2007.pdf (last viewed 28 April 2008).

- 3.121 What is important, however, is that this new initiative is developed as part of the overall development of a proportionate system for solving housing problems and resolving housing disputes. It would be extremely unfortunate if this were to be yet another example of an unco-ordinated development, which we have criticised above as one of the reasons why current provision of advice and help lacks coherence.
- 3.122 However, there is no reason why this should happen. If those leading the new initiative are aware of and understand the principles set out here, this report will make a major contribution to ensuring that the new initiative makes an innovative contribution to the overall development of proportionate housing advisory services.

PART 4

NON-FORMAL DISPUTE RESOLUTION

INTRODUCTION

- 4.1 The Issues Paper set out proposals for a three-pronged approach to the development of a proportionate system for dealing with housing problems and disputes. Part 3 of this report sets out our conclusions relating to improvements in the provision of advice and assistance, using the concept of triage plus. In this Part we set out our views on the contribution that non-formal dispute resolution mechanisms should make. Part 5 discusses formal court and tribunal procedures.
- 4.2 Since we published the Issues Paper, we have been developing our work on new approaches to the regulation of the private rented sector. Our provisional proposals were set out in the Consultation Paper, *Encouraging Responsible Letting*.¹ The central idea in that paper is that private landlords should be subject to mandatory self-regulation. Our final recommendations on this will be published shortly.
- 4.3 A key feature of self-regulation is that means for the speedy and effective resolution of complaints and disputes should be readily available. While courts or tribunals remain the forum of last resort, the preferred option is the use of non-formal dispute resolution procedures. The recommendations and conclusions in this Part are, therefore, also integral to the recommendations we make in *Encouraging Responsible Letting*.
- 4.4 The Government has also announced that, following the Cave review² there is to be a new approach to the regulation of the social rented sector. The current Housing and Regeneration Bill proposes the establishment of a new Office for Tenants and Social Landlords. The recommendations and conclusions we make in this report will also be relevant to the development of that new office.
- 4.5 In the Issues Paper we suggested that there were three non-formal processes in particular which should be considered in the development of a proportionate dispute resolution system:
- (1) ombudsmen;
 - (2) internal management responses by bodies involved in the housing sector; and
 - (3) alternative dispute resolution.
- 4.6 For the purpose of this report, we have reclassified these. The discussion now proceeds under four headings:
- (1) Ombudsmen;

¹ *Encouraging Responsible Letting* (2007) Law Commission Consultation Paper No 181, <http://www.lawcom.gov.uk/docs/cp181.pdf>.

² Department of Communities and Local Government, *Every tenant matters: a review of social housing regulation* (June 2007).

- (2) Use of complaints procedures;
- (3) Mediation; and
- (4) Other forms of alternative dispute resolution.

OMBUDSMEN

4.7 There is already a very significant involvement of ombudsmen in the resolution of housing problems and disputes. These include:

- (1) the Local Government Ombudsmen, who have power to investigate local authority housing matters;
- (2) the Independent Housing Ombudsman Service, which has jurisdiction in respect of Registered Social Landlord housing, but may also take on private sector matters;
- (3) the Public Services Ombudsman for Wales, who may investigate public bodies (including local authorities and social landlords); and
- (4) the Estate Agent Ombudsman for private sector matters relating to estate agents. (The position of this Ombudsman will be significantly enhanced when the provisions of the Consumers, Estate Agents and Redress Act 2007 come into force in April 2008.)
- (5) the Surveyor Ombudsman Scheme, established in 2007 by the Royal Institution of Chartered Surveyors (RICS) to hear complaints about its members.

4.8 Our current work on remedies against public bodies examines the work of ombudsmen in detail, and how the role of ombudsmen could be enhanced.³ As a result, we do not propose to make detailed recommendations here about changes to the way in which ombudsmen carry out their functions. We do, however, think it important that ombudsmen are empowered to act flexibly and in ways that enable people's complaints to be dealt with efficiently.

4.9 For example, if a complaint is wrongly submitted to one ombudsman scheme, it should be transferable to the correct scheme without requiring the complainant to start the whole process again. In addition, the ombudsmen should keep the boundaries of their jurisdictions under review. If it appears that matters which should properly be investigated by an ombudsman are being allowed to fall through the net, that should be made clear to the Government and, if necessary, legislative changes should be made.

4.10 There are many aspects of the work that ombudsmen undertake that make them a very attractive participant in a system of proportionate dispute resolution.

³ A Consultation Paper will be published later in 2008.

- (1) It is clear from our consultation that the services provided by ombudsmen can be a highly cost-efficient method for resolving problems. For example, the cost to landlords of the Independent Housing Ombudsman Service is very low – it is calculated on the basis of an annual cost of £1.15 per unit of accommodation.
- (2) We note that the responses provided by ombudsmen in respect of their work indicate that much of their time is spent undertaking what we regard as triage plus, rather than pure dispute resolution. For example, the Local Government Ombudsman has attempted to increase knowledge amongst advisers of the ombudsman’s work, through the creation of a special section on the Local Government Ombudsman website, as well as providing telephone access to an investigator for advisers.
- (3) Additionally, the Local Government Ombudsman advised that his service prioritises providing feedback to local authorities where appropriate:

We have regular liaison arrangements with many authorities - particularly those against whom we receive a significant number of complaints. As part of those contacts, we are able to chase progress on the implementation of our recommendations and also to point out issues where we consider that the authority needs to improve.
- (4) We have also noted other significant benefits with the use of ombudsmen services in the resolution of housing disputes, notably the flexibility with which ombudsmen are able to conduct their investigations; and the moral authority which a decision of an ombudsman carries.

4.11 One particular issue that arises in the housing context is the potential for both overlaps and gaps between the roles of the Independent Housing Ombudsman Service and the Local Government Ombudsman. This is an issue which stakeholders have raised with us in the past. The Local Government Ombudsman noted that:

We are not aware of overlaps between the different ombudsman schemes in the housing area (except where these may occur as a result of someone moving between England and Wales or Scotland). We are not aware of serious gaps either. But on occasion neither we nor the Housing Ombudsman Service (HOS) have been able to assist when a private owner or tenant has complained about the alleged nuisance conduct of an RSL tenant. We have been unable to help because the RSL is not within our jurisdiction; the HOS has been unable to help because the complaint does not come from an RSL tenant.

4.12 The response of the Housing Ombudsman Service also indicated:

At the present time we devote a significant amount of our resource to re-directing tenants of Local Authorities or of private sector landlords who have not joined the Scheme. In the case of the former, we refer them to the Local Government Ombudsmen.⁴

4.13 Given that ombudsmen have an important role to play in a proportionate dispute resolution system, it is highly undesirable that there should be any gap between the functions of the Local Government Ombudsman and of the Independent Housing Ombudsman Service. **We recommend that the housing-related jurisdictions of the Local Government Ombudsman and the Independent Housing Ombudsman be kept under review with a view to closing any gaps that may become apparent.**

4.14 **We further recommend that housing advisers should gain greater awareness of the role of ombudsmen as part of the triage plus approach; and taking a complaint to one of the relevant ombudsmen services should, wherever appropriate, be one of the options recommended to those seeking advice as part of a triage plus approach.**

USE OF COMPLAINTS PROCEDURES

4.15 The Issues Paper considered the part that could be played by what we termed management responses in a proportionate dispute resolution system. The Issues Paper noted that since the 1960s a number of techniques had been developed to ensure that public officials took better decisions. These techniques were associated with “new public management”, which had become prevalent in public sector organisations. The techniques we identified included:

- (1) performance indicators;
- (2) performance review;
- (3) internal audit of decision-making;
- (4) external audit of decision-making;
- (5) complaints-handling mechanisms;
- (6) internal/external review of decision-making; and
- (7) the use of public interest groups.

4.16 We noted in the Issues Paper that the use of all these tools would not necessarily be required or relevant to a housing matter. Rather, we envisaged that a proportionate dispute resolution system would involve service providers developing and using different methods of management as appropriate to their service.

⁴ The response also noted the advantages and disadvantages of a single, merged ombudsman service.

- 4.17 What emerged from the consultation responses is that the most commonly available management response was through the use of a complaints handling mechanism. The availability of a complaints procedure was found throughout local government, in most RSLs, and amongst letting agents and landlords who were signed up to a professional organisation.
- 4.18 Indeed, in many cases, before use can be made of the ombudsman services discussed in the preceding section, any available complaints procedure must have been tried.
- 4.19 Consultees agreed that the present use of management responses – especially complaints procedures – carried both advantages and disadvantages. The Brent Private Tenants' Rights Group noted the preventative nature of management responses; clearly this is an important way in which problems can be solved before they are transformed into disputes. This was echoed in the Citizens Advice response:

CAB advisers' experience would suggest that consumers will usually be seeking the simplest and speediest remedy to their problem and that where this can be achieved through a management response, this is clearly the most satisfactory option.

- 4.20 Prevention on a wider scale was also identified by the Local Government Ombudsman as an advantage of complaint handling techniques. He said:

The local authority can agree to change its policy or procedures or take other measures (such as allocate additional resources to a service budget) irrespective of whether it accepts that it was at fault in handling the complainant's case. ... A good internal complaint handling process can result in early resolution of problems or disputes thus minimising the expenditure of time and energy by the complainant in pursuing his or her concerns and minimising the use of public resources in reaching this outcome. In some instances, management responses can enable quick learning from complaints to the benefit of others.

- 4.21 Citizens Advice emphasised the need for customers to be aware of how the management techniques may be used. The issue of awareness was also raised by Bolton At Home (an Arms-Length Management Organisation), who argued that an approach of openness must be adopted by organisations:

Appropriate and effective management responses have to be rooted in the context of a culture of sharing with tenant/resident groups, who should feel empowered to influence and fashion policy.

- 4.22 Although there are clear advantages to the use of complaints procedures, they do require organisations to respond positively where a complaint, particularly a well justified complaint, is made. Organisations that feel on the defensive about the standard of service they provide may be unwilling to accept that any complaints are justified. Thus Lancelot Robson, a Residential Property Tribunal chair, suggested that the difficulty with relying on management responses is the need felt by organisations to justify their original decisions. For this reason he felt that appropriate alternatives must exist to deal with faulty decisions.

4.23 Complaints procedures may also lack an independent element. Thus, Shelter said:

Unless there is a genuinely independent presence in the review process, this [dealing with complaints in an open, constructive and supportive manner] is difficult to achieve, for the understandable reason that a senior officer is overseeing a decision of the same organisation, and there will be at least a pre-disposition to take a defensive attitude.

4.24 Some consultees also suggested that management responses were mostly ineffective, and the threat of legal action was necessary to provide sufficient protection. However, the Civil Justice Council noted the potential problems with the existence of such a threat:

The response of some public bodies in dealing with complaints tends to be unduly legalistic and somewhat defensive, instead of addressing the cause of the grievance openly and sympathetically. Undoubtedly, there is a sense in which the spectre of possible legal action hangs over such responses, and the language of the response bears all the hallmarks of having been pored over by lawyers in case admissions of liability have been inadvertently made. Not surprisingly, complainants are often disillusioned, and likely to feel that the exercise has been a smokescreen or a delaying tactic before more productive remedies can be invoked.

4.25 There was some limited support for the development of a pre-action protocol which would require landlords to undertake appropriate management action prior to coming to court. However, in the context of significant variations between the nature of landlords in the housing sector, we are not certain that a protocol which accommodated all the relevant types of landlord could be framed.

4.26 Overall, consultees agreed that the existence and utilisation of management responses including complaints handling was an important step in the dispute resolution process. However there was a strong sense that the effectiveness of such practices in resolving disputes was limited by a number of factors. These included the willingness of organisations to operate complaints procedures in a positive way; the focus that regulators often put on targets rather than actual improved outcomes; and the unsuitability of some types of problem for resolution through such procedures.

4.27 Notwithstanding these reservations, **we conclude that complaints handling and other management response techniques should be developed as far as possible as a key component of a housing dispute resolution system.** To prescribe particular methods for all organisations would not take into account the need for variation in management techniques. Rather they should be tailored to suit the nature of the particular organisation and its resources, as well as the type of work with which it deals.

MEDIATION

- 4.28 In recent years there has been considerable interest in the use of mediation as a form of alternative dispute resolution. In the Issues Paper we discussed the history, strengths and weaknesses of mediation. We expanded on this in our Further Analysis Paper. The Consultation Paper posed more detailed questions about the use of mediation in the resolution of housing disputes.

What is mediation?

- 4.29 Mediation is a method of dispute resolution which involves “a neutral third party with no power to impose a resolution helping the disputing parties to reach a mutually acceptable settlement”.⁵ The presence of the third party, who exercises a degree of management over both the parties and the process, is what distinguishes mediation from negotiation, where parties interact directly with each other.
- 4.30 Mediation has powerful advocates, including Lord Woolf, who strongly endorsed the use and development of mediation in both his interim and final reports on *Access to Justice*.⁶ Supporters of mediation argue that it is often a quicker, cheaper, more informal and more flexible alternative to taking a matter to court. It can also lead to better outcomes, with mediated agreements being adhered to more willingly than court orders. Litigation, by contrast, is seen as costly, adversarial, inflexible, impersonal, susceptible to delay, and often traumatic for the parties involved. Research suggests that those who actually use mediation generally like it.
- 4.31 However, it is important to keep mediation in perspective. It is not universally embraced,⁷ and despite continual reinforcement from senior judiciary and Government, demand for mediation remains modest.⁸

Mediation in courts and tribunals

- 4.32 In recent years, courts have become more engaged with mediation. Some courts run their own mediation schemes. More now take advantage of the recently established National Mediation Helpline.⁹

⁵ R Bush and J Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (1994) p 2.

⁶ See Lord Woolf MR, *Access to Justice: Interim Report* (1995); Lord Woolf MR, *Access to Justice: Final Report* (1996).

⁷ See for example L Mulcahy, “The Devil and the Deep Blue Sea? A Critique of the Ability of Community Mediation to Suppress and Facilitate Participation in Civil Life” (2000) 27 *Journal of Law and Society* 133, who describes it as a “practice in search of a theory” (p 134); and H Genn, *Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal* (Department for Constitutional Affairs Research Report No 1/2002, 2002) ch 6, http://www.hmcourts-service.gov.uk/docs/adr_initiatives.pdf (last viewed 28 April 2008).

⁸ H Genn, *Court-Based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal* (Department for Constitutional Affairs Research Report No 1/2002 2002) p 103, http://www.hmcourts-service.gov.uk/docs/adr_initiatives.pdf (last viewed 28 April 2008).

- 4.33 As part of their overriding obligation to engage in active case management,¹⁰ courts have, since 1999, been under a duty to consider alternative dispute resolution methods and encourage their use if appropriate.¹¹ A number of reported cases have indicated that courts may penalise parties, who summarily reject offers from their opponents to consider mediation prior to trial, perhaps with an adverse costs order.¹²
- 4.34 The involvement of courts in mediation has not been uncontroversial. It has been argued that the imposition of costs penalties for failing to undertake mediation works against the voluntary ethos of alternative dispute resolution, and constrains the right of the parties to access the court.¹³ On the other hand, the two processes can work well together: “mediators can achieve outcomes which are beyond the capacity of courts to achieve”.¹⁴ Rates of settlement of mediated cases are also relevant; a recent pilot of quasi-compulsory referrals to mediation in London courts found that the average rate of settlement for cases was 53%.¹⁵
- 4.35 The issue of court-ordered or compulsory mediation is a contentious one. Compulsory mediation schemes have found success in some other countries, such as Australia.¹⁶ In the UK, mediation retains its original voluntary nature. In *Halsey v Milton Keynes General NHS Trust*, the court held that requiring parties to engage in alternative dispute resolution prior to court proceedings may be an unacceptable infringement of their right of access to the court under article 6 of the European Convention on Human Rights.¹⁷
- 4.36 In the context of housing disputes, the Pre-action Protocol for Housing Disrepair Cases now provides:

⁹ See <https://www.nationalmediationhelpline.com/index.php> (last viewed 28 April 2008). Callers to the helpline receive basic information about the mediation process, and are referred to an accredited mediation provider.

¹⁰ See generally Civil Procedure Rules 1998, Part 1.

¹¹ Civil Procedure Rules 1998, r 1.4(e).

¹² For example, *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803, *Dunnett v Railtrack plc (in railway administration)* [2002] EWCA Civ 302, [2002] All ER (D) 314 (Feb); *Hurst v Leeming* [2003] EWHC 499 (Ch), [2003] All ER (D) 207 (Mar).

¹³ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002; *Steel v Joy* [2004] EWCA Civ 576, [2004] 1 WLR 3002.

¹⁴ *Dunnett v Railtrack plc* [2002] EWCA Civ 302, [2002] All ER (D) 314 (Feb) at [14].

¹⁵ H Genn et al *Twisting arms: court referred and court linked mediation under judicial pressure* (Ministry of Justice Research Series 01/07, May 2007) p 197, <http://www.justice.gov.uk/docs/Twisting-arms-mediation-report-Genn-et-al.pdf> (last viewed 28 April 2008).

¹⁶ See Housing: Proportionate Dispute Resolution (2007) Law Commission Consultation Paper No 180 para 7.15, <http://www.lawcom.gov.uk/docs/cp180.pdf>.

¹⁷ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002.

The parties should consider whether some form of alternative dispute resolution procedure ... would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The 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. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.¹⁸

4.37 The Pre-action Protocol for Possession Claims Based on Rent Arrears contains a similar provision (though it does not refer to costs consequences for failure to consider mediation).¹⁹ We note, however, the response of the Association of District Judges to the Issues Paper, which indicated “early mediation in all cases is desirable...(but) there are few teeth to any failure to observe the pre-action protocols”.

4.38 Some consultees indicated a strong view that compulsory mediation would be pointless, as successful mediation requires a willingness to mediate. On the other hand, David Daly, a barrister and mediator, said that:

There is an advantage to making mediation compulsory in that everybody will have the process explained to them by the mediator before they attempt to walk out! Funnily enough though once you get the parties talking it is relatively unusual for them to walk out before the end of the allotted time. By definition there can be no such thing as a compulsory mediation. What can be made compulsory is the *attempt* at mediation. I lean towards a greater element of compulsion but I do not know how it can be done.

4.39 In addition to the *Halsey* ruling, section 24 of the Tribunals, Courts and Enforcement Act 2007 provides that “mediation of matters in dispute between parties to proceedings is to take place only by agreement between those parties”. Hence, any tribunal within the Tribunals, Courts and Enforcement Act 2007 structure cannot order parties to engage in mediation where the parties are unwilling to do so, though tribunals are to encourage use of mediation.²⁰

Use of mediation

4.40 Overwhelmingly, consultees indicated support for mediation as a process in principle, but cautioned against a blanket approach. Many consultees pointed out that mediation is not appropriate in every case.

¹⁸ Pre-action Protocol for Housing Disrepair Cases, para 4.1(a); Civil Procedure Rules 1998.

¹⁹ Pre-action Protocol for Possession Claims Based on Rent Arrears, para 11; Civil Procedure Rules 1998.

²⁰ Tribunals, Courts and Enforcement Act 2007, s 24 also provides for mediation to be conducted by members of the tribunal.

- 4.41 Consultees recognised that use of mediation has advantages. The Association of Tenancy Relations Officers and the National Union of Students stated that evidence suggests mediation is cost effective and may save time and distress. The Leeds University Union Student Advice Centre reflected that some landlords would rather negotiate a settlement than go through the courts, so mediation may have a particular role to play in the housing context. LACORS²¹ stated that in some cases mediation may help to resolve or clarify the issues at stake, and agreed that successful mediation could lead to costs savings.
- 4.42 Consultees also expressed some reservations about the use of mediation. The Advice Services Alliance stated that parties should be given sufficient information and the opportunity to obtain independent advice before deciding to mediate. The Council on Tribunals and the Chancery Bar Association agreed that appropriate training must be provided to judges or tribunal members so they know when to suggest mediation and can explain its advantages and disadvantages. The Money Advice Trust cautioned that:
- There is no clear evidence to justify a blanket assumption that mediation is necessarily “better” than adjudication whether in a court or tribunal.
- 4.43 Consultees made various suggestions about how mediation might be further incorporated into the housing context. Several consultees proposed that mediation should be offered routinely as part of the protocol in every case, allocating time before the hearing if necessary. The National Federation of Residential Landlords considered that the court or tribunal should be able to define those cases where mediation would be appropriate, and recommend this course to the parties.
- 4.44 The Legal Services Commission was more circumspect, submitting that mediation should be available provided both parties feel they can participate equally. Similarly, Shelter stated that mediation should only be offered in appropriate cases, as it will not always be relevant. The Royal Institution of Chartered Surveyors suggested that, rather than the tribunal itself offering mediation, it is important for the court or tribunal to link into alternative dispute resolution services which already exist and are already available to the parties.
- 4.45 The Local Government Ombudsman pointed out that the Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 now empowers the ombudsmen to appoint mediators or others to assist with the conduct of an investigation. He reasoned that if ombudsmen, courts and tribunals are in future going to offer complainants the option of mediation, these fora should be “ensuring that the mediation service is being delivered in a broadly consistent manner, so that people’s experience of mediation is reasonably similar regardless of how they have accessed the administrative justice system.” He suggested that there may be some advantage in looking at this issue in a more holistic way.

²¹ Local Authorities’ Co-ordinators of Regulatory Services, a body created by the UK local authority associations.

- 4.46 The Residential Property Tribunal Service has undertaken some early work of its own in this field to further the policy set out in the Government White Paper “Transforming Public Services: Complaints, Redress and Tribunals” with the aim of feeding the practical experience into the Law Commission study. The first pilot study in 2005 was good on process but poor in other respects. A second pilot paid more attention to involving staff and achieved a high degree of success. The scheme has now been made permanent.

Encouraging mediation

- 4.47 As noted above, only one respondent supported the idea of compulsory mediation, and many consultees explicitly rejected it. The Chancery Bar Association commented that mediation is not generally effective unless it is voluntary, and that compulsion has failed in schemes such as the Central London pilot. The Law Society and the College of Law Legal Advice Centre concurred in this view, saying that mediation usually only works where the parties agree to it, and that forcing parties to mediate may lead to wastage of resources. Nottingham City Council and the British Holiday and Home Parks Association said one party may quite reasonably not wish to mediate, and should not be compelled to do so.
- 4.48 Some consultees had helpful suggestions for ways to encourage mediation in the housing context without resorting to compulsion. The Chancery Bar Association, the Legal Services Commission and the Civil Justice Council recommended that the court’s or tribunal’s role should be mainly promotional or educational, and should be limited to encouraging mediation and providing where appropriate. Arden Chambers and the Law Reform Committee of the Bar Council suggested that when a court or tribunal considers that a case is suitable for mediation, it should recommend that course to the parties and warn them that they might be penalised in costs if the case goes to trial. The Money Advice Trust proposed that mediation should be a stage within the process and parties should be encouraged to take part. However failure to agree should not adversely affect the outcome before the court or tribunal itself.
- 4.49 The National Union of Students suggested there is scope for making mediation part of a pre-action protocol, so alternative dispute resolution methods would have to be used before litigation, with a caveat that disputants could continue to litigation should they have reasonable grounds not to take part in mediation. The Local Government Ombudsman was also supportive of the use and further development of pre-action protocols to encourage alternative dispute resolution. The Residential Property Tribunal Service suggested an alternative model could be to require parties to *consider* mediation.

Costs penalties for failure to mediate

- 4.50 Several consultees expressed support for the idea of costs penalties for failure to mediate, but with strong reservations about the circumstances in which they should be used.

- 4.51 The Civil Justice Council, Money Advice Trust and Nottingham City Council suggested the court or tribunal should be able to impose costs penalties when it is felt that time has been taken up unnecessarily by a wholly unreasonable refusal to mediate. Shelter agreed that costs penalties should be used only in the clearest cases where the defendant's refusal to engage has wasted the court's time and generated substantial additional costs. The British Holiday and Home Parks Association stipulated that clear guidelines should be drawn up so parties know when they are at risk of a costs order, and that parties should be given the opportunity to justify their decision.
- 4.52 Some respondents did not agree that costs are an effective way of penalising a refusal to mediate. LACORS submitted that there will be some cases where the dispute cannot be resolved by mediation and where the parties and other local authorities will benefit from clarification of the issues by the court or tribunal. NUS feared that adding another level where costs could be imposed would add more time, delay and cost to a case. Furthermore, they considered that parties should not be deterred from continuing in a case for the reason that they cannot risk an adverse costs order. The Residential Property Tribunal Service was also concerned that the threat of adverse costs orders may push many cases down the wrong route.
- 4.53 The Chancery Bar Association suggested the following:

The tribunal should retain a discretion to take this into account when evaluating the conduct of the parties generally. However this should be subject to guidelines and there should only be adverse costs implications if a party was acting unreasonably in refusing. There should be a strong burden on the party trying to prove this. When deciding whether a party has been unreasonable the tribunal should have particular regard to whether the costs of mediation were disproportionately high and the effect of delay on the claim. There should be no assumption that because a party has refused to mediate they should be penalised.

Mediation in a housing context

- 4.54 In considering the usefulness of mediation in a housing context, we concluded that some housing disputes are suited for resolution via mediation; this was supported by consultees' responses.

Relationships

- 4.55 One of the strong themes which emerged from consultees' responses to the Issues Paper was that mediation is a useful method of dispute resolution where the participants are involved in a relationship which is ongoing (and which will have to continue after the mediation process concludes); and that this is often the case in housing disputes.
- 4.56 Lancelot Robson, a part-time chairman of the Residential Property Tribunal Service, described the relationship aspect of mediation thus:

Mediation in housing disputes has two different types of added value. One is the salvaging of an ongoing relationship... I should make it clear that I am referring to face-to-face mediation. My tribunal experience indicates that it is the physical meeting and exchanging of views which is important...The parties are brought together face-to-face and hear each other's stories.

4.57 Clark Willmott Solicitors, in describing the strengths of mediation, said:

Mediation can bring added value by (hopefully) avoiding a breakdown in relationship between the parties in a dispute where those parties should or need to liaise with one another. This could be adjoining neighbours or tenants and landlords, especially where the tenant has a periodic tenancy which has security of tenure.

4.58 The Council on Tribunals felt that mediation was valuable because of "relationships building, getting issues off one's chest within a safe environment".

4.59 The Brent Private Tenants' Rights Group runs an "InterSolutions" service as part of its Better Renting program. The Group provided an example of a mediation conducted by the InterSolutions service, which resulted in the preservation of relationships which may otherwise have broken down irretrievably:

Better Renting worked with a landlord and his tenants of a true "HMO from hell" using our InterSolutions service. The relationships in the house had completely broken down because for some years one tenant had been acting as a house manager but informally without anything in writing, and towards the end had run completely out of control. He had "signed up" some of the tenants, but the details of any tenancy agreements were impossible to determine. Some tenants had done some improvements – some of which were to a very poor standard and contravened building regulations – but thinking they had permission to do them, they were mutinous at what they saw as unfair treatment. Altogether it was a mess.

Better Renting acted as an honest broker. We were very careful that everyone understood we were not acting for either side, but explaining what the legal situation was to both side until people really understood what could be achieved. The upshot was that four existing tenants were signed up on new Better Renting model agreements to tenancies they could afford, two rooms were freed up for new tenancies, also signed up on the model agreements.

4.60 It was also suggested that mediation helps to preserve relationships because of its reduced emphasis on "winning" and "losing". The Leasehold Advisory Service noted that mediation "lacks the winner take all approach of courts and tribunals".

Neighbours

- 4.61 Another particular example cited by several respondents was the situation of a dispute between neighbours, succinctly described by Clark Willmott Solicitors as “where the problem is really two people living next door to one another who don’t get on”. The Genesis Housing Group similarly described this as “personality clashes or misunderstandings or prejudices about a person’s lifestyle”. Liz Ginn, a mediator at Heartlands Mediation, said:

The process allows the neighbours to look to the future, usually there is a part of their joint agreement which describes how communication will occur in the future in the event of a problem – mediation is good where the relationship will continue, ie when neighbours continue to live alongside each other.

Communication

- 4.62 The strength of mediation as a tool to enable effective communication was recognised by several respondents. The Tenancy Relations/Housing Aid Unit of the Sheffield City Council, in considering the value of mediation, noted that “some disputes may be founded in an ability of one or both of the parties to communicate effectively rather than there being an intractable problem”. The Residential Property Tribunal Service said “our experience is that cases are sometimes referred to the Tribunal not because there is a dispute but because there is a failure in communication”.

Skill-building

- 4.63 It was also suggested that mediation adds value in its ability to develop people’s long-term capacity to negotiate, and solve their own problems; the Chartered Institute of Housing Cymru referred to this as “life skills and capacity building”. Liz Ginn felt that mediation gives “the ability for the parties to sort out disputes in the future for themselves”. Bolton Council, the first to introduce a formal local authority managed mediation network dealing with housing issues, also emphasised that mediation helped people to develop skills and methods of resolving disputes that they could carry forward to other areas of their life.
- 4.64 We have noted in the past that because mediation has the effect of individualising and privatising disputes, it may have less public benefit than court-based processes. However, as we pointed out in the Further Analysis Paper, mediation may have a positive effect for parties on a personal level.
- 4.65 In the context of housing, where many of those involved in disputes are marginalised or vulnerable, it can be argued that a process which enhances the individual’s capacity to solve their own problems is of particular use.

Disrepair cases

- 4.66 Cases involving claims of disrepair are, we believe, well-suited to resolution by way of mediation. It seems far preferable for a landlord and tenant to engage in open and frank discussions about the need for repairs by way of mediation, with a view to reaching agreement about what will be done, than for the matter to have to be adjudicated by a court. This also helps to preserve the relationship between the landlord and the tenant.

4.67 A study of cases referred to mediation at the Birmingham Civil Justice Centre found a high proportion of housing disrepair cases (21.3% of all cases stayed for mediation – this was the second largest group of cases).²² The authors of the study found that there was a settlement rate of 69.5% for cases which were completed in the period of the study. The authors of the study, in producing a qualitative analysis of the cases mediated, noted that participants surveyed thought that some cases in particular were most suitable for mediation. These were:

- (1) cases where parties were seeking flexible arrangements as the outcome of the mediation,²³ and
- (2) cases in which an apology or an explanation would be a potential outcome (the example provided was of a medical negligence case).²⁴

4.68 Both of these issues seem relevant in the context of disrepair claims, in which it may be appropriate for flexibility in arrangements made for repairs, or in which it may also be appropriate for discussion about how an aspect of disrepair has affected a tenant, and an apology may be of assistance in resolving the dispute.

Housing issues for which mediation is not appropriate

4.69 There was also a strong view from many consultees that, because of the nature of the dispute, some housing matters were not appropriate for mediation.

4.70 Several respondents recognised that where disputes involved violence or significant harassment, mediation would not be appropriate.

4.71 Many (though not all) respondents considered that homelessness matters were inappropriate for mediation. Respondents tended to indicate that this was because of the need for a clear decision on the law. Anthony Collins Solicitors were also of the view that “in homelessness cases, law is detailed and complex changing weekly”.

4.72 Possession cases were also raised. The Guild of Residential Landlords and the National Federation of Residential Landlords considered that mediation may delay the process in possession cases where time is of the essence and compromise is an unrealistic proposition. Shelter agreed that where a landlord has issued a possession order, he or she is unlikely to have a change of mind.

²² L Webley, P Abrams and S Bacquet *Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme: Final Report* (2006), <http://www.dca.gov.uk/civil/adr/fast-track-mediation-birmingham.pdf> (last viewed 28 April 2008).

²³ Above at p 79.

²⁴ Above.

Conclusions on mediation

- 4.73 Our examination of mediation as a dispute resolution process reveals both strengths and weaknesses. As an informal, flexible process it can be tailored to the individual dispute and has been shown to lead to party satisfaction even where settlement does not result. However, mediation is not always cost- and time-effective, and there are circumstances where use of mediation may be inappropriate or disproportionate.
- 4.74 Nonetheless, we regard mediation as an important part of a proportionate dispute resolution system. **We conclude that the use of mediation in housing disputes should be encouraged and further developed, but we do not propose any alteration to the principle that it should be voluntary.**
- 4.75 Specifically, **we recommend that (1) mediation should be available for all housing disputes in the tribunal, but should be provided only where all parties agree; (2) rules, practice directions and protocols should emphasise the use of alternative dispute resolution, and the court/tribunal should enforce them; and (3) courts/tribunals should actively promote the availability of alternative dispute resolution methods to litigants and legal representatives. In particular, parties should be provided with information about services available in the locality.**

OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION

- 4.76 In addition to mediation, there is a number of other forms of alternative dispute resolution that may be mentioned in the housing context.

The Dispute Service for Tenancy Deposits

- 4.77 A recent development is the creation of The Dispute Service, a not-for-profit organisation established in 2003. The organisation provides dispute resolution services for disputes between landlords, agents and tenants. Section 213 of the Housing Act 2004 requires that a tenancy deposit paid to any person in connection with an assured shorthold tenancy must be dealt with in accordance with an authorised scheme. Paragraph 10 of schedule 10 to that Act requires schemes to provide non-compulsory means for the resolution of disputes without recourse to litigation. Arising from those provisions, The Dispute Service was awarded a government contract to run a tenancy deposit protection scheme (known as “the Tenancy Deposit Scheme”).²⁵
- 4.78 The Tenancy Deposit Scheme was based on the previous Tenancy Deposit Scheme for Regulated Agents, a voluntary scheme which began in May 2004 and was absorbed into The Dispute Service in April 2007 (when the mandatory tenancy deposit protection scheme began). From 2004 until 2007 approximately 900 deposit disputes were resolved in accordance with the Scheme for Regulated Agents. This scheme is still operating in relation to tenancy agreements entered into before April 2007.

²⁵ Two other bodies were awarded contracts for the same purpose; The Deposit Protection Service, and Tenancy Deposit Solutions Ltd.

- 4.79 Under the new Tenancy Deposit Scheme, landlords and agents may (for a fee) apply to join the Tenancy Deposit Scheme. Additionally, certain entities (professional bodies, accreditation schemes and trade associations) may also be regarded as “approved bodies”, giving their members access to the Tenancy Deposit Scheme.
- 4.80 Where a dispute arises in relation to a deposit, the matter may be brought to the attention of The Dispute Service by any party (the tenant, landlord or agent), and the dispute is referred to an Independent Case Examiner. The Examiner makes a decision about the dispute, and decides how to apportion payment of the deposit money. The Dispute Service also provides a procedure for complaints about the service itself.
- 4.81 The processes for the resolution of disputes outlined on The Dispute Service’s website, as well as the case examples provided, show that the resolution of disputes via the scheme can be quick and inexpensive.²⁶
- 4.82 **We conclude that The Disputes Service provides another form of proportionate and appropriate dispute resolution in the housing context.**

Early neutral evaluation

- 4.83 Another possibility raised in the Consultation Paper was use of Early Neutral Evaluation as a form of dispute resolution. Early neutral evaluation involves a preliminary appraisal of a case by a neutral third party, who considers the evidence and/or legal merits of the matter. The finding of the appraiser is non-binding, and is intended to encourage negotiation, as well as refining the issues in contest.
- 4.84 Consultees were generally supportive of early neutral evaluation. Arden Chambers considered early neutral evaluation would be “most helpful” and could lead to significant savings of tribunal time and cost, as did the Money Advice Trust and the Law Reform Committee of the Bar Council. The Association of Tenancy Relations Officers and the Association of Housing Advice Services considered that early neutral evaluation is a valuable tool which should be routinely offered. The Advice Services Alliance and the Housing Law Practitioners’ Association thought that early neutral evaluation is likely to be of most assistance in disrepair cases.
- 4.85 At the same time, the Housing Law Practitioners’ Association had reservations about the process, arguing that early neutral evaluation will be impossible in some situations, such as possession cases. They argue that in some matters, such as homelessness appeals, the conclusion drawn from the evaluation would be the same as the formal adjudicator’s in any event. Shelter, too, expressed caution:

There are obviously risks, in that the member must be careful not to usurp the function of the [court or] tribunal, and recommendations must be subject to supervision.

²⁶ The target timescales set out on The Dispute Service’s website indicate that a final examiner’s report will be provided within 35 days of receiving the initial dispute referral.

- 4.86 The Chancery Bar Association expressed the strongest disapproval of early neutral evaluation:

This would not be a beneficial service to offer and there are very few cases where it would be of assistance. Early neutral evaluation will not lead to more settlement and may lead to unnecessary costs being incurred by the parties who prepare for a mini-trial before the trial. Early neutral evaluation can often discourage mediation and encourage a party to proceed to trial.

- 4.87 By contrast, the Residential Property Tribunal Service suggested that it might exercise a kind of “mini triage plus” to identify which cases are suitable for mediation as opposed to paper determination or full hearing. An early neutral evaluation could be held where a chairman could make a determination on the papers which would be non-binding but would give the parties an early view of the tribunal’s thinking on the matter.
- 4.88 In the light of these observations, **we conclude that consideration should be given to the development of early neutral evaluation in the context of housing disputes.**

Restrictions on expert witnesses

- 4.89 In our discussion of the case for transferring jurisdictions from the courts to a specialist tribunal, we observed that a possible advantage of the tribunal would be that the fact that experts were part of the tribunal might reduce the need for parties to employ their own experts. This applied particularly to surveyors and valuers.
- 4.90 Several consultees thought this implied that we were proposing restrictions on the use of expert witnesses and expressed the view that restrictions on expert witnesses would not be likely to increase the chances of settlement. Tenant respondents believed that, given the complexity of housing law, there is a need for experts in all cases.²⁷
- 4.91 The Housing Law Practitioners’ Association stated that the use of experts in disrepair cases is “absolutely vital” in pre-action preparation and that this is already integrated into the protocol process. The Chancery Bar Association similarly argued that in many disrepair cases where expert evidence is required, compromise is often reached once both parties have consulted an expert and it is the experts who play a pivotal role in negotiations.
- 4.92 Shelter said:

²⁷ Many respondents also referred to “complexity” in the context of homelessness cases – see, eg, para 5.91 of this report. We feel it important to recognise that while much of the law relating to housing is complex – unnecessarily so – not every case is complex. Several consultees also recognised this in their responses.

Expert evidence is often necessary in determining whether the tenant/occupier has a cause of action, and if so how it should be formulated. We would not therefore favour placing restrictions on the instruction of expert witnesses. Ultimately, however, we believe that the existence of expert evidence should not preclude a role for early neutral evaluation or possibly for mediation.

4.93 The College of Law Legal Advice Centre reflected that:

The disrepair protocol provides for expert evidence to be obtained and for joint inspections. Our experience is that this has dramatically increased the likelihood of early settlement. Such evidence would assist in mediation or early neutral evaluation.

4.94 Other respondents called for a degree of restriction. Arden Chambers and the Law Reform Committee of the Bar Council expressed the view that a single evaluator could provide the necessary service:

In disrepair cases the evidence of a suitably qualified evaluator should be sufficient to reach a conclusion for ENE and is more likely to lead to early resolution than if both sides instruct their own witnesses.

4.95 Pain Smith Lawyers said reasonable restrictions on the use of experts by encouraging single-joint experts would reduce costs and encourage their use. Similarly, District Judge Tim Parker stated “some restriction, in line with the CPR position, would probably tend to encourage settlement. A complete ban on experts would probably discourage it”.

4.96 The Council on Tribunals considered that a tribunal with expert non-legal members should reduce the need for experts, but the right to have experts should not be restricted. This in essence reflected our provisional view.

Other procedures

4.97 We are aware of a number of other alternative procedures. Among them we note the existence of the Surveyors and Valuers Arbitration scheme, established by the Royal Institution of Chartered Surveyors.

Conclusions on other dispute resolution methods

- 4.98 In the light of the discussion we conclude that (1) the adoption of a mixed approach, adapting various forms of alternative dispute resolution tailored to housing, is likely to be the best approach to supporting an appropriate and proportionate system of non-formal housing dispute resolution;²⁸ (2) a pilot of early neutral evaluation should be considered, to be run specifically in relation to housing cases; and (3) though there should be no restrictions at this time on the giving of evidence by expert witnesses, their use should be tightly controlled. Parties should be required to justify the need for instructing expert witnesses prior to a hearing.

FINAL COMMENT

- 4.99 We have emphasised in this Part the importance of non-formal dispute resolution mechanisms. While we agree that there may be some disputes which can ultimately only be resolved by more formal means, the role of ombudsmen, complaints procedures, mediation and other alternative disputes resolution methods in diverting disputes away from formal determination is vital for proportionate dispute resolution.
- 4.100 The existence of such methods in a dispute resolution system also ensures that the system embodies all the values we suggested were necessary in Part 2. For example, the particular skill of ombudsmen in dealing with systemic problems arising from consideration of individual cases greatly assists in ensuring that the decision has impact both individually and systemically. The ability of mediation and early neutral evaluation to limit costs to participants is also an example of how the “efficiency/cost” value can be achieved.

²⁸ See A. Arden, “Housing law v mediation – A suitable case for ADR?” (2005) 8 *Journal of Housing Law* 45.

PART 5

FORMAL DISPUTE RESOLUTION

INTRODUCTION

- 5.1 Throughout our programme of work on the reform of housing law, an issue that continues to be raised is whether housing disputes should be resolved as at present in the county court, with some matters going to the Residential Property Tribunal Service, or whether there should be a specialist housing court or tribunal which would do all housing work. We raised the question in our Issues Paper. We consulted specifically on the issue in the 2007 Consultation Paper.
- 5.2 The Consultation Paper proposed that:
- (1) There should be a transfer of jurisdiction over claims for possession and disrepair in respect of rented dwellings, from the county court to the Residential Property Tribunal Service, which would become a First-tier Tribunal in the new Tribunals Service. There could also be a transfer of jurisdiction in respect of cases involving mobile homes and caravans.
 - (2) Appeals on a point of law from the First-tier Tribunal should go to the Upper Tribunal (both entities created by the Tribunals Courts and Enforcement Act 2007); and appeals would require the tribunal's permission.
 - (3) Homelessness and statutory appeals currently heard by the county court, and housing and homelessness related judicial review applications, currently made to the Administrative Court, should be transferred to the Upper Tribunal.
 - (4) In relation to Wales, the present system should be reformed so that the Residential and Property Tribunal for Wales (Residential Property Tribunal Wales) could be absorbed into the First-tier Tribunal.
- 5.3 We argued that the case for change rested on the following grounds:
- (1) the ability of tribunals to specialise (particularly in light of a perception by some of a lack of expertise in the county court);
 - (2) the potential reduction in delay to housing cases dealt with by a tribunal (in the context of an overall strategy of reducing the need for adjudication of housing disputes), as compared with the delay experienced in housing cases in the county court; and
 - (3) the ability to achieve greater consistency of decision-making and administrative practice in the tribunal.
- 5.4 In so doing we sought to address what we suggested were the problems with current arrangements (see Part 2 of this report).

- 5.5 Responses to the Consultation Paper have revealed this approach to be extremely controversial. In view of this response we have decided not to turn our principal provisional proposals into final recommendations. Instead, we recommend an initiative in relation to certain housing disrepair disputes. We also make some recommendations which relate to the Upper Tribunal in the new Tribunals Service.
- 5.6 We anticipate that this conclusion will also be controversial. In view of this we start this Part by revisiting the arguments for and against a rebalancing of jurisdictions, before turning to our detailed recommendations.

COURT OR TRIBUNAL: SPECIALIST OR GENERALIST?

- 5.7 At the heart of the discussion is the question whether there should be a specialist body to determine housing law disputes. This has been debated for many years.¹ Although, in setting the terms of reference for this project we agreed that this issue should not be its central focus, we could not ignore it altogether. Indeed, the matter had already arisen in the context of our work on property tribunals.²
- 5.8 In the Consultation Paper we concluded that, if a specialist forum was to be created, then the only practical way this could be achieved was through the creation of a specialist housing tribunal. We saw no prospect of government being willing to create a specialist housing court. We remain of this opinion.
- 5.9 The recent Consultation Paper on Part 1 of the Tribunals Courts and Enforcement Act³ states that, in the new Tribunals Service, there is to be both a specialist Lands Chamber in the Upper Tribunal, and a specialist Land, Property and Housing chamber in the First-tier Tribunal.
- 5.10 However, although the Tribunals Service will have specialist tribunals that could deal with housing law issues, the question of exactly which functions each should undertake has not been resolved, nor has the issue of the relationship between the tribunals' functions and the courts'.

The arguments for specialism and the transfer of jurisdictions

- 5.11 We start by summarising the views of those who have argued that there should be a specialist tribunal. We consider first a number of general statements in support of the principle, and then some more specific comments on the proposal that cases should be transferred to a specialist tribunal.

¹ See, for example, A Arden, "A fair hearing? The case for a housing court" (2001) 4 *Journal of Housing Law* 86, which reproduced an article originally written in 1977; N Madge, "Hearing housing cases – Who should be listening?" (2001) 4 *Journal of Housing Law* 83; and A Arden, "The case for a housing appeal court" (2006) *Journal of Housing Law* 59.

² Land, Valuation and Housing Tribunals: The Future (2003) Law Com 281, <http://www.lawcom.gov.uk/docs/lc281.pdf>.

³ Government proposals are set out in *Transforming Tribunals: Implementing Part 1 of the Tribunals Courts and Enforcement Act 2007* (CP 30/07, Ministry of Justice, 2007) available at http://www.justice.gov.uk/docs/tt_consultation_281107.pdf (last viewed 28 April 2008).

General statements in favour of specialisation

- 5.12 Shelter outlined their view that the nature of housing disputes warrants a specialist approach, saying:

We believe that such a specialised jurisdiction is justified by the fundamental importance of housing to the health and welfare of individuals and to society as a whole; and because of the fact that there exists a body of statutory law and jurisprudence which needs specialist expertise if it is to be applied consistently and developed in accordance with a deeper awareness of the legal and policy issues.

- 5.13 Immigration Judge Russell Campbell, who also sat as a deputy district judge, argued that the development of a specialist forum for the resolution of housing disputes was “long overdue”. He argued:

The development of a specialist body to hear housing cases would provide an opportunity to introduce effective case management as a key element in proportionate dispute resolution. This might best be undertaken by a court or tribunal officer to whom a case is allocated on issue. Rather than simply listing the case for hearing, mediation or some other means of resolving the dispute might be required before a case management conference is ordered. The parties might have to demonstrate that any steps required by an applicable protocol have been taken. If a triage plus provider has not been involved in the dispute, one or both parties might be directed to consult the provider before further steps in the court or tribunal are permitted....

The experience of the Asylum and Immigration Tribunal might be useful in the context of identifying important decided cases which ought to be followed and as a means of ensuring consistency. Immigration law and housing law share some things in common. There is a great deal of each and the law develops rapidly. Judges are required to make findings of fact from “dense” and often hotly disputed accounts. Key decisions of the Immigration Appeal Tribunal and now the Asylum and Immigration Tribunal, are “starred” and binding in subsequent cases. ... The adoption of these or similar techniques might accelerate the development of expertise amongst housing judges and ensure consistency. Triage plus providers and others would be made aware of the important decisions that they and their clients should be familiar with. Although housing practitioners are at present able to follow developments through the Housing Law Reports and the practice pages of Legal Action, most – if not nearly all – county court decisions fall well below the radar. It became apparent to me at Judicial Studies Board seminars some years ago that housing cases may be dealt with in rather different ways in county courts around the country. As a result, many examples of good practice and good judging remain hidden from general view.

5.14 The Council on Tribunals thought that an effective adjudicative body for housing disputes should have “a sufficient degree of specialism (including non-legal members) to deal with the issues”. The Council also agreed that consistency could be enhanced in a specialist tribunal context, and outlined their view as to the factors which contribute to consistency and predictability:

- (1) A specialised judiciary is likely to have more familiarity and greater experience in a particular jurisdiction, which increases the security of decision-making.
- (2) Training is more likely to be provided by a specialist tribunal.
- (3) A specialist tribunal is likely to show less resistance to appraisal, which is a problem in the present tribunal context.
- (4) An Upper Tribunal, for whom a specialist housing jurisdiction would be a major source of appeals, would be in a better position to identify important cases where a starred or precedential case would help clarify the law.
- (5) Appointment, ticketing and promotion arrangements that allowed more experienced members to undertake the more complex cases are more likely to be in existence in a tribunal than in all purpose county courts.

5.15 (They added) A specialist tribunal would have a stronger definition of its own identity, purpose and values than the multi-purpose court, especially if most of its members did the major part of the work, if not all, in the justice system in this field.

5.16 The Residential Property Tribunal Service response also referred to the advantage of having administrative staff with specialist expertise.⁴ They said:

Given the diversity of the types of housing case, the RPTS has designed different procedures for each jurisdiction and has trained administrative staff not only on those procedures but also on the legal framework underlying the procedures. This has enhanced staff performance and has led to the better administration of cases and we believe fewer errors. The staff have ownership of cases and are able to assist and reassure parties on matters of procedure. Typically as a case approaches hearing, there is an increase in correspondence, applications and document lodging. The staff are able to co-ordinate this activity and to ensure that the Tribunal dealing with the case are aware of recent developments.

The processes have been designed to ensure that parties engage with the Tribunal at an early stage. The first point of contact is with the administrative staff. In general this means that cases do not drift and that applications are not used merely as a tactic in the relationship between landlord and tenant.

⁴ This point was also touched on by Anthony Collins Solicitors in their response to the Issues Paper. They thought that the existence of a dedicated and expert team of tribunal staff was a key solution to the “inefficient/ineffective resolution of disputes by the county court”.

Comments in favour of transfer to a specialist tribunal

- 5.17 In relation to our provisional proposal for a significant transfer of matters from the county court to the tribunal, the Law Reform Committee of the Bar Council was supportive of a more specialised approach to the resolution of housing disputes, noting that:

In the Leasehold Valuation Tribunal the inclusion of a surveyor on the panel is usually invaluable. For example, in service charge disputes, the surveyor's input often results in more informed decision-making and a substantial reduction in the time required to try a case. We consider that a surveyor's involvement in disrepair cases would be equally beneficial.

- 5.18 The Committee also endorsed the efforts made by the Residential Property Tribunal Service to ensure a consistent approach to its decision-making and administration, saying "we consider that this shows that a specialist tribunal is capable of achieving a higher level of consistency".

- 5.19 The National Landlords Association was "cautiously supportive" of the proposal to transfer jurisdiction of housing matters to a tribunal, and felt that it was a logical step for the Residential Property Tribunal Service to be incorporated into the new First-tier Tribunal. The Association said:

In relation to the resolution of housing disputes it is our view that greater specialisation would lead to increased efficiency in terms of the time taken to reach a decision. It is conceivable that unnecessary adjournments could be reduced due to the greater specialisation knowledge possessed by tribunal members. It is also likely that there would be greater consistency in judgments owing to the increased experience of handling housing disputes that the tribunals will quickly gain...

The NLA are generally supportive of the proposals to transfer jurisdiction for rental housing possession and disrepair cases to a First-tier Tribunal system...we regularly receive complaints regarding the inefficiencies inherent in the county court system and believe that the proposed reforms will lead to the following improvements:

1. Increased specialisation.
2. Lower running and administration costs for users and operators.
3. Greater procedural flexibility.
4. Shorter processing time for disputes.
5. The provision of a more user-friendly and focused service for users.

5.20 Consistent with their overall view (above paragraph 5.12) Shelter were generally supportive of transferring housing disputes to a specialist tribunal. However, their view was dependent on there being no decrease in the amount of legal aid funding available for supporting housing cases. Indeed, they argued that an increase in funding available for housing service was necessary; “housing advice and representation currently enjoys an inadequate share of an inadequate cake.”

5.21 Shelter set out a number of benefits they thought might result from a change of jurisdiction. They said:

- (1) A tribunal may have greater flexibility both in its control of its own procedure and in the nature of the orders it makes.
- (2) A tribunal will generally offer greater informality of procedure (although some tribunals have become more formal in their approach over time). The balance between formality and informality is a difficult one, and we have some concerns about the possible loss of the formal structure which the Civil Procedure Rules imposes on cases which involve complex legal and/or factual issues. However, the tribunal should be able to adjust its procedure according to the requirements of the case and in line with the overriding objective...and in some cases it would no doubt wish to give directions for the lodging of written arguments and witness statements much as the court would do at present.
- (3) A tribunal may, in its greater use of inquisitorial or interventionist techniques, be able to compensate for the lack of an equal playing field where one party is legally represented and the other is not. The greater informality of tribunal jurisdiction may be expected to assist those litigants in person, particularly with regard to the preparation of documents and other case management directions. Where legal argument is required, and one party only is legally represented, a tribunal may be expected to take a more active role in exploring and challenging the arguments and if necessary in researching the law, than would a judge versed in the adversarial procedures of the county court.
- (4) A tribunal may be expected to have a greater awareness of local conditions and policies which create the context in which, for example, the statutory discretion in possession cases should be exercised.
- (5) A tribunal may offer expert participation in the adjudicatory process.
- (6) The tribunal jurisdiction may be exercised on the basis of no orders for costs, or orders for capped or limited costs.

5.22 Again consistent with their general view (above paragraph 5.14) the Council on Tribunals was in principle supportive of the proposal to transfer jurisdiction. However they were concerned at the costs which might be involved in the absence of detailed information which set out financial implications for such a change. The Council said:

The Council broadly agrees with the working assumptions, but points out that the scale of change envisaged and the implications for the county courts, Tribunals Service and customers should not be underestimated, particularly given the nature and volume of housing cases currently heard in the county court...The Council believes that it would be necessary to demonstrate that the changes can be resourced within available funds or that new funds will be available before embarking on such a major change programme. The Council recognises that there is a case for substantive change but is wary of implementing changes on the scale envisaged unless it can be demonstrated that identified benefits outweigh the cost of change and that a high quality service can be provided.

- 5.23 Similarly, some consultees indicated that they could not support the proposal unless a clear decision to extend legal aid funding to the specialist tribunals was made. Wilma Morrison, from the Central London Law Centre, supported a housing court, rather than any extension of the jurisdiction of the Residential Property Tribunal Service, on the assumption that legal aid and representation would not be made available to tenants in the Tribunal. She went on

In view of the current legal aid changes and the effect it might have on the provision of providers in the housing field it is imperative that any proposed changes must be piloted, evaluated and fully financially resourced.

Mortgage possession hearings

- 5.24 In making our provisional proposals, we thought mortgage possession cases should remain in the county court. A number of consultees suggested that we should have been bolder. For example, Arden Chambers said:

We also question why mortgage possession proceedings should not be brought within the tribunal's remit. We accept that transfer of jurisdiction to the tribunal would not tackle the difficulties in respect of costs which are already experienced in the county court (paragraph 3.83 of the paper). That, however, is not a reason for not transferring jurisdiction. The creation of a specialist tribunal is intended to provide more consistent decision-making in relation to rent arrears cases than is currently found in the county court. Inconsistency in the court's approach to mortgage arrears cases is also a common complaint about the county court. Accordingly, we would have thought that transferring jurisdiction over mortgage arrears cases to the tribunal should be a priority.

- 5.25 Similarly, Money Advice Trust commented:

The arguments for rent arrears-related possession claims to be transferred to the tribunal apply equally well to mortgage possession claims ... it appears that mortgage possession claims would perhaps be even better suited to a specialist tribunal than rent possession claims, because of what we perceive to be a current lack of specialist knowledge in the county court to deal with mortgage law.

- 5.26 Shelter felt that a specialist tribunal would provide better protection for parties in mortgage possession cases, saying:

In mortgage possession proceedings, in which most defendants may receive very little advice and no representation (other than from a duty adviser, if the court has a duty representation scheme), there are often arguments to be made about the nature of the court's discretion under section 36 of the Administration of Justice Act 1970, especially in relation to proposals to spread payment of the arrears across the outstanding term of the loan. In respect of second loans which fall under the provisions of the Consumer Credit Act 1974, the court has sweeping powers to re-structure the loan by means of a time order, but is unlikely to do so in practice without the benefit of strong legal representation. Additionally, costs in mortgage possession cases often spiral out of all proportion, and at present there is confusion as to how much control a court has over costs which the mortgagee claims to be able to add by virtue of the mortgage covenants. There is a need for legislation to address this last issue, in particular.

- 5.27 A recent report from Citizens Advice⁵ also calls for the transfer of mortgage possession hearings to the specialist tribunal. They argue that this would enable related issues, in particular relating to consumer protection, to be dealt with.

Summary

- 5.28 In short, those in favour of the transfer thought 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. However, even some of those supporting the idea in principle wanted legal aid to be available for hearings before tribunals. And the Council on Tribunals was very concerned about the administrative costs of the proposed change.

The arguments against the transfer of jurisdictions

General

- 5.29 Notwithstanding the views set out in the previous paragraphs, there was significant hostility to our provisional proposals. For example, the Association of District Judges (with whom Mr Justice Collins, President of the Administrative Court, and the Council of Circuit Judges, agreed) said:

Our position can be summarised as one of complete opposition to the idea of transferring rented housing disputes to a tribunal. We also consider there is no need for a specialist housing court, but judges with particular experience and knowledge could be "ticketed", so that difficult cases could be referred to them.

The Civil Committee of the Judicial Studies Board adopted a similar position.

⁵ Set up to fail: Citizens' Advice, *CAB clients' experience of mortgage and secured loans arrears problems*, (2007) para 4.32, http://www.citizensadvice.org.uk/pdf_set_up_to_fail_evidence_report.pdf (last viewed 28 April 2008).

5.30 Underlying these sentiments was a view that housing law issues were too important to be decided by a tribunal, and that the protection offered by the courts was the only adequate means of resolving housing disputes. For example, the Association of District Judges said that “it is part of our overall submission that decisions about whether or not a citizen should lose their home are so serious that they should only be decided by a judge sitting in a court”.

5.31 Similarly, the Civil Justice Council indicated:

We believe that in respect of cases which have a serious effect upon the wellbeing of the individual – and few cases can have greater significance than those which may result in a person’s eviction from his or her home – the authority of a court is required to sanction a possession order or provide an appropriate remedy.

5.32 District Judge Wendy Backhouse, writing in a personal capacity, disagreed that the expertise of district judges was insufficient to handle housing cases, noting that in her view “the number of housing cases which involve complex issues is small”; and thought that, if it was necessary, specialisation within the county court (rather than removing the jurisdiction to a tribunal altogether) was preferable. District Judge Backhouse thought that our Consultation Paper proposal:

proceeds from an out-dated and stereotyped image of the county court as hide-bound and inflexible and a rather idealised image of tribunals. Housing cases in the courts are heard in private and judges frequently adopt informal/interventionist procedures to help the individual litigant present their case effectively. District Judges are well used to such an approach through dealing with small claims in which most parties are unrepresented.

(She concluded...) The paper does not make a convincing case that the perceived advantages of the tribunal are so great as to justify the dismantling of the current system with all the attendant cost and disruption.

5.33 The Law Society’s response argued for improvements to the existing court system, rather than transfer functions to a tribunal. They concluded “that it would be more effective to concentrate on developing effective practical procedural reform within the county court system”.

5.34 Hostility to our provisional proposals did not only come from judges and lawyers. In particular, the British Property Federation, while recognising the problems of the existing system, urged, on similar lines to those of the Law Society, that a better approach would be to improve the court system. (Indeed, it should be remembered that we made recommendations for a number of procedural reforms in our Renting Homes report). They argued:

The BPF does not believe that transferring housing disputes from the courts to a tribunal service will be the panacea to all problems ... the focus for now should be on improving the justice system rather than necessarily revolutionising the way it is done.

Possession cases

5.35 In relation to the specific proposal for the transfer of possession cases to the tribunal, there was considerable concern about the practical implications of such a change.

5.36 The Residential Property Tribunal Service, though supportive of the general principle of re-balancing, indicated that, although such a proposal might be desirable at a later stage, they did not see how the resources they would need to cope with the present number of possession claims in the county court could be provided.⁶ They said:

The number of possession claims dealt with by the Courts amounts to more than ten times the number of cases being dealt with by the RPTS at present. The infrastructure required to process and deal with such a volume of cases is simply not available.

5.37 The Association of District Judges urged that we should be mindful of any action that would reduce the fees recoverable in the courts for civil proceedings. The Association said:

Successive governments have insisted that the civil courts must be self-funding. Most of the income of the courts derives from court fees. Currently, the county court receives a fee for every possession claim issued, whether by a landlord or a mortgage company. None of these claimants will be fees exempt, and, given the fact that nearly 300,000 possession claims are issued each year (based on the 2006 figures ... and including over 23000 accelerated possession claims), it can readily be seen that the fee income from possession claims is a very significant part of the total fee income of county courts.

If half of that fee income was removed from the court system, this would in our view have a very significant impact on the courts and access to justice. The courts would still have to fund the civil justice system, and could only do so by increasing the fees in all other areas of civil work. Such fees are already at dangerously high levels.

5.38 Several responses stressed that the impact of the recent Rent Arrears Protocol in reducing landlord possession claims is yet to be measured; respondents expected an improvement in the county court system as a result of the protocol, and so felt that possession claims should remain with the county court.

5.39 Thus the Law Society said:

⁶ Provisional figures for the first half of 2007 indicate that there were 72, 480 landlord possession claims lodged, using the accelerated and standard procedures – Ministry of Justice Statistical Bulletin, *Statistics on Mortgage and Landlord Possession Actions* (3 August 2007), <http://www.justice.gov.uk/docs/stats-mortgage-land.pdf> (last viewed 28 April 2008).

The main concerns relating to possession proceedings are that the court process is too slow, and that possession proceedings are sometimes issued unnecessarily. The Rent Arrears Protocol was introduced in October 2006. It is too early to say whether the protocol has reduced the numbers of cases issued. We consider it sensible to wait and see how the protocol is working before making any change.

5.40 And the Civil Justice Council felt that:

In respect of the county court's role in relation to housing possession claims based on rent arrears, we believe it has benefited significantly from the introduction of the Rent Arrears Pre-action Protocol, which was the brainchild of this Committee. While the Protocol has only been in operation for one year, we consider that it has made a major impact in ensuring that possession proceedings are not brought without good cause, and genuinely as a last resort.

5.41 The Ministry of Justice Statistical Bulletin on Mortgage and Landlord Possession Actions describes the aim of the protocol. It indicates that the introduction of the protocol in October 2006 may explain the reduction in the number of rented housing possession claims made and orders issued.⁷

Other matters

5.42 A number of other arguments were also raised against a significant transfer of jurisdiction to the tribunal. In particular, in the Consultation Paper we had argued that, logically, if the tribunal was to be the principal adjudicative forum, it should have powers to deal with housing related issues, in particular anti-social behavior orders where these were linked to demotion orders. While a number of respondents saw no reason why such a transfer of powers could not take place, others were very unhappy at the idea of a tribunal having powers to make anti-social behavior orders. However in view of the conclusions we have reached as a result of the consultation, we do not consider these issues further.

CONCLUSIONS AND RECOMMENDATIONS

5.43 In light of the foregoing discussion, we now draw our conclusions and set out our recommendations. We think three options are open to us:

- (1) to recommend that there should be no change to current arrangements;
- (2) to recommend proceeding on the basis set out in the Consultation Paper;
or
- (3) to recommend that, while the creation of a more specialist jurisdiction might remain a long-term goal, any progress towards that goal should be measured and tested.

⁷ Ministry of Justice Statistical Bulletin, *Statistics on Mortgage and Landlord Possession Actions* (3 August 2007) p 4, <http://www.justice.gov.uk/docs/stats-mortgage-land.pdf> (last viewed 28 April 2008). There were 82, 189 claims issued in the first half of 2005, and 82, 019 issued for the first half of 2006; compared with a provisional figure of 72, 480 for the first half of 2007.

- 5.44 In relation to option 1, we could have taken the view that – given the degree of controversy our provisional proposals provoked – it would not be sensible to recommend any reform. However, we conclude that to take this view would mean that we would have failed to complete the task that we were given by the Department for Constitutional Affairs.⁸ We have to bear in mind that our recommendations should lead to a system based on proportionality and the need to provide a user-focused service which is simple, effective and fair.
- 5.45 Equally we accept that, in view of the conflicts of opinion, option 2 is not one we feel able to pursue, notwithstanding the disappointment that those who supported our provisional views will inevitably feel.
- 5.46 **We conclude that option 3 is to be preferred.** We accept that a combination of the fact that there have recently been changes to court procedures and the fact that the new Tribunal Service is not yet fully functioning at present makes the argument for change extremely uncertain. However, in principle there are arguments in favour of a specialised tribunal, and certain modest steps can be taken now, subject to testing and evaluation. In the following paragraphs we set out the details of the recommendations and conclusions we have reached under this head.

Long-term vision

- 5.47 Notwithstanding the considerable resistance to change provoked by our provisional proposals, we think that the question whether in the longer-term the possibility of rather greater reform than we propose in this report should not be wholly closed. Experience in other jurisdictions, notably New Zealand, Australia and Canada, suggests that a shift to a more specialised tribunal can result in the benefits of greater efficiency, lower cost to the user, and more access to justice.⁹ **We conclude that Government should keep under review the possibility that further specific housing matters may be transferred to the Land, Property and Housing Chamber of the First-tier Tribunal, or to the Upper Tribunal.**

Interim reforms

- 5.48 Taking up the arguments put forward by the British Property Federation and the Law Society, **we conclude that there are important interim reforms that can be made.**
- 5.49 **First, implementation of our recommendations in Renting Homes would, by clarifying the respective obligations of landlords and occupiers, go a considerable way to improving their understanding of their legal relationships. This is a key element in a system of proportionate dispute resolution.**

⁸ See paras 1.6, 1.7 and 1.8 of this report.

⁹ One example is the Consumer, Trading and Tenancies Tribunal in New South Wales, Australia. A study conducted by Australian academic Brendan Edgeworth examined the effectiveness of that tribunal in handling housing disputes, and concluded that it had significantly improved access to justice in the housing sector. It should also be borne in mind that tribunals are already responsible for decision-making in areas of fundamental importance to the individual, and the state, for example in respect of asylum-seeking, nationality, immigration, mental health, discrimination, competition and tax.

5.50 **Second, there are specific changes that could be made to the ways in which the courts operate.** Specific recommendations, which we have already made in *Renting Homes*,¹⁰ include:

- (1) Introduction of structured discretion in possession cases;
- (2) Removal of the procedural traps which surround use of Housing Act 1988, section 21; and
- (3) Introduction of the new abandonment procedure.

5.51 **Third, it is important to ask what lessons can be learned from the way in which tribunals operate to see whether they can be applied in the court service.** A number of respondents, including those who opposed our provisional proposals, made suggestions for improving the way in which the county court dealt with housing cases.

5.52 **We recommend that the following issues should be considered:**

- (1) Several respondents referred to the desirability of improving training. We had identified training, including continuous development, as one of the potential strengths of the Tribunal Service. It would be helpful if the approaches taken in respect of the training of the tribunal judiciary could be made available to those in the county court. **The Civil Committee and the Tribunals Committee of the Judicial Studies Board should jointly consider whether there are aspects of the training developed by the latter which could with advantage be promoted by the former.** Similarly, **the Civil Committee of the Judicial Studies Board and the Residential Property Tribunals Service might also consider whether there are training issues over which they could collaborate.**
- (2) Of those respondents who opposed transferring significant jurisdictions to the tribunal, many thought that some of our objectives could be achieved by the ticketing of judges – that is, the introduction of a system for certifying certain judges as expert in housing matters, and reserving such matters to them. Respondents in this category included, for instance, the Housing Law Practitioners Association, the Law Society, the Civil Justice Council, Shelter, and the Association of District Judges (who thought that only a limited number of difficult cases would need reserving to a ticketed judge). **Further consideration should be given to the desirability of the ticketing of specialist housing judges.**

¹⁰ *Renting Homes* (2006) Law Com No 297, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf and http://www.lawcom.gov.uk/docs/lc297_vol2.pdf.

- (3) The importance of schemes to provide duty possession desks to assist unrepresented tenants was emphasised by some respondents. The Civil Justice Council, for instance, said that “no court which has a duty scheme would contemplate being without one, and there is no question that such schemes have proved their worth”. They pointed to adequate funding as being a key issue. This view was shared by respondents that tended to represent the interests of tenants, like Shelter and the Housing Law Practitioners Association. Consideration should be given to encouraging and enabling every court centre to have a duty service available, to which judges could refer those appearing in court unrepresented.
- (4) A number of respondents referred to the utility of web based information. A key resource is the website of the Court Service, and we consider that it could do more to help potential defendants understand the system. **Through development of its website, the Court Service should provide those appearing before courts with as much information as practicable about how to prepare for the hearing and the sources of advice and assistance which are available locally to help those appearing before the court.**
- (5) More generally, it is obvious that whether or not a party is present in court has a significant effect on their likely success. **Given the evidence that attendance at a hearing affects the outcome of decisions, the Court Service should discuss with the Tribunals Service ways in which the latter has been able to encourage more parties to attend their hearings.**
- (6) Many respondents accepted that the presence of surveyor members was a useful feature of the Residential Property Tribunal Service (although some, like the Law Society, took the line that surveyors were only useful in a relatively small proportion of cases) but argued that the county court should be able to sit with surveyors as wing members, rather than transferring jurisdictions to the tribunal. **Consideration should be given to enabling and, where appropriate, encouraging courts to sit with expert surveyor assessors.**

Provision of legal aid in tribunal hearings

5.53 We accept the concerns expressed in responses to our Issues and Consultation Papers that, if cases are transferred to tribunals, there is a significant risk that legal aid would no longer be available for such cases. **We recommend that there should be no change of jurisdictions without legal aid being made available before a tribunal on the same basis as it is currently available before a court.** Our proposals below are all subject to that precondition.

Proposals for a limited transfer of cases from the courts to the First-tier Tribunal

Stand alone housing disrepair cases

- 5.54 On the assumption that the Residential Property Tribunal Service becomes part of the new Land, Property and Housing chamber of the First-tier Tribunal, and not before that time, **we recommend that what we describe as “stand-alone” housing disrepair cases brought by tenants should be transferred to the new Tribunal.**
- 5.55 By “stand-alone” housing disrepair cases we mean cases brought by tenants alleging a breach of the implied covenant to repair in the Landlord and Tenant Act 1985, section 11. This provides that landlords must keep in repair the structure and exterior of a “dwelling house” and the installations for the provision of water, heating, electricity, gas and sanitation. It only applies to leases of less than seven years. We are therefore *not* recommending the transfer of those cases in which a tenant relies on disrepair as a counterclaim to a claim for possession by the landlord.
- 5.56 If it is thought that there should be no such transfer without further detailed assessment of both the costs and benefits of such transfer, **we recommend, in the alternative, that the Government should take the necessary steps to establish a pilot scheme, whereby, in certain parts of the country, such cases are transferred to the new Tribunal.** The impact of such a pilot should be independently evaluated so that a fully informed decision may be made as to whether the scheme should be made national. The length of the pilot should be for government to determine, but should be of sufficient duration to enable a proper assessment to be made.
- 5.57 In the Consultation Paper, we argued that such cases were appropriate for transfer on two principal grounds. First, the availability of expert surveyor members in the Residential Property Tribunal can assist with determinations in relation to the condition of properties. Second, inspections of properties are standard practice in the Residential Property Tribunal Service.
- 5.58 In the responses to our consultation there appeared to be some concern in relation to the role to be played by expert tribunal members. The Housing Law Practitioners’ Association thought that it was unclear whether we had suggested that expert members would be part of the decision-making body in the tribunal, or would give expert evidence *and* be a part of the decision-making process. If the latter, the Housing Law Practitioners’ Association was extremely concerned.¹¹ We meant the former.

¹¹ The Chancery Bar Association was also concerned that “the expert tribunal member may form a view which forms the basis of the decision which the parties have little opportunity of challenging other than on an appeal”.

- 5.59 The Act states that specialist members are appointed to tribunals,¹² and that the Lord Chancellor may determine the level of qualification appropriate for their appointment.¹³ Such members would not give evidence in the matter; simply by virtue of their expertise, they bring a greater understanding of the issues in contention to the decisions of the tribunal. Indeed, this is one of the arguments in favour of tribunals generally. They have specialists with expertise who assist in the decision-taking process.¹⁴
- 5.60 The advantages of disrepair claims being determined by a tribunal with added expertise were recognised by Pain Smith Lawyers, who agreed with our proposal, because “the area of rented housing disrepair claims would benefit from the expertise and speed of the First-tier Tribunal”.
- 5.61 The Residential Property Tribunal Service agreed that it would provide a suitable forum for the resolution of those cases. They noted in this respect their ability to have surveyor members in matters involving questions of property condition; and considered that there were benefits in the involvement of specialist lawyers as tribunal Chairmen. The Residential Property Tribunal Service noted, however, that it would need to be able to make orders for specific performance. We agree that, if “stand-alone” disrepair cases were transferred, the Tribunal should have power to order specific performance in the same circumstances as the County Court now does.
- 5.62 Figures for the number of “stand-alone” disrepair cases that currently go to court are hard to calculate. A reasonable estimate suggests that it is, at most, in the order of 1000-1500 cases a year. This would represent a significant but not in our view unmanageable increase in the tribunal’s workload.

DISREPAIR CLAIMS IN SCOTLAND

- 5.63 In this context, the position in Scotland deserves consideration. The Housing (Scotland) Act 2006 set out a new standard in respect of repair for private rented houses;¹⁵ and imposes a duty on private landlords to ensure that houses meet that standard both at the time of renting and throughout the tenancy.¹⁶

¹² Tribunals, Courts and Enforcement Act 2007, s 4(3).

¹³ Tribunals, Courts and Enforcement Act 2007, para 2 of sched 2.

¹⁴ Examples of the use of such expertise are familiar in, for example, Child Support Tribunals, the Competition Tribunal, Medical Appeals Tribunals, and tribunals dealing with appeals on disability benefits.

¹⁵ Housing (Scotland) Act 2006, s 13.

¹⁶ Housing (Scotland) Act 2006, s 14.

- 5.64 Section 21 of the Housing (Scotland) Act 2006 renamed the existing Rent Assessment Panel and Rent Assessment Committees as the Private Rented Housing Panel. The Panel has taken over statutory responsibility for the functions previously carried out by the Rent Assessment Panel. It was also given authority to hear applications and make determinations about whether a private landlord had complied with his or her duties under the repairing standard.¹⁷ Where the Panel finds that a landlord has failed to comply with the standard, it may make a repairing standard enforcement order.¹⁸ Additionally, the Housing (Scotland) Act 2006 makes it a summary offence to fail to comply with a repairing standard order, or to enter into a tenancy or occupancy while there is an outstanding repairing standard order (and the Panel has not given its consent to the tenancy or occupancy).¹⁹ Where a landlord has failed to comply with a repairing standard enforcement order, the Panel may also make a rent relief order.²⁰ The provisions in respect of repairing standard enforcement orders and the Panel came into effect on 3 September 2007.²¹
- 5.65 The Housing (Scotland) Act 2006 is intended to “address problems of condition and quality in private sector rented housing”,²² and was based on the findings of the Housing Improvement Task Force. The Scottish Executive undertook consultation in the publication “Maintaining Houses – Preserving Homes”, which followed the work of the Task Force. The consultation paper indicated that, prior to enactment of the Housing (Scotland) Act 2006, options for tenants whose housing was in a state of disrepair were limited to bringing an action in court (or withholding rent).²³ The consultation described the view of the Scottish Executive as to the appropriateness of the Panel (the old Rent Assessment Panel) in dealing with disrepair matters in the following way:

A new Repairing Standard would not be fully effective unless there was a mechanism for enforcing it, providing a more accessible and easier method of redress and encouraging private tenants to ensure that landlords adhere to the statutory standard. This is consistent with the principle that householders should take more responsibility for their housing conditions.

¹⁷ Housing (Scotland) Act 2006, s 24.

¹⁸ Housing (Scotland) Act 2006, s 24.

¹⁹ Housing (Scotland) Act 2006, s 28.

²⁰ Housing (Scotland) Act 2006, s 27.

²¹ Housing (Scotland) Act 2006 (Commencement No 5, Savings and Transitional Provisions) Order 2007, art 3.

²² Explanatory Notes to the Housing (Scotland) Act 2006, para 5.

²³ Scottish Executive, *Maintaining Houses – Preserving Homes Consultation* (2004) p 38, para 109.

The Task Force considered options for improving access to redress and proposed that the existing Rent Assessment Committees (RACs) should have their role developed, in order to establish an easily accessible agency to which tenants could turn for help and where tenants with genuine complaints about repair problems could obtain redress. The Committees are very familiar with the workings of the private rented sector, having developed a good understanding of how landlords operate and appreciation of the issues that tenants can face in dealing with difficult landlords. The RACs are an appropriate basis for the new body, because of the similarities between their existing role and nature and the features required, so we intend to implement this recommendation. In order to reflect its wider responsibilities, the Rent Assessment Panel, from which the RACs are drawn, would be renamed the Private Rented Housing Tribunal for Scotland.²⁴

- 5.66 The Panel also offers a mediation service, which is available in circumstances where the tenant indicates they wish to use the mediation service, and the landlord agrees to be involved in the mediation process. The Panel Secretary must draw the attention of the parties to the possibility of mediation of the dispute, and must explain and facilitate the mediation if appropriate.²⁵ Mediation is conducted by a Panel member (who will not have any involvement in the case if the matter cannot be successfully mediated and the dispute is to be resolved by the PRH Committee). There are approximately 35 Panel members, of whom 16 are trained mediators. Decisions of the Private Rented Housing Committees are also required to be made publicly available;²⁶ these are to be published on the Panel's website.²⁷
- 5.67 The proposals for the creation of the Panel were widely supported.²⁸ We accept that it is too early to establish the success or otherwise of the Panel in resolving individual disputes, and affecting standards of rented housing repair in Scotland generally. However, the arguments used to support the case for the creation of the new panel equally apply in England and Wales.

Park homes cases

- 5.68 Park Homes are the subject of a distinct legal code, based, as regards disputes between site owners and mobile home owners, on the Mobile Homes Act 1983 and the Caravan Sites Act 1968 (both of which were amended by the Housing Act 2004). The Caravan Sites and Control of Development Act 1960 provides for a site licensing system. In the Consultation Paper, we asked whether possession claims in respect of caravans and mobile homes should be transferred to the First-tier Tribunal.

²⁴ Scottish Executive, *Maintaining Houses – Preserving Homes Consultation* (2004) paras 109 and 110.

²⁵ Private Rented Housing Panels (Applications and Determinations) (Scotland) Regulations 2007, reg 7.

²⁶ Private Rented Housing Panels (Applications and Determinations) (Scotland) Regulations 2007, reg 26(3).

²⁷ See <http://www.prhpscotland.gov.uk/prhp/1.html> (last viewed 28 April 2008).

²⁸ Scottish Executive, *Maintaining Houses – Preserving Homes - A Report on Responses to the Consultation* (2005) para 7.51.

- 5.69 In response, the British Holiday and Home Parks Association argued that any transfer of jurisdiction to the tribunal should be a transfer of the entire jurisdiction. The Association felt that increased specialisation could offer benefits for this particular area of law, noting that their members frequently encounter judges who have not dealt with a Mobile Homes Act 1983 case before. However, the Association was concerned by the financial implications of the transfer.
- 5.70 The National Park Homes Council was also qualified in its response. It said it would only support the transfer of jurisdiction if several conditions were met. Those conditions were that:
- (1) The transfer covers all mobile home disputes, not just those concerning possession.
 - (2) The Tribunal possesses sufficient expertise in this unique area of legislation.
 - (3) The Tribunal receives sufficient public funding to function effectively without increasing costs to users.
- 5.71 We accept that it would not be sensible just to transfer jurisdiction over possession claims for mobile homes and caravans to the First-tier Tribunal. However we conclude that this niche area of law, involving perhaps around 60 cases a year,²⁹ relating to caravans and mobile homes could benefit from the specialist approach offered by the First-tier Tribunal. **We therefore recommend that all of the jurisdictions arising from the Mobile Homes Act 1983 should be transferred to the First-tier Tribunal.**

Other suggestions for transfer to the First-tier Tribunals

Housing related statutory nuisance and Defective Premises Act cases

- 5.72 In discussing our proposals for transferring disrepair cases to the new First-tier Tribunal, a number of consultees argued that we should have included statutory nuisance cases arising under Part 3 of the Environmental Protection Act 1990 which are currently heard in the magistrates' court.

- 5.73 Arden Chambers said:

Commonly, in disrepair cases, there may be defects which mean that a property is in such a condition as to be a statutory nuisance ... even though the occupier will not have a contractual claim for breach of repairing covenant, eg in cases involving condensation damp. Often, parallel proceedings are brought in the magistrates court under section 82, 1990 Act, and in the county court for breach of the repairing covenant implied by section 11 Landlord and Tenant Act 1985. This is costly and bewildering for landlords and tenants alike...

²⁹ Estimate made by the Chief Executive of the RPTS to Law Commission staff. If the advantages we envisage of a transfer to the tribunal materialised, some increase in the workload could be anticipated.

We recognise, of course, that [the] ...1990 Act, does not only apply to dwellings and do not consider that the tribunal's jurisdiction in statutory nuisance cases should go beyond housing cases. We also accept that the tribunal's jurisdiction will have to evolve gradually. Nevertheless, the RPTS is already ideally equipped to deal with EPA cases given that the RPT is already the forum for dealing with appeals against local authority enforcement action under the Housing Act 2004. Accordingly, we consider that affording the tribunal jurisdiction to hear claims under the 1990 should be a priority as it would provide an immediate demonstration of the benefits of a specialist tribunal.

- 5.74 This was echoed in the response of the Law Reform Committee of the Bar Council, and the Residential Property Tribunal Service.
- 5.75 It is also arguable that proceedings brought under section 4 of the Defective Premises Act 1972 can be regarded as being of a similar nature. In respect of both of these types of proceedings, similar arguments for the transfer of such matters to the tribunal arise as in the case of disrepair proceedings. We have not, however, specifically consulted on either of these classes of case, but **we recommend that, if our recommendation for a pilot study relating to the transfer of disrepair cases to the First-tier Tribunal is accepted, consideration should be given to including housing-related statutory nuisance cases and Defective Premises Act cases as well.**

Proposals from the Residential Property Tribunal Service

- 5.76 The Residential Property Tribunal Service identified a number of other matters which they thought could be brought within the jurisdiction of the tribunal, including:
- (1) Forfeiture – The Residential Property Tribunal Service indicated that it has a limited jurisdiction to determine whether there has been a breach of covenant within a lease (section 168(4) of the Commonhold and Leasehold Reform Act 2002). The Residential Property Tribunal Service thought it was unclear whether it may also decide whether a breach has been waived. If not, the Service propose that a clear jurisdiction to decide waiver would be welcomed.
 - (2) Enfranchisement (Leasehold Reform Act 1967 and Leasehold Reform, Housing and Urban Development Act 1993) and the right of first refusal (Landlord and Tenant Act 1987) – The Residential Property Tribunal Service advised that, at present, power to deal with enfranchisement, lease extension and the right of first refusal is split between the County Court and the Leasehold Valuation Tribunal. The Service advocated rationalisation of this division so that more matters could be decided by the Leasehold Valuation Tribunal, for the benefit of users.

- (3) Leasehold service charge cases – The Residential Property Tribunal Service thought that, when dealing with service charge cases, it is often not possible to give a complete adjudication because some issues raised by the parties are not within the tribunal’s jurisdiction (for example, the failure of a landlord to carry out repairs). The Residential Property Tribunal Service said “such a determination is well within the competence of the tribunal which already deals with breach of covenant under section 168(4) of the Commonhold and Leasehold Reform Act 2002, construction of leases and dilapidations”.
- (4) Freehold service charge cases – The Residential Property Tribunal Service advised that determinations of the liability to pay and the reasonableness of service charges for freehold properties are at present not dealt with by the Leasehold Valuation Tribunal, and sections 18 to 30 of the Landlord and Tenant Act 1985 do not apply to freeholds.
- (5) Variation of leases – The Residential Property Tribunal Service thought that, as Part 4 of the Landlord and Tenant Act 1987 applies only to leases of flats (and not to leases of houses), this causes a difference in developments including a mixture of leasehold flats and houses.
- (6) Company disputes – The Residential Property Tribunal Service argued for the tribunal to have the ability to determine company disputes directly concerned with the maintenance and management of long leasehold property.
- (7) Rent charges – The Residential Property Tribunal Service also suggested having the ability to deal with disputes about rent charges.
- (8) Council tax - The determination of appeals against council tax banding is currently dealt with by the Valuation Tribunal Service, which is composed of lay members – the Residential Property Tribunal Service thought that it could be better dealt with by an expert tribunal.

Other proposals

5.77 Other candidates for transfer that emerged from consultees were:

- (1) proceedings related to sections 212 to 215 of the Housing Act 2004 (tenancy deposit schemes);
- (2) matters arising from the right to buy provisions of the Housing Act 1985.

We have not specifically consulted on these matters, so we make no firm recommendations in relation to them.

5.78 However, a principle emerges from these suggestions and other responses. **We conclude that wherever possible, persons bringing proceedings, whether before a court or a tribunal, should be able to have their matters dealt with in a single process.** A proportionate system of dispute resolution should not require parties to start more than one set of proceedings to achieve a resolution of their dispute.

Proposals for transfer of cases to the Upper Tribunal

- 5.79 Since the publication of our Consultation Paper, the Government has published a consultation paper on the structure and functions of the Tribunal Service.³⁰ In it, the Ministry of Justice seeks views on the structure of both the First-tier and Upper Tribunals, and matters such as the assignment of judges and the role of lay-members. Final decisions on these matters will not be made until later this year.
- 5.80 Similarly, in this context, we are aware that there is a widespread perception that the Administrative Court, which currently deals with some homelessness-related matters as well as other housing-related judicial reviews, is seriously overburdened. There have been suggestions that there should be some re-thinking of that Court's jurisdictions. At the same time, the proposal in the Woolf report³¹ that the Administrative Court should develop a practice of sitting in the regions has yet to be implemented, but a judicial working group, reporting in November 2007, has recommended that the Administrative Court sit in four regional centres outside London.³²
- 5.81 So it is within this somewhat fluid policy environment that we must come to our own conclusions about the jurisdictions upon which we consulted.

Homelessness matters

- 5.82 At present, the central substantive appeal against local authority decisions in relation to homelessness applications is by way of a statutory appeal to the County Court. This is an appeal on a point of law, and requires the County Court to exercise its functions in a way that mirrors judicial review. Our first provisional proposal in relation to transfers to the Upper Tribunal in the Consultation Paper was that this substantive jurisdiction – contained in Housing Act 1996, section 204 – should be transferred to the Upper Tribunal.³³ We then went on to ask, if this transfer took place, what homelessness or housing related jurisdictions should (also) be transferred to the Upper Tribunal?³⁴ In these cases, the transfer would be from the Administrative Court rather than the County Court.

³⁰ *Transforming Tribunals: Implementing Part 1 of the Tribunal, Courts and Enforcement Act 2007* (CP 30/07, Ministry of Justice, 2007)

³¹ See Lord Woolf MR, *Access to Justice: Interim Report* (1995); Lord Woolf MR, *Access to Justice: Final Report* (1996).

³² *Justice outside London: Report of judicial working group* (November 2007), http://www.judiciary.gov.uk/publications_media/judicial_views_responses/justice_outside_london/index.htm (last viewed 28 April 2008).

³³ Housing: Proportionate Dispute Resolution, Law Commission Consultation Paper No 180 para 3.71.

³⁴ Housing: Proportionate Dispute Resolution, Law Commission Consultation Paper No 180, para 3.74.

THE SUBSTANTIVE JURISDICTION AND INTERIM RELIEF

- 5.83 The two candidates for the substantive jurisdiction are therefore the County Court and the Upper Tribunal. However, respondents have pointed to a particular flaw in the current law – at the moment, even after the 1996 transfer of the substantive jurisdiction, claimants still have to go to the Administrative Court in London to seek interim relief (subject to the partial remedy in section 204A³⁵, which can be sought in the local county court).
- 5.84 The separation of the substantive appeal from (some) avenues for interim relief is, we consider, unacceptable. First, it presents claimants in difficult circumstances with unnecessary and disproportionate burdens in seeking interim relief, which may well be necessary for them to be able to exercise in practice their substantive right to appeal. Shelter, in their response to the Issues Paper, say that “improvements are desperately needed ... [to counter] the absence of an accessible emergency remedy in homelessness cases”. The result must be that at least some claimants who would have won an appeal against a refusal of accommodation under section 204 are instead left homeless and unable to assert their legal rights. Secondly, the lack of locally available interim relief adds to the over-burdening of the Administrative Court. That in turn leads to unacceptable delays for litigants.³⁶
- 5.85 This leads us to the conclusion that there is an important issue to be settled prior to that as to the ultimate destination of the substantive destination.
- 5.86 **We recommend that whichever forum – the County Court or the Upper Tribunal – is to exercise the jurisdiction under the Housing Act 1996, section 204, that forum should have full power to issue whatever associated interim relief is necessary.**

OUT OF HOURS/EMERGENCY SERVICE

- 5.87 As consultees pointed out, if a paper right to interim relief is to be meaningful, it must be accompanied by appropriate provision for out of hours service. This would apply possibly to both fora. The Housing Law Practitioners’ Association said:

³⁵ Section 204A allows a claimant with an outstanding s 204 appeal application to appeal against the decision by a local authority not to exercise its power under s 204(4) to provide accommodation to certain classes of applicant pending the appeal; or to exercise that power for only a limited time, or to cease to exercise it. The Court can only make the relevant order where the failure of the local authority to exercise the power would substantially affect the complainant’s ability to pursue his or her substantive appeal.

³⁶ R (Casey) v Restormel Borough Council [2007] EWHC 2554 (Admin).

The High Court has an out of hours emergency service - particularly used in homelessness and housing related community care cases. The County Court does have such a jurisdiction (CPR PD 25A para 4.5(2) (b)) although the experience of our members is that the High Court is the more organised and accessible. This jurisdiction is entirely foreign to tribunals but essential to provide. This aspect caused particular concern to our members. Not to be able to make emergency applications to prevent eviction or for the provision of overnight accommodation would be a serious reduction in service.³⁷

- 5.88 We agree. **A forum with the interim relief powers we propose should necessarily have an out-of-hours facility. Any transfer of jurisdiction over judicial review matters must involve providing access to the tribunal on an out-of-hours, emergency basis where appropriate.**

SUBSTANTIVE JURISDICTION: HOMELESSNESS APPEALS

- 5.89 We now turn to the question of whether the County Court should continue to exercise the jurisdiction under section 204 (with additional powers in relation to interim relief), or be transferred to the Upper Tribunal.
- 5.90 When these cases were given to the county court in 1996, there was widespread criticism that the move was being taken solely to remove pressure from the Administrative Court and that such cases were not appropriate for county courts. More than a decade on, we are not aware that these cases are causing particular problems for the county court. It is however hard to get exact figures for the numbers of cases determined annually by the county court.
- 5.91 There was mixed support for our proposal. The Advice Services Alliance was unsure whether the transfer of jurisdiction from the county court was necessary, but agreed that if there was such a transfer, cases should be heard by the Upper Tribunal. Paul Greevy, from the Nottingham City Council, thought that “there is a degree of complexity in homelessness cases which is absent from many possession hearings, and this proposal would make a lot of sense”.
- 5.92 Similarly, the Chartered Institute of Housing had concerns about the Upper Tribunal being the arbiter of homelessness statutory appeals – it suggested that the First-tier Tribunal was the more appropriate body. The Institute felt, first, that it was inappropriate for appeals which turned on questions of fact (which they believed the majority of homelessness appeals were) to be heard by the Upper Tribunal. Secondly, the Institute was concerned about the accessibility of the Upper Tribunal. It felt that accessibility would be more limited in the Upper Tribunal compared with the First-tier Tribunal, and a lack of accessibility would lead to a loss of a deterrent effect for local authorities to manage their caseloads appropriately. Finally, the Institute argued that the nature of Upper Tribunal decisions (that they would be binding) would make it difficult for local authorities to make the appropriate determination, saying:

³⁷ The Association made this point in relation to the general question of transfer, rather than the specific issue of judicial review.

A system that generates a huge amount of cases all of which set precedent and are of equal status in a situation where the possible permutation of facts for a particular type of case are virtually infinite is just likely to result in a stand off between local authorities and applicants who are represented.

5.93 On the first point, we note that the appeal is, legally, limited to a point of law.³⁸ It may be that in the particular context of these cases, the distinction between matters of law and matters of fact is difficult to draw. But in any event, the Upper Tribunal will have fact finding functions. We do not agree that such cases are appropriate for the First-tier Tribunal. On the final point, not all decisions of the Upper Tribunal are intended to have binding effect. Only a limited selection of such cases will. Thus we do not agree that the binding nature of Upper Tribunal decisions would lead to confusion amongst local authority decision-makers. Rather, we suggest it would encourage clarity for local authorities if there were clear guidance from relevant Upper Tribunal decisions.

5.94 The question of accessibility to hearings was an issue raised by several other respondents (in addition to the Chartered Institute of Housing). The Civil Justice Council (which did not support the transfer of functions generally) said:

We see no good reason for homelessness statutory appeals to be transferred from the county court to the Upper Tribunal. The purpose of the Housing Act 1996 in giving the county courts jurisdiction over section 204 appeals on a point of law from homelessness review decisions was to give applicants a local remedy, in circumstances where they had previously had to rely on judicial review. It is not presently clear at which venues the Upper Tribunal would sit, but even where it is located in regional centres, it is likely to be less accessible in geographical terms than the county court.

5.95 The extent to which the Upper Tribunal will sit regionally has yet to be determined. Even if it does sit regionally, it will certainly not sit in as many centres as the county court. The prospect that there will be fewer locations in which statutory appeals could be heard if there were a transfer of jurisdiction is certainly a disadvantage in access to justice terms.

5.96 Nonetheless, the ability of the Upper Tribunal to provide a specialist context for adjudicating such disputes is important, particularly because, as many respondents pointed out, the law in relation to homelessness is particularly complex. Decisions of the Upper Tribunal would be likely to develop the jurisprudence of homelessness law in a more coherent way than at present.

5.97 On this question, there is ultimately a play-off between, on the one hand, the easy accessibility of the local county court, and, on the other, the possibility that a more remote Tribunal, but one which is a superior court of record able to make judgments of precedential value, will be able to improve and clarify law and practice in relation to homelessness.

³⁸ Housing Act 1996, s 204(1).

5.98 We have to consider whether we should persist with our provisional proposal to transfer these appeals to the Upper Tribunal. We have concluded that we cannot. First, we are mindful of the strong reservations expressed by consultees. Secondly, as we noted at the outset of this section, policy is clearly still in the process of being made and clarified. Without a finalised vision of how the Upper Tribunal would work, including its regional reach (and while developments may be taking place elsewhere, such as in the Administrative Court), it would be going too far to make a firm recommendation.

5.99 **We therefore make no final recommendation on this question. However, as with disrepair, we would see considerable advantage in the Government taking the power to establish a pilot in defined areas of the country in which appeals under Housing Act 1996, section 204 would be transferred from the county court to the Upper Tribunal.** If a pilot were to be undertaken, the relative advantages of transfer and no change could be fully evaluated before a final decision was made.

SUBSTANTIVE JURISDICTION: OTHER AREAS OF JUDICIAL REVIEW

5.100 It would not be appropriate for us to recommend that further areas of judicial review should be transferred from the Administrative Court to the Upper Tribunal before the final destination of homelessness statutory appeals is determined. In any event, it was noteworthy that respondents for the most part did not address the question in detail. Several simply suggested that all judicial review matters to do with housing and homelessness should be transferred, to ensure consistency, but that was in the context of the a transfer of the homelessness cases.

5.101 Arden Chambers argued that there were two types of judicial review matter which ought to be heard by the Upper Tribunal:

(1) Section 188(3) Housing Act 1996 – Where a decision has been made by a local authority not to continue providing accommodation to an applicant pending a review, and the applicant wishes to challenge the decision, the challenge is presently by way of judicial review.

(2) Sections 198 to 201 Housing Act 1996 – Where a decision has been made by a local authority (the notifying authority) to refer a case to another local authority (the notified authority), and the notified authority wishes to challenge a finding of the notifying authority, the challenge is by way of judicial review.

5.102 **If a pilot were to be established to assess the desirability of transferring homelessness statutory appeals, consideration should be given to simultaneously piloting giving the Upper Tribunal jurisdiction to deal with other homelessness and housing related judicial review applications (such a jurisdiction being concurrent with, rather than replacing, that of the Administrative Court).**

Other appeals

5.103 One of the arguments made by proponents of the creation of a specialist jurisdiction was that there could be a rationalisation of routes of appeal, to an appellate body able to develop a specialist housing jurisprudence.

- 5.104 At present the routes of appeal are extremely complex. Some appeals from the county court go to the High Court; others go direct to the Court of Appeal. Some appeals from the Residential Property Tribunal Service go to the Lands Tribunal; others go to the Court of Appeal. We regard this as confusing and not contributing to a proportionate system of dispute resolution.
- 5.105 In the Consultation Paper, we suggested that the use of the Upper Tribunal provided the opportunity, not just for simpler routes of appeal, but also for the development of clearer and better appellate jurisprudence on housing law. Most respondents who dealt with this issue agreed. There was also general agreement with our suggestion that there should be a system for designating particular Upper Tribunal decisions as having precedential value.
- 5.106 However, our discussion of appeals in the Consultation Paper, and therefore of respondents' comments, was on the basis of our provisional proposals that there should be a substantial shift in first-instance responsibility for housing from the county court to the First-tier Tribunal. As we explain above, we have not considered it right to pursue this approach.
- 5.107 This has a knock-on effect on our proposals for appeals. Of course, appeals from the First-tier Tribunal, exercising the functions of the RPTS plus those relatively modest extensions we consider should at least be piloted, will benefit from a simple route of appeal to the specialist Land Chamber of the Upper Tribunal. Given the continuing role of the county court, however, this will not amount to the major part of housing law at appellate level. If it is still desirable to have a single appellate body for housing law, the question becomes whether it would be possible or appropriate to extend the appellate jurisdiction of the Upper Tribunal to cover housing appeals from the county court.
- 5.108 As we have seen, the Government is proposing that the Upper Tribunal is to be a superior court of record, with power to establish binding precedent. There is to be, subject to consultation, a specialist Land Chamber. In the Government's view,

The creation of the Upper Tribunal provides the opportunity not only to rationalise the procedures, but also to establish a strong and dedicated appellate body at the head of the new system. Its authority will derive from its specialist skills, and its status as a superior court of record, with judicial review powers, presided over by the Senior President. It is expected that the Upper Tribunal will come to play a central, innovative and defining role in the new system, enjoying a position in the judicial hierarchy at least equivalent to that of the Administrative Court in England and Wales. The government expects it to benefit from the participation of senior judges ...³⁹

- 5.109 In the light of this approach, it seems reasonable to us to conclude that the Upper Tribunal will be a body clearly well able to satisfy the *quality* requirements for appeals from county courts. It will not be a low-status forum with inadequate judicial resources at its disposal.

³⁹ *Transforming Tribunals: Implementing Part 1 of the Tribunal, Courts and Enforcement Act 2007* (CP 30/07, Ministry of Justice, 2007) para 178.

- 5.110 There appears to be a general principle that limits the extent to which judges can participate in appeals where the decision appealed against was made by a judge of the same standing. Thus, we understand that there is a practice such that, where a High Court judge is sitting in the Court of Appeal, Civil Division, or a circuit judge is sitting in the Criminal Division, he or she will not give the lead judgment in an appeal from, respectively, another High Court or circuit judge. However, as it is expected that High Court judges will sit (albeit as tribunal judges) in the Upper Tribunal, it would seem possible to replicate such a system in the Tribunal, where decisions by circuit and district judges in the county court will be the subject of the appeals.
- 5.111 The question is therefore an abstract constitutional one – is there a constitutional principle that forbids appeals from courts to tribunals? It would certainly appear that such an appellate route would be a constitutional novelty – we know of no precedent. But that is perhaps not surprising – there has not been an appellate tribunal with both the scope and status of the Upper Tribunal before.
- 5.112 This is not a question that we consider that we can answer now. Because it arises out of changes to our approach since the Consultation Paper, we have not consulted on it. **Despite the advantages that we still see in a unified appeal route and a specialist forum to mould housing law, we accordingly cannot make a recommendation on this issue. We think, however, that the matter deserves further consideration.**

WALES

- 5.113 The position of the Residential Property Tribunal Wales (“RPT Wales”) was considered in the Consultation Paper. We noted that responsibility for RPT Wales rests with the Welsh Ministers; and that RPT Wales would fall outside the new structure created by the Tribunals, Courts and Enforcement Act 2007.
- 5.114 In forming our proposals in relation to the work of RPT Wales, we concluded that there were three options:
- (1) To transfer responsibility in relation to RPT Wales from the Welsh Ministers to the UK government in Westminster; that is, reverse devolution. We thought that RPT Wales could then form part of the First-tier Tribunal created by the Tribunals, Courts and Enforcement Act 2007 (as we envisaged for the Residential Property Tribunal Service). Hence the same housing jurisdictions we suggested should be transferred to the Residential Property Tribunal Service (as part of the new tribunal service) should similarly be transferred to RPT Wales (to form part of the tribunal service).
 - (2) To transfer particular housing jurisdictions to RPT Wales, but not incorporate RPT Wales into the new tribunal structure created for England.
 - (3) No change to the current system.
- 5.115 We suggested that the first option outlined above would be preferable, though we noted our significant misgivings about that approach.

5.116 Respondents to consultation who dealt with this issue in depth were generally not in favour of our proposal. Jocelyn Davies AM, the Deputy Minister for Housing in the Welsh Assembly Government, said that she was not persuaded by our proposal to extend the role of RPT Wales to include new jurisdictions, nor could she support the transfer of responsibility for RPT Wales from the Welsh Assembly Government back to Westminster.

5.117 Andrew Morris, the President of RPT Wales, commented that:

the Reverse Devolution option flies in the face of a general trend which followed the referendum which has given Wales a Government of its own largely independent of Parliament and looking to expand its powers in the future.

5.118 We have reconsidered the suitability of the reverse-devolution proposal. First, the responses to consultation on this topic are clear that it is contrary to the general thrust of devolution to Wales. Secondly, we are no longer proposing the most significant transfer, that of possession cases, to the tribunal. This second factor means that the argument for absorbing RPT Wales into the Tribunal Service is much weakened. We therefore concede that our original proposals would not be an appropriate solution. Instead, **we recommend that, for consistency, jurisdiction over rented housing disrepair claims should be transferred to RPT Wales – but there should be no change to the present system of governance of RPT Wales.**

PART 6

CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

- 6.1 To achieve the vision for the proportionate resolution of housing problems and disputes, this Report reaches three broad conclusions:
- (1) Triage plus should be adopted as the basic organising principle for those providing advice and assistance with housing problems and disputes.
 - (2) Other means of resolving disputes, outside of formal adjudication, should be more actively encouraged and promoted.
 - (3) There should be some re-balancing of the jurisdictions as between the courts and the First-tier and Upper Tribunals in the new Tribunals Service, combined with modernisation of procedural rules which effect the ability of the courts to act as efficiently as possible. (para 1.23)

BETTER ADVICE AND ASSISTANCE: PROMOTING TRIAGE PLUS

- 6.2 We conclude that “trriage plus” should become a central concept in a reformed system for housing problem solving and housing dispute resolution. (para 3.11)
- 6.3 We recommend that triage plus should comprise:
- (1) Signposting: initial diagnosis and referral.
 - (2) Intelligence-gathering and oversight.
 - (3) Feedback. (para 3.14)
- 6.4 We conclude that identifying ways to increase the ability of organisations, in the public, private and voluntary sectors, to facilitate referrals of advice seekers to the appropriate body, is fundamental to ensuring the creation of a holistic approach to resolving housing problems. (para 3.31)
- 6.5 We conclude that public education and information-provision is central to the signposting concept, and in need of further development. (para 3.34)
- 6.6 We conclude that signposting is important because: it provides individuals with a means of obtaining advice about their housing problems; it provides an opportunity to engage them in the process of solving their problems or resolving their disputes; and, where it works well, it should facilitate the resolution of other problems as well. (para 3.37)
- 6.7 We conclude that the Community Legal Advice Centre/Network models provide a strong basis on which to develop a triage plus system. (para 3. 46)
- 6.8 We conclude that many agencies work with what they are familiar and reveal a lack of awareness of relevant types of work conducted by other service providers. (para 3.50)

- 6.9 In order to improve the links between different advice providers, we recommend, first, that all service providers in the housing sector, including advisers, advocacy groups, adjudicatory bodies and government should develop a comprehensive list of housing service providers in their local area, encompassing the range of entities which might be relevant to those engaged in housing disputes. (para 3.52).
- 6.10 We recommend that existing informal links between advice providers should be formalised. (para 3.55)
- 6.11 We conclude that more could be done by courts and tribunals to provide information to litigants about local service providers. (para 3.56)
- 6.12 We recommend that the Court Service takes steps to ensure that all courts are able to offer a list of local firms which have a Legal Services Commission housing contract. (para 3.57)
- 6.13 We conclude that the development of phone and internet housing information and advice should be encouraged and where possible expanded. (para 3.66)
- 6.14 We conclude that in determining funding for service providers in the housing sector, consideration should be given to providing resources specifically for education and information work. (para 3.70)
- 6.15 We conclude that the Legal Services Commission should continue to encourage active programmes of information and community education through the development of Community Legal Advice Centres and Networks. (para 3.71).
- 6.16 We conclude:
- (1) First, that housing service providers should be enabled to obtain and maintain up-to-date information technology systems. This should be included as part of their funding arrangements. (para 3.89)
 - (2) Secondly, that service providers should be encouraged to use local knowledge to identify issues that need addressing, particularly issues arising at the local level. (para 3.90)
 - (3) Thirdly, that new ways of communicating the intelligence that has been gathered at local, regional and national levels should be developed, so that all those engaged in housing problem solving and dispute resolution can learn about and, where necessary, improve the services they offer. (para 3.91)
- 6.17 We conclude that the legitimacy of feedback activity in the housing advice sector should be acknowledged. (para 3.105)
- 6.18 We recommend that government and other funders recognise the need to fund public policy activity by service providers in the housing sector. (para 3.105)
- 6.19 We recommend that more work should be done on how to evaluate feedback activities. (para 3.108)

6.20 We conclude that, in the context of developing a proportionate system of housing dispute resolution, it is time for a change of approach in respect of the provision of housing advice. (para 3.111)

NON-FORMAL DISPUTE RESOLUTION

6.21 We recommend that the housing-related jurisdictions of the Local Government Ombudsman and the Independent Housing Ombudsman be kept under review with a view to closing any gaps that may become apparent. (para 4.13)

6.22 We further recommend that housing advisers should gain greater awareness of the role of ombudsmen as part of the triage plus approach; and taking a complaint to one of the relevant ombudsmen services should, wherever appropriate, be one of the options recommended to those seeking advice as part of a triage plus approach. (para 4.14)

6.23 We conclude that complaints handling and other management response techniques should be developed as far as possible as a key component of a housing dispute resolution system. (para 4.27)

6.24 We conclude that the use of mediation in housing disputes should be encouraged and developed, but we do not propose any alteration to the principle that it should be voluntary. (para 4.74)

6.25 We recommend that:

- (1) mediation should be available for all housing disputes in the tribunal, but should be provided only where all parties agree;
- (2) rules, practice directions and protocols should emphasise the use of alternative dispute resolution, and the court/tribunal should enforce them; and
- (3) courts/tribunals should actively promote the availability of alternative dispute resolution methods to litigants and legal representatives. In particular, parties should be provided with information about services available in the locality. (para 4.75)

6.26 We conclude that The Disputes Service provides another form of proportionate and appropriate dispute resolution in the housing context. (para 4.82)

6.27 We conclude that consideration should be given to the development of early neutral evaluation in the context of housing disputes. (para 4.88)

6.28 We conclude that:

- (1) the adoption of a mixed approach, adapting various forms of alternative dispute resolution tailored to housing, is likely to be the best approach to supporting an appropriate and proportionate system of non-formal housing dispute resolution;
- (2) a pilot of early neutral evaluation should be considered, to be run specifically in relation to housing cases;

- (3) though there should be no restrictions at this time on the giving of evidence by expert witnesses, their use should be tightly controlled. Parties should be required to justify the need for instructing expert witnesses prior to a hearing. (para 4.98)

FORMAL DISPUTE RESOLUTION

- 6.29 From the options open to us, we conclude the following option is to be preferred: a recommendation that, while the creation of a more specialist jurisdiction might remain a long-term goal, any progress towards that goal should be measured and tested. (paras 5.43 and 5.46)
- 6.30 We conclude that Government should keep under review the possibility that further specific housing matters may be transferred to the Land, Property and Housing Chamber of the First-tier Tribunal, or to the Upper Tribunal. (para 5.47)
- 6.31 We conclude that there are important interim reforms that can be made. (para 5.48)
 - (1) First, implementation of our recommendations in Renting Homes would, by clarifying the respective obligations of landlords and occupiers, go a considerable way to improving their understanding of their legal positions. This is a key element in a system of proportionate dispute resolution. (para 5.49)
 - (2) Second, there are specific changes that could be made to the ways in which the courts operate. (para 5.50)
 - (3) Third, it is important to ask what lessons can be learned from the way in which tribunals operate to see whether they can be applied in the court service. (para 5.51)
- 6.32 We recommend that the following issues should be considered:
 - (1) The Civil Committee and the Tribunals Committee of the Judicial Studies Board should jointly consider whether there are aspects of the training developed by the latter which could with advantage be promoted by the former.
 - (2) The Civil Committee of the Judicial Studies Board and the Residential Property Tribunals Service might also consider whether there are training issues over which they could collaborate.
 - (3) Further consideration should be given to the desirability of the “ticketing” of specialist housing judges.
 - (4) Consideration should be given to encouraging and enabling every court centre to have a duty service available, to which judges could refer those appearing in court unrepresented.

- (5) Through development of its website, the Court Service should **provide those appearing before courts with as much information as practicable** about how to prepare for the hearing and the sources of advice and assistance are available locally to help those summoned to court.
 - (6) Given the evidence that attendance at a hearing affects the outcome of decisions, the Court Service should discuss with the Tribunals Service ways in which the latter has been able to encourage more parties to attend their hearings.
 - (7) Consideration should be given to enabling courts to sit with expert surveyor assessors. (para 5.52)
- 6.33 We recommend that there should be no change of jurisdictions without legal aid being made available before a tribunal on the same basis as it is available before a court. (para 5.53)
- 6.34 We recommend that what we describe as “stand-alone” housing disrepair cases should be transferred to the new Tribunal. (para 5.54)
- 6.35 We recommend, in the alternative, that the Government should take power to establish a pilot scheme, whereby, in certain parts of the country, such cases should be transferred to the new Tribunal. (para 5.56)
- 6.36 We recommend that all of the jurisdictions arising from the Mobile Homes Act 1983 should be transferred to the First-tier Tribunal. (para 5.71)
- 6.37 We recommend that, if our recommendation for a pilot study relating to the transfer of disrepair cases to the First-tier Tribunal is accepted, consideration should be given to including housing related statutory nuisance cases and Defective Premises Act cases as well. (para 5.75)
- 6.38 We conclude that a general principle is that wherever possible, persons bringing proceedings, whether before a court or a tribunal, should be able to have their matters dealt with in a single process. (para 5.78)
- 6.39 We recommend that whichever forum – the County Court or the Upper Tribunal – is to exercise the jurisdiction under Housing Act 1996, section 204, that forum should have full power to issue whatever associated interim relief is necessary. (para 5.86)
- 6.40 A forum with the interim relief powers we propose should necessarily have an out-of-hours facility. Any transfer of jurisdiction over judicial review matters must involve providing access to the tribunal on an out-of-hours, emergency basis where appropriate. (para 5.88)

- 6.41 We have concluded that we cannot persist with our provisional proposal to transfer appeals against homeless determinations under Housing Act 1996, section 204 to the Upper Tribunal. We therefore make no final recommendation on this question. However, we would see considerable advantage in the Government taking the power to establish a pilot in defined areas of the country in which these appeals would be transferred from the county court to the Upper Tribunal. (paras 5.98 and 5.99)
- 6.42 If a pilot were to be established to assess the desirability of transferring homelessness statutory appeals, consideration should be given to simultaneously piloting giving the Upper Tribunal jurisdiction to deal with other homelessness and housing related judicial review applications (such a jurisdiction being concurrent with, rather than replacing, that of the Administrative Court). (para 5.102)
- 6.43 In respect of other housing appeals, despite the advantages that we see in a unified appeal route and a specialist forum to mould housing law, we cannot make a recommendation on this issue. We think, however, that the matter deserves further consideration. (para 5.112)
- 6.44 We recommend that, for consistency, jurisdiction over rented housing disrepair claims should be transferred to RPT Wales – but there should be no change to the present system of governance of RPT Wales. (para 5.118)

(Signed) TERENCE ETHERTON, *Chairman*
STUART BRIDGE
DAVID HERTZELL
JEREMY HORDER
KENNETH PARKER

WILLIAM ARNOLD, *Chief Executive*
1 April 2008

APPENDIX A

LAW COMMISSION EXPERT WORKING GROUP

LIST OF MEMBERS OF EXPERT WORKING GROUP

- A.1 The following people were members of the Law Commission's expert working group on housing disputes:
- (1) Sue Baxter, Housing Policy Officer, SITRA;
 - (2) Lawrence Greenberg, Lawrence Greenberg Consultancy, Accredited Mediator, Accreditation Network UK Accreditation Consultant, expertise in dispute resolution, governance and project management;
 - (3) Adam Griffith, Policy Officer (Legal Services), Advice Services Alliance;
 - (4) David Hawkes, Manager, Gloucestershire Money Advice Service;
 - (5) Caroline Hunter, Senior Lecturer in Housing Law, Centre for Economic and Social Research, Sheffield Hallam University, member of Socio-Legal Studies Association Executive Committee;
 - (6) Jo Lavis, Affordable Housing, Rural Communities Division, Department for Environment, Food and Rural Affairs;
 - (7) John Martin, Bradford Resource Centre and Community Statistics Project;
 - (8) Sally Morshead, member, formerly chair, of the Law Society Housing Law Committee;
 - (9) Val Reid, Policy Officer (Alternative Dispute Resolution), Advice Services Alliance;
 - (10) Patrick Reddin, Director of Reddin and Co Ltd. Chartered Building Surveyors and Corporate Building Engineers, Honorary Secretary of the Association of Building Engineers, specialist in housing and disrepair;
 - (11) Kimi Rochard-Bovell, Private Housing Information Unit, Co-ordinator of Willesden County Court Advocacy Service, Brent Council;
 - (12) Howard Springett, Kingston Citizen's Advice Bureau;
 - (13) Bridget Stark, Camden Federation of Private Tenants
 - (14) Philip Walker, Area Co-ordinator, The London Magistrates' Courts, Support and Information Service, Her Majesty's Courts Service, formerly at Brent Council; and
 - (15) Neil Wightman, Project Manager, Housing Options Group, Housing and Adult Social Care, London Borough, Camden.

APPENDIX B

RESPONDENTS TO ISSUES PAPER

LIST OF RESPONDENTS TO ISSUES PAPER

- B.1 Responses to the Housing: Proportionate Dispute Resolution Issues Paper were provided by:
- (1) Advice Services Alliance (Ann Lewis);
 - (2) Andrew Arden, Barrister, Arden Chambers;
 - (3) Association of District Judges;
 - (4) Association of Residential Managing Agents (Berenice Seel);
 - (5) Martin Bayntun, Landlord (20 to 100 properties), Foreignmagic Ltd;
 - (6) Angus Bearn, Landlord (10 to 19 properties), Favoured Locations Ltd;
 - (7) Wendy Black, Housing Caseworker, Citizens Advice Bureau;
 - (8) Bolton Council and Bolton at Home (Hilary Lewis);
 - (9) Brent Private Tenant's Rights Group (Kit Wilby);
 - (10) British Property Federation;
 - (11) Bromsgrove and District Citizens Advice Bureau (Penny Harrison);
 - (12) Judge Russell Campbell;
 - (13) Chartered Institute of Housing (Sam Lister);
 - (14) Chartered Institute of Housing Cymru;
 - (15) Citizens Advice;
 - (16) Civil Justice Council;
 - (17) Council on Tribunals;
 - (18) David Daly, Barrister and accredited mediator, Tanfield Chambers;
 - (19) Brendan Edgeworth (University of New South Wales).
 - (20) Federation of Private Residents Associations (Robert Levene, Chief Executive);
 - (21) Genesis Housing Group (Tom Crisp, Quality and Research Officer);
 - (22) Liz Ginns, Mediator, Heartlands Mediation;
 - (23) Lawrence Greenberg;

- (24) John Hales, Supervising Solicitor, Lewisham Law Centre;
- (25) Dave Hickling, Tenancy Co-ordinator, Sheffield Council;
- (26) Housing Corporation (Clare Miller);
- (27) Housing Law Practitioners' Association;
- (28) Neil Hughes, Tenant Board Member, Eden Housing Association;
- (29) Independent Housing Ombudsman Service (Mike Biles);
- (30) Irwin Mitchell Solicitors;
- (31) Jacob Langlands, Solicitor, also member of Global Leadership Interlink;
- (32) Law Centres Federation;
- (33) Law Reform Committee of the Bar Council (Arden Chambers);
- (34) Law Society;
- (35) Legal Services Commission;
- (36) Leasehold Advisory Service (Anthony Essien);
- (37) Simeone Lewis, Individual;
- (38) Local Government Ombudsmen;
- (39) London Housing and Disrepair Forum and National Disrepair Forum;
- (40) Macclesfield Wilmslow and District Citizens Advice Bureau;
- (41) Merseyside Housing Law Group (Simon Rahilly);
- (42) Roger Murphy, Individual;
- (43) National Landlords Association;
- (44) National Union of Students (Marie Burton, Union Solicitor);
- (45) Paddington Law Centre (Anne McNicholas, Elizabeth George, John McLean);
- (46) Public Services Ombudsman for Wales (Elizabeth Thomas);
- (47) Patrick Reddin, Reddin and Co and Association of Building Engineers;
- (48) Residential Property Tribunal Service;
- (49) Lancelot Robson (Kingston University Law School);
- (50) Runcorn Residents Federation;

- (51) Shelter (John Gallagher);
- (52) Tessa Shepperson, Solicitor, Landlord Law;
- (53) SITRA (Eileen McMullan);
- (54) Social Housing Law Association;
- (55) Yongut Suayngam, Landlord (less than five properties);
- (56) Victor Sullivan, Landlord (less than five properties);
- (57) David Thomas, Thomas and Co Solicitors;
- (58) TPAS (Richard Warrington);
- (59) Helen Tucker, Solicitor, Anthony Collins Solicitors;
- (60) Alan Tunkel, Barrister, Lincoln's Inn;
- (61) Robert Wassall, Partner, Clarke Willmott Solicitors; and
- (62) Ian Wightwick, Barrister, Unity Street Chambers.

APPENDIX C

RESPONDENTS TO CONSULTATION PAPER

LIST OF RESPONDENTS TO CONSULTATION PAPER

C.1 Responses to the Housing: Proportionate Dispute Resolution: The Role of Tribunals Consultation Paper were provided by:

- (1) Advice Services Alliance;
- (2) Arden Chambers;
- (3) Association of District Judges;
- (4) Association of Housing Advice Services;
- (5) Association of Tenancy Relations Officers;
- (6) District Judge Wendy Backhouse;
- (7) Andrew Blair, Tenant;
- (8) Professor Anthony Bradley, Cloisters Chambers;
- (9) British Holiday and Home Parks Association;
- (10) British Property Federation;
- (11) Chancery Bar Association;
- (12) Chartered Institute of Housing;
- (13) Citizens Advice;
- (14) Civil Justice Council;
- (15) College of Law Legal Advice Centre;
- (16) Mr Justice Collins, Lead Judge, Administrative Court;
- (17) Community Law Partnership;
- (18) Council on Tribunals;
- (19) Jocelyn Davies AM, Deputy Minister for Housing, Welsh Assembly Government;
- (20) Roy Dixon, Landlord, Vale Housing Association Ltd;
- (21) Carolyn Harms, Tenant;
- (22) Her Majesty's Council of Circuit Judges;
- (23) Barbara Houghton, The Riverside Group;

- (24) Judicial Studies Board Civil Committee;
- (25) Housing Law Practitioners' Association;
- (26) LACORS;
- (27) Law Reform Committee of the Bar Council;
- (28) Law Society;
- (29) Leeds University Student Advice Centre (Andrea Kerslake, housing specialist);
- (30) Legal Services Commission;
- (31) Local Government Ombudsman (Tony Redmond);
- (32) Money Advice Trust;
- (33) Wilma Morrison, Central London Law Centre;
- (34) National Federation of Residential Landlords;
- (35) National Landlords Association;
- (36) National Park Homes Council;
- (37) National Union of Students (Sarah Wayman);
- (38) Nottingham City Council (Paul Greevy);
- (39) District Judge Tim Parker;
- (40) Residential Landlords' Association Ltd;
- (41) Residential Property Tribunal Service;
- (42) RPT Wales;
- (43) Royal Institution of Chartered Surveyors;
- (44) Shelter;
- (45) David Smith, Pain Smith Solicitors;
- (46) Adrian Thompson, Guild of Residential Landlords;
- (47) Unipol Student Homes; and
- (48) Wakefield Housing Aid Service (Steven Tew, Advice Services Manager).