The Law Commission

HOUSING: PROPORTIONATE DISPUTE RESOLUTION

An Issues Paper

This issues paper, completed on 20 March 2006 by the Public Law Team at the Law Commission, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Public Law Team at the Law Commission would be grateful for comments on the issues raised in this paper before 11 July 2006. Comments may be sent either –

By post to:
Eleanor Cawte
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London
WC1N 2BQ

Tel: 020 7453 1228
Fax: 020 7453 1297

By email to:
public@lawcommission.gsi.gov.uk

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LAW COMMISSION

HOUSING: PROPORTIONATE DISPUTE RESOLUTION

AN ISSUES PAPER

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PART 1
INTRODUCTION

1.1 Our report Renting Homes, and the accompanying Rented Homes Bill, for the first time sets out a coherent scheme for the legal regulation of rented homes.[1] However effective our scheme proves to be (and assuming it is adopted by Government), disputes between landlords and their contract-holders will still arise.

1.2 Currently, housing problems are at or near the top of the issues brought to citizens advice bureaux and other advice agencies.[2] The Legal Services Commission spends a significant amount of money each year on housing dispute resolution.[3] Truly comprehensive law reform, particularly on issues affecting large sections of the public who do not generally employ lawyers, must address questions about how advice on legal rights and obligations is to be provided, and – where necessary – how disputes are to be resolved.

1.3 This project asks how a more "holistic approach" for the "proportionate"[4] resolution of housing problems and disputes can be developed, to complement our recommendations for a more coherent legal framework. The principles outlined here also extend to the owner-occupied sector which, by definition, the Renting Homes project did not consider.

1.4 Although this project follows on from Renting Homes, it is freestanding. It does not depend on our recommendations for the reform of the substantive law

BACKGROUND

1.5 During the Renting Homes consultation,[5] we received many criticisms about current methods for resolving housing disputes, and many suggestions for change. In our first Report, we commented:

[1] Forthcoming 2006.

[2] Citizens advice bureaux dealt with 5,259,000 new problems in 2004/05, of which 499,000 were housing related: Citizens Advice Annual Report and Accounts 2004/05, http://www.citizensadvice.org.uk/complete_report_0405_web_final.pdf (last visited 11 January 2006).

[3] In its corporate plan for 2003/04 the Legal Services Commission's estimated budget expenditure on housing advice was £21.3 million.

[4] Transforming Public Services: Complaints, Redress and Tribunals (July 2004) Cm 6243, http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf (last visited 5 January 2006).

[5] Responses to Renting Homes 1: Status and Security (April 2002), Consultation Paper No 162, http://www.lawcom.gov.uk/docs/cp162.pdf.

> … 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 In addition, in the consultation which led to our report on Land, Valuation and Housing Tribunals,[7] consultees also indicated dissatisfaction with current means for the resolution of housing disputes.

1.7 In both cases, expressions of dissatisfaction came from a wide range of users and organisations. For example, in response to Renting Homes, the National Federation of Residential Landlords said: "most landlords have no faith in the county court due to its inability to deal with matters effectively and in a business timescale. It is costly, both to the landlord user and to the taxpayer. A simpler, much more cost-effective, solution *must* be found now." TAROE (Tenants and Residents Organisation of England) said that "housing courts or tribunals are vitally needed."

1.8 In response to the Land Valuation and Housing Tribunals consultation, the Bar Council said that "the need for a common court to deal with all housing and land matters, which are presently under different jurisdictions, has never been greater." The Civil Justice Council said that "the whole picture of adjudication in housing cases needs to be considered." These comments reflect long-standing dissatisfaction with the housing dispute resolution system.[8]

1.9 By way of specific example, there have for years been concerns about housing possession proceedings being brought on the ground of rent arrears (to which can be added proceedings for mortgage arrears). These are numerically significant, making up a considerable proportion of the county court's caseload.[9] Possession proceedings are subject to two principal criticisms.

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

[7] Land, Valuation and Housing Tribunals: The Future (2003) Law Com No 281, http://www.lawcom.gov.uk/docs/lc281.pdf. That report examined the work of tribunals dealing with land and property matters, including Leasehold Valuation Tribunals and Rent Assessment Committees, and proposed a unified tribunal system for the resolution of land, valuation and housing disputes.

[8] Recent articles include District Judge Nic Madge, "Hearing housing cases – who should be listening?" [2001] JHL 83 and Andrew Arden QC, "A Fair Hearing? The Case for a Housing Court", originally published in 1977, republished in [2001] JHL 86.

[9] In 2004 there were 232,257 possession cases on the ground of mortgage or rent arrears heard in the county courts, which made up 15% of the county court's caseload: see Judicial Statistics Annual Report 2004 (May 2005) Cm 6565, p 58. Other research suggests, however, that the proportion of housing possession cases in an individual county court's caseload may be much higher. In a random sample of the computer records of cases at four county courts, Moorhead and others found that the percentage of county court cases which were housing possession cases varied between 33% and 40.2%, averaging 35.5%: see R Moorhead and M Sefton, *Litigants in person – Unrepresented litigants in first instance proceedings*, DCA Research Series 2/05 (March 2005), http://www.dca.gov.uk/research/2005/2_2005.pdf (last visited 11 January 2006).

(1) Possession proceedings frequently involve an inappropriate use of court resources.[10] In many cases, particularly in the social rented sector, the landlord does not actually want possession, only the rent to be paid. Indeed, often the rent arrears are not the fault of the tenant, but are only the result of poor administration of housing benefit.

(2) Possession proceedings are inefficient. They are relatively expensive, with costs usually added to other debts already owed by the debtor; they fail adequately to distinguish those who can't pay from those who can but won't;[11] they take too long to reach a final outcome; those affected do not attend; and there is inconsistent decision-making by judges insufficiently specialised in housing law.[12]

1.10 Many other ways in which current methods of dealing with housing problems and resolving housing disputes can also be seen as disproportionate. We discuss this further in Part 2.

1.11 The need for new approaches to dispute resolution has been recognised within the Department for Constitutional Affairs (DCA). Their White Paper, Transforming Public Services: Complaints, Redress and Tribunals[13] made specific proposals for the creation of a new tribunals service. But it also set out a vision for a fundamental rethink of current approaches to systems of grievance redress, especially in the public services. In particular, the White Paper introduced the concept of "proportionate dispute resolution".[14]

1.12 Annex D of that White Paper specifically highlighted our proposed work on housing disputes and made clear the extent of our enquiry. It emphasised the "root and branch" element to our project:

> … the project must do more than simply interrogate law and procedures. [I]t will consider:

[10] This was recognised by Lord Woolf in his Access to Justice Final Report (1996) p 202, para 20, http://www.dca.gov.uk/civil/final/sec4b.htm#c16 (last visited 5 January 2006).

[11] E Kempson and S Collard, *Managing Multiple Debts: experiences of County Court Administration Orders among debtors, creditors and advisers*, DCA Research Series 1/04 (July 2004), http://www.dca.gov.uk/research/2004/1_2004.pdf (last visited 11 January 2006).

[12] Empirical studies include, C Hunter, S Blandy, D Cowan, J Nixon, E Hitchings, C Pantazis and S Parr, *The Exercise of Judicial Discretion in Rent Arrears Cases*, DCA Research Series 6/05 (October 2005), http://www.dca.gov.uk/research/2005/6_2005sm1.pdf (last visited 5 January 2006); S Blandy, C Hunter, D Lister, L Naylor, J Nixon *Housing possession cases in the county court: perceptions of black and minority ethnic defendants* LCD Research Paper No 11/02 (December 2002), http://www.dca.gov.uk/research/2002/11-02es.pdf (last visited 5 January 2006); J Nixon, C Hunter, Y Smith, B Wishart, *Housing cases in the county courts*, Joseph Rowntree Foundation (1996), http://www.jrf.org.uk/knowledge/findings/housing/pdf/H196.pdf (last visited 5 January 2006).

[13] (July 2004) Cm 6243, http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf (last visited 5 January 2006).

[14] See Transforming Public Services: Complaints, Redress and Tribunals (July 2004) Cm 6243, http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf (last visited 5 January 2006) ch 2.

> 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; and
>
> 5. The links between dispute resolution of legal problems and access to other housing and related services.[15]

1.13 These ideas have been taken forward more generally in the DCA's strategic plan for 2004-2009, published in December 2004.[16] This identifies, as a specific Departmental objective, the need for "faster, effective and proportionate dispute resolution".[17]

TERMS OF REFERENCE

1.14 With these background factors in mind, the terms of reference for this project, as agreed with the Department of Constitutional Affairs, were broadly drawn.[18] They are:

> 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.

1.15 As "glossed" in the White Paper (para 1.12 above), it is clear that the Law Commission has been asked to undertake a project of considerable complexity, which raises fundamental questions about housing dispute resolution. In essence, the project must:

(1) investigate the capacity of current modes of housing dispute resolution to solve people's housing problems;

[15] Transforming Public Services: Complaints, Redress and Tribunals (July 2004) Cm 6243, http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf (last visited 5 January 2006) p 61.

[16] Department for Constitutional Affairs, Delivering Justice, Rights and Democracy DCA Strategy 2004-09 (December 2004), http://www.dca.gov.uk/dept/strategy/ (last visited 5 January 2006).

[17] The theme has also been taken up by the Civil Justice Council; see their report "Improved Access to Justice – Funding Options and Proportionate Costs" August 2005.

[18] Initially we had suggested an investigation into the value of, and designs for, a new specialist forum for the resolution of housing disputes. But the Department of Constitutional Affairs thought this too narrow in that it continued to consider dispute resolution procedures solely through the lens of court and failed to reflect the new user focus of the Department of Constitutional Affairs.

(2) consider how they might be adapted into a broader approach to housing problem-solving;

(3) examine the relationship between housing problems and dispute-resolution processes; and

(4) consider the nature of disputes and how they arise, and the social processes involved in the shaping of disputes and their resolution.

A DISTINCTIVE PROJECT

1.16 The focus on procedural issues means this is not a typical Law Commission project. (Most of our work relates to proposals for reform of substantive law.) This has impacted on our method and approach. Two particular differences must be noted.

(1) Much of the literature on which we have drawn is theoretical and historical rather than legal in nature.[19] We start from the fundamental insight that disputes are not just a matter of law and legal rights. Rather, they are shaped by the procedures available for their resolution and by the information people have about how they might be resolved. They do not always involve only the issues they appear to involve, but often have hidden or unarticulated causes. (To repeat the simple example given above, possession proceedings are often really about poor housing benefit administration, rather than failure by a tenant to pay the rent.)

(2) Although we have a vision of the architecture of the scheme we are proposing, at this stage we offer fewer firm provisional proposals on the details than we normally do in our consultation papers. We want the responses of consultees about the practical issues that must be addressed to help us shape our outline structure into a practical and workable reality.

1.17 Nevertheless while the subject-matter and approach of this project may be novel, our objective remains the same: to deliver public benefit by investigating the need for reform of the law and legal processes, and if needed, making recommendations for reform.

[19] We are publishing, in a separate volume, entitled Housing: Proportionate Dispute Resolution: Further Analysis, an account of the theoretical literature that has informed the argument set out in this paper. This can be found at http://www.lawcom.gov.uk/docs/further_analysis.pdf.

DEVELOPING OUR STARTING POINT

1.18 We started with a seminar held in September 2004.[20] Those attending the seminar observed that many occupiers of private and social housing face a multiplicity of social and/or financial problems – memorably described by one delegate as "housing unhappiness". Many of those at the seminar accepted that housing problems are often only one manifestation of a complex range of interconnected problems.

1.19 In light of this, we thought we might be able to develop a classification of different classes of housing problem. We made some progress on this. We could see that occupiers might have, for example:

(1) environmental problems – eg unkempt common areas; graffiti; burned out cars;

(2) physical problems – eg disrepair or structural problems; non-working lifts;

(3) neighbour problems – eg noise or other forms of anti-social behaviour;

(4) landlord problems – eg failure to respond to service requests;

(5) agent problems – similar, particularly in the private sector where the landlord was not available;

(6) problems with the agreement – eg not setting down what was agreed or not being clear about what was agreed;

(7) personal problems – eg breakdown of a relationship or loss of job;

(8) problems arising from homelessness and vulnerability.

1.20 Similarly, landlords might have problems with their tenants (eg not paying the rent, or failing to look after the premises) or with unauthorised people coming into the premises or onto the estate.

1.21 Many housing problems arise from a complex mixture of interconnected factors. In addition, the nature and extent of housing problems are highly contingent on local and national housing conditions and other social variables, such as levels of employment and economic activity.

1.22 In the end though we decided that there were so many different ways in which people lived their lives that, without a huge empirical investigation, no such list could ever be comprehensive. We were not convinced of the value of ourselves trying to produce such a list.

[20] Law Commission, Public Law Team, *Resolving Housing Disputes: Report of a seminar held on 9 September 2004* (October 2004), http://www.lawcom.gov.uk/docs/report_from_090904.pdf.

1.23 Instead, we thought it would be better to examine how problems become transformed into disputes. We wanted to understand how the mechanisms available for the resolution of disputes actually shape their nature and characteristics. We thought this might provide a sounder basis for determining whether the mechanisms for resolving disputes were proportionate.

1.24 For example, if the predominant model for dispute-resolution is going to court, this implies, first, that the problem is "justiciable" and can and must be transformed into a justiciable dispute.[21] Second, courts are predominantly used for the resolution of individual matters within an adversarial litigation process. They are less suited to determining collective matters, for example an estate-wide housing repair programme. Although important, a court-focused model is not best suited to resolving all the multiplicity of problems and disputes that arise in real life. We have to consider the issues more broadly than this.

PRE-CONSULTATION STAGE

1.25 In developing the ideas set out in this paper, we have been helped by a number of people with an interest in and experience of housing dispute resolution. Apart from those who attended the seminar in September 2004,[22] we have been greatly assisted by a small expert group representing a number of users and advice groups.[23] In addition, we have 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 Department for Constitutional Affairs.

We are most grateful to all those who gave so freely of their time to assist us.

1.26 But we know that there are many other groups and organisations with views about what a proportionate system of housing dispute resolution might involve. We want to engage with and learn from as wide a range of people and organisations as possible. Throughout this paper there are questions designed to shape consultees' responses.

[21] To adopt the language used by Professor H Genn in her study *Paths to Justice* (1999) and by the Legal Services Research Centre Report: P Pleasence, A Buck, NJ Balmer, A O'Grady and H Genn, *Causes of Action: Civil Law and Social Justice* (2004), http://www.lsrc.org.uk/publications/Causes%20of%20Action.pdf (last visited 10 January 2006).

[22] A list of those attending the meeting is set out in Appendix A.

[23] A list of the members of the group is set out in Appendix B.

STRUCTURE OF THE PAPER

1.27 The structure of this Paper is as follows. Part 2 considers present means for solving housing problems and resolving housing disputes and the ways in which the current system may be criticised and said to operate disproportionately. It also sets out the values which any reformed system should embrace. Part 3 gives an overview of the scheme we propose. Parts 4 – 8 set out in more detail our initial thinking on how the elements of the scheme would operate. Part 9 summarises the argument, brings together the questions raised in the paper, and asks for views on how the scheme could be put into practice.

OUTCOMES

1.28 Our plans are that, following consultation on the issues raised in this paper, we will analyse the responses. In the light of them we will develop firmer proposals for reform. We will publish a consultation paper around the end of 2006 which will set out our provisional proposals. We anticipate delivering a final report in the summer 2007. We do not at this stage think it will be necessary for a draft Bill to accompany the final report.

PART 2
THE PROBLEM AND THE CHALLENGE

INTRODUCTION

2.1 Part 1 introduced the problem we seek to address in general terms. It may help the reader if we provide a more concrete example to illustrate the questions we consider in this project. This Part therefore starts with a hypothetical example, not drawn directly from one specific case, but drawn from experience which is not, we think, untypical. The Part then considers the challenge of this project and summarises how we intend to approach it. It also sets out criteria against which proposals for reform should be judged. The bulk of this Part considers the extent to which and the ways in which the present system seems to fail to satisfy these criteria.

HOUSING UNHAPPINESS: A HYPOTHETICAL EXAMPLE

2.2 T is a local authority tenant. She lives in a flat on an estate that is run-down and unpopular. Her flat has not been painted for years and the kitchen is out-dated. The flat also suffers from condensation. She has a three-year-old child who suffers from asthma. A teenage gang hang about the communal areas of her block making noise and harassing the tenants, particularly after dark.

2.3 There are many ways in which T might respond to her situation.

(1) She might just do nothing.

(2) She might talk to her neighbour, who tells her that she has lived on the estate for years, and that it's never worth complaining; so she does nothing.

(3) She may talk to a worker at the Sure Start project who would consider how the situation was affecting the relationship between the tenant and her child.

(4) She might go to her GP about her boy's asthma; the GP might write to the local authority urging a transfer to a property that suffers less from damp.

(5) She might also go to her GP for something to relieve the stress and depression from which she suffers.

(6) She might raise the issues with a local tenants' management committee.

(7) She might write to her local councillor.

(8) She might write to her MP.

(9) She might go to the police, especially about the teenage gang, though they might respond that without evidence there is little they could do.

(10) She might go to her estate housing office, who tell her that her block of flats will be redecorated and improved "as soon as money is available". She may also find one or more leaflets there that give information about controlling condensation or what to do about harassment.

(11) Her GP may suggest she attend the citizens' advice bureau "outreach" facility[1] located in the surgery. Alternatively, she might go to the CAB in town. Either of these may suggest a number of actions she might take. These might include: writing to the councillor or the MP (see above); using the local authority complaints procedure; if there is no response, suggesting that the tenant complain to the Local Government Ombudsmen about the failure of the local authority complaints system. They may also suggest she may need to go to the local law centre; or to a solicitor.

(12) If she goes to the law centre, they may suggest ways in which she might start proceedings against the local authority relating to the condition of the flat. They might also suggest pressing the local authority to take steps against the teenagers, including consideration of the use of anti-social behaviour orders ("ASBOs").

(13) Similarly, if she goes to a solicitor in private practice, he or she might check to see if there is any actionable disrepair, arguing that issuing proceedings may trigger an offer of a move to another estate. Or the solicitor might decide to investigate the potential of a private prosecution for statutory nuisance if an expert opinion links the asthma to the housing conditions. In either case, if the solicitor has a housing franchise from the Legal Services Commission, he or she may contemplate taking steps within the terms of their contract with the Commission.

(14) She may approach the solicitor she used for her divorce. He tells her that there is no solicitor in the area with a housing franchise and she should complain to her local MP.

(15) The solicitor may also inform her about the housing advice service available through CLS Direct (the new call-centre service).

(16) T may complete a survey that the local authority carries out to assess the level of tenant satisfaction. She explains the causes of her housing unhappiness on the questionnaire. There is a high response level with the majority of tenants expressing serious concerns about anti-social behaviour. The local authority decides to prioritise community safety on the estate and launches a number of initiatives.

[1] In addition to their own offices, citizens advice bureaux provide advice from the following settings: 1176 health settings including GP surgeries, health centres and hospitals, 598 community centres, 80 schools/colleges, 209 prisons, courts and probation offices. See the Citizens Advice website, http://www.citizensadvice.org.uk/index/aboutus/factsheets/cab_key_facts.htm (last visited 26 January 2006).

Comment

2.4 This example reveals the huge range of options available. However, none of these helps T unless she is sufficiently confident to decide that she has the ability to do something about her unhappiness. She must also be aware of the existence of one or more of the agencies to whom she might turn for further advice or assistance.

2.5 The question of how individual citizens can acquire the knowledge and skills to access the variety of agencies that might help them with their life problems is beyond the direct scope of this project, although, as will be seen, some of the issues we raise in this paper may have an indirect impact on it. It has recently been made the subject of a separate Government inquiry.[2]

2.6 Assuming she has the requisite confidence and awareness, each of the people or organisations to whom she might turn has something to offer her to resolve her problems. But unless she gets in touch with all of them, (and indeed others that may be available but which are not listed here) she is unlikely to get a full picture of all the options available. She will thus be unable to make a fully informed choice about what is best for her.

THE CHALLENGE

2.7 The Government's vision, that there should be a "holistic" approach to the resolution of peoples' problems and disputes, will not be realised unless there is a clearer and more coherent structure. The challenge for this project is whether this can be achieved. To meet this challenge, we draw attention at the outset to two aspects of the approach we are adopting.

Pro-active consultation

2.8 The DCA emphasises that reform of dispute resolution procedures must be informed by what the public wants, not just what the legal system is able to offer. Some might conclude, therefore, that the Law Commission should undertake a huge research study which asked just that. It is not doing so for two reasons.

2.9 First, any such survey is beyond both the financial and human resources of the Law Commission. Second, asking people in the abstract what sort of problem-solving or dispute-resolution procedure they would like would not necessarily lead to ideas that would be workable in practice. It is often easier to think about what is currently available and how that might be adapted to meet new challenges.

2.10 Thus, the Commission will adopt a very pro-active process of consultation. It wants to engage with as wide a range of individuals and organisations as possible, to learn as much as possible not only about what is currently provided, but also what people would like and ideas for making new developments a reality.

[2] Taskforce on Public Legal Education, chaired by Professor Hazel Genn CBE for the Department of Constitutional Affairs, established in January 2006.

Criteria for judging a proportionate dispute resolution system

2.11 In addition, we want to be clear about the criteria for judging whether any system is "good" and "proportionate" or "bad" or "disproportionate". Paragraphs 2.12 and 2.13 set out a list of values which we consider should underpin any system of housing dispute resolution. These can be used both to evaluate existing methods of housing dispute resolution, and to judge any proposed reforms. We also consider the link between these values and "proportionate" dispute resolution.

VALUES

2.12 Problem solving and dispute resolving processes reflect important, but frequently conflicting, values. A proportionate housing dispute resolution system should be based upon a set of clearly identified and explicitly stated values. The core values that we have identified are as follows.

(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 towards 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.* The interests of those in weak bargaining positions should not be unfairly treated as against the interests of 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 in 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 a problem, must treat them with respect and 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 efforts 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 ineffective, 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.

2.13 In addition to any values which we believe to be important in underpinning a dispute resolution system, consideration must be given to principles set out in the Human Rights Act 1998.

Values and proportionate dispute resolution

2.14 Clearly there are tensions between these different values. There cannot be a "one-size-fits-all" policy. The balance between these values cannot be struck the same way for every housing problem or dispute. Rather, we consider that a proportionate dispute resolution system is one which allows appropriate balances to be struck between the core values.

2.15 Thus, a system could be said to operate disproportionately if, for example:

(1) a local authority spends more on legal costs in successfully defending a disrepair claim brought in court, on narrow legal grounds, than it would spend on carrying out the repair – in this case the balance between costs and accuracy is arguably not being struck appropriately;

(2) a private landlord has to wait several weeks for a court to grant a possession order to which he is automatically entitled – arguably, effectiveness and efficiency are not being given sufficient weight, compared, for example, with concerns about fairness, equality of arms, or having an independent tribunal take the decision.

2.16 All systems for solving problems or resolving disputes consume resources, both cash and human. Cash resources may come directly from individuals or organisations who pay for the services required, or indirectly through funding provided by agencies of the state or other organisations, or by a combination of the two. Human resources involve the engagement of people in the process of dealing with problems and disputes. They also involve the emotional stresses and strains that affect those with problems or engaged in a dispute.

2.17 A system is more likely to be proportionate if the resources expended on using it bear a sensible relationship to the problem to be solved or dispute to be resolved. A proportionate system of housing dispute resolution does not, however, prioritise efficiency or cost saving above all other values, but recognises that there is often a trade-off with other values such as accuracy.

2.18 We seek to ensure that issues about the relationship of resources to proportionality are articulated, rather than left hidden. Thinking openly about them helps to define the choices that those with problems and disputes must make about how those problems or disputes might be best sorted out. It is also essential for policy makers who have to devise systems for solving problems and resolving disputes, by revealing the bases on which their choices must be made.

Have we identified the correct values?

Are there others we should add?

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

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

JUDGING THE PRESENT SYSTEM

2.19 With these general comments in mind, we consider a number of matters that are currently known to exist in the context of housing problems and disputes,[3] which any proposals for reform must address.

[3] In reality, many of the issues we identify apply equally to other problem areas as well. But for the purpose of this Paper, we need to think about these in a housing context

Participation and access

2.20 We know from published research that many people with justiciable housing problems[4] which might be transformed into disputes in fact do nothing about them.[5] This is a particular problem for young people in the 18-24 age group who are far more likely to have housing problems, but far less likely to access any forms of advice and assistance that might help them.[6] Access to advice and assistance may also be a particular problem for members of ethnic minorities whose ability to speak English is limited.[7] Many people do not know about their rights nor the ways in which they might seek to assert them. In this sense there remain considerable problems of access. While our project cannot directly address the problems of lack of awareness of rights, we think that a reformed system of redress should be able to offer ideas about how to reach out to the unaware or ill informed. Otherwise the redress system will not be able to offer an adequate response to this group. It is hard for many to access reliable and comprehensible information about their housing rights and obligations.[8]

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

2.21 Problems of access may arise from the physical location of places where problem-solving or dispute-resolution services are offered. Even if people are aware that advice might assist them to do something about their housing problems, there are areas of the country where advice is very hard to access. The Legal Services Commission has acknowledged that there is a problem and that there is a need to improve the situation.[9] Again, while our project can do nothing directly about this issue, we think that the intelligence gathering function we envisage for our proposed system will feed into discussion about how to fill those gaps. This may not mean the opening of offices in specific locations; much may be achieved through the use of telephone helplines, such as CLS Direct.

[4] H Genn in *Paths to Justice* (1999) at p 12 stated that "… a justiciable event was defined as a matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being "legal" and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system." A justiciable dispute is one over which a court or tribunal has jurisdiction.

[5] See H Genn, *Paths to Justice* (1999) and the Legal Services Research Centre Report: P Pleasence, A Buck, NJ Balmer, A O'Grady and H Genn, *Causes of Action: Civil Law and Social Justice* (2004), http://www.lsrc.org.uk/publications/Causes%20of%20Action.pdf (last visited 10 January 2006).

[6] See, for example, J Kenrick, *Rights to Access: Meeting Young people's needs for advice*, Youth Access (2002).

[7] See, for example, H Genn, B Lever, L Gray with N Balmer, and National Centre for Social Research, *Tribunals for diverse users*, DCA Research Series 1/06 (January 2006), p 110 http://www.dca.gov.uk/research/2006/01_2006p1.pdf (last visited 26 January 2006).

[8] Our Renting Homes project seeks to address this issue, at least in part.

[9] See eg The Legal Services Commission, *Improving access to advice in the Community Legal Service* (July 2004), http://www.legalservices.gov.uk/docs/cls_main/improving_access_report.pdf (last visited 27 January 2006).

2.22 Notwithstanding the points made in the previous paragraph, large numbers of people do seek advice on housing matters.[10] This may suggest that, at least for those who know how to obtain advice, access is not a problem. But it is also known that many advice agencies are swamped with work; many have to ration demand, including having limited opening hours or leaving the phone off the hook. The fact that many successfully access services does not mean that there is adequate access to those services.

2.23 Once people have sought advice, relatively few of these translate into any sort of formal court or tribunal proceedings. In fact, this will often be an appropriate response, since either a court or tribunal would not have power to deal with the issue, or would not be able to deal with the matter proportionately. In some cases, those who seek advice get access to other avenues of redress and resolve their problems in that way. However reliable data on the extent to which this happens are not available.

2.24 A further point needs to be stressed. Many of the organisations who currently offer advice and assistance focus on the needs of tenants. It is important to recognise that often landlords, particularly private landlords, may equally be in need of help. Any reformed scheme must take this into account as well.

2.25 In short, there remain significant problems of access to current methods for the resolution of housing problems and disputes. The present system has a tendency to deal better with the more knowledgeable, the less vulnerable, and the less exhausted who can take advantage of the services on offer. It is less successful in providing assistance to those in greater need of it.

Effectiveness

Failure to deal with the underlying problem

2.26 The way in which housing problems are shaped into legal disputes often hides the true nature of the problem. For example, possession proceedings for rent arrears appear to be about the failure of the tenant to pay the rent. As noted above, in practice, many possession proceedings are actually about the inadequate administration of housing benefit. Such proceedings may disguise a more fundamental problem, for example that the tenant is withholding rent because the landlord has not undertaken repairs he is required to do. More generally, rent arrears may arise out of other problems, such as general indebtedness caused by, say, loss of employment.

2.27 There are cases where the tenant is forced to prioritise other debts above their rent or is simply unable to pay their rent due to their other outgoings. In such cases, the claimant landlord has to make a choice about whether to proceed with possession proceedings or seek alternative measures, such as money advice service provision. There may be others who simply will not pay their rent and landlords will again have to decide what to do in such cases (which may also include issues of abandonment).

[10] For examples of the data available see Appendix C, table 4.

2.28 However, the fact that a problem has to be transformed into a dispute – in these examples, a dispute for a court to deal with – means that there are occasions when the underlying problem may well remain unresolved.

Are there particular types of housing problem where the current system tackles the problem presented to the adviser or court but fails to deal with the underlying problem?

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

Lack of comprehensiveness

2.29 Current modes of dispute resolution tend to be much better at dealing with individual cases rather than collective issues. For example, a problem about housing repairs may be sensibly handled by an estate-wide improvement and refurbishment programme. Yet, justiciable problems that are transformed into disputes to be determined by a court usually have to be presented on an individual basis. Courts are not well suited to resolve collective issues.

2.30 Similarly if allegations of unlawful discrimination in, say, the allocation of housing are brought to a court, only the individual case can be dealt with, even though underlying the individual case, there may be institutional racism or other forms of discrimination in the body alleged to have acted in a discriminatory way.

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

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

connected issues affecting the same person

which a reformed system should properly address?

If so, what are these issues?

How might they be best addressed in the reformed system?

Rigidity

2.31 There are institutional constraints that may prevent the most effective use of the different procedures to resolve particular problems. For example, if the parties to a dispute want a third party to decide the outcome of the dispute, there are difficult problems of interface between the work of courts and the work of ombudsmen. Thus, it is generally not possible for a case – once referred to a court – to be referred to an ombudsman, even though this could lead to a more appropriate dispute resolution process.

2.32 Similarly, the different statutory provisions relating to the establishment of ombudsmen, in particular the Local Government Ombudsmen and the Independent Housing Ombudsman,[11] can result in procedural inflexibility that militates against proportionate problem solving and dispute resolution.

2.33 Rigidity leads to different agencies having to deal with essentially the same issues (arising out of the administration of social housing). This can also lead to inefficiency ie a disproportionate use of resources.

Are there particular rules of law or procedure that inhibit proportionate dispute resolution?

2.34 Development of the substantive law relating to the handling of anti-social behaviour requires significant interaction between civil law and criminal law processes. This may raise broader questions as to whether the very way in which the courts are organised may contribute, in such cases, to disproportionality.[12]

Delay

2.35 In our consultation on Renting Homes, we heard many complaints about the (relative) slowness of using courts, as compared with other dispute resolution systems. There are targets which courts have to meet, especially in relation to possession proceedings.[13] Nevertheless, there may still be an issue as to whether procedures could be made even speedier. It is also said that some ombudsmen's procedures are too long and drawn out.

Is delay a problem? If so, in what contexts?

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

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

[11] The Local Government Ombudsmen were established, and their powers are governed, by the Local Government Act 1974 Part 3, ss 23 to 34. The Independent Housing Ombudsman scheme was set up under the Housing Act 1996 s 51 and Sch 2, para 7. See the Independent Housing Ombudsman Service website, http://www.ihos.org.uk/downloads/common/HOS_Scheme.pdf (last visited 11 January 2006).

[12] See S Bright, "Anti-social behaviour: Local Authority responsibility and the voice of the victim" (2003) 62 *Cambridge Law Journal* 305.

[13] See Civil Procedure Rules, r 55.5 and Civil Procedure Rules, Practice Direction 55, paras 3.1 to 3.3.

Cost

2.36 Fear of incurring costs is a significant factor which deters many who have sought initial advice from taking things further. Increasingly strict legal aid means tests mean that fewer people are entitled to free or subsidised assistance with legal costs. Some litigation previously funded through legal aid, such as housing disrepair claims, is now funded through conditional fee agreements. Money spent on bringing or defending legal claims can reduce the resources available for tackling underlying housing problems eg widespread housing disrepair.

2.37 Access to the courts requires payment of a fee (though remission of fees is available to the very poor). Access to the Residential Property Tribunal Service requires payment of fees for some cases not for others. Access to ombudsmen is usually free. Some mediation services require payment of a fee; others do not. A reformed housing dispute resolution scheme needs to explore the extent to which a more coherent charging policy is possible.

Are there places where the current system imposes disproportionate costs?

If so, on whom do these costs fall?

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

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

Lack of coherence

2.38 There is currently a lack of a structured and disciplined process for marrying those with problems and disputes to the most appropriate methods of resolving them. This can lead to inefficient or disproportionate use of resources, inappropriate use of the system, and problems remaining unsolved.

2.39 A wide variety of bodies engage in a variety of types of housing problem solving or housing dispute resolution. A non-exhaustive list of bodies who try to help solve housing problems includes:

(1) citizens advice bureaux;

(2) Housing Aid Centres;

(3) independent advice agencies;

(4) law centres;

(5) welfare rights centres;

(6) Shelter's Housing Advice Centres;

(7) local branches of specialist groups such as Help the Aged, or Age Concern;

(8) other agencies within the scope of the Advice Services Alliance[14] or Advice UK.[15]

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

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

2.40 Organisations that are available to resolve disputes include:

(1) the courts,

(2) the Residential Property Tribunal Service,

(3) various ombudsmen both statutory and private sector (for example, the Estate Agents Ombudsman, the Local Government Ombudsmen and the Housing Ombudsman Service),

(4) tenancy relations officers,

(5) community mediation schemes,[16]

(6) local arbitration services,[17]

(7) local authority and registered social landlord (RSL) complaints resolution procedures.

2.41 They also include private dispute resolution schemes like those operated by the Association of Residential Letting Agents (ARLA), or the Royal Institute of Chartered Surveyors and the disciplinary procedure run by the Residential Landlords Association.[18] Occasionally, as with the tenancy deposits dispute resolution system,[19] such forms of self-regulation have been made the subject of legislation.

[14] See the Advice Services Alliance website, http://www.asauk.org.uk/ (last visited 27 January 2006).

[15] See http://www.adviceuk.org.uk/ (last visited 31 Jan 2006).

[16] Those falling within the scope of Mediation UK: see http://www.mediationuk.org.uk/ (last accessed 31 January 2006).

[17] Eg the arbitration scheme for disrepair set up by Hackney Council and run by the Chartered Institute of Arbitrators' dispute resolution service. An outline of the scheme is available at ADR Now's website: http://www.adrnow.org.uk/go/SubPage_84.html (last visited 6 January 2006).

[18] See http://www.rla.org.uk/rla.exe?input=../rla/scrp/codePractice.htm (last visited 6 January 2006).

[19] Housing Act 2004 ss 212 to 215.

2.42 These bodies tend to operate in isolation from each other. Apart from a generic involvement in solving problems or resolving disputes relating to people's homes, there is little which links these bodies or welds their methods and structures into a coherent system. They have different ways of working. They have widely differing rules on the charges made to use them and the cost consequences of using them. They are funded in different ways. Not all are available in every area of the country. As a consequence in many cases there are quite different avenues available for dealing with very similar types of problem or dispute.

2.43 For example,

(1) A problem about lack of repair may be transformed by a law centre into a legal claim for a court to determine. Or it may be transformed by a housing aid centre into an issue about poor housing administration that may be taken to an ombudsman. Alternatively, there may be internal processes of complaint through which the occupier can raise the issue and obtain a remedy or simply get their landlord to do the repair. Mediation may enable each of the parties to express their feelings, frustrations, and constraints (for example, cost, access) and voluntarily come to an agreement about how they can take the issue forward.

(2) An issue about aggressive landlord behaviour may be transformed into a legal action for unlawful eviction or harassment brought before a court. In those areas where the service exists, it may be seen as a tenancy relations issue, which is appropriate for the tenancy relations officer to seek to resolve through negotiation or mediation.

(3) Problems with noisy neighbours might be transformed into a legal action in nuisance to be taken to court; or into an environmental health issue to be dealt with administratively by environmental health officers; or into an issue for a neighbourhood or community mediation scheme to mediate.

(4) Unhappiness about the allocation of a property by the local authority to a person on the housing register, may lead to use of the landlord's complaints scheme, or, where offered, an internal review process.[20] The person affected might complain to the relevant ombudsman or seek a judicial review, either of which could result in consideration of different elements of the same process. Alternatively, the household might opt to accept the property, possibly in the hope of obtaining a subsequent transfer, or simply by deciding to "lump it".

2.44 The fact that there is this enormous variety of ways in which problems may be solved or disputes resolved is not in itself a bad thing. But it is important that when choices are made about which of the available methods is used, they should be made on the basis of as good and as full information as possible.

[20] If the offer of a property had been the result of an application under the homelessness legislation, the local authority is *required* to offer an internal review.

2.45 Research on disputing[21] suggests that in some cases, where people have availed themselves of legal or other advice (assuming such advice is available) such decisions may be relatively well informed. Even here, however, the advice proffered will, crucially, be shaped by the training and experience of the adviser. Solicitors may give quite different advice from the adviser in a citizens advice bureau or a law centre.

2.46 In addition, far too often decisions by people experiencing housing problems as to whether seek a solution, and if so which method to use, are based on the consideration of less relevant factors. These include: the existing power relations between the participants;[22] the length of time a process takes; personal factors such as culture, education, status, gender and ethnicity; the participants' experience of and confidence in articulating problems; the relationship between the dispute resolution mechanism and the participants;[23] who the person with the problem talks to about it;[24] the emotions of the participants;[25] the willingness and openness of the person, who created the problem, to respond to suggestions for doing something about it;[26] the financial resources available to the person with the problem for dealing with it; and the outcomes sought by the person with the problem.

Do these theoretical examples reflect the practical experience of consultees?

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

How might this be achieved?

[21] Discussed in Part 2 of the Further Analysis paper.

[22] For example, it is unlikely that a short-term occupier of a property would issue proceedings for disrepair as this would be likely to provoke termination of the occupation. Instead, they would be more likely to look for somewhere more decent to live.

[23] For instance, the association of courts with criminal sanctions or assumptions of bias in the popular imagination may affect their participation in judicial and quasi-judicial proceedings

[24] So, for example, who a problem is discussed with (neighbour, relative, advice worker, or judge) will affect the dispute resolution method, if any, which is chosen.

[25] Housing disputes are often highly emotionally charged as they revolve around the home and its loss.

[26] For example, a letting agent who has an open and helpful response to tenants' problems is more likely to be trusted by their clients. So too a local authority landlord.

Lack of impact

2.47 Current methods of dealing with housing problems and disputes do not place great emphasis on providing feedback designed to prevent problems arising in the future. Research suggests that court decisions have an uncertain impact.[27] There are some notable exceptions to this.

(1) Ombudsmen regularly offer systemic advice where they think a case brought to them reveals system failure as well as poor handling of the individual.[28]

(2) Citizens Advice uses evidence from its bureaux to campaign for change. So, too, does Shelter. A notable recent success in the housing context was their successful joint campaign to persuade government to regulate tenancy deposits.[29]

(3) Local citizens advice bureaux also engage in what they call "social policy work" which involves drawing to the attention of local organisations general issues that come to their attention from the problems clients bring in. An obvious example is their constant work in a number of areas to try to improve standards of housing benefit administration.

2.48 In general, however, feedback is not seen as a central function of those engaged in housing problem solving or dispute resolution. Even where it might be argued that the process is designed to offer some feedback – for example through the use of judicial review in the courts – the evidence is that the impact of court rulings is very uneven.

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

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

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

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

[27] S Halliday, *Judicial Review and Compliance with Administrative Law* (2004); S Halliday and M Hertogh, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (2004); S Halliday, "The Influence of Judicial Review on Bureaucratic Decision-making" [2000] *Public Law* 110; M Sunkin and K Pick, "The Changing Impact of Judicial Review" [2001] *Public Law* 736

[28] See, for example, The Commission for Local Administration in England, Advice and Guidance from the Local Government Ombudsmen, *Special Report: Advice and guidance on arrangements for forwarding housing benefit appeals to the Appeals Service* (February 2004), http://www.lgo.org.uk/pdf/sp-2-web.pdf (last visited 11 January 2006) and The Commission for Local Administration in England, Advice and Guidance from the Local Government Ombudsmen *Special Report: neighbour nuisance and anti-social behaviour* (February 2005), http://www.lgo.org.uk/pdf/neighbour-nuisance-asb.pdf (last visited 11 January 2006).

[29] Housing Act 2004 ss 212 to 215.

THE EFFECT OF HISTORY

2.49 Much of the reason for this wide variety of processes and their lack of coherence is the result of history. Historical analysis of the development of housing dispute procedures shows, first, that there has been constant innovation in housing dispute resolution. This is significant as it shows a system that is not afraid of new ideas. But close analysis of that history demonstrates that the attention given to the resolution of specific housing problems at particular points in time has been at the expense of the development of a broader, more coherent system. An understanding of the history provides at least a partial explanation for the currently fractured nature of the system for solving housing problems and resolving housing disputes.

2.50 Consider the following examples. The development of Rent Assessment Committees and the creation of the Commission for Local Administration (Local Government Ombudsmen) were both important innovations in their own right. However, their creation was rooted in concerns prevalent at the time of their introduction. They reflected views that, respectively, more work should be undertaken by tribunals rather than courts; and by ombudsmen, rather than other forms of dispute resolution.

2.51 In 1980 the priority was to give statutory security of tenure to council tenants who had not benefited from such rights until that point. This was accompanied by due process rights enabling decisions to be contested in court. In the late 1990s, many felt that the due process rights of tenants who were anti-social were disproportionate.[30] A readjustment of those rights resulted.

2.52 More recently, the expansion of the jurisdiction of the Residential Property Tribunal Service (RPTS) – particularly under the Housing Act 2004 – has given it a range of jurisdictions which a few years earlier would unquestionably have gone to the courts. Yet this has been done with very little obvious public discussion of the interface between the work of that tribunal and the work of the courts. We are not saying that the decisions to increase the RPTS jurisdiction were wrong; far from it. But they were not the outcome of any fundamental review of housing dispute resolution procedures.[31]

2.53 There have also been innovations in dispute resolution adopted in other areas which have not been considered for application in the housing dispute-resolution context. A specific example is the statutory adjudication scheme created by the Housing Grants, Construction and Regeneration Act 1996. They may not be appropriate for resolving housing disputes; but this should not prevent the question being posed whether there are innovations in other areas of the legal landscape that might be adopted or adapted to use in the housing context.

[30] Such sentiments are reflected in government plans. See Home Office Respect Task Force, *Respect Action Plan* (January 2006), http://www.respect.gov.uk/assets/docs/respect_action_plan.pdf (last visited 27 January 2006).

[31] A somewhat similar observation might also be made in relation to the dispute resolution procedures incorporated into the scheme for commonhold introduced by the Commonhold Regulations 2004 (SI 2004 No 1289), Sch 3. Sch 3 is a document called the "Commonhold Community Statement". At para 4.11 entitled "Dispute Resolution", the dispute resolution procedures are described, in paras 4.11.1 to 4.11.30. The Commonhold Regulations 2004 were made under the Commonhold and Leasehold Reform Act 2002 s 32(1).

2.54 More recently, the establishment of the Liverpool Community Justice Centre[32] offers a novel approach to dealing with local community crime problems. This brings under one roof a range of statutory services (eg the youth service, social services) which in turn provides the judge with a much wider range of disposal options. This is a model which, if successful in the criminal context, might be considered for application in the housing context as well.

2.55 Another example of innovation arises from the increasing reliance on the use of internal dispute resolution mechanisms. These have occurred partly as the result of new ways of managing the provision of services, particularly by government and quasi-government agencies (which include local housing authorities and RSLs). There has been an increasing trend for public service deliverers to mirror innovations in the private sector, of which dispute resolution is an important component.

2.56 Private sector industry associations generally now subscribe to a variety of methods of dispute resolution – ombudsmen, arbitration, mediation – as forms of industry self-regulation. Thus it is not surprising to find a number of new mechanisms available in the housing context.

2.57 In the public sector analogous developments have occurred. In the case of ombudsmen, it is common for an ombudsman to refuse to take on a case unless an informal complaints mechanism has first been used.

2.58 Further adjustments to the system of dispute resolution have resulted from the implementation of the Human Rights Act 1998. One example is the changes made to the procedures available to enable people to challenge by way of judicial review in the county court local authority decisions on homelessness applications.

2.59 This ability to innovate is one of the strengths of the current system. Indeed, central to our ideas for a proportionate system of housing dispute resolution is the need for the system to learn from the implications of the work it does in order to bring about further sensible changes that where possible prevent problems arising, or permit easier resolution. But at present change happens haphazardly; it is not done in a strategic and structured way.

2.60 Indeed, innovation can generate enthusiasms which divert attention from the development of a more coherent system. Although adopted with the best of motivations, the innovations mentioned above have led to an increasingly complex range of means of resolving housing disputes. Complexity is compounded when the jurisdictions of particular parts of the system are altered. This can lead to further incoherence. For example, alterations to the jurisdiction to deal with homelessness (the removal of judicial review from the Administrative Court to the county court) took place without reference to how other disputes in public sector housing law, such as housing allocations,[33] might best be resolved.

[32] See the Criminal Justice System in England and Wales website: http://www.cjsonline.gov.uk/the_cjs/whats_new/news-3233.html (last visited 9 January 2006).

[33] See the Housing Act 1996 ss 204 to 204A.

2.61 While each innovation is perfectly logical and justifiable in its own right, this has been at the expense of developing a coherent overview of the broader terrain of housing disputes. This project seeks to fill that gap.

2.62 One question that has been raised on numerous occasions, which have not led to innovation, has been whether there should be a specific housing court or tribunal. At particular times, eg during the 1970s and 1980s, debate on this issue became heated. It remains under discussion, but with a lower profile. The point to stress is that any consideration of this question is but one part of the focus of our analysis. Those who promote this debate should not assume that the creation of such a forum would provide the solution to the broader question of what should be the design of a system of proportionate housing dispute resolution.[34]

CONCLUSIONS

2.63 For any particular individual or organisation the answer to the question whether the system for solving problems or resolving disputes is disproportionate or proportionate depends on that person's or organisation's own perspective on the issue and the process chosen. Different methods of dispute resolution strike the balance between the conflicting core values in different ways. In some cases, the emphasis placed on particular values may lead to disproportionate cost or delay. For example,

(1) The local authority which spends more money on legal costs defending disrepair cases than it spends on remedying disrepair is likely to view the current system as disproportionate. Similarly, though for different reasons, the individual living in a property in a state of chronic disrepair may not want to wait the time required for proceedings to come to court. He may be happier with a more administrative response that actually gets the repairs done or offers a transfer to a different home.

(2) For private landlords waiting for a possession order to which they are automatically entitled, the system may seem disproportionately bureaucratic. The only reason they may have to engage with this process is so that the local authority will regard the tenant as unintentionally (rather than intentionally) homeless.

(3) For a policy maker seeking to improve the stock of all rented properties the system may seem disproportionately concerned with the resolution of individual disputes and much less well adapted to dealing with collective rights for the benefit of the community as a whole.

2.64 But while different people may have different views on whether use of a particular process is or is not proportionate, we think there is evidence to suggest that the present systems for solving housing problems and resolving housing disputes are not always proportionate. We think reforms are needed which will:

(1) increase people's access to information and processes;

[34] The issue has also recently been raised in Scotland: see D O'Carroll and S Scott, *A Housing Tribunal For Scotland: Improving Rented Housing Dispute Resolution*, Chartered Institute of Housing Scotland (June 2004), http://www.cih.org/scotland/policy/resproject014.pdf (last visited 10 January 2006

(2) enable the system to operate more flexibly;

(3) allow people to make fully informed choices about what process or procedure is best for them;

(4) as far as possible, seek to resolve both the presenting and any underlying problems;

(5) provide as wide a range of outcomes to people with problems as possible;

(6) provide the feedback required to improve decision making to prevent similar problems arising in future;

(7) operate in a timely and efficient way; and

(8) operate at proportionate cost.

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

2.65 We need to ensure that any reformed system is more coherent, with a less confusing institutional structure. It needs to be able to learn from what it does so that, as social, political or other changes occur, it can develop flexibly, without replicating current levels of incoherence and complexity. It should avoid ad hoc adjustments that may solve one particular problem, but which have other unintended or unplanned consequences for other parts of the system. The values which underpin problem solving and dispute resolution should be stated much more clearly, not least so that the tensions between them are made clear.

2.66 With these considerations in mind, we turn to consider what a reformed system for solving housing problems and resolving housing disputes might look like. Part 3 sets out an overview of the scheme as a whole; Parts 4 - 8 consider in more detail the component parts of the scheme we envisage.

PART 3
RESHAPING HOUSING PROBLEM SOLVING AND DISPUTE RESOLUTION – AN OVERVIEW

INTRODUCTION

3.1 In this Part we offer an overview of a possible new scheme for dealing with housing problems and disputes. One point must be stressed at once. Whatever faults may be identified with the present system of housing dispute resolution, there are plenty of good features that must be retained and incorporated into any modified system. Any programme of reform must be evolutionary not revolutionary.

3.2 The scheme, which we outline here and discuss in more detail in Parts 4 – 8, is designed to address the problems we argue exist in the current system. We listed these in Part 2 as:

(1) participation and access;

(2) ineffectiveness, which includes

(a) failure to deal with the underlying problem;

(b) lack of comprehensiveness; and

(c) rigidity;

(3) delay;

(4) cost;

(5) lack of coherence;

(6) lack of impact, particularly lack of feedback.

A reformed system must address these problems.

OUR APPROACH

3.3 In preparing this paper, we have taken our cue from the Government White Paper Transforming Public Services: Complaints, Redress and Tribunals. We were asked to look at housing problem solving and dispute resolution in a "holistic" way. Our approach has been informed by a rich literature on disputing that analyses the relationship between problems and disputes. From this at least three different models of dispute resolution can be identified.

3.4 First is a "*pathways*" model. This suggests that the person with a problem sets out on a pathway that involves transforming the problem into a dispute, and then proceeds on steps that lead to the resolution of that dispute. The process involves "naming" the problem as a wrong for which it is appropriate to seek redress, "blaming" another person for creating the wrong, and "claiming" redress as compensation for the wrong done to him or her.

3.5 This model works particularly well to explain traditional legal ways of resolving disputes in judicial proceedings in courts or court-like institutions (such as tribunals). It is particularly suited to what lawyers would recognise as private law disputes, or the assertion of individual rights, which may be dealt with by the courts. It may have less explanatory value in the context of the assertion of collective rights for example by tenants' organisations against their landlords. And it does not particularly apply to non-justiciable problems that cannot easily be transformed into a definable *legal* issue. It thus has significant limitations as an explanatory model of dispute resolution that embrace matters falling outside the sphere of private law and individual legal rights.

3.6 Second is a "*pyramid*" model. Again, this sees a problem being transformed into a dispute, which then goes through a hierarchy of processes. The dispute resolving process starts at the bottom (say with negotiations with the person alleged to have caused the problem) and rises upwards through a hierarchy of procedures culminating in civil litigation at the top. It is possible for the dispute to be resolved at different points in the hierarchy. But such a model often implies not only that the courts are at the top of the pyramid, but also that anyone who does not reach the top of the pyramid has somehow been short-changed. While there can be no doubt that in our constitutional system, the court is the final interpreter of the law, that should not necessarily imply that there are not other modes of resolving disputes that may be just as good as or even more appropriate than the courts. There is a tendency for hierarchical systems to encourage disproportionality by encouraging use of multiple dispute resolution processes and in particular the courts (where this may lead to excessive costs and delays).

3.7 Third is what may be described as the "*accountability*" model. This is less concerned with analysing the processes by which problems are transformed to disputes and reach final resolution. Rather, it starts from the perspective of the person with the problem. It focuses on the nature of his or her complaint, what he or she is seeking, and how he or she might go about obtaining a solution to that problem. At the heart of this model is the idea that the person causing the problem should, in some way, be rendered accountable for the problem and be required to take steps to rectify the matter. Whether this is achieved through going to court, or to a tribunal or ombudsman, or through some other process, formal or informal, is less important than the outcome of the process.

3.8 This third model seems a particularly attractive way of looking at a holistic approach to housing dispute resolution, given the task of developing a system that is proportionate. It fits well with the desire of the DCA to ensure that courts and other dispute resolution processes are more focussed on what the user wants. It allows greater weight to be placed on effectiveness and impact.

3.9 It has two particular advantages. Unlike the pathways model, it does not imply that there is an inexorable process leading to the ultimate point of a judicial or other formal determination. Unlike the pyramid model, it does not imply that there is one "top" process, with everything else being regarded as in some way inferior.

3.10 Even so, the models are not mutually exclusive, but work together in different ways at different times regarding different issues. Furthermore, as with all models, they are just that – models. They cannot provide a full explanation of the process of solving problems or resolving disputes. Nor do we claim that the accountability model is uniquely correct. Each of the other models makes a contribution to thinking about housing problems and disputes and their resolution. In particular, being clear about the processes of transformation of problems into disputes is a key element which underpins the scheme we set out for consultation.[1]

3.11 But in developing our thinking we have found the accountability model offered a way of thinking about how a system might be shaped that was genuinely able to reflect what users of the system might want and was proportionate.

3.12 The most important point to arise from the accountability model is that it makes clear that any proportionate system of housing dispute resolution must extend beyond courts and other formal court-like processes. It must include the diverse places in which housing problems can be aired and, hopefully, resolved.

3.13 For example, a common method of calling to account staff working within an organisation, whether in the private or public sectors, is through the use of performance indicators and/or financial incentives. These may well be relevant, particularly in the context of processes such as the use of internal review, or internal complaints procedures to solve problems and resolve disputes. A purely court-focused analysis ignores the multiplicity of techniques for calling people to account. We think it relevant to consider both the places in which and the techniques by which those responsible for resolving housing problems can be called to account. This is essential for a "holistic" approach to housing dispute resolution.

VALUES

3.14 In Part 2, we also argued that it was important to recognise the values that should underpin any reformed system, in particular the processes of dispute resolution. Values provide criteria against which not only existing dispute resolution mechanisms may be measured but also how they might be reformed.[2] Articulating relevant values provides the basis for making choices about different procedures. "Proportionate dispute resolution" directly raises questions about the choices to be made[3] and the bases on which they should be made.

[1] See part 2 of the Further Analysis paper, http://www.lawcom.gov.uk/docs/further_analysis.pdf for theory on how problems are transformed into disputes.

[2] As D Galligan notes in *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) p 37, "values generate standards…".

[3] Transforming Public Services: Complaints, Redress and Tribunals (July 2004) Cm 6243, http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf (last visited 5 January 2006), para 2.2:

3.15 Drawing on the research literature on disputing and administrative justice, we identified the core values as: accuracy; impartiality and independence; fairness; equality of arms; transparency; confidentiality; participation; effectiveness; impact; promptness; efficiency. External human rights constraints must also be considered.

3.16 Not all these values point consistently in the same direction; there is an obvious conflict between transparency and confidentiality, for example. Further, dogged pursuit of one value at the expense of another (eg accuracy versus promptness) can lead to disproportionate use of resources. Finally, not all these values are relevant in all circumstances.

3.17 However, the fact that they do not all work together, but are inconsistent and not always relevant does not mean they have no utility. Stating these values provides an essential basis against which choices can be made. One value may need to be traded off against another; but this should be done consciously, rather than without thought.

UNDERSTANDING HOUSING PROBLEMS AND DISPUTES

3.18 Although, as noted in Part 1, we abandoned any attempt to create a detailed "typology" of housing problems and disputes, we nonetheless think that there is an identifiable set of classes of issue which the system needs to be able to accommodate. They include:

(1) Party-party matters. There will always be the prospect of problems and disputes arising between the parties to the tenancy agreement or occupation contract.

(2) Citizen and state matters. Many housing matters involve challenges to decisions taken by agents of the state, eg housing benefits officers, environmental health officers or the police.

(3) Third party issues. In many cases, the real issue may arise from the behaviour of a third party. For example, a letting agent may wrongfully keep the deposit paid by the tenant, without the landlord's knowledge. The tenant's legal relationship is with the landlord, not the agent.

(4) Factually complex issues, where the housing component is only one element. For example, the defendant to mortgage possession proceedings may have wider debt problems. It is almost a matter of chance that the creditor resorting to possession proceedings is the mortgage lender, as opposed to some other creditor who might have a different route to redress.

> Our strategy turns on its head the Department's traditional emphasis first on courts, judges and court procedures, and second on legal aid to pay mainly for litigation lawyers. It starts instead with the real world problems people face. The aim is to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place; and, where they cannot, provides tailored solutions to resolve the dispute as quickly and cost effectively as possible. It can be summed up as "Proportionate Dispute Resolution" (emphasis in original).

(5) Legally complex matters, where the problems involve several areas of law. Thus the same underlying problem eg domestic violence or anti-social behaviour could give rise to several disputes in different forums.

(6) Emotionally charged matters. Housing disputes often raise issues about a person's home – the centre of their lives. For example, in legal terms, possession proceedings involve the more neutral "premises". Yet such proceedings are often regarded personally by the occupier as involving the loss of their *home*. As a consequence, they are often highly emotionally charged. It is important a reformed system can acknowledge the emotional dimension.

Do consultees agree that these are the types of issue which any reformed system needs to be able to accommodate?

Are there other classes of matter which also need to be considered?

AIMS OF THE CONSULTATION

3.19 Through consultation, we aim to:

(1) get a better understanding of where and how housing problems are currently solved and disputes are currently resolved, so that we can see how a more ordered and coherent framework might be developed;

(2) consider what may be learned from the way other countries deal with housing problems and disputes that might be applied here;

(3) identify ways in which current provision can be adapted to achieve greater proportionality;

(4) explore how any reformed system can improve the quality of initial decisions (whether taken by landlords, tenants, government officials or others) so that problems can be avoided from the outset.

3.20 As the process of reform will be evolutionary, rather than revolutionary it must be developed with considerable input and advice from all those directly affected by it, including landlords and tenants. A new system cannot simply be imposed "top-down"; it must be shaped from the bottom by those currently working on the front line who understand the present system's limitations and have ideas for taking it forward. They have the experience of what currently happens and will have ideas about how things might be different.

OVERVIEW

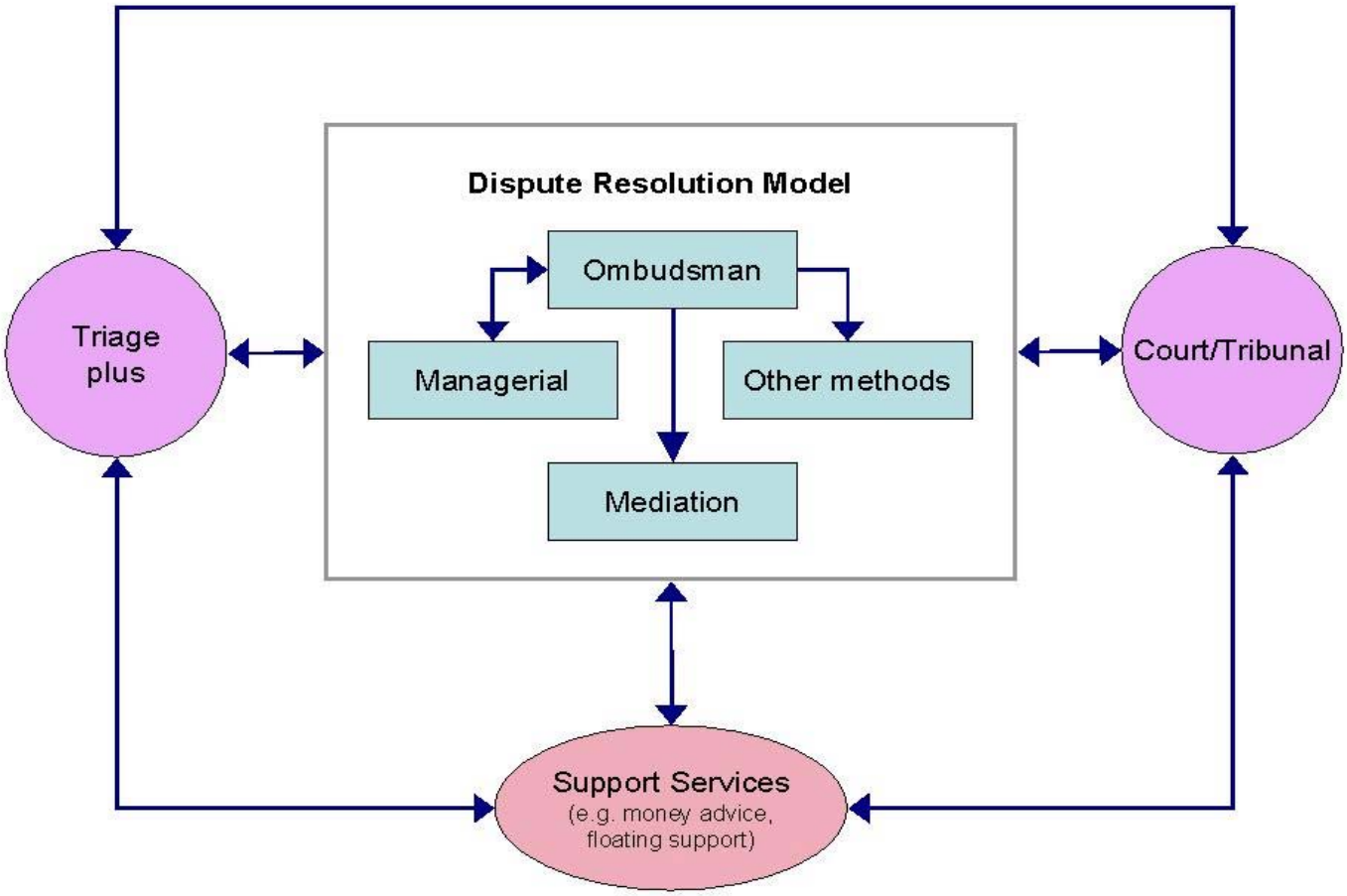
3.21 With these general observations in mind, we suggest that a proportionate system for solving housing problems and resolving housing disputes should comprise three principal elements:

(1) "triage plus";

(2) non-court/tribunal processes; and

(3) court/tribunal processes.

3.22 The relationship between the components of the scheme is set out in the following diagram. There is no predefined "start" point in the diagram: for example, parties may access triage plus at different stages. An arrow pointing from one component in the "Dispute Resolution Model" box to another indicates that one dispute resolution method may make use of others (eg that ombudsmen may use mediation as part of their work). Arrows between the triage plus, support services, court/tribunal and dispute resolution methods elements show that information flows between these elements, and that they learn from each other, as well as being able to refer individual cases to each other.



3.23 It is obvious that this builds on what currently exists. But there are fundamental differences between what happens in practice now, and how we think a reformed scheme might work in the future.

3.24 First, we envisage a system that is *flexible*. Cases do not have to progress on a rigid pathway from "triage plus", through non-court processes to a court process. Certain types of case must go straight to court/tribunal – eg an urgently sought injunction. Others will get no further than making a complaint or taking a case to mediation. The system is designed to deliver what the user wants in a proportionate manner.

3.25 Second, we want the system to be *dynamic*. It should harness currently available entrepreneurial capacity but in a way which is coherent, and takes relevant values into account. Innovations in dispute resolution and accountability mechanisms should be tested against an agreed set of values, and brought into the scheme, as and when they are developed. This will promote best practice in dispute resolution as well as improving initial decision-making.

3.26 Third, we want the system to be *intelligent*. Intelligence will be used both to feed back general problems to those responsible for creating them; and to understand how the system itself is working and how it should be improved.

Triage plus

3.27 Central to the structure we envisage is what we currently call "triage plus". We discuss this in more detail in Part 4. In our view, "triage plus" goes beyond the provision of advice and diagnosis of problems (what we call "signposting"), and has at least two other key roles: oversight and intelligence gathering. An essential function of triage plus is the gathering of the information that enables its other roles of signposting and oversight to be undertaken.

Signposting

3.28 The first role of triage plus is to provide a disciplined means of giving those seeking to solve their housing problems a fully informed choice of options. This focuses on the user of the system, enabling him or her to decide how to take matters forward.

3.29 The process of transformation of problems into disputes is currently highly dependent on the person or agency to which the problem is taken. Different agencies have different preferences and expertise. While it may in practice be impossible to eliminate all these differences, we think the system should aim to offer those seeking advice a more structured approach to possible ways forward. Without that, as we saw in the hypothetical case in Part 2, the person with the problem will never get the information to enable them to make a fully informed choice.

3.30 Once the range of options has been explained, the person may then choose to use a cost-free route that takes a long time, in preference to a more expensive route that deals with the issue more quickly. The person may choose a quick resolution of the problem, as opposed to one that delves into every possible legal nuance.

3.31 Further, where problems cannot be readily solved, and are transformed into disputes, for example by a triage provider, they should be able to be directed to the place where they may be best resolved, without facing inappropriate procedural barriers which prevent the issues being disposed of in the most proportionate way.

Oversight

3.32 Second, triage plus should identify and where necessary solve systemic problems as well as deal with individual cases. For example if there is evidence in a particular area that some housing related matter is not being dealt with properly, it should be part of the function of the system to feed back the issue to the body or person creating the problem.

3.33 We have already noted that ombudsmen make general recommendations about improving administrative practices. But a court which finds that a landlord regularly falls into procedural error in bringing possession proceedings would not currently seek to give general advice to that landlord about how his/her practice and procedures might be altered to avoid those pitfalls. Nevertheless, failure to do this can result in the waste of resources. Providing feedback is at the heart of a proportionate system; the "impact" value is given insufficient weight by many current dispute resolution methods.

Intelligence gathering

3.34 To perform its functions of signposting and oversight, triage plus must also gather the information necessary to enable it to perform these tasks. Intelligence gathering is central to the development of a system which learns from itself, and innovates and adapts to meet users' needs.

Non-court/tribunal processes

3.35 For the purposes of this paper, we have identified three principal types of process which we think can contribute to the reformed system:

(1) internal management responses available for problem solving and dispute resolution (such as use of complaints procedures);

(2) ombudsmen; and

(3) ADR, particularly mediation.

3.36 The consultation seeks evidence about how these mechanisms work at present, how they could develop, and what the barriers are to their most effective working practices. For example, one consultation issue is how the local authority housing functions of the Local Government Ombudsmen might interface more effectively with the RSL (and private landlord) functions of the Independent Housing Ombudsman Service. Another is the relationship between the ombudsman and the court/tribunal. There is a range of important questions about the contribution different forms of ADR can make to problem solving and dispute resolution.

Court/tribunal processes

3.37 Here we return to the issues which first led us to propose that we do a project on housing dispute resolution: what are the arguments for/against the creation of a specialist housing court or tribunal? But we want to take this further.

3.38 First, we seek views on whether the present division between civil and criminal courts is appropriate in the housing context. In particular, we want to know whether legal processes for dealing with matters relating to anti-social behaviour work in a proportionate way or whether they could be altered. What values would be affected should any proposals for change emerge?

3.39 Second, we ask whether court/tribunals should have additional ways of disposing of cases. For example, ordering possession against a person in deep financial trouble will not alter their fundamental problem – their inability to manage their finances. Should courts have a power to require persons to receive advice on money management? Ordering possession against a person engaging in severely disruptive anti-social behaviour does not solve the problem if no steps are taken to alter that behaviour. Should courts/tribunals have power to require persons to undergo forms of cognitive or other behaviour altering therapies?

3.40 Third, we want to receive ideas about whether and if so how courts/tribunals can provide collective as well as individual solutions to problems. (Indeed, this is a challenge for the system as a whole.)

PART 4
TRIAGE PLUS

INTRODUCTION

4.1 Central to our vision for a new scheme of proportionate housing dispute-resolution is what we call "triage plus". We have adopted this as a working label from the concept used in dealing with medical issues.[1] We have attached the "plus" label to indicate that we envisage triage plus doing much more than diagnosing problems and determining treatment priorities, which we understand is at the heart of the medical use of the term.

FUNCTIONS

4.2 We see triage plus undertaking three principal functions: signposting, oversight, and intelligence gathering.

Signposting

4.3 The overriding function of triage plus is to provide a disciplined, structured process to inform and/or direct individual and collective housing problems to appropriate resolution methods.

4.4 The current system of housing advice already contains elements of triage plus. Those with relevant knowledge and expertise give advice on how problems may be solved and disputes resolved. This is provided in eg citizens advice bureaux and other advice agencies, law centres, solicitors' offices and even in the courts through the judicial use of case management powers.[2] But, at present, each of these usually acts in isolation. The system lacks coherence. Further, the advice they give and the options they suggest depend greatly on the advisers' particular training and expertise. Not all advice givers are able to identify all the relevant options in the way we suggest should be the goal of a reformed housing problem and dispute resolution service.

Is our working assumption that few, if any, current advice providers are able to offer their clients the full range of options correct?

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

[1] Our concept of triage plus does not precisely match the medical model, and eventually it may be preferable to adopt an alternative label. But it does give the flavour of what we think is essential. It is a concept that we understand is being considered in other dispute-resolution contexts – eg personal injuries, where the potential medical links between the bringing of legal proceedings and undergoing rehabilitation may make the concept more relevant. The term "triage" was suggested by several participants at our original September 2004 seminar. See Law Commission, Public Law Team, *Resolving Housing Disputes: Report of a seminar held on 9 September 2004* (October 2004), http://www.lawcom.gov.uk/docs/report_from_090904.pdf.

[2] Indeed, in our original seminar, some district judge participants themselves described their role using the terminology of triage. See Law Commission, Public Law Team, *Resolving Housing Disputes: Report of a seminar held on 9 September 2004* (October 2004), http://www.lawcom.gov.uk/docs/report_from_090904.pdf.

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

What practical assistance could be developed which would enable advisers to provide the holistic advice proposed?

Do organisations use structured questionnaires or computer programmes which both help to identify the essential problems of matters in disputes and suggest appropriate and proportionate ways of dealing with them?

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

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

4.5 The triage plus provider[3] would operate in a variety of ways. At least three ways of functioning can be clearly identified under the signposting heading: response mode; proactive mode; and educational mode.

Response mode

4.6 The individual, group, or representative organisation with the housing problem would approach the triage plus provider. The provider would fully explore the issues with the client. Then, in consultation with the client, they would decide the most appropriate method or combination of methods to respond to the problem.

4.7 Triage plus might be provided from physical premises in a particular locality. It might also operate on a "virtual" basis through, for example, advice call centres (such as CLS Direct) or appropriate websites (of which there is an increasing number).

4.8 It would however need to know about the range of options available in the locality where the housing problem existed. For example, there would be little point advising a landlord to use a tenancy relations officer service, if such a service was not available in the particular locality.

Proactive mode

4.9 Triage plus should also act proactively. One of the great complaints about the present arrangements for solving housing problems is that people with problems do nothing about them until a very late stage when dramatic (and often expensive) interventions are needed. Triage plus must address these issues.

[3] At this stage, we are deliberately not identifying which body or bodies would provide the triage plus function.

4.10 This positive approach will be assisted if the model agreements recommended in Renting Homes are introduced. They will provide all landlords and occupiers with essential information[4] about the existence of triage plus and how to contact the triage plus provider. Analogous arrangements could be put in place by mortgage providers.

4.11 But triage plus will not be able to rely exclusively on the provision of this information to provide the service. There will need to be regular publicity campaigns to ensure that members of the public are aware of the availability of triage plus in their area. The triage plus provider should not just wait for people to come through the door, but must promote its services in the community.

4.12 In addition triage plus should reach out into those parts of the community that have not historically taken advantage of existing advice services. An obvious example in this context is the provision of help to those in the 18-24 age group. They are known to be reluctant to use existing forms of advice agency, even though their housing problems can be particularly acute.[5] If their problems are not resolved, they can lead to the much greater social and financial costs associated with homelessness and social exclusion.

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

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

Educational mode

4.13 To prevent problems arising in the first place, or getting out of control if they cannot be completely prevented, triage plus should engage in public education on housing rights. While triage plus could not be expected to deliver a complete programme of public legal education, it could nevertheless make important contributions to it. For example, the triage plus provider could attend meetings of landlords', or tenants' groups to offer information about its services. To do this, triage plus would probably need national support, for example through the provision of appropriate educational material and ideas for the delivery of relevant information.

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

Is it possible to measure the impact of this work?

Oversight

4.14 The second function of triage plus is oversight. Triage plus should oversee the dispute resolution methods being used locally and nationally.

[4] For example, a freephone number that would direct the caller to the relevant local agency.

[5] Eg J Kenrick, *Rights to Access: Meeting Young people's needs for advice*, Youth Access (2002).

4.15 Again, this is not entirely new. As mentioned in Part 2, in their campaigning and lobbying work, Citizens Advice uses information about particular issues by gathering data from its advice bureaux. In the housing context, a major factor leading to the introduction of new rules to deal with tenancy deposits was the evidence drawn from citizens advice bureaux; similarly, Citizens Advice has been able to draw attention to other problem areas, such as the administration of housing benefit. Other advice agencies, such as those run by Shelter, operate similarly.

4.16 But while there is experience of using accumulated local knowledge to make the case for change and reform at the national level, less is known about its influence at the local or regional level.

4.17 We envisage that the triage plus provider would meet from time to time with local stakeholders to provide information about the types of problems coming to them. If these revealed systemic problems, the triage plus provider would explore ways of changing practice to prevent such problems arising in future. This might involve the triage plus provider meeting with, for example, the local authority, local RSL management teams, representatives of local landlords and residential agents, tenants' groups, and court/tribunal user groups.

4.18 Oversight enables a number of things to happen which are not part of the present system. First, proportionate dispute resolution must provide feedback to the persons or bodies from whom problems arise. This important ambition is at the heart of the Government's plans. Triage plus is the mechanism for delivering feedback.

4.19 Second, it is important that the problem solving and dispute resolving system remains dynamic. Methods of resolving problems and disputes should not be closed but open to expansion and development, taking into account the values outlined in Part 2. Thus the triage plus provider should be able to pilot and evaluate new methods of dispute resolution. This could be done both at the local and national levels. Intelligence gathering provides the evidence base on which policy makers can develop and try out new ideas.

4.20 Thirdly, there may be circumstances when the triage plus provider should itself be able to take action. For example, if a local practice seems to be at variance with the triage plus provider's understanding of the law, it might be desirable for the triage plus provider to be able to take the issue to a court or tribunal for determination. Another example might be to enable the triage plus provider to refer a particular administrative failing in a local authority or RSL to an ombudsman. While this might be controversial, it could be important in ensuring that agencies operated in accordance both with the law and the appropriate values.[6] These functions would also enable triage plus to help clarify the legal framework underpinning housing.

[6] We envisage the possibility of a process similar to the Attorney General's reference procedure. In the context of the criminal law, the Attorney General can refer a point of law to the Court of Appeal when a defendant has been acquitted: Criminal Justice Act 1972 s 36. The reference must specify the point of law referred to, and where appropriate, such facts of the case as are necessary for the proper consideration of the point of law. The defendant can be represented at the hearing, though his formal part in the case is over.

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

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

Intelligence gathering

4.21 The third function of triage plus, implicit in the other two functions, is the creation, through intelligence, of a knowledge bank. The triage plus provider should keep data on the number and types of applications made to it and their outcomes. At present, comprehensive data do not exist. There is no way of knowing about, let alone evaluating, the whole range of advice and dispute resolution services available to solve housing problems and resolve housing disputes.

4.22 Collection of such information, on a comprehensive basis, would provide much better information about the use of the system (and the value placed on it by its actual and potential clients). This would give funding bodies confidence that their investment is soundly based.

4.23 Data collection may also reveal other matters. For example, it may raise concerns about the operation of the system in practice. Depending on the sophistication and type of monitoring system in operation, it may demonstrate that a local part of the dispute resolution system is out of line with national statistics.[7]

4.24 Again, this function would not be fundamentally new. We have already mentioned the data collection and reporting functions that citizens advice bureaux undertake. All the bodies funded by the Legal Services Commission are also required to provide detailed information about their activities on an annual basis to the Commission. What would be new would be the use to which some of this information was put. Good intelligence is at the heart of oversight, and in ensuring that the dispute resolution system remains dynamic and addresses the needs of its users.

TRIAGE PLUS: PROBLEM SOLVING AND DISPUTE RESOLUTION

4.25 So far, our description of triage plus has concentrated on its signposting and oversight functions. We anticipate that, in addition, the very process of triage plus will often enable the person with the housing problem to solve it. This might be achieved in a variety of ways.

Reconciliation to the inevitable

4.26 First, triage plus may make the person realise that although they have a problem with their housing, there is really nothing that can be done about it. It is false to assume that everything perceived as a problem can be solved. Some things just have to be lived with. Triage plus may help the person become reconciled to the inevitable.

[7] See J Mashaw, "The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims" (1974) 59 *Cornell Law Review* 772, p 791 and the following pages.

Self-help

4.27 Second, triage plus may give the person the confidence and information required to do something about the problem themselves. It is important that a proportionate dispute-resolution system recognises the value and relevance of enabling the person with a problem to sort it out him or herself. Many problems can be resolved if the person with the problem knows who to contact and how to contact them. Citizenship requires individuals to take responsibility for their own lives to the fullest extent possible. Triage plus supports that objective.

Referral for support and advice

4.28 A third outcome may be that the person with the problem is referred to appropriate support or other advisory services. For example, people with rent arrears may be referred to debt counsellors, who will be able not only to help the person get better control of their finances, but also to negotiate with those to whom money is owed breathing space to enable the person establish a firmer financial base.

4.29 What is important to remember in this context is that research shows that people suffer from "referral fatigue".[8] If they cannot be referred directly to assistance, they often drop out of the system. When this happens, the problem is not solved; indeed it will often become worse. Getting help where it is needed quickly is a key part of a proportionate dispute-resolution service.

4.30 The principal strength of triage plus is that it operates as the core of the housing problem-solving/dispute resolution scheme. If it works as intended, then at an early stage parties are able to consider their options in the light of the available information.

INSTITUTIONAL ISSUES

4.31 Consideration of triage plus cannot be divorced from consideration of practical issues that will be involved in transforming the concept into practice. The following issues need addressing:

(1) who should provide triage plus;

(2) where is triage plus to be provided;

(3) should use of triage plus be compulsory;

(4) how should triage plus be organised; and

(5) how can triage plus be funded?

[8] See H Genn, *Paths to Justice* (1999), Ch 3.

Who should provide triage plus?

4.32 In pre-consultation, it was suggested by some that triage plus would only work if it is established as a new and separate service, distinct from the current range of advice and other agencies. Others took the view that triage plus would not necessarily require new providers, but rather more systematised approaches to the giving of advice and the collection of data.

4.33 On this view, current housing advisors could, with appropriate training and resources, become triage plus providers. Thus, citizens advice bureaux, Shelter, housing advice centres, solicitors and other legal advisors would form the backbone of the scheme together with other advisors.

4.34 In thinking about this question, we must be extremely realistic about the resources that are likely to be available to fund triage plus. Our sense is that it will be easier to develop the scheme by re-moulding existing services rather than by creating completely new ones.

4.35 We would particularly welcome views about whether triage plus requires the creation of a wholly new service, or could be based on existing services.

Where is triage plus to be provided?

4.36 Another issue relates to the availability of housing advice. At present, there are considerable concerns about "housing advice deserts" – areas of the country where advice on specific housing questions is not available.[9]

4.37 Although not a complete solution, the development of 24 hour telephone advice lines (such as CLS Direct), internet advice, and other media, may ease some of these barriers to effective advice.

4.38 As a matter of practical reality it is unlikely that all parts of the country will be able to support a local triage plus provider. Where population numbers are small, alternative arrangements need to be made.

4.39 What is important is that the triage plus provider understands the area from which the housing problem is coming so that appropriate options for resolving the problem can be offered. Much housing dispute resolution happens locally, within a community (for example, community mediation) or local authority (for example, use of complaints procedures). The triage plus provider must know about these.

4.40 Although we have been working quite independently of each other, we note that the Legal Services Commission consultation paper echoes these concerns. It makes proposals for the development of local advice services that are very much in tune with our proposed model.[10]

[9] See, for example, N Ardill and S Willman, "Housing advice – Avoiding the crisis" (January 2003) *Legal Action* 9.

[10] Legal Services Commission, *Making rights a reality – The Legal Services Commission's Strategy for the Community Legal Service, Volume 1: A Consultation Paper* (July 2005), http://www.legalservices.gov.uk/docs/civil_consultations/cls_strategy_vol1_english.pdf (last visited 12 January 2006) p 38, para 7.10.

Should use of triage plus be compulsory?

4.41 Although many people take no action about their problems at all, many others like to sort things out directly. For example, a person might pursue a complaint about their treatment by a bureaucracy through that bureaucracy rather than see it as a dispute requiring resolution. Where this happens, the bureaucracy will usually be interested only in dealing with the problem or dispute in the ways that are under its control. It would not offer the full range of options envisaged by triage plus.

4.42 To make use of triage plus compulsory would be over bureaucratic and go against the value, identified above, of ensuring that the person with the problem can choose how to solve it (part of the "participation" value). On this view, it would be unrealistic to compel individuals or organizations to use triage plus if they do not want to.

4.43 This does not mean, however, that there can be complete freedom of choice as to whether or not to use triage plus services. There are aspects of the present system which contain elements of compulsion. For example, both the disrepair protocol, and the draft possession protocol set out actions which should be followed before a landlord can start proceedings in court, with the prospect of costs sanctions for failure to follow them.

Should similar principles apply to those who seek advice from triage plus?

4.44 A related issue is what should happen once triage plus has identified the proportionate procedure for the problem or dispute presented to it? Should the person be required to follow that advice, particularly where the advice is clear-cut? Or should the person be free to choose an alternative to that suggested? Or, as an intermediate step, should the parties be able to choose an alternative subject to the risk of penalty (such as concerning payment of costs) if they have chosen inappropriately (however that may be defined)? How can questions of compulsion be reconciled with due process obligations arising under the Human Rights Act 1998?

4.45 Certain forms of assistance are already made conditional on the use of particular types of dispute resolution process. For example, legal representation under the Community Legal Service may be delayed until mediation has been tried**. We welcome the views of consultees on these issues.** In particular we want to understand the relationship between the choice aspect of participation and the other values such as efficiency and promptness.

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

How is triage plus to be organised?

4.46 Although anxious to avoid the creation of new bureaucracies, we accept triage plus will not occur spontaneously. It needs to be organised. We think that the lead for this will have to be taken nationally. We anticipate that this leadership role would be taken by the Legal Services Commission. They will determine the details of the scheme, including requirements for the production of national statistics and other forms of intelligence gathering, the benchmarking of dispute resolution performance, and oversight of local performance against national averages.

4.47 In addition, if triage plus is to operate effectively at the local level, there will need to be significant input from local government. Many local authorities already invest heavily in the provision and co-ordination of advice and other dispute resolution and dispute prevention services. It is likely, in partnership with the Legal Services Commission, they would play an essential role in the development of triage plus.

4.48 Decisions on policy will need to be accompanied by decisions on who funds the development of triage plus. These funding streams should seek to encourage collaborative working between different parts of the system, reducing current barriers to collaboration.

How can triage plus be funded?

4.49 As noted above, in developing our conception of a proportionate housing dispute resolution scheme, we have proceeded on the assumption that there will be no significant increase in the level of public funds available for the provision of advice and representation. It has to be based on the more efficient use of resources that are currently available. This is why we see our scheme as evolutionary rather than revolutionary. It brings together services and takes advantage of processes that are already on offer to the public.

4.50 Of course, in accordance with current principles for public expenditure, it is possible to build a business case for investment, if future savings can be demonstrated. We expect that a reformed and more coherent dispute resolution system will lead to the identification of changes in current practice and procedure that will generate savings. These savings can then be recycled into alternative activities.

4.51 Nevertheless, the outline of the functions of triage plus suggests that there are likely to be costs associated with its establishment. We offer some further illustrations of the potential of our scheme to identify savings in Part 9. As we think our scheme could result in the identification of cost-savings elsewhere in the civil justice system, these constitute the starting point for the development of the requisite business case. In addition, it must be asked:

could other sources of funding be brought into consideration?

4.52 In other jurisdictions such as New Zealand and some Australian states, housing dispute resolution systems are financed at least in part by the interest earned on tenancy deposits.[11] Differences between the housing markets of those jurisdictions and England and Wales may limit the potential funds available from the interest on tenancy deposits here, and thus the potential for contributing to the cost of housing dispute resolution.[12]

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

4.53 It may also be worth exploring whether insurance could provide funds for proportionate resolution of housing disputes, including triage plus. Mortgage lenders generally insist on homeowners taking out buildings cover. Home insurance policies often offer legal expenses cover as an option, sometimes for a small additional charge.

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

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

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

Could homeowners be encouraged, or even required, to take out "dispute resolution expenses" cover?

Alternatively, could a supplement to, or tax on, the cost of the policies themselves be used to pay for elements of a housing dispute resolution service, such as triage plus providers or tribunals?

[11] In New South Wales, 50% of the operational costs of the Consumer, Trader and Tenancy Tribunal are met by interest on tenancy deposits, while some income is generated from bonds deposited by real estate agents as part of their licensing. The vast majority of the work of the Residential Tenancy Tribunal of South Australia comes from the tenancy deposit schemes. In New Zealand, NZ$8 to $9 million per year of the funding for the Tenancy Tribunal comes from interest on tenancy "bonds".

[12] For example, in New Zealand 40% of households rent, the proportion is increasing, and even social renting tenants pay deposits (which are limited to no more than 4 weeks rent). In Australia, while 24-26% of households rent privately, only around 10% do in the UK. The tenancy deposit provisions in ss 212-215 of the Housing Act 2004 apply only to assured shorthold tenancies.

4.54 One option, that would be new, would be to make local triage plus providers budget holders. They would act as the gatekeeper of resources for dispute resolution, rather as Primary Care Trusts do for the NHS. For example, triage plus could determine that in a particular locality better use of resources would be achieved through the promotion of a collective settlement of a problem (eg putting into effect a programme of repairs on a housing estate or block of flats) rather than dealing with a large number of individual matters arising from the same cause.

CONSULTATION ISSUES

4.55 We think triage plus should be at the centre of a reformed system of proportionate housing dispute resolution.

Do consultees agree?

If so, do they agree that the three main functions of triage plus should be signposting, oversight, and intelligence gathering?

Are there other functions that triage plus could or should perform? How can these functions best be carried out?

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

Do consultees agree that the triage plus provider should be able to refer cases to a court or ombudsman without itself being a party to a dispute? (See para 4.20)

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

4.56 We said at the outset that any reform will be evolutionary not revolutionary. It needs to build on what is already happening in particular localities. Mapping as far as we can current provision is a key part of this project, which can only be done with the help of those working in the front-line.

What do agencies offering housing advice services currently offer?

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

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

4.57 We also want to hear the views of consultees about the values which should underpin triage plus. In particular:

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

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

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

PART 5
MANAGEMENT RESPONSES

INTRODUCTION

5.1 For housing problems that cannot be solved by triage plus – either through self-help, or through the use of suitable advice services – other procedures are available. We need to understand their interactions and the contribution each can make to a proportionate housing dispute resolution system.

5.2 In Parts 5 to 7 we consider a number of methods of solving problems or resolving disputes that do not involve going to a court or tribunal:

(1) management responses;

(2) ombudsmen; and

(3) ADR, in particular mediation.

5.3 We have selected these for three principal reasons.

(1) They appear to be the mechanisms which are currently most readily available and in use in the housing context.

(2) They demonstrate a variety of mechanisms, criteria and working practices which all contribute to the proportionality of the system we are proposing.

(3) They have the potential for further development, both at the local and national level.

5.4 We make three preliminary points. First, they must not be seen in isolation. Each overlaps with the others. For example, the working practices of ombudsmen depend on good administrative processes; use of an internal complaints procedure is often an essential precursor to any action by an ombudsman. Mediation can be used as part of a management response or the work of ombudsmen. One of the questions for this project is whether they should overlap more and become more integrated, or whether there are limits to the extent to which limitations on their activities should be relaxed.

5.5 Second, it is important to emphasise that we see these all these methods as "appropriate" rather than "alternative" forms of problem solving and dispute resolution. They can all make an appropriate contribution to the proportionality of the system. Each provides a method by which problems and disputes can be addressed.

5.6 Management responses transform problems into "complaints" made by their service "consumers" or "customers" which are solved in a number of ways, generally both responding to the consumer and impacting on direct service provision.

5.7 Ombudsmen consider problems which have been transformed into complaints of maladministration, which also are resolved in a variety of ways. Where appropriate, resolution of the complaint is usually possible despite a lack of formal enforcement powers.

5.8 Mediation is a process through which, with the facilitation of a neutral third party, people with a problem come to a shared understanding of the issues that divide them and, where the mediation is successful, agree how the problem can be solved.

5.9 Third, although the methods considered in these Parts operate outside the formal surroundings of a court or tribunal, this does not mean that they operate wholly outside the law. Each operates "in the shadow of the law" – the range of legal rights and responsibilities that make up housing law. They may reach different outcomes from those that can be achieved in a court or tribunal. But such outcomes may still be proportionate and provide results with which those in dispute are content. They can also address problems that are outside the scope of formal legal rules and deliver remedies not available from a court.

MANAGEMENT RESPONSES

5.10 The rest of this Part considers the particular contribution management responses may make to problem solving and dispute resolution.

5.11 From the 1960s, social administration has been strongly influenced by "New Public Management". Management techniques designed in the private sector were adopted to try to ensure quality control over decision-making in the public sector. "[A]ny grievance against a public body ought to be remedied by that body itself without further prompting".[1]

5.12 Adoption of principles of new public management resulted in two important changes.

(1) Individual service providers became much more aware of their personal responsibility to deliver services. Performance indicators were increasingly used to measure outputs. Failure to meet prescribed service standards was used to put pressure on service providers to improve performance.

(2) Increasing attention was paid to the consumers of services. The consumer perspective involved "the active participation of consumers in decision making, consumer satisfaction, the introduction of consumer 'charters', and the use of 'voice', together with the possibility of obtaining compensation where the standards specified in the charter are not met…"[2]

[1] N Lewis and P Birkinshaw, *When Citizens Complain: Reforming Justice and Administration* (1993) p 67.

[2] M Adler, "A Socio-legal approach to administrative justice" (2003) 25 *Law and Policy* 324, p 333.

5.13 In the housing context, tenants were no longer "clients" receiving services which the public bureaucracy decided to deliver to them. They became "consumers" or "customers" of housing services. A new relationship between service provider and service recipient emerged. It is in this changed "provider-recipient" or perhaps better "manager-consumer" relationship that ideas for a new system of proportionate problem and dispute resolution must be set.[3]

5.14 The benefits of effective administrative procedures are that:

(1) they provide a quick, cheap and relatively simple set of processes for ensuring that the right decisions are made to start with (with the added aim of ensuring that the same mistake does not happen again); and,

(2) equally important, if the wrong decisions are made, they can quickly be put right.

Instead of focusing exclusively on putting wrong decisions right, there is an equally strong emphasis on getting decisions right in the first place.

Techniques

5.15 New public management incorporates the following tools to help get decisions right in the first place:

(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,

(7) use of "public interest groups".

5.16 This is not presented as a list of activities to which all public/social sector housing providers must subscribe. Rather it is a menu of options which can be developed and moulded to suit local circumstances. They have been grouped together here to reflect, first, methods of ensuring that decisions are right in the first place, and second, correcting wrong decisions.

5.17 It is important to stress that they are management tools. Service delivery organisations, however complex, should use them in a reflexive and learning way, both to resolve problems that have arisen in the past and to improve future service delivery.

[3] Above.

Performance indicators

5.18 Performance indicators enable the performance of organisations to be compared with other similar organisations. They may not be effective for highlighting problems with individual decisions. Indeed their use can lead to the manipulation of performance data. But this does not undermine their more general utility.

5.19 Thus, they can highlight systemic problems with certain services, such as repairs or homelessness decision-making. They can show whether or not decisions are made in a timely nature. They provide a method for judging whether individual housing problems are part of a more generic failure with the service offered. This may affect the choice of process for resolving the problem.

Performance review

5.20 Performance review, such as appraisal, generally occurs on a regular basis. It may also be activated by complaints against personnel. A combination of quantitative and qualitative techniques are used by managers to review the performance of their staff.

5.21 Quantitative review can identify issues about the performance of individual personnel, where their decision-making is out of line when set against comparable personnel. The reporting of statistics at local level can feed into a general statistical report to national agencies. The purpose of this type of review is to improve the accuracy and timeliness of first instance decision-making.

Internal audit of decision-making

5.22 Internal audit is closely related to performance review and operates on a qualitative and, sometimes, selective basis.

5.23 One method of internal audit is for managers to see all decisions made. In this way, they can check the accuracy of the decisions and can raise questions over the information gathering approach of the frontline personnel. It can also alert managers in advance to problematic cases.

5.24 A second method of internal audit is for the manager to select a number of cases either of a particular decision-maker or of a group of decision-makers. The manager reviews the decisions and procedures establishing their accuracy and fairness.

5.25 A third method of internal audit uses broader quality assurance techniques, which can be related to externally produced generic quality assurance mechanisms, such as BS5750.[4] This method focuses less on individual decision-making, more on the organisation's procedures and management control systems: "The design and operation of this system represents a model of organisational self-observation, and the external monitoring process involves the audit/inspection of this system of control and self-observation". [5]

[4] BS5750 is a British Standard, described on the BSI website as

External audit of decision-making

5.26 The Audit Commission, and its Housing Inspectorate arm, have responsibility for the external audit of social housing organisations in England. The Audit Commission operates through inspections of such organisations, or parts of them, against Key Lines of Enquiry, checking quality against a range of criteria concerned with value for money and related to economy, efficiency and effectiveness. It then rates the organisation (Excellent, Good, Fair, and Poor). It also produces reports on good practice.[6]

5.27 The Audit Commission's function is not designed for the purpose of intervention in individual cases, but of establishing financial accountability on behalf of taxpayers and citizens. However, its Key Lines of Enquiry demonstrate the types of enquiries that are made as part of the inspection process.[7]

5.28 In addition to the Audit Commission, there are other less prominent organisations which have a similar role. In the private sector, for example, there is a plethora of consultancy organisations. In all sectors, reliance is placed on external evaluation of services (for example, by university researchers).

5.29 Promulgation of best practice by the Office of the Deputy Prime Minister, Office of Fair Trading, Local Government Ombudsmen, Chartered Institute of Housing (through their electronic Housing Quality Network) and other organisations offers the opportunity for external norms to be included in the assessment of local practice.

Complaints-handling mechanisms

5.30 Organisations also provide mechanisms for dealing with individual complaints from their occupiers and others (such as applicants, contractors or landlords). Complaints processes tend to focus on decision-making processes rather than actual outcomes, although the line between the two is difficult to draw. Most social and public agencies now have clear procedures for dealing with complaints from their customers.

5.31 Not all organisations take the opportunity for learning which such procedures offer. A practice note from the Chartered Institute of Housing's Housing Quality Network emphasises the potential benefits of a positive approach to complaints:

> a standard for the quality of a company's management system. BS 5750 was introduced to help companies build quality and safety into the way they work so that they could always meet their customers' needs. The Registered Firm mark was introduced in 1979 to show that a company had been audited and registered to BS 5750.

[5] M Power, "Evaluating the audit explosion" (2003) 25 *Law and Policy* 185, p 189.

[6] See for example, Audit Commission, *Closing the Gap: Working together to reduce rent arrears* (27 November 2002), http://www.audit-commission.gov.uk/reports/AC-REPORT.asp?CatID=PRESS-CENTRE&fromPRESS=AC-REPORT&ProdID=24855CC0-016A-11d7-B216-0060085F8572 (last visited 12 January 2006).

[7] Audit Commission, *Key Lines of Enquiry: Prospects for Improvement* (June 2005), http://www.audit-commission.gov.uk/kloe/downloads/HousingKLOE1june05.pdf (last visited 12 January 2006).

> An appropriate, staged, procedure that provides tenants with a mechanism for redress, should be seen positively as another form of feedback. Complaints should be encouraged and welcomed as providing an opportunity to audit service performance and to influence policy and practice. It is also an essential element of customer service and a further opportunity to facilitate customer involvement and to enhance our tenants' life skills.

5.32 Those responsible for policy review should recognise the value of this form of feedback and be able to identify trends that indicate policy review is required, or that can influence scheduled policy review. Such monitoring, by service activity and/or by type of failure, can help identify the root causes of complaints, and thus policy and practice problems and gaps and training needs, as well as suggesting a focus on priorities for action and resource implications. There is a potentially strong relationship between complaints-handling processes, performance review, and audit practice.

Internal/external review or appeal

5.33 Organisations offer those who are the subject of individual decisions the opportunity to review or appeal those decisions. Such a review or appeal (again the line between these is difficult to draw[8]) can be either statutory or independently created as a matter of good practice. It can be run internally by the organisation itself or externally by a specially created service or, for example, by a neighbouring housing provider.

5.34 Even where other mechanisms of individual redress are available, such as an ombudsman, it may still be good practice for the organisation to have such a process. It facilitates decision-making, makes grievance redress swifter, and encourages customer loyalty through its use.

5.35 The rise of such grievance redress mechanisms has been one of the most remarkable aspects of everyday practice. For example, before being statutorily required to do so, many local authorities followed suggested good practice by setting up internal appeals mechanisms against homelessness decision-making.[9]

5.36 Such redress mechanisms can resolve grievances swiftly. If used properly, they provide opportunities for learning for decision-makers and managers. As householders may be more likely to use such processes than other forms of grievance redress, this can provide good feedback to the organisation.

5.37 To be successful, those who are the subject of a decision need to be told of their right to use the review system; they should be entitled to know the reasons for the decision in order to facilitate their participation in the process; they should be able to seek advice and representation, where necessary, about their grievance; and, where they are unsuccessful, they should be entitled to know why.

[8] See R Sainsbury, "Internal reviews and the weakening of social security claimants' rights of appeal" in G Richardson and H Genn, *Administrative Law and Government Action* (1999) p 290.

[9] D Cowan with J Fionda, "Homelessness internal appeals mechanisms: Serving the administrative process - Part One" (1998) 27 *Anglo-American Law Review* 66.

Use of "public interest groups"

5.38 Finally, certain social housing organisations have made serious efforts to promote tenant participation in housing management. In some cases, teams of tenants inspect the housing management practices and processes. Such innovations play an important role in ensuring the accountability of the housing service being provided to tenants, as well as offering further mechanisms for the empowerment of the tenant body.

5.39 Tenant inspection teams are part of a wider set of activities that may be included under the general heading of "public interest groups". Housing management can work with a range of public interest bodies in joint or inter-agency working and partnerships. In Ayres and Braithwaite's influential work on regulation, such public interest groups have an important role to play in bridging gaps in the compliance practices of organisations. It provides an answer to the question, "who guards the guardians?".[10]

Management responses to housing problems

5.40 Management responses offer a complex set of processes and practices which seek to provide tools for resolving problems and through which the organisation itself can learn. No single process or practice stands alone. Failures at one stage can be picked up and rectified at other stages.

5.41 The central benefit of such responses is quality control. In institutional environments, they build on existing practices. For example, institutional landlords already use audit as a mechanism of management. Further, the methods can be sensitive to changing approaches to, and understandings of, quality. This enables the organisation's priorities to be reflected through the way it develops its management responses.

5.42 A good example is use of the management response model to explore how the behaviour of a local authority (as a landlord seeking possession) might be better co-ordinated with its responsibilities for housing the homeless. At present, there is often a lack of joined-up thinking. Thus the solution to one problem (how to deal with a tenant who does not pay the rent) simply leads to the creation of another (how to deal with a person subject to a court order for possession).

5.43 More effective use of the management response model could also prevent use of possession actions to accelerate housing benefit claims, by forcing the landlord to consider the housing benefit situation prior to a decision to seek possession. Local policies could play an identifiable role in the decision-making of landlords.

5.44 This approach enables the development of knowledge about best practice, which could be shared to facilitate holistic or cross-boundary working. It also ties in with considerations of what complainants want in terms of future service delivery. Research tells us that many complainants are more interested in seeking an apology and correction in the level of service delivery in the future than, for example, an award of damages. This model facilitates that process.

[10] I Ayres and J Braithwaite, *Responsive Regulation* (1992) p 57.

5.45 Finally, use of this approach does not rely on complaining activity by the person against whom the decision was made. This responds to the problem of "the lumper" (the household which does not seek review of a negative decision). In housing cases, "lumpers" may well be some of the most "excluded" persons in society.

Limitations

5.46 Although the management response model offers many advantages, it also has limits.

5.47 First, it depends heavily on the indicators or targets chosen. Organisations that adopt output targets will functions differently from those that adopt outcome targets. For example, an output target approach to rent arrears may result in possession proceedings being taken to court, whether or not that is an appropriate response to the particular case. An outcomes approach would focus more on the individual case, and whether the underlying problems of debt or money management have been addressed.

5.48 Second, staff may treat the organisation's internal systems cynically. For example, an approach to internal review of decisions, which merely provides a veneer of legitimacy to initial decisions made by officers, militates against the success of this model. Such cynicism can be countered through a requirement of publicity, such as numbers of successful internal reviews. But that requirement is not yet current practice.[11] In our suggested scheme, the responsiveness of the organisation would be subject to oversight by triage plus.

5.49 Third is the problem of public perception. Managerial responses may be perceived as lacking independence, despite their being primarily responsible for the promotion of good and accurate decision-making. This criticism is based on the widely accepted *legal* value that, to be fair, adjudicators should be independent and impartial, despite such absolutes being difficult to maintain.

5.50 Management responses view fairness differently – fairness is not necessarily an individual process of "wrong-righting" but responding to consumer-driven concerns about broader decision-making failures. Managerial methods may involve "wrong-righting" at two levels. First, the individual decision about which the complaint was made may be overturned or put right. Secondly, changes may be made to the processes which led to the individual wrong decision to ensure that similar mistakes are not made in future cases.

[11] See D Cowan, S Halliday and C Hunter, "Adjudicating the implementation of homelessness: The promise of socio-legal studies" (forthcoming) *Housing Studies*.

5.51 Fourthly, we acknowledge the unevenness of these developments in social housing agencies. In an empirical study of two local authority homeless persons units, for example, significant divergences in orientation were observed.[12] In broad brush terms, one unit was referred to as giving primacy to audit, through which the management response approach might be expected to flourish; the other was characterised as giving primacy to more defensive concerns about risk and its management, through which the management response model might not be expected to flourish.

5.52 A fifth apparent limitation is its lack of potential relevance to the private sector. The preceding discussion has related solely to the development of these approaches in the social sector. Even so, it should be noted that management responses largely derived from the private sector. Large private sector organisations should, therefore, be familiar with the range of practices, standards, and values which we consider here.

5.53 But small private sector landlord organisations or individual landlords will not. Some of these will be members of or affiliated to broader associations of landlords. Local authority dispute resolution schemes can provide mechanisms through which private sector disputes can be resolved. But there will still be a significant number of private landlords and others who will not have such affiliations, who will therefore not be able to avail themselves of the potential for this range of dispute resolution procedures.

Values

5.54 The management response model primarily values accuracy through its relationship to efficiency or cost effectiveness. Accuracy and efficiency are sometimes seen as opposing values, but the management response model seeks to balance them. Efficiency is gained through accuracy. Inaccurate decisions may lead to expensive challenges. However, there are concerns that organisations may take decisions which give primacy to the efficiency or promptness values, at the expense of accuracy, in the expectation that usually they will not be challenged. Good, well-used customer complaints and internal review mechanisms, together with the role of the public interest groups, can avoid that outcome. So, too, can increased emphasis on transparency of process and the giving of reasons for decisions.

5.55 Linking these management responses into our overall scheme suggests that ultimate control over accuracy belongs to the triage plus providers. It is they that can direct complainants towards tribunal or court proceedings should the need arise. This acts as a disciplinary corrective to over-reliance by social landlords on the efficiency value.

[12] D Cowan, S Halliday, with C Hunter, P Maginn and L Naylor, *The Appeal of Internal Review* (2003) chs 3 and 4.

5.56 A principal benefit of management responses is their impact value. They seek to enhance good decision-making in the future by a learning and responsive organisation. It is able to do so because the decision-making structures are clearly so directed. Although the value of these mechanisms in securing impact is empirically untested, there is some evidence of such beneficial pay-offs from a quantitative study of homelessness decision-making.[13] Indeed, it is logical to assume that organisations would pay attention to their own practices in these circumstances.

5.57 As regards participation, management response methods clearly favour swift decision-making and can include the more-than-token involvement of the households affected eg in complaints procedures or internal or external reviews. Some managerial techniques such as internal and external audit place less emphasis on individual participation.

5.58 Management responses are also usually very cheap for the person with the problem to access; certainly from his or her point of view they can offer a proportionate means of problem solving.

5.59 The two values which are perhaps less supported by management response methods, are independence and impartiality. As regards the former, there is clearly greater organisational dependence than is the case with other processes considered in this paper. That is mitigated to an extent, as has been suggested, by other parts of our scheme including the role of triage plus. Impartiality is, as Galligan suggests,[14] an empirical question. Where the organisation genuinely engages with the mix of adjudicatory and accountability features suggested here, then a lack of impartiality is less problematic. A lack of impartiality becomes problematic where the organisation does not engage with the process. Here again triage plus can act as a corrective.

ISSUES FOR CONSULTATION

5.60 We invite views of consultees on the role of management response methods of problem solving and dispute resolution within the context of housing. In particular we are anxious to know views on the questions set out below.

What benefits do consultees think these methods provide?

What disadvantages do they have?

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

Are there types of problem which they cannot effectively address?

Is there scope for the further development of the use of these methods?

[13] See D Cowan, S Halliday and C Hunter, "Adjudicating the implementation of homelessness: The promise of socio-legal studies" (forthcoming) *Housing Studies*.

[14] D Galligan *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996).

If so, what is that scope?

What incentives can be created to encourage greater use of these methods?

What role can public interest groups play in ensuring the accountability of housing services? We are especially interested to hear from any public interest groups with experience of having done this.

What limits are there to the effectiveness of public interest groups within housing?

Are there stakeholders who would benefit from the advocacy of a public interest group who are currently unrepresented by such a group?

5.61 There are a number of other issues about the application of management response methods to particular housing issues, on which we seek the views of consultees.

To what extent might the techniques be developed in the context of rent arrears possession proceedings?

To what extent should and could private landlords be subject to these techniques?

To what extent should mortgage lenders be encouraged or required to engage in these techniques prior to, or instead of, possession proceedings?

PART 6
OMBUDSMEN

INTRODUCTION

6.1 Although the term "ombudsman" is much used, it "is not a protected title, it carries with it no special sanctity and as a consequence it has been applied as a label in circumstances where the minimum conditions for a dispute resolution mechanism clearly do not obtain".[1] In an attempt to ensure some consistency in the use of the label, the British and Irish Ombudsman Association has clear criteria for membership. These state that the label should only be used if the following conditions are met:

(1) independence of the ombudsman from those whom the ombudsman has the power to investigate;

(2) effectiveness;

(3) fairness; and

(4) public accountability.[2]

USE OF OMBUDSMEN IN HOUSING

6.2 Ombudsman services are available for all sectors of the housing market - public, quasi-public, and private. They include:

(1) the Local Government Ombudsmen, who deal with local authority housing matters;

(2) the Independent Housing Ombudsman Service ("IHOS"), which has statutory responsibilities for the Registered Social Landlord ("RSL") sector, but can also take on private sector work;[3]

(3) (from 1 April 2006) the Public Services Ombudsman for Wales, which will be able to investigate a range of public bodies including local authorities and social landlords;

(4) the Estate Agents Ombudsman, which operates in the private sector.

Of these, only the last is non-statutory.

[1] R James, *Private Ombudsmen and Public Law* (1997) p 3.

[2] See the website of the British and Irish Ombudsman Association, "Criteria for the recognition of ombudsman offices", http://www.bioa.org.uk/BIOA-New/criteria.htm (last visited 17 March 2006). We do not suggest that the ombudsmen we discuss fail to meet these conditions.

[3] Its predecessor, the Housing Association Tenants Ombudsman Service, had no statutory force beyond a Housing Corporation circular requiring housing associations to join it and abide by its terms of reference: Housing Corporation Circular 39/93, *The Responsibilities of Registered Housing Associations with respect to the Housing Association Tenants' Ombudsman* (1993).

6.3 The variety of ombudsmen working in the housing arena has resulted in significant differences in working practices. For example, ombudsmen differ as to whether they should be proactive by (say) setting best practice guidelines as well as reactive to complainants. Some ombudsmen have filters through which complainants must pass, even though these filters may put complainants off.

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

JURISDICTIONAL ISSUES

Maladministration or fairness

6.4 The key issue that original ombudsmen were asked to investigate was "maladministration".

6.5 By contrast, the Independent Housing Ombudsman Service is concerned with fairness in all the circumstance of the case, as opposed to maladministration.[4] Indeed the published scheme does not say that the IHOS is concerned with maladministration.[5] Rather it gives a non-exhaustive list of actions, which may amount to maladministration, and which may trigger investigation by the IHOS.

6.6 These include:

(1) failing to comply with relevant legal obligations, or codes of practice;

(2) behaving unfairly, unreasonably, negligently or incompetently;

(3) failing to apply its own procedures;

(4) taking an unreasonable amount of time to deal with a complaint; and

(5) treating the complainant personally in an unsympathetic, heavy-handed or inappropriate manner.

6.7 In addition, the IHOS may also investigate any "unresolved disputes" between the landlord and the tenant, regardless of whether there may have been any maladministration on the part of the landlord.[6] The Independent Housing Ombudsman Service's jurisdiction has also been extended to service charge disputes which can also be referred to the Leasehold Valuation Tribunal.

6.8 Use of a general concept such as "maladministration" gives considerable scope to ombudsmen to interpret their remit flexibly. Generous interpretations of the scope of their power have, in general, been supported by the courts. The list approach of the IHOS may, in some cases, prove to be a little limiting. But it has the advantage of making much clearer to members of the public what they can actually do.

[4] The Housing Act 1996 Sch 2, para 7 concerns determinations by a housing ombudsman under an approved scheme. See the Independent Housing Ombudsman Scheme, http://www.ihos.org.uk/downloads/common/HOS_Scheme.pdf (last visited 17 March 2006).

[5] Above at para 14.

[6] Above at para 15.

Is the more detailed approach to be preferred to the more general one?

Ombudsmen and the courts

6.9 Generally, ombudsmen do not consider complaints if the complainant has not given the organisation an opportunity to rectify or deal with the problem locally by using a management response such as a complaints procedure.[7]

6.10 There is currently a draft Regulatory Reform Order which, if it becomes law, will extend the powers of the Local Government Ombudsmen by enabling them to by-pass this limitation in a number of cases.[8]

6.11 Ombudsmen are also not able to act if alternative remedies are being sought through the courts.[9] This is a particularly problematic limitation. A significant number of complaints dealt with by ombudsmen could also involve seeking a remedy in law.[10] Judicial guidance on this limitation is that

> … It is reasonably clear that what is being dealt with is a situation where if the complaint was justified the person concerned might be entitled to obtain some form of remedy in respect of the subject matter of the complaint if he had commenced proceedings within the appropriate time limits. The commissioner is not concerned to consider whether in fact the proceedings would succeed. He merely has to be satisfied that the court of law is an appropriate forum for investigating the subject matter of the complaint.[11]

6.12 If followed to the letter, this suggests that most cases should go to court rather than to an ombudsman. It is not clear that this guidance is followed in practice. It would certainly be out of tune with the aims and objectives of the reforms to civil justice, which stress the importance of the court as the "forum of last resort".

6.13 A strict separation of the jurisdictions might imply that it is for the courts, not the ombudsmen, to interpret the law. But ombudsmen clearly have to understand, and where necessary, apply the law. The involvement of ombudsmen in legally contested arenas, for example, homelessness decision-making, repairs and housing benefit, emphasises the point. They must act lawfully. They are subject to the oversight of judicial review if they do not.

7 See, eg, Local Government Act 1974 s 26(2).

8 Cabinet Office Consultation Paper, *Reform of Public Sector Ombudsmen Services in England*, (August 2005), http://www.cabinetoffice.gov.uk/propriety_and_ethics/documents/ombudsmen_reform.pdf (last visited 17 March 2006) paras 57 to 59.

9 Eg, the Local Government Act 1974 s 26(6). The proviso to that exclusion enables an investigation to be conducted where "it is not reasonable to expect the person aggrieved to resort or to have resorted to it".

10 As Henry LJ suggested, this provision may not have been recognised as problematic in 1974, before judicial review had emerged: *R v Local Commissioner for Local Government for North and North East England ex parte Liverpool City Council* [2001] 1 All ER 462, para 23.

11 *R v Commissioner for Local Administration ex parte Croydon London Borough Council* [1989] 1 All ER 1033, 1044, by Woolf LJ.

6.14 This may, therefore, lead to the suggestion that a strict constitutional separation of ombudsman services on the one hand and adjudication by the courts on the other does not stand up to consideration.[12]

6.15 One option might be to give ombudsmen the power to make decisions on points of law. Such decisions would no doubt be subject to appeal in the courts. But in the absence of any appeal, it would enable the ombudsmen to deliver a total dispute resolution service. However, having this power might impact on their procedures leading to greater formality and less flexibility.

6.16 An alternative option would be to give ombudsmen power to apply to a court for determination of a point of law. This would retain the separate constitutional function of the court as interpreter of the law; but it could add complexity to the process of dispute resolution and render it disproportionate.

6.17 Key questions for this project are:

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

What should it be?

How should this relationship be managed?

INVESTIGATORY TECHNIQUES

6.18 Ombudsmen adopt a variety of investigatory methods and working practices. Some place heavy reliance on informal dispute resolution processes, such as mediation. Some include adjudication (involving a hearing) in their portfolio of work. Others are required to conduct a full investigation of any matter thought to fall within their jurisdiction.

6.19 Perhaps most flexible is the Independent Housing Ombudsman Service. Not all complaints to the IHOS lead to full investigation. This ombudsman will, where possible, resolve disputes before a fully-fledged investigation is launched. Formal investigation is undertaken only when there is evidence of "serious maladministration".[13] Some may argue that this results in a restrictive approach to the use of investigations which undermines the purpose of the ombudsman's function. Others will see it as a good example of where the use of quicker and simpler procedures may be more proportionate.

6.20 We understand that the Estate Agents Ombudsman takes a similar approach.

[12] It is quite clear that the Financial Ombudsman Service has limited the extent to which insurance companies can rely on their strict legal rights: the Law Commission and Scottish Law Commission published a joint scoping paper on Insurance Contract Law on 18 January 2006.

[13] A detailed breakdown of the Independent Housing Ombudsman Service's complaint handling procedures can be found in its Casework Manual, available on-line at http://www.ihos.org.uk/downloads/common/HOS_Casework_Manual_04-1.pdf (last visited 17 March 2006).

6.21 The Local Government Ombudsmen have, as a result of the statutory provisions which established the office, less procedural flexibility. The draft Regulatory Reform Order, mentioned above, would enable the Local Government Ombudsmen to take advantage of such mechanisms by removing the requirement on them to conduct a formal investigation in every case.[14]

6.22 Thus, ombudsmen can take advantage of a "menu" of dispute resolution mechanisms, including mediation, conciliation, arbitration, informal hearing, advice and information, as well as the more traditional method of enquiry and investigation. This may be regarded as essential for the development of a proportionate system of resolving housing disputes.

6.23 What can be problematic is knowing when finality has been reached. If use of an informal process simply results in demands for the use of another more formal one, this may undermine efforts to make the system proportionate, by increasing delay or failing to deliver a decision where one is needed.

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

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

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

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

OUTCOMES

Recommendations

6.24 One of the principal ways in which ombudsmen differ from the courts is that they offer a different range of outcomes from those available in court. Recommendations can include:

(1) financial redress;

(2) apology to the complainant;

(3) review of procedures.

There may be a combination of these recommendations.

[14] See Cabinet Office Consultation Paper, *Reform of Public Sector Ombudsmen Services in England* (August 2005), http://www.cabinetoffice.gov.uk/propriety_and_ethics/documents/ombudsmen_reform.pdf (last visited 17 March 2006) paras 50 to 56.

6.25 One characteristic of ombudsmen is that enforcement of recommendations is indirect (eg through publication of adverse reports), rather than direct. In practice, the organisation against whom an adverse finding has been made, usually complies with the recommendation. In private sector ombudsman services, non-compliance may lead to sanctions against the organisation (such as deregistering it from an association). Where an RSL does not comply with a recommendation of the IHOS, Housing Corporation regulations contain recommendations regarding the indirect enforcement of its findings.[15]

6.26 Lack of direct enforcement is defended on the basis that ombudsmen and their recommendations carry "moral authority" which leads to compliance in practice. In addition it is argued that, were their recommendations to be become directly enforceable, this might lead to defensive practices and import formal legal safeguards into this non-formal scheme of "administrative justice".[16]

6.27 Even so, section 42 of the Commonhold and Leasehold Reform Act 2002 would allow the commonhold ombudsman, when dealing with non-compliance by a commonhold unit-holder, to apply to the High Court for an order requiring the directors of the commonhold association to comply.[17] The Pensions Ombudsman can make binding recommendations, subject to an appeal to the county court on a point of law. The Financial Services Ombudsmen can make awards of up to £100,000 which are directly enforceable against the body successfully complained against.

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

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

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

[15] Housing Corporation Circular 03/97,The Responsibilities of a Social Landlord With Respect to the Independent Ombudsman Scheme Approved by the Secretary of State for the Environment (1997).

[16] For discussion, see M Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (2002) pp 53 to 55.

[17] No commonhold ombudsman has yet been approved under the Commonhold and Leasehold Reform Act 2002, s 42.

Oversight

6.28 As well as dealing with the individual case, ombudsmen also provide oversight of classes of case. Thus, the Local Government Ombudsmen have drawn on their casework to develop a number of policy guidelines offering feedback both to particular local authorities, and to local government in general. Thus, their involvement can lead to changes in the management and administration of the service itself.[18]

COMMENT

Strengths

6.29 The strengths of the ombudsmen derive from their status within the *administrative justice* hierarchy. In contrast to courts, ombudsmen can be expected to understand the demands and needs of the administration of services. Their focus on maladministration means that ombudsmen have in mind good standards of administration against which individual services can be monitored. The publication of reports, advice and guidance, offers a particular method for such norms to be created and fostered.

6.30 For some, there is strength in the non-enforceability of recommendations, as it requires moral authority to be established as well as the acceptability of the remedy. This can facilitate good administration by encouraging non-defensive approaches.

6.31 Further, at present the cost of the provision of the services of the IHOS to landlords (including private landlords) is extremely cheap[19] and the service is currently free to complainants. This may suggest that ombudsmen should play a key role in the delivery of a proportionate dispute resolution system.

Weaknesses

6.32 Arguably there are weaknesses in current arrangements. First, ombudsman services have "grown like topsy". Their jurisdictions have been expanded and contracted without much thought given to the coherence of the individual service or its relationship with other ombudsman services.

Are there both gaps and overlaps in service provision which need to be addressed?

[18] See, eg, The Commission for Local Administration in England, Advice and Guidance from the Local Government Ombudsmen, *Special Report: Advice and guidance on arrangements for forwarding housing benefit appeals to the Appeals Service* (February 2004), http://www.lgo.org.uk/pdf/sp-2-web.pdf (last visited 11 January 2006); and The Commission for Local Administration in England, Advice and Guidance from the Local Government Ombudsmen *Special Report: neighbour nuisance and anti-social behaviour* (February 2005), http://www.lgo.org.uk/pdf/neighbour-nuisance-asb.pdf (last visited 11 January 2006).

[19] Currently £1.15 per unit of accommodation per year.

6.33 Second, ombudsman services were originally designed to pierce the bureaucratic veil of public sector organisations, in particular central and local government. Their extension beyond the public sphere raises questions about the coherence of the underpinning principles of ombudsman services. For example, it might be said that their primary utility lay in equalising the relationship between individual citizens and public bureaucracy.[20] Use of the accountability model may be helpful in this context.

Can ombudsman services retain their coherence *and* extend their jurisdiction?

6.34 Third, ombudsmen do not in general assist private landlords, save those who have voluntarily signed up for the IHOS. There are good reasons for this. Private sector disputes are usually party-party and, therefore, not within the traditional domain of ombudsmen: maladministration and other criteria used by ombudsmen are not particularly apt to deal with such problems. The working methods and enforcement mechanisms available to ombudsmen may not be appropriate in such cases.

6.35 Nevertheless, ombudsmen clearly do operate in the private sector, in particular the IHOS and the Estate Agents Ombudsman. And away from housing, ombudsman services have become the predominant form of dispute resolution in other private sector contexts, especially financial services.

6.36 Fourth, while the non-availability of enforcement mechanisms may be seen as a strength, it may be seen as a weakness. This is particularly the case when dealing with a private sector organisation. The sanction of de-registering an organisation from its trade association may be powerful when membership of the association confers commercial advantage or boosts consumer confidence. For industries which lack a strong trade association (which is the case in the private sector of the housing market) such a sanction appears weak.

6.37 Fifth, ombudsmen's practices can prevent some from accessing their services, even when these would be appropriate and proportionate. Empirical research demonstrates[21] that few complainants proceed beyond first instance reviews (the management response). The use of such a filtering device by ombudsmen may be justified in theory (to prevent their being swamped with complaints that could be resolved by management responses) but can lead to potential complaints not entering that ombudsman service.

6.38 Sixth, we have discussed above the different jurisdictional bases of the different ombudsmen and have asked whether these should be rationalised.

[20] This role is emphasised in the Cabinet Office document, *The Ombudsman in your Files* (January 1997), http://www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/ombudsman_1.pdf (last visited 17 March 2006).

[21] See D Cowan and S Halliday with C Hunter, P Maginn and L Naylor, *The Appeal of Internal Review* (2003).

Values

6.39 Setting the work of ombudsmen against the values we identified in Part 2, it can be seen that they promote nearly all of them.

6.40 The focus of the ombudsmen is on accountability and the appropriateness of administrative action. They seek to promote good quality administration and, through this, accurate decision taking. They prioritise the value of independence.[22] They seek to promote fairness and transparency.

6.41 Most ombudsmen require written complaints before they can act which may inhibit accessibility.[23] Once received, they will investigate without more. In this sense they may be said to deny the participation value, as ombudsmen conduct their investigations without the complainant being required to become involved further. That said, many complainants do not want to remain involved; they want someone else to undertake appropriate inquiries. In addition, complainants and the organisations against which they are complaining are usually given an opportunity to comment on draft reports. In other words, they are offered a different form of participation.

6.42 Some ombudsmen also promote the impact value. The Local Government Ombudsmen have clearly taken on this role. Where clear service standards exist, ombudsmen judge complaints against those standards; thus, the impact value of their work is at least partially promoted. It might be further improved by consideration being given to the following:

(1) regular liaison with bodies against whom significant numbers of complaints are received;

(2) following up the implementation of promises to effect change;

(3) further development of codes of practice;

(4) allowing ombudsmen to conduct investigations on their own initiative.

[22] This is given a special meaning for those in the private sector: see the website of the British and Irish Ombudsman Association, "Criteria for the recognition of ombudsman offices", http://www.bioa.org.uk/BIOA-New/criteria.htm (last visited 17 March 2006): "… in the private sector the body which appoints the Ombudsman and to whom the Ombudsman reports, can be regarded as independent, provided that those of its members who are representatives of organisations subject to the Ombudsman's jurisdiction, constitute a minority of the membership".

[23] The Financial Ombudsman Service is particularly conscious of this problem which it seeks to address through the call centre it runs as part of its service to the public. Staff help those who call in to shape their problem into an issue which the relevant financial institution or ombudsman can deal with.

6.43 The values which ombudsmen may not achieve, depending on factors such as the number of complaints requiring investigation against the available resources for the ombudsman, are promptness and efficiency. In particular, the Local Government Ombudsmen had some difficulty in achieving speedy decision-making, particularly after the councillor filter[24] was removed.[25] This is an empirical question, which could be monitored through triage plus.

6.44 Furthermore, as noted earlier in this Part, ombudsmen are very cost-effective, particularly from the complainants' perspective, and, at least in the case of the IHOS, from the landlord's perspective as well.

ISSUES FOR CONSULTATION

6.45 We seek consultees' views on the questions listed below.

What is the role of ombudsmen in a proportionate system for resolving housing disputes?

Can they play an effective role in private sector contexts?

What is the potential for developing their roles?

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

Can/should their working practices be made more uniform?

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

6.46 We would like information about the extent to which ombudsman services are currently able to:

liaise with housing bodies against whom significant numbers of complaints are received;

follow up promises to effect change made by housing bodies;

develop codes of practice in relation to housing disputes;

conduct investigations on their own initiative.

[24] Until 1988, the Local Government Ombudsmen were only able to receive complaints from members of the public indirectly, through councillors. The Local Government Act 1988 s 29 removed this restriction, allowing citizens to complain to the Local Government Ombudsmen directly.

[25] F Laws, "The local government ombudsman: Contemporary issues and challenges", in N Hawke, *The Ombudsman – Twenty Five Years On* (1993) p 64: "I have to say that our performance has slipped to a maladministrative level during this fairly violent upheaval and only now is the Commission creeping back to an acceptable response time. To be taking four or five months to answer a simple complaint and one and a half years to issue a report is something of which I am ashamed".

6.47 We would also be interested in consultees' views about the value of such activities.

6.48 Finally, we would be interested in any views consultees may have about other ways of enhancing the effectiveness of ombudsmen.

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

PART 7
MEDIATION

INTRODUCTION

7.1 The dispute resolution landscape has been expanded over the last 15-20 years by increasing interest in alternative (or better, appropriate) dispute resolution (ADR). There are a number of types of ADR, including early neutral evaluation, conciliation and arbitration which, in different ways, try to bring disputes to a conclusion.

7.2 The particular form of ADR we consider here is mediation, which has started to have some impact on the resolution of housing disputes. In essence, mediation involves "a neutral third party with no power to impose a resolution help[ing] the disputing parties to reach a mutually acceptable settlement."[1]

7.3 The idea of mediation has powerful supporters, who proclaim its benefits (usually in contrast to court-based adjudication). They include Lord Woolf who commended the use of ADR in his reports on Access to Justice, which led to the reforms of civil procedures contained in the Civil Procedure Rules 1998.[2] Despite its advocates, though, it is necessary to keep mediation in perspective. There is still "modest demand" for mediation schemes. It is not embraced enthusiastically by everyone.

HISTORY

7.4 Negotiation is, of course, one of the oldest and most practised techniques of dispute resolution. Many regard mediation as being much the same process as negotiation.

7.5 Mediators, however, draw a clear distinction between negotiation and mediation. Negotiation involves the parties to a dispute dealing directly with each other. As mentioned above, mediation brings in the neutral third party who can often assist when negotiation has either not been tried or has run into the sand.

7.6 Interest in mediation has arisen out of concerns about litigation. It is argued that litigation is too costly; adversarialism predominates; and court processes are too impersonal. Mediation offers the opportunity for voluntary, efficient and empathetic dispute resolution.

7.7 Its role in housing dispute resolution was initially limited to family conflict resolution. However, it has expanded into the resolution of "neighbourhood problems" and, in some local authority cases and areas, the resolution of problems with rent arrears and disrepair. These developments are still going on.

[1] R Bush and J Folger, *The Promise of Mediation: responding to Conflict through Empowerment and Recognition* (1994) p 2.

[2] See the Civil Procedure Rules r 26.4 and requirements concerning claims not covered by pre-action protocols about willingness to enter into mediation (Practice Direction – Protocols, para 4.3).

7.8 We think use of mediation in housing disputes has more potential than has yet been realised in practice. In part, this is because mediation can be particularly helpful in situations where the parties need to remain in an ongoing relationship after the dispute is over, as in many landlord and tenant and anti-social behaviour cases.[3]

7.9 Community mediation may also have a particular contribution to make to the resolution of certain types of disputes, particularly neighbour disputes and some anti-social behaviour problems.[4]

7.10 Over recent years, courts have become more engaged with mediation. A number of courts run their own mediation schemes. An important recent innovation has been the creation of the pilot National Mediation Helpline, a call centre operation that brings those who are willing to mediate a dispute together with an appropriate mediator. An increasing number of courts are taking advantages of this service.

7.11 Involvement of the courts in promoting mediation is not uncontroversial. Some argue that where judges seek to encourage, more or less firmly, parties to consider mediation, this may work against the voluntary nature of the process. The potential imposition of costs penalties on parties for failing to consider mediation appears at odds with this voluntary ethos.[5]

7.12 Others regard these fears as overstated. They see no difficulty in encouraging parties to think about mediation and even meeting a mediator, so long as they can return to court if no progress is made. In any event, the present Civil Procedure Rules mean that the courts must consider the potential use of mediation. The Legal Services Commission is also increasingly interested in encouraging use of mediation as a preliminary to full court litigation.

[3] See, in particular, A Brown, A Barclay, R Simmons and S Eley, *The Role Of Mediation In Tackling Neighbour Disputes And Anti-Social Behaviour*, Scottish Executive Social Research, Research Findings No 167/2003 (2003), http://www.scotland.gov.uk/cru/resfinds/drf167.pdf (last visited 13 January 2006).

[4] More information about community mediation can be found at the website of Mediation UK: http://www.mediationuk.org.uk/ (last visited 31 January 2006).

[5] *Dunnett v Railtrack PLC* [2002] 2 All ER 850; *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002.

TECHNIQUES

7.13 The characteristics of mediation are that the mediator is a neutral facilitator "using their professional skills to contain the emotional charge of the conflict and focus the disputants on the task of agreement, while leaving the determination of the actual outcome to the parties."[6] Outcomes include: the parties voluntarily making an agreement; or narrowing the dispute to certain issues;[7] or failing to make an agreement.

7.14 The process of mediation is extremely flexible. The mediator has to respond to the parties' circumstances (such as their willingness to engage with each other).[8] In most mediations, the parties' strict legal rights are not as relevant as a willingness to compromise.[9]

7.15 To function, mediators utilise a range of strategies, designed to enable the mediator to exert some form of control or management over the parties. For example, mediators will often remind parties that any court proceedings are likely to be "expensive, time-consuming, and emotionally painful".[10] They also offer parties to disputes "reality checks", which encourage the parties to think carefully about the strengths and weakness of their positions.

Strengths

7.16 First, mediation "encompasses an alternative vision of how and why disputes need to be resolved" because it includes "a rejection of adversarial approaches to dispute resolution; emphasis on the importance of co-operation; a focus on self-determination and voice; and an insistence that disputes must be understood within their broader contexts and away from the narrow constraints of legal doctrine."[11]

6 R Dingwall, "Empowerment or enforcement? Some questions about power and control in divorce mediation" in R Dingwall and J Eekelaar, *Divorce, Mediation and the Legal Process* (1988) p 151.

7 A "successful" mediation may theoretically be either, although in practice some may only put the former in that bracket. Agreement before or after mediation may also be counted as successful. The practice of the Commercial Court was to count the absence of a letter to the court informing it that a mediation had been unsuccessful as evidence of a successful ADR – see H Genn, *Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, LCD Research Paper No 1/02 (2002) p 27.

8 "Mediators need to be able to respond cleverly to the personalities, principles and strategies of those with whom they are dealing during the mediation session … and most importantly, they need to be able to see through the often refined and polished negotiating performances displayed by some litigants during the course of mediations": H Genn, The *Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Paper 5/98 (1998) para 6.1.1.

9 However, this may not always be possible or realistic: H Genn, *Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, LCD Research Paper No 1/02 (2002) p 141.

10 R Dingwall, "Empowerment or enforcement? Some questions about power and control in divorce mediation" in R Dingwall and J Eekelaar, *Divorce, Mediation and the Legal Process* (1988) p 163.

11 L Mulcahy, "Feminist fever? Cultures of Adversarialism in the Aftermath of the Woolf Reforms" (2005) 58 *Current Legal Problems* 215, pp 225 to 226

7.17 Second, mediation gives individuals the chance to participate meaningfully in their own settlement. This occurs notwithstanding the parties' formal legal position.

7.18 Third, the power of mediation may be important in situations which involve ongoing relationships. It is suggested that mediated settlements are longer lasting and lead to greater compliance. Given the voluntariness and mutuality of settlement, enforcement may be easier.

7.19 Fourth, a particular strength of the process is the general satisfaction which parties and their representatives express in it, even when they had no pre-knowledge about the process.[12] Such positive evaluations do not only reflect the views of those who enter into the process successfully. Even unsuccessful mediations can lead to positive evaluations. The process of the mediation can be almost as important as the outcome (although *ex post* evaluations of process are often influenced by the outcome).[13] Mediations which do not produce settlement can still be helpful in defining, or narrowing the issues in dispute.

7.20 Fifth, there is increasing experience with time-limited mediations. Most in-court schemes offer a maximum of three hours; so too does the National Mediation Helpline. This helps to ensure that the cost of any mediation is kept to proportionate levels.

[12] H Genn, *The Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Paper No 5/98 (1998) paras 5.11 and 5.13. At para 5.13.1, representatives of litigants' comments

> … reflected an appreciation of the speed and informality of the process and, most particularly, the opportunity that the mediation provided for their client to air their particular grievance directly to the opposing side. The catharsis involved in expressing grievances in a relatively public forum may, in some cases, both increase the likelihood of settlement, and also increase the acceptability of compromise.

[13] In an important aside, Genn notes that satisfaction with the process "is at least in part a function of management of expectations. If people do not know what to expect they will guess what to expect – probably incorrectly": H Genn, *Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, LCD Research Paper No 1/02 (2002) pp 55 to 56.

Weaknesses

7.21 Perhaps the biggest weakness of mediation lies in some of the claims made for it, which are hard to sustain. Despite the assertion that parties voluntarily arrive at their own settlement through mediation, in practice the mediator exercises control in a variety of ways.[14] Further, as parties are usually unused to mediation, they "are extremely sensitive to cues as to how they are supposed to act; they will look to the mediator to provide those cues".[15] The claims that mediation is cost- and time-saving are also hard to prove.[16]

7.22 Another claim for mediation, that parties are able to express their emotions within the process (by contrast to the court system), has not been empirically proven, though is frequently asserted and there is considerable experience which suggests this claim is well founded.

7.23 Third, there are dangers in mediation for those who do not have equal bargaining power. In seeking to render the unequal equal, the mediator may have to shed his or her neutrality. Retaining neutrality may lead the mediator to condone inequality. When asked to reflect on this issue, housing officers in one study of mediation in neighbour disputes and anti-social behaviour, recognised that "the more skilled and confident somebody felt, the more likely it would be that they might see a positive outcome emerging from the process and vice versa".[17] This leads some to argue that mediation is inappropriate where parties are unequal (such as landlord and tenant). Our initial view is that mediation has much to offer in many housing disputes, but that there may be circumstances where mediation would not be proportionate or appropriate.

[14] H Genn, *The Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Paper No 5/98 (1998) para 6.4.2.

[15] T Grillo, "The mediation alternative: Process dangers for women" (1991) 100 *Yale Law Journal* 1545, p 1556.

[16] See the discussion in H Genn, *The Central London County Court Pilot Mediation Scheme: Evaluation Report*, LCD Research Paper No 5/98 (1998); and H Genn, *Court-based ADR Initiatives for Non-Family Civil Disputes: The Commercial Court and the Court of Appeal*, LCD Research Paper No 1/02 (2002). In the context of neighbour disputes and anti-social behaviour, see J Dignan, A Sorsby and J Hibbert, *Neighbour Disputes: Comparing the Cost-Effectiveness of Mediation and Alternative Approaches*, Centre for Criminological and Legal Research, University of Sheffield (1996); and A Brown, A Barclay, R Simmons and S Eley, *The Role Of Mediation In Tackling Neighbour Disputes And Anti-Social Behaviour*, Scottish Executive Social Research, Research Findings No 167/2003 (2003), http://www.scotland.gov.uk/cru/resfinds/drf167.pdf (last visited 13 January 2006) para 7.3. Both these studies did find substantial cost-savings in mediation but with significant caveats. Indeed, as most disputes are settled out of court, the comparison of mediation and court-based costs may lead to false conclusions.

[17] A Brown, A Barclay, R Simmons and S Eley, *The Role Of Mediation In Tackling Neighbour Disputes And Anti-Social Behaviour*, Scottish Executive Social Research, Research Findings No 167/2003 (2003), http://www.scotland.gov.uk/cru/resfinds/drf167.pdf (last visited 13 January 2006) para 9.4.

7.24 Fourth, mediation offers privacy, both for discussion of the issues and for the outcomes. Critics argue that mediation operates to privatise public discontent:: there is a public good in public hearings and the development of precedent.[18] On the other hand, not everyone wants to wash their dirty linen in public. Thus mediation offers parties additional choice, which has a proper contribution to make to proportionate dispute resolution.[19]

7.25 Fifth, mediation is not always appropriate. In evaluations of three schemes by Genn, she found a high degree of consistency in reasons given by solicitors for refusing mediation: there is a point of law or complex factual evidence;[20] a refusal by one or both parties to compromise; the invitation to mediate was issued too early in the life of the dispute; a belief that solicitor negotiations would settle the case without the need for ADR.[21] Unwillingness to engage with the other party, inequality, and fear of reprisals are regularly mentioned as factors against mediating in cases of neighbour disputes.[22]

7.26 Finally some mediation schemes do not work with a party or parties who have a history of violence or aggression.[23]

Values

7.27 The relationship between mediation and the values discussed in Part 2 above is interesting.

7.28 Although mediation operates "in the shadow of the law", it places less emphasis on legal accuracy. However, this is also arguably its strength. Mediated settlements reflect what the parties want; they seek and assert the "bottom line" that they can live with, irrespective of strict legal rights. On this basis, a mediation can deliver outcomes that are accurate as according to the parties' wishes (although compromise can be painful). Mediation can also deliver outcomes that a court cannot, which may lead to a more effective resolution of the dispute. Legal inaccuracy, then, may be a value of mediation in itself.

[18] Respectively, O Fiss, "Against settlement" (1984) 93 *Yale Law Journal* 1073; D Luban, "Bargaining and compromise: Recent work on negotiation and informal justice" (1985) 14 *Philosophy and Public Affairs* 397.

[19] C Menkel-Meadow, "Whose dispute is it anyway?: A philosophical and democratic defense of settlement (in some cases)" (1995) 83 *Georgetown Law Journal* 2663, pp 2690 to 2691.

[20] Genn suggests that such a reason "may simply be a convenient argument for rejecting a process about which solicitors and their clients are dubious": H Genn, *Court-Based Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal*, LCD Research Paper No 1/02 (2002) p 110.

[21] Above pp 109 to 111. Genn indicates that these reasons require further analysis.

[22] A Brown, A Barclay, R Simmons and S Eley, *The Role Of Mediation In Tackling Neighbour Disputes And Anti-Social Behaviour*, Scottish Executive Social Research, Research Findings No 167/2003 (2003), http://www.scotland.gov.uk/cru/resfinds/drf167.pdf (last visited 13 January 2006) ch 9.

[23] See J Dignan, A Sorsby and J Hibbert, *Neighbour Disputes: Comparing the Cost-Effectiveness of Mediation and Alternative Approaches*, Centre for Criminological and Legal Research, University of Sheffield (1996) p 26.

7.29 Mediation gives primacy to the participation value. Mediation is a participatory, deliberative process through which the parties come to a voluntary settlement. In the process, the cathartic effect of mediation is important to recognise. It also supports confidentiality. To that extent, it may be a less transparent process than some of the others discussed in this paper.

7.30 Mediation is also based on impartiality and independence. The fact that the mediator is neutral should ensure that.

7.31 Mediation's claims to improve the speed of decision-making and to reduce costs, are not yet borne out by empirical evaluation, certainly not in the specific context of the resolution of housing disputes. (Rather than comparing mediation with courts, it would be more appropriate to evaluate these claims by comparing mediation with other negotiated settlements.)

7.32 The main value "loser" is impact. Private outcomes cannot be fed back to organisations in the way that decisions of ombudsmen or courts can be. The individualisation and privatisation of the dispute and its outcome lead to impact derived from feedback being sacrificed.

7.33 More optimistically, in cases where community mediation may be particularly useful (such as anti-social behaviour or neighbour disputes) if more harmonious relationships can be re-captured through the mediation process, this can have a beneficial impact on the broader community or neighbourhood.

ISSUES FOR CONSULTATION

7.34 We invite views on the role of mediation within housing disputes.

Are there particular housing contexts where mediation is particularly appropriate?

Are there contexts where it is particularly inappropriate?

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

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

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

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

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

7.35 We would particularly value personal accounts of the use of mediation processes in housing contexts.

PART 8
ADJUDICATING HOUSING DISPUTES: COURT OR TRIBUNAL?

INTRODUCTION

8.1 Although the means of solving housing problems and resolving housing disputes, outlined in Parts 4 – 7 can deal with many housing issues, there will still be a need for a body or bodies with the authority to undertake formal adjudicatory functions.

8.2 "Adjudication" is a concept that is used differently in different contexts. For example, the Independent Housing Ombudsman Service offers "adjudication" as one of its means for resolving housing disputes. In that context, it seems to be used to indicate that a hearing is involved in the process. For the purposes of this Part, we use "adjudication" specifically to refer to the functions of courts and tribunals.

8.3 At present, their functions, as they relate to the resolution of housing disputes, are divided between the courts (both civil and criminal) and tribunals (principally those contained in the Residential Property Tribunal Service (RPTS)).

8.4 As mentioned in Part 1 of this paper, we have already heard many comments suggesting that there should be reform of the present structure. People point to experience in other jurisdictions which have developed specialist housing tribunals (under a variety of names). They argue that we should adopt a similar structure in this country. This Part considers the case for change.

THE NEED FOR A COURT OR TRIBUNAL

8.5 We start by identifying the reasons why a formal adjudicatory body is needed. Courts and tribunals are key elements of our constitutional system. They:

(1) enable governments to meet their obligations under Article 6 of the European Convention on Human Rights and Fundamental Freedoms;

(2) are an independent forum in which authoritative interpretations of the law can be handed down, which determine the extent of housing rights and obligations;

(3) hear evidence and find facts which determine the extent of individual's housing rights and obligations;

(4) determine appeals from other courts within the court hierarchy;

(5) hear challenges by way of judicial review to the legality of dispute resolution outcomes and procedures that fall outside the formal court structure;

(6) provide the authority for actions imposed by the state, including both criminal sanctions for breach of the criminal law, or remedies for breaches of private or public law;

(7) authorise enforcement of the remedies provided by the court.

8.6 While these important functions must continue, this does not mean that the precise ways in which courts and tribunals are currently used to resolve housing matters should remain as they are.

8.7 Indeed, changes to the detail of current arrangements can already be predicted, as the new Tribunals Service comes into existence (from 3 April 2006). Although initially, the RPTS will not come within the new structure, it is intended that this should happen in 2008. One feature of the new Tribunals Service will be the creation of a new structure for determining appeals. This will alter the detailed relationship between tribunals and courts.

8.8 Other changes may evolve if ideas for a single civil court are taken forward.[1]

8.9 Any discussion of how to create a proportionate system for the resolution of housing disputes must raise questions about the current roles of courts and tribunals, and whether or not they should be re-shaped.

STRENGTHS AND WEAKNESSES OF THE CURRENT SYSTEM

8.10 We start by considering those factors which are said to represent the strengths and the weaknesses of the current system. Some of these derive from empirical research findings; others are assertions frequently voiced but not empirically proven.

Strengths

8.11 Looking at the values identified in Part 2, courts and tribunals satisfy many of them. Most importantly, they are independent. They seek to deliver legally accurate and legally authoritative outcomes. Their processes are based on principles of fairness, which allow both sides of any argument to be heard, and transparency. Their decisions have direct impact on the parties to the proceedings.

Weaknesses

8.12 But courts and tribunals also have their weaknesses. They cannot always offer equality of arms, especially where one side to a dispute has legal representation and the other does not. Their very transparency limits their scope to allow proceedings to be confidential.

[1] Department of Constitutional Affairs Consultation Paper, *A Single Civil Court? The scope for unifying the civil jurisdictions of the High Court, the county courts and the Family Proceedings Courts*, CP 06/05 (3 February 2005), http://www.dca.gov.uk/consult/civilcourt/civilcourt_cp0605.pdf (last visited 27 January 2006).

8.13 Formal procedural rules, which require particular notices to be served or steps taken, within specified time periods, with procedural sanctions for non-compliance, may limit the ability of individuals to negotiate the legal system unaided. The Civil Procedure Rules arguably limit the capacity of individuals to participate in court proceedings. Recent research into the experiences of litigants in person in the High Court and county court has shown that courts do not find it easy to accommodate the litigant in person.[2] Tribunals are less restrictive in this respect. Indeed, district judges determining cases in the small claims track can be equally procedurally flexible. It is possible this could be addressed with greater emphasis on training in judgcraft skills (as is provided by the Judicial Studies Board for tribunals judiciary).

8.14 Courts and tribunals have to determine justiciable issues – issues over which they have jurisdiction; they cannot always get at the "real" source of the dispute. They are particularly ill-suited to delivering broad outcomes affecting a number of people with problems, as opposed to dealing with the individual issue.

8.15 Courts are criticised for adjourning too frequently, thereby failing to be as effective as they should. Outcomes from courts and tribunals (save for the genuine "test case") tend to have little wider impact. Despite new performance targets, courts are criticised for taking too long to hear cases. And there are constant complaints that the costs of going to court (both in terms of the fees to be paid, and the costs of paying for legal representation) are disproportionate; in other words they lack economic efficiency.

KEY QUESTIONS

8.16 Two key questions have recurred for years in relation to the adjudication of housing disputes, which we need to take into account. Should the adjudicatory function be carried out by a specialist or a generalist body? Should that body be a court or a tribunal? Two further questions also need consideration: in deciding housing matters, should current barriers between civil and criminal courts be reconsidered? Can it be made easier for collective disputes to be resolved by courts/tribunals?

Specialist or generalist?

8.17 Whether the adjudicatory body should be a specialist or generalist one remains a significant issue. A recent study of housing possession proceedings found that county court district judges hearing these cases generally had limited experience of housing law prior to their judicial role and had limited training of housing law before taking on that role.[3] It is known that a number of district and circuit judges do have considerable expertise in housing matters. But many more do not. By contrast, members of the RPTS are recruited for their expertise in housing matters, and receive special training to enhance that expertise.

[2] See R Moorhead and M Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, DCA Research Series 2/05 (March 2005), http://www.dca.gov.uk/research/2005/2_2005.pdf (last visited 13 January 2006).

[3] C Hunter, S Blandy, D Cowan, J Nixon, E Hitchings, C Pantazis and S Parr, *The Exercise of Judicial Discretion in Rent Arrears Cases*, DCA Research Series 6/05 (October 2005), http://www.dca.gov.uk/research/2005/6_2005.pdf (last visited 27 January 2006).

8.18 There is little appetite in government for the creation of specialist courts. Successive Lord Chancellors have set their face against moving in this direction.[4] Current moves towards a single civil court, albeit with the possibility of specialist streams, are further indications that proposals for a specialist housing court will not find favour.

8.19 It can be argued that the county court could become more specialist in practice through an informal process of "ticketing" certain district judges with expertise in housing law to hear housing cases. In any event, it is also argued that housing cases often involve issues beyond housing itself. Thus, they do not lend themselves easily to single-focus dispute resolution mechanisms. On the other hand the RPTS is a specialist tribunal, and one that in recent years has had an expanding jurisdiction.[5] Could this become the cornerstone of a specialist housing adjudication body?

What are consultees' views about the desirability of creating a specialist housing jurisdiction?

Court or tribunal?

8.20 The specialist/generalist debate also relates to the court/tribunal debate. In principle, if one were to opt for a specialist body, it might appear to have a better "fit" with the tribunal system for the reasons given below.

(1) A number of tribunals already have housing jurisdictions.

(2) Given the range of housing disputes, the greater procedural flexibility of tribunals could allow for a more responsive approach to individual cases. For example, housing disrepair cases could routinely involve a visit to the premises, as currently happens with fair rent or rent increase cases heard by Rent Assessment Committees under the Rent Act 1977 or Housing Act 1988.

(3) It would allow greater use of the expertise in the tribunal. Again, taking disrepair as an example, the fact that the RPTS includes surveyor members could reduce the need for expert witnesses.

(4) It would facilitate the further development of expertise in housing law and policy amongst those taking the decisions.

(5) The less hierarchical approach of tribunals is more in tune with the resolution of housing disputes and would enable apparent inequalities between landlord and tenant to be better balanced.

[4] Though there has been increasing specialisation in the commercial sector, with the creation of the Technology and Construction Court, the Patent Court and the Commercial Court.

[5] See the Housing Act 2004, s 229.

(6) The less formal approach of tribunals, with their emphasis on the "enabling role" might appear more appropriate for the resolution of housing disputes and to offer a more proportionate context for the determination of matters properly the responsibility of the formal dispute-resolution procedure.

(7) Some people equate "courts" with what goes on in criminal courts: there is a lack of public understanding of the difference between criminal courts and civil courts. A "tribunal" might have a less intimidating ring.[6]

8.21 Given the existence and experience of the Residential Property Tribunal Service, the housing tribunal could simply be an expansion of that jurisdiction with the adoption of their working practices.

8.22 There are, however, powerful arguments going the other way.

(1) Tribunals would not have the authority to provide rulings on points of law, particularly points of common law arising outside their specialist field.

(2) Historically, legal aid has not been available for representation before tribunals.

(3) Tribunals would not be the appropriate body for dealing with matters of criminal law.

(4) Transferring housing disputes to a tribunal would result in housing law losing out as a specialist area of practice that should be recognised and supported.

Clearly, this is also an important consultation issue.

Criminal and civil jurisdictions

8.23 Retaining a generalist approach might be relevant to arguments that current sharp distinctions between civil and criminal courts should be modified. Relaxation of the distinctions would enable, for example, civil and criminal proceedings for unlawful eviction and harassment or civil and criminal proceedings relating to housing-related anti-social behaviour orders to be heard in a single set of proceedings, rather than having to go through two distinct sets of proceedings.

Should current civil and criminal jurisdictions be amalgamated?

Dealing with collective issues

8.24 Another general issue is the ability of formal dispute resolution procedures to deal with collective, as opposed to individual, matters.

[6] Hazel Genn's recent study of tribunal users suggests this argument should not be pushed too far; some of her respondents found the label "tribunal" just as intimidating, as in "Nuremberg War Crimes Tribunal": H Genn, B Lever, L Gray and N Balmer, *Tribunals for Diverse Users*, Department for Constitutional Affairs Research Series 1/06 (January 2006), p 100, http://www.dca.gov.uk/research/2006/01_2006.pdf (last visited 31 January 2006).

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

OPTIONS FOR CHANGES

8.25 First, as with any reform project, there is the option to do nothing. The present structure of courts and tribunals may not be the most coherent that could be devised, but if it functions more or less satisfactorily, there would be little point in making recommendation for reform. Our preliminary analysis suggests that there is a lack of proportionality in the current system which justifies thinking about making the case for change. But we need to discover whether consultees agree.

8.26 Second, there is the issue of whether there should be closer integration of civil and criminal court process. We have already noted in passing that there are a number of housing-related areas where the division between civil and criminal courts arguably contributes to inefficiency and disproportionality.

8.27 We recognise that there are important distinctions between civil and criminal courts, not least in the procedural rules and standard of proof to be applied in each. But if these distinctions could be addressed in ways other than by the retention of two separate court systems, should this not be considered? We will be interested in the views of consultees on this matter.

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

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

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

8.28 Third, and not necessarily distinct from the second option, is whether there should be an amalgamation of the use of courts and tribunals to resolve housing disputes. Historically, the civil courts have had the more extensive jurisdiction, with only limited specialist functions being given to tribunals. The Housing Act 2004 has, to an important extent, broken the mould. That Act has given the RPTS a raft of new powers which in the past would undoubtedly have been given to the courts. Why should this process stop there? Transferring many or all of the housing functions currently undertaken in the county court to the RPTS must clearly be considered as another option for change.[7] If a specialist court or tribunal was created, should other courts and tribunals retain concurrent jurisdiction in some or all cases? In the following paragraphs we sketch out a possible jurisdiction for a specialist housing tribunal.

[7] The Scottish equivalent to the RPTS, rent assessment committees, are to be renamed "private rented housing committees" and will be given jurisdiction to consider whether private landlords have complied with their statutory repairing duties, under the Housing (Scotland) Act 2006. They will be able to order the landlord to carry out repairs, and make "rent relief" orders in the event of non-compliance.

8.29 In this model a single tribunal would have jurisdiction to hear all housing disputes[8] which are currently heard by either a county court, High Court, magistrates' court, Crown Court, Leasehold Valuation Tribunal, Rent Assessment Committee, Residential Property Tribunal or Rent Tribunal. The latter four tribunals would fall within the central housing tribunal.

8.30 Any new housing tribunal would not take any jurisdiction from the Lands Tribunal, Agricultural Land Tribunal, Adjudicator to HM Land Registry or Valuation Tribunals. While these bodies hear disputes concerning housing (such as compensation for compulsory purchase of a house, or disputes over succession to farm house tenancies) it would cause unnecessary procedural complexity to transfer disputes involving houses from these bodies to the housing tribunal, while retaining their existing jurisdiction over non-housing matters. Transferring their entire jurisdiction to the housing tribunal would dilute the specialist focus on housing of the latter body. The existence of composite hereditaments (properties subject in part to non-domestic rates and in part to council tax) means that it would not be straightforward to transfer the council tax jurisdiction of the Valuation Tribunals to the new housing tribunal.

8.31 The county court, High Court and magistrates' court would cease to have jurisdiction over all housing disputes other than those arising under the Family Law Act 1996 or the Matrimonial and Family Proceedings Act 1984, for which they would retain concurrent jurisdiction with the housing tribunal. This concurrent jurisdiction would recognise the difficulty of categorising people's problems or disputes as "housing problems" as opposed to (say) "family disputes".

8.32 The housing tribunal would also determine disputes relating to housing benefit connected with other housing disputes within its jurisdiction. Giving it the ability to determine such issues where they do arise should aid efficient resolution of such cases. The housing tribunal would be able to join the housing benefit authority as a party to proceedings where its actions appear relevant to the subject of the dispute. The Appeals Service would retain its jurisdiction to hear housing benefit appeals.

8.33 The housing tribunal could have jurisdiction over civil matters and housing related criminal offences (housing statutory nuisance cases, breaches of anti-social behaviour orders obtained by social landlords). This would build on the approach taken in innovative "problem courts" like the Liverpool community justice centre, and enable a more holistic consideration of housing problems involving both civil and criminal law issues.

[8] See Law Commission, Public Law Team, *Housing Disputes – County Court Jurisdictions* (December 2005), http://www.lawcom.gov.uk/docs/county_court_jurisdictions.pdf; Law Commission, Public Law Team, *Housing Disputes – High Court Jurisdictions* (December 2005), http://www.lawcom.gov.uk/docs/high_court_jurisdictions.pdf; Law Commission, Public Law Team, *Housing Disputes – Magistrates' Court Jurisdictions* (November 2005), http://www.lawcom.gov.uk/docs/magistrates_court_jurisdictions.pdf; Law Commission, Public Law Team, *Housing Disputes – Crown Court Jurisdictions* (November 2005) http://www.lawcom.gov.uk/docs/crown_court_jurisdictions.pdf; and Law Commission, Public Law Team, *Housing Disputes – Tribunal Jurisdictions* (December 2005), http://www.lawcom.gov.uk/docs/tribunal_jurisdictions.pdf.

8.34 A fourth option is that, in order for housing law to retain its distinct identity, it would be desirable for a specialist housing court to be created. As noted above, this option faces considerable policy objections. Officials fear that such a proposal would lead to unacceptable additional expense, and, in this sense, not be proportionate.[9]

8.35 Even if the structural changes implicit in options 2 to 4 were not to find favour, a fifth option might be to change the range of issues that have to be taken to a court or tribunal. For example, it is currently an important principle that an order for possession of a home should not be made without the possibility of some intervention from the court. But is it proportionate to require a private landlord to pay £150 to issue proceedings for an order for possession of an assured shorthold tenancy, the granting of which is mandatory and for which they will have to wait around six weeks? Even more so when the only reason for requiring the order to be obtained is because of the refusal of the local authority to accept the occupier as homeless until such an order has been obtained? Arguably a more proportionate response would be for such cases to go to a tribunal, particularly, as is the case with the majority of tribunals, it can be accessed for no or only a minimal charge.

8.36 A sixth option might involve revisiting the interrelationship between the body (court or tribunal) making the orders that are the outcome of proceedings taken before it, and the agencies (often local authority homelessness departments) who have to deal with the consequences of that decision. At present, for perfectly understandable reasons, the two issues are kept separate. Court of Appeal guidance makes it clear that county court judges must reach their decisions on possession without second guessing what the response of the local authority will be.[10] But is this the best way of doing things? Is there a case for creating a more integrated decision-taking system which brings together possession and homelessness decisions?

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

RELATED ISSUES

8.37 Any discussion of institutional reform must take into account other issues which might be consequent on institutional changes. Here we consider four particular matters: legal aid, the small claims track limit, fees and costs.

[9] It may be noted the status of employment law as a specialist area of legal practice does not seem to suffer from the fact that cases are heard in employment tribunals rather than labour courts.

[10] See *LB Lewisham v Akinsola (sued as Adeyemi)* (2000) 32 Housing Law Reports 414, *Watford BC v Simpson* (2000) 32 Housing Law Reports 901.

Legal aid

8.38 One of the principal arguments against extension of the tribunal function is that it is feared this would lead to a reduction in the potential for the use of legal aid. It is true that, historically, legal aid for representation was primarily available for trials in courts, not hearings before tribunals. Current legislation relating to the provision of legal services does not (contrary to many people's understanding) create a statutory bar to the use of legal aid in tribunals.[11] However, the present funding code precludes this in most circumstances. An important related issue would therefore be whether appropriate levels of public funding for representation, when that was needed, could be made available were there to be a concentration of housing dispute resolution in a housing tribunal.

In what circumstances should legal aid be available for proceedings before tribunals or courts?

The small claims track limit

8.39 The Better Regulation Task Force has made suggestions that the current limit on the small claims track should be raised. At present disputes relating to housing disrepair are treated on the same basis as personal injury disputes – the small claims jurisdiction is set at £1000. A recent report from the Civil Justice Council suggested that both for personal injuries and for housing disrepair disputes it should be retained at that level. It appears, however, that in making this argument, the authors were principally concerned with personal injury, not with housing disrepair. In these cases, the question remains one that must be considered further, particularly by those with housing expertise.

8.40 The argument in favour of retaining the current level is, primarily, that housing disrepair involves the use of experts. Raising the current limit would prevent the recovery of costs by the successful party against the losing party. Against, there are issues relating to proportionality. Should a party successfully asserting a claim for just over £1000 recover costs from the other side? Consideration of this issue raises a broader question about the relationship between courts and tribunals. Arguably a more proportionate system of disrepair disputes might involve use of a tribunal (with a surveyor as a member) actually visiting the premises and deciding what needs to be done and by whom without the need for expert witnesses at all.

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

[11] The Access to Justice Act 1999.

Access fees

8.41 The question of the fees that must be paid by parties to bring proceedings before a court or tribunal is also extremely controversial. HM Court Service policy is to ensure that the basic cost of running the courts is borne by those using the courts. The application of this principle is subject to considerable criticism, particularly areas of legal activity that have a high social policy content. Indeed, as can be seen in the context of family cases, the policy is not rigidly applied. In the context of family proceedings, application of the fees principles is substantially amended in order to ensure that access to the courts is not denied in those cases where it is essential. Should not similar arguments apply in housing cases?

8.42 By contrast, access to most tribunals is achieved without the necessity to pay fees in advance. There are certain exceptions to this, in particular in cases before the RPTS involving leaseholders. But if no fee is required at all, will this not simply encourage unnecessary use of tribunals for cases that have no merit, which would make their use disproportionate as a means of problem solving?

8.43 Experience in other jurisdictions suggest that, whether or not cases go to tribunals or courts, a requirement to pay modest fees may be a suitable means of deterring those who would abuse the system without excluding those who need to access it.[12] But would that be the correct approach here?

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

Costs

8.44 A third issue is what the rules relating to costs should be. The principle in the civil courts is that the loser pays the costs of the winner. This acts as a powerful incentive to negotiate cases to a conclusion prior to trial, particularly for risk-averse parties.[13]

8.45 There is an important exception in that cases in the small claims track fall outside the normal costs regime; the parties have to bear their own costs. In addition, in tribunal proceedings, costs generally do not follow the event. Each side bears their own costs. This leads to arguments that as a result the tribunal cannot exercise any control over a party who is willing to waste costs to weaken the hand of the other side.

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

[12] C Hunter and J Nixon, *Report to the Law Commission on Australian Tenancy Tribunals* (June 2005), http://www.lawcom.gov.uk/docs/australian_tenancy_tribunals.pdf.

[13] See Law Commission, Public Law Team, *The Impact of Different Costs Regimes on Disputants Choices* (Sept 2005), a review of relevant research on the Law Commission website, http://www.lawcom.gov.uk/docs/impact_of_costs_regimes.pdf.

PRACTICAL QUESTIONS

Location

8.46 The discussion, so far, has been considering questions about the nature of the body required to adjudicate housing disputes. In addition to seeking consultees' views on the basic shape of such a body or bodies, we would welcome views on their location.

8.47 The nature of many housing disputes is often determined by particular considerations that arise at the local or regional level. We therefore have assumed that housing adjudication should be offered in a wide variety of local locations.

8.48 At present both the courts and the RPTS are organised on a regional basis. Her Majesty's Court Service is divided into seven regions each headed by a Regional Director, and 42 areas, each headed by an Area Director responsible for the delivery of services in their area.[14] The RPTS is organised into five regional offices called Rent Assessment Panels.[15]

8.49 Court hearings have traditionally required those in dispute to go to them. Tribunal practice can be more flexible. Hearings are in dedicated centres but are also held in accommodation that has been specially rented. As noted, RPTS hearing frequently involve visits to the premises in question.

Where should housing disputes that require a hearing be held?

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

Should other experiments be tried, particularly in rural areas – for example a travelling court (say a converted bus) which takes the court or tribunal to the people?

Use of information technology

8.50 Experience elsewhere suggest that there is scope for using new information technologies to conduct hearings, for example video-conferencing. These have proved particularly valuable in places such as Australia where huge distances make the cost of attending hearings disproportionate. Given the smaller scale of England and Wales, it may be thought that this would not be necessary.

[14] See Her Majesty's Court Service Framework Document (1 April 2005), http://www.hmcourts-service.gov.uk/cms/files/framework_document_final.pdf (last visited 31 January 2006).

[15] See the RPTS website, http://www.rpts.gov.uk/about_us/about_us.htm (last visited 31 January 2006).

8.51 Another possibility might be the possibility of determining disputes "on-line". The DCA is preparing to offer a "Possession Claims Online" service, analogous to its "money online" service.[16]

Would greater use of information technology be welcomed as offering users greater choice in the ways hearings are conducted?

Personnel issues

8.52 As noted above, membership of the RPTS includes not just lawyers, but also those with other professional qualifications, including surveying and valuation.

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

Would such a move facilitate proportionate housing dispute resolution?

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

Provision of advice

8.53 One of the tasks we envisage for triage plus would be the provision of appropriate advice to those contemplating taking their dispute to a court/tribunal. We accept that the adjudicating body should not offer individuals advice about the merits of a case. But that does not mean they could not do more to help people prepare for their hearings. This could save time in the long run and thus contribute to the proportionality of procedures.

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

Encouraging attendance at hearings

8.54 There is a great deal of research evidence that the outcome of hearings is greatly influenced by whether or not parties attend the hearings. This is not surprising since the majority of disputes turn principally on questions of fact rather than questions of law.

8.55 A number of tribunals (not just in the housing field) have gone to some lengths to encourage parties to disputes and appeals to come to hearings.

Is such encouragement also needed in the housing context?

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

[16] Amendments introduced by the Civil Procedure (Amendment No. 3) Rules 2005 (SI 2005 No 2292), introduced a new rule, r 55.10A, and a new Practice Direction, Practice Direction 55B, which provide for a new on-line system for making possession claims. The service will be accessed via www.possessionclaim.gov.uk. However, at the time of writing the website is not up and running. See http://www.hmcourts-service.gov.uk/cms/2554.htm (last visited 31 January 2006) for more information about plans to deliver this service.

Use of case management powers

8.56 One of the notable changes in civil procedure in recent years has been to give judges considerably increased powers of case management. These have been one of the principal responses to the criticism highlighted by Lord Woolf that cases were taking far too long. In the cases of tribunals, case management powers are available, but it seems that there are few sanctions available against those who ignore procedural rulings made by tribunals.[17]

8.57 By exercising case management powers, the housing adjudication body may be able to encourage parties to use other dispute resolution methods eg ombudsmen or mediation, where they would be more appropriate. It would thus reinforce the role of the triage plus provider. This could be reinforced by a requirement to publish annual statistics about the types of case they dealt with.

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

What sanctions should apply where procedural rulings are ignored?

Formality and informality

8.58 It is often argued that formal procedures may discourage some potential users, or require them to consult specialist advisers, increasing the costs involved. It is often suggested that courts are more formal than tribunals. In fact, research suggests that, insofar as they have knowledge of what goes on, the public does not perceive tribunals to be qualitatively different from courts.[18]

What degree of formality is appropriate for adjudicating housing disputes?

Should this vary depending on the nature of the proceedings?

The need for oral hearings

8.59 Another trend in civil litigation has been significant moves away from heavy reliance on oral advocacy to increased requirements to submit arguments on paper in advance of hearings.

[17] See for example S Blandy, I Cole, C Hunter, D Robinson, R Inniss and S Kane *Leasehold Valuation Tribunals: Extending the Remit – Analysis of Appointment of a manager, insurance disputes and service charges before Leasehold Valuation Tribunals* (January 2001) pp 33 to 40.

[18] H Genn, B Lever, L Gray and N Balmer, *Tribunals for Diverse Users*, Department for Constitutional Affairs Research Series 1/06 (January 2006), p 100, http://www.dca.gov.uk/research/2006/01_2006.pdf (last visited 31 January 2006).

8.60 In the housing context, there are limited classes of proceeding which can be dealt with exclusively on the papers, notably accelerated possession proceedings. (Although not directly related to housing, most planning appeals are now dealt with by written representations, without any hearing or inquiry). The Council on Tribunals has recently conducted a consultation which has asked questions about the need for oral hearings.[19]

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

Adversarial vs inquisitorial procedures

8.61 One of the criticisms of current court procedures is that an adversarial litigation process may not assist the maintenance of ongoing relationships. In some cases, the last thing the parties may want is for their relationship to continue. But in many cases, the landlord-occupier relationship will be a continuing one.

8.62 We have noted that one of the advantages claimed for mediation is that, being consensual rather than confrontational, it is often more conducive to the continuance of business and other long-term relationships.

Can adjudication procedures be made less adversarial?

Would a more inquisitorial approach improve the ability for parties to move on from their dispute?

Impact

8.63 We have noted that the outcome of the adjudication of a housing dispute has a direct impact on the parties. We have also noted that an adjudication involving an important point of law may be a test case that will affect the outcome of many other cases.

8.64 Central to the Department for Constitutional Affairs's vision of a "holistic" approach to problem solving and dispute resolution is the idea that feedback should be provided to prevent similar problems arising in the future.

8.65 There are parts of the tribunal system where this is beginning to occur. For example the Annual Report of the President of Appeal Tribunals raises issues which are fed back to the Department for Work and Pensions.[20]

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

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

[19] See the Council on Tribunals' Annual Report 2004/05, p 10, para 12, http://www.council-on-tribunals.gov.uk/files/ar2005.pdf (last visited 31 January 2006).

[20] The Report by the President of Appeal Tribunals on the standards of decision-making by the Secretary of State 2004-05, http://www.appeals-service.gov.uk/publications/reports_and_business_plan.htm#annual_reports (last visited 31 January 2006).

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

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

Or do consultees think that the types of case that require adjudication tend to be such that it is hard to draw general inferences from them?

Combatting delay

8.66 Our proposed model housing dispute resolution system should divert a number of cases currently heard by courts and tribunals (eg housing possession claims where housing benefit is an issue) to other forms of dispute resolution. The housing forum should therefore have a lower caseload than courts and tribunals currently hearing housing cases.

8.67 In principle, if cases that are not appropriate for adjudication are diverted, other cases can be listed and heard sooner. And if there are fewer adjournments (greater efficiency) delays should be reduced.

Is there further scope to combat delay in proceedings that require adjudication?

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

Hearing times

8.68 One criticism of present procedures is that, in particular, possession proceedings are allocated quite inadequate time for anything other than the most cursory procedure.[21] Removing appropriate cases could enable the adjudicators to devote more time to each case (leading to greater accuracy). If the pressure on listings is reduced, individual litigants may be better able to participate if adjudicators and their support staff can take more time to explain procedures and decisions.

Should current listing practices be altered?

Should parties be able to choose their own hearing times?

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

[21] C Hunter, S Blandy, D Cowan, J Nixon, E Hitchings, C Pantazis and S Parr, *The Exercise of Judicial Discretion in Rent Arrears Cases*, DCA Research Series 6/05 (October 2005), http://www.dca.gov.uk/research/2005/6_2005.pdf (last visited 27 January 2006), pp 29 and 106.

Innovative court orders or disposals

8.69 We have discussed the inability of courts to get to the real underlying problem. Ordering possession for rent or mortgage arrears against a person in deep financial trouble will not alter their fundamental problem – their inability to manage their finances. Ordering possession against a person engaging in severely disruptive anti-social behaviour does not solve the problem if no steps are taken to alter that behaviour.

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

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

Enforcement of decisions

8.70 One of the complaints heard most frequently in relation to the work of the courts is that, once made, it is hard to get judgments enforced. The Department for Constitutional Affairs has recently completed a review of court enforcement procedures, which looked at improved methods of recovery for civil court debt and commercial rent, and a single regulatory regime for warrant enforcement agents.[22]

8.71 Historically tribunals have not had direct powers to order enforcement of their decisions. Unless this principle were to be altered, this would limit the attractiveness of making a tribunal the principal forum for housing dispute adjudication.

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

Should tribunals have enhanced enforcement powers?

Striking the balance

8.72 Many of the potential changes listed above would, if brought into effect, alter current practice. This could have effects that were undesirable, as well as effects that might be thought to be desirable. There are clearly balances to be struck between swift decision-making, accuracy and cost. For example, if resources must be found to pay for triage plus and other forms of dispute resolution, this may lead to reductions in numbers of adjudicators and their support staff. If housing adjudicators hear only "hard" cases (requiring the involvement of lawyers), and fees per case have to rise to cover its running costs, this may produce cost inefficiency.

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

[22] Law Commission, Public Law Team, *Enforcement of court and tribunal decisions* (March 2005), http://www.lawcom.gov.uk/docs/enforcement.pdf, pp 2 to 5 give further details of the enforcement review. See also the Department for Constitutional Affairs website at http://www.dca.gov.uk/enforcement/indexfr.htm.

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

PART 9
PUTTING THE SCHEME INTO PRACTICE: SUMMARY AND CONSULTATION QUESTIONS

INTRODUCTION

9.1 Throughout this paper, we have made clear that our primary purpose is to develop ideas for a more proportionate system for solving housing problems and resolving housing disputes. We want to share these ideas with policy makers and the public at large to see whether there is broad support for the ideas we are advancing, whether they go too far, or not far enough.

9.2 We listed the principal objectives of any reform programme in para 2.64. They were to:

(1) increase people's access to information and processes;

(2) enable the system to operate more flexibly;

(3) allow people to make fully informed choices about what process or procedure is best for them;

(4) as far as possible, seek to resolve both the presenting and any underlying problems;

(5) provide as wide a range of outcomes to people with problems as possible;

(6) provide the feedback required to improve decision making to prevent similar problems arising in future;

(7) operate in a timely and efficient way; and

(8) operate at proportionate cost.

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

9.3 We also identified a range of types of issue which any reformed system needs to be able to accommodate. These were: party-party matters; citizen and state matters; matters involving third parties; factually complex matters, where housing is only a part; legally complex matters, involving several areas of law; and emotionally charged matters (para 3.18).

(1) Do consultees agree that these are the types of issue which any reformed system needs to be able to accommodate?

(2) Are there other classes of matter which also need to be considered?

9.4 We also know that we need to do more work on the practical steps that need to be taken to deliver these ideas on the ground. *The importance of the responses from consultees in helping us to shape those next steps cannot be overstated.* We need to know as much as we can about what currently happens, and how those engaged in this work would like to see things develop in the future. We anticipate that a further round of consultation on more detailed recommendations will be needed.

PROVISION OF INFORMATION AND ADVICE

9.5 The first general issue which we want to explore with consultees is the provision of information and advice. All the relevant research literature shows that the key to getting problems solved and disputes resolved proportionately is getting good information and advice to those with problems or in dispute as early as possible. The same research also reveals there are two perennial problems.

9.6 First, far too often such information and advice is sought too late, by which time the problem or dispute has reached crisis point. Although a detailed strategy for delivering public legal education on housing matters is outside our remit, we hope that our recommendations can reinforce the work currently being undertaken by the Taskforce on Public Legal Education.

9.7 Second, there are many groups who might benefit for information and advice, but they are groups who are extremely hard to reach. These include, for example, members of minority ethnic groups, those with below average levels of educational achievement, and many young people. They also include in the housing context many landlords who are equally uninformed about their rights and obligations.

9.8 We are anxious to learn about those who seek to provide information and advice to the hard to reach groups identified above.

9.9 We know that a great deal of imaginative work is undertaken by, for example, Citizens Advice, Shelter, and the bodies that represent landlords and their managing agents. We anticipate responses from them. But there will be others whose work we do not know about. We ask all consultees to be appropriately immodest about their work!

9.10 In addition, we would like to know of any evaluations of the impact of work that has been done. We have read, for example, in the specialist housing press stories of social landlords being able to cut the costs of dealing with disputes by putting resources into problem solving. Nipping a problem in the bud is cheaper than allowing a dispute to arise.

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

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

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

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

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

IDENTIFICATION OF OPTIONS

9.11 In discussing the hypothetical problem set out at the beginning of Part 2 we noted the fact that a large range of options, both of sources of advice and the dispute resolution mechanisms they suggested, was available. We are interested to explore how a more disciplined basis could be developed for informing people with housing problems or disputes about their options. Our working assumption set out in Part 4 was that few, if any, current advice providers are able to offer their clients the full range of available options.

(1) Is our working assumption correct?

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

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

(4) What practical assistance could be developed which would enable advisers to provide the holistic advice proposed?

(a) Do organisations use structured questionnaires or computer programmes which both help to identify the essential problems of matters in disputes and suggest appropriate and proportionate ways of dealing with them?

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

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

TRANSFORMING PROBLEMS INTO DISPUTES

9.12 Part of our analysis (paras 3.4 – 3.14) draws on research that investigates how problems are transformed into disputes, including disputes which can be determined by a court or tribunal. Among many points, this research argues that the process of transformation is affected both by the advice-giver and by the procedures and rules to be implemented by the dispute-resolver. We offer some practical examples of the process in action at para 2.43. We suggest that this can lead to differences in the ways in which individuals are advised and also differences in the ways in which disputes are resolved. Some of these may be less proportionate than others.

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

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

(3) How might this be achieved?

VALUES

9.13 In Part 2 we identified a number of values which should underpin any reformed system for dealing with housing problems and disputes (see para 2.12). We would welcome views on the relative importance of these differing values. We also noted that many of these values were in conflict one with another; assertion of one could lead to a diminution of another. A proportionate dispute resolution system is one built on these values and which allows appropriate balances to be struck between them.

(1) Have we identified the correct values?

(2) Are there others we should add?

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

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

Impact

9.14 One of the major problems we identified with the current system which our ideas for reform seek to address is how those who solve housing problems or resolve housing disputes can give feedback to the bodies or individuals who caused the problems so that they can alter their practices and prevent problems arising in the future. In other words, how can they learn from experience? We noted that some agencies do offer some forms of feedback (para 2.47). But practice is, we understand, by no means universal.

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

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

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

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

Effectiveness

9.15 One of the core values we identified in Part 2 was effectiveness. Methods of dispute resolution may be ineffective for a number of reasons: failure to produce a decision where one is required; failure to deal with the underlying problem; lack of comprehensiveness or rigidity.

Failure to deal with the underlying problem

9.16 In Part 2 we suggested that the process of transforming problems into disputes can mean that the specific problem which the disputant brings to the attention of the adviser, court or other dispute resolution mechanism (in court proceedings, the specific "cause of action") may not address the underlying problem. We gave the example of possession proceedings being taken for rent arrears, where the underlying problem was failure of housing benefit administration.

9.17 We acknowledge that there are limits to the extent that any system for solving problems and resolving disputes can go. Nevertheless:

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

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

Lack of comprehensiveness

9.18 Another related issue is about the extent to which current mechanisms for dealing with problems and disputes are sufficiently comprehensive to address the issues that arise in practice. We suggested that one deficiency was the difficulty of resolving issues on a collective as opposed to an individual basis (para 2.29). We also suggested that the present system may not be able to deal readily with systemic problems such as discrimination (para 2.30).

9.19 Another, rather different, example arose in considering the relationship between courts making decisions on possession and local authorities making decisions on applications for accommodation by the homeless. At present these are seen as quite distinct activities (para 8.36).

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

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

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

(b) connected issues affecting the same person

which a reformed system should properly address?

(3) If so, what are these issues?

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

Rigidity

9.20 The system of housing dispute resolution may be ineffective if there are rules which prevent the resolution of disputes without going to more than one dispute resolver. We suggest that some of the current jurisdictional barriers might need to be removed (see eg para 2.31). We are anxious to know consultees' views on the extent to which rigidity, for example as between courts and ombudsmen, contributes to disproportionate dispute resolution, whether through ineffectiveness, delay or costs.

Are there particular rules of law or rules of procedure that inhibit proportionate dispute resolution?

Efficiency/cost

9.21 Efficiency or cost is another core value. The relationship between the problem or the dispute and the cost of dealing with it must be looked at as part of striking an appropriate balance between the conflicting values. Particularly as regards the expenditure of public money, but also more generally, it is important that the costs of following a particular procedure do not get out of balance with what is at stake.

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

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

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

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

9.22 It seems inevitable that there will be continuing pressure to identify potential cost savings. This consultation offers those with knowledge of the system the opportunity to identify ways in which expenditure might be redirected, rather than having cuts imposed by those who may have less understanding. Answers to these questions will be a key element in building the case for the reinvestment of savings into new forms of (proportionate) service delivery.

9.23 We would be interested in consultees' views as to whether there are other sources of funding which could contribute to the cost of proportionate housing dispute resolution.

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

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

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

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

(5) Could householders be encouraged, or even required to take out "dispute resolution expenses" cover?

(6) Alternatively could a supplement to, or tax on, the cost of the policies themselves be used to pay for elements of a housing dispute resolution system, such as triage plus providers or tribunals?

Lack of coherence

9.24 One of the reasons why the identification of the range of options is so difficult is the huge number of bodies offering advice or dispute resolution services. This fragmentation can be symptomatic of, and lead to, inappropriate balances being struck between the core values. We are anxious to ensure that the entrepreneurial spirit that obviously exists should not be undermined.

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

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

9.25 We know that there are a number of umbrella organisations who themselves advise advice agencies. We will be particularly interested to hear their views on whether they think there are ways in which overall standards of advice giving need to be improved and if so how this might be achieved.

Delay

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

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

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

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

TRIAGE PLUS

9.27 In Part 4 we set out our ideas relating to "triage plus". We see triage plus bringing greater coherence to housing advice provision and the direction of housing problems and disputes to appropriate methods of resolution. The issue of compulsion (as to the use of triage plus, or acceptance of any recommended dispute resolution methods) or encouragement to choose appropriately is important.

9.28 Triage plus would also involve oversight of the housing dispute resolution system, enabling different parts of the system to learn from each other. The triage plus provider would pass on concerns about systemic problems (eg widespread disrepair, housing benefit administrative delays) apparent from the matters about which advice is sought, or from courts' or ombudsmen's caseloads to the decision makers responsible. Who would provide triage plus, where and how, and how it would be funded and organised are important questions, given that additional funds are unlikely to be made available.

9.29 For convenience, we set out here the questions we posed in the text.

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

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

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

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

(5) Do consultees agree that the triage plus provider should be able to refer cases to a court or ombudsman without itself being a party to a dispute? (See para 4.20)

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

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

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

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

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

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

(12) Who should provide triage plus? (para 4.33-4.36)

(13) Where is triage plus to be provided? (paras 4.37-4.41)

(14) Should use of triage plus be compulsory? (paras 4.42 –4.46)

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

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

(17) How should triage plus be organised? (paras 4.47 to 4.49)

(18) How can triage plus be funded? (paras 4.50 – 4.55)

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

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

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

MANAGEMENT RESPONSES

9.30 In Part 5 we set out our views on the relevance of management responses to solving housing problems and resolving housing disputes. We saw this as an important feature of the "accountability model" of analysis that has informed our thinking (paras 3.7 – 3.13).

9.31 We saw the benefits of management response methods as being their relative cheapness, that they ensure that decisions are right first time, or that if they are not right first time, are quickly rectified (para 5.14). In the specific context of housing problems, we suggested that a focus on management responses could lead to better co-ordination of possession proceedings and decisions on homelessness (para 5.42 and para 8.36). It could also lead to more appropriate use of possession proceedings, which would not be taken unless prior issues such as housing benefit problems had been sorted out (para 5.43). Another consequence could be more appropriate outcomes (para 5.44)

9.32 We listed the following issues for consultation.

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

(2) What disadvantages do they have?

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

(4) Are there types of problem which they cannot effectively address?

(5) Is there scope for the further development of the use of these methods?

(6) If so, what is that scope?

(7) What incentives can be created to encourage greater use of these methods?

(8) What role can public interest groups play in ensuring the accountability of housing services? We are especially interested to hear from any public interest groups with experience of having done this.

(9) What limits are there to the effectiveness of public interest groups within housing?

(10) Are there stakeholders who would benefit from the advocacy of a public interest group who are currently unrepresented by such a group?

9.33 There are a number of issues about the application of the management response model to particular housing issues.

(1) To what extent might the techniques be developed in the context of rent arrears possession proceedings?

(2) To what extent should and could private landlords be subject to these techniques?

(3) To what extent should mortgage lenders be encouraged or required to engage in these techniques prior to, or instead of, possession proceedings?

OMBUDSMEN

9.34 Part 6 considers the role of ombudsmen in the housing context. There are a number of ombudsmen, some statutory (eg the Local Government Ombudsmen), and some privately established (eg the Estate Agents Ombudsmen) which investigate housing disputes. Not all apply the same criteria in judging cases (eg maladministration) or adopt the same working practices (eg using mediation, oral hearings). The interface between ombudsmen and the courts can be problematic. The fact that ombudsmen's decisions are not generally enforceable in the courts may raise questions about the extension of their role to the private sector.

9.35 Again we set out the issues for consultation we raised in that Part.

(1) What is the role of ombudsmen in a proportionate system for resolving housing disputes?

(2) **Can they play an effective role in private sector contexts?**

(3) **What is the potential for developing their roles?**

(4) **Are there both gaps and overlaps in service provision which need to be addressed?**

(5) **Can and should there be greater uniformity of approach in their working practices?**

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

(7) **Do they face institutional barriers which prevent them operating as effectively as they could?**

(8) **What is the current relationship between ombudsmen and the courts, both in law and in practice?**

(9) **What should it be?**

(10) **How should this relationship be managed?**

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

(12) **What are consultees' views on the different approaches to investigation revealed by current practice?**

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

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

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

(16) **Should the recommendations of ombudsmen dealing with housing matters be made directly enforceable, eg by taking enforcement proceedings in court?**

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

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

(19) **Can ombudsman services retain their coherence *and* extend their jurisdiction?**

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

(1) liaise with housing bodies against whom significant numbers of complaints are received;

(2) follow up promises to effect change made by housing bodies;

(3) develop codes of practice in relation to housing disputes;

(4) conduct investigations on their own initiative.

Do consultees think such activities are valuable?

9.37 Finally:

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

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

MEDIATION

9.38 The role of "appropriate dispute resolution" ("ADR"), in particular mediation, is considered in Part 7. An agreement to settle a dispute reached by the parties to it, with the help of a neutral third party, may include solutions which a court could not have ordered. The parties may be more likely to comply with an agreement they reached themselves than a decision imposed on them. Mediation may maintain or restore ongoing relationships (eg between neighbours). The role of the courts in encouraging mediation can be controversial, if the parties feel coerced. Some commentators have concerns about the use of mediation where there is an imbalance of power between the parties.

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

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

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

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

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

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

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

9.39 We would particularly value personal accounts of the use of mediation processes in housing contexts.

ADJUDICATING HOUSING DISPUTES: COURT OR TRIBUNAL?

9.40 Part 8 raises a large number of issues about the role of a formal adjudicatory body in resolving housing disputes. A variety of courts (civil and criminal) and tribunals currently hear housing cases. We acknowledge the need for such a body eg to provide authoritative interpretations of the law, hear appeals, and comply with ECHR requirements for an independent and impartial tribunal (para 8.5). We note their strengths, such as independence, procedures based on transparency and fairness, and the delivery of authoritative, accurate outcomes (para 8.11) but also what some regard as their weaknesses, relating to cost, delay, inequality of arms and failure to consider underlying issues (paras 8.12 to 8.15). Some people have called for a specialist housing court or tribunal.

(1) Should such a body be specialist or generalist? (paras 8.17 to 8.22 and para 8.34)

(2) Should it be a court or tribunal? (paras 8.20 to 8.22 and 8.28 to 8.34)

(3) Should current civil and criminal jurisdictions be amalgamated? (para 8.23)

(4) Does a proportionate system of housing dispute resolution require the closer integration of criminal and civil courts? (paras 2.34, 8.26 and 8.27)

(5) Do legal processes for dealing with matters relating to anti-social behaviour work in a proportionate way, or should they be altered? (paras 2.34 and 8.27)

(6) What values would be affected by any greater integration of civil and criminal procedures? (para 8.25 to 8.27)

(7) What reforms are needed to enable collective issues to be better determined by a court or tribunal? (para 8.24)

(8) Are there any types of proceedings that should be excluded from a court or tribunal? (para 8.35)

(9) In what circumstances should legal aid be available for housing proceedings before tribunals or courts? (para 8.38)

(10) Should there be a uniform policy relating to the fees to be paid for taking proceedings in a court or tribunal? (paras 8.41 to 8.43)

(11) Should the small claims limit for housing disrepair cases be altered? (paras 8.39 and 8.40)

(12) What should be the costs rules in a proportionate system of housing dispute resolution? (paras 8.44 and 8.45)

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

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

(15) **Should other experiments be tried, particularly in rural areas – for example a travelling court (say a converted bus) which takes the court or tribunal to the people?**

(16) **Would greater use of information technology be welcomed as offering users greater choice in the ways hearings are conducted? (paras 8.50 and 8.51)**

(17) **Should the housing adjudication body involve not just lawyers but also those with a wider range of professional expertise? (para 8.52)**

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

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

(20) **To what extent should the court/tribunal itself try to help those who want to use its services? (para 8.53)**

(21) **Is such encouragement (to the parties to disputes to attend hearings) also needed in the housing context? (paras 8.54 and 8.55)**

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

(23) **What case management powers should be available in the context of housing adjudication? (paras 8.56 and 8.57)**

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

(25) **What degree of formality is appropriate for adjudicating housing disputes? (para 8.58)**

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

(27) **To what extent can housing disputes be adjudicated without the need for oral hearings? (paras 8.59 and 8.60)**

(28) **Can adjudication procedures be made less adversarial?**

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

(30) **Could feedback from those who adjudicate housing disputes have the effect of preventing problems arising in future? (paras 8.63 to 8.65)**

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

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

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

(34) Or do consultees think that the types of case that require adjudication tend to be such that it is hard to draw general inferences from them?

(35) Is there further scope to combat delay in proceedings that require adjudication? (paras 8.66 and 8.67)

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

(37) Should current listing practices be altered? (para 8.68)

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

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

(40) Should courts or tribunals have a power to require persons to receive advice on money management? (para 8.69)

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

(42) Are there particular problems involved in the enforcement of decisions relating to housing? (paras 8.70 and 8.71)

(43) Should tribunals have enhanced enforcement powers?

(44) Should there be restrictions on the use of legal representation (as in some housing tribunals in Australia and New Zealand)? (para 8.72)

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

THE PRACTICAL CONSEQUENCES OF OUR REFORMS

9.41 This issues paper does not set out a detailed blueprint for institutional or legal change. Nevertheless it is useful to illustrate the practical benefits of the ideas we discuss. The table below returns to the hypothetical example of housing unhappiness discussed in paras 2.2 and 2.3. T is a local authority tenant. She lives in a flat on an estate that is run-down and unpopular. Her flat has not been painted for years and the kitchen is out-dated. The flat also suffers from condensation. She has a three-year-old child who suffers from asthma. A teenage gang hang about the communal areas of her block making noise and harassing the tenants, particularly after dark.

Action/person consulted by T	What might happen now	Situation in reformed system
Do nothing.	Possibly due to ignorance of options, cynicism, fatigue.	More likely to be due to conscious choice – having received leaflet from council about its complaints system, along with contact details for local CAB (triage plus provider) and CLS Direct, and having seen posters and leaflets at GP's surgery, she is aware of options but chooses not to exercise them.
Talk to neighbour.	Neighbour says it's never worth complaining, so T does nothing.	Neighbour had used council's new general complaint system to complain about housing dept's non-response to repair request. System introduced after ombudsman criticised council's approach to complaints. Neighbour received apology and timetable for proposed programme of repairs. T complains and gets same response. Housing dept management notes that disrepair complaints still being received from this estate so decides to introduce estate wide repair and improvement programme.
Talk to Sure Start worker.	Sure start worker considers effect on relationship with T's child.	No change.
Consult GP about son's asthma.	GP writes to landlord requesting transfer to less damp property.	No change.
Consult GP about stress and depression.	GP prescribes appropriate medication, and suggests she talks to CAB outreach facility at surgery.	No change.
Raise issues with local tenants' management committee.	Committee sympathises, but says council has said flats will be redecorated and improved "as soon as money is available".	Tenants management committee had been consulted by council as part of drawing up repair and improvement programme. Agreed to prioritise tackling damp over installing new kitchens. Tells T that double glazed windows to

		be installed in 12 months' time in her block .
Write to local councillor.	Councillor promises to raise her case with housing department – councillor told that repairs will be carried out "when money is available".	Councillor contacts housing department, passes on T's complaints. Councillor and T are told about agreed repair programme. T is sent leaflet about local triage plus provider and CLS direct, and told housing managers now looking into ASB with view to seeking ASBOs.
Write to MP.	MP writes to council and Housing Minister.	Council explains to MP that repairs programme has been agreed and that housing managers now looking into ASB with a view to seeking ASBOs against teenage gang. Housing Minister explains limited funds available for council housing repair programme, that priorities agreed at local level, and gives summary of powers available to councils to tackle ASB.
Go to police.	Police advise that without evidence there's little they can do.	Police pass on complaint to council housing department. Complaint one of many from this estate, taking total over "trigger threshold" for further scrutiny by senior housing managers, who visit estate and decide to seek ASBOs against teenage gang. Council agree that estate warden should spend more time patrolling area near this block, to gather evidence.
Go to estate housing office.	Officer tells her that her block will be decorated and improved "as soon as money is available". Leaflets available about controlling condensation and dealing with harassment.	Officer explains repair programme agreed with tenants' management committee. Gives her leaflet about controlling condensation. Notes that complaint about teenage gang is one of many that week from that building. Local housing officers report to senior management on numbers of ASB complaints each week from different buildings and

		estates. T's complaint takes total over "trigger threshold" for further scrutiny by senior housing managers, who visit estate, talk to officer, and decide to seek ASBOs against teenage gang.
Visit citizens advice bureau.	Suggests writing to councillor or MP, using local authority complaints procedure, and complaining to Local Government Ombudsman about failure of complaints system. Suggests she go to local law centre or consult solicitor.	As a local "triage plus" provider, CAB is well aware of problems on this estate. It had helped previous client to complain to Local Government Ombudsman about the council's poor response to repairs which led to new complaints system being introduced. Reports to council on numbers of disrepair complaints received by residents of particular estates. Explains to T that council has agreed improvement programme for estate. Also advises on other options: disrepair action in court (but advises that she'd not get legal aid for it, and that local court wouldn't be able to hear case for 9 months); statutory nuisance prosecution (in respect of which CAB would seek telephone advice from specialist housing solicitor). Advises that in this case, no point writing to MP or councillor as council well aware of the problems. T's son's health problems make her case more urgent than most so that rather than suggesting she wait for programmed repairs and improvements, CAB advises her to complain to council about ASB and disrepair, with GP's report on son's health, and ask for urgent repairs or transfer. After initial refusal by council, CAB suggests community mediation meeting to discuss her case, or else statutory nuisance prosecution. Mediator helps T and housing officer agree that she can move to flat in another

		block on nearby estate which has already been improved, but where still some ASB issues. ASB complaint to council triggers action by housing managers as described above.
Visit law centre.	Suggests legal proceedings against council relating to condition of flat. Suggests pressing council to take steps against teenagers, including ASBOs.	Law centre is also triage plus provider. Presents same options and gives same advice as CAB.
Visit private practice solicitor.	Investigates whether actionable disrepair, suggesting that issuing proceedings may trigger offer of move to another estate. Investigates possibility of private prosecution for statutory nuisance. Takes steps within terms of contract with Legal Services Commission.	Solicitor knows about estate improvement programme and likely delay and lack of legal aid for court proceedings issued for disrepair. As the expert which the CAB would consult about statutory nuisance prosecutions, solicitor advises her on this option, but suggests she tries complaining to council first, asking for repair or transfer. If complaint unsuccessful, would bring private prosecution.
Visit solicitor used for divorce.	Tells her there is no solicitor in the area with a housing franchise and she should complain to her local MP. Tells her about CLS Direct housing advice service.	Solicitor knows that CAB and law centre are housing triage plus providers. While he can't help T directly, he phones CAB and makes appointment for her there, gives her their leaflet and tells her about CLS Direct housing advice service as well. If she phoned CLS Direct, they could provide initial advice or connect her to adviser at law centre or CAB.
Complete council tenant satisfaction survey.	Majority of tenants express serious concerns about anti-social behaviour. Local authority decides to prioritise community safety on the estate and	Council aware that ASB still a serious problem on the estate, but since introduction of estate warden, has become less of problem than in previous tenants' survey. Continues to monitor

	launches a number of initiatives.	data from estate offices about ASB complaints, and seeks ASBOs against teenage gang.

APPENDIX A
LIST OF ATTENDEES AT HOUSING DISPUTES SEMINAR 9 SEPTEMBER 2004

A.1 The following people attended the seminar held by the Law Commission on 9 September 2004 at the Judicial Studies Board Conference Centre, London.

(1) Ardill, Nony, Legal Action Group

(2) Aziz, Hameed Habib, Leeds City Council

(3) Backhouse, Wendy, Law Society

(4) Biles, Dr Michael, Independent Housing Ombudsman

(5) Blandy, Sarah, Centre for Economic and Social Research, Sheffield Hallam University

(6) Bratten, Helen, The Rent Service

(7) Bryant, John, National Housing Federation

(8) Campbell, Russell, Immigration Adjudicator and District Judge

(9) Clark, Debbie, DCA, Community Justice Division

(10) Cuningham, Sandra, ODPM

(11) Daniels, John, ODPM

(12) Dabezies, Carlos, District Judge, Willesden County Court

(13) Dickie, Fiona, Law Centres Federation

(14) Edwards, Sue, National Association of Citizens Advice Bureaux

(15) Evans, Lynne, Law Centres Federation

(16) Flynn, Reidy, Financial Ombudsman Service

(17) Frazer, Andrew, DCA

(18) Gallagher, John, Shelter & Housing Law Practitioners Association

(19) Greathead, Andrew, Birmingham City Council

(20) Greenberg, Lawrence, Lawrence Greenberg Consultancy

(21) Gregory, District Judge, Bow County Court

(22) Griffith, Adam, Advice Services Alliance

(23) Essien, Tony, Leasehold Advisory Service (LEASE)

(24) Hunter, Caroline, Centre for Economic and Social Research, Sheffield Hallam University

(25) Kemp, Dr Vicky, Legal Services Commission, Research

(26) Lewis, Ann, Advice Services Alliance

(27) Lister, Sam, Chartered Institute of Housing

(28) Long, Steve, Chief Rent Officer for Wales

(29) MacDonald, Fran, National Assembly for Wales

(30) MacMahon, Peter, Local Government Ombudsman

(31) Bryant, Stephen, The Rent Service

(32) McGrath, Siobhan, Residential Property Tribunal Service

(33) Morgan, Phil, Tenant Participation Advisory Service

(34) Mulcahy, Professor Linda, The School of Law, Birkbeck College

(35) Pavlich, Professor George, University of Alberta, Canada

(36) Price, Howard, Chartered Institute for Environmental Health

(37) Samupfonda, Evis, Southwark Council

(38) Searle, Sheila, Kingston Legal Services

(39) Stimpson, Mike, Southern Private Landlords Association

(40) Stockton, Paul, DCA, Head of Administrative Justice Division

(41) Thomas, Elizabeth, Local Government Ombudsman for Wales

(42) Ventrella, Matt, Advice UK

(43) Walker, David, Southwark Mediation

(44) Walsh, Michelle, Housing Corporation

(45) Wayte, Ruth, Legal Services Commission, Policy

(46) Wrankmore, Mike, DCA

(47) Partington, Professor Martin, Law Commission

(48) Percival, Richard, Law Commission

(49) Carr, Helen, Law Commission

(50) Cawte, Eleanor, Law Commission

(51) Brimacombe, Dr Helen, Law Commission

(52) Baldwin, Dr Tim, Law Commission

(53) Kirton-Darling, Edward, Law Commission

(54) Litten, Jessica, Law Commission

(55) Turney, Richard, Law Commission

(56) Atkins, Michael, Law Commission

APPENDIX B
LIST OF HOUSING DISPUTES EXPERT WORKING GROUP MEMBERS

B.1 The following people were members of the Law Commission's expert working group on housing disputes.

(1) Lawrence Greenberg, Lawrence Greenberg Consultancy, Accredited Mediator, Accreditation Network UK Accreditation Consultant, expertise in dispute resolution, governance and project management

(2) Neil Wightman, Project Manager, Housing Options Group, Housing and Adult Social Care, London Borough, Camden

(3) David Hawkes, Manager, Gloucestershire Money Advice Service

(4) Patrick Reddin, Director of Reddin & Co Ltd. Chartered Building Surveyors and Corporate Building Engineers, Honorary Secretary of the Association of Building Engineers, specialist in housing and disrepair

(5) Sue Baxter, Housing Policy Officer, SITRA

(6) Val Reid, Policy Officer (Alternative Dispute Resolution), Advice Services Alliance

(7) Adam Griffith, Policy Officer (Legal Services), Advice Services Alliance

(8) Caroline Hunter, Senior Lecturer in Housing Law, Centre for Economic and Social Research, Sheffield Hallam University, member of Socio-Legal Studies Association Executive Committee

(9) Howard Springett, Kingston Citizen's Advice Bureau

(10) Jo Lavis, Affordable Housing, Rural Communities Division, Department for Environment, Food and Rural Affairs

(11) John Martin, Bradford Resource Centre and Community Statistics Project

(12) Kimi Rochard-Bovell, Private Housing Information Unit, Co-ordinator of Willesden County Court Advocacy Service, Brent Council

(13) Philip Walker, Area Co-ordinator, The London Magistrates' Courts, Support & Information Service, Her Majesty's Courts Service, formerly at Brent Council

(14) Sally Morshead, member, formerly chair, of the Law Society Housing Law Committee

(15) Bridget Stark, Camden Federation of Private Tenants

APPENDIX C
STATISTICAL MATERIAL

C.1 One of the problems with the present system of housing dispute resolution is the lack of any truly comprehensive information about the numbers of problems people have, the extent to which they take advice, and the steps that follow once that advice has been given. We also know rather little about the costs involved. We set out below examples of some of the information that is available, but it is stressed that much of this is based on data whose quality is not always clear.

C.2 One of the purposes of the "knowledge-bank" function of the triage system that we propose would be the establishment of much securer information about the use of different parts of the dispute resolution system, and the costs associated with that use.

C.3 Table 1 offers estimates of the numbers of housing problems and justiciable housing problems.

Table 1: Baseline data on the number of people with housing problems		
Estimated number of justiciable rented and owned housing problems experienced in England and Wales	approx 2 m	annually[1]
Estimated experience of housing problems in England and Wales	1 in 12 adults	over 3 years[2]

C.4 Table 2 presents data on the most frequently arising housing problem – the accrual of rent arrears. The number of notices seeking possession of course relates to all grounds for possession, but as the overwhelming number of possession proceedings are brought for rent arrears, this gives a good indication of the potential use of possession proceedings for rent arrears cases. Two points may be noted. Not every case of rent arrears translates into the issuing of a notice seeking possession. Presumably in many cases the problem is resolved before that stage is reached. Second, it may be noted that the number of actual proceedings started in court is far lower (see Table 6).

Table 2: Data on rent arrears		
Proportion of social renting tenants in England reporting that they were at least 2 weeks in arrears during last year	14%	2002/03[3]

[1] Based on responses to survey by H Genn, *Paths to Justice* (1999).

[2] P Pleasence, A Buck, NJ Balmer, A O'Grady and H Genn, *Causes of Action: Civil Law and Social Justice – The Final Report of the First LSRC Survey of Justiciable Problems* (2004), p 14.

Proportion of council tenants classed by local authorities as having been in arrears, England and Wales	39%	annually[4]
Notices seeking possession issued by social landlords, England	550,000	annually[5]

C.5 Table 3 sets out information about specific types of housing problem. Again, the contrast between some of these figures (eg on noise) and the numbers of court processes started (see Table 6) is stark.

Table 3: Data on specific types of housing related problem		
Complaints received by local authority environmental health officers about noise nuisance from domestic premises, England and Wales	220,605	2003/04[6]
Neighbour disputes reported to local authority housing and environmental health departments	250,000	annually[7]
Proportion of the total *Paths to Justice* survey sample reporting problems getting their landlord to carry out repairs	3%	over 5 year period[8]
Estimated tenancy deposit disputes in England	140,000	annually[9]

[3] Survey of English Housing live table S434 (2004) Office of the Deputy Prime Minister, http://www.odpm.gov.uk/pub/62/S433Excel21Kb_id1155062.xls (last visited 10 March 2006).

[4] Housing Rent Arrears and Benefits Statistics 2001,CIPFA statistical information service (2002) and Housing Rent Arrears and Benefits Statistics 2003, CIPFA statistical information service (2004) cited in H Pawson, J Flint, S Scott, R Atkinson, J Bannister, C McKenzie and C Mills, *The Use of Possession Actions and Evictions by Social Landlords* (2005) ODPM p 21.

[5] H Pawson, J Flint, S Scott, R Atkinson, J Bannister, C McKenzie and C Mills, *The Use of Possession Actions and Evictions by Social Landlords* (2005) ODPM p 8.

[6] Noise Complaints and Prosecutions 2003-2004, Chartered Institute of Environmental Health, available on its website at http://www.cieh.org/research/stats/noise03.htm.

[7] Report of Policy Action Team 8: Anti-Social behaviour, Social Exclusion Unit (2000), cited in *Sustainable Solutions to Anti-social Behaviour: local government's joined-up approaches to tackling anti-social behaviour* (September 2004), Local Government Association.

[8] H Genn, *Paths to Justice* (1999) p 36.

[9] Figure suggested by extrapolation from 2002/03 Survey of English Housing data.

C.6 Indications of the numbers of people who seek advice are set out in Table 4. These show that, although many people go for advice, the figures are still significantly lower than the estimated numbers of housing problems (see Table 1).

Table 4: Data on the number of people seeking advice		
Housing related "matter starts" funded by the Legal Services Commission	87,177	2002/03[10]
New housing problems dealt with by citizens advice bureaux in England and Wales	549,000	2003/04[11]
Calls to Shelter's freephone housing advice line	60,000	annually[12]
Homeless or vulnerably housed people advised by CRISIS	5,959	2003[13]
Cases dealt with by the National Homeless Advisory Service	9,842	2003/04[14]
People advised by Housing Justice in relation to housing or homelessness issues	20,000	annually[15]
Calls to the Leasehold Advisory Service ("LEASE")	27,438	2004[16]

C.7 Table 5 gives data about the use of housing related ombudsmen and appropriate dispute resolution ("ADR") services. We include here data on use of the RICS complaints procedure.

Data on the numbers of people using housing related ombudsmen and ADR services		
Housing related complaints received by the Local Government Ombudsmen	6,802	2003/04[17]
New complaints received by the Independent Housing Ombudsman Service	4,207	2003/04[18]

[10] *Home Remedies: The challenges facing publicly funded housing advice*, (May 2004) Citizens Advice p 2.

[11] Citizens Advice Annual Report 2003/04.

[12] http://england.shelter.org.uk/home/home-835.cfm (last visited 10 March 2006).

[13] "What we do" leaflet on Crisis website http://www.crisis.org.uk/pdf/AboutCrisis.pdf.

[14] National Homelessness Advice Service Annual Review 2003/04.

[15] Housing Justice website at http://www.justhousing.org.uk/alliance/alliancehacs.htm (last visited 10 March 2006).

[16] LEASE Annual Report 2004, para 5.2.

[17] Data supplied by D Cowan.

Disputes referred to community mediation (not all necessarily relate to housing) and accepted as suitable	12,000	annually[19]
Disputes handled by the Royal Institution of Chartered Surveyors Dispute Resolution Service (not all will be housing disputes)	9,341	2003/04[20]
Complaints received by, and within the terms of reference of, the Ombudsman for Estate Agents	2,320	2003/04[21]

C.8 Possibly the most striking feature of Table 6 is that it is apparently impossible to find data on the use of proceedings for harassment and unlawful eviction after 1996.

Table 6: Data on the use of court procedures		
County court possession actions entered (rent and mortgage) England and Wales	232,257	2004[22]
County court warrants of possession for land issued	118,750	2004[23]
Housing (non-possession) county court small claims, England and Wales	577	2004[24]
County court applications for occupation orders under the Family Law Act 1996, part 4, England and Wales	10,239	2004[25]
Prosecutions commenced for unlawful eviction or harassment of occupiers	143	1996[26]
Anti-social behaviour orders, England and	2,660	2004[27]

[18] Independent Housing Ombudsman Service Annual Report 2004.

[19] J Gray, M Halliday and A Woodgate, *Responding to community conflict – A review of neighbourhood mediation* (2002), Joseph Rowntree Foundation.

[20] Royal Institution of Chartered Surveyors Annual Review 2003-04, p 11.

[21] Ombudsman for Estate Agents Annual Report 2004 on the OEA website www.oea.co.uk.

[22] Judicial Statistics England and Wales for 2004, Department for Constitutional Affairs ("DCA")(2005) Cm 6565, p 58.

[23] Judicial Statistics England and Wales for 2004, DCA (2005) Cm 6565, p 59.

[24] Judicial Statistics England and Wales for 2004, Department for Constitutional Affairs ("DCA")(2005) Cm 6565, p 55.

[25] Judicial Statistics England and Wales for 2004, DCA (2005) Cm 6565, p 78.

[26] D Cowan, "Harassment and Unlawful Eviction in the Private Rented Sector – A Study of Law In(-)Action [2001] 65 The Conveyancer 249.

Wales		
Prosecutions for noise nuisance coming from domestic premises	509	2003/04[28]

C.9 Table 7 sets out information about the workloads of the Residential Property Tribunal Service ("RPTS"). This shows that total numbers of proceedings going through these specialist systems are far lower than those going through the courts.

Table 7: Data on the use of the RPTS and the Lands Tribunal		
Rent Assessment Committee cases	3,400	2005[29]
Leasehold Valuation Tribunal cases	3,700	2004[30]
Estimated caseload of Residential Property Tribunal under the Housing Act 2004 provisions	6,000	annually[31]
Leasehold reform cases received by Lands Tribunal	90	2004[32]

[27] Home Office statistics on http://www.crimereduction.gov.uk/asbos2(cjs)jun05.xls (last visited 10 March 2006).

[28] Noise Complaints and Prosecutions 2003-2004, Chartered Institute of Environmental Health website at http://www.cieh.org/research/stats/noise03.htm.

[29] Prediction by Mike Ross, Residential Property Tribunal Service ("RPTS").

[30] Data supplied by Mike Ross, RPTS.

[31] Prediction by Mike Ross, RPTS.

[32] Judicial Statistics England and Wales for 2004, DCA (2005) Cm 6565, p 90.