A Report by

JUSTICE

Justice and the Individual

Chairman of Committee

David Edwards

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JUSTICE

British Section of the International Commission of Jurists

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JUSTICE

Extracts from the Constitution

PREAMBLE

Whereas JUSTICE was formed through a common endeavour of lawyers representing the three main political parties to uphold the principles of justice and the right to a fair trial, it is hereby agreed and declared by us, the Founder Members of the Council, that we will faithfully pursue the objects set out in the Constitution of the Society without regard to consideration of party or creed or the political character of governments whose actions may be under review.

We further declare it to be our intention that a fair representation of the main political parties be maintained on the Council in perpetuity and we enjoin our successors and all members of the Society to accept and fulfil this aim.

OBJECTS

The objects of JUSTICE, as set out in the Constitution, are:

to uphold and strengthen the principles of the Rule of Law in the territories for which the British Parliament is directly or ultimately responsible; in particular to assist in the maintenance of the highest standards of the administration of justice and in the preservation of the fundamental liberties of the individual;

to assist the International Commission of Jurists as and when requested in giving help to peoples to whom the Rule of Law is denied and in giving advice and encouragement to those who are seeking to secure the fundamental liberties of the individual;

to keep under review all aspects of the Rule of Law and to publish such material as will be of assistance to lawyers in strengthening it;

to co-operate with any national or international body which pursues the aforementioned objects.

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This Committee was appointed by
the Council of JUSTICE in July 1990
with the following terms of reference:-

'To enquire into the provision of legal services to individuals who are unable to afford their market cost'.

This report has been endorsed and approved for publication by the Council of JUSTICE

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CHAPTER 1

Introduction

1.1 Our present system of civil justice is Court-based and adversarial. Its use requires skilled and expensive lawyers. It is not well suited to the needs of a modern democracy whose citizens find the civil judicial process daunting, especially because of its cost. Furthermore central government has found it increasingly difficult both to staff the Courts properly and to allow the necessary legal aid lawyers to be paid a fair rate for the job.

1.2 At the same time the citizen's chances of becoming entangled with the law have greatly increased because of the complexity of the law and social developments such as the dramatic growth of house and car ownership. People are now generally better educated and their sense of fairness demands more informal procedures and greater personal involvement in the resolution of their disputes. Thus there is a mismatch between what the ordinary citizen needs and what the Civil Courts currently provide. It is for these reasons that the Lord Chancellor has been led to scrutinise the present Court system.

1.3 JUSTICE would start from a quite different place, namely, what are the reasonable needs and requirements of the individual citizen? Rather than start with the Courts, we should look at how to help the individual obtain a wider range of legal services than are now available under the Legal Aid schemes.

1.4 This report considers what can be done to help those individual citizens who cannot afford to pay for legal services at current commercial rates. While the impact of the law on the life of the individual is continually increasing, more and more citizens find the cost of legal advice and action is out of their reach.

1.5 This is not, however, true of all kinds of legal work. Competition induced by Government action has reduced the cost of conveyancing considerably. Indeed, there are relatively few complaints about non-contentious costs generally. It is in the field of litigation where legal costs are seen to be beyond the reach of the man in the street.

1.6 Many disputes are currently not resolved, because of fear of cost. These can often be addressed by other means including mediation, conciliation and ombudsman-type procedures. These methods of alternative dispute resolution are considered below.

1.7 The citizen also urgently needs help which is not now properly provided, such as advice and representation in tribunal cases, especially in relation to industrial tribunals and social security appeals. There is also a need to make proper provision for those appearing in County Courts on possession cases. The Legal Aid system must be made more cost effective. This will provide much-needed help in other areas.

1.8 Is it really still acceptable that an individual can lose his home or livelihood without any access to legal help, but if he is faced with a routine criminal charge, the State will provide both solicitor and counsel, irrespective of his criminal record?

1.9 Because of the manpower and financial constraints much more needs to be done by the advice agencies, especially Citizens Advice Bureaux (CABx). This will only happen if there is a revision of the national policy, which is basically that individual CABx must be funded by local authorities without any uniform basis.

1.10 The very large sums currently spent on financing representation (£1bn on civil and criminal legal aid) are not all well spent. There is a need to make savings in some of these areas. These could finance essential new expenditure for the benefit of the consumer. Unfortunately the Lord Chancellor seems to regard the maintenance of the existing Court system as paramount, although the Treasury is unwilling to bear the cost. 'What cannot be afforded', says the Lord Chancellor, 'is a straightforward extension of Legal Aid eligibility limits'.

1.11 To give effect to the need for a more consumer-oriented legal system this report looks at all the main ingredients:

i) the Courts themselves

ii) different ways of paying lawyers

iii) alternatives to the Courts

iv) those areas where with suitable change we could do without lawyers altogether.

1.12 In this report we seek to show how the consumer can be better served and at lower cost.

CHAPTER 2

Court Procedure

2.1 There are changes under way in the procedure of the Civil Courts, most of which originate from the Civil Justice Review. As will be seen later the most important changes are new mechanisms which bypass the County Court altogether and provide dispute resolution at a much lower cost to the consumer. Nevertheless ordinary civil claims for compensation will still require a comprehensive Court-based system which is currently provided by the County Court. Here the two main problems are the interaction of current Legal Aid rules with the County Court rules relating to small claims. Claims below £1,000 are referred to arbitration for which Legal Aid is not available. Advice and assistance under the Green Form scheme may be appropriate in cases where there is a difficulty, such as the need to obtain medical reports. Arbitration by the District Judge provides a relatively speedy and simple decision. The procedure is informal and the parties are fully involved.

2.2 JUSTICE considers that for claims between £1,000 and £5,000 there ought also to be an automatic reference to arbitration which may be rescinded either on the application of one of the parties, or by the District Judge himself. Cases where substantial preparation was involved would be left in the standard adversarial Court procedure, and Legal Aid would then be available. At the same time when the District Judge was considering whether it was appropriate to rescind the reference to arbitration, he might also consider whether the case would be more appropriate for another forum such as one of the ombudsman procedures. A consequence of this alteration would be to give parties a choice between the traditional adversarial procedure and the inquisitorial procedure which tends to be followed in arbitrations. JUSTICE believes that the majority of litigants at this level would prefer the latter procedure. That is what many expect when they come to Court, hoping that the hearing will 'get to the bottom' of what has occurred rather than witness an adversarial contest.

Priority Cases

2.3 It is in the County Court that the ordinary citizen in financial difficulties most needs help. The Civil Justice Review asked the Legal Aid Board (LAB) to look at the possibility of funding agencies running duty schemes in the County Court. The Legal Aid Board formed the view that

priority should be given to helping defendants in housing possession and debt cases.* The Legal Aid Board is issuing a consultation document on the implementation of these proposals but it is clear that the fundamental question is whether funds will be made available to help defendants in proceedings of these kinds.

2.4 JUSTICE believes that there should be a relationship between the availability of public funds and the seriousness of the citizen's predicament.

Possession Cases

2.5 We have considered whether advice on possession proceedings is so important as to require special provision. There seems to be evidence that many defendants in housing possession proceedings do not attend Court, or get advice before the hearing date.

2.6 There have been suggestions from several quarters about the possibility of duty schemes at County Courts. We doubt whether this is the right route because of the problems of manning another duty scheme and the likely heavy cost of one. The money would be better spent on the advice services, especially CABx, and on green form advice. In 1991 75,000 people received advice and assistance from Solicitors under the green form scheme about landlord and tenant and housing matters. CABx dealt with 736,000 enquiries in the same year on housing, property and land. Housing possession proceedings are usually the major symptom of a family's general debt problems.

Debt Advice

2.7 Perhaps the most serious legacy of the excesses of the late 1980s is the very large number of people who are in serious financial difficulty as a result of loss of employment, excess borrowing on credit cards, mortgage arrears, or a combination of all these factors. We should recognise that we are a credit-based society. Properly used credit is all to the good and a vital engine of growth. Unless however urgent steps are taken to protect the vulnerable we shall continue to face mounting social problems due to insupportable private debt. The starting point must be improved money education. Newspapers of all kinds and consumer magazines have rendered considerable service in explaining to the ordinary citizen the complications of our modern financial system. We need to build on this type of general initiative by more specific moves. Credit card companies are still promoting loan offers amounting to thousands of pounds. This advertising is usually addressed to all regardless of ability to repay. Government legislation in the consumer credit field has helped to make

* LAB Report for year 1990/91 page 19

information such as the rate of APR on consumer credit widely understood. Money education needs a multiplicity of avenues from schools through newspapers and magazines to specialist leafleting.

2.8 In spite of these existing attempts at money education there is still an enormous demand for debt counselling for those who have got into financial difficulties, not always of their own making. In recent years the roller coaster economy, causing interest rates to double during a period of 18 months, and deregulation of the credit industry with consequent over-encouragement to borrow, have resulted in a 'live now - pay later' attitude among the public more widespread than in most other European countries. Provision of competent financial advice is therefore essential. Even though it is not strictly legal advice it often relates to Court proceedings for debt or possession where often debt counsellors can negotiate arrangements which may stave off financial disaster. Probably the largest source of debt counselling is within CABx which in 1990/91 handled 1.5m enquiries (21.7% of all Bureaux enquiries) on the subject of consumer and debt problems. Specialist money advice units have also grown up, but CABx bear the brunt of the burden. They are however seriously under-funded, some have closed and most have restricted opening hours. At the same time they are clearly a cost effective resource. In 1990/91 they handled 7 million enquiries at a total cost of £39m yielding an average cost per enquiry of £5.50. Obviously there is an enormous range in the time involved in handling each enquiry and debt counselling is often very time consuming. Local Bureaux are financed primarily from grant aid given by local authorities which in 1990/91 totaled £27m. The Government, through the DTI, provided £11 ¼m for central services, training, provision of information etc. Many local authorities have reduced their funding of Bureaux partly because of rate capping.

Funding debt counselling

2.9 There is now wide recognition that the credit industry itself should contribute to the cost of debt counselling. It is not just the banks and building societies but retailers, hire purchase and finance companies and card providers who all contribute to the totality of debt problems. Many lenders, particularly banks, already undertake imaginative ventures but the building societies have been reluctant to assist in this field, although their advice to borrowers at branch level is usually good. What is needed is for the whole credit industry to contribute to the cost of debt counselling so that by spreading the burden widely it will not impinge too harshly on any one sector. The Money Advice Trust was established in 1991 with the target of raising from consumer credit institutions the sum of £10 for every £1m they lend each year. This voluntary move has attracted only limited support and raised less than

10% of the target of £3m in the first year. Although voluntary initiatives such as individual banks funding CABx and debt counselling units should be encouraged, the problem is too serious for voluntary provision alone. There should be a statutory requirement across the whole industry to contribute in ways which might vary according to the nature of the credit provided. For some institutions an addition to the credit licence costs might be appropriate. The National Consumer Council have even suggested that mortgage borrowers might contribute a very small proportion of their mortgage borrowing as a kind of insurance premium against the possibility that they might need financial advice in future.

2.10 The role of CABx in debt and housing advice is pivotal. Bureaux are also a key resource in the tribunal field. For all these reasons a national scheme must be devised whereby the funds available to CABx are very substantially increased. There should be a statutory duty on local authorities to fund CABx in their area at a level which will enable them to provide the key basic service and to remain open for reasonable periods. The Government should increase its contribution via the DTI by using savings from other recommendations in this report to plough into national initiatives which can help improve the service of individual CABx. This should be particularly channelled into the provision of training, literature and the strengthening of the computerised information network available to CABx. A substantial part of funds raised from the private sector, in accordance with the suggestion in the previous paragraph, should also be directed towards supporting and strengthening the CABx network. There are only about 1100 Bureaux covering the whole country, approximately one tenth of the number of the network of Solicitors offices.

National Scheme

2.11 In particular the financial institutions to which the public have access should be encouraged to make grants to provide these additional funds. A national scheme must be devised whereby the funds available to CABx for debt counselling, whether from central government funds, the Legal Aid Board, or institutions such as the Money Advice Trust, are very substantially increased.

Performance of the Courts

2.12 Very large new burdens have been placed on the County Court system as a result of the Civil Justice Review and the large increase in the jurisdiction of the Courts. There has been no comparable increase in staffing. Most County Courts are under-staffed. They are not able to render a satisfactory service.

2.13 An examination of the internal procedures of County Courts would undoubtedly throw up opportunities for saving staff time. For example very little use is made in County Courts of computers and word processors. There is scope here for great improvements in efficiency and productivity.

2.14 At present taxation procedures for Legal Aid bills take up much Court staff and District Judge time. The existing detailed taxation procedure in Legal Aid cases is a burden on the profession in that the bill requires preparation by a costs specialist and also takes up Court staff and District Judge time which would be better spent on handling cases. Summary forms of bill should be devised which require time taken, attendances, documents, correspondence, etc to be listed but in a simplified form without the traditional trappings of taxation. A similar form is already used to assess criminal costs.

Divorce Procedure

2.15 At present the great majority of divorce cases are started on the ground of unreasonable behaviour or adultery because that is the quickest way to obtain a divorce. But from the parties' point of view it is quite the wrong way because it often inflames the relationship and therefore leads to increased legal costs. Worse than that, it upsets relations between parents and children.

2.16 The Law Commission in *'The Grounds for Divorce'* recommended that divorce should only be available after a period of consideration and reflection by the parties. Over this period the first priority would be to save the marriage.

2.17 If this is not possible then maximum agreement should be reached about child care and financial issues before a divorce is granted. A pre-requisite to the successful implementation of such a proposal is the availability of conciliation and mediation services to enable the parties to reach agreement on these issues. The Law Commission recommended that these services should be available.

2.18 The Law Commission proposed that irretrievable breakdown of the marriage should remain the sole ground for divorce but that the five alternative factual situations required to prove this should be abolished, as allocating fault encourages bitterness and animosity, making it harder for the parties to agree about arrangements for their children and their financial affairs. These facts should be replaced by the passage of a twelve month period before the marriage is dissolved. This period would be initiated by one or both parties lodging a declaration in court that the marriage had broken down.

2.19 The Lord Chancellor, Lord McKay, in his speeches to the National Family Conciliation Council on 17th October 1990 and during the debate on the Law Commission's report on 31st January 1991 emphasized that couples should be encouraged to take responsibility for their broken relationships and that the government's first priority here, as elsewhere in family law, is the protection of the children from the harmful effects of family breakdown. He recognised the importance of the conciliation process and the need for organisations such as the national Family Conciliation Council.

2.20 We believe these proposals are sensible and in keeping with current thinking in the area with less emphasis placed on judicial intervention. Research, both here and in the US, has shown that where couples conciliate or mediate there is a greater level of satisfaction about the decisions reached and better prospects of continued joint-parenting. These proposals will encourage the parties to look to the future rather than the past. It is essential that the Law Commission's recommendations that conciliation services be built into the procedure are taken on board.

2.21 According to the 1990/91 Legal Aid report* there were about 94,000 bills paid in that year under matrimonial legal aid which cost about £128m. About £317m was recovered or agreed by assisted persons of which £25m was retained in the fund under the statutory charge. These figures have been rising at a very fast rate.

2.22 Much of this expense is incurred in the preparation of large bundles of often unneeded or irrelevant documentation or professional valuations of property in issue, often where there need be little dispute on the question of valuation and certainly would not be if the parties were paying from their own resources. There should be an alternative simplified procedure available for people who are more interested in quick and relatively inexpensive solutions which may not involve them in the risk of paying large legal costs. The existing Court procedure should be retained for those cases where mediation is inappropriate eg where large sums of money are involved and the parties are not eligible for Legal Aid. Where a dispute does proceed to a full hearing more encouragement should be given to solicitors to deal with these matters themselves instead of instructing counsel. It is commonplace for counsel to be granted a certificate at the conclusion of a contested hearing, as clearly they will have done a good job which should be paid for, but there is no reason why the majority of divoce practitioner solicitors should not carry out their own advocacy in such cases.

* LAB Annual Report 1990/91 Civil Tables 12 and 15

2.23 One possible model for mediation in matrimonial ancilliary relief is as follows: a panel of solicitors should be established at each Divorce County Court and each member of the panel would be prepared to act as a mediator in matrimonial property and financial proceedings. The mediating solicitor would act inquisitorially and not as the solicitor for either party. Each party would fill in a comprehensive form setting out his/her income and capital and financial obligations, assertions about the other party's means, and setting out claims to a share in property including the matrimonial home. Green Form advice would be available in the completion of these forms. The forms would then be sent to the mediating solicitor who would call the parties to a meeting and mediate between them. He would discuss figures with them and then propose a figure for income and capital awards. Each party would then have fourteen days in which to accept, reject, or compromise the mediator's figures. In order to avail themselves of this service, each party would pay a non-returnable fee of £75 to the mediator direct. Those eligible for Green Form advice would be entitled to claim this sum as a disbursement. The Legal Aid Board would provide that no application for Legal Aid for property or maintenance proceedings would be considered unless the parties had been through this procedure, and the result of the procedure would be notified to the Legal Aid Board with an application. The procedure might also be available to those not financially eligible for Legal Aid with higher fees based on a sliding scale.

CHAPTER 3

Financing Lawyers - Legal Aid and the Alternatives

3.1 Looked at from the consumer's point of view, the governing principles for a better legal aid system might be to:

a) provide legal aid by comparing the importance of the case to the individual balanced against the expense to the State

b) provide as much choice as possible between Court systems and alternative ways of resolving disputes, and alternative ways of financing litigation

c) offer as much certainty for legal aid eligibility as is practicable. The present system aims at a theoretical equity which can in practice seldom be achieved because of the diversity of people's financial circumstances.

JUSTICE approach

3.2 Following these principles JUSTICE believes there should be greater flexibility and choice in the system. We need to change parts of the system to make money available to spend on help which is not now offered such as for tribunal preparation and representation. In cases such as personal injury, negligence, and contract claims, the support which is now provided by the State should be channelled where it is most needed. A layered approach might be as follows:

Claims up to £1,000

3.3 Here the small claims procedure would be appropriate and legal aid would not be available. Those eligible would be entitled to advice and assistance under the Green Form scheme, including payment of disbursements for medical reports, police reports etc. The solicitors' statutory charge would apply.

Claims above £1,000

3.4 Legal Aid would not be available for those cases where arbitration in the County Court was the procedural route. For ordinary adversarial procedure there is no alternative to non contributory legal aid for those below the existing minimum contribution level. Legal aid for them should remain broadly as at present. These cases do not result in great

net expenditure to the fund because of the existence of the statutory charge and losing party costs. Nevertheless 80% of successful legal aid applicants pay no contribution and free legal aid represents about 80% of civil expenditure out of the fund.

Those not entitled to legal aid

3.5 The central question which has been discussed for years is how to finance litigation for those whose means do not entitle them to free legal aid including those who are outside the existing upper income eligibility limit. There are three possible solutions - Contingency Legal Aid Fund (CLAF), Legal Expenses Insurance (LEI), and changes to the legal aid contribution mechanism.

JUSTICE proposals re. CLAF

3.6 CLAF was proposed by JUSTICE in 1966 and again in 1978, * by the Law Society in 1987, and by the Bar Council in 1989. CLAF has been successful in Hong Kong. CLAF provides risk-free litigation to plaintiffs who could not otherwise afford litigation because they would become potentially liable to pay the other side's costs. A fund is established which would have to be financed initially by the Government. Those whose cases are accepted for support by CLAF will be required to agree that if they are successful either in obtaining a satisfied judgment or in negotiating a payment, a stated percentage of their damages will be retained by the fund to finance other people's cases which are not successful.

3.7 CLAF is available to an intending litigant if his cause has 'reasonable prospects of success': the Legal Aid test. If he wins and recovers damages and costs, he will pay a modest proportion (say 10%–20%) of those damages to CLAF. If he loses, CLAF pays his costs, and the other side's costs. The deduction from damages recovered by successful parties is used to fund the costs of the losing cases.

3.8 The alleged disadvantages of CLAF are illusory.

'Successful litigants subsidise the unsuccessful'

No-one knows who is going to be 'successful' until judgment is given. Anybody paying a LEI premium is effectively subsidising a loser if he wins: and he is being subsidised if he loses. There is no compulsion to join CLAF: the litigant volunteers to part with a proportion of his damages only if he wins.

* Contingency Legal Aid Fund Justice Report 1978

'Deprivation of full compensation'

There are many risks and chances in litigation. A vast proportion of all claims are settled, each side compromising his full claim for certainty. Reductions for contributory negligence (ranging from 10% (seat belts) to 90%) cannot accurately be predicted until judgment. The CLAF contribution is no different in principle from the prudent householder's insurance premium paid over many years for LEI. Most people would prefer 80% of a loaf to no bread at all.

'Adverse selection: the danger that 'Winners' will not chose CLAF'

We do not consider that this is likely to cause problems in the pilot scheme if it is restricted to those outside the existing legal aid limits. Personal injury cases account for the largest proportion of civil claims, and there are few 'certain winners'. Even passengers in cars have their problems on liability: seat belts, drunken driver, under age driver. There must be restrictions on CLAF use to prevent abuse. The litigant withdrawing from CLAF once liability was admitted would be liable to pay his full CLAF percentage. CLAF would have to be subject to the merit test, and could be withdrawn when the merits ceased to justify support. CLAF could be withdrawn if offers or payments into court were unreasonably refused. The litigant would then become liable to pay the CLAF percentage of any sum offered.

'CLAF is not suitable for all litigation'

CLAF is well suited to all forms of plaintiff personal injury litigation including medical negligence. CLAF is not suited to some multi-plaintiff litigation, such as drug claims and 'disasters'. If one such case was lost the Defendants' costs could exhaust CLAF. CLAF is not suited to divorce or crime. It is probably unsuited to commercial disputes, tax matters, landlord and tenant, or intellectual property. It may be suited to building disputes relating to private houses. It is unsuited to Judicial Review.

The fact that CLAF is not suited to all areas of litigation cannot be a reason for refusing it to those who would benefit from it.

The CLAF percentage

3.9 Insurers settle with legally-aided plaintiffs because they will have to pay their own costs even if they win. The Legal Aid figures are therefore irrelevant. A better analogy is with cases financed by trade unions where the union will bear the opponent's costs if the case is lost. Experience seems to produce a figure of about 10% of total damages recovered as the amount paid out for costs of successful opponents. This accords with the Hong Kong experience where the percentage does not exceed 12.5%.

CLAF Pilot Scheme

3.10 We suggest a CLAF pilot scheme on the following lines:-

i) It should operate in three trial centres, out of London, with experience in personal injury litigation. Birmingham, Bristol and Manchester are good examples.

ii) It should run for four years, so as to allow some cases to go to appeal.

iii) Initial funding from the Treasury should be by a loan facility of £300,000 at each trial centre.

iv) CLAF should be administered by the LAB because the administrative decisions to be taken are very similar to those in legal aid cases.

v) There should be a non-returnable joining fee of £100 to deter 'free-riders'.

vi) Claims would be limited to personal injury claims. Multi-plaintiff or group claims would be excluded at the discretion of the CLAF committee. For example: all the passengers on a crashed coach, or in a train, could join because the liability issues will be inexpensive and almost certainly there will be a finding in favour of the Plaintiff.

vii) CLAF support should be given to claims which have 'reasonable prospects of successfully recovering damages and costs'. No purpose is served in funding litigation where costs would not be recovered from, say, an impecunious Defendant, or a foreign company with no funds in the UK.

viii) CLAF support, once given, could be foregone; but there would remain a contractual liability to pay to CLAF a percentage of all funds recovered in respect of the incident.

ix) A panel of solicitors experienced in personal injury litigation, and of Counsel similarly experienced, should be appointed to undertake CLAF cases.

x) CLAF support should be withdrawn if an offer or payment into court was unreasonably refused, and Counsel experienced in personal injury litigation so advised.

Variable percentage to encourage settlement?

3.11 We consider that there should be a single CLAF percentage deduction whether the case is disposed of at the initial stage, or after judgment. The risks and chances of litigation provide a sufficiently powerful incentive to settle. The difficulty in identifying an appropriate date for payment of a higher percentage makes the proposal unattractive. 'One month before trial' cannot be determined if cases float into the list. 'Delivery of brief' may be variable and can be a few days before trial. No Plaintiff could get anyone to represent him seven days before trial.

We accept that some change may prove necessary if CLAF experience justifies this.

Conclusion

3.12 CLAF should be implemented by a pilot scheme at three trial centres. It should be administered initially by the LAB. Government funds in the form of a loan facility of £900,000 would be required to 'prime the pump', but this would probably be repaid completely within the four years. After that CLAF would be self-financing.

3.13 If the pilot scheme is successful and CLAF is extended nationwide, legal aid in these damages claims would no longer be required, releasing funds for other Legal Aid work. The money thus saved could be used for extending help to important areas such as advice and representation in tribunal cases. Those who wish to ensure that they will continue to receive the service of lawyers under something like the existing private arrangements should be encouraged to take out legal expenses cover, particularly as an addition to other forms of insurance e.g. motor and household.

3.14 Whether or not the CLAF pilot scheme is successful, the legal aid financial conditions should be reformed as suggested below.

Legal Aid Eligibility Limits

3.15 There are various reforms here which would greatly increase the number of citizens eligible for legal aid without increasing Government expenditure:

a) The system of means assessment must be simplified. At present there are detailed regulations and complicated procedures whose aim is to achieve what can only be a spurious equity. The means and liabilities of individuals vary so greatly that in a national scheme a broad brush approach must be taken.

b) At present contribution out of income is only taken for one year. Legal aid cases last about two years on average so that contribution should (subject to (g) below) be taken for the duration of the case but without revision for increases of income. This would save administration cost. Assisted persons would still have the right to apply for contribution to be reduced if their means decreased. This would encourage the legally aided party to try to ensure that his case moved speedily to judgment and it would also make him more receptive to offers of settlement.

c) The existing assessment regulations should be replaced and new assessments should be based retrospectively on the applicant's previous year's tax information as set out in the Form P60 issued by the Inland Revenue each year showing the previous year's gross income and the deductions for income tax and national insurance contributions. Using this to establish gross income and tax there should be deductions for housing costs and dependants, but no other deductions. The other general commitments of the applicant should be taken into account through a combination of the free limit and a small reduction in the fraction of disposable income taken for contribution at the lower levels.

d) Legal aid for those outside the existing upper limit should be available, but with a rising sliding scale of contribution fraction. The present contribution fraction of 25% of disposable income above the free limit might be progressively raised until perhaps half of disposable income was required as contribution at the new upper limit.

e) There should be a flexible upper income limit. Where the likely cost of the case exceeded the means of the applicant, legal aid could still be granted (by analogy with the existing criminal legal aid procedure). The combination of these changes would fulfil our aim of linking the means of the applicant to a decision to embark on litigation.

f) The substantial cost of administering legal aid ought to be borne not just by the tax payer where legal aid is free of contribution, but by the assisted person who is required, under simplified rules, to make a contribution. Contribution should therefore include an element to cover administration and not just the costs paid out to the assisted person's solicitor. This element is probably about £50 so where a client was successful no contribution below £50 would be returned to the client out of the legal aid fund. *

g) There should be a procedure for suspending payment of contribution when the likely total cost of the particular proceedings had been reached.

* See Review of Financial Conditions for Legal Aid, Appendix F, LCD June 1991

Legal Expenses Insurance

3.16 Legal expenses insurance (LEI) involves payment of an annual premium to buy cover in certain categories of cases for a claimant's legal costs, including any costs awarded against him, up to a limit of indemnity. This type of insurance is a relatively new concept in the UK, having been in existence only since 1974, but it has existed in some form in Europe since the beginning of the century. According to research published jointly by the Law Society and the Consumers' Association in January 1991, it was estimated that nearly one half of all West German households had some form of LEI, with 31 companies (all specialist insurers) serving a market worth approximately £1 billion a year. The majority of claims appeared to arise as a result of road accidents. German experience however may not be a guide to prospects in the UK. Lawyers' fees are high and strictly regulated by law. Until recently there was no comprehensive legal aid scheme. In Sweden, often mentioned in connection with LEI, 80% of the population are covered by a compulsory scheme, which is designed as an adjunct to their legal aid system. Of those questioned in the UK, only 7% claimed to have some form of LEI. Trade Unions fund litigation for their members. Motoring organisations such as the AA and RAC do the same. This is a valuable form of LEI which could be further expanded.

3.17 There are two main types of LEI: free standing policies, or cheaper more limited supplements to car or home contents insurance. Both usually include access to a free legal advice telephone line. This service is also available to people who do not have full LEI cover, because it is often included as part of other types of insurance policy.

3.18 The Law Society/Consumers' Association report included a review of the individual policies currently available and a survey of public attitudes about LEI. The experiences of people who had made claims on legal expenses policies were also analysed. The tone of the report is in general favourable to LEI.

3.19 The major limitation of LEI is that its relatively low volume puts it at risk from 'adverse selection' i.e. the individuals most likely to buy LEI are most likely to claim, while many who do not consider they will ever be likely to need it will not bother to insure. Since the basis of insurance is that many people will insure but few will claim within any one period, adverse selection will quickly undermine the whole business. Either premiums will be very high or the insurer will go out of business. However, if the market could expand significantly the greater spread of risk should keep premiums down and limit the need for further restrictions.

3.20 The most successful companies have offered LEI policies to groups rather than individuals. Membership group schemes designed for Trade Unions and Trade Associations, as fringe benefits to Trade Unions and Trade Associations for small businesses are common. An extension of the group principle is the sale of LEI cover as part of, or as an optional extra to, other insurance policies. This has been most successful with motor insurance, which of course is compulsory, so that brokers have extensive experience of handling claims. However difficulties in obtaining reimbursement for payments made following a motor accident have led to consumer and broker dissatisfaction. Brokers therefore have a strong vested interest in selling LEI policies as a supplement to motoring policies as these provide an uninsured loss recovery service. In addition they often cover personal injury claims, defence of motoring prosecutions, and consumer cases involving the purchase, sale or servicing of a car. The LEI companies become experts because of the volume of work of this kind. Thus LEI policies which cover motoring claims have become the most important and fastest growing part of the LEI market. Those covered by these policies are not necessarily accident or litigation prone.

3.21 Family legal protection, as it is known, is now widely available with house insurance and is also widely available with house buildings and contents policies either incorporated in the policy or sold as an optional extra.

3.22 The major advantages of LEI as a source of private funding are:-

a) it already exists and there seems to be a potential for development and growth of the market;

b) cover for most types of Court cases, except matrimonial cases, can be purchased and tribunal cases can be covered;

c) relatively low premiums can buy substantial cover;

d) within the indemnity limit it will cover any costs awarded in favour of the insured party's opponent.

Competence and Experience of lawyers

3.23 Whatever means are used to pay lawyers, it is no longer acceptable for every high street solicitor to be able to undertake all kinds of litigation. Most High Court work and personal injury cases now largely in the County Court require experienced solicitors. The Law Society should be asked to look urgently at what can be done to improve the competence of solicitors in this field. The principle of franchising which is now being applied experimentally to the Green Form scheme is clearly relevant here. Efforts must be concentrated on getting a better service for the client by the use of skilled practitioners and not wasting money on those who do not know what they are doing. The Law Society should consider means of ensuring more widespread compliance with their statement of the best practice in personal injury cases.

CHAPTER 4

Alternatives to traditional Courts

4.1 This chapter deals with the many existing alternatives to the traditional Court system, such as tribunals, ombudsmen and specialist institutions and 'alternative dispute resolution' (ADR).

Alternative Dispute Resolution

4.2 The Court system provides no way of resolving disputes amicably. No conciliation or mediation service is available. There is one exception to this: the welfare officer will mediate in children cases if invited to do so. It is on this principle that we seek to build.

4.3 The State needs to provide means for facilitating mutually agreed settlements of disputes. If settlement cannot be achieved, a quick, inexpensive and convenient trial system is required.

4.4 Over the past year (1991) several reports have been written on 'Alternative Dispute Resolution' (ADR). These include:

i) Alternative Dispute Resolution: The Law Society Paper of July 1991.

i) Consumer Redress Mechanism: Office of Fair Trading: November 1991.

iii) Committee on Alternative Dispute Resolution: General Council of the Bar: 25th October 1991.

iv) 'Out of Court': National Consumer Council: January 1991

Each of these reports reviews the various different systems of ADR which exist. A common feature of all ADR systems, with the exclusion of County Court 'Small Claims' procedure is the conciliation procedure. It is sometimes called 'mediation', and we refer to it as such.

4.5 The ADR systems which have been set up include those:

i) Sponsored by Trade Associations (eg the Association of British Travel Agents);

ii) Sponsored by professional organisations, such as The Law Society and the Royal Institution of Chartered Surveyors;

iii) Pursuant to anticipated or actual statutory provisions (eg the Banking Ombudsman and the Building Societies Ombudsmen respectively; and

iv) Set up by a monopoly supplier (eg the British Telecom scheme).

Surveys of their users, and reports relating to their business, reveal a number of important factors about 'user satisfaction'. Any improvements to a Court based system of ADR must take these factors into account.

Perhaps the most important body working in this field now is the Centre for Alternative Dispute Resolution sponsored by a number of firms of solicitors and accountants. Their mode of working is mediation and not arbitration. Its address is:
3/5 Norwich Street, London EC4A 1EJ (Tel: 071 430 1852).

'User Satisfaction' with existing ADR

4.6 Trade based schemes rely upon the agreement of the trader to be bound by the result. If he leaves the Trade Association, the redress for the consumer is illusory. That can be overcome if the Trade Association agrees itself to satisfy any award. Such an attitude would inspire public confidence in the scheme.

4.7 Some ADR schemes have been set up, but have never been used: eg the Funeral Directors. It is unlikely that consumers are unreservedly satisfied with the conciliation process, and it is more likely that publicity is not given to the scheme.

4.8 ADR schemes suffer from delays which are similar to delays which occur in litigation. Speedy resolution of disputes is required by aggrieved consumers. It is an old adage that 'justice delayed is justice denied'.

4.9 Many ADR schemes involve 'paper only' arbitrations. This is inexpensive, but it can favour the literate and intelligent who can put their written case clearly. It also deprives people of their 'day in Court' when, they feel, they can explain the problem more clearly.

4.10 Preliminary hearings are generally felt to achieve no purpose. They have the positive disadvantage of adding to the delay. The purpose of the preliminary hearing is thought to be to identify the issues, to see what is agreed and what remains disputed, and to identify what documents are required. This can as easily be achieved by a standard letter, if it is necessary at all.

4.11 Visits to premises, or a view of the subject matter, by the decision taker or conciliator are usually required. This enables him to see the defective double glazing or the badly made furniture; it enables the consumer to point out precisely what he is complaining about.

4.12 Decisions by Ombudsmen may apply not only the law but what is fair in all the circumstances. That may involve an application of 'proper professional practice' and 'accepted business conduct'. Both of these will usually involve conduct which is substantially more favourable to the consumer than strict adherence to legal duty. It is relevant to point out that in the law of negligence what starts out as 'good practice', but not something which everybody has to do, becomes over the years what everybody does: and so failure to do this becomes negligence.

4.13 The BT Scheme does not permit any questioning of the reasonableness of the BT standard consumer contract. This contract is extensive and is printed in small relatively obscure type on the back of BT documents. It is notoriously hard to read. The scheme itself involves investigation of the call charging equipment, but this is presented as being incapable of error and it is run by BT engineers who alone understand how it works.

4.14 A feature common to ADR systems is that attempts are made, using a third party, to compromise a dispute between a consumer and a supplier. We call this 'mediation'.

4.15 Sometimes the mediator is vouchsafed confidential information not to be disclosed to the other side. In other cases, the mediator can have no such special information.

4.16 'Recommendations' may be made by the mediator. If these are not accepted by one or other party, the mediator can do no more, and a hearing is necessary.

4.17 If, after a hearing, one party has not significantly 'beaten' a recommendation, there may be a costs sanction.

4.18 It is not wholly satisfactory for the conciliator or mediator to be the same person as the arbitrator who conducts the hearing. A person who has tried to bring the parties together, has their 'bottom line', and who has attempted to bridge otherwise uncompromising positions, cannot have the same independence as an arbitrator who is to decide the merits of each individual case. Nevertheless the various Ombudsmen discharge both functions (as conciliator and arbitrator) in the same case and do this without apparent dissatisfaction.

4.19 A person attempting to bring together two parties who are in conflict has different obligations and different attitudes from one who is attempting to resolve that conflict. He also needs different training. There are no qualifications for conciliator or mediator, but training courses are run. It is significant that the Courts have provided a mediation service for many years in family cases. The divorce court welfare officers have always been available to try and reconcile warring spouses and Family Conciliation schemes have generally been successful. Relate, formerly the Marriage

Guidance Council, selects well suited people to be trained and instructed as its counsellors. The same is true of the Samaritans.

4.20 It is plain that a person who is to be a conciliator or mediator must possess particular personal qualities; and he must be trained for his task. Lawyers engaged in any form of civil litigation may well be suited to the task of mediation, not least because they have been settling civil disputes for years.

Arbitration

4.21 Arbitration has the following advantages over a hearing in Court:

i) it is done in private;

ii) the rules of evidence are not strictly applied;

iii) the procedure is informal and can be adapted to the nature of the subject matter. An arbitration on a building contract will be different in form and substance from an arbitration relating to the installation of a washing machine.

4.22 Arbitration is unsuited to establishing rights, to claims for possession of land, to divorce, and to children's cases. There are other areas of litigation where arbitration is inappropriate. Essentially, arbitration is inappropriate where the Court's order is required to be enforced in order to achieve a right.

The Northern Ireland Experience

4.23 We wish to lay emphasis on the Northern Ireland small claims procedure for two reasons. The first is that it has worked well and achieved some 'user satisfaction'. The second is that it is a Court-based scheme which has already been implemented in one province of the United Kingdom.

4.24 The Judicature (Northern Ireland) Act 1978 introduced a small claims procedure within the existing County Court system. Its procedural rules are contained in the Northern Ireland County Court Rules 1981. A small claim is anything up to £500. It excludes personal injuries, defamation, wills, title to land, or motor collisions.

4.25 The claim is made by completing a one page form. This, together with the fee, is taken or posted to the Court Office. The Court Office then serves it on the Defendant.

4.26 There is no preliminary hearing. The next thing that happens is the hearing before the Circuit Registrar (who would be the District Judge in England and Wales). He may adopt any method of procedure he considers convenient and he must give a fair and equal opportunity to each party to present his case. The parties can consent to decide the case

on the basis of statements and documents submitted by them. Legal representation is permitted and 'by leave of the Court in special circumstances' any other person may appear on behalf of any party.

4.27 The party who succeeds recovers only his application fee: he cannot recover the cost of witnesses, legal representation, expert reports, or his own expenses. If however there has been 'unreasonable conduct', costs and witness expenses, can be awarded. This is plainly prudent because it permits one party to make an offer in settlement and then to recover costs if that offer is 'beaten'.

4.28 The Court can call for its own expert report on any matter in dispute. The cost of that report is borne by the Court. This is perceived to be a useful advantage in the system. The Court commissions the report, pays for it and uses it in its judgment.

4.29 The decision is sent by post. Appeal is not, realistically, possible.

4.30 Enforcement of the Registrar's decision is through the Court. It becomes a Judgment enforceable as any other Judgment.

4.31 45,000 applications for arbitration were made in the first six years. 75% were by businesses, and these were probably to recover small debts. About 7% were by individual applicants, and not all were consumer claims. It is significant that although a small proportion of the total were consumer claims, of the disputed cases 20% were consumer claims. The median amount claimed in 1984/85 was £101. Nearly 4% of applications were for £20 or less. About 5.5% were for the then maximum of £300.

4.32 Research was carried out for the General Consumer Council for Northern Ireland and published in 1985. The authors (Greer and Mulvaney) said:

'(it) was an enterprising experiment, which was particularly innovative in its simplicity - and the fact that it has essentially retained that characteristic over the past 6 years represents its main strength. Its main weakness is that not enough has been done to develop that procedure into something more distinctive and responsive to the needs of its potential individual users'.

Private Sector Ombudsmen Schemes

4.33 The JUSTICE report 'The Citizen and the Administration', published in 1961, led to the appointment in 1967 of the Parliamentary Commissioner for Administration, the first of the public sector ombudsmen. More recently a number of private ombudsman schemes have been set up. The Parliamentary Commissioner deals primarily with complaints about maladministration brought by individuals against central government. The private ombudsmen deal mainly with complaints by individuals

about services provided in the private sector. Also, although some of the complaints dealt with by the private ombudsmen are about maladministration, others are claims, for example, of breach of contract, which could have been pursued (at least in theory) through the ordinary courts: the private ombudsman schemes are, therefore alternative means of dispute resolution schemes.

4.34 The private ombudsmen schemes were set up because it had become increasingly unacceptable that private individuals in dispute with large institutions should so often be left in practice with no effective means of redress through the courts because of fear of the cost. In the financial services field, and elsewhere too, there was perceived to be an inequality of bargaining power between the provider of services and the consumer. It was this that led first to the setting up of the Insurance Ombudsman scheme, then the Banking Ombudsman scheme and later the Building Societies scheme. More recently there has been the appointment of the IMRO Referee, the Legal Services Ombudsman, the Corporate Estate Agents Ombudsman and the Pensions Ombudsman.

4.35 Although each of the financial services sector schemes is differently constituted, broadly speaking they have certain common aims and characteristics. In all of them the ombudsman is independent and, for practical purposes, his decision when adverse to the member of the scheme against whom the complaint was brought, is binding if accepted by the complainant. Moreover, the ombudsman may be able to give a remedy which a court could not.

4.36 Typically, independence is secured by adoption of a tripartite structure. Firstly, there is an ombudsman company of which the members are the companies who are members of the scheme. They elect the board of directors of the company. The board raises funds for the scheme from members and is responsible for any necessary alterations to the ombudsman's terms of reference. Secondly, there is a separate council on which there is a majority of independent public figures. The council appoints the ombudsman and he reports to it. The council's main function is to safeguard the independence of the ombudsman, in particular by securing for him the funds necessary for the scheme. Thirdly, there is the ombudsman who, with his staff, is solely responsible for deciding complaints.

4.37 It is a condition of membership of the 'voluntary' private sector schemes, such as the Insurance and Banking Ombudsman schemes, that an award of the ombudsman adverse to a member should be accepted as binding by that member. Under the Building Societies scheme, which is a statutory scheme, that is not strictly speaking the case, but in practice up to the end of 1991 only one decision of the Building Societies Ombudsman has not been accepted by the member against whom it was

made. Under both the 'voluntary' and the 'compulsory' schemes, if the complainant does not accept the ombudsman's decision, he is at liberty to pursue his claim through the courts or elsewhere.

4.38 Because the ombudsmen are usually required by their terms of reference to have regard to what is fair in all the circumstances in arriving at their decisions, they can take into account not only any applicable rule of law but also what is in their opinion good practice for the particular industry concerned. Moreover, they can usually take into account any maladministration or other inequitable treatment and can award compensation on those grounds, and for 'inconvenience'. To that extent they can go further than the courts and have what can be described as an additional 'equitable' jurisdiction. Furthermore, they are not bound by the strict rules of evidence and can, for example, admit hearsay.

4.39 As compared with the courts, the private sector schemes offer some distinct advantages to individual users:

a) Unlike the Parliamentary Commissioner there is no filter and complainants have direct access to the ombudsman.

b) There is an inbuilt emphasis on conciliation. In particular, the requirement that before the ombudsman will fully investigate a complaint, the complainant must first exhaust the company's own internal complaints procedures, does often have the effect of achieving an early settlement, without it being necessary to pursue the matter any further. The very existence of a scheme requires the company to improve its internal procedures.

c) The ombudsman usually conducts an inquisitorial 'documents only' investigation. This assists speedy resolution and avoids formality.

d) Each scheme relates to a specific industry. Hence, the ombudsman acquires a specialised knowledge of the industry concerned and tends to know better than a less specialised tribunal both what questions to ask as 'inquisitor' and what significance to attach to the replies received.

e) The typical £100,000 jurisdiction goes well beyond the small claims court limit and also exceeds the amount in dispute in the great majority of 'consumer' complaints.

f) Most important of all, the schemes are free. No fees are charged to bring a complaint, and no lawyer or other professional adviser need be retained. Because costs do not follow the event, an unsuccessful complainant has no liability for the other party's costs.

g) Finally, as already mentioned, compensation may be awarded in circumstances in which it would not be awarded by a court.

4.40 A private sector ombudsman scheme offers advantages to scheme members and to the public at large as well as to complainants:

a) For companies and others who belong to a scheme, the initial requirement that the consumer should exhaust the member company's internal complaints procedures means that the member has to have such procedures. That in turn creates a better opportunity to resolve disputes internally at minimum cost and without any intervention by the ombudsman.

b) Even if the dispute does go on to be considered by the ombudsman, the costs involved are likely to be much less than those of a court. Essentially, this is because the inquisitorial procedure adopted enables the dispute to be resolved without any need for representation.

c) Over the course of time, the respective ombudsmen tend to build up their own body of decisions and practice. That becomes known to scheme members who through their own customer complaints departments can anticipate the ombudsman's likely decision and thereby settle many potential disputes at the outset. The private sector schemes, therefore, help to prevent some and to resolve other disputes, as well as providing a means of deciding them if they cannot be either avoided or settled. This advantage is further assisted by the publication by the ombudsman of annual reports. These reports, which are well publicised by the media, are of some benefit to the public at large, because, besides drawing attention to the existence of the schemes, they indicate on the basis of accumulated case experience where improvements can and should be made to the respective industry practices.

4.41 Though private sector ombudsman schemes have advantages, they cannot provide more than a limited alternative to the courts for a number of reasons which include the following:

a) They are applicable only to those types of consumer dispute where there is an industry, association or profession which can fund and administer a suitable scheme.

b) The remedies available are usually limited to monetary compensation only.

c) The nature of the dispute may make it desirable that a third party should be joined in, but that is not possible in an ombudsman scheme and nor can a third party be in any way bound by the ombudsman's decision.

d) Oral evidence under oath and subject to cross-examination, as in a court, may also be desirable, but is not possible.

e) There are some cases where the size, importance or complexity make a full court hearing with representation more appropriate.

4.42 The private sector schemes are, therefore, useful supplements to, not a substitute for, an effective court system.

4.43 Because the schemes are funded by members, no funding is required from central government. At a time when there are limited government resources available for legal aid and other legal services, self-financing private sector schemes are particularly attractive. For that and the other reasons mentioned above, private sector ombudsman schemes should, in our view, be encouraged and where possible improved. How this might be achieved is discussed below.

4.44 One of the most frequent criticisms of the existing private sector schemes is that as more of them continue to appear, there is increasing confusion on the part of potential users about the correct route to follow, especially when some of the schemes overlap. How can a member of the public be expected to know that the IMRO Referee is the Investment Management Regulatory Organisation Ombudsman? Even if he is aware of the existence of the IMRO Referee, how is he to know that his complaint against his bank about stock market investment advice should go to the IMRO Referee, rather than to the Banking Ombudsman, when the bank belongs to both schemes? Individual ombudsmen, when asked about this difficulty, argue that it is more apparent than real. In practice, they say that only a relatively small number of complaints is incorrectly routed and when that does happen, the ombudsmen take it on themselves to re-route the complaint correctly. Despite this there are commentators who have argued that rather than have a multiplicity of schemes which sometimes overlap, there should instead be one single scheme for the whole of the financial services sector. Alternatively, it is said that there should be a single umbrella organisation for the various schemes to avoid confusion and to secure more uniformity in procedures. JUSTICE rejects both the idea of a single scheme for the financial services industry and a single umbrella organisation, because almost inevitably the effect would be a loss of the informality, of the specialised knowledge, and of the speed of resolution which at present characterise each of the relatively small separate schemes. Instead, it is likely that there would be more bureaucracy, less flexibility and less scope for the wider, 'equitable' approach.

4.45 Where we do, however, consider there is room for improvement is by the production of an official 'guidebook' listing and explaining in detail the different schemes. This is something which might be undertaken by the Office of Fair Trading, as envisaged in paragraph 8.26 of a Report of the Director-General of Fair Trading into systems for resolving consumer complaints entitled 'Consumer Redress Mechanisms' published in November 1991 by the Office of Fair Trading. Effectively, this would make more widely available the comprehensive information which at present is only available to a limited extent through the CABx.

4.46 Though the members of some schemes make information about their own industry scheme widely available to customers, others do not. We recommend that all schemes should be well publicised and that it should be a condition of membership of an ombudsman scheme that members should regularly avail themselves of the opportunity to draw attention to their scheme by, for example, posters in branches and notices on statements of accounts, as well as in promotional literature and elsewhere.

4.47 Simply to regard the private sector schemes as a supplement to the courts would be to ignore the extra advantages which each system can and should gain from the other. Two examples are as follows:

a) County Courts might be actively encouraged to refer consumer plaintiffs to a private sector ombudsman, when appropriate, on the basis that the ombudsman's jurisdiction is much greater than that of the small claims court, and the service available is more specialised than that of the courts.

b) Resolving a dispute by use of one team of lawyers (that of the ombudsman) is generally more cost-effective than employing three separate teams, i.e. for the plaintiff, the defendant and the court respectively. That, together with increasing recognition that adversarial procedures are not the most appropriate method of dealing with many civil disputes, indicates that the civil courts have something to learn from the pro-active inquisitorial procedures of the ombudsmen, who combine the roles of investigator, conciliator and decision maker.

4.48 The proliferation of private ombudsman schemes brings with it the danger that the word 'Ombudsman' may become debased. For example, a number of newspapers have appointed what they term 'ombudsmen'. Some of these are clearly independent. Others, however, are ex-employees. None has the power to award compensation. In paragraph 7.16 of the Report on Consumer Redress Mechanisms, referred to above, the idea was canvassed that some protection of the term 'ombudsman' might be secured by setting up 'a College or Council which could set standards of admission to the profession of Ombudsman' and that the 'schemes themselves might benefit from having to comply with minimum standards'. Suggested criteria would include the independence of

the ombudsman and the power to impose binding awards on scheme members. We welcome this proposal and note that a start has already been made by the public and main private sector ombudsmen who have themselves set up a joint working party to study how best to protect the term 'ombudsman' and to define the criteria to be applied to those claiming to be properly entitled to use it.

4.49 Finally, we hope that all necessary steps will be taken to encourage the setting up, where appropriate, of new private sector ombudsman schemes on similar lines to the established ones. The Financial Services Act 1986 provided a precedent by its requirement that the Securities and Investments Board and all self-regulatory organisations and recognised professional bodies should have effective complaint-handling procedures. The Banking Ombudsman Scheme was set up voluntarily in 1986 without legislation, because it was believed that legislation would result if action was not taken by the industry itself. The building societies did not take similar voluntary action. Hence they were required by the Building Societies Act 1986 to become members of an adjudication scheme recognised by the Building Societies Commission, which in turn led to the setting up of the present Building Societies Ombudsmen schemes.

4.50 The common feature of all the non-Court forums for resolving dispute is the general ignorance of the rights which are available to the citizen. More than 50 years ago at the outbreak of war it was recognised by Government that war time conditions would require places to which the citizen could go to get advice about the multiplicity of war time regulations. The Citizens Advice Bureaux were established then, but responsibility for their funding was never assumed by Government. In the last 50 years the output of legislation has been enormous and all aspects of social and community life have become infinitely more complex. It must be reiterated that there is no point in creating rights by legislation unless the individual is made aware of those rights and has the means to get advice and representation if necessary to enforce them. The priority here must be to extend and support the existing CAB network by establishing a proper funding mechanism as suggested in the previous chapter. The next requirement is the recognition that any forum for dispute resolution must have a proper system of leaflets which can be made available to the individual at the time when he really needs them. The Citizen's Charter is laying emphasis on the rights of the citizen to a fair deal from Government departments. Above all this needs a new strategy to make available to the citizen proper knowledge about the rights that he already has. In fact many disputes arise simply because of ignorance. Attempts by the Department of Social Security, for example, to give better explanations of Social Security decisions will reduce the number of Social Security appeals. It should be provided, whether in the Citizen's Charter or otherwise, that any tribunal or other body which offers a dispute resolution service should ensure that leaflets explaining the service are available at appropriate times and places.

Advice and Representation

4.51 Leaflets should explain to an aggrieved party how he or she may get advice and, where appropriate, representation. The Citizens Advice Bureau is the traditional first port of call but for many people there is no CAB immediately available and the coverage of firms of solicitors is still widespread throughout the country. Advice and assistance under the Green Form scheme is especially relevant in the more important tribunal cases (see below). The franchising experiment now being carried out by the Legal Aid Board should improve the availability of skilled specialist advice at an efficient and economical rate. Under this proposal the Legal Aid Board will grant franchises to firms of solicitors to undertake particular categories of work in which they have demonstrated expertise on a basis designed to give the best value for money for the individual and for the Legal Aid scheme.

4.52 There are some services where legal advice may not be necessary. For example the ombudsmen schemes will usually take on an individual's complaint against the relevant institution without the need for him to be legally advised or represented. Similarly the Criminal Injuries Compensation Board can, in the simpler case, assist the individual to make application for compensation. Another model is UKIAS (see 4.63 below).

Tribunals - General Observations

4.53 Tribunals decide hundreds of thousands of cases every year (more than the number of High Court and County Court cases put together) over a wide range of issues. Legal Aid is available for only a minority of tribunals. In many cases, therefore, applicants to tribunals must either attempt to obtain advice and representation from free legal and para-legal sources, or they must pay for representation by private practitioners, or they must do without representation. The matters decided by tribunals are often serious, concerning, for example, rights to welfare benefits, rights to remain in the country, rights not to be detained under Mental Health legislation, rights not to be unfairly dismissed from work. The case law and regulations concerning entitlements in these areas are often highly complex. The citizen is often overwhelmed by the legal resources at the disposal of the State or the company with whom he or she is in dispute.

4.54 In seeking to answer the question 'How best can access to justice in the various Tribunals be improved?' we have been guided by the following principle: that there is no single solution or set of solutions applicable to all tribunals. We do however reiterate the conclusion of the JUSTICE unpublished report on the Costs of Civil Litigation (1974) which was that, in addition to green form advice, legal aid proper should be available in tribunals but only on the basis of satisfying a number of specific criteria. This approach was endorsed by the JUSTICE report on Industrial Tribunals (1987).

4.55 We have looked, therefore, at other ways of giving effect to those rights. We have looked at other sources of representation and, where such representation is not available, we have considered how the unrepresented citizen appearing in the tribunal might be best protected. Neither matter is easy, and we are none too confident that the objectives can be satisfactorily achieved. Because of that, and in keeping with the constant theme of this report, namely Alternative Dispute Resolution, we have looked, in particular, for the earliest point at which intervention through assistance would most assist the citizen with a grievance or dispute. We have sought to determine the most efficient means of providing an effective service at this point.

The point of service

4.56 The time when legal advice is required varies depending on the area of the law: for an employee it is at the point when he or she perceives there to be a problem with the employer; for the social security claimant it is at the time when a claim is first to be made; and so on. In an ideal world legal advice should be available at such an early stage - prevention rather than a cure. More realistic, at the present time, is to determine the moment where legal advice is essential: i.e. the 'unfair' dismissal; the refusal to pay benefit; and so on. In every area there is a 'trigger'.

The General Availability of Legal Advice

Law Centres

4.57 The first law centres were established in the early 1970s. There are now around sixty, all with relatively uncertain funding. Service is provided by legally qualified workers who provide the service for very modest remuneration and at no cost to clients. The areas of work which law centres specialise in are those which are not well served by private practice and for which legal aid is unavailable, for example, housing problems, welfare rights, health, employment etc. As a result of specialising in these areas law centres have developed a level of expertise that is difficult to match in more generalist advice agencies.

4.58 Despite their limited resources, evidence from research on tribunals* indicates that law centres operate very successfully in advising and representing tribunal applicants who are unable to obtain legal aid for representation. Indeed, their success rate with the cases brought before social security appeal tribunals was among the best.† This is a reflection of the extent to which law centres concentrate their activities and develop specialist expertise in areas of law that are relatively unattractive to private practitioners.

4.59 Law centres provide an important service to some of the most disadvantaged members of the community, and do so very economically. The resources of law centres tend to be uncertain and under pressure. Few are able to provide the level of service that they would wish. For twenty years Governments have failed to come to a decision about how law centres should be funded. A properly thought out policy is long overdue. The present uncertainty is indefensible.

Citizens Advice Bureaux (CABx)

4.60 Currently the level of funding is not spread evenly either by population or geography across the country. Thus, access to independent advice via CABx is not readily available to all.

4.61 The effect of charge capping in 1991-2 on local authorities has meant that some bureaux have lost funding. Currently three London bureaux are closing and a bureau in the North East has closed. Many bureaux have faced reductions in their income through grant aid. This financial crisis arises at a time when demand for bureau services is high and growing - for example in the areas of consumer debt and mortgage repossessions - and in the framework of the 'citizen's charter' which promotes the role of organisational accountability to individuals, and the consequent need for independent advice.

4.62 Central Government's restraints on local authority financing means that Councils have little scope for improving and developing the services provided by CABx. We have noted that the National Association of Citizens Advice Bureaux contend that local authority support for voluntary sector advice agencies should be separately identified within the local authority Standard Spending Assessment in preference to the present situation which includes funding for this sector in the 'Other Services' block.

* cf Generally H Genn and Y Genn *The Effectiveness of Representation at Tribunals:* A Report to the Lord Chancellor, LDC 1989

† *Ibid.* cf for example Table 3.3. page 71

Government-funded Tribunal Advice/Representative Service

4.63 One alternative to providing advice and representation by Legal Aid could be based on the United Kingdom Immigration Advice Service (UKIAS) model. Members of UKIAS provide advice and representation to those who wish to appeal against decisions of the Home Office regarding immigration matters. Any person wishing to challenge a Home Office Immigration decision has a right to contact UKIAS and to be advised and represented by it. There is no charge to those using the service, and UKIAS is financed from Home Office funds. UKIAS is staffed by a mixture of lawyers and non-lawyers who are salaried. The financial relationship between UKIAS and the Home Office has led to the suggestion that UKIAS cannot provide an independent representation service. It has also been suggested that the service provided by UKIAS is inferior to that provided by private practitioners. Recent research on the outcome of hearings before immigration adjudicators suggested that, holding other factors constant, UKIAS had the highest rate of success among representatives, followed by solicitors and then other representatives, and that representation by Counsel did not increase the likelihood of success more than representation by a solicitor or UKIAS.*

4.64 The findings of this research in relation to the potential for a government-funded representation service are important. Hearings before immigration adjudicators are an example of relatively formal and explicitly adversarial tribunal procedures. The Home Office is always represented, often vigorously, by an experienced Presenting Officer. Witnesses for the applicant give sworn evidence and are cross-examined by the Presenting Officer, although the Home Office representative is not. Immigration adjudicators often take a very formal approach to the presentation and evaluation of evidence.

4.65 The research quoted was based on information from files closed between 1986 and 1987. Although it was possible† that in the intervening period the personnel and character of UKIAS have changed somewhat, the research indicates nonetheless that it is possible for a government-funded representation service to take cases on an unselective basis, and to provide a high quality service for clients. Key factors in the success of UKIAS (rather like Law Centres) seemed to be the commitment of staff to the work being done and the development of specialist skills. UKIAS also appeared to enjoy the good opinion of most immigration adjudicators.

* *Ibid.* cf pp 85–87

† As was suggested in the recent furore over the Government's proposal to withdraw Legal Aid from immigration matters on the ground that UKIAS were providing an adequate service

4.66 UKIAS provides an economical model of a publicly-funded representation service which, despite the doubts of sceptics about its independence, appears to have provided as good a service overall to its clients as solicitors and barristers in the immigration field. The ability of a publicly funded representation service to provide high quality representation for clients within this type of adjudicative forum suggests that this model is appropriate for tribunals in which it is now difficult for applicants to obtain representation.

The Free Representation Unit (FRU)

4.67 Since the early 1970s FRU has sought to fill the gap in the provision of legal services in the UK caused by the unavailability of legal aid for the vast majority of tribunal hearings. FRU now has excellent facilities and three full-time staff (one administrator and two caseworkers). The representatives are principally bar students and pupil barristers. Its resources are concentrated on representation rather than advice. In recent years the number of cases in which representation was provided by FRU has been over 1000. FRU has begun to select important cases for particular attention, most notably in taking two cases recently to the Court of Appeal.

4.68 After the development and certainty of the period 1987-1990, FRU is now faced by something of a crisis. The number of cases coming into the unit is now about 1,700. This is due to the increase in employment work arising from the recession; the closure of Law Centres in London; and the fact that FRU has attracted more CICB and Immigration work as it has developed its specialism in these fields. Unfortunately FRU has not been able to maintain the percentages of cases in which it was able to provide a representative. As the caseload undertaken has increased in the past two years, so the costs have risen. There has been no equivalent rise in the real level of financial support from the Bar Council (£31,000 this year). FRU urgently needs more financial support if it is to maintain, quite apart from increasing, its current workload. Notwithstanding this, FRU remains a successful organisation. The service that FRU provides should be expanded, both regionally and in London.

Can FRU be expanded?

4.69 FRU is limited by the number of bar students and pupils who are willing to volunteer, by the the small number of staff available to train representatives and administer cases, and by shortage of money. These limits could be overcome by:

a) attracting law school students and young solicitors and trainee solicitors who want the opportunity to practise advocacy;

b) establishing units similar to FRU elsewhere in the country;

c) seeking the financial and administrative support of local Law Societies and law firms.

4.70 This is a field in which young lawyers and trainee solicitors, especially those employed by substantial firms, should be encouraged to participate. It is a pity that the pro bono activities which are widespread in US law firms have not taken root here.

Tribunal Duty Scheme?

4.71 As a last resort we have considered whether there is any merit in a Duty Scheme to provide representation at the last moment at tribunals and, therefore, as a last resort. Recent research undertaken into the provision of duty schemes at the County Court shows that the schemes providing representation on the day are of marginal impact on the case. Given the factual and legal complexity of most tribunal cases, we doubt whether the impact would be any different were such a scheme to be designed for tribunals. A duty scheme would, therefore, have greater value were it to take effect at an earlier stage, as a part of a more general attempt to encourage the seeking of advice in good time prior to the hearing.

Procedures at Tribunals

Inquisitorial Procedures

4.72 Unrepresented litigants suffer from lack of familiarity with procedures and lack of legal sophistication. This is manifested in an inability to understand the relevance of the law and the regulations to the particular case. It leads to an inability to prepare and construct a winnable case. During hearings unrepresented litigants are at a disadvantage because there is usually an imbalance of power, in that the other side is normally represented by a lawyer of experience. Unrepresented litigants have difficulty in expressing themselves, in telling a linear story, in understanding the significance of questions put to them.* The impact is most telling in those tribunals where the procedure is most adversarial and where, accordingly, cross-examination is critical (for example, Industrial Tribunals). Put another way, the natural disadvantages that unrepresented litigants suffer can be more easily ameliorated in procedures that are more inquisitorial, in that they permit greater intervention and investigation by the tribunal itself.

4.73 There are no tribunal hearings which are technically 'inquisitorial'. But Mental Health and Social Security Appeal tribunals are very informal

* cf Genn and Genn, Chapter 7 generally

and have flexible procedures, and are controlled by chairmen who are encouraged to put applicants at ease and to take an active role in the proceedings. These can be contrasted with adversarial procedures in which tribunal chairmen feel less free to intervene to assist an unrepresented applicant and in which unrepresented applicants have little hope of conducting effective cross-examination.

4.74 If greater availability of representation is not possible, then modification of procedures towards a more investigative and less adversarial model might assist unrepresented applicants in putting their case. Such a change in procedure, however, must be accompanied by better and more intensive training for tribunal chairmen.

Training for Chairmen

4.75 Where litigants are unrepresented the role of the tribunal chairman is crucial. The fairness of the process, both objectively and in the perception of litigants, depends on the behaviour of the tribunal chairman. Unrepresented litigants have no-one to ensure that they have had a fair opportunity to speak; they have no representative to ensure that procedures are correctly followed, that evidence is properly presented, and that the decision-making process is based on adequate presentation of relevant facts.

4.76 The job, from the tribunals' point of view, in the absence of representation, is a difficult one. They have to perform many different roles. They are responsible for eliciting the necessary information from appellants; they must correctly apply the law and adjudicate the case; they must assist unrepresented applicants while remaining impartial and objective; they must arrive at decisions that are justifiable and consistent.

4.77 Tribunal chairmen naturally differ in their ability to carry out all of these functions: some are impatient with loquacious appellants; many are insensitive to the difficulties faced by unrepresented appellants; some will painstakingly search for information relevant to the tribunal's decision while others will simply hear what an applicant has to say without further questioning. Some will be at pains to assist unrepresented applicants while others feel that only a limited amount of help can be given without compromising the impartiality of the tribunal. Tribunal chairmen, both within and between different tribunals, differ substantially in their approach to the tasks before them, and in their beliefs about what constitutes appropriate and desirable behaviour during hearings. This leads to inconsistency in procedures and outcomes.

4.78 Chairmen require considerable training if they are to understand the difficulties under which unrepresented applicants labour and if they are to develop a sensitive, helpful and consistent approach toward applicants.

Interlocutory Procedures

4.79 One area in which unrepresented litigants are at most disadvantage is in the period leading up to the hearing. Again this is most noticeable in the most adversarial tribunals. Use of orders for discovery and Further and Better Particulars can be very useful. Most unrepresented litigants will be ignorant of these opportunities or unclear as to how best to utilise them. In the Industrial Tribunal there could be a system of automatic directions, with either a chairman looking over the papers at an early stage or else a clerk to the tribunal who has sufficient experience making orders to ensure that the unrepresented applicant is not at a disadvantage at the interlocutory stage. An alternative is to have a pre-hearing review in every case where the applicant is unrepresented.

Social Security Commissioners

4.80 In the introduction to this section of the report we indicated that there was one exception to our rule that we would not devote space to repeating the very strong arguments in favour of extending legal aid to tribunals. There is one tribunal which, we think, has an exceptional case. Appeals from the Social Security Appeal Tribunal (SSAT) go to a Social Security Commissioner. The following points represent an overwhelming case for the extension of legal aid to cover such appeals:

a) about 1500 such appeals are made each year (some on the papers, some after a hearing);

b) appeal must be on a point of law (note the parallel with the Employment Appeal Tribunal, the equivalent appellate stage from the Industrial Tribunal, where an appeal must also be on a point of law, but where legal aid is available);

c) because of the complex nature of the regulations the issues are usually extremely difficult;

d) in the majority of cases it is wholly unrealistic and wholly unreasonable to expect an unrepresented appellant to be able to express his or her case. The Department of Social Security is, of course, always represented (normally by Treasury Counsel);

e) the cases often involve an important principle and/or potentially a large amount of money (in terms, that is, of the potential cost to the Exchequer).

4.81 The Lord Chancellor has indicated both inside and outside Parliament that he accepts the strength of these arguments. The Social Security Commissioners themselves would, we know, welcome such an extension.

List of Recommendations

Chapter 1

1.3 When considering change and improvements to the legal system, the first priority of the Government should be to have regard to the needs and interests of the individual citizen.

Chapter 2

2.2 Arbitration in County Courts should be extended to claims between £1000 and £5000.

2.4 Priority cases, such as possession proceedings in the County Court, should have special provision via CABx and Green Form advice.

2.7 There should be greater provision for education about money matters.

2.8 The principal source of debt advice should be CABx.

2.9 Lenders, including building societies and banks, but also the issuers of cards and the retail industry, should be required by Government to fund a much greater provision of debt counselling.

2.10 There must be a national policy to fund CABx properly using a combination of central and local government funds plus substantial new support from lending institutions.

2.12 County Courts are understaffed. More staff should be employed and greater use made of modern technology.

2.13 Legal and taxation procedure should be reformed.

2.14 Divorce procedure should be radically altered on the lines of the Law Commission report on the 'The Ground for Divorce'.

2.18-2.19 Conciliation procedures in divorce should be extended.

2.20 These reforms in divorce procedure will save substantial legal aid expenditure which must be used towards funding the changes recommended in paragraphs 2.6, 2.10, 3.10, 4.45, 4.48, 4.50, 4.51, 4.54 and 4.63.

2.21 There should be simple alternative procedures for resolving disputes on property and finance.

2.22 One such procedure is mediation by solicitors or panels attached to divorce County Courts.

Chapter 3

3.6 A Contingency Legal Aid Fund (CLAF) scheme should be established.

3.7 The successful CLAF litigant should pay 10–20% of his damages to the Fund. If he loses CLAF pays his costs and the other side's.

3.8 CLAF is primarily suited to plaintiff personal injury and should not generally cover commercial disputes, tax or cases where the primary remedy claimed is not financial.

3.10 A pilot CLAF scheme should be established in three trial centres funded initially by the Treasury.

3.15 Legal Aid financial conditions must be reformed and simplified.
Contributions should continue to be collected out of income for the duration of the case.
Assessment of means should be based primarily on last year's tax documents.
Legal aid should be available to those whose income is above the existing upper limit.
There should be a new flexible upper limit and the existing contribution fraction of 25% of income above the free limit should rise at the upper end to 50% of disposable income under the regulations.

3.20 People should be encouraged to add legal expenses cover to existing house contents and car insurance.

3.23 The Law Society should be asked to take steps to improve the competence of lawyers undertaking litigation.

Chapter 4

4.6-4.32 This section lists the features of successful systems of alternative dispute resolution.

4.39 This section lists the advantages to individual users of private sector Ombudsman schemes.

4.45 Recommends the production of an official guidebook listing and explaining the various ombudsmen schemes.

4.48 Suggests a college or Council to set minimum standards of independence of schemes.

4.50-4.52 Emphasises the need to fund CABx so that they can advise individuals how to approach the different Courts and ADR systems. It also recommends comprehensive leaflets advising individuals how to go about obtaining redress.

4.54 Legal aid should be extended to some tribunal cases.

4.59 The Government should adopt a proper policy towards funding law centres and end the present uncertainty.

4.69 The Free Representation Unit should be expanded in centres outside London. It should attract trainee solicitors and the financial and administrative support of local law societies and law firms.

4.74 If greater resources are not available for tribunal representation, a less adversarial mode of procedure should be adopted.

4.78 There should be more training for tribunal chairmen.

4.79 There should be more interlocutory orders and automatic directions before the final hearing.

4.80 There is an overwhelming case for the extension of legal aid to cases coming before Social Security Comissioners.