CIVIL JUSTICE COUNCIL

CONSULTATION PAPER

GENERAL PRE-ACTION PROTOCOL AND

PRACTICE DIRECTION ON PRE-ACTION PROTOCOLS

This consultation will end on 2nd May 2008.

A consultation produced by the Civil Justice Council.

This information is also available on the Civil Justice Council website at www.civiljusticecouncil.gov.uk.

Introduction

This consultation exercise has been undertaken following the outcome of the Civil Justice Council's earlier consultation on a proposal to introduce a Consolidated Pre-Action Protocol. A full summary of the outcomes of that consultation exercise is available on our website.

Following that process, the Civil Justice Council (CJC) is now proposing to recommend the introduction of a General Pre-Action Protocol that will be used in those cases, to which the existing or any future subject-specific Pre-Action Protocols do not apply. It is further proposed to amend Practice Direction on

Pre-action Protocols and that this should supplement Part 3 of the Civil Procedure Rules (CPR). This consultation paper seeks views on the proposals and is aimed at all individuals and groups who have an interest in trying to resolve civil disputes in England and Wales. The CJC is making these proposals jointly with Her Majesty's Courts Service.

The CJC, as a Non-Departmental Public Body, is not covered by the code of practice on written consultation issued by the Cabinet Office. However such bodies are encouraged to follow the code, and the consultation is being conducted in line with it so far as appropriate.

The proposed General Pre-Action Protocol largely codifies and clarifies the requirements in the Practice Direction on Pre-Action Protocols. Therefore, there should be no significant additional cost as a result of following the procedure contained in it. A detailed impact assessment has not been produced for this proposal.

The consultation period is 12 weeks terminating on 2nd May 2008

Consultees

Copies of the consultation are being sent to:

- **Judicial bodies**, including HM Association of District Judges and the Council of HM Circuit Judges
- **Advice bodies**, including Citizens Advice, Advice UK and the Federation of Information and Advice Providers
- **Creditor bodies**, including the Civil Court Users Association
- **Practitioners and their Representative bodies**, including the Law Society and the Bar Council.
- **Government Bodies,** including the Office of Fair Trading, the Insolvency Service, HM Revenue and Customs

(The Council Secretariat can provide a full list on request to the address on page 14).

However, this list is not meant to be exhaustive or exclusive and a response are welcomed from anyone with an interest in or have views on the subject covered by this paper.

Background

Pre-Action Protocols

Pre-Action Protocols were conceived by Lord Woolf in 1996 as part of his Access to Justice report to set standards and timetables for the conduct of disputes before a claim is started. They require the exchange of information and investigation of disputes at an early stage. The parties in a dispute will therefore be in a better position to make a realistic assessment of the merits of any case far earlier than previously. This enables the parties to often settle disputes without recourse to litigation. Where litigation is unavoidable, claims coming before the court will be better prepared. Judges are able to consider how far litigants have followed the pre-action protocols and are able to impose sanctions on those who do not comply with them or who have acted unreasonably during the pre-action period where there is no pre-action protocol.

There are currently 9 pre-action protocols in force, namely: -
Personal Injury
Clinical Disputes
Construction and Engineering Disputes
Defamation
Professional Negligence
Judicial Review
Disease and Illness
Housing Disrepair
Possession Claims based on Rent Arrears

The overall intention of pre-action protocols is to ensure that before proceedings are commenced all reasonable steps are taken to avoid the necessity for litigation and particularly:

• to encourage the exchange of early and full information about a dispute,
• to enable the parties to settle their dispute without the need to start a claim, and
• to support the efficient management by the court and the parties of claims that cannot be avoided.

Role of the Civil Justice Council

Pre-action protocols were originally developed by a number of working groups of interested parties, with the then Lord Chancellor's Department (and subsequently Department for Constitutional Affairs) acting as a facilitator. Following a process of drafting and consultation, the agreed pre-action protocols were submitted to the Master of the Rolls (MR) as Head of Civil Justice for approval in accordance with the Practice Direction on Protocols.

It subsequently became apparent that some more formal system was needed to keep the existing protocols under review and up-to-date and consider proposals for new protocols. The MR therefore asked the Civil Justice Council to be his principal advisor on the future development of the pre-action protocol regime, ensuring in particular that any proposals for change are subject to wide consultation. The MR has also indicated that (as is the practice with Practice Directions) he will ask the Civil Procedure Rule Committee (CPRC) to review the drafting any proposed amendments, with the view to ensuring overall consistency of style and presentation with the Civil Procedure Rules.

The CJC has established a Pre-Action Protocol Committee with the following terms of reference:

- to consider whether the format and content of the pre-action protocols is presented (where appropriate) in a uniform way;
- to look at ways in which the costs associated with complying with pre-actions protocols can be reduced;
- to consider whether changes are necessary and can be made to simplify the pre-action protocols;
- to consider whether there are additional types of dispute that would benefit from a specific pre-action protocol;
- to look at the content of individual pre-action protocols and where necessary make proposals for change and consultation with a wider group of stakeholders.

Membership of the Pre-Action Protocol Committee:
Mark Harvey – Chairman (Solicitor, Hugh James)
Marie Gellart – (Solicitor, Greenwoods)
Martin Heskins – (Solicitor, Law Society)
Paul Kirtley – (Barrister)
District Judge Robert Jordan
Andrew Frazer (HMCS)
David Di Mambro (Barrister and CPRC member was invited to join the Committee for the purpose of developing the proposed General Protocol)

Summary of Consolidated Pre-Action Protocol Consultation

In February 2007 the CJC sought views on proposals to introduce a Consolidated Pre-Action Protocol that would have replaced the current nine pre-action protocols by integrating the core steps and guidance common to all of the pre-action protocols. This was in light of the growing concern that had been expressed in various quarters about the proliferation of pre-action protocols, many of which are identical in substance in many respects but different in style. A majority of the responses were opposed to the proposal and there was an understandable reluctance to reduce the number of pre-

action protocols from stakeholders who had committed so much time to drafting their respective pre-action protocols originally.

In light of the responses and following further consideration, the decision was made not to take forward that proposal. Instead it was decided to produce the General Pre-Action Protocol as a default protocol where other pre-action protocols are not applicable. Once agreed, this could be used as a template against which to review and, if appropriate, rationalise and clarify existing pre-action protocols.

This latter intention arises as there was a general recognition by respondents that the various pre-action protocols are in some cases out-dated and contain unnecessary information. Accordingly, the CJC plans to hold a forum of relevant stakeholders during the course of this consultation exercise. The forum will be an opportunity both to discuss the content of this consultation paper and the scope for rationalisation of the subject-specific pre-action protocols.

The Proposals

The idea of a General Pre-Action Protocol is not new. In October 2001, the then Lord Chancellor's Department issued a consultation paper on a General Pre-action Protocol to be used in all cases where no specific pre-action protocol existed. That consultation concluded that the pre-action protocol would be too general in its application and would be likely to lead to unnecessary delay and confusion. It was subsequently decided to build on the existing provisions within the CPR by extending the requirements of pre-action protocols to all other disputes. Rather than extending the scope of existing pre-action protocols, this was achieved by expanding the Practice Direction on Protocols to describe in greater detail the pre-action conduct expected of parties generally (**see annexe A**).

Overview

Most practitioners are already familiar with the principles and requirements contained in the Practice Direction on Protocols. But we consider that these requirements, given their importance and wide scope, could be set out more clearly and accessibly for the benefit, in particular, of unrepresented potential litigants. It is not intended to change the requirements significantly or increase the burden on practitioners and businesses that already follow them as part of their routine pre-litigation work.

The current Practice Direction is in effect a default pre-action protocol for those other cases that fall outside the scope of the existing pre-action protocols. However, at the moment the format in which the Practice Direction is presented does not offer it the same sort of prominence or profile as the subject specific pre-action protocols. The result is that people who are less familiar with Civil Procedure Rules, for example certain categories of litigants in person, are less likely to be aware of the behaviour expected of them before issuing court proceedings as set out in this Practice Direction.

We therefore propose to revise the Practice Direction on Protocols and create a new General Pre-Action Protocol applicable in all disputes not subject to one of the other pre-action protocols. The Practice Direction will be shorter than now, and focus on the court's powers to impose sanctions for non-compliance and other general information relevant to all disputes. The General Pre-Action protocol will set out the requirements on parties to a dispute and the steps they are expected to follow before issuing proceedings. The proposed General Pre-Action Protocol does not generally depart in substance from the requirements contained in the current Practice Direction, but it does seek to flesh out the existing requirements with additional detail and to simplify and clarify the language used. This structure is intended to provide a more easily accessible and clearer framework for parties when trying to resolve disputes. Drafts of the proposed Practice Direction and General Pre-Action Protocol are at **annexes B & C**. These drafts have been

prepared by CPR lawyers at the Ministry of Justice on the basis of earlier drafts provided by the CJC's Pre-Action Protocol Committee.

We also propose that the Practice Direction, which is currently free-standing, should in future supplement Part 3 of the CPR. This will more clearly integrate it into the corpus of the CPR, making it more visible to users. Aligning it with the courts case management powers under Part 3 of the Rules should serve to highlight the court's powers to use sanctions for non-compliance with pre-action protocols

Question: Do you agree with the proposed new structure of a shorter Practice Direction highlighting the court's case management powers and a General Pre-Action Protocol setting out the requirements on parties to a dispute? Please give reasons for your view.

Question: Are there particular classes of cases or types of circumstances where the General Pre-Action Protocol should not apply? If so please specify.

Language

As stated above, we have taken the opportunity to simplify the language used throughout both the redrafted Practice Direction and the proposed General Pre-Action Protocol. These have been drafted with litigants in person closely in mind. In particular, we have wherever possible avoided reliance on legal terminology, such as disclosure, limitation or contributory negligence, and either paraphrased or defined these in plain English. We have also avoided references to 'issuing proceedings' or similar in favour or 'starting a court claim'. We have used the word 'dispute' rather than 'claim' to refer to case at the pre-action stage. Subject to that, we have sought to draft in a way that is consistent with the approach taken in the CPR itself. For example, we have

avoided the word ‘should’ in relation to requirements, in favour of the words ‘must’ (when referring to the parties) and ‘will’ (when referring to the court). Although the meaning is the same, we think this will also help give litigants in person a clearer flavour of what is expected.

Question: Do you have any comments on the language used and the drafting of the revised Practice Direction and General Pre-Action Protocol? If so, please specify.

Alternative Dispute Resolution (ADR)

A central aim of the pre-action protocol regime is to encourage parties to make every effort to resolve their dispute without the need for court proceedings. The General Pre-Action Protocol as with other pre-action protocols emphasises the importance for the parties making every effort to resolve their dispute prior to starting a claim.

The ADR section is broadly the same as that in the other pre-action protocols. The main change is the deletion of the sentence: "*It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR".* Whilst it is accepted that mediation is a voluntary process, the presence of this sentence appears to contradict the general encouragement for parties to mediate (or use other forms of ADR) that runs through the rest of the General Pre-Action Protocol.

We have added arbitration to the list of ADR options. Arbitration schemes are available, in particular, for many different types of consumer dispute to which this protocol will apply. We have also sought to clarify the description of early neutral evaluation.

Finally, we have made explicit that parties are expected to make continual efforts to settle, both before a claim is started and during proceedings, and added a paragraph exhorting parties to take stock and reconsider settlement after completing the pre-action exchanges.

Question: Do you agree with the approach taken to ADR in the General Pre-Action Protocol?

Steps to take before starting a court claim

These follow the approach taken in the current Practice Direction on Protocols, although the stages and required contents of letters and responses are set out in rather more detail.

Due to the broad scope of application of the proposed General Pre-Action Protocol, we have not sought to specify in the Protocol the time for responding to a letter before claim. Most of the subject-specific pre-action protocols specify a normal period for response and a long-stop period.

Instead, the protocol provides for the letter before claim to specify a period for the full response (to run from the date of the letter before claim) and for the acknowledgement to specify a different (longer) period if required. We have not provided for a further process by which the claimant can agree or dispute the longer period. Rather, it is left to the court to decide whether the proposed periods were reasonable if and when proceedings are issued. The Protocol gives non-binding guidance about the sorts of period that might normally considered reasonable in simple, standard and specialist cases.

Question: Do you agree with the required steps set out in the General Pre-Action Protocol, and in particular the approach taken to time limits. Please give reasons for your view.

Question: Would it be helpful to include a 'model' letter (non-mandatory) before claim (for a standard consumer claim) as an annex to the General Pre-Action Protocol?

Debt claim requirement

We have included one additional substantive requirement in the General Pre-Action Protocol. This is a requirement for business claimants against the un-represented individuals provide the following information:

- details of how the money owed can be paid;
- details of who the defendant should contact to discuss repayment options (e.g. installments or deferment);
- information about sources of free debt advice.

The Protocol does not require this information to be provided as part of the letter before claim because in many cases it may already have been provided as part of the creditor's debt collection routine.

The inclusion of this requirement reflects one of the outcomes of HMCS's consultation on *The Debt Claims Process* (CP22/07). That consultation considered options for encouraging debtors to engage with their creditors at an early stage, rather than (as some do) ignore demands until court proceedings are issued, thereby adding to their debt.

A full analysis of the outcome of that consultation will be published in March. One finding emerging from the consultation is that there is no case for introducing a formal pre-action notice issued by the court or the creditor. However, 76% of respondents agreed that the provision of the information outlined above was useful and should be required by the pre-action regime.

Question: Do you agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?

Experts

The revised Practice Direction and the General Pre-Action Protocol both include basic guidance referring to the rules about experts are encouraging parties to keep the use and cost of experts to a minimum.

The General Pre-Action Protocol goes to state that, where an expert is required, the parties should consider whether a single joint expert or an agreed expert should be appointed. Both these terms, which are often confused, are defined in plain English.

Finally, the Protocol adopts the procedure for appointing an agreed expert used in the Personal Injury Pre-Action Protocol.

Question: Do you agree with the approach taken to experts in the General Pre-Action Protocol? Please give reasons for your view.

Limitation

The revised Practice Direction maintains the current provision in the existing pre-action protocols. Where it is not possible to comply with the pre-action protocol due to the imminent expiry of a statutory time limit, a claim should be started and an application made for the proceedings to be stayed so that the pre-action protocol can be complied with.

The General Pre-Action Protocol goes further than the provisions in the revised Practice direction. Where the dispute is approaching a statutory time limit the parties are encouraged to agree to a reasonable period of time within which the defendant will not raise the statutory defence of 'time bar' whilst the parties continue to try and resolve their dispute. This avoids the needs to start a court claim and make an application for a stay of proceedings.

Although a subtle point the parties are not actually agreeing to extend a statutory time limit (although that is the practical effect). Rather the parties are agreeing that the defendant will not raise the statutory defence of 'time bar' for a fixed period of time beyond the expiry of a limitation date

Question: Do you agree that, where limitation is an issue, parties should be encouraged to agree not to take the 'time bar' defence?

Questionnaire

We would welcome responses to the following questions set out in this consultation paper: -

1. **Question: Do you agree with the proposed new structure of a shorter Practice Direction highlighting the court's case management powers and a General Pre-Action Protocol setting out the requirements on parties to a dispute? Please give reasons for your view.**

2. **Question: Are there particular classes of cases or types of circumstances where the General Pre-Action Protocol should not apply? If so please specify.**

3. **Question: Do you have any comments on the language used and the drafting of the revised Practice Direction and General Pre-Action Protocol? If so, please specify.**

4. **Question: Do you agree with the approach taken to ADR in the General Pre-Action Protocol?**

5. **Do you agree with the required steps set out in the General Pre-Action Protocol, and in particular the approach taken to time limits. Please give reasons for your view.**

6. **Question: Would it be helpful to include a 'model' letter (non-mandatory) before claim (for a standard consumer claim) as an annex to the General Pre-Action Protocol?**

7. **Question: Do you agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?**

8. **Question: Do you agree with the approach taken to experts in the General Pre-Action Protocol? Please give reasons for your view.**

9. **Question: Do you agree that, where limitation is an issue, parties should be encouraged to agree not to take the 'time bar' defence?**

How to respond

Please send your response by……2008 to:
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