CJC Consultation on Pre-Action Protocols

Response of DWF Law LLP

20 January 2022

Submitted in addition to the online form due to concerns about the limitations of the text boxes, and answers being cut off in the pdf/print version.

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1. Your response is:
   - Public
   - Anonymous
   - Confidential
2. Your first name: [redacted]
3. Your last name: [redacted]
4. Your location (town/city): Manchester
5. Your role:
   - Judge
   - Lawyer
   - Insurer
   - Paralegal/legal assistant
   - Litigant
   - Policymaker/civil servant
   - Other
6. Your job title: [redacted]
7. If relevant, whose interests to you predominantly represent?
   - Claimants
   - Defendants
   - N/A
8. Your organisation: DWF Law LLP
9. Are you responding on behalf of your organisation? Yes
10. Your email address [redacted]

Question 11: Do you agree that the Overriding Objective should be amended to include express reference to the pre-action protocols (PAPS)?

Yes.

It is imperative that the overriding objective should direct parties to the PAPs and stress the importance of compliant pre-action conduct. This extends to active case management, without which any revised PAPs will largely be ineffective.

Question 12: Do you agree that compliance with PAPs should be mandatory except in urgent cases? Do you think there should be other exceptions generally or in relation to specific PAPs?

Yes.

Unless compliance with PAPs is mandatory, there is a risk that parties will pay only lip service to them and largely defeat their purpose.

Where problems of limitation apply, a party should be permitted to issue protective proceedings and the proceedings should then be stayed until the PAP has been complied with.

It is agreed that, as with some existing PAPs, consideration should be given to whether or not exceptions should be provided for, but not in such a way that the exceptions facilitate circumventing the particular PAP.

Question 13: Do you agree that there should be online portals for all cases where there is an online court process and that the systems be linked so that information exchanged through the PAP portal will be automatically accessible to the court (except for those designated as without prejudice)?

Yes

In principle yes. There would be a number of benefits to having online portals where there is an online court process:

1 An online pre-action process could be so designed that it steers the parties into compliance with the relevant PAP.

2 In the event of proceedings, the information already within the online system would remain available and avoid duplication. (This might even in straightforward claims remove or reduce the need for statements of case).

3 Such an online system would permit early judicial scrutiny of the claim, including how the parties had conducted themselves in the PAP phase.

However, an online system of this type would need to be both accessible to all users, including litigants in person (LIP) and would also need to be comprehensive and robust. Some current online systems are incomplete and this creates problems for users.

Care needs to be given to online portals when they are for use by LIPs. They need to be simple to use and the PAPS and processes need to be embedded in the system.

Question 14: Do you support the creation of a new summary costs procedure to resolve costs disputes about liability and quantum in cases that settle at the PAP stage? In giving your answer, please give any suggestions you might have for how such a costs procedure should operate?

No. The creation of an additional summary costs procedure would not be proportionate, given the relatively small number of cases to which it would apply; the additional judicial resources it would absorb; and the risk that it would encourage costs building in the PAP phase.

Currently, where cases settle pre-issue, defendants will invariably meet a claimant's reasonable costs, where costs would have been payable following the issue of proceedings. Such costs are usually agreed but in the relatively

small number of cases where agreement cannot be reached, the claimant can issue Part 8 proceedings under CPR 46.14.

Question 15: Do you agree that PAPs should include mandatory good faith obligation to try to resolve or narrow the dispute? In answering the question, please include any views you have on the proper scope of any such obligation and whether there are any cases and protocols in which it should not apply.

Yes. However, the success or otherwise of this proposal will be dependent on one of the principal areas of weakness identified in relation to existing PAPs: the non-disclosure of comprehensive details of the claim with disclosure of all relevant supporting documents.

It is a concern of defendants in most, if not all, types of claims that only lip service is paid to the obligations under the PAPs to provide this information. This restricts the defendant's ability to form anything approaching an accurate assessment of the claim and to put forward meaningful offers.

For any *good faith obligation to try to resolve or narrow the dispute* to become more than a theoretical concept, PAPs must stress that the duty to provide information about the claim and the disclosure of supporting documents and other relevant information is an obligation and not merely an aspiration. This duty should begin when the claim is first notified and be ongoing, so that, if not able to take steps to resolve the claim, the defendant is at least able to provide input into the collation of evidence, including that from suggested expert witnesses.

Sufficiently robust guidance as to what is necessary for a party to comply with this section of a PAP should thus enable the parties to reach a stage at which an agreed form of ADR may take place, with a realistic prospect that the claim will be resolved.

Proportionality also needs to be a key factor in these obligations in order to control costs as does the case type. For example, it may be more difficult to comply in an NIHL case stemming over a number of decades than an RTA claim.

Question 16: Do you agree that, unless the parties clearly state otherwise, all communications between the parties as part of their good faith efforts to resolve or narrow the dispute would be without prejudice? Invitation to exchange in good faith steps could still be disclosed to the court to demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36.

Yes.

In cases where the parties are represented it is for those representatives to decide what communications should be without prejudice. It will be necessary to provide LIPs with guidance as to the meaning of privilege in this context.

There is concern that if communications that narrow the dispute are not without prejudice LIPs may be taken advantage of.

Costs sanctions for not engaging are an obvious incentive, but care must be taken to leave discretion with judges.

Question 17: Do you agree that there should be a requirement to complete a joint stocktake report in which the parties set aside the issues on which they agree, the issues on which they are still in dispute and the parties' respective decisions on them? Do you agree that the stocktake report should also list the documents disclosed by the parties and the documents they are still seeking disclosure of? Are there any cases and protocols where you believe the stocktake requirement should not apply? In giving your answer please include any comments you have on the Template Joint Stocktake Report in Appendix 4

Yes, subject to the points below in professional negligence. However, as with the good faith obligation dealt with under question 15 above, steps must be taken to ensure that this requirement is not merely honoured in the breach.

Lessons must be learnt from the joint statements prepared by experts under CPR Part 35. In addition to setting out areas of agreement and continuing disagreement, the parties must justify areas of continuing disagreement, i.e. set out succinctly why agreement cannot be reached.

It is agreed that a list of documents should be disclosed by the parties, together with a list of any documents that are still sought: where appropriate this should be cross-referenced to areas of continuing dispute, to identify how inadequate disclosure may have frustrated ADR.

Irrespective of the form of ADR, the joint stocktake report should not make any mention of offers made. That should be a matter for costs depending on whether any offer(s) made were under Part 36, by way of a *Calderbank* offer, or in some other form.

The time allowed for preparation of the joint stocktake report should be sufficient for the parties properly to reflect on the ADR procedure, agree their position with clients, and then attempt agreement between themselves. An extendable period of 28 days would probably be more appropriate.

In professional negligence cases, we suspect that this could be an unnecessary expense as the parties' positions in our experience are clearly set out in the letter of claim and response, rendering a stocktake unnecessary, or this is likely to become an area of contention absorbing time and costs and entrenching positions to the point that ADR becomes more difficult.

Question 18: Do you agree with the suggested approach to sanctions to non-compliance set out in paragraphs 3.26- 3.29. In particular, please comment on:

a) Whether courts should have the power to strike out a claim or a defence to deal with grave cases of non-compliance?

Yes, but the breach must be of the gravest nature and there are risks of satellite litigation about the meaning of *"grave cases of non-compliance"*.

b) Whether the issue of PAP compliance should be expressly dealt with in all Directions questionnaires, or whether the parties should be required to apply to the court should they want the court to impose a sanction on an opposing party for non-compliance with a PAP?

Whilst we see no issue with Directions Questionnaires enquiring about whether the relevant PAP has been complied with, we do consider that a party should be required to make an application to the court to impose a sanction on an opposing party for alleged non-compliance with the PAP and that the non-complying party should be able to respond to any application in the usual way.

c) Whether the PAPs should contain a clear steer that the court should deal with PAP compliance disputes at the earliest practical opportunity, subject to the court's discretion to defer the issue?

Yes – before any dispute has the chance to fester or entrench positions

d) Whether there are other changes that should be introduced to clarify the court's powers to impose sanctions at an early stage of the proceedings, including costs sanctions?

No.

e) Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why?

No.

Question 19: Do you agree that PAPs should contain the guidance and warnings about pre-action conduct set out in paragraphs 3.8-3.13?

Yes.

There should be an emphasis on the mandatory nature of PAPs; the existence of penalties for non-compliance; the importance of 'proportionality', with provision of a suitable explanation; a warning about 'fundamental dishonesty', again with a definition; and guidance as to which PAP applies to which type of dispute, with the general PAP applying if no other PAP can be identified.

Question 20: Do you think there are ways the structure, language and/or obligations in PAPs could be improved so that vulnerable parties can effectively engage with PAPs? If so, please provide details?

Yes. Before any revised PAPs are introduced, time must be invested in trying to achieve the following, as far as is reasonably possible:

a) The use of wording common to all PAPs so that the general principles are consistent but are written succinctly.

b) Having regard to the type of claim covered, wording which is accessible to LIPs including, the use of plain English and ensuring that all web content is accessible with appropriate fonts, colours etc. In practice, those PAPs commonly used by LIPs probably require a limited amount of technical language to be used, while the PAPs which do require greater precision in wording are used more by professional and corporate entities, who are more likely to be represented anyway.

c) Ensuring that PAPs follow a logical sequence, which mirrors any online system to which they are related.

d) Where necessary, separate guidance may be provided to guide parties through parts of a PAP, without making the PAP itself too lengthy.

Question 21:Do you believe pre-action letters of claim and replies should be supported by

statements of truth?

No.

To do so would probably delay claims being notified to defendants, as claimants would be overly cautious before doing so and may result in limited information being provided at that stage, as parties may be over-cautious in their pre-action documents. Such a move might also be prejudicial to defendants, given the relatively limited time available in which to respond.

Such a requirement could pose difficulties as to who would sign the letters of claim/letters of response. For example, in a commercial dispute, the correspondence is not prepared in the same way as a statement of case or witness statements, but rather often involves input from several individuals from a party (e.g. those involved in a project and those dealing with complaints and disputes) together with input from the party's legal team. Whilst parties endeavour to make their PAP correspondence as comprehensive as possible, the nature of the process is that the parties are only at an initial stage in the process of resolving their dispute. Indeed the PAP for Construction and Engineering Disputes expressly notes that, "The Protocol is not intended to impose a requirement on the parties to marshal and disclose all the supporting details and evidence that may ultimately be required if the case proceeds to litigation." We consider that requiring statements of truth to be appended to PAP correspondence would only serve to increase costs significantly.

Nevertheless, the sending of the letter of claim will trigger compliance with the PAP and either with it, or as soon as possible afterwards, there should be compliance with the PAP, by the claimant providing full details of the claim.

Consideration should be given to including a requirement in PAPs that not less than a given number of days before the selected form of ADR takes place, a schedule of loss should be provided which *should* be verified with a statement of truth.

Question 22: Do you believe that the rule in the Professional Negligence Protocol giving the court the discretion to impose sanctions on defendants who take a materially different position in their defence to that which they took in their pre-action letter of reply should be adopted in other protocols and, if so, which ones?

No. In other types of claim the courts will now have the opportunity to compare the defendant's initial response to the claim, and how the defence was presented up to and including the joint stocktake. Any material change in the defendant's position after that can be dealt with using the courts' existing powers.

It should be borne in mind that the letter of response is often the first substantive response to a claim and, given the limited timeframe available under the PAPs, is usually prepared on the basis of preliminary investigations. Additional arguments may subsequently be included at the pleadings stage where further investigations have been undertaken and there has been disclosure.

Question 23: Do you think any of the PAP steps can be used to replace or truncate the

procedural steps parties must follow should litigation be necessary, for example, pleadings or disclosure? Are there any other ways that the benefits of PAP compliance can be transferred into the litigation process?

No. this should not be an automatic process. We do not consider the PAPs should be used to replace any procedural steps in proceedings.

That said, if the joint stocktake procedure is effective, then in some cases (lower value, straightforward claims), the joint stocktake report could be considered in lieu of further statements of case. It will set out the remaining areas of dispute between the parties. In addition, the bulk of disclosure should have taken place, removing the need for further disclosure lists, save in respect of the obligation of ongoing disclosure.

Questions specifically related to Practice Direction - Pre-Action Conduct

Question 24: Do you wish to answer questions about Practice Direction – Pre-Action Conduct?

Yes

Question 25: Do you support the introduction of a General Pre-action Protocol (Practice Direction)? In giving your answer please do provide any comments on the draft text for the revised general pre-action protocol set out in Appendix 4.

Yes. The following observations are made:

1. It would be better if reference was made to case specific PAPs at the very beginning, to emphasise that the PD is to be used only in default. Any wording before paragraph 6 of the PD should be found in all PAPs.

2. Such common wording should make clear that compliance with the PD (or PAP) is mandatory and the steps to be followed should then be set out. Wording should be avoided that does not provide clear guidance on the application of the PD (PAP). For example, some of the wording in paragraph 3 is repeated in paragraph 8.

3. The definition of "*reasonable and proportionate steps"* in paragraph 12, as offered in paragraph 13 is inadequate, as is that in paragraph 14. This is important guidance in the context of warnings about misconduct.

4. It should be stressed that the three steps to be taken before proceedings may be commenced are interlinked, with each one to be completed satisfactorily before the next is engaged.

5. While offers should be encouraged, it is inappropriate to suggest that making an offer is necessarily a good-faith step.

6. All time scales should be revisited to ensure that they are realistic. A limited amount of additional time allowed at this stage has the potential to save far more time at a later stage. This is particularly the case where the PD currently permits a claimant to commence proceedings if a defendant fails to complete a stocktake report, in effect, within 14 days of the end of the ADR procedure. This time should either be longer, or clear provision made for a defendant to request and be permitted further time to complete the exercise.

Question 26: Do you agree parties should have 14 days to respond to a pre-action letter of claim

under the general pre-action protocol, with the possibility of a further extension of 28 days where expert evidence is required? In cases of extension, the defendant would still be required to provide a reply within 14 days disclosing relevant information they had in their possession and confirming that a full reply would be provided within a further 28 days. Claimants would have 14 days to respond to any counter claim. If you do not agree with these timeframes, what timeframes would you propose?

As it is difficult to predict what types of claims will fall into the PD, it is equally difficult to agree that 14 days will be sufficient time in which a defendant should respond. Assuming that the claimant's letter of claim is *fully* compliant with the requirements of the PD, a defendant is often faced with an onerous task in responding, also in a compliant manner. It must be borne in mind that the sending of the letter of claim is a scheduled piece of work for the claimant but creates an unscheduled task for the defendant. A longer timescale is needed but still with the option to agree an extension where justified, even where no further information is required from the claimant. If thought necessary, any additional extension might be subject to a maximum length.

Question 27: Do you think that the general PAP should incorporate a standard for disclosure, and if so, what standard? For example, documents that would meet the test for standard disclosure under CPR 31, or meet the test for "Initial disclosure" and/or "Limited Disclosure" under Practice Direction 51U for the Disclosure Pilot. In giving your answer we are particularly interested in respondents' views about whether the standard should include disclosure of 'known adverse documents'?

We support the findings of the interim report that there is a requirement for more, but proportionate, disclosure at the pre-action stage of most PAPs. Most of the current requirements place obligations on the defendant, and there is a need for the claimants to provide full information and disclosure pre-issue so there is a level playing field. As has been stressed above, the success of the revised PAPs and this PD is dependent on a high degree of transparency between the parties, with full disclosure of information/documents in a timely manner. The wording of the PD in this regard should not only make it clear to the parties what are their obligations but also provide a check and balance against which the court may measure compliance.

We do however have reservations about introducing provisions of a litigation standard of disclosure into the PAP regime. It may be preferable to adapt the key documents requirements provided for under PD51U.

Questions specifically related to personal injury protocols?

The sub-committee were very conscious that there is a need for evidence to underpin any changes that might be suggested in response to the questions below.

Question 28: Do you wish to answer questions about the personal injury protocols?

Yes

Question 29: Do you agree that there should be a generic PI protocol that incorporates relevant

general principles from the General PAP but also identifies PI specific objectives not applicable to other litigation (Part A) with users being directed to a subject specific "Part B" rules for each specialist area? • Yes • No • Other

Yes.

All PAPs should, as far as possible, follow the same wording but then incorporate such additional text as is required for a given type of claim. The use of a Part A and a Part B would probably achieve this. While it is recognised that a one-size-fits-all approach cannot be adopted, the streamlining of the various PAPs and the PD should be achieved, as far as possible.

We consider that specific protocols are required for clinical disputes, foreign accidents and abuse claims.

Question 30: Do you agree that all PI protocols should include a good faith obligation more prominently in the introduction to try to resolve or narrow the dispute?

Yes.

This should be emphasised immediately after the mandatory nature of compliance has been stated.

Question 31: Do you agree that all PI protocols should include an obligation to a complete a joint stocktake report/list of issues and should this be: a) before or after ADR, and/or b) filed with the Directions Questionnaire?

Yes, after ADR. The approach outlined above should apply equally to all PI PAPs. This should be consecutive with there being the good-faith obligation, ADR and then the joint stocktake. In line with the draft PAP the joint stocktake report should be filed by the claimant with their statement of case. That said, the cost should be proportionate to the value of the claim.

Question 32: Do you agree that any revisions to the Personal Injury Protocol need to be approached with great care to ensure workstreams for multi-track cases are clearly separated out from fast-track work? If so: a) How could there be effective, referencing to and integration with the Serious Injury Guide where appropriate? b) How can the current protocol be updated to reflect moderately severe cases as well as catastrophic injury cases despite workflows for each being significantly dissimilar?

As indicated above, a great deal of time needs to be invested in the redrafting of all PAPs and the PD (assisted by finding common wording wherever possible). This will include distinguishing carefully between high volume/low value cases, and lower volume/higher value and thus between fast-track and multi-track cases (and perhaps even intermediate cases).

It should not be too difficult to build workstreams/route mapping into the Part B sections of the PAPs, dependent on case type and value.

a) The Serious Injury Guide should remain a separate document and not integrated into the PAP. Consideration could though be given to having certain minimum requirements in a claim for future losses before the application of the SIG is triggered.

b) The extension to the fixed recoverable costs regime will impact on cases up to a value of £100,000, so will apply to the moderately severe cases. It is difficult to provide a comprehensive answer to this question in the absence of the detail as to how the PAPs will be structured and drafted.

Question 33: Do you agree that there should be better integration of each protocol with the Rehabilitation Code? If so, should the protocol require a claimant to identify any rehabilitation they consider would be beneficial, with estimated costs if possible and should it require a defendant to supply reasons if they refuse, or fail to provide assistance with rehabilitation.

It is difficult to comment on this when there are already problems integrating rehabilitation into current claims processes. The difficulty is the lack of cooperation and the desire amongst claimants to control the process, introduce their own case manager and drip-feed information to the defendant. However, it is agreed in principle that the possibility of rehabilitation should be built into the relevant PAPs and it is noted the PI PAP already references the Rehabilitation Code.

The claimant should provide justification for rehabilitation and the cost of such treatment, before it is undertaken and the defendant should be given an opportunity to respond.

Specifically in relation to clinical negligence claims the Rehabilitation Code needs to be pushed, discussed and followed.

Question 34: Do you agree the transitional integration clauses for injury claims exiting fixed recoverable processes and slotting into the main injury protocol require greater clarity? • Yes • No • Other

Yes.

Question 35: Is there value in being more specific within protocols about the level of quantification work to be undertaken without a route map agreed with the other party and the timetable for commencing proceedings following an admission of liability? • Yes • No • Other

Yes.

If a new era of more collaborative dispute resolution is to be encouraged, then this must include following the letter of the PAP after an admission has been made and before proceedings may be issued, i.e. the provision of information/documentation; ADR; and a stocktake report.

Question 36: Do you agree the management of disclosure pre-issue needs to be strengthened to encourage greater compliance with the protocol? Paragraph 7.1 of the protocol expects the claimant to identify which documents are relevant and why. Should there be equal obligations on defendants to give reasons why they consider a document is not relevant/why they will not disclose a document?

To repeat comments made above, pre-issue disclosure is central to the success of any revised PAPs and the reason that existing PAPs are seen to have been ineffective in a large number of cases. All parties should provide full disclosure and a "cards on the table" approach.

In practice, this will come back to the way in which the courts properly scrutinise pre-action conduct and penalise misconduct. This should apply equally to claimants, defendants and any additional parties to a claim.

Question 37: Should the claimant's letter of claim state what medical records have been obtained and are available for disclosure and what medical records are still to be obtained? • Yes • No • Other

Yes

This is entirely consistent with the concept of transparency.

Question 38: Do you agree that a working group should be established, as a priority, to consider a specific protocol for abuse claims? • Yes • No • Other

Yes.

This type of claim is likely to be seen for many years to come and as such, would best be processed through a dedicated PAP.

Question 39: Do you agree that a working group should be established to consider a specific protocol for foreign accident cases? • Yes • No • Other

Yes.

Brexit has left a procedural gap in the handling of cross-border disputes, although its impact has yet to be realised due to the reduced amount of travel abroad during the COVID-19 pandemic and consequently the reduced numbers of accidents occurring in different jurisdictions.

Our experience suggests that some insurers would prefer to continue to deal with lower value claims in the jurisdiction of England & Wales, instead of incurring the costs of disputing jurisdiction. We therefore suggest that consideration should be given to the creation of a framework within which they can continue to do so. Such a framework would promote certainty and the ability to resolve claims quickly and at proportionate cost. At the same time, it would promote access to justice for claimants, who in the lower value cases should not face having to navigate the procedural complexities involved when jurisdiction is challenged.

It is difficult to suggest a definitive solution at this stage whilst the UK is not currently a party to the Lugano Convention, and we acknowledge there would be issues around litigation and enforcement following any protocol process, but as we have indicated, we consider that it would be sensible to have a procedure within which insurers and claimants can deal with cases pragmatically and proportionately. DWF has a dedicated team of international claims and travel specialists who are experts in cross-border claims with multi-jurisdiction and applicable law issues and would welcome the opportunity to participate in a working group.

Question 40: Should initiatives with third party organisations such as the expert witness community and HMRC be considered to reduce delays in the resolution of injury disputes? • Yes • No • Other

Yes.

It would be unwise to create a series of PAPs, without regard for third parties on whose services the parties in dispute are dependent. We query the reference to a specific "expert witness community" in the higher value claims. These are not volume matters and require experts in specialist disciplines.

Question 41: Should the personal injury PAPs deal with the question of what to do where a Claimant obtains medical evidence prior to issue but elects not to serve, and if so, what steps should be open to the defendant?

Yes. The wording of any revised PAPs should make it clear that as part of the duty of full disclosure, any available medical evidence should be served. It should be a clear case of misconduct if a claimant fails to serve medical evidence that is relied on and available to them at any time during the PAP phase.

Question 42: Prior to commencement of proceedings by the claimant should the defendant be entitled to obtain a medical report on the claimant if the claimant does not disclose a medical report? • Yes • No • Other

No.

It is for the claimant to prove their case. The claimant should be obliged to provide disclosure of records pre-action and keep the defendant updated on reports being obtained. We believe that the process in the PAP for low value personal injury claims in road traffic accidents could be adopted whereby the claimant is required to disclose the first report before they go on to obtain further medical evidence.

Question 43: Do you agree that the protocol should include provision that for the purposes of rehabilitation the claimant solicitors should give reasonable access for medical assessment when requested by the defendant insurer? • Yes • No • Other

Yes

In lower value claims there is a benefit in requiring the claimant to justify - either by disclosure of medical records, a medical report or an initial assessment - the need for rehabilitation before it is undertaken. That would give the

defendant a chance to offer the rehabilitation at lower cost or challenge the need for treatment if it is was not justified.

The 2015 Rehabilitation Code already applies to cases valued at over £25,000.

Question 44: If you consider any change to the PI PAP expert evidence process in multi-track cases would be beneficial what would the new process look like?

Currently within the PI PAP there is a nomination process which doesn't really work. There are rarely 'good' reasons for objecting to an expert (unless they are from the wrong discipline) from the outset. The instructing party should inform the defendant of which expert is instructed and the expected timescale for completion of their report, whether the examination will take place in person or remotely, and what records are being accessed. If further reports are recommended, the report containing the recommendation must be disclosed to the defendant as it should now be treated as an 'agreed' report on the basis that the claimant is progressing with those further recommendations. This fits with 7.8B of the PAP for low value RTA personal injury claims.

In the intermediate value claims, the process should proceed as suggested above; namely, the claimant is to disclose medical records and keep the defendant apprised of the medical reports obtained, with disclosure of existing reports before further reports are procured.

In the higher value claims, greater flexibility is required; however, the collaborative approach usually taken in such cases means there is less need for a prescriptive PAP, albeit there continues to be a need for disclosure of records and reports, cooperation regarding rehabilitation, and an acknowledgement that in these claims the defendant is likely to obtain their own evidence.

Question 45: Would an ability to have pre litigation court case management help dispute resolution in multi-track personal injury cases? • Yes • No • Other

No.

A suitably robust PAP, coupled with the ability to apply to the court per CPR Parts 25 and 31.16, should suffice.

Questions 46, 47, 48

Not responding to questions on Housing, Debt and JR PAPs

Questions specifically related to the Construction and Engineering protocol

Question 70 (now 49): Do you wish to answer questions about the construction and engineering protocol? • Yes • No

Yes

Question 71 (now 50): Would you support aligning the time limits for responding to the pre-action letter of demand to those suggested for the revised general PAP (14 days with a right to extend for a further 28 days to obtain further information)? • Yes • No • Other

No.

We would not support a reduction in the time limits for providing a substantive response (i.e. letter of response) to the letter of claim. We consider it would be helpful for the timeframe for issuing a letter of response to be extended to 3 months from the date of acknowledging a letter of claim as permitted under the Pre-Action Protocol for Professional Negligence as, in many instances, the current period of 28 days under the Pre-Action Protocol for Construction and Engineering Disputes is insufficient. It seems unfair that a professional negligence claim against a construction professional is subject to stricter time limits than a professional negligence claim being brought against any other professional.

Question 72 (now 51): Do you support the retention of the referee procedure? • Yes • No • Other

No

In our experience, the referee procedure is not used by parties.

Question 73 (now 52): Would you support the formal incorporation of a standard of disclosure and, if so, which standard?

Yes. It may be helpful for there to be an obligation on the parties to disclose copies of evidence referred to in the letter of claim and letter of response, e.g. contracts, completion certificates, quantum documents. Disclosure along the lines of the Initial Disclosure provided by the parties pursuant to PD51U (the Disclosure Pilot for the Business and Property Courts) might be appropriate. In many instances such evidence is disclosed by the parties when corresponding under the existing PAP, but this is not the situation in all cases.

Questions specifically related to the professional negligence protocol

Question 74 (now 53): Do you wish to answer a question about the professional negligence protocol? • Yes • No

Yes

Question 75 (now 54): Would you support aligning the time limits for responding to the pre-action letter of claim to those suggested for the revised general PAP (14 days with a right to extend for a further 28 days to obtain further information)?

No

The current pre-action protocol for professional negligence is generally effective in that post-Woolf, most professional negligence disputes are resolved by ADR, not by the courts, and usually without the need for the issue of proceedings. The requirement for claimants to set out their case and provide key documents and for defendants to respond in a similar fashion makes it significantly simpler for parties to engage in negotiations or to mediate before proceedings are issued and positions become entrenched. Parties can currently weigh up the merits of their arguments and those of their opponents based on the key evidence that is likely to be available should the matter litigate.

In our experience, the issue of proceedings is limited to cases where pre-action information has been poorly provided; where a party has a strong emotional need for their day in court; where the law is unclear; or where debt recovery proceedings have been countered with an unexpected negligence claim.

In the average situation, we consider 14 days would be insufficient for the defendant to complete a suitably detailed response, whereas the comparatively long current timeframe (21 days + 3 months) enables defendants to engage their stakeholders, liaise with insurers, engage lawyers (a step which is often not straightforward), weigh up the merits of the situation, respond and, oftentimes, make a settlement offer at the same time.

These cases tend to be paper heavy and require relevant personnel to be interviewed. They require a strategy to be agreed between stakeholders and consideration of any wider regulatory implications.

It should also be remembered, as we mention in Q26, a claimant's letter of claim will be a scheduled piece of work but creates an unscheduled task for the defendant; and whilst most cases do not involve expert evidence, where this is a factor, the claimant faces no time restriction in obtaining, and reviewing that evidence and before sending a letter of claim.

The current three weeks to acknowledge plus three months to respond may seem like a long time, but in our experience, given the factors we mention above, concerning stakeholders, insurance issues, complexity and wider regulatory considerations, in fact most claims tend to require a further two months to reach any sort of clarity in terms of a response.

A core objective of the PAPs is to foster consensual dispute resolution but the less time a defendant has, the more likely the claimant is to receive a bare denial and this objective would not be furthered. A 14 day deadline is far too short a time for defendants to respond to letters of claim in professional negligence claims. Such a short deadline would carry a risk of jeopardising the defendant's insurance position, jeopardising the defendant's regulatory position and encouraging bare denials rather than mature reflection and moves towards ADR.

Questions specifically related to the proposed low value small claims track

Question 76 (now 55): Do you wish to answer a question about to the proposed low value small claims track protocol?

No.