

CJC Pre-Action Protocol Consultation Questions – Nov 2021

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The consultation is open until 24 December 2021 at 10am.

Consultees do not need to answer all questions if only some are of interest or relevance. This form contains branching so you will be able to skip sections that you do not wish to respond to.

Answers should be submitted through the online form. Please note that responses are limited to 4,000 characters per question (around 650 words). Any individual question response longer than 4,000 characters will be cut off at 4,000 characters. If you want to supply any response not in text form please email cjc.pap@judiciary.uk for details on how to do so.

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1. **Your response is:**
Public
2. **Your first name**
[REDACTED]
3. **Your last name**
[REDACTED]
4. **Your location (town/city)**
London (although the firm has offices throughout England & Wales)
5. **Your role:**
Lawyer (firm of solicitors)
6. **Your job title**
[REDACTED]
7. **If relevant, whose interests to you predominantly represent?**
Defendants
8. **Your organisation**
BLM Law
9. **Are you responding on behalf of your organisation?**
Yes
10. **Your email address**
[REDACTED]

Questions Relevant to all Protocols

11. **Do you agree that the Overriding Objective should be amended to include express reference to the pre-action protocols?**
 - Yes
 - No
 - Other

We note that “there was widespread support for remedying this omission” - November 2021 report, paragraph 3.6. We also support the thrust of the changes to CPR part 1 set in that paragraph.

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

Yes – qualified.

As a matter of principle, we accept that mandating compliance with PAPs should generally promote efficiency and clarity in dispute resolution. It seems to us that this should apply to most claims involving the paradigm of a single claimant, a single defendant and an incident arising at a relatively recent single point in time, such as a breach of duty. We also accept, as the question says, that urgent matters may need to be treated more flexibly.

A specific area of qualification is claims for **occupational diseases**, particularly those that relate to events alleged to have occurred many years in the past. In this field, the above paradigm often breaks down: allegations may relate to historic events/exposures and there may be multiple defendants (and insurers) involved. Investigations and liability decisions can be subject to unavoidable delays due to difficulties in obtaining medical records, historic company records, HMRC information (etc). In our view a degree of flexibility is necessary for these types of case given that delays caused by the sorts of factors listed in previous sentence are largely outside the parties' control. **We would point out that these very different features of long-tail disease claims should be taken into account in respect of all our answers to questions about personal injury PAPs in particular.**

We endorse the comment at 4.26 of the report that “it would probably be inappropriate at this stage to seek significant changes” to the Disease & Illness PAP

We would therefore suggest in response to this particular question that sanctions might apply only in the event of unreasonable non-compliance with the Disease & Illness PAP.

13. Do you agree that there should be on-line 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)?

It is difficult to disagree with the premise of the question. Close integration between online court process and management of cases at pre-action stage through a portal should offer cost efficiencies and a straightforward mechanism of escalating from the latter to the former. It is easy to see that at that level the question reflects the MR's vision of 'a single funnel' for all claims.

The 'portalisation' of all types of case and their full integration with court systems is, however, very clearly a huge project. It might therefore be appropriate to prioritise certain types of civil claim in order to prove the underlying concept/hypothesis before proceeding more broadly and drawing from that experience.

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.

In our view, this summary procedure is not required and has the potential to create additional complexities around legal costs which are undesirable, including arguments as to whether the underlying pre-action proceedings are cost-bearing. There already exists a Part 8 costs-only procedure which, coupled with Provisional Assessment, allows for reasonably swift and cost-effective resolution of costs disputes.

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

Yes, subject to further clarification.

Although the question refers to a mandatory good faith obligation, the report also talks of "a non-prescriptive obligation" in this context (at page 4). These different descriptions could lead to some confusion about what is required to meet the obligation. In our view the text below, at paragraph 14 of appendix 5 to the report, is very helpful indeed and could be afforded greater prominence in order to avoid confusion:

"It is important to stress that a good faith obligation to try to resolve or narrow the dispute would not compel the parties into a specific ADR process. Nor would it require the parties to compromise their claim or defence. ADR and offers of compromise would be sufficient but not necessary steps to discharge a parties' good faith obligation. Instead, the parties' obligation is to engage and co-operate with each other in exploring ways of resolving or narrowing the dispute."

The proposed period of 14 days after receipt of the pre-action letter of reply (paragraph 3.22) for initiating good faith steps could be quite exacting in some circumstances, but we note that the proposed 8-week period for completing

them may be extended by agreement thus offering some flexibility on this aspect.

16. Do you agree that, unless the parties clearly state otherwise, all communications between the parties as part of their good faith efforts to try to resolve or narrow the dispute would be without prejudice? Invitations to engage in good faith steps could still be disclosed to the court 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
- **No**
- Other

The proposal in the question might be appropriate where unrepresented parties are involved. However, where litigants are represented, they should be able to decide freely whether their communications - on the good faith obligation or any other issues - are to be treated as without prejudice.

Selecting a yes / no / other option in replying to this question is slightly problematic. It is equally possible to phrase our response above as 'Yes, save where parties are represented there should no such presumption.'

17. Do you agree that there should be a requirement to complete a joint stocktake report in which the parties set out the issues on which they agree, the issues on which they are still in dispute and the parties' respective positions on them? Do you agree that this 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 also include any comments you have on the Template Joint Stocktake Report in Appendix 6.

Yes.

The specification of the stocktake report and the proposed disclosure list should be workable in most cases subject to PAPs. These materials should assist in narrowing areas of dispute and promoting resolution.

The timing of the stocktake report, within 14 days of the end of the good faith steps, could be problematic. Agreeing the report could involve meetings between the parties and further liaison by each party with their representatives. We would question if all necessary steps can be taken in 14 days in most cases. If not, it might be prudent to allow for more time. That need not be a default period of, say 28 days and nor does it need to be couched as an open-ended extension by agreement. Provision could made that a

request made within the first 14 days for a further 14-day period shall not be refused. [This mechanism is not unlike the extra consideration period of 5 days which is allowed for in the case of late offers under the Low Value Road Traffic Injury Claims PAP at 7.37.]

That said, we would point out that it may be less realistic to mandate stocktake steps should be undertaken in disease cases. The explanation is largely that already provided about the fundamental difference these cases present: ie very many do not fall within the single defendant paradigm that underlies other types of litigation and the other PAPs within the scope of this review.

18. Do you agree with the suggested approach to sanctions for non-compliance set out in general principles from para 3.26? In particular please comment on:
- a) Whether courts should have the power to strike out a claim or defence to deal with grave cases of non-compliance?
 - b) Whether the issue of PAP compliance should be expressly dealt with in all Directions Questionnaires, or whether 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?
 - 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?
 - d) Whether there are other changes that should be introduced to clarify the court's powers to impose sanctions for non-compliance at an early stage of the proceeding, including costs sanctions?
 - e) Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why?

(a) We agree that the court must have the power to strike out claims or defences in the most serious instances of non-compliance. Of course, this is a draconian sanction and as such its use needs to be carefully calibrated to address the worst sorts of behaviour.

There is, inevitably, a balance to be achieved here. A strike out cannot be so remote or exceptional a prospect that it is of little weight in practice. The sanction must be a realistic one capable of being applied in order for its existence to influence behaviour and drive compliance with the relevant PAP.

(b) We can see advantages and disadvantages in both the proposed approaches – ie dealing with compliance/sanction in DQs or allowing specific application for a sanction. The latter appears to offer a slightly more flexible approach and while it is capable of being abused or over-used, it may avoid the risks of building time-consuming arguments at the DQ stage.

(c) We agree and would go further than a 'steer' to that effect. It seems to us that clear provision could be made that the court will deal with PAP compliance disputes at the earliest practical opportunity (subject to discretion, as set out in the question).

(e) Here again we would emphasise the need for a nuanced approach to disease claims given the particular complexities around multiple defendants and historic events. The points already made about unavoidable delays in obtaining medical records, HMRC information and historic company records in these cases are also relevant. One possibility is that sanctions might be imposed in these cases on the basis of unreasonable non-compliance with the relevant PAP (although such an approach would not be without some risk of satellite litigation).

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
- No
- Other

Yes. The principles set out at those paragraphs of the report represent important principles with wide application. We welcome in particular the proposed Jet2 Holidays warning.

We understand the point made at 3.10 that there may sometimes be difficulties in identifying the correct defendant and/or where to send a letter of claim. The suggestion of guidance to the effect that large organisation should publish contact details for handling pre-action letters of claim on their website is set out at 4 of the proposed general PAP. In our view this must remain guidance only and should not take the form of a widespread obligation. It would appear to us to be disproportionate to make this obligatory given that we are not aware of frequent and/or serious difficulties in tracking down appropriate points of contact.

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.

We agree. However, giving practical effect to the proposal is an issue on which other stakeholders will be better placed to comment. We would merely like to add that a balance needs to be struck between any changes making the PAPs more accessible as proposed and retaining clear and unambiguous language that can also serve as a precise guide for practitioners.

21. Do you believe pre-action letters of claim and replies should be supported by statements of truth?

- Yes
- No
- Other

No. There is a real risk, as recognised in the report at 12 at page 106, that such a requirement could, on balance, encourage cautious and defensive behaviours rather than a 'cards on the table' approach. We accept that conclusion.

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. We would argue that existing powers should be adequate to deal with this matter in other types of case.

The D&I PAP recognises the need for flexibility on the point at its paragraph 6.10 (emphasis added):

*"Letters of claim and response are not intended to have the same status as a statement of case in proceedings. Matters may come to light as a result of investigation after the letter of claim has been sent, or after the defendant has responded, particularly if disclosure of documents takes place outside the recommended 90-day period. These circumstances could mean that the 'pleaded' case of one or both parties is presented slightly differently than in the letter of claim or response. **It would not be consistent with the spirit of the protocol for a party to 'take a point' on this in the proceedings, provided that there was no obvious intention by the party who changed their position to mislead the other party.**"*

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?

As a matter of principle, we would oppose a default setting under which PAP steps, without further, would be taken as replacing or truncating necessary steps in litigation. There may however be some cases, perhaps generally lower value ones, where parties may seek to agree, for example that (i) letters of claim and responses could be adopted as pleadings or (ii) or the stocktake report could serve as part of the disclosure process.

Questions specifically related to Practice Direction - Pre-Action Conduct

24. Do you wish to answer questions about Practice Direction – Pre-Action Conduct?
- Yes
 - No
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, in principle.

We note the debate about the merits of introducing a general PAP has evolved over time.

At this stage we would merely comment that debate about the merits of introducing a General or overarching PAP has evolved over time. The settled recommendation now is to put forward a proposal for a General PAP. The report notes that “to give effect to any proposals for PAPs recommended by the CJC is a matter for the CPRC to decide” and it therefore appears to us that there is likely to be a further phase of refining and redrafting proposals and details.

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?

We disagree.

We say so on the basis that the proposed 14-day response period is significantly shorter than at present and appears limited to “where expert evidence is required” rather than where other evidence or relevant material might reasonably be required before a defendant can reach a view on the nature of its response.

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’?

The approach to Initial Disclosure at PD 51U, 5.1 could offer a practical starting point for the standard of disclosure in the proposed General PAP. Although there is no reference there to known adverse documents, we suggest that the standard in the General PAP should cover those. It is of critical importance that disclosure weighs equally on both sides: defendants are entitled to be provided with adequate material by claimants so that they are able to prepare a reasoned response to the claim being presented.

Questions specifically related to personal injury protocols

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

28. Do you wish to answer questions about the personal injury protocols.

- Yes
- No

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 – in principle.

It seems to us that the proposal is in essence to consolidate the common parts of the various PI PAPs in to ‘Part A’. ‘Part B’ would then provide rules specific to particular types of injury claims in various chapters/sections, including - we presume – general rules where the injury is not covered by a specific section.

Although we welcome and support the thrust of paragraph 4.3 at page 34, we believe there is significant challenge here: to carry out this exercise without introducing unnecessary or additional complexity in the field given that there are already several specific injury-type PAPs such as for clinical negligence, disease claims and holiday sickness cases. Modernising the format of PI PAPs may well not be a contentious proposal: however, care will need to be taken to ensure that unintended changes to the substance of PI litigation are not brought about by doing so.

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
- No
- Other

Please however also see our response to question 15 above.

With regard to the reference at 4.17 to the possibility of adopting the 'show cause' procedure more widely, please see our response to question 78 below.

31. Do you agree that all PI protocols should include an obligation to 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.

Please however also see our response to question 17 above.

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?

In our view it is critical that fast track and multi-track steps and workflows are clearly separated in any revised PI PAP.

We do not agree with the premise at (a) that the Serious Injury Guide should be integrated within a revised PI PAP. In our view, the key benefit of the Guide is that it is able to operate outside, but in parallel with, pre-action and litigation procedures. This provides real flexibility for parties to work collaboratively to address claims with remarkably different types of facts, losses, care and other needs. There will however be cases in which parties are simply unable to operate within the guide and we do not think it would be appropriate to that either compliance or non-compliance into account in the PAP or litigation process.

We are unable to comment on (b) to any meaningful extent without sight of the proposed workflows. We should like to ask if workflows for moderately severe cases are being considered as part of (or alongside) the MoJ's work towards

extending fixed recoverable costs to all claims valued > £100,000? This upper figure will capture significant numbers of 'moderately severe' injury claims.

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.

Yes, in **very** broad terms.

However, we do not think it is necessary to integrate the text of the Code in the PAPs. Reference to the Code and a link to its content (as at present, in section 4 of the general PI PAP) seems to us to be appropriate.

That said, we would welcome the inclusion of text along the lines of the second sentence of the question so that meaningful engagement on effective rehabilitation is promoted at the early stages of any claim. The requirements set out above on each party offer a greater focus on rehabilitation than the "*parties should consider...*" formulation currently used at 4.1 of the PAP.

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. We agree.

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, in conventional PI claims at least.

However, in disease claims the evidence (both lay, expert and otherwise) required to address quantum differs on a case-by-case basis and is often in disputed and determined at a case management hearing (i.e. is there a need for care report? Can the Defendant rely upon the evidence of a forensic accountant?). For that reasons further specificity as proposed could be of limited value in these claims.

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?

Yes, in principle.

We repeat our comments from question 27: It is of critical importance that disclosure weighs equally on both sides: defendants are entitled to be provided with adequate material by claimants so that they are able to prepare a reasoned response to the claim being presented.

Disease claims in particular. At 7.3, the D&IPAP address disclosure (which include adverse documents) and provides that:

"if the claim is not admitted in full, the defendant should enclose with his letter of reply documents in his possession which are material to the issues between the parties and which would be likely to be ordered to be disclosed by the court, either on an application for pre-action disclosure, or on disclosure during proceedings. Reference can be made to the documents annexed to the personal injury protocol."

Developing the point about disclosure weighing equally, we consider that a claimant in a disease claims should be obliged to disclose all documents, insofar as it is reasonable and proportionate to do so, at the pre-action stage.

Any sanction for non-compliance - on either side - should be at the court's discretion-

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

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. As the question states, this should be a matter of priority.

39. Do you agree that a working group should be established to consider a specific protocol for foreign accident cases?

- Yes
- No
- Other

No. It seems likely to us that despite the recent Supreme Court decision in *Brownlie* (No2), the volume of these claims being pursued in England & Wales has diminished with the UK's departure from the relevant EU regime (Brussels I recast). In any event, foreign accident claims are quite far from representing a homogenous group and in reality, the only factor they share is that the incident happened elsewhere. It seems to us that that this is a much weaker unifying factor than is used in existing PI PAPs, ie that of a type of claim or harm common to a large group of cases.

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

In disease claims in particular, it is noteworthy that historic allegations of negligence (i.e. occurring many decades ago) are often made against defendant companies which are no longer solvent. Consequently, the only records available to evidence such employment will be HMRC records (HMRC Schedule/Facing Cards). There has been an increased delay in obtaining such documents and the release of HMRC Facing Cards can often only be achieved by way of a Court Order thereby protracted litigation and increasing costs. An 'initiative' with HMRC whereby such requests are expedited would be welcome and likely result in the swifter resolution of disputes.

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, in principle, although there is a need for a flexible and nuanced approach to this point. We refer back to our answers to questions 27 and 36.

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

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

No. The point is already addressed in the Rehabilitation Code.

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?

We are not able to comment at this stage.

45. Would an ability to have pre litigation court case management help dispute resolution in multi-track personal injury cases?

- Yes
- No
- Other

No, or rather probably not. We would favour meaningful encouragement to parties to comply with the PAP rather than risk blurring the boundary between pre-action conduct and litigation.

No answers offered to Questions 46 – 69

Questions specifically related to the construction and engineering protocol

70. Do you wish to answer questions about the construction and engineering protocol?

- a. Yes
- b. No

71. 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)?

- a. Yes
- b. No
- c. Other

72. Do you support the retention of the referee procedure?

- a. Yes
- b. No
- c. Other

73. Would you support the formal incorporation of a standard of disclosure and, if so, which standard?

Questions specifically related to the professional negligence protocol

74. Do you wish to answer a question about the professional negligence protocol?
 a. Yes

75. 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.

Claimants have up to 6 years to consider and formulate their case so it hardly appears fair or balanced for insureds or insurers that their opportunity to respond should be quite so short. Further reducing, as is suggested, the current 21-day acknowledgment and subsequent three-month time limit for a response to just 14 days with a right to extend a further 28 days to obtain further information is going to be very difficult in most cases and is likely to be counter-productive (with time spent arguing about extensions and provision of documents). Most professional negligence cases will have insurance in the background, and in order for the policy to respond, the specified claims notification provisions will need to be followed. These require notification of the claim (with provision of additional information to insurers often via brokers) and initial coverage/claim management decisions to be taken by insurers before the substantive defence work on the letter can start.

Shortening the time limits will likely give rise to the same issues that defendant solicitors already have with the construction protocol which only allows 28 days (and is not enough for larger cases and multi-defendant claims).

Questions specifically related to the proposed low value small claims track

76. Do you wish to answer a question about to the proposed low value small claims track protocol?

No, not at this stage. [Hence question 77 falls away.]

Any other comments

78. Please include here any other comments you wish to make not covered by the questions already posed.

(1) Specific points with reference to the PAP for Clinical Disputes (although we use the label 'clinical negligence' and hence refer below to CN claims).

(a) Claimant to confirm specialty of expert(s) upon which the Letter of Claim (LoC) is drafted and that the expert(s) supports the allegations.

- (b) Disclosure of all records obtained by claimant solicitor to accompany the LoC. To be by e-mail and (preferably) without charge for providing to the defendant (likely to be recoverable in principle as a disbursement if the claim succeeds).
- (c) A proposal that the response period be extended beyond current 4 months. (This can be insufficient in insured CN claims given the need to establish coverage).
- (d) Provision of an estimate (not a budget) of costs to date to accompany the LoC.
- (e) The possibility of a costs maximum for the LoC phase, perhaps most appropriate in claim in which damages are lower than £25k? (These claims may be the subject of a specific regime of fixed recoverable costs in the near future.)
- (f) Full particularisation of past losses in the LoC. TBA is insufficient especially when the claims relate to events maybe three years ago.
- (g) A formal opportunity and timeframe in which the defendant may ask questions of clarification of the allegations with the LoC. (Our experience is that requests of this nature are often met with a response to the effect that 'it's all in the LoC', which hardly helps to narrow the issues,)
- (h) Failure to respond to the LoC should result in an appropriate sanction but we do not accept that there should a trigger in that event to make a specific application for that purpose or to force the defendant to respond. The reality is that claimant is likely to issue, and the appropriate consequences can be addressed in resolution of the litigation.

(2) Views on wider use of the 'show cause' procedure.

- (a) The report of the PI Subcommittee (appendix 6 to the interim report, page 125) makes what might appear to be an inconsequential proposal about the 'show cause' procedure: *"The specialist High Court asbestos list 'show cause' procedure could be adopted to address primary liability in all personal injury cases outside fixed recoverable costs. The process has the benefit of narrowing issues and thereby reducing costs and achieving greater chance of settlement."*
- (b) While we agree that the procedure can narrow disputes and reduce costs **within the specific setting of mesothelioma claims**, we do not accept that it could or should be replicated elsewhere in personal injuries litigation. On the basis of the approach to causation within the Fairchild 'enclave' (*Fairchild v Glenhaven* [2002] UKHL 22) and section 3 of the Compensation Act 2006, mesothelioma claims are subject to a unique regime of causation and joint and several liability. Those principles, and the need for expedition because of the limited life

expectancy of living claimants, form the justification underpinning the procedure in those cases. Given that the combination of those factors simply does not exist in other types of personal injury claim, we are driven to conclude that there is no basis for adopting the 'show cause' procedure in other types of case.