Civil Justice Council Costs Consultation Response

October 2022

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THE QUESTIONS

1.1 Part 3 – Costs under pre-action protocols/portals and the digital justice system

3.1 What are the implications for costs associated with civil justice of the digitisation of dispute resolution?

Current practitioners and advice groups are best placed to comment on the specificity of cost proposals in relation to pre-action protocols ('PAPs') and the digitisation of this process. However, we would emphasise some general principles which should be at the forefront of thinking in this area.

First, it is important that individuals are not discouraged from sending PAP correspondence, especially when fundamental rights are at stake (such as in judicial review), because of a fear of excessive costs orders. Second, it is important that any system reflects that many court users have

vulnerabilities and/or will be litigants in person ('LIP'). Digitisation has potentially significant benefits, but this must not come at the expense of those who will be excluded by digital processes. Individuals should also not be penalised for difficulties they may have engaging with the online PAP process or their lack of legal knowledge (especially in areas where public funding is unavailable). Third, in a judicial review context, it is important to remember that there is often a wider public interest in these claims and that PAP letters can be an important way of holding the state accountable over a potential illegality. It is also worth emphasising that the merits of a claim will not always become fully apparent until a satisfactory response has been received by the defendant and individuals should not be dissuaded from pursuing legitimate issues with unreasonable cost consequences. It should be remembered that the public authority will generally have access to more complete information about an issue, which may only be disclosed to a claimant after issuing a PAP (or even until issuing a claim). Fourth, in judicial review claims, it is important for public authorities to be under a reasonable duty of candour at the PAP stage, though this should be proportionate and ensure that only reasonable costs are incurred. It is important both that public authorities are upfront about the issue at hand (given their increased knowledge and access to information) but also that claimants are not put off submitting PAP letters by potentially crippling costs consequences.

3.2 What is the impact on costs of pre-action protocols and portals?

JUSTICE have previously set out to the Civil Justice Council ('CJC') that we do not object, in principle, to making compliance with PAPs mandatory (with costs consequences for non-compliance), as there is already a general expectation they will be followed. In the context of certain disputes, e.g. housing, we consider that making PAPs mandatory could substantially benefit both sides. It should however be made clear that this does not apply to urgent cases, where immediate court action may be necessary, and that there are circumstances in judicial review claims (due to the strict time limits) where a claim may need to be issued without full compliance with PAPs, provided there is a good explanation for this.

In relation to the summary costs procedure, we consider generally that practitioners and advocacy groups are best placed to respond on the specifics of cost issues during a PAP process. In relation to judicial review claims, we would emphasise the importance of balancing early disclosure and ensuring that costs remained proportionate at an early stage of litigation (particularly when legal aid, and its costs protection, is not available). It is important that claimants of limited funds are not discouraged from submitting a meritorious PAP because of costs consequences, and that there is full legal aid funding available for the pre-action stage. The failure of a public authority to provide a reasonable response to earlier non-PAP correspondence seeking clarity or information on an issue

should also be considered, given the public authority will likely be in an initially advantageous position given their first-hand knowledge and access to information.

For LIPs, it is important that they understand the potential consequences of engaging with a digital PAP process (particularly if there is a summary costs procedure). Our Preventing Digital Exclusion report highlighted how litigants in person often do not understand the consequences of submitting online forms and that online court interaction can diminish the perceived importance of the step taken. It is also very important that clear guidance is given for those without legal expertise and that digital services are tested clearly with LIPs and other excluded persons in mind.

We would also emphasise the importance of providing an accessible alternative to a digital PAP system, especially for those areas where there is not publicly available legal funding. JUSTICE has repeatedly emphasised that digitalisation of the courts can be an opportunity to simplify processes and promote access to justice, but it must not come at the expense of those users of the courts who have vulnerabilities, are not digitally literate or who cannot afford the technology to properly access digital services. In relation to costs, we would be particularly concerned if individuals were being penalised with costs orders because of their inability to access properly or engage with digitalised processes.

3.3 Is there a need to reform the processes of assessing costs when a claim settles before issue, including both solicitor own client costs, and party and party costs?

When determining costs orders, including sanctions for non-compliance, it is vital that the courts consider the wider interests of justice of the claim, the seriousness of the breach, the reasons for non-compliance and the full circumstances of the case. This should include when the PAP response is plainly inadequate by the public authority (leading to avoidable litigation being brought) or when the public authority failed to provide a response to reasonable correspondence prior to a PAP letter being sent. Individuals should not be penalised for their lack of knowledge of certain key facts or documents when they have made reasonable endeavours to seek this information from the public authority. Leeway should in particular be given to LIPs and those with vulnerabilities, especially when the breach of procedure is due to a lack of legal or procedural knowledge or inability to engage with any online PAP process due to lack of access to the technology or understanding of how to use it. This should include when deadlines have been missed by individuals because it has taken them too long to seek digital assistance or advice.

There is also a question about the point at which the duty of candour arises in judicial review claims and how this affects costs. If the duty only arises after permission is granted, this may require a

claimant to take significant costs risks without understanding the full context of the original decision. In our view, making it clear that a duty of candour arises at the pre-action stage, and the extent of that duty, would help to narrow or resolve issues earlier and reduce overall costs. However, the intensity of this duty should vary according to the stage of proceedings; at the pre-action stage, the public authority should only be required to provide information and documents which are proportionate and properly necessary to respond to the initial PAP correspondence. It is important to ensure that claimants are properly informed of relevant issues at the PAP stage, but that claimants are not put off sending PAP correspondence on important issues due to potential cost penalties against them.

4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

Costs capping orders already exists within judicial review claims, though there are issues with the way in which it currently works which we have set out previously.[1] Sir Rupert Jackson previously recommended the implementation of qualified one-way costs shifting ('QOCS') for judicial review claims[2] and, when this was ruled out by the government, he then recommended that the Aarhus rules be extended to all judicial review claims.[3] This was again rejected by the government as they did not agree that there was an 'access to justice' issue in judicial review. We do have serious concerns with the current costs regime and its impact on access to justice. It is important that further data is obtained on the actual costs of judicial review claims and the impact of those costs on the behaviour of claimants (and putative claimants). We think that Jackson's proposals are worth further consideration, piloting and evaluation.

Given the constitutional importance of judicial review in holding to account public authorities, it is in our view imperative that individuals with potentially meritorious judicial review claims are not prevented or unduly deterred or discouraged from bringing judicial review claims due to the financial cost and risks involved.

[1] JUSTICE, *'The Independent Review of Administrative Law – Call for Evidence Response'* (October 2020), para 105 - 111
[2] The Right Honourable Lord Justice Jackson, *'Review of Civil Litigation Costs: Final Report'* (December 2009), pp.310-311
[3] The Right Honourable Lord Justice Jackson, *'Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs'* (July 2017), para 3.4 p.130