General Pre-Action Protocol

and

Practice Direction on Protocols

Response to Consultation
[8 October 2008]

General Pre-Action Protocol and Practice Direction on Protocols

Response to consultation carried out by the Civil Justice Council.

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

Contents

Introduction and contact details	4
Background	5
Summary of responses	6
Responses to specific questions	7
Conclusion and next steps	12
Annex A – List of respondents	13

Introduction and contact details

This document is the post-consultation report for the consultation paper, General Pre-Action Protocol and Practice Direction on Pre-Action Protocols.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Kitty Doherty** at the address below:

Civil Justice Council
Room E214
Royal Courts of Justice
Strand London
WC2A 2LL

Telephone: 020 7947 6585

This report is also available on the Council's website: www.civiljusticecouncil.gov.uk.

Background

The consultation paper '*General Pre-Action Protocol and Practice Direction on Pre-Action Protocols*' was published on 21 February 2008. It invited comments on proposals to introduce a General Pre-Action Protocol that would be used in those cases, to which subject-specific Pre-Action Protocols did not apply. It also put forward proposals to amend the Practice Direction on Protocols and for the amended Practice Direction to supplement Part 3 of the Civil Procedure Rule (CPR), which concerns courts' case management powers

.

The consultation period closed on 19 May 2008 and this report summarises the responses, including how the consultation process influenced the further development of the proposal consulted upon.

A list of respondents is at Annex A.

Summary of responses

1. A total of 44 responses to the consultation paper were received. The largest number of responses came from the legal profession – 27 in total (13 from legal practitioners, 1 from a Barrister and 13 from representative bodies such as the Law Society and the Association of Personal Injury Lawyers). There were 6 responses from members of the judiciary, including the Council of Circuit Judges and Judges of the Chancery Division. From the commercial business field there were 10 responses. Of these, 8 were from the financial services industry and included bodies such as the CCUA and FLA. The only Government body to respond was the Office of Fair Trading.

2. A full list of respondents is at Annex A.

3. Responses were evaluated for the level of support/opposition for the proposals and to take account of alternative or complementary suggestions that could be incorporated into the work being done in encouraging parties to behave in a reasonable and responsible manner in the conduct of their disputes

4. Overall there was a general recognition that streamlining and simplifying the pre-action process is desirable. However, the majority of respondents (75%) were opposed to the idea of a General Pre-Action Protocol. 25% of respondents were in favour of the introduction of a General Pre-Action Protocol. A further 20% supported amending the Practice Direction to highlight courts' case management powers more clearly.

5. The clear consensus was that, as they stood, the proposals sought to impose an overly prescriptive and rigid framework that would be inappropriate if it were to apply to a vast range of disputes. The prevailing view expressed was that creating a "one size fits all" protocol for situations where there is no specific protocol might give rise to more problems than solutions. It was also felt that the mandatory language used in the draft practice direction and protocol was inappropriate and a likely source of uncertainty and confusion given its broad scope of application.

Responses to specific questions

1. **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.**

6. As indicated in paragraph 4 above, a clear majority of respondents did not support the proposals for a General Pre-Action Protocol. Several respondents were concerned about the absence of evidence to suggest that paragraph 4 of the current Practice Direction was inadequate regarding pre-action behaviour in the cases where no specific protocol applies. Many referred back to the results of the previous consultation undertaken by the then Lord Chancellor's Department on the same subject, and argued that nothing had changed since then to justify the introduction of a General Pre-Action Protocol.

7. A significant number of respondents, whilst recognising the CJC's aim in providing a clearer structure that would be understood by litigants in person, questioned whether changes to practice directions and protocols would have a significant impact on this audience. Instead, it was felt that the development of a general set of principles, focusing more on behaviours as opposed to a specific process for litigants in person, would be more appropriate.

8. Another common view held was that that the proposals sought to adopt a "one size fits all" approach to the issue of pre-action conduct. There was general agreement that litigants should be expected and encouraged to behave reasonably and proportionately during the pre-action stages of a dispute. But it was argued that what was appropriate conduct would depend on the circumstances, including the nature of the dispute and the procedural regime affecting the proposed claim.

9. Respondents also thought that the longer and more obligatory requirements of the proposals did not allow for differences between disputes and were likely to create confusion in the minds of litigants in person who might believe that they had to take every step, even when that was not appropriate for the particular type of dispute they faced.

10. Some respondents highlighted that currently the powers available to the court for non-compliance with a specific protocol are set out in paragraph 2 of the Practice Direction, but these are not expressly extended to the other cases covered by paragraph 4. It was also noted that the manner in which the courts seek to apply sanctions for non-compliance is a matter for judicial interpretation. If an inflexible approach were prescribed, there would be a significant risk of that parties would resort to satellite litigation about sanctions,

detracting from the primary purpose of dispute resolution. The protocols should not give rise to sanctions for not doing something at the pre-action stage that could or would not be ordered by the court (e.g. disclosure of documents or draft expert evidence). The proposals for the letter of claim would allow the prospective claimant to go on a fishing expedition for documents and evidence before seeing the defendant's response.

11. Nine respondents expressed the view that the proposal to place the Practice Direction in the more logical and prominent position supplementing CPR Part 3 was a step in the right direction.

---

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

13. Given that a majority of the respondents were against the proposal for a General Pre-Action Protocol, many did not respond to this question. However, most of those who did reply saw difficulty in specifying which particular classes of case should be excluded from the provisions of a General Pre-Action Protocol without fully assessing the impact in each particular class.

14. All the respondents from the Financial Services industry thought that the proposal should not apply to routine debt recovery cases and those regulated by the Consumer Credit Act. They said that this would be a duplication of existing regulation and would both increase costs and confuse parties.

15. Numerous other exemptions were put forward ranging from claims within the Chancery jurisdiction; intellectual property claims; interim remedies; insolvency and bankruptcy claims; claims where urgent relief is necessary; cases where fraud is alleged; claims to enforce judgments, arbitration awards or expert determinations.

---

3. 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.

16. The majority of respondents expressed concern with the language adopted in particular in the General Pre-Action Protocol. It was widely held that the language used was too prescriptive and rigid. Many thought that the protocol framework should be seen as a guide and that therefore the use of the word 'must' rather than 'should' was inappropriate.

17. The use of the word "dispute" throughout the body of the General Pre-Action Protocol was another area of concern highlighted by a number of respondents. They saw this as ambiguous given the wide scope of its application in a general

protocol. It was held that further clarification would be required, given that over 95% of debt claims were undisputed.

18. Some of the other views expressed are listed below -

    - The Practice Direction fails to make clear whether a failure to adhere to the protocol will lead to a different substantive costs order being made or whether the failure is a factor to be applied by the costs judge in the course of assessment.

    - The lengthy and detailed disclosure process prescribed in paragraph 7 of the General Pre-Action Protocol is unduly onerous, particularly for parties to a commercial dispute.

    - Parties would be left in doubt as to whether they had in fact complied with the pre-action protocol.

    - The use of the term "reasonable period of time" in paragraph 7.1 of the protocol will lead to uncertainty.

19. Only a small number of respondents said they agreed with the language used. They thought it would be readily understandable by litigants in person as it avoided the unnecessary verbiage and antiquated sentence structures found in some of the existing protocols.

---

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

20. There was broad agreement from respondents that a General Pre-Action Protocol should encourage parties to consider alternative methods of settling a dispute. However, the majority of responders were concerned by the removal of the words "it has been expressly recognised that no party can or should be forced to mediate or enter into any form of ADR". The point made was that a document aimed at litigants in person should provide a full picture of the relevant legal rights and obligations.

21. Other views expressed raised were as follows -

    - There were many cases in which ADR may not be appropriate for reasons that might have nothing to do with the type of claim.

    - In the vast majority of debt claims where there is no valid dispute or defence, the ADR element is already well promoted at pre-issue stage to catch the few cases to which it would apply. Lenders are already bound to participate in the Financial Service Ombudsman Service.

    - Inclusion of "arbitration" as an ADR option was confusing.

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.**

22. 33% of the respondents were broadly in agreement with the steps outlined. But many of these acknowledged the element of uncertainty, given the wide range of disputes the general protocol is designed for.

23. There was general consensus among respondents that the time limits were over-prescriptive and impractical. It was widely felt that this approach would lead to abuse by those parties who wished to employ delaying tactics and lead to satellite litigation.

24. A number of respondents were in favour of the approach to pre-action disclosure taken by the Commercial Court Long Trials Working Party, which is currently being piloted in the Commercial Court. Others thought that the approach taken in the protocol was a flexible and pragmatic framework.

---

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

25. The prevailing view from respondents on a model letter was that it would be too difficult to provide a draft suitable for the range of possible cases – even in a standard consumer dispute (there was a lot of debate and speculation as to whether there was indeed such a thing). Another concern raised was that there would be a high risk of any 'model' letter becoming the *de facto* standard, which would be counterproductive.

26. In general, respondents submitted that guidelines on what should be included would be sufficient. One respondent suggested that references to free consumer advice could be included, such as Citizens Advice or Consumer Direct. These could provide more specific templates that better meet the needs of the individual.

---

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

27. Ten respondents agreed with this proposal. One suggested that paragraph 7.5 of the draft General Pre-Action Protocol should apply to claims by a business against an individual who is a consumer, not just any individual.

28. However, the majority of respondents, including all those representing the credit and/or business industry, were strongly opposed to this proposal. The majority viewpoint was that the area of debt collection is not suited to the proposed Protocol due to the need for a fast and efficient system of bringing

these disputes to the courts. One creditor organisation offers the following reason for not supporting this proposal:

> "Creditors engage with debtors at an early stage as possible. Information is provided to consumers at early arrears stage, usually at 1 or 2 months, of the various payment options (e.g. payment holidays) and free debt advice agencies available to help them with their payment and debt problems. Customers in financial difficulties potentially have a range of options to choose from to manage payment and debt problems with their lenders' help, or support of debt advisers. All cases of financial difficultly are treated sympathetically and positively by our members, who subscribe to the Banking Code. To repeat the same processes again at the claim stage would serve no useful purpose and further delay resolution"

---

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

29. The vast majority of respondents were opposed to the approach taken to experts. Again, many considered the length and prescriptive nature of the provision inappropriate, and it was widely agreed that existing requirements of the Civil Procedure Rules already provide sufficient control over use of experts.

---

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

30. The majority of respondents were uncomfortable with the idea that defendants should agree not to take the "time bar "defence. It was thought that the law on limitation was complex, and that any attempt to allow parties to make side agreements contrary to statute would be undesirable and dangerous. The following response of the Chancery Division sums up the common opinion held:

> "Parliament has with the benefit of detailed advice declared the law on limitation. It is not for Courts by procedural devices to encourage parties to disapply that law and to substitute for the considered provisions of the Act and of the CPR bargains of their own making. Why should the court favour claimants? The claimant who has left it so late that he cannot comply with a pre-action protocol may on that account be penalised in costs: that is the risk involved in not bringing in your claim within a reasonable time".

Conclusion and next steps

31. We are grateful for the helpful and informed responses we have received about the proposals for a General Pre-Action Protocol and revised Practice Direction (PD) on Protocols. Following consideration of all the points raised above, and the discussions with stakeholders at the CJC Protocol Forum held on 13 March 2008, it is clear that the concept of a General Pre-Action Protocol is not supported by the majority of respondents. We therefore will not be recommending the introduction of a General Pre-Action Protocol.

32. However, many respondents acknowledged the need for more detailed information and guidance on pre-action behaviour, particularly from the perspective of litigants in person but also less experienced practitioners. It was also accepted that there could be greater clarity about the enforcement of protocols, and broad support for the proposal that the PD should be moved to supplement Part 3 of the CPR. These are issues that the CJC is keen to see addressed, and we intend to put proposals to the Civil Procedure Rule Committee (CPRC) to enhance the Practice Direction on Protocols.

33. Specifically, we will recommend that the PD should set out clearly the general principles governing appropriate pre-action behaviour in all cases, which are then supplemented by specific requirements in subject-specific protocols. The PD should set out the court's approach to non-compliance with the general principles as well as the protocols.

34. The PD should be supported by additional guidance on pre-action behaviour aimed, in particular, at litigants in person with a straightforward but disputed consumer claim. This would set out in more detail the steps that are likely to constitute compliance with the general principles.

35. We also consider that the PD could include a requirement to give effect to the outcome of the Ministry of Justice's consultation on the Debt Claim Process (CP 22/07). This will specify the basic pre-action information that should be provided by business claimants to individual defendants in debt cases. These requirements will embed the best practice that is already followed by responsible creditors. The PD will not prescribe the format in which the information should be provided or specify a particular time scale or process. This should ensure that responsible creditors can comply without needing to make any changes to their current systems.

36. The CJC will also be considering a process for reviewing the current pre-action protocols. We accept that the subject specific protocols have worked because they have been designed by the experts in the field rather than imposed. We are keen to ensure that the same approach should be adopted in a programme of reviews, and will be inviting relevant stakeholders to lead each review. The role of the CJC is to set some general parameters and co-ordinate the process. We envisage that the CPRC will also have a role in terms of drafting style and consistency, but not substance.

Annex A – List of respondents

Clifford Chance LLP

The Property Litigation Association

Thompsons Solicitors

Commercial Litigation Association

Commercial Bar Association

His Honour Judge S P Grenfell

Herbert Smith LLP

Allen & Overy LLP

Richard Honey

Manchester Civil Judiciary

The Association of District Judges

Student Loans Company

The City of London Law Society

Forum of Insurance Lawyers

TeCSA

Nationwide Building Society

Lovetts Solicitors

The Law Society

Chancery Bar Association

Council of Mortgage Lenders

London Solicitors Litigation Association

Beachcroft

Peabody Trust

Finance & Leasing Association

Institute of Legal Executives

Institute of Credit Management

Office of Fair Trading

Royal Institution of Chartered Surveyors

HM Council of Circuit Judge’s

Medical Defence Union

Association of Personal Injury Lawyers

Chancery Division Judiciary

Lloyds TSB

Alliance and Leicester PLC

Thomas Higgins LLP

Civil Court Users Association

Green & Co Solicitors

National Australia Group Europe Limited

Geoffrey Parker Bourne Solicitors

AXA Insurance

Claims Against Professionals

Reed Smith LLP