

CONSULTATION ON CONSOLIDATED PRE-ACTION PROTOCOL

Introduction

The Civil Justice Council is proposing to recommend the introduction of a Consolidated Pre-Action Protocol that will reduce the present nine to one protocol by incorporating the core steps and guidance common to all of the protocols but with subject specific appendices.

There are currently 9 pre-action protocols in force, namely: -

Personal Injury
Clinical Negligence
Construction and Engineering Disputes
Defamation
Professional Negligence
Judicial Review
Disease and Illness
Housing Disrepair
Rent Arrears

There is also a Practice Direction on Protocols, which includes a section on the pre-action behaviour expected covers cases with no specific Protocol. This Practice Direction makes clear that the court will take account of compliance or non-compliance with the protocols in making decisions about case management and costs.

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

- to encourage the exchange of early and full information about the prospective legal claim,
- to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,
- to support the efficient management of proceedings where litigation cannot be avoided.

The Civil Justice Council, as a Non Departmental Public Body, is not covered by the code of practice on written consultation issued by the Cabinet Office. However such bodies are encouraged to follow the code, and the consultation is being conducted in line with it so far as appropriate. The consultation period is 12 weeks terminating on **27^h April 2007.**

Consultees

This paper has been published on the CJC website and copies sent to the following bodies:

Socio-Legal Studies in the Faculty of Laws at University of London.

Association of British Insurers
British Chamber of Commerce
The Confederation of British Industries
The Federation of Small Businesses
The Forum of Private Businesses
Association of Personal Injury Lawyers
Commercial Bar Association
Institute of Legal Executives
London Common Law and Commercial Bar Association
London Solicitors Litigation Association
Personal Injury Bar Association
The Bar Council
The Law Society of England and Wales
Advice Services Alliance
Advice UK
Citizens Advice
Local Government Association
Medical Defence Union
National Council of Women of Great Britain
The Legal Action Group
Which
Office of Fair Trading
The National Health Service Litigation Authority
Trade Union Congress
National Consumer Council

The Judicial Office of England and Wales

Forum for Insurance Lawyers

Motor Accident Solicitors Society

The Civil Procedure Rules Committee

The Clinical Disputes Forum

The Association for Victims of Medical Accidents

Background

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

Following discussions, the MR has decided to ask the Civil Justice Council to be his principle advisor on the future development of the Pre-Action Protocol regime. It will now be responsible for considering and consulting on any proposals from stakeholders (including the DCA) for additions or amendments. The MR also intends to ask the Civil Procedure Rule Committee to review proposed amendments, with the view to ensuring overall consistency of approach and presentation within the Civil Procedure Rules and its sub-ordinate instruments.

The Civil Justice Council has therefore established a sub-committee to consider the Pre-Action Protocols. Its remit is: -

1. To consider whether the format and content and of the pre-action protocols is presented insofar as appropriate in a uniform way;
2. To look at ways in which the costs associated with complying with pre-actions protocols can be reduced;
3. To consider whether changes are necessary and can be made to simplify the protocols;
4. To consider whether there are areas that would benefit from a protocol;
5. To look at the content of individual protocols where necessary and to make proposals for change for consultation with a wider group of stakeholders.

This paper focuses on the first aim listed above.

Action following consultation

The Pre-Action Protocol committee in conjunction with the Department for Constitutional Affairs will consider the responses to the consultation and report to the full Civil Justice Council. The Council will then make recommendations to the MR. Any draft amendments will be considered by the Civil Procedure Rule Committee, and will be given effect as part of a future CPR Update. If a consolidated protocol is recommended, it is hoped that this could be introduced in October 2007.

The CJC sub-committee will then turn to consider whether any parts of the Protocol could be simplified, or whether new subject-specific material should be added, as a second phase of its work.

The Proposals

Concern has been expressed at the proliferation of Pre-Action Protocols in the various areas of civil litigation. Many of the protocols contain the same core steps and guidance as each other, resulting in unnecessary duplication of guidance and instruction. There are currently nine subject specific protocols together with the Practice Direction on Pre-Action Protocols and several other protocols have been proposed.

This paper introduces a draft Consolidated Pre-Action Protocol that incorporates the core steps and guidance common to all of the protocols (and the practice direction), together with subject specific appendices.

The draft has not sought to reduce, amend or extend the substance or scope of the existing direction and protocols in any way. However, the sub-committee believes that parts of the text of some of the protocols could in fact be reduced or removed without affecting the substance or effectiveness of the particular protocol. This could also result in a considerable reduction of the appendices.

If consultation responses support a consolidated protocol, the next stage is to revisit the subject specific appendices drawn from the individual protocols to ensure that it is presented in a consistent style.

It is considered that a consolidated document of consistent style will be easier for litigants to access, understand and apply, and that it will also make it easier to draft any future subject-specific material that it was thought appropriate to add to the appendices.

Questions

We would welcome responses to the following questions: -

1. Is a Consolidated Protocol thought to be beneficial?
 - A. If so, what do you consider to be the benefits?
 - B. If not please say why.

2. To achieve a consistency of style and content should the Consolidated Protocol include full precedents, such as letters of claim or letters of response (as in the Personal Injury protocol for example)?
 - A. Is it preferable to have templates (as in the Clinical Negligence protocol)
 - B. Is it better to have general guidance (as in for example, the Judicial Review protocol)?

3. Is there material from the current protocols included in the appendices which can now be dispensed with in the interest of brevity, consistency and continuing relevance? One example is the continued inclusion in annex D of the protocol for the Resolution of Clinical Disputes, of Lord Woolf's recommendations from 1996. It is submitted that this is no longer necessary to aid the effectiveness of that protocol.

4. The Practice Direction on Pre-Action Protocols provides specifically for sanctions where proceedings are commenced as a result of non-compliance with a protocol. The protocols themselves refer broadly to the court's power to apply sanctions for non-compliance without specificity. It is said by many interested parties that the protocols would benefit from the inclusion of sanctions to assist in dealing with parties who fail to fulfil the requirements of the protocol.
 - A. Do you agree with this view?
 - B. If so, what form should such sanctions take?
 - C. If not why not?

5. Are there parts of the Pre-Action Protocol that should be simplified or removed because they add more cost than benefit?
 - A. If so, which parts and
 - B. Why?

6. What other areas of civil litigation, if any, would benefit from subject specific requirements appended to the consolidated protocol?

7. Do you have any other comments?

HOW TO RESPOND

Please send your response by 27^H April 2007 to: -
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Publication of Response

A paper summarising the responses of this consultation will be published in five months time. The response paper will be available online at **www.civiljusticecouncil.gov.uk**.

Representative Groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

The Civil Justice Council may wish to publish responses to this consultation document in due course. Please ensure your response is marked clearly if you wish your response or name to be kept confidential.

If you are replying by email, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system, unless you specifically include a request to the contrary in the main text of your submission to us.

Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.