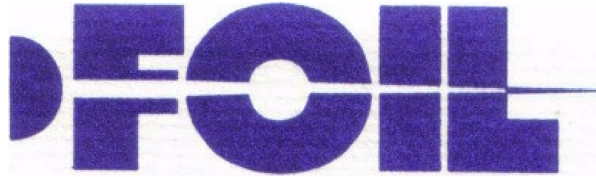

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THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS CONSULTATION PAPER ON **PRE ACTION PROTOCOLS** RESPONSE OF **THE FORUM OF INSURANCE LAWYERS**

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Preliminary comments

FOIL would invite a delay in any reform until the DCA process reforms have come to fruition following the imminent consultation process. Reform in the Personal Injury sector at this stage risks undermining the planned process reforms and undermining the objectives of any improvements to the protocols that might be identified.

For the last 18 months FOIL, APIL, MASS and a number of major insurers have been engaged in a cross industry review of the process in multi track personal injury cases and have produced a draft wording of a behavioural/ process document that should supplement the PI Protocol. The parties are close to piloting the proposals. The CJC have been kept informed of this process and the output may help in any wider review of protocols.

One further point concerns the "layers" of the proposed new pre-action regime. It seems to us that the proposal, if followed, invariably leads to three layers – the Consolidated Protocol, the Appendices, and the Practice Direction to the Protocol. You see in our response to Question 5 that we query if the better place for much of the behaviour principles.

The Consultation Questions

1. **Is a consolidated Protocol thought to be beneficial?**

   Yes - the principle is thought to be beneficial in that it provides a means by which generic issues and steps can be addressed that will apply to all areas of litigation. Namely -

   - Notification of claims
   - Letter of the claim
   - Core information exchange
   - Funding issues
   - Expert evidence

- ADR

These are areas that should be addressed within a generic consolidated protocol.

However FOIL are of the view that the existing Practice Direction on Protocols (PDP) goes a very long way to deal with these core principles and that a new draft as has been suggested does introduce new concepts to the existing specific protocols through the “copy and paste” process. [These will be addressed further but for example section 25 on expert evidence suggests a flexible approach is needed for expert evidence. Such a concept does not exist in the Personal Injury Protocol or for that matter CPR Part 35.]

The existing PDP would require the addition of a generic section on the approach to expert evidence and FOIL would invite the adoption of the principles that underpin part 35 in the selection, choice, and exchange of reports etc. Synergy between the pre action and post issue environment would serve to remove a major area of dispute in the current regime.

For example why should there be distinction between a single “agreed” expert pre issue and a single joint expert under part 35.8? We can see no reason for a distinction and would suggest that the part 35.8 process works well for joint expert instruction and should be adopted pre issue.

2. Use of precedents

From the perspective of the personal injury field FOIL would favour standard templates to save time and costs and to encourage compliance. 95% or more of such claims have a value of less than £10,000; process handling is required in the interests of efficiency and precedents will promote efficiency on both sides. A regime that hinges on fixed costs will depend on process reforms and standard templates.

In the multi track field such templates may still work in any many areas and the mere fact that the claims have higher value should not undermine such

efficiencies. However in certain areas the templates might be replaced or augmented by check list "issue" headings.

Any templates should be the subject of regular review and revision by practitioners.

In the personal injury field, industry bodies such as FOIL, APIL, MASS and insurers could periodically review these.

3. **Current appendices revision**

In the personal injury field it is suggested that -

- **Experts** - The section on experts should be dropped as the generic process on experts will be covered in the consolidated protocol (see above).

- **Disclosure** - the current disclosure appendices serves to encourage a formulaic approach to the pre action disclosure phase. Claimant Solicitors routinely request production of every single of the listed documents when such records will not prove determinative to the issue. For example a manual handling claim could involve some 21 types of record!

  If the insurer has investigated the case and issued a denial of liability the records in their possession would be released with the denial.

  The process might be improved by the Defendant having to serve a list of records in their possession that they considered relevant.

  Any records over and above that list that were required by the Claimant would require a detailed justification as to relevance and proportionality.

4. **Sanctions**

The focus on sanctions is in the pre litigation environment is much debated. However FOIL would suggest a more measured approach than sanctions to act as a deterrent. Sanction is more likely to encourage some practitioners to use the Protocols as a tactical weapon to at best point score and worst build costs. Such a focus will undermine the overriding objective of the pre action protocols - namely to encourage efficient resolution of disputes.

It is also worth mentioning that sanctions already exist -

- Practice Direction on Pre Action Protocols 2.3
- CPR Part 44.3 et alia

The fact that the sanctions are rarely, if ever, used by the Courts is a matter for debate and review by the judiciary to create a consistent playing field in all areas of litigation.

Other than the existing regime under the PDP or CPR the Claimant has the ultimate sanction to issue. Once proceedings are issued the Defendant faces higher costs and risk of censure by the Court.

By contrast the Defendant has little ammunition to deploy prior to the issue of proceedings and FOIL would encourage a more creative approach to the issue of sanctions that might be made available to them. FOIL would propose a (perhaps restricted) right to issue for the Defendants to enable them to drive a case to judicial case management when faced with an obdurate Claimant and / or solicitor. It is understood that the Claimant sector feel that the right would expose claimant to unfair pressure. However, FOIL understands that the principle is supported by the Association of District Judges, who have commented on it in their paper of *Judicial Neutral Evaluation*.

To protect the Claimant it is suggested that the CPR be reformed to permit an application by the Defendant for permission to issue based on breach of a principle of the Pre Action Protocol. Precipitate application might be penalised in costs but timely application might allow the case to progress sooner than might other wise the case. The application would be an opportunity to allow

both parties to explain their position and might in itself help to resolve the dispute through informal preliminary evaluation in the application. This procedure might only be used in the multi track arena and one can foresee that the Courts would control its use. The risk might serve as a source of restraint on excesses!

By way of example, if a Defendant requires more information about, for example, a Claimant's career prospects, a judge may intervene to determine if it is right that the Claimant provides that information to the Defendant. The judge can clearly do so post-issue under disclosure rules; FOIL's view is that the power should extend to pre-issue applications on specific issues.

5. CJC draft consolidated Pre Action Protocol

In response to this question we have assumed that this is the document referred to in the consultation question

Section	Remove / Include	Comment
Introduction	Remove	The principles are covered in the Pre Action Practice Direction - PPD
Aims	Remove	Ibid
Guidance	Include	Build into PPD
Limitation	Remove	The principles are covered in the Pre Action Practice Direction - PPD
Initial notification	Include	This step prior to the formal letter of claim would enable the insurer to make an early concession and save costs and should be built into the generic PPD.
Records	Remove	The principle of early release of information is covered it the existing PPD. Specific obligations for individual areas of claim should be addressed in the individual

		protocols (i.e. appendices).
Letter of Claim	Remove	The principles are covered in the Pre Action Practice Direction - PPD
Response	Remove	The principles are covered in the Pre Action Practice Direction - PPD. However the generic "opt out response" under paragraph 15 should be built to the PPD.
Response	Remove	The principles are covered in the Pre Action Practice Direction - PPD
ADR	Remove	The principles are covered in the Pre Action Practice Direction - PPD
Experts	Remove	See reply under Question one above. The concepts suggested are out of line with the personal injury pre action protocol and the provisions of CPR part 35.
Costs	Remove	Covered in the housing protocol. This type of issue should not be in the consolidated document.
Judicial review	Remove	This type of issue should not be in the consolidated document. If needed a JR prop6tocol is required.

Conclusion

1. FOIL would invite a delay in any reform to the protocols that might be effected by the ongoing DCA led process reforms for low value personal injury claims. The interface between any new process and the protocols has yet to be discussed and mapped out and the reforms should be seen first before reforming the current protocols. FOIL are concerned that reform in this area could driver adverse behaviour that conflicts or undermines the DCA reform process.

2. FOIL endorses the move to simplify the Protocols if practicable.

3. The draft issued with the consultation paper however is not supported as by seeking to cross the boundaries of many work types, it introduces new (and unhelpful) concepts key other areas. E.g. Paragraph 25 unhelpfully conflicts with the Personal Injury Protocol and CPR Part 35. The proposed wording carries a significant risk of encouraging Claimant lawyers in the pi arena will argue that they can justify securing medical evidence in certain cases through the need for a "flexible" approach to expert evidence.

4. Any move towards simplification should not put at risk the benefits to practitioners of having protocols in the pre issue arena.

5. A consolidated generic protocol should concentrate on core behaviour and core steps common to all areas of litigation and should avoid work type specific issues which should be left to the Appendices.

6. Any changes such as those concerning expert evidence, with significant cost and process impact should be the subject of wider consultation as the CJC envisage. FOIL would welcome an opportunity to partake in such a review with other stakeholders.

7. FOIL has specific concerns raised by practitioners over issues of disclosure, experts and response times. These are not alleviated by the proposal and FOIL considers that the disease and illness protocol will need careful attention and revision in due course. FOIL would welcome the opportunity for direct input into that process.

Response prepared on behalf of FOIL by the Rules and Process Special Interest Group

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FOIL has approximately 1700 members from over 100 private practice firms. It is the only organisation that represents solicitors that act for defendants in civil proceedings.