



FOIL UPDATE

September 2009

The CJC Review of Pre-action Protocols

In 2006 the Master of the Rolls asked the Civil Justice Council to assume responsibility for keeping the system of pre-action protocols (PAPs) under review. Following on from their work in 2007/8 to develop and introduce the new PD on pre-action conduct which came into effect in April this year, the CJC has now announced a programme to undertake a review of all of the PAPs, through review groups of stakeholders, culminating in a Forum in 2010. The review groups are being co-ordinated by the Law Society which will provide a chair for each group. The Forum, to which stakeholders will be invited, will consider the recommendations put forward by the various review groups and make recommendations to the Master of the Rolls. FOIL has indicated that it wishes to be involved in the review groups for personal injury, disease, clinical negligence, professional negligence and construction and engineering.

The CJC obviously recognises that the new RTA process will come into effect in 2010 and that claims within the new process will fall within the Personal Injury PAP. The CJC is confident that the PAP can be reviewed taking into account the new process. One particular issue for consideration is whether the Personal Injury PAP should be extended beyond the fast track.

In general terms the CJC will be considering:

- o Whether the format and content of the PAPs is presented in a uniform way and whether any differences between them are justified
- o Whether changes can be made to simplify the PAPs
- o The process through which PAPs become part of the CPR
- o Whether there are other areas of work which would be benefit from a PAP
- o Whether some or all of the documents in annexes are still necessary

Issues for consideration

Response times

The periods within which the defendant should respond, by an acknowledgement and a response, are shown in the table opposite. The review will ask whether these time periods are still appropriate.

	Def's Ack.	Def's Resp.
PI	21 days	3 months (6 o'seas)
Clin Neg	14 days	3 months
Construction	14 days	28 days
Defamation	-	14 days
Prof. Neg	21 days	3 months
Judicial Review	-	14 days
Disease	21 days	3 months
Housing Disrepair	-	20 working days

Dispute Resolution

Concern has been expressed by some of the judiciary that at present the protocols are treated as an all or nothing exercise. Either the protocol process results in the resolution of the dispute, or at least the liability aspect of it, or it does not. In that case litigation inevitably follows which starts again from scratch. Some PAPS, for example, Disease, invite the parties to take stock before progressing to the issue of proceedings.

The CJC wishes to consider to what extent the PAPs could draw attention to identifying and reducing the real issues of conflict. Should a formal requirement be introduced

that all parties enter into a stocktaking period with an obligation to complete a list of issues remaining in dispute to assist the court in exercising its powers under CPR 1.4(b)-(d)?

Checklists and Flowcharts

At present these are included in the Rent and Mortgage Protocols and the Clinical Negligence Protocol. Do they serve their purpose and would other PAPs benefit from the same?

Experts

There are differences in the manner in which experts are instructed in different types of dispute. Looking at the PAPs in which FOIL has a particular interest the detailed provisions in the Personal Injury and Disease PAPs are replaced by more general provisions in the Clinical Negligence and Construction PAPs. The CJC wishes to consider whether some of the older protocols could be updated by reference to Part 35, the PD to Part 35 and the Protocol on the Instruction of Experts.

ADR

ADR is referred to in all but the Construction and Engineering and Judicial Review protocols. The CJC asks whether it should be included in all, as the purpose of the protocols is to resolve disputes without recourse to the courts. The review groups are asked to consider whether the following paragraph from the PD on Pre-action conduct could be adopted for all PAPs:

8. Alternative Dispute Resolution

8.1 Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR (see paragraph 4.4(3)).

8.2 It is not practicable in this Practice Direction to address in detail how the parties might decide to resolve a matter. However, some of the options for resolving a matter without starting proceedings are –

- (1) discussion and negotiation;
- (2) mediation (a form of negotiation with the help of an independent person or body);
- (3) early neutral evaluation (where an independent person or body, for example a lawyer or an expert in the subject, gives an opinion on the merits of a dispute); or
- (4) arbitration (where an independent person or body makes a binding decision), many types of business are members of arbitration schemes for resolving disputes with consumers.

8.3 The Legal Services Commission has published a booklet on ‘Alternatives to Court’, CLS Direct Information Leaflet 23 (www.clsdirect.org.uk) which lists a number of organisations that provide alternative dispute resolution services. The National Mediation Helpline on 0845 603 0809 or at www.nationalmediationhelpline.com can provide information about mediation.

8.4 The parties should continue to consider the possibility of reaching a settlement at all times. This still applies after proceedings have been started, up to and during any trial or final hearing.

This seems unlikely to alter significantly the intent on ADR in any of the protocols in which FOIL has an interest, although it does remove the warning on costs and the express statement that ADR is not compulsory, and the mention of face to face meetings and the NHS complaints procedure in the clinical negligence protocol.

The first meeting to discuss the review will take place on Friday 28 September. Andrew Underwood, Head of the Rules SIG, will be representing FOIL and in due course other SIG heads and representatives will become involved in their specialist areas. At this stage views on all the PAPs are very welcome - please contact Andrew Underwood on aunderwood@keoghs.co.uk or Shirley Denyer on shirley.denyer@foil.org.uk.

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