FORUM OF INSURANCE LAWYERS

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The CJC Review of Pre-Action Protocols

On 21st August the CJC published its long-anticipated report, following the review of Pre-Action Protocols (PAPs) which began in 2000 and included a consultation to which 133 interested parties responded, including FOIL. It has been decided that the first phase of the revision process (this report) should be dedicated to examining the role of PAPs in the civil justice system, and in particular the potential benefits of digitalising pre-action processes, and the place and content of the Practice Direction on Pre-action Conduct. The second phase, which is still to come, will be focused on potential reforms to litigation specific PAPs and/or the creation of new litigation specific PAPs. No timescale for that phase has been indicated.

While the report recommends further incorporation of PAPs into the CPR, nothing in it is designed to extend the court's powers or expand the court's role in regulating pre-action conduct beyond the existing legal framework.

Key recommendations

The report reaffirms that the role of PAPs is to provide sufficient notice and information to parties to enable them meaningfully to engage in formal or informal dispute resolution processes, and where a full resolution is not agreed, to help narrow the dispute so that any subsequent litigation is limited to resolving those issues that need to be determined by the court.

The result of this stage of the review is a lengthy series of recommendations, some of which are dealt with in more detail later in this Update:

1. The Overriding Objective be amended to refer to the need for compliance with, and enforcement of, pre-action protocols.

2. All PAPs should make explicit reference to the Overriding Objective, and specifically the parties' obligation to co-operate.

3. Compliance with pre-action protocols be made formally mandatory. Urgent cases should be exempt from this requirement. Urgent cases should include, at a minimum, situations where

the limitation period is expiring, where urgent injunctions are being sought and expressly exempt claims where there is a serious risk to the health or welfare of a party without urgent intervention of a court.

4. All online pre-action portals should include a question asking parties about their vulnerability. Where parties identify themselves as vulnerable, additional information should be provided to those parties identifying support that may be available to them.

5. The working group (WG) recommends that any online portals must be based on a clear understanding of their intended scope and the scope of relevant applicable court processes.

6. The WG recommends that MOJ examine the feasibility of developing a general pre-action portal which is limited to the main PAP steps, but can be linked to relevant existing online general claims portals (such as OCMC & Damages Claims Online).

7. If multiple online portals are adopted for specific claim types, along the lines of guided settlement systems, the WG recommends that the PAP online process for any given type of online court or guided settlement process should be co-designed, with proper consultation with stakeholders, so that the two work relevantly together.

8. The WG recommends that all pre-action portals be designed to be used by both professional court users and litigants in person (including, appropriate layperson summaries to explain technical language where necessary). This objective includes developing portals both for individual web-based access and for professional users who require integration with their own case management systems via an API. This will maximise the efficiencies of the system for all users.

9. The WG recommends that a paper-based alternative is available to all pre-action portals if adequate digital assistance is not available to technologically disadvantaged people.

10. The WG recommends that parties should not be compelled to conduct dispute resolution discussions online, however subject to the technology being available and cost effective, developers of pre-action portals should be permitted to facilitate confidential dispute resolution discussions online through a secure part of their portals.

11. The WG recommends that any pre-action portal provide appropriate signalling to vulnerable litigants about sources of assistance that may be available to them, the rules on vulnerable litigants (including CPR Part 1.6 and PD1A) and provide an opportunity for litigants to identify themselves as vulnerable.

12. The WG recommends that governance of pre-action portals be allocated to the OPRC.

13. The WG recommends that all pre-action portals should adopt a commitment to transparent sharing of data.

14. The cost of creating, operating, and maintaining any pre-action portal (of whatever kind) needs careful consideration. This in the WG's view falls into two categories: namely, consideration of the cost overheads for users, including professional firms, and costs to the court system which go beyond set up cost and demand ongoing funding. The WG

recommends close attention is paid to cost aspects and cautions against underestimating the technical challenges involved, and resources required, to successfully develop and operate pre-action portals.

15. While the WG recommendations do not apply directly to private pre-action portals where use of them is voluntary, there should be a formal certification process for private portals that are marketed to prospective parties as being compliant with pre-action protocols applying to the parties' dispute – and therefore "court ready" without the parties having to take any additional steps beyond use of the portal – to ensure they meet minimum standards.

16. The PD-PAC be replaced by a PD that contains the General PAP; and a PAP for Lower Value claims worth £500 or less (the wording of which should be developed in consultation with LIP advocacy groups). Possible text for the General PAP and PAP for Lower Value Small Claims is set out in Annexes 2 and 3 of the report.

17. The rules governing pre-action processes should be the same whether they are carried out through digital portals or other forms of communication. Pre-action protocols should vary based on the needs of the litigation and the parties to the dispute, not the technology used by the parties. Depending on how the technology evolves, there may be cases where it is Civil Justice Council appropriate to vary the rules governing pre-action processes in the digital sphere if it is demonstrated that the pre-action steps required of the parties can be sensibly modified without undermining the common objectives of pre-action protocols.

18. The WG recommends the adoption of the guidance in paragraphs 2 to 17 in the Draft General PAP.

19. The General PAP should require defendants to provide a **letter of acknowledgement within 21** days of receipt of the claimant's pre-action letter of claim, and a **full response within 90** days of receipt of the pre-action letter of claim. The defendant must identify in its letter of acknowledgement whether it believes it is the right defendant for the claim (or the identity of the correct defendant where that defendant is a related entity) and where the defendant believes it is insured for the claim, and the identity and contact details of that insurer. The defendant should also indicate what additional information it needs to provide a full response.

20. The Small Claims PAP should provide defendants with **a maximum 30 days** to provide **full response** to pre-action letters of claim.

21. The General PAP does not include a formal disclosure standard but does include additional guidance on the meaning of "key documents" as set out in paragraph 4.9 of the draft General PAP. The guidance should also remind parties that documents disclosed as part of the information exchange process should only be used for the dispute at hand.

22. The General PAP should include an obligation to engage in pre-action dispute resolution. Proposed wording for the obligation can be found at paragraphs 4.10-4.20 of the Draft General PAP in Annex 2 of the report.

23. Dispute resolution under the Small Claims PAP should be encouraged, but optional, and parties should be made aware of the obligation to engage in mandatory mediation if litigation is commenced.

24. The General PAP includes a requirement to complete a joint stock take report in which the parties identify the issues they agree on, the issues they disagree on and the reasons for that disagreement, and the status of the parties' disclosure.

25. The WG recommends the adoption of the guidance on sanctions set out in paragraphs 5.1-5.12 of the Draft General PAP in Annex 2 of the report.

26. All directions questionnaires (for all tracks) should contain a question about PAP compliance, asking each party to confirm whether they have complied with the PAP and to identify any non-compliance by the other party.

27. The WG recommends streamlining the process for determining costs quantum disputes under Part 8 and CPR 46.14. In particular the rules should clarify that the court has power to summarily assess costs even without a hearing, and parties should be given the option of being able to request summary or provisional detailed assessments when filing the Part 8 claim form.

28. The WG recommends that any new procedure for determining costs liability disputes for claims that are resolved at the pre-action stage should first be introduced in specific areas of litigation where there is a likely need for such a procedure. The areas where a new procedure might be needed will be dealt with in the second report focused on litigation specific PAPs.

29. For cases covered by the General PAP and the Lower Value Small Claims PAP, the CPRC and OPRC should consider amending the pleading rules to allow the parties to rely on pre-action letters of claim and replies, in conjunction with the joint stocktake report where one is completed by the parties, as the pleadings for their claims and defences. This freedom should be subject to the court's discretion to order conventional pleadings or further particulars where appropriate.

Inevitably there are pros and cons for defendants.

Recommendation	**Upside**	**Possible issues**
Stricter enforcement of the overriding objective and compliance with PAPs.	Will hopefully dissuade claimants from withholding information which hinders early settlement.	It will work both ways and defendants will also need to comply.
Awareness of vulnerability, including the availability of paper-based alternatives where a process is otherwise online.	It is only fair that the vulnerable are protected.	Will claimants 'game' this to try to circumvent full compliance and build costs? This is an issue affecting vulnerability generally, including fixed recoverable costs.

		Provision must also be made for those vulnerable parties who do adopt a paper-based approach.
Digitalisation.	Undoubtedly of potential benefit to defendants in reducing costs *and* ultimately allowing the courts to police pre-action behaviour.	1. Any system(s) must work and that is an issue already; 2. It will take time to reduce all of the existing PAPs and CPR to fit on line processes. There could be a great deal of pain and expense, more likely to be borne by the parties than by the government. The time that may be required to achieve what has been recommended should not be underestimated.
The cost of digitalisation.	Workable if the cost is split fairly between the government, which will benefit from digitalisation and the users of the process(es).	The government will seek to shift the burden onto users and will try to avoid paying a reasonable proportion of the costs of the justice system, collected through general taxation. While the report stresses the importance of a robust system, it is silent on the key issue of who will pay.
A revised General PAP.	This should be seen as the template for how most if not all PAPs will be framed in the future. *If* compliance is enforced, defendants should benefit from an improved flow of information from claimants and the chance to settle as a result of the push towards dispute resolution and the stock take, at which non-compliance can be raised.	Defendants must be wary of the time limits. Only time will tell if the process is policed sufficiently robustly to alter the negative behaviour of some claimant representatives.
Sanctions for non-compliance	These work both ways but are to be welcomed.	The acid test will be how the judiciary applies the proposed sanctions (see point 25 above).

FOIL Technical Director **Dr Jeffrey Wale** comments:

The report makes numerous recommendations and is the first stage in a wider reform process around the pre-action phase.

The CJC working group maintain that they are not seeking to extend the jurisdiction of the courts in the pre-action territory (para 1.21) but do recommend that PAPs should be made mandatory with a few exemptions based on urgency, limitation or health and safety grounds. This jurisdictional claim in the pre-action space is reinforced by the recommendation that governance of pre-action portals be allocated to the new Online Procedure Rules Committee. The working group has the following to say on the issue of jurisdiction:

'None of the recommendations in this report are intended to alter the existing framework for regulation of pre-action conduct; namely, the court only has jurisdiction over pre-action conduct where that is provided for in primary legislation; where there is a dispute about costs for a claim that is settled at the pre-action stage, or where a legal claim is issued by the parties. Should any future challenges to the vires of aspects of PAPs be made, this may have implications for some of the recommendations in this report if they are not supported by primary legislation. Whether the courts choose to use their inherent jurisdiction to expand the orders they can make before any claim is issued – as they have done in the past - is properly a matter for the courts. The WG can only stress the crucial role that PAPs have come to occupy in civil litigation in England & Wales' (para 1.24).

Ultimately, the working group has decided to hedge their bets on the vires question. However, the central concern here is the possible consequences of additional jurisdictional claims by the courts over the pre-action space. It would be better if there was a conscious Parliamentary steer here, rather than leaving it to the courts to fill the space using their inherent jurisdiction.

The working group did not bottom out the question of whether PAPs should work seamlessly with the post-action processes – that issue was left open. If there is to be a fully integrated system which connects pre-action processes and documentation to the legal proceedings that engages very different considerations to a system that does not strive for full integration. Notwithstanding, the importance of co-design in the pre-and post- action portals is emphasised by the working group. It is also intended that co-design will facilitate the integration of professional case management and digital claims platforms.

The report also highlights but ultimately sidesteps the thorny issue of resourcing, emphasising that the cost of creating, operating, and maintaining any pre-action portal needs careful consideration.

Nicola Critchley, of **DWF,** President of FOIL adds:

Many of the recommendations are uncontroversial and pre-action portals are nothing new.
The potential to use the pre-action stage more effectively to resolve cases or to narrow the areas of dispute does seem a sensible proposal. Care will need to be taken to ensure the pre-action space does not become increasingly complex and that the boundaries of pre and post action stages do not become blurred. The thorny issue of the funding of these reforms, whilst acknowledged by the working group, has yet to be addressed.