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## Legal Focus

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# Insurers eager to understand pre-action protocol change

## Plans to change pre-action protocols in the UK have provoked considerable discussion among insurers and solicitors

On November 15, 2021 the UK's Civil Justice Council (CJC) published an interim report for consultation on the subject of pre-action protocols (PAPs). It has provoked considerable discussion among insurers and solicitors, *writes Gregor Woods and Stephen Tester*.

It is ambitious in scope, in its consideration of the role PAPs should play in the civil justice system in the 2020s, including their role in an "increasingly digitalised justice system". Once the consultation process ends, the CJC's working party will make policy recommendations to the Civil Procedure Rule Committee, the body responsible for drafting the PAPs.

Although the scope of the CJC's review encompasses all existing PAPs, three were considered worthy of attention by sub-committee: personal injury; housing: and judicial review. It is not entirely clear from the report why these three were singled out for special treatment and the apparent absence of expert practitioners on the working group in the fields of construction and engineering or professional negligence is surprising.

Academics, mediators and judiciary aside, the working party includes: a specialist in legal costs; a claimant personal injury solicitor; a barrister specialising in data protection; two solicitors specialising in housing law; and a property law barrister. It appears to include no one handling professional negligence construction/engineering litigation on a day-to-day basis, individuals who might be expected to have considerable insight into the efficacy of the existing arrangements and areas for improvement. Similarly, no one practicing medical negligence litigation was present on either the personal injury sub-committee or on the working group.

**The proposals**

Turning to the proposals themselves, a broad range of amendments to the structure and role of PAPs is floated. Key proposals include making all PAPs available via online portals and "formally recognising" that compliance with PAPs is to be mandatory.

Other options include a "good faith" obligation to try to narrow or resolve disputes; a requirement on parties to complete a joint stock-take report as a final step pre-issue; and a summary costs procedure, independent of Part 8, for costs liability and quantum disputes resolved pre-issue.

It is also proposed there will be new processes to raise compliance concerns, expanding court sanction powers and improving the accessibility of PAPs by reducing technical language and introducing litigant-in-person-friendly guidance.

A default general PAP, with more concrete timeframes and disclosure standards, has also been recommended. Defendants will have 14 days to respond to a letter of claim, with the option to request an extension of 28 days. In relation to the construction and engineering PAP and professional negligence PAPs, it has been proposed response times are brought into line with the proposed general PAP.

Some of the proposals, for example those concerned with improving accessibility and consistency of wording, will be broadly welcomed, although as ever, the devil can be in the detail. Introduction of "accessible language" can, unless care is taken, introduce ambiguity, but no one will argue with the principle.

Similarly, online access with suitable guidance will help, but those who lack the necessary IT skills or online capability will need to be supported. The broader drive towards "online justice" must not overlook them.

**Response times**

Perhaps the most controversial proposal concerns the proposed reduction to defendant response times under the construction and engineering and professional negligence PAPs. The existing arrangement is slightly different under each. Under the construction and engineering PAP, a defendant has 28 days to respond to a letter of claim, with the option to agree an extension of up to 28 days maximum. Under the professional negligence PAP, the defendant has three months to respond from acknowledgement, with the option to agree further, uncapped, extensions. Bringing both into line with the proposed general PAP would be a radical and unwelcome change for defendants and their insurers.

Under the proposed general PAP, the defendant "must respond" within 14 days "and provide whatever information it may have in response to the claimant's letter". If more time is required, it must write to the claimant within that 14-day period stating it will respond within a further 28 days. Further extensions can be agreed by consent.

Such a change would represent a huge reduction in the professional negligence response time. In the construction and engineering context, it could be argued it is more defendant-friendly, dropping the 56-day cap, but in either scenario it suggests a lack of understanding as to what is required to provide a sensible response to often complex allegations requiring collation and consideration of a considerable volume of evidence.

**Absence of experts**

It is perhaps here the absence of industry experts on the working group is most telling. Furthermore, professionals will usually have insurers who must be notified and with whom coverage and the incurring of defence costs need to be confirmed. The authorities are clear that expert evidence is critical to the resolution of claims of professional negligence. Appropriate experts are in high demand and are not immediately available to provide reports. Some realism is required when setting timetables for response, or risk reducing responses to the most anodyne denials.

The report is also light on justification for such reductions or indeed evidence the existing scheme is failing. The risk is such reductions will militate against the parties' ability to commence sensible negotiations and provoke litigation, the very thing the PAPs seek to avoid where possible.

A further concern for some is the push to transform PAPs from codes of best conduct to mandatory obligations. All would agree they are to be followed. They are already de facto mandatory. Failure to comply risks court sanction once litigation commences. Existing powers are wide. They include not merely penalising offenders in costs, but also staying the action pending compliance. Unreasonable refusal to engage in alternative dispute resolution is hazardous. Judges apply discretion when considering sanctions.

Lord Woolf, who created PAPs when introducing his radical reform of civil justice 26 years ago, was keen to ensure they were different in character to the rules. They were to create an environment in which sensible negotiations could take place but fall outside the scope of the formal rules of procedure. This character arguably gives PAPs their greatest strength – flexibility, acting as a roadmap within which parties can operate with a degree of discretion to facilitate sensible discussions, backed by proportionate sanctions.

From the defendant perspective, the failure of claimants to properly particularise their case and the lop-sided approach to disclosure are common concerns. In the personal injury context, letters of claim typically cut and paste sections from Annex C to the PAP with little thought to relevance. The disclosure obligation is firmly on the defendant, with no commensurate obligation on the claimant to disclose, for example, relevant medical records. Reform is required here to increase the prospects of a negotiated settlement pre-issue.

We now await the CJC's final report. Whatever the outcome, this will be a significant element in the process of civil justice reform. ■

*Gregor Woods and Stephen Tester are partners at CMS*