

Response of the
London Solicitors Litigation Association

to the Civil Justice Council

Consultation Paper –

General Pre-Action Protocol and
Practice Direction on Pre-Action Protocols

1. **Introduction**

The LSLA was formed in 1952 and represents the interests of a wide range of civil litigators in London. It has some 1,000 members throughout London among all the major litigation practices, ranging from sole practitioners to major international firms.

Members of the LSLA Committee sit or have recently sat on the Civil Justice Council, the Civil Procedure Rules Committee, the Law Society Council, the Law Society Civil Litigation Committee, the Commercial Court Users Committee and the Supreme Court Costs Group, to name but a few. As a consequence, the LSLA has become a primary port of call for consultation on issues affecting civil and commercial litigation in London and it has, on many occasions, been at the forefront of the process of change. Two members of the Committee recently sat on the Commercial Court Working Party on Long Cases.

2. **Executive Summary**

The LSLA has considered the consultation paper and has responded individually to the questions that are raised in it. The LSLA is very much in favour of and has always stood by the principle that the parties to a dispute should attempt to settle it without the necessity of commencing court proceedings. The LSLA appreciates that the principle lying behind the proposed General Pre-Action Protocol is to achieve that aim. We question, however, whether that aim is going to be achieved by the imposition of the draft pre-action protocol as proposed. The main submission of the LSLA is that the consultation paper does not establish any empirical evidence as to the need for a General Pre-Action Protocol. Further, in the view of the LSLA, the range of disputes intended to be covered by a General Pre-Action Protocol make it inappropriate to impose on parties the rigid obligations included within the draft.

3. **Specific Questions**

Q1. Do you agree with the proposed new structure of a shorter Practice Direction highlighting the court's case management powers and a General Pre-Action Protocol setting out the requirements on parties to a dispute? Please give reasons for your view.

We do not agree with the proposed new structure for the following reasons.

In order to justify any change to the current position, the LSLA believes that some need should be established to cure a current fault in the system or to make the current system more

efficient or effective. The Practice Direction already provides general requirements of pre-action conduct and the question raised by the consultation paper is whether any further detail is required as set out in the draft.

The consultation paper suggests that the need is established on the basis that the requirements of pre-action conduct “... *could be set out more clearly and accessibly for the benefit, in particular, of unrepresented potential litigants*”. The consultation paper goes on to suggest that, “*The format in which the practice direction is presented does not offer it the same sort of prominence or profile as the subject matter of the subject specific pre-action protocol. The result is that people who are less familiar with civil procedure rules, for example, certain categories of litigants in person, are less likely to be aware of the behaviour expected of them ...*”.

In our view it is surprising that the consultation paper does not analyse any statistical evidence or offer any empirical evidence of its conclusions. Further, there appears to be no impact assessment.

It seems pure speculation as to how the proposed pre-action protocol will be seen and used by its target audience – litigants in person. We speculate that if a litigant in person is writing a letter making a demand for money, they are hardly likely to be considering at that time any pre-action protocol. They will expect that the money will be paid and are hoping to avoid court proceedings altogether.

If, in the more likely event, the litigant in person is the recipient of the letter before action, bearing in mind the prescriptive nature of the proposed General Pre-Action Protocol, we would question what is the likely effect on them of all of the documents and details that will have to be required and to which they will have to answer. The recipient will receive a letter before action which will contain the details set out in paragraph 7 of the draft. They will also receive a substantial body of paperwork which will have an “official” feel to it. The letter will, for instance, enclose a copy of the pre-action protocol. The letter will carry with it prescriptive threats and particularly that if the alleged debtor does not comply with the pre-action protocol in their response, the court may impose sanctions on them at some subsequent point. It is to be noted that it is felt that the draft Protocol itself should say explicitly that the letter before action is not the start of the court claim but we question whether the perception of a recipient of the letter and accompanying documents will be that it is the start of the court process. We remain to be convinced that the prescriptive provisions actually serve the best interests of that target audience.

The existing pre-action protocols have largely been the result of negotiation and consultation with practitioners and stakeholders. Those pre-action protocols have reflected practice derived from those consultations and negotiations. The Civil Justice Council in its consultation paper already recognises the valuable work undertaken by stakeholders when it says, *“There was an understandable reluctance to reduce the number of pre-action protocols from stakeholders who had committed so much time to drafting their respective pre-action protocols originally.”*

The General Pre-action Protocol is, however, not such an animal. It is intended to cover such a wide range of disputes (all those outside the existing pre-action protocols) that there is no confined list of consultees or parties that might negotiate terms. Accordingly the CJC’s proposals are to impose such a pre-action protocol on those directly affected by it.

In those circumstances the submission of the LSLA is that the CJC needs to show strong “need” for the General Pre-action Protocol before it proposes to impose it on those directly affected by it. This makes more important the need for impact assessment and a statistical analysis of available data.

Background

The consultation paper sets out the historical background to the instant proposals. The paper records that in 2002 the Lord Chancellor’s Department announced that it would not be taking forward the proposals for a General Pre-action Protocol because, *“The diverse requirements and specific types of disputes and the absence of any consensus as to how to amend the proposed protocol means that it is now believed that any further steps to develop a General Pre-Action Protocol would be unlikely to be successful”*.

The result of that was that the Practice Direction was altered but no further steps were taken. In our submission there is no change since 2002 that now justifies the introduction of a General Pre-Action Protocol. The CJC itself has consulted previously on the subject in that in February 2007 it sought views on proposals to introduce a Consolidated Pre-Action Protocol replacing the nine current protocols. Following consultation a decision was made not to take that proposal forward. The concept of a General Pre-Action Protocol is intended, however, to be a protocol for everything other than the nine. The LSLA was not convinced that there was need for a Consolidated Pre-Action Protocol and we retain that view in relation to the General Pre-Action Protocol.

Q2. Are there particular classes of cases or types of circumstances where the General Pre-Action Protocol should not apply? If so please specify.

The question raised reflects the problem with a General Pre-Action Protocol. It is difficult to determine, without a full assessment, to which proceedings such a pre-action protocol should **not** apply. In our view the exercise should be taken the other way in that, rather in keeping with the existing pre-action protocols in specific areas, each type of proceedings should be examined and determined whether it should be included within a pre-action protocol. We think that that exercise must be undertaken before any proposal goes forward. It is presumed that statistics would be necessary and that the large bulk of claims covered by the General Pre-Action Protocol would be debt claims. Whilst generally there should be a requirement that creditors seek to settle with their debtors prior to the issue of proceedings, we would question whether in practice the General Pre-Action Protocol sits well with the reasonable practices currently undertaken by large creditors. The times specified within the General Pre-Action Protocol may encourage debtors to use the protocol to good effect in delaying payment and then hanging over the creditor threats arising from some failure to comply fully with the pre-action protocol.

Q3. Do you have any comments on the language used and the drafting of the revised Practice Direction and General Pre-Action Protocol? If so, please specify.

We have concerns about the language used in the draft General Pre-Action Protocol. We believe it to be too prescriptive of the process. We take, for instance, the directive at paragraph 3.2 which says as follows,

“The parties must attempt to settle the dispute by negotiation or some other form of dispute resolution. When this fails to resolve the dispute the parties must then follow the steps set out in paragraph 5 below.”

Of particular concern to us in relation to the prescriptions are the provisions of paragraph 4. That prescribes that the time limits are maximum periods and that every attempt must be made to comply as soon as practicable. It goes on to say that if parties are able to comply earlier than the relevant time limit, they must do so. Bearing in mind the penalties that may be faced for a failure to comply, we would be very concerned about this sort of prescription. Parties will be left in considerable doubt as to whether they have in fact complied with the pre-action protocol bearing in mind the provisions of paragraph 4.

Q4. Do you agree with the approach taken to ADR in the General Pre-Action Protocol?

We agree with the encouragement for alternative dispute resolution. We would question whether a litigant in person is going to understand in any way the concept of mutual evaluation and its nature or effect. The list of alternatives includes arbitration but that is an adjudicative process, the costs of which can be higher than the costs of using the court. We would question in any event whether it is truly an alternative to the court bearing in mind that the concept of alternatives should be settlement through discussion, negotiation or mediation.

Q5. Do you agree with the required steps set out in the General Pre-Action Protocol, and in particular the approach taken to time limits? Please give reasons for your view.

We do not agree the approach taken to time limits. Our view is that they are too prescriptive with application to a whole range of disputes without some proper assessment as to whether they sit well with the nature of those disputes or the procedure that should be applied to them.

Q6. Would it be helpful to include a ‘model’ letter (non-mandatory) before claim (for a standard consumer claim) as an annex to the General Pre-Action Protocol?

We are not convinced that there should be a model letter. We can see the force of the standard letter from a business claimant to a consumer containing the information detailed at page 11 of the consultation paper. In our view, if this is indeed one of the aims of the General Pre-Action Protocol, then there should be a distinct and separate pre-action protocol for business claims against unrepresented individuals. We can see that that may serve some purpose but we are not convinced that there should be one model letter in any General Pre-Action Protocol.

Q7. Do you agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?

See 6.

Q8. Do you agree with the approach taken to experts in the General Pre-Action Protocol? Please give reasons for your view.

No comment but we do ask whether the target audience will have any understanding of the points that arise in relation to experts.

Q9. Do you agree that, where limitation is an issue, parties should be encouraged to agree not to take the ‘time bar’ defence?

We would be concerned about the limitation issue and whether parties will be waiving certain rights without legal advice on the encouragement of the pre-action protocol. We do not believe this to be appropriate.