

General Pre-Action Protocol

The Advice Services Alliance's response to the
Lord Chancellor's Department's consultation
paper

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1 Introduction

- 1.1 The Advice Services Alliance (ASA) was established in 1980, and is the umbrella organisation for independent advice services in the UK. Its aims are to:
- champion the development of high quality information, advice and legal services;
 - ensure that people are not denied access to such services on account of lack of means, discrimination or other disadvantage;
 - encourage co-operation between organisations providing such services;
 - provide a forum for the discussion of issues of common interest or concern to advice organisations.
- 1.2 Full membership of ASA is open to national networks of independent advice services in the UK. Current full members are:
- Citizens Advice Scotland (CAS)
 - DIAL UK (the disability information and advice line service)
 - Federation of Information and Advice Centres (FIAC)
 - Law Centres Federation (LCF)
 - National Association of Citizens Advice Bureaux (NACAB)
 - Scottish Association of Law Centres (SALC)
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.3 Other organisations and individuals concerned with the provision of advice and legal services are affiliated to ASA as associate or subscribing members.
- 1.4 ASA undertakes policy and development work in agreed areas on behalf of its members. Our current priorities for such work are:
- Alternative dispute resolution
 - The civil justice system as it impacts on advice agencies and their clients
 - Legal services, including co-ordinating advice network involvement in legal aid; contracting
 - Quality and standards of advice
- 1.5 ASA is pleased to have an opportunity to respond to the Lord Chancellor's Department Consultation Paper on the General Pre-action Protocol. Our response has been drawn up in consultation with:
- The ASA ADR Advisory Group
 - The ASA County Court Advisers Group
 - ASA network members.

Our response should be considered in conjunction with any individual responses submitted by ASA member networks. This response seeks where possible to represent the consensus of opinion amongst network members. However, comments on specific proposals should not be taken in every case as necessarily representing the views of all networks.

Responses to the Questionnaire

(Page 11 of the consultation document)

2 What do you see as the advantages and disadvantages of having a general protocol?

- 2.1 ASA supports the principle of having a general pre-action protocol because it provides a clear process for communication between parties, disclosure of relevant information, and timescales by which this should be completed. It also encourages parties to consider ADR where appropriate.
- 2.2 However, ASA has three significant concerns about the implementation of this protocol:
- a) Litigants in person may not know about the rules, and we are concerned that they should not be further disadvantaged by not being aware of the protocol requirements. Information about the protocol needs to be provided well before a court application is made, and the availability of information in user-friendly language at advice agencies, libraries, civic centres, courts, solicitors and other access points need to be well-thought out and resourced.
 - b) Cases allocated to the small claims track already work to a procedure which is intended to be simple, quick and easy to use. We have a concern that the pre-action protocol may add another perceived hurdle to the process of small claims, and may seem off-putting to those intending to use this procedure. There are also two specific issues which need to be considered with regard to small claims cases:
 - As costs are generally borne by the parties in small claims track cases, cost penalties for parties who do not comply with the protocol would not be appropriate
 - Sections dealing with disclosure and experts need further consideration when applied to small claims track cases (see questions 4 and 5 below)
 - c) The LCD needs to give serious consideration to the appropriate lead-in time for implementing this pre-action protocol, and to the way in which information about its requirements will be disseminated to the general public and to legal advisers. As advisers rather than courts will in effect be “managing” cases at the pre-claim stage, it is vital that they are fully informed of the significance of the protocol, and its effect on the process of their client’s case, before the protocol comes into effect.
- 2.3 Appropriate legal advice at an early stage is to be encouraged. It would be useful to make this point in one of the introductory sections of the protocol (2.1 and 2.2), by suggesting that inexperienced or unrepresented prospective litigants should consider taking legal advice about the merits of their potential claim, and the possibility of a negotiated settlement, in order to make an informed decision about the best way to proceed, and to encourage early settlement where possible.

3 Should the protocol apply to a wide range of proceedings, regardless of complexity or value?

- 3.1 ASA believes that it would provide a clearer and more consistent pattern to have a single general pre-action protocol providing a basic procedure to be followed in all cases, unless there is good reason for an exception. It is necessary for the LCD to take an overall strategic view as to whether there should be specific protocols for particular types of case. The development of specific protocols on an ad-hoc basis, as is currently happening, can give rise to confusion. ASA therefore believes that existing protocols should have an end date, and work on new protocols currently being drafted should be suspended temporarily, so that they can all come under a general review of the need for exceptions to the general pre-action protocol, a review which should be actively managed by the LCD.
- 3.2 The application of the general pre-action protocol to small claims track proceedings needs further consideration (see point 1.2.2 above and questions 4 and 5 below).

4 Is the guidance contained in the protocol clear?

- 4.1 Most of the guidance in the protocol is clear, but some phrases and terminology could be clearer. Some issues need further thought and clarification.
- 4.2 Pre-action protocol 2.1 *“This protocol covers the range of disputes not covered by a specific protocol”.*

This could be clearer. It would also be more consistent with the ASA comments under (2.1) above if it were re-phrased:

*“This protocol covers all disputes. However, for certain disputes including clinical negligence and personal injury (insert list here *) there are specific protocols which need to be followed. These protocols can be found in the Protocol Practice Direction in volume 3 of the Civil Procedure Rules.”*

- 4.3 Pre-action protocol 3.2 *“It would not be consistent with the spirit of the protocol to take a point on this...”*

It would be helpful to clarify what “take a point on this” means in more user-friendly language.

For example: “Where this happens, it would not be consistent with the spirit of the Protocol to ask the court to penalise a party who changed their position, provided that there is no obvious intention to mislead.”

- 4.4 Pre-action protocol 3.6 Consideration of a form of alternative dispute resolution. *“The Protocol does not specify when or how this might be done...”*
It would be helpful at this point for the protocol to refer to the CLS information leaflet number 23 “Alternatives to court”, or, if possible, to include the text of the leaflet as an annex to the protocol when it is published. Some consideration should also be given as to how and where to provide information about ADR suppliers to parties and their advisers, other than the information about family and community mediation suppliers listed in the CLS Directory (see point 10.2 below).
- 4.5 Pre-action protocol 4.2 It would speed up the process if the normal requirement of the protocol could be that *“The recipient, his insurer or legal representative should*

reply to the enquiry letter with the information requested within 21 calendar days of its receipt.”

- 4.6 Pre-action protocol 4.4 After the first sentence, add: *“However, a letter of acknowledgement should still be sent within 21 calendar days, explaining the reason for the delay in sending a detailed response.”*
- 4.7 Pre-action protocol 5.1 This period of reflection and consideration is a good opportunity to consider whether ADR is appropriate for the case. This could therefore be amended to read... *“Where a claim has not been resolved as a result of following the protocol, the parties may wish to review the issues in dispute, **and consider whether ADR is an appropriate way to attempt to resolve the dispute. If it is not, or if ADR is attempted and is not successful, the parties may then wish to review the evidence that the court is likely to need to decide the issues, before a formal claim is issued with the court.**”*
- 4.8 Pre-action protocol 6.2 Is it necessary to state that the court will not be concerned with minor infringements? Perhaps it would be more helpful to omit the first two sentences, and replace them with a version of the final sentence as a statement of principle: *“If the court has to consider the question of compliance after proceedings have begun, it is likely to look at the effect of non-compliance on the other party when deciding whether to impose sanctions”.*

5 Do you see any difficulties with disclosure requirements set out in the protocol?

- 5.1 ASA has some concern about cases where there is a significant imbalance of power, or where a legally knowledgeable party is dealing with one who is much less aware of legal requirements, such as a Litigant in Person. It is possible in such cases that the provisions of the protocol may be used to intimidate parties into disclosing inappropriate documents. It would therefore be important to ensure that the protocol contains clear guidelines on appropriate disclosure of documents (see points 6 and 7 below), and that courts are aware of this issue in cases which proceed to litigation.
- 5.2 If the protocol is to apply to cases likely to be allocated to the small claims track, then the sections in the protocol dealing with disclosure (3.3 – 3.4) need further consideration, as part 31 CPR does not apply to cases on the small claims track (see CPR Rule 27.2(1)(b)).

6 Are there any practical difficulties which might arise from the approach set out in the protocol on expert evidence?

- 6.1 If the protocol is to apply to cases likely to be allocated to the small claims track, then the section in the protocol dealing with experts (3.5) needs further consideration, as most of part 35 CPR does not apply to cases on the small claims track (see CPR Rule 27.2(1)(e)).
- 6.2 It would be helpful to provide brief guidelines for inexperienced parties on “what is an expert”?

7 Do you consider the example enquiry letter to be suitable? Is the coverage adequate? If not, what else should be covered? Should there be scope for giving an extension of time for reply?

7.1 We have some concerns about the language in the enquiry letter. Although phrased in terms with which lawyers are not doubt familiar, repeated use of the term “dispute” in the letter may risk exacerbating the initial problems, and to balance this, it would be useful to incorporate a clear statement expressing a desire to resolve matters amicably, and to avoid the need for litigation if possible. As currently drafted, the letter focuses more on the exchange of information, which is the “fallback” aim of protocols, rather than resolution, which ought to be the first objective.

7.2 *“To date, costs of pursuing this matter have been £x. I attach a schedule of costs”.* This terminology does not seem conciliatory, and would not necessarily be clear to parties sending or receiving the letter who are not familiar with the procedures and language of litigation. ASA suggests amending it to; *“The costs I have incurred in attempting to settle this matter have been £x.”* It would also be helpful to attach brief guidelines on the kinds of costs which would be allowable. As some parties will be dealing with this stage of the procedures without legal help or advice, it is essential that the protocol should provide clear advice and guidelines on issues which may not be familiar to a person dealing with these matters for the first time.

7.3 In the penultimate sentence, the request for provision of “the relevant information and documents” should be accompanied by brief guidelines on appropriate documents for disclosure (see point 4.1 above).

7.4 In the final sentence the phrase *“I expect to receive an acknowledgement of this letter.... within 21 days”* is not compatible with the suggested provisions at 4.2 (see points 3.5 and 3.6 above). Also the phrase *“in the normal course of post”* is meaningless. ASA suggests the following wording:

“I expect to receive a reply and the information requested within 21 days of your receipt of this letter, as specified in the protocol. If this is not possible, please acknowledge receipt of my letter within 21 days, let me know the date by which you will be able to provide me with an answer and the information requested, and explain why extra time is needed.”

7.5 Timely legal advice at an early stage may help to promote an early resolution. We suggest that a standard phrase is included in both letters, such as:

“If you are unsure how to deal with this matter, you may wish to seek legal advice. Information about the legal advice providers in your area is provided in the Community Legal Service Directory, available in your local library, or from 0845 6081122 or www.justask.org.uk”

8 Do you consider the example letter of response to be suitable? Is its coverage adequate? If not, what else should be covered? Should there be scope for giving an extension of time for reply?

- 8.1 As with the sample enquiry letter, we have some concerns about the language in the response letter, specifically the repeated use of the term “dispute”, which risks exacerbating the initial problems. Use of more neutral and conciliatory language at this stage may well encourage early settlement.
- 8.2 As with the enquiry letter, it would be helpful to include brief guidelines on appropriate documents for disclosure.
- 8.3 In the final sentence “*I expect a response from you by...*” it would be helpful to include guidelines on an appropriate timescale for a response, in order to avoid increasing delay.

9 Is the period of reflection and consideration helpful? Are any difficulties expected in practice?

- 9.1 This would be an appropriate stage of the procedure, when initial documents have been exchanged, to consider whether ADR is an appropriate way to attempt to resolve the dispute. This raises issues about:
- How to decide whether ADR is appropriate
 - How to get information about ADR options
 - How to get information about local ADR suppliers

We suggest that a reference to consideration of ADR is added at this point (see comments under point 3.7 above and the section on ADR at point 10 below).

- 9.2 ASA also suggests that there should be brief guidelines on the period of reflection and consideration, including:
- who can invoke it and how
 - what would be a reasonable period of time for reflection and consideration
 - whether either party can refuse extra time if delay would be unreasonable

While a period to consider the best way forward seems appropriate in principle, there is a risk that this might be used by one party as an opportunity for delay, or to avoid settlement of the issues.

10 Are there particular classes of proceedings or types of circumstance where the protocol should not apply? If so, what are they?

- 10.1 ASA has a concern about the application of the protocol in cases where there are particularly short time limits for applying for a judicial remedy. For example, in the case of Homelessness appeals under the Housing Act 1996, the statutory time limit for appealing to a county court is 21 days. Obviously the prospective claimant could not therefore wait 21 days for a reply under the protocol in such a case.

- 10.2 The protocol should therefore contain information flagging up these types of cases, and the time limits that apply.
- 10.3 The Judicial Review Pre-action Protocol published recently and due to come into force in May 2002, contains a prominent notice box which says; “**This protocol will not be appropriate in urgent cases, for example where...**” The general protocol ought to contain a similarly prominent notice, to cater for cases for such as these.
- 10.4 Since the aim of the protocol is to prevent cases coming to court where early settlement is possible through negotiation or some other form of ADR, another option might be to have some provision for “registering an interest” with the court but not actually issuing a claim, so that the provisions of the protocol may be followed without prejudicing the time scales which might prevent a judicial remedy, and the applicant is not disqualified from making a subsequent claim if an early settlement is not possible. Such a provision would be novel, and the details would require some working out, but it is worth investigating.
- 10.5 Our previous experience suggests that responses from the credit industry will urge an exception for debt claims arising from lending regulated under the Consumer Credit Act 1974, on the basis that the CCA already provides a regime requiring notice to be supplied to debtors prior to any court action. We think it worth noting that whilst this is true, the CCA requirements do not cover the type of issues which would be the subject of the general protocol, and in some instances actually focus on the possibility of recourse to the court. The S.87 default notice, for example, includes the phrase:

“if you have difficulty in paying any sum owing under the agreement, or taking any other action required by this notice, you can apply to the court which may make an order allowing you or any surety more time.”

11 The protocol and the use of ADR

- 11.1 There is nothing in the questionnaire relating to the protocol’s encouragement of the use of ADR, but if the aim of the protocol is to encourage people to consider and use ADR where appropriate, then a number of wider issues need to be considered by the LCD, and by a range of government departments. We recognise that these issues go beyond the scope of the protocol itself, but in order to support the objectives of the protocol in practice, they need to be considered by all involved:

Appropriateness of ADR. ADR is in principle a useful option in many cases, but it is not always suitable. Mediation, for example, may not protect the individual rights of parties for whom negotiation on equal terms is not possible. Ombudsman schemes may investigate maladministration, but fail to provide an adequate and timely remedy for the individual who has suffered injustice. A checklist for identifying key factors which would suggest that ADR might be appropriate would be helpful for litigants in person, legal advisers, solicitors and also for mediators and arbitrators. There is a helpful starting-point in the ASA book “Advising on ADR” by Margaret Doyle (published June 2000).

Information about ADR availability. ADR is not very visible in the Community Legal Service, and has often not been included in the mapping exercises by local CLS Partnerships. For the government’s pro-ADR policy to work, ADR needs to have a higher profile in the national provision of legal services, in particular in fields other than family and community mediation. There also needs to be far more information

about ADR available to the general public and to the advice sector, in a user-friendly format. If prospective litigants are to be encouraged to use ADR where it is available, but not penalised where it is not, there needs to be good, up-to-date information about ADR schemes available locally. The LCD and Court Service could encourage courts to liaise with local CLSPs in order to map local ADR provision, and make the information available to the public and to legal advice agencies and solicitors in the local area.

- 11.2 **Funding and provision of ADR Services.** Provision of ADR is very patchy, both in terms of the types of schemes on offer, and the geographical location of existing ADR services. The local mapping exercises suggested above should provide the starting point for identifying gaps in provision of ADR services. However, new suppliers, where needed, must be adequately resourced. Although family mediation services are eligible for legal aid contracts, other mediation services can only be funded by disbursements from legal aid, and therefore have no secure source of core income. Until there is better provision of services across the country the protocol's promotion of ADR as an alternative to court action will be at best partially effective.
- 11.3 **ADR Quality Assurance.** It is important that ADR services should meet appropriate quality standards. The Mediation Quality Mark currently applies to family and community mediation services, and the British and Irish Ombudsman Association (BIOA) has membership criteria that serve as useful basic quality standards for ombudsmen schemes, but there is no single nationally recognised scheme for quality assurance for other providers of mediation. If prospective litigants are to have confidence in the processes they are being asked to attempt, it would be helpful to have some indication of what to look for in a provider, and/or to have a nationally recognised list of approved quality standards.