Scottish Civil Justice Council

Information Gathering Exercise on Pre-Action Protocols:

Report on Responses

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CONTENTS

INTRODUCTION

Background to Information Gathering Exercise

1. The Courts Reform (Scotland) Bill proposes, at sections 96 and 97(2)(b)(ii), to give the Court of Session the power to introduce, by means of rules, compulsory pre-action protocols. In order to assist its consideration of the relevant rules, should the proposed powers become law[1], the Personal Injury Committee of the Scottish Civil Justice Council undertook an information gathering exercise around the current use of voluntary pre-action protocols and the possible introduction of compulsory pre-action protocols.

2. The information gathering exercise was initially targeted at an audience of relevant overarching bodies and was due to run between April and May 2014. However, following a meeting of the Personal Injuries User Group on 6 May, to allow other interested parties the opportunity to respond, the information gathering exercise was published on the Scottish Civil Justice Council website and the closing date extended until 30 June 2014.

Responses

3. In total 24 responses were received to the information gathering exercise and 22 of the respondents agreed to their response being published. The majority of the responses received were from organisations (22), with 12 of those reflecting a range of the views of the legal profession (e.g. legal profession representative organisations, firms who act for pursuers and firms who act for defenders) and 10 reflecting the views of insurers and their representative organisation. Responses were also received from 1 local authority and 1

[1] The Courts Reform (Scotland) Act received Royal Assent on 11 November 2014. The provisions which give the Court of Session powers to introduce pre-action protocols are now at section 103(2)(b)(ii) and section 104 (2)(b)(ii)

individual. One of the responses received only offered comments in relation to question 5. A list of those who responded is at Annex A and the responses have been grouped into the following categories:

Category	**No. of Responses**		
	Organisation	**Individual**	**Total**
Legal Professional Representative Organisations	5	0	5
Insurers' Representative Organisations	1	0	1
Legal Profession	7	1	8
Insurance Firms	9	0	9
Local Authority	1	0	1
Total	23	1	24

Brief Overview of Responses

4. The majority of the questions asked respondents to indicate their view in either a positive or negative manner with a third option of 'no preference' also being available. Care has been taken in the report to look both at the comments offered and the tick box selected in order to accurately represent the views of the respondents on the issues consulted upon.

5. The main findings from the information gathering exercise can be summarised as below.

6. The majority view (held mainly by insurance firms) is that changes are required to the current voluntary pre-action protocols in order to implement the recommendations of the Scottish Civil Courts Review and some detailed models for a compulsory pre-action protocol were provided. Changes suggested by these respondents were as follows :

    - two thirds (including some legal professionals and legal profession representative bodies) believe that there should be sanctions on any party which fails to comply with protocol;

    - ten insurance firms, and their representative organisation, along with two legal practitioners think that an electronic based portal similar to the Ministry of Justice Low Value PI should be introduced as this would bring savings and efficiencies and result in faster settlement ;

    - three insurance firms and one legal professional indicated that pre-litigation offers should be treated as pre-litigation tenders;

    - two respondents suggest that there should be a "fixed fees regime", two that "expenses should be proportionate to case in hand", and two suggest a fee structure similar to that in England and Wales should be created as this can be 40% of current Scottish costs;

    - three respondents suggest that there should be fixed timescales; and

    - six respondents believe that a mandatory protocol should place greater emphasis on pre-action conduct between parties:

        - increased contact, better and earlier exchange of information and better investigation;

        - a compulsory period for negotiation;

- an option for parties to agree extension of timescales; and

- two respondents (a legal professional and a local authority) believe that it should be compulsory for the claimant or pursuer to provide at the earliest opportunity a full name, date of birth, national insurance number, address, details of injuries, employers name and address, hospital attended, treatment received, material witnesses and copies of their evidence along with clear summary of facts including allegations of negligence.

7. A majority of respondents were of the view that changes are required to ensure that pre-action protocols better reflect the needs of party litigants and that insurers should highlight the right to independent legal advice to party litigants. Some also felt that insurers should explain the pre-action protocol:

    - the majority of respondents, whether answering "Yes" or "No" to this question were insurance firms;

    - the majority of respondents mention that the Association of British Insurers (ABI) code of conduct for dealing with unrepresented claimants allows them to obtain independent legal advice at any time;

    - eight respondents (the majority of whom were insurance firms) suggest that the ABI code of conduct should be incorporated into a Scottish protocol for party litigants; however

    - two insurance firms consider that no protocol is necessary because of the existence of the ABI code of conduct.

8. Opinion is fairly evenly divided on whether a compulsory pre-action protocol should apply to higher value cases involving fatal or catastrophic injury. The majority of those responding "Yes" to this question were legal practitioners

and legal profession representative organisations and some of the comments were:

- mesothelioma should be excluded;
- yes - for fatal claims; and
- time limits may need to be varied to reflect complexity of these cases.

9. The majority who answered "No" were insurance firms and some of the comments were:

    - it may be difficult to meet protocol timeframe as cases can be complex and require extensive investigation or the intervention of the courts; and
    - pre-litigation offers should be treated as pre-litigated tenders.

10. Four of those answering "Yes" and four of those answering "No" suggest that a protocol for high value cases should be similar to the "multi- track code" in England and Wales (mainly suggested by insurance firms). Seven respondents also suggest a threshold of £25,000 (with one suggesting £30,000 and one separate expense rates for cases between £1,000 and £10,000 and those between £10,000 and £25,000). Proposals for a voluntary protocol for cases over £25,000 were also put forward.

11. Differing opinions were offered on whether it is necessary to consider an additional protocol for mesothelioma or maintain the current informal arrangements which fast track such claims. The majority of those responding "Yes" were from legal professionals and legal profession representatives. Comments received were:

- pre-action protocols could be extended but not to mesothelioma claims as these are highly complex and require to be settled in short timeframe;

- mesothelioma claims could be included if protocol was sufficiently flexible around time limits;

- mesothelioma should have its own protocol which should include: shorter timetable, encouraging early payment of damages and exchange of key information;

- the current informal arrangements which deal with the majority of mesothelioma claims has brought about a "significant reduction in settlement times (average of five months compared with twenty two months)"; and

- the pre-action disease protocol in England and Wales should be mirrored.

12. The majority of those offering comments on the success of the pre-action protocols for professional negligence and industrial disease claim were legal professionals and legal profession representative organisations. While one legal profession representative organisation is of the view that both have been very successful, the majority consider that both are underused (although only a few commented on the professional negligence pre-action protocol. Reasons cited for underuse were that:

    - in professional negligence claims it is mainly due to the complexity of these cases and the low threshold in place; and

    - in industrial disease claims it is due to the informal arrangements in place for pleural plaques and mesothelioma cases.

13. While a small majority of respondents offered no views on the introduction of a separate compulsory pre-action protocol for medical negligence claims a significant minority (10) of respondents offered support for this and none of the respondents ticked "No". Those who support the introduction of a medical negligence pre-action protocol indicated:

    - it would help standardise these cases;
    - it should be flexible and parties should have clearly agreed timescales with the option to extend them if necessary; and
    - there should be early decision on liability and early disclosure of evidence.

14. The majority of respondents expressed no views on whether there are any issues relating to the operation of the pre-action protocol for the Resolution of Clinical Disputes in England and Wales that should be taken into account. Those who did offer comments (8) were legal professionals or legal profession representative organisations.

    - Negative issues highlighted included:
        - letter of response not provided in prescribed timeframe;
        - untimely disclosure of medical records; and
        - extensive costs being built up by claimant's solicitor at protocol stage.
    - Positive comments made included:
        - good template on which to build pre-action protocol for medical negligence claims;

- parties encouraged to explore ADR and, where not considered, court can take into account in determining subsequent litigation costs; and

- claimant can make offer to settle at early stage by putting forward amount of compensation acceptable.

15. There was overwhelming support for a new pre-action protocol regime to be introduced in advance of the creation of the specialist Personal Injury court (with around one third of these also indicating support for both being introduced at the same time as long as this did not delay the introduction of the protocol regime). Of the two respondents who answered in the negative, one suggested the specialist Personal Injury court should be in place first to ensure the development of a consistent body of jurisprudence while the other thought that both the specialist Personal Injury court and the pre-action protocol regime should be introduced at the same time.

16. The majority of respondents were aware of variations in awards of expenses where the pre-action protocol had not been adhered to and consider that compulsory pre-action protocols with clear sanctions for non-compliance would ensure greater certainty.

Report on responses to specific questions

17. The following table provides a more in depth report on the responses received to each question.

INFORMATION GATHERING EXERCISE ON PRE-ACTION PROTOCOLS

TABLE OF RESPONSES

QUESTION	RESPONSES
Q1. Are the stated aims and purposes of the current voluntary pre-action protocols adequate to comply with the recommendations of the Scottish Civil Courts Review if made compulsory?	**8 Yes 15 No 1 No comment** The majority of those responding "Yes" were legal practitioners and legal profession representative organisations while the majority of those responding "No" were insurance firms**.** **Comments**: Those who answered "No" were generally of the opinion that the current protocols are not sufficiently robust and that greater sanctions are required to ensure compliance. Several respondents suggest that the key outcome for a compulsory protocol should be a transparent process which encourages early exchange of information and evidence to facilitate dialogue and agreement and creates legacy of evidence that can be used if the case litigates. Some also commented that the fees allowed under the protocols are "excessive". Others consider that there is a "gulf between pre-litigation behaviours and what occurs when case litigates" Of those who answered "Yes", two consider it important to recognise that the protocol is intended to facilitate settlement and should not to be interpreted to mean avoiding litigation "at all costs".

Q2. If not, what changes, if any, should be made to the voluntary pre-action protocols to make them more effective in achieving their stated aims and purposes?	**Comments**: A number of different detailed frameworks /models for a compulsory pre-action protocol were provided. Key suggestions for change were: • there should be sanctions on any party which fails to comply with protocol; • an electronic based portal similar to the Ministry of Justice Low Value PI should be introduced as this would bring savings and efficiencies; • pre-litigation offers should be treated as pre-litigation tenders; • there should be a "fixed fees regime" • a fee structure similar to that in England and Wales should be created as this can be 40% of current Scottish costs; • there should be fixed timescales; • expenses should be proportionate to case in hand; and • a mandatory protocol should place greater emphasis on pre-action conduct between parties: ➢ increased contact, better and earlier exchange of information and better investigation; ➢ a compulsory period for negotiation; ➢ an option for parties to agree extension of timescales; ➢ compulsory for claimants or pursuers to provide at the earliest opportunity a full name, date of birth, national insurance number, address, details of injuries, employers name and address, hospital attended, treatment received, material witnesses and copies of their evidence along with clear summary of facts including allegations of negligence. One professional organisation stated "Decisions *on premature issuing of proceedings* should continue to rest with court" and "Ban *pre-medical offers* as this is a huge problem at present."

Q3. Are changes required to ensure that pre-action protocols better reflect the needs of party litigants?	**13 Yes 7 No 4 No Preference** **Comments**: Of those answering in the positive, several considered that insurer should highlight the right to independent legal advice to party litigants and some also felt that they should explain the pre-action protocol. One insurance firm and one firm of solicitors were of the view that party litigants should be provided with guidance as to the requirements of the pre-action protocol. The majority of the respondents answering "Yes" and the majority of those answering "No" were insurers. Whether they answered "Yes" or "No" the majority of respondents mentioned that the Association of British Insurers code of conduct for dealing with unrepresented claimants allows them to obtain independent legal advice at any time. Several respondents (the majority of whom were insurers or insurers' representative organisation) suggested it could be incorporated into a Scottish protocol for party litigants however; conversely, two insurance representative organisations felt that no protocol was necessary because of the existence of the code. Two legal professional representative organisations stated that the practice of pre-medical offers should be ended. A few respondents stated their view that no changes to the voluntary pre-action protocols were required to better reflect the needs of party litigants but that changes would be required in respect of any compulsory protocols so as to ensure better protection for them, such as that offered through the ABI code of conduct. One respondent thought that: a protocol should not apply to self-insured Public Sector organisations in personal injury claims, expenses should be limited to protocol costs where there is a breach; defenders' expenses should be recoverable in cases of unreasonable behaviour and additional headings of claim added following litigation should be at the court's discretion. Another considered that fees payable under a compulsory pre-action protocol should only be made to law firms and individuals should not be able to recover expenses.

Q4. Should a compulsory pre-action protocol apply to higher value cases involving fatal or catastrophic injury?	**11 Yes 12 No 1 No Preference** The majority of those responding "Yes" were legal practitioners and legal profession representative organisations while a small majority of those responding "No" were insurance firms or insurance representative organisations. **"Yes"**Comments: • one suggests for fatal claims but excluding mesothelioma claims; • one agrees in principle but expresses concern that compliance could front load costs and considers that regard would have to be given to this in relation to a legal aid claim; • several recognise that times limits may need to be varied to reflect the complexity of these cases; • several suggest that the protocol for high value cases it should be similar to the "multi-track code" in England and Wales; • one notes that the SCCR specifically recommended that all PI cases should go through a pre-action protocol "in principle" • one suggests separate fixed expenses rates apply to claims between £1,000 and £10,000 and those between £10,000 and £25,000 "**No" Comments:** • majority suggest that it may be difficult for parties to meet protocol timeframes as these cases are often complex and require considerable investigation or the intervention of the courts; • majority recommend that pre-litigation offers should be treated as pre-litigated tenders and be applied to claims which exceed pre-action protocol limits; • several suggest that if a protocol is considered necessary for high value cases it should be similar to the "multi-track code" in England and Wales ; and • some propose a threshold of £25,000(with one suggesting £30,000) and that cases over that amount could be subject to a voluntary pre-action protocol. One respondent offered proposals for a voluntary protocol for cases over £25,000 which was endorsed by two others

Q5. Is it necessary to consider any additional protocols, or maintain exceptions, for specific types of injury or disease claim, for example, mesothelioma?	**19 Yes 2 No 3 No Preference** The majority of those responding "Yes" did so as they consider mesothelioma to be an exception and the majority of these responses (by one) were from the legal profession and their representative organisations. Views were divided between the need to develop a separate protocol for mesothelioma and keeping the current voluntary informal arrangements (which deal with the majority of these cases) and provide for a shorter timetable and early disclosure of evidence. **Comments:** • some thought the pre-action protocol could be extended but not to mesothelioma claims as these are highly complex and require to be settled in short timeframe; • one suggested mesothelioma claims could be included if the protocol was sufficiently flexible around time limits; • some thought mesothelioma should have its own pre-action protocol and suggested that it should include: a shorter timetable, encouragement of early payment of damages and exchange of key information; • several noted that the informal arrangements which deal with the majority of mesothelioma claims has brought about a "significant reduction in settlement times (average of five months compared with twenty two months)" • one felt that a disease protocol should reflect the involvement of multiple parties; and • several respondents suggest developing a pre-action disease protocol along the lines of that in England and Wales (although two respondents noted that the "absence of fixed-fee provision along the lines of personal injury protocol has led to an increase in number of Noise Induced Hearing Loss claims". Of the 2 respondents who answered "No", one stated "asbestos claims should be excluded from a compulsory pre-action protocol" and the other indicated that they had no experience of the voluntary protocol being applied to any asbestos claims. One respondent provided a paper outlining specific problems with asbestos related claims.

Q6. How successful has the use of separate pre-action protocols for professional negligence and industrial disease claims been?	Several respondents either offered no comment or indicated that they had not sufficient experience to comment. The majority of those who did offer comments were legal professionals or their representative organisations. **Comments:** The majority of those offering comments were of the view that the voluntary pre-action protocol for industrial disease claims is underused due to the informal arrangements in place for pleural plaques and mesothelioma cases. While few respondents commented on the pre-action protocol for professional negligence, the majority who did view it as being underused mainly due to the complexity of these cases and the low threshold in place. One respondent considers that both of these pre-action protocols have been very successful.
Q7. Should a pre-action protocol for medical negligence claims be developed?	**10 Yes 0 No 14 No Preference** No one responded "No" to this question and those listed under "no preference" either indicated they had no preference; offered no comment; indicated they had no view; or said it was out with their area of expertise. A significant minority of respondents therefore support the introduction of a separate compulsory pre-action protocol specifically designed to cater for the complexities of medical negligence claims. **Comments**: • would help standardise these unique and complex cases; • any protocol must be flexible; • timescales should reflect that investigation and gathering reports can take longer and parties should have option to extend timescales; and • earlier disclosure of evidence of liability, causation and quantum would bring it into line with Chapter 42A requirements.

	Two respondents point out that the need for a proper protocol has become increasingly widely recognised by various groups including Professor Sheila MacLean's Working Party on No Fault Compensation and the subsequent Scottish Government Recommendations for No-Fault Compensation in Scotland for injuries resulting from clinical treatment April 2014 (Para 5.17.4, page 28). One respondent is of the view that a protocol should be developed based on the pre-action protocol for the Resolution of Clinical Disputes used in England and Wales.
Q8. If you answered yes to Question 7, what should the key features be?	**Comments**: Key features identified by those who offered comments are: • protocol must be flexible and appreciate the complexities which can arise in these types of cases; • similar protocol to that in professional negligence cases; • early decision on liability and causation; • early disclosure of medical and clinical records; • ensuring independence of medical expert and allowing joint instruction where possible; • detailed allegations in letter of claim and list of relevant docs sought included with intimation; • detailed schedule of loss with supporting material and claims only to be intimated if there is supportive evidence; • clearly agreed timescales for investigation and responses with option to agree extension to timescales; • agreed scale of costs/expenses; • relief from sanctions for non-compliance where there is reasonable justification; and • early identification of any rehabilitation or treatment needs of injured party
Q9. Are there are any issues relating to the operation of the Pre-action Protocol for the Resolution of Clinical Disputes in England and Wales that should be taken into account?	**7 Yes 0 No 17 No Preference** No one responded "No" to this question and those listed under "no preference" either indicated they had no preference; offered no comment; indicated they had no view; or said it was out with their area of expertise. Those who did offer comments were legal professionals or their representative organisations

	Comments: **Negative** comments from those who did offer a view include: • letter of response not provided within prescribed time frame; • timely disclosure of medical records is an issue; • exchange of information could be less adversarial; • causes need for extensive investigation in short timeframe; and • can result in extensive costs being built up by claimant's solicitor at protocol stage. **Positive** comments from those who did offer a view include: • claimant can make offer to settle at early stage by putting forward amount of compensation acceptable; • parties decide where it is appropriate to use joint experts; • parties are encouraged to explore ADR and if not considered court must have regard to that when determining costs in any subsequent litigation; and • good template on which to build pre-action protocol for medical negligence claims.
Q10. Should a new pre-action protocol regime be introduced in advance of the creation of the specialist Personal Injury Court? Please give reasons for your answer.	**21 Yes 2 No 1 No Comment** The vast majority of respondents consider that the new regime should be introduced prior to the creation of the specialist Personal Injury court. **Comments**: Around a third of respondents answering "Yes" qualified their response by indicating that it would be beneficial to introduce both at the same time but that the protocol should be introduced in advance of the creation of the specialist Personal Injury court, if there is any delay in this. One respondent considered that it must be put in place prior to the specialist Personal Injury court to allow the court to build on this foundation in resolving disputes quickly and efficiently.

	One respondent indicated that it should be brought in at the same time but should be staged to allow claims to flow through the system efficiently and at minimum cost. Another respondent indicated that it should be brought in at the same time and that "a correctly presented mandatory pre-action protocol will ensure that the Personal Injury court will only be exposed to cases where a satisfactory pre-action conclusion is genuinely impossible to achieve." Of the two respondents who answered "No", one suggested that the specialist Personal Injury court should be in place prior to the introduction of the new pre-action protocol to ensure the development of a consistent body of jurisprudence while the other considers that both should be introduced at the same time. Seven respondents (6 "Yes" and 1 "No") indicated that compulsory pre-action protocols should dovetail with the Courts Reform (Sc) Bill proposals and are also important to the successful implementation of Sheriff Principal Taylor's recommendations.
Q11. Are you or your organisation aware of variations in awards of expenses where the pre-action protocol has not been adhered to?	**21 Yes 2 No 1 No Comment** The vast majority of respondents indicated that they were aware of variations in awards and expenses where the pre-action protocol had not been adhered to. **Comments:** The view of the vast majority of respondents is that different courts and Sheriffdoms take different approaches and that compulsory pre-action protocols with clear sanctions for non-compliance would ensure greater certainty. Of the two respondents who said "No" one considers that a fixed expenses scheme would provide certainty and the other advises that they have not been exposed to financial sanctions being applied by the courts.

	Reference was made to: *McIlvaney v A Gordon*, 2010 CSOH118; *Thomson v Aviva*, unreported, Livingston Sh Ct, 10 June 2010; *Durie v Sabre Insurance*, Perth Sh Ct, 27 June 2011; *Ewan Graham v Douglas Bain*, unreported, Cupar Sh Ct, 17 Sept 2012; *McDade v Skyfire*, unreported, Glasgow Sh Ct, 21 Aug 2013; *Ross Brown v Sabre Insurance*, 2013 CSOH51; and *Emma Lawson v. Sabre Insurance*, 2013 PD4/13.

Next Steps

18. The Personal Injury Committee (PIC) will look at the responses in depth and make recommendations to the Scottish Civil Justice Council (SCJC) as to the policy which should be adopted. The SCJC has agreed to consider this issue further following the passage of the Courts Reform (Sc) Bill.

19. Both the PIC and the SCJC are grateful to everyone who responded to the information gathering exercise. These responses will be of great assistance to them in their further consideration of the matter.

ANNEX A

INFORMATION GATHERING EXERCISE ON PRE-ACTION PROTOCOLS – LIST OF THOSE WHO RESPONDED

- Allianz Insurance
- Association of British Insurers
- Association of Personal Injury Lawyers in Scotland
- Aviva Insurance Ltd
- BLM Law
- CMS Cameron McKenna LLP
- Direct Line Group
- Esure Group Plc
- Faculty of Advocates
- Fraser Simpson, Partner, Digby Brown LLP (responding as an individual member of the legal profession)
- Law Society of Scotland (prepared by a working party under the auspices of the Civil Justice Committee
- Forum of Insurance Lawyers
- Forum of Scottish Claims Managers
- Motor Accident Solicitors Society
- Motor Insurers' Bureau
- NFU Mutual Insurance Society Ltd
- North Lanarkshire Council
- PSV Claims Bureau Ltd
- Simpson and Marwick Solicitors
- Thompsons Solicitors
- Thorntons Law LLP
- Watermans Solicitors Ltd
- Weightmans LLP
- Zurich Insurance Plc