



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

The Institute of Legal Executives (ILEX) is the professional and regulatory body for Legal Executives and currently has a membership of 24,000 students and practitioners.

Legal Executive practitioners are employed within solicitors' firms to conduct specialist legal work. Amongst other things, legal executives undertake the following work:

- Advice and representation to clients accused of serious or petty crime;
- Advice and representation to families with matrimonial problems;
- Handling various legal aspects of a property transfer;
- Assist in the formation of a company;
- Be involved in actions in the High Court and county courts;
- Draft wills;
- Undertake the administration of oaths.

Terms of Reference of Consultation Paper

This consultation paper proposes a General Pre-Action Protocol to those cases where the Specific Pre Actions Protocols do not apply. The response is submitted following consultation from ILEX members.

1 Question: 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.

1.2 In principle, ILEX agrees with the implementation of a General Pre-Action Protocol to mop up those types of cases not included in the Specific Pre-Action Protocols.

1.3. However, ILEX also sees the advantages of a General Pre-Action Protocol that is proportionate to the value of claims. This has not been considered in the consultation paper.

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

2.1 Subject to the circumstances below, ILEX is of the view that there should be no reason for exceptions from the General Pre-Action Protocol.

2.2 Limited extended periods of compliance, however, may add flexibility to those cases where one or more parties reside or carry on business outside the jurisdiction.

2.3 Arguably, if a claimant's in-house procedures provide for exchange of information, together with other pre-action compliance procedures, the cost/benefit of the General Pre-Action Protocol is not so great. It follows, therefore, whether the Protocol should still apply in these situations.

3 Question: 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.

3.1 ILEX is in favour of avoiding legalese, unnecessary verbiage and antiquated sentence structures from the protocols. As such, we accept that where appropriate, plain English should be encouraged. Our only comment is as follows:

3.2 Litigants in person may get confused by the protocol's active promotion of Alternative Dispute Resolution (ADR), but then reading the extract that ADR cannot be enforced. As the paper right points out, this is contradictory.

4 Question: Do you agree with the approach taken to ADR in the General Pre-Action Protocol?

4.1 ILEX is in favour of encouraging ADR, where it is appropriate (bearing in mind that the reason parties resort to litigation is invariably because of negotiations breaking down). However, it must be recognised that ADR may be disproportionately expensive in simple cases and those that are small claims.

5 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.

5.1 Yes – However, ILEX is of the view that some guidance on what is reasonable as regards time limits might assist litigants in person.

6 Question: Would it be helpful to include a ‘model’ letter (nonmandatory) before claim (for a standard consumer claim) as an annex to the General Pre-Action Protocol?

6.1 Although ILEX can see the advantages of a model letter, ILEX is mindful that the Pre-Action Protocol will cover a myriad of circumstances and situations even in a standard consumer dispute. A model letter purporting to cover all possible situations would be unhelpful for claimants and may encourage litigants in person to rely too heavily on a model letter. This may have cost implications.

7 Question: Do you agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?

7.1 ILEX supports the objectives and purposes of a General Pre-Action Protocol. In simple debt cases, however, caution is required. Further compliance conditions may be unfair for a creditor who has already supplied sufficient information to a debtor.

7.2 The debtor who is stalling and using delaying tactics will be in a position to exploit the situation further to the detriment of the creditor. It is essential to strike the right balance between the right of the creditor to pursue a legitimate debt quickly and the right of the debtor to know the circumstances arising from the alleged debt.

7.3 In many situations, standard letters are issued to defaulters advising of the need to seek assistance from CABx, law centres and other consumer groups. These letters also explain the next steps that the creditor will take in the event of failure to respond. In any event, ILEX is of the view that it is important to keep it simple in straightforward debt cases.

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

8.1 ILEX has no objections to a general rule that encourages parties to keep the use and costs of experts to a minimum. If the use of experts is unavoidable, a jointly agreed expert ought to be used.

8.2 Notwithstanding the above, there are situations in some relatively low value cases e.g. certain property work such as claims arising from fires or escape of water and product liability cases the issues can be complex so that expert evidence is necessary either whilst the Claimant's insurers are dealing with the claim or immediately upon referral to solicitors for an advice on liability/causation. In any event, practitioner feedback indicates that the decision to seek potentially expensive expert evidence is not taken lightly.

8.3 Moreover, if a court subsequently objects to an expert being used, cost implications will arise and the issue of proportionality becomes relevant.

9 Question: Do you agree that, where limitation is an issue, parties should be encouraged to agree not to take the 'time bar' defence?

9.1 In general, ILEX is of the view that the provisions in the Limitation Act are there to be complied with other than in exceptional circumstances. That said, ILEX does not object in principle to the protocol encouraging parties to agree not to take the 'time bar' defence, but a prescribed form should be used. Otherwise, there is a very real danger that litigation will ensue to determine whether the parties agreed not to take the 'time bar defence'.

9.2 ILEX is also not convinced that judges will necessarily have regard to a vague agreement purporting not to take the 'time bar defence' when a defendant legitimately raises the issue of 'time bar'. This begs the question, should the protocols have a greater standing than the provisions of the Limitation Act 1980?

10 General Comments

10.1 At paragraph 4.3 of the proposed practice direction, after 'proposed practice direction' omit extra full stop.

10.2 Paragraph 4.6 talks about 'minor infringements'. Perhaps consider using examples of what amounts to minor infringements.

