Carl Poole

Secretary to the Civil Procedure Rule Committee

c/o Access to Justice Policy Division

Ministry of Justice

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By email: CPRCRollingConsultations@justice.gov.uk

Dear Mr Poole,

**Consultation on proposed amendments to CPR Part 21 and proposed revocation of Practice Direction 21**

APIL is grateful for the opportunity to respond to the CPRC’s consultation on Part 21 of the Civil Procedure Rules and the supplementing Practice Direction (PD). While revoking PD 21 and incorporating some of the provisions into the rule may lead to simplicity of use, we are concerned about the practical effect of importing parts of a PD into a rule. Transferring provisions from the PD that were simply advisory into the rule and, subsequently, making them compulsory can cause problems in practice and create satellite litigation. We welcome the proposed amendments overall, but we have highlighted some areas of concern below.

Furthermore, our members have provided us with general comments about CPR Part 21. APIL is aware that this consultation has a limited focus specifically on the draft changes, but we have included some broader comments for consideration. A wider review of CPR Part 21 is needed.

**General comments**

We suggest that the Civil Procedure Rules Committee considers adopting the family law approach to settlements under Part 21. In family proceedings, settlements which are subject to court approval are binding unless ordered otherwise. Given the intention to review the discount rate every three years and the prospect of a differing rate for certain heads of loss, it is highly likely that there will be resiles from defendants in the future. The family law approach would hold defendants to deals they have entered into, regardless of whether the discount rate has changed in the period between settlement and approval, unless the court does not approve such a deal. This would also protect claimants as the court would not approve an inadequate settlement.

We also recommend codifying within Part 21 the *Coles v Perfect[[1]](#footnote-1)* approval mechanism. We believe that the current rules are “all or nothing” and fail to factor in claimants whose capacity to litigate is borderline. In *Coles v Perfect*, the High Court considered whether it needed to determine that a party lacked capacity before it could validly approve a settlement agreement under CPR 21.10 in a claim for damages for personal injury. It was decided that court approval of settlement remains valid even if a party is subsequently found to lack capacity. This case modelled the approach of applying protectively for court approval when capacity might potentially be an issue.

**Comments on proposed changes to CPR Part 21**

Requirement for a litigation friend in proceedings by or against children and protected parties

21.2

**21.2 (1) –** We propose that the CPRC defines “proceedings”, particularly in light of the decision in *Belsner[[2]](#footnote-2)*. In *Belsner* it was held that pre-proceedings are not contentious. Unless “proceedings” is defined within CPR 21 to clearly include pre-issue steps, the rules and *Belsner* could be read as meaning pre-issue cases which settle do not need to be approved which is clearly wrong.

How a person becomes a litigation friend without a court order

21.5

**21.5 (3) (a)** **–** We believe that “when the claim is made” is ambiguous and could be better defined. At present, this is treated as when the claim form is issued, but it can be considered that the claim is made when a party sends a letter before action. The word “file” in the section indicates that it is when the claim form is issued. This could, however, cause confusion on pre-action disclosure applications, for example, although in practice claimants file Certificates of Suitability at that stage.

**21.5 (6) –** We are concerned with the practical effect of importing this part of the PD into the rule. In *KU v LCC[[3]](#footnote-3)*, the Court of Appeal summarised the status of a PD. The provisions in a PD have no legislative force – they are only meant to provide guidance to matters of practice in the civil courts. Transferring s2.2 c) of the PD into the rule makes the requirement to serve medical records (which was previously advisory) compulsory. This will have impacts in practice and we believe that this could create satellite litigation in relation to litigation capacity (linked with capacity in relation to property and affairs) which can be a significant area of dispute.

The rule in relation to lack of capacity should mirror *Folks v Faizey[[4]](#footnote-4).* In this case, the Court of Appeal followed the approach in *Masterman-Lister[[5]](#footnote-5)* and decided that the rules as to capacity are not designed to provide a vehicle for reopening litigation which, having been properly conducted, had for long been settled. The application to appoint a litigation friend is a matter for the party himself to determine, often with the advice of a solicitor but without the need for enquiry by the court.

Further, the need to serve evidence to establish capacity will cause the claimant undue delay and expense, as it can be hard to obtain an expert’s report. It can take up to 12 months or more to obtain a report. We suggest that establishing capacity should be based on the common sense of the party, its family and solicitors and, as such, it should be enough to serve a declaration supported by a statement of truth, where the claimant consents.

We believe that this requirement is quite onerous for the claimant and gives defendants the possibility to challenge and create difficulties in relation to litigation and financial capacity.

Appointment of a litigation friend by court order – supplementary

**21.8 –** We believe that the Deputy and Power of Attorney, if applicable, should be served too.

Compromise etc. by or on behalf of a child or protected party

**21.10**

There is an inconsistent approach to court approval where there are interim payments. Some take the view that any sum needs approval, whereas others take the approach that if the interim payment is over £100,000 or £250,000 the case should be issued, which means that in a child’s case, the case is issued extremely early in order to obtain approval. This increases the pressure on the court’s time. There should be an amendment to 21.10 that any interim payment requires court approval.

**21.10 (2) (f) –** This should be wider than “accident” to cover illness and intentional act (abuse) cases.

Control of money recovered by or on behalf of a child or protected party

**21.11 (9) (a)** – £100,000 is a very significant sum. If the threshold is increased to £100,000, fewer claimants will be entitled to apply to the Court of Protection for the appointment of a deputy. Consequently, more claimants will need to apply to the Court Funds Office (either by themselves with the help of a litigation friend or solicitor). We believe that an impact assessment should be carried out given that the court would struggle to cope with a significant increase in claimants seeking damages from the Court Funds Office on an ongoing basis.

**21.11 (1) –** We believe that the disabled claimant should not be required to pay these costs. It is discriminatory, particularly in a fixed recoverable costs regime.

We hope that our comments prove useful. If you have any queries about our response, please contact Ana Ramos, Legal Affairs Assistant, on the contact information below, in the first instance.

Yours faithfully,



Ana Ramos

Legal Affairs Assistant

Association of Personal Injury Lawyers

1. [2013] EWHC 1955 (QB) [↑](#footnote-ref-1)
2. *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387 [↑](#footnote-ref-2)
3. [2005] 1 WLR 2657 [↑](#footnote-ref-3)
4. [2006] EWCA Civ 381 [↑](#footnote-ref-4)
5. [2002] EWHC 417 (QB) [↑](#footnote-ref-5)