# Table of Contents

Table of Figures .......................................................................................................................... v  
Table of Tables ........................................................................................................................... vi  
Abbreviations ............................................................................................................................ vii  

**Executive Summary** .............................................................................................................. ix  
Background ................................................................................................................................ ix  
The Project ................................................................................................................................. x  
Findings ...................................................................................................................................... x  
Future Options ......................................................................................................................... xiii  
  
  **Option One:** Retain the Pre-Action Protocols and Strengthen the Supporting Infrastructure .......................................................................................................................... xiii  
  
  **Option Two:** Amend the Pre-Action Protocols to Incorporate a Mandatory Pre-Action Requirement to Mediate ............................................................................................... xiv  
  
  **Option Three:** Abandon the Pre-Action Protocols ........................................................................ xiv  

1. **Chapter One – Background and Methodology** ................................................................. 1  
   **Introduction** ........................................................................................................................ 1  
   **Project Aims** ...................................................................................................................... 2  
   **The Research Team** ......................................................................................................... 3  
   **Focus of this Report** .......................................................................................................... 4  
   **Methodology** .................................................................................................................... 4  
   **Stage One** .......................................................................................................................... 5  
   **Literature Review** .............................................................................................................. 5  
   **Design of Project Methodology and Initial Scoping Work** .................................................. 5  
   **Stage Two** .......................................................................................................................... 10  
   **Court File Review** ............................................................................................................ 10  
   **Ongoing Consultation with Key Stakeholders** ................................................................. 12  
   **Barrister Interview and Survey** ...................................................................................... 14  
   **Samples and Data Analysis** ............................................................................................. 15  
   **Difficulties in Evaluating the Pre-Action Protocols** ......................................................... 16  

2. **Chapter Two – Introduction to Pre-Action Requirements** ............................................. 17  
   **What are Pre-Action Requirements?** ............................................................................... 17  
   **Pre-Action Approaches** ..................................................................................................... 18  
   **Pre-Action Requirements in Australia and the United Kingdom** .................................... 20  
   **Recent History of Pre-Action Requirements in Australia** ............................................... 20
Pre-Action requirements for Personal Injury and Construction Disputes ..... 23
The United Kingdom .................................................................................. 24
Issues Relating to Pre-Action Requirements .............................................. 26
Pre-Action Requirements, Access to Justice and the Role of the Courts ..... 26
Civil Procedure Reform or Stand-Alone Legislation? ............................. 27
Are Pre-Action Requirements Effective? ................................................... 28
2014 Pre-Action Requirements in South Australia ................................. 29
Context of Reform .................................................................................... 29
The Reforms ............................................................................................... 30
Application to Construction and Medical Negligence Disputes .......... 32
Concerns ..................................................................................................... 33

3. Chapter Three – Timeliness .................................................................. 35
Introduction ............................................................................................... 35
Past Research on Timeliness .................................................................... 37
Findings in Relation to Timeliness ............................................................. 39
  Do the SA Pre-Action Protocols Reduce Time? ....................................... 39
Pre-Action Processes and Timing ............................................................... 57
Conclusions ................................................................................................. 59

4. Chapter Four – Cost ................................................................................. 61
Introduction ............................................................................................... 61
Past Research on Cost ............................................................................... 62
Findings in Relation to Cost ....................................................................... 64
  The Prohibitive Monetary Cost of Civil Litigation ................................... 64
  Private/Non-Monetary Costs ................................................................. 66
  Public Costs ............................................................................................. 67
The Impact of Pre-Action Protocols ......................................................... 67
Conclusions ................................................................................................. 73

5. Chapter Five – Fairness and Justice ......................................................... 75
Introduction ............................................................................................... 75
Past Research on Fairness Perspectives and Pre-Action Requirements ..... 76
Process Fairness .......................................................................................... 77
  Perceptions about the Fairness of Resolving ‘Pre-Action’ and the Fairness of
  Other Dispute Resolution Processes ....................................................... 77
  Power Imbalance and Plaintiff Experiences ........................................... 82
The Provision of Advice and Client Perceptions of Fairness .................. 83
The Negotiation Environment .................................................................... 84
Perceptions of Process Fairness Linked to the Time Taken to Deal with Disputes ................................................................. 85
Perceptions of Process Fairness Linked to Cost ................................................. 85
Perceptions of Process Fairness Linked to Effectiveness .............................. 86
Outcome Fairness ....................................................................................... 87
Conclusions ............................................................................................... 89

6. Chapter Six – Attitudes and Behaviour ................................................. 93
Introduction ............................................................................................... 93
Behaviour ................................................................................................. 94
Compliance and Court Involvement ............................................................ 94
Legal Practitioner and Party Behaviour .................................................... 95
Behaviour at Pre-Action Meetings and Informal Conferences .................. 99
Should the Pre-Action Protocols Include Additional Behavioural Obligations? ................................................................. 99
The Impact of Expert and Legal Practitioner Behaviour on Delay ............ 103
Attitudes and Culture .............................................................................. 104
Conclusions ............................................................................................... 106

7. Chapter Seven – Effectiveness and Future Options ............................ 109
Introduction ............................................................................................... 109
Objective One: Did the Protocols Establish Orderly Procedures for the Just Resolution of Civil Disputes? ............................................................ 110
Compliance ............................................................................................... 112
Objective Two: Did the Protocols Facilitate and Encourage the Resolution of Civil Disputes by Agreement Between the Parties? .................... 121
Objective Three: Did the Protocols Avoid Unnecessary Delay in the Resolution of Civil Disputes? .......................................................... 122
Objective Four: Did the Protocols Promote Efficiency in Dispute Resolution So Far as That Object is Consistent with the Paramount Claims of Justice? .................... 123
Outcome Quality .................................................................................... 125
Appropriateness of the Pre-Action Protocols to Different Types of Disputes ........................................................................ 127
Should the Pre-Action Protocols be extended to other types of disputes? 129
Comparing the Pre-Action Meeting to Other Dispute Resolution Processes .................................................................................. 131
Objective Five: Did the Protocols Minimize the Cost of Civil Litigation to the Litigants and the State? ............................................................ 132
Future Options .......................................................................................... 132
Option One: Retain the Pre-Action Protocols and strengthen the supporting infrastructure .................................................................................................................. 133

Option Two: Amend the Pre-Action Protocols and Incorporate a Mandatory Pre-Action Requirement to Mediate.................................................................................................................. 137

Option Three: Abandon the Pre-Action Protocols .................................................................................................................. 141

Selected References .......................................................................................................................................................... 143

Appendix A: Project Team ........................................................................................................................................... 149

Appendix B: Project Steering Committee .......................................................................................................................... 151

Appendix C: Expert Advisory Group .............................................................................................................................. 153

Appendix D: Court File Audit Sheet ............................................................................................................................... 154

Appendix E: Interview Guide ........................................................................................................................................ 157

Appendix F: Participant Information Sheet ..................................................................................................................... 159

Appendix G: Consent Form ............................................................................................................................................... 167

Appendix H: Online Barrister Survey Preamble and Questions ......................................................................................... 170
Table of Figures

Figure 1.1. Total Civil Lodgments (Supreme Court) ......................................................... 8
Figure 1.2. Total Civil Lodgments (District Court) ............................................................ 8
Figure 1.3. Civil Lodgments (Magistrates Court) ............................................................. 9
Figure 1.4: Numbers of new, closed, current and all claims, public sector (excluding Western Australia) and private sector claims, 2008-09 to 2012-12 .................................................. 10
Figure 3.1: The Pre-Action Protocols help parties to settle disputes ....................... 43
Figure 3.2: Pre-Action requirements help parties to settle disputes ......................... 43
Figure 3.3: Relationship between court events and time from filing to finality .......... 51
Figure 3.4: Relationship between court events and time from cause of action arising to finality ........................................................................................................................................... 51
Figure 5.1: The Pre-Action Protocols are procedurally fair (n=8) .............................. 80
Figure 5.2: Pre-Action requirements usually create processes which are fair (n=11) .... 81
Figure 5.3: The Pre-Action Protocols result in outcomes which are fair (n=8) ............ 88
Figure 5.4: Disputants tend to perceive the outcomes achieved under the Pre-Action Protocols as fair (n=7) ........................................................................................................ 88
Figure 5.5: Pre-Action requirements can assist in achieving fair outcomes (n=11) .... 89
Figure 6.1: Legal practitioners/Disputants usually make a genuine effort to resolve disputes during the pre-action stage (n=7) ................................................................. 97
Figure 6.2: The Pre-Action Protocols should include good faith requirements (n=7) .... 102
Figure 7.1: Where there has been compliance, how often did the parties attend a pre-action meeting? (n=7) ................................................................. 116
Figure 7.2: What do you think is the most common reason for non-compliance? (n=8) ................................................................................................................................. 117
Figure 7.3: How often do Masters and Judges enquire about compliance with the pre-action protocols? (n=8) ........................................................................... 118
Figure 7.4: Pre-action processes can be efficient (n=11) ............................................. 125
Figure 7.5: In my experience, the Pre-Action Protocols have assisted parties to reach lasting outcomes (n=8) ................................................................. 126
Figure 7.6: Pre-Action process can result in outcomes which are lasting (n=11) ....... 126
Figure 7.7: Pre-Action requirements can assist praties to reach outcomes that are effective and acceptable (n=11) ................................................................. 127
Figure 7.8: Pre-Action requirements are inappropriate in some types of matters (n=11) ................................................................................................................................. 128
Figure 7.9: Pre-Action requirements can divert cases away from the courts that should be there (n=10) ................................................................................................. 129
Figure 7.10: The Pre-Action Protocols should be used in other types of disputes (n=8) ................................................................................................................................. 130
Figure 7.11: The courts should do more to support Pre-Action Protocols (n=8) ....... 135
Table of Tables

Table 3.1: Mode of claim finalisation for closed public sector, states and territories (excluding Western Australia), 1 July 2012 to 30 June 2013 .............................................. 41
Table 3.2: Total claim size ($) for closed claims, by mode of claim finalisation, public (excluding Western Australia) and private sector claims, 1 July 2012 to 30 June 2013 ............................................................................................................................. 42
Table 3.3: Time to Finalisation ....................................................................................... 45
Table 3.4: Length of claim (months) for closed public sector (excluding Western Australia) by total claim size ($), 1 July 2012 to 30 June 2013 ...................................................... 48
Table 3.5: Length of claim (months) for closed public sector claims (excluding Western Australia) and private sector claims, by total claim size ($), 1 July 2012 to 30 June 2013 .............................................................................................................. 48
Table 3.6: Medical negligence: Indicators of claim value and complexity, matter duration .............................................................................................................................. 49
Table 3.7: The Pre-Action Protocols and Time (n=8) .................................................. 54
Table 3.8: Pre-Action Requirements and Time (n=11) ............................................... 55
Table 4.1: The Protocols have Increased/Decreased the Cost of Civil Litigation .......... 71
Table 4.2: Can Pre-Action Requirements Result in Cost Saving for Parties .............. 71
Table 5.1: Disputants’ perceptions of process fairness- online barrister survey ........ 81
Table 5.2: Are disputants happy to resolve disputes during the pre-action stage?...... 82
Table 7.1: Medical Negligence Compliance Data- Court File Review (n=44) .......... 113
Table 7.2: Reason for non-compliance provided in the memorandum of compliance (n=18).......................................................................................................................... 113
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>EDR</td>
<td>External Dispute Resolution</td>
</tr>
<tr>
<td>ACJI</td>
<td>Australian Centre for Justice Innovation</td>
</tr>
<tr>
<td>JRAC</td>
<td>Joint Rules Advisory Committee</td>
</tr>
<tr>
<td>VCAT</td>
<td>Victorian Civil and Administrative Tribunal</td>
</tr>
<tr>
<td>VSBC</td>
<td>Victorian Small Business Commissioner</td>
</tr>
<tr>
<td>auDRP</td>
<td>.au Dispute Resolution Policy</td>
</tr>
<tr>
<td>CDRA</td>
<td>Civil Dispute Resolution Act</td>
</tr>
<tr>
<td>NADRAC</td>
<td>National Alternative Dispute Resolution Advisory Council</td>
</tr>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>MACA</td>
<td>Motor Accidents Compensation Act</td>
</tr>
<tr>
<td>MAS</td>
<td>Medical Assessment Service</td>
</tr>
<tr>
<td>MAA</td>
<td>Motor Accidents Authority</td>
</tr>
<tr>
<td>PIPA</td>
<td>Personal Injuries Proceedings Act</td>
</tr>
<tr>
<td>BCISPA NSW</td>
<td>Building and Construction Industry Security of Payment Act</td>
</tr>
<tr>
<td>TAC</td>
<td>Transport Accident Commission</td>
</tr>
</tbody>
</table>
Executive Summary

Background

In 2014, new pre-action requirements applying to medical negligence and construction disputes were introduced to the District and Supreme Courts of South Australia via the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) (the Pre-Action Protocols). Pre-action requirements, including pre-action protocols, obligations and schemes, oblige disputing parties to take or consider undertaking certain actions that can promote the resolution or management of a dispute before court or tribunal proceedings are commenced. Most frequently, they are intended to work by encouraging cooperation between disputants, reducing costs and delay and producing more proportionate outcomes. However, some commentators have raised concerns that pre-action requirements may impinge on the role of the courts or compromise access to justice by increasing the levels of cost and delay experienced by litigants, particularly when matters do not resolve or where significant costs are ‘front-loaded.’

In South Australia, the 2014 protocols for construction disputes require that, before a claimant can initiate proceedings in the District or Supreme Courts of South Australia, they must send a letter of claim containing an offer to resolve the dispute to the respondent or the respondent’s insurer. If the offer is not accepted, the respondent must provide a letter of response within 21 days. If the parties do not reach an agreement within 30 days after receipt of the letter of response, they must attend a pre-action meeting.

The 2014 protocols for medical negligence disputes require a similar pre-action exchange of letters between the parties, although, there are also initial notice and response requirements and the claimant’s letter of claim must contain an offer to resolve the dispute, as well as a proposed ADR process and timetable. If the respondent does not accept the claimant’s offer, they must send a letter of response to the claimant, including a response to the proposed ADR timetable, within 30 days. Where the matter is not settled through this exchange, but the parties agree on ADR, ADR must be attended within 60 days of the letter of response. If the parties do not agree on the form and details of ADR, they must attend a pre-action meeting within 30 days of the letter of response.

---

The Project

The Evaluation of Pre-Action Processes in South Australia Project (this Project), which has culminated in this Report, was designed to analyse the effectiveness of the 2014 Pre-Action Protocols and aims to provide feedback to the South Australian Judiciary and other interested stakeholders on whether the key objects of the Pre-Action Protocols are being achieved. These objects are:

- To establish orderly procedures for the just resolution of civil disputes; and
- To facilitate and encourage the resolution of civil disputes by agreement between the parties; and
- To avoid unnecessary delay in the resolution of civil disputes; and
- To promote efficiency in dispute resolution so far as that object is consistent with the paramount claims of justice; and
- To minimise the cost of civil litigation to the litigants and the State.\(^2\)

Accordingly, the Project examines the effectiveness of the Pre-Action Protocols from cost, time, efficiency, fairness and behavioural perspectives.

The Project was conducted by the University of Newcastle and the University of Adelaide in two stages. The initial stage was funded by the Supreme Court of South Australia. It involved the development of a literature review; the establishment of an Expert Advisory Group that assisted to design the data collection methodology and survey instruments; and initial scoping work, which included in-depth focus groups with medical negligence lawyers and insurers and construction lawyers.

The second stage of the research was supported by the Law Foundation of South Australia. It involved a manual review of all the available courts files for medical negligence and construction disputes lodged in the District and Supreme Courts of South Australia between 1 January 2014 and 30 September 2017; a series of focus groups with plaintiffs, defendants, lawyers and judicial officers who had been involved in matters where the pre-action protocols had applied; an online survey of the members of the South Australian Bar; and ongoing consultations with key stakeholders, including the Joint Rules Advisory Committee in South Australia.

Findings

Timeliness

In terms of time savings, the research found that the Pre-Action Protocols may have had some impact on settlement activity before proceedings commence in that they may have resulted an increase in settlements by insurers- for example, by placing greater focus on settlement or making potential plaintiffs aware that they do not have a ‘direct’ pathway into court. However, the extent of any impact on settlement activity is unclear. In addition, it is important to note that there was some evidence that (when used) the Pre-Action Protocols can save time by assisting parties to narrow issues in dispute or by guiding inexperienced practitioners. Although, there also appeared to be some attitudinal issues relating to the Protocols, which suggested that

\(^2\) District Court Civil Rules 2006 (SA) r 3; Supreme Court Civil Rules 2006 (SA) r 3.
time savings may have been limited due to the Protocols not often being used to narrow issues or to assist with litigation planning.

In terms of the cases evaluated during the court file review, there was significant variation in the time taken for disputes (that were commenced in court) to finalise. The court file and focus group data suggests that delays may occur where large, complex claims are involved, where there is a need to gather expert evidence, or due to the behaviour of some lawyers, disputants or experts. The researchers note that delays (arising due to the first two factors) are not always unreasonable. The very low levels of compliance with the Pre-Action Protocols (see below) made it difficult to assess whether the Protocols have assisted to ‘avoid unnecessary delay.’ However, there was no evidence that the Protocols increased delay, and, where they resulted in earlier resolution or the narrowing of issues, they would have had a positive impact on timeliness.

In respect of the appropriateness of the processes prescribed by the Pre-Action Protocols and timing, there was some concern raised by research participants about the expectation that parties might be in a position to resolve disputes in such early stages, particularly before expert evidence is gathered. Concerns were also raised in relation to the strict timeliness imposed by the Protocols and which can be problematic for some stakeholders, particularly medical negligence defendants. However, there were some positive perceptions about the current pre-action steps, with one medical negligence plaintiff lawyer, for example, suggesting that ‘engaging early and determining the issues, determining prospects of success and attitudes early helps to guide the plaintiff.’

Cost

In terms of whether the Protocols ‘minimise[d] the cost of civil litigation to the litigants and the state’, there was mixed evidence relating to the cost of the Pre-Action Protocols, although, on the whole, they were viewed as cost neutral. Almost all of the lawyers interviewed considered that, overall, the Pre-Action Protocols had not resulted in any significant front-loading of costs and did not believe that the Protocols had increased cost for parties, primarily on the basis that many of the steps required by the Protocols are steps that would have been taken anyway. Perceptions amongst barristers were more negative. However, it is not clear whether this is a result of barristers being more likely to be involved in more complex cases.

From a public cost perceptive, there was no evidence that there were additional public costs incurred as a result of the Protocols and the small number of settlements and time savings that may have been achieved by the Pre-Action Protocols (either directly or indirectly) would have reduced some public (as well as some private monetary and non-monetary) costs.

---

1 District Court Civil Rules 2006 (SA) r 3(c); Supreme Court Civil Rules 2006 (SA) r 3(c).
2 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
3 District Court Civil Rules 2006 (SA) r 3(e); Supreme Court Civil Rules 2006 (SA) r 3(e).
Fairness and Justice

On the whole, the Pre-Action Protocols were considered fair and just. With respect to procedural fairness and the ‘establishment of orderly procedures for the just resolution of disputes’, there was some evidence that, where there has been compliance, the Pre-Action Protocols may have had some positive impacts by creating a ‘fairer’ negotiation environment and a ‘more structured process.’ However, the very low levels of compliance (see below) mean that there is a significant issue regarding whether that objective can be said to have been met.

The data gathered from the focus groups suggests that disputants’ perceptions of process fairness and satisfaction likely depend on their dispute resolution objectives and psychological needs. The role of legal advisors in explaining, prompting and using the Protocols was noted as significant. Further, a sense of taking on ‘the system’ in an inevitably one-sided battle was apparent amongst medical negligence plaintiffs who were frustrated by timeliness, cost, delays, the attitude and conduct of defendant lawyers, and who also indicated being unaware of their pre-action meeting and dispute resolution options. The researchers suggest that there may be some issues about whether the pre-action processes could be regarded as procedurally fair, particularly in the medical negligence area, given the lack of focus on party voice, as it seems that it was rare for meetings to take place involving parties and also rare for any mediation to take place.

Attitudes and Behaviour

In terms of whether the Protocols ‘facilitate[d] and encourage[d] the resolution of civil disputes by agreement between the parties’, it was noted above that the extent to which the Protocols have resulted in the resolution of disputes is unclear. What may be more relevant in terms of assessing resolution is the impact that the Protocols have had on the attitudes and behaviour of litigants and participants. Here, the researchers note that there appeared to be disinclination amongst some lawyers to resolve disputes at an early stage and to engage in the Pre-Action Protocol process, and that this may be due to a range of factors, including the perceived need to be fully armed with expert evidence before any negotiation, perceptions of a value/cost imbalance, the perceived inappropriateness of the Pre-Action Protocols in relation to large, complex disputes, and a lack of court follow-up. Further, while, there was some evidence that the Protocols had increased collaboration and cooperation between some lawyers in both the medical negligence and construction areas, most participants in the focus groups could provide at least one example in which they had experienced another lawyer or party taking a particularly adversarial approach or failing to engage during the pre-stage.

Effectiveness

As noted above, there appears to be a significant issue concerning non-compliance with the Pre-Action Protocols, particularly in relation to medical negligence disputes,
and this is clearly undermining the effectiveness of the Protocols. Data from the court file review indicated that there was evidence of non-compliance in more than 50% of medical negligence files reviewed, and that it was relatively common for there to have been non-compliance with no reason for that non-compliance provided. All medical negligence lawyers that participated in the focus groups agreed that there has been significant, ongoing non-compliance with the Pre-Action Protocols, and this perception was further supported by the responses to online survey of the SA Bar. Participants indicated that there may be a range of reasons for this, including urgency, a lack of awareness of the Pre-Action Protocols, an unwillingness on the part of defendants to engage in the pre-action process, and the potential difficulties defendants face in complying with the time limits set out in the Protocols. Responses also suggest that a lack of court follow-up is likely contributing to the low rate of compliance with the Pre-Action Protocols.

Finally, there were mixed views about whether, overall, the Protocols ‘promote[d] efficiency in dispute resolution so far as that object is consistent with the paramount claims of justice.’ As noted above, there were some positive perceptions about the impact that the Protocols can have on engagement between parties, however, others believed that the Protocols will not do what they are intended to do until the profession begins to take them seriously. There were also some concerns raised about the appropriateness of the Protocols in relation to ‘big, complex’ claims.

Future Options

Based on these findings, a number of options for creating more effective arrangements into the future emerge. The Research Team supports Option One and Two and considers that serious consideration should be given to Option Two.

Option One: Retain the Pre-Action Protocols and Strengthen the Supporting Infrastructure

One option is to retain the Pre-Action Protocols and strengthen the supporting infrastructure to increase compliance and improve effectiveness. This may be achieved through:

- Greater Education and Information — There is a need for accessible information (e.g. additional information and clear flow charts on the court website) and education for lawyers and parties about their obligations under the Protocols. There is a need to ensure court staff and judicial officers understand the Protocols. Diverse attitudes towards engaging in the Pre-Action Protocols also indicate a need for better information about expectations and compliance requirements and better education of lawyers and parties about the availability of ADR and the value of early facilitative ADR. In terms of the value of ADR in large matters, a focus on preparing a matter for litigation (not just resolution) may also be useful and a pre-action meeting process could focus on matters that include an agreed plan for the exchange of evidence and the development of options relating to joint experts.

- Greater Court Supervision and Support — This could include more rigorous checking by the registry staff in relation to compliance when matters are commenced, together with prompt referral if required. Judicial officers may need more education and greater clarity relating to
their roles. The development of checklists for judicial officers and registry staff and consideration of how referral and costs orders can be made are also relevant matters to consider.

- Conduct Requirements (Good Faith) - Some behavioural standards may need to be articulated in respect of the requirements (for example, ‘good faith’ or some other standard), and court and practitioner input and supervision into defining appropriate standards may support compliance and reduce costs. However, any such requirements will also require court follow-up.

- Simplification of the Protocols - It may be possible to simplify the Protocols and add some greater flexibility, for example, by making a distinction between ‘large’ claims and ‘other’ claims, or by requiring participants to exchange simple documentation and then allowing them to opt to attend mediation within six weeks (with a certificate from an accredited mediator relating to attendance).

**Option Two: Amend the Pre-Action Protocols to Incorporate a Mandatory Pre-Action Requirement to Mediate**

Results from the focus groups indicated that, in the medical negligence area in particular, it is rare for a pre-action mediation to be held, primarily for reasons of expense. Yet, many lawyers recognised the benefits that mediation can offer and supported the idea of including mediation as a step in the pre-action stage, particularly if mediations were to be conducted by mediators with relevant expertise.

Such mediation could be directed at settlement as well as litigation planning. For example, experienced mediators could assist parties to prepare a timetable, a costs summary, summary of issues and also consider whether joint expert reports might be feasible. This approach would of necessity require early court follow up and supervision. The findings also suggest that, to be effective, any mandatory requirement to mediate would need to be accompanied by a basic infrastructure that ensures that such processes are easy to access at an appropriate cost. The retail lease schemes in place in Victoria and NSW, where mandatory mediation occurs on a fixed cost basis (subsidised in Victoria but not in NSW) provide examples here.

The researchers also note that to support fixed fee mediation, it would be desirable to set up a panel of mediators who are accredited and have relevant subject-matter expertise. This option would also need to be supported by an education campaign, court supervision and enforcement, and good faith or other conduct requirements with associated cost consequences for failing to mediate in good faith or comply with other conduct guidelines.

**Option Three: Abandon the Pre-Action Protocols**

Another option is to abandon the Pre-Action Protocols and return to the Rule 33 arrangements. Given that there was some evidence that the Protocols have been helpful and that the low rates of compliance together with the low incidence of ADR use means that the potential of the Protocols has not been achieved, the researchers suggest that this is probably the least effective option.
Chapter One – Background and Methodology

Introduction

1.1. Pre-action requirements, including pre-action protocols, obligations and schemes, are intended to encourage disputing parties to take or consider undertaking certain actions that can promote the resolution or management of a dispute before court or tribunal proceedings are commenced. Pre-action requirements can require disputants to disclose certain information, correspond or meet with each other, or undertake some form of alternative dispute resolution.¹ There is great variation in the way in which pre-action requirements work. For example, in Australia, pre-action requirements can be related to External Dispute Resolution (EDR) schemes, they may be linked to courts or tribunals via court rules and require close court supervision, may be linked to legislative schemes (for example, in the retail lease sector) or may operate independently of EDR schemes and court processes (for example as a result of contractual provisions) (see Chapter 2).²

1.2. Pre-action requirements have existed in Australia for many years in the social, community, health, family, consumer, and business sectors. However, over the past decade they have become an area of increasing focus, often linked to justice innovation and access to justice reforms. Most often, they are intended to work by reducing cost and delay and producing more proportionate outcomes. In 1996, Lord Woolf reported on the inadequacies of the United Kingdom’s justice system, stating that ‘[i]t is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal.’³ These concerns are shared by a number of other common law jurisdictions, including Australia, where much work has been done towards refining the core principles of access to justice. A particular emphasis has been placed on reducing cost and

delay in the justice system. Pre-action obligations can be regarded as one approach that can assist in reducing cost and delay.

1.3. In 2014, new pre-action requirements applying to medical negligence and construction disputes were introduced to the District and Supreme Courts of South Australia via the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) (the Pre-Action Protocols). Pre-action obligations already applied to many civil and monetary disputes in South Australia. However, medical negligence and construction disputes were selected as appropriate areas for pre-action obligation extensions (see 2.57).

1.4. The Evaluation of Pre-Action Processes in South Australia Project (the Project) was designed to analyse the effectiveness of the 2014 Pre-action Protocols and is explored in this Report.

Project Aims

1.5. The Project aims to provide feedback to the South Australian Judiciary and other interested stakeholders on whether the key objects of the Pre-Action Protocols are being achieved. These objects are:

- To establish orderly procedures for the just resolution of civil disputes; and
- To facilitate and encourage the resolution of civil disputes by agreement between the parties; and
- To avoid unnecessary delay in the resolution of civil disputes; and
- To promote efficiency in dispute resolution so far as that object is consistent with the paramount claims of justice; and
- To minimise the cost of civil litigation to the litigants and the State.

1.6. Accordingly, the Project examines the effectiveness of the Pre-Action Protocols from cost, time, efficiency, fairness, and behavioural perspectives.

1.7. The Project was divided into two stages. The Supreme Court of South Australia funded the initial exploratory research (see below from 1.14). The Law Foundation of South Australia funded the data collection, analysis, and reporting phases of the Project (see below from 1.27.). Accordingly, the Project also includes the following components that meet the objects and purposes of the Law Foundation of South Australia:

- The Project supports the promotion and development of legal research in the reform of law by closely considering the effectiveness of pre-action arrangements – a major area of law reform;

---


5 District Court Civil Rules 2006 (SA) r 3; Supreme Court Civil Rules 2006 (SA) r 3.
The Project supports the education and training of legal practitioners by considering and exploring how lawyers and others engage in pre-action work and by delivering seminars relating to the findings of the project;

The Project supports education in law and the legal system by educating students in empirical law approaches with a view to building a capacity within South Australia in developing evidence-based approaches;

The Project provides assistance for legal services to the community by exploring legal roles and representation issues in pre-action environments.

1.8. As a result of these objectives, the Project Team included academic staff and students from Flinders University and the University of Adelaide. The outcomes of the Project may also assist in future planning and enable assessments to be made about pre-action schemes which could potentially have an impact nationally.

The Research Team

1.9. The Project was led by Professor Tania Sourdin, initially in her capacity as Director of the Australian Centre for Justice Innovation (ACJI) at Monash University. The Project came under the auspices of the University of Newcastle in July 2016 when Professor Sourdin assumed the role of Dean of Newcastle Law School. Professor Sourdin was originally partnered by Professor David Bamford of Flinders University. However, Margaret Castles of the University of Adelaide took over as academic partner on the Project during March 2017 after Professor Bamford retired from Flinders University. The Research Team consisted of (see Appendix A):

- Professor Tania Sourdin (Project leader, principle researcher and writer);
- Professor David Bamford (Academic partner from February 2017);
- Margaret Castles (Academic partner from March 2017);
- Jacqueline Meredith (Researcher from January 2017 to January 2018);
- Madeline Muddle (Senior Researcher and writer from December 2017);
- Blake Grierson (Research Assistant from September 2018); and
- John Woodward (Editor).

1.10. The Research Team was assisted by the Project Steering Committee (please see Appendix B for details of the members of the Project Steering Committee). An Expert Advisory Group was also established during the initial stages of Project to assist with the development of the Project’s objectives and methodology (please see Appendix C for details of the members of the Expert Advisory Group). The Research Team wishes to acknowledge the important input of these groups and to express its thanks.
Focus of this Report

1.11. This Report is divided into seven Chapters. Chapter 1 contains background information, including an explanation of the Project’s aims and methodology. Chapter 2 introduces pre-action requirements. It considers the range of pre-action requirements that have been implemented recently in Australia and the United Kingdom, issues that have arisen in relation to pre-action requirements, and the nature of the new Pre-Action Protocols in South Australia, which are the subject of this Report. Chapters 3 to 7 examine the effectiveness of the Pre-Action Protocols in relation to specific evaluation criteria: time (Chapter 3), cost, (Chapter 4), fairness (Chapter 5), attitudes and behaviour (Chapter 6), and effectiveness (Chapter 7). Chapter 7 also explores future options with respect to reform of the Pre-Action Protocols and outlines the recommendations that arise from this research.

Methodology

1.12. The Project applied a range of methodologies at different stages of research. The initial stages of research were funded by the Supreme Court of South Australia and involved:

- The development of a literature review (see 1.14.);
- The establishment of an Expert Advisory Group that assisted in designing the project objectives, methodology and survey instruments (see from 1.15.); and
- Initial scoping work, which included some preliminary data collection (see from 1.21.) and in-depth focus groups with medical negligence lawyers and insurers and construction lawyers (see from 1.18.).

1.13. The Law Foundation of South Australia funded the data collection, analysis, and reporting stages of the research. Qualitative and quantitative data were collected using a range of research methods and from a variety of sources, including:

- File based data collection from the District and Supreme Courts of South Australia (see from 1.27.);
- Ongoing consultation with key stakeholders, including focus group interviews with plaintiffs, defendants, lawyers, a barrister, and judicial officers and meetings with the Joint Rules Advisory Committee (see from 1.35.); and
- An online survey of members of the South Australian Bar (see from 1.48.).
Stage One

Literature Review

1.14. The literature review was originally drafted in June 2015 and updated in September 2016 and July 2017. It examined existing pre-action requirements operating in Australia and the United Kingdom, with a specific focus on recent pre-action obligations that may apply to medical negligence and construction disputes. The specific characteristics of the South Australian reforms were considered in detail. The review drew on literature from Australia and overseas to explore the nature and development of pre-action arrangements and the issues that have been raised in relation to pre-action requirements. It also had regard to past research into the effectiveness of pre-action requirements. This allowed the South Australian reforms to be examined in the context of evaluations of other arrangements.

Design of Project Methodology and Initial Scoping Work

The Expert Advisory Group and Initial Focus Group Interviews

1.15. The Expert Advisory Group was initially established in 2015. It consisted of academics, lawyers and barristers who had been involved in medical negligence and construction disputes, a health care sector insurer, a construction industry association representative, and a Master of the District Court (see Appendix C). The Advisory Group collaborated with Professor Sourdin and Professor Bamford to develop the project objectives, methodology and survey instruments. As a result of the small number of files that had been the subject of the Protocols at that time, it was agreed in late 2016, that the project should be ‘paused’ for a 12-month period to enable a larger sample of matters to be explored (see below).

1.16. The Advisory Group meetings commenced in April 2015. It was initially decided that the best way to proceed was to survey those who had been involved in construction and medical negligence disputes where the Pre-Action Protocols applied over a 12-month period, dealing with disputes that finalised in 2016. Users of the schemes (potential plaintiffs, potential defendants, defendant lawyers and plaintiff lawyers) were to be surveyed online and via telephone. The survey data was to be supplemented with qualitative data collected during focus group interviews with key stakeholders including court staff, judges, and medical and construction experts. It was also intended that the methodology would involve the collection of base data from insurers (in respect of medical negligence matters) and defendant law firms (in respect of construction disputes) using an online survey to ensure that the survey data did not reflect aberrant outliers.

1.17. During June and August 2015, the researchers created draft survey instruments using Qualtrics Survey Software. These were provided to the Advisory Group for review and feedback. The Advisory Group raised concerns regarding a lack of base data, given the limited period of operation of the Protocols, indicating that it may take several years before such a survey could be meaningfully conducted. Concerns were also raised in relation to confidentiality and the accessing of information about complainants in construction and medical
negligence disputes. Experts recommended anonymising information. This suggestion was adopted. The data obtained from court files, focus group interviews and online surveys was de-identified prior to analysis. Experts also indicated that their preference was to explore matters that had been litigated.

1.18. The Advisory Group also assisted by organising focus groups with medical negligence lawyers and insurers and construction lawyers. Professor Sourdin conducted the focus groups in Adelaide during August 2015. The medical negligence focus group was attended by four medical negligence lawyers (including one barrister) and one insurer. The construction focus group was attended by three construction lawyers and one insurer. Participants were asked to consider and ‘test’ the draft survey instruments prior to attending their respective focus groups. The focus groups were then used to discuss the project methodology and to obtain preliminary data on participants’ perceived effectiveness of the Pre-Action Protocols. The preliminary data regarding participants’ views of the Pre-Action Protocols was analysed in conjunction with the data collected during the December 2017 focus groups (see below at 1.35.) and is reported in narrative form in this Report.

1.19. In the medical negligence area, the Advisory Group and focus group participants raised concerns about the small number of cases that had been subject to the new Pre-Action Protocols, the length of the online surveys, and the capacity of insurers to complete the surveys and report on medical negligence matters. In the construction area, the Advisory Group raised concerns about the small number of cases that had been subject to the Pre-Action Protocols and the existence of survey fatigue among construction lawyers. Focus group participants also raised concerns about the small number of construction cases that had been subject to the Protocols.6

1.20. Given the concerns regarding the small sample size and also concerns about the data load on participating parties such as insurers and lawyers, members of the Advisory Group suggested that the methodology be altered to a more qualitative approach. This suggestion was adopted. It was determined that the methodology would involve a manual court file review and ongoing consultation with key stakeholders, including in-depth focus groups with plaintiffs, defendants, lawyers and judicial officers regarding their views and experiences of the Pre-Action Protocols and their effectiveness. It was suggested that a viable sample population would not be possible to explore until 2017 (that is, a few years after the protocols had been introduced).

Initial scoping work: Collection of existing data

1.21. The researchers sought to identify disputes that had been subject to the new Pre-Action Protocols. However, as already noted, the Advisory Group indicated that they were not aware of many disputes that had been subject to the Protocols. Consequently, the researchers sought to obtain some information directly from the Supreme Court of South Australia (noting that this information is limited in that matters that settled as a result of the protocol would not have progressed to court).

---

6 Subsequently it was established that a number of construction disputes may be initiated as debt or breach of contract claims, and not identified as construction disputes (see 1.28).
1.22. A request was made to the Courts Administration Authority of South Australia to provide a list of cases that had been subject to the Protocols and had been filed in either the District or Supreme Court. The list was provided on 28 July 2016 and contained two building disputes and ten medical negligence disputes lodged since October 2014. In August 2016, the Court was able to locate an additional three medical negligence cases, bringing the total of medical negligence cases to 13. The Court invited the researchers to inspect the files. As noted above, given the small pool of matters, it was decided to ‘pause’ the project to enable a larger sample of matters to be examined.

1.23. The researchers also sought to determine whether the number of medical negligence and construction matters being filed in South Australia had been rising or falling over time. This was a relevant enquiry as the introduction of the Protocols had coincided with the introduction of new jurisdictional limits which may have resulted in an increased number of matters being filed in the lower courts. Therefore, a reduction in, for example, medical negligence matters commencing in the District or Supreme Court could not be interpreted as necessarily being related to the success of the Protocols if such a reduction would have occurred in any event. Considering the overall number of medical negligence ‘insurance’ claims compared to court cases might indicate that the Protocols had resulted in a reduction in court cases. However, unfortunately, there was very limited statistical material available that could be explored in relation to either matter.

1.24. There was some evidence that the number of total court lodgments declined in all South Australian courts over the past decade. However, that decline may be due to a number of factors and cannot be linked to the development of the Protocols. The Court did not capture cause of action data in searchable form until the new Rules commenced in October 2014. Some data regarding civil lodgments in the Supreme, District and Magistrates Courts was gathered from the Court annual reports. The findings are summarised in Figures 1.1.-1.3

---

FIGURE 1.1. TOTAL CIVIL LODGMENTS (SUPREME COURT)

FIGURE 1.2. TOTAL CIVIL LODGMENTS (DISTRICT COURT)
1.25. Some data regarding changes in the number of medical indemnity claims across Australia was also obtained. In 2014, the Australian Institute of Health and Welfare reported that the total number of public and private sector medical indemnity claims in Australia (excluding Western Australia) rose steadily each year from 2008/09 to 2011/12 but decreased from 2011/12 to 2012/13 (see ‘All claims’ in Figure 1.4.).

There were about 14,000 claims open at some stage [that is, at any given stage] during the year for the 2010/11 to 2012/13 years, compared with 12,500 for 2008/09 and 2009/10. There is limited or no data available post 2014. The data above does however show a reduction in medical negligence claims that would also logically explain why there might be a reduction in medical negligence court cases.

1.26. In these studies, ‘claims’ arise from ‘allegations of negligence or breach of duty of care by health-care practitioners during the delivery of health services.’

A ‘new claim’ is created ‘when a reserve amount is placed against the costs expected to arise in closing the claims’, and a claim is ‘closed’ ‘after being finalised through a court decision, a negotiated settlement between claimant and insurer, or discontinuation (either by the insurer, or the claimant’s withdrawing the claim).’ In Figure 1.4., closed claims added to current claims sums to all claims, while new claims can be either closed or current depending on whether they were closed in the year when they were opened. Reopened claims are current claims that had previously been closed.

---

9 Ibid vii.
10 Ibid.
11 Ibid.
12 Ibid 56.
Stage Two

Court File Review

1.27. During October and December 2017, Professor Sourdin and two research assistants reviewed the identifiable and available court files for medical negligence and construction disputes lodged in the District and Supreme Courts of South Australia between 1 January 2014 and 30 September 2017 (the sample period). The Supreme Court assisted by identifying and locating relevant files for the researchers and granted them permission to review those files. Initially, 44 medical negligence files and 4 construction files were identified and reviewed.

1.28. During April 2018, the Joint Rules Advisory Committee advised the researchers that it was likely that there were more than four construction (or ‘building’) disputes lodged during the sample period. They indicated that it was likely that some files had not been identified due to being initially classified as ‘debt’, ‘contract’ or ‘judicial review’, rather than ‘building’, cases. The researchers sought assistance from the Courts to identify the construction files that had not been identified.

1.29. The District Court produced a list of possible construction cases initiated in the sample period by searching for party names containing building terms (‘build’, ‘develop’, ‘home’, ‘engineer’). This search resulted in 74 files. These files were examined. It was determined that there are an additional 20 unidentified building and construction files that were initiated in the sample period (bringing the total of identified building matters for the period to 24). However, two of the
additional files came into Chambers for file management and were not identified by the search method set out above. This suggests that it is likely that there are more files that have been missed due to misidentification.

1.30. The District Court further advised that most of the missed files are identified in the CCMS system as ‘debt’ or ‘contract’ files and the reason those files are misidentified in the system appears to be that it is often not until the defence is filed (and/or a counter-claim or third-party claim) that the true nature of the dispute is ascertained. This is problematic as it suggests that the misdescription of building and construction disputes by plaintiffs commencing proceedings is likely to be diverting such cases away from the Pre-Action Protocols.

1.31. Unfortunately, time and resources did not permit evaluation of the additional 20 building and construction files to be undertaken.

1.32. In relation to the 44 medical negligence and four construction files that were reviewed, the researchers manually extracted information from hard copy files (some of which included more than 100 folios) using the Court File Audit Sheet in Appendix D. This data included:

- Date cause of action arose
- Cross-claim information
- Whether the pre-action protocols applied and whether the Form 3 had been filed
- Plaintiff demographics (gender, date of birth, education, occupation)
- Defendant demographics (gender, date of birth, education occupation)
- Claim information – heads of damage for plaintiff
- Claim information – heads of damage for defendant
- Status of file - whether finalised
- Terms of settlement
- Process used to finalise matter
- All processes used in matter
- Records regarding case management action – number of hearings, adjournments and applications
- Mediation details (internally/ externally mediated, date, attendance, outcome)
- Duration of final hearing
- Whether proceedings were dismissed by consent

1.33. The researchers also collected the names and contact details of the parties and legal representatives that had been involved in the disputes. The contact details were used to identify potential participants for the December 2017 focus group interviews and April 2018 supplementary interviews. The identifying details were stored separately from the remaining file data in secure locations at the University of Newcastle and only linked to that data by randomly allocated identification numbers. The researchers provided undertakings to not disclose to
any person not associated with the research project any identifying information disclosed in the court files.

1.34. The data collected using the court file audit sheets was entered into a Microsoft Excel (2016) spreadsheet, and where necessary, converted from alpha to numeric representation to allow it to be read by the software program. The analysis of the quantitative data was conducted using descriptive statistics developed with Microsoft Excel (2016) (see also 1.52.).

**Ongoing Consultation with Key Stakeholders**

**Focus Group Interviews and Supplementary Interviews**

1.35. A follow up series of semi-structured focus group interviews were held with key stakeholder groups in Adelaide in December 2017. The purpose of the focus groups was to obtain data regarding stakeholders’ views and experiences of the Pre-Action Protocols. The focus groups were facilitated by Professor Sourdin and touched on issues including:

- Introductory matters- how disputes arose, steps taken to resolve disputes
- Time- whether the protocols resulted in the early resolution of disputes
- Cost- whether the protocols increased or decreased the costs of civil litigation
- Fairness- perceptions of outcome and procedural fairness
- Attitudes- how disputants and practitioners perceive the protocols and how they engage with them
- Efficiency- whether there are better processes to support the resolution of disputes.

1.36. A copy of the interview guides is included in Appendix E. All participants were provided with information sheets regarding the research and were required to sign a consent form prior to the interviews being conducted (see Appendices F and G).

**Plaintiffs and Defendants**

1.37. Plaintiff and defendant contact details were obtained during the court file review. On October 2017, 34 medical negligence plaintiffs, 19 medical negligence defendants, four construction plaintiffs, and four construction defendants were mailed invitations to participate in focus groups. Because the address data on court files was limited, at times, letters were sent to lawyers with a request that the information be sent on to the client. They were sent follow up letters extending the RSVP date on 20 November 2017.

1.38. The focus group for medical negligence plaintiffs was held on Wednesday 13 December 2017. Two plaintiffs attended the interview. The focus group for medical negligence defendants was held on Thursday 14 December 2017. One defendant attended the interview. Another provided their views to the research team via email. No construction plaintiffs or defendants attended the initial focus group interviews and as a result separate interviews were held with lawyers (see below).

**Lawyers**
1.39. Lawyers’ contact details were also obtained during the court file review. 27 medical negligence plaintiff lawyers, 19 medical negligence defendant lawyers, four construction plaintiff lawyers and four construction defendant lawyers were emailed invitations to participate in focus groups in October 2017. Follow up emails extending the RSVP date were sent in November 2017.

1.40. The focus group for medical negligence plaintiff representatives was held on Thursday 14 December 2017. It was attended by three practitioners with extensive experience in medical negligence.

1.41. The focus group for medical negligence defendant representatives was held on Friday 15 December 2017. It was attended by two practitioners. One had worked in medical negligence exclusively for the past 20 years. The other had significant experience representing plaintiffs in medical negligence matters and had acted for a defendant in one medical negligence matter since the protocols had been introduced.

1.42. The focus group for construction defendant representatives was held on Wednesday 13 December 2017. It was attended by one practitioner who ‘works predominantly in the construction space.’ 13 No construction plaintiff lawyers were able to attend the focus group interviews held in December 2017.

Supplementary Interviews

1.43. Construction and medical negligence lawyers who responded to the invitation to participate in the December 2017 focus groups but could not attend were invited to participate in supplementary, semi-structured telephone interviews. The interviews were conducted by Professor Sourdin using the same interview guide used during the December 2017 focus groups (see Appendix E).

1.44. Two medical negligence plaintiff lawyers, one medical negligence defendant lawyer, three construction plaintiff lawyers and two construction defendant lawyers were invited to participate via email on 15 March 2018. They were sent follow up emails extending the RSVP date on 9 April 2018. One medical negligence plaintiff lawyer and one construction plaintiff lawyer participated in telephone interviews during April and May 2018, respectively.

Judicial Officers

1.45. Professor Sourdin also conducted individual interviews with a judicial officer of the Supreme Court of South Australia and a judicial officer of the District Court of South Australia using the same interview guide that was used during the plaintiff, defendant, and lawyer focus group interviews (Appendix E).

Additional Focus Group Details

1.46. The focus groups and interviews were audio recorded and electronic notes were taken by research assistants present at the interviews. The data was de-identified and key themes and direct quotes were extracted. Due to the small sample size of the data obtained (n=13), a descriptive analysis process was undertaken, and the qualitative data is used in de-identified narrative form in

\[13\] Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
Meetings with the Joint Rules Advisory Committee (JRAC)

1.47. Professor Sourdin and members of the Research Team met with JRAC on Monday 11 December 2017, and again on Thursday 26 April 2018. These meetings touched on:

- The Project’s progress and preliminary findings; and
- Options for improving the Pre-Action Protocols and Court Rules.

Barrister Interview and Survey

1.48. During the focus group and consultation process, barristers were identified as another group of stakeholders that could offer important insights into the effectiveness of the Pre-Action Protocols.

Interview follow up

1.49. Professor Sourdin met with one barrister who had been involved in matters where the Pre-Action Protocols had applied in December 2017. An informal interview was conducted using the interview guide that was used during the focus group and supplementary interviews (Appendix E). The data from this interview is considered alongside the qualitative data obtained during the focus group interviews throughout this Report. The barrister suggested that an online survey would be the most efficient way to gather data on barristers’ perceptions of the Pre-Action Protocols.

Survey design

1.50. An online survey was developed using Qualtrics Survey Software with the aim of gathering data on barristers’ views and experiences of the Pre-Action Protocols and their effectiveness, and of pre-action requirements more generally. The survey was divided into two sections: the first contained specific questions relating to the Pre-Action Protocols that are the subject of this Report and the second contained questions intended to gain insight into barristers’ perceptions of pre-action requirements generally (not necessarily those that are the subject of this Report). Barristers who had been involved in matters where the Pre-Action Protocols had applied were invited to answer both sets of questions and others were invited to answer the second set only. Many of the questions were drawn or adapted from a bank of survey questions developed by Professor Sourdin over two decades of research and evaluation of dispute resolution schemes in Australia. The questions focused on issues relating to compliance, time, cost, fairness, attitudes and behaviour, and efficiency. Demographic information (including gender, age, years worked as a lawyer, main areas of practice, involvement in pre-action or alternative dispute resolution processes) was also collected. Participants were provided with information about the Project in the survey preamble and were asked to indicate their consent to

---

14 See, eg, Sourdin, above n 2; Tania Sourdin, ‘Mediation in the Supreme and County Courts of Victoria’ (Report, The Department of Justice and Australian Centre for Peace and Conflict Studies, 2008).
being involved in the research at the beginning the survey. All responses were anonymous. The survey preamble and questions can be found in Appendix H.

Survey distribution and responses

1.51. An anonymous link to the survey was distributed to the South Australian Bar via an email sent by the President of the South Australian Bar Association on behalf on the Research Team on 13 April 2018. A reminder was sent on 23 April 2017 and a final invitation to participate was sent, along with a message from the Research Team, on 2 May 2018. The survey remained open until 18 May 2018. Fifteen responses were recorded. Four of the responses were incomplete. In these instances, the demographic material was retained, and the rest of the data was discarded. Of the 11 complete responses, eight responses were provided by barristers who had been involved in matters where the Pre-Action Protocols had applied and who therefore responded to both the specific and general questions; one response was provided by a barrister who had not been involved in any matters where the Pre-Action Protocols had applied and who answered the general questions only; and two responses were provided by barristers who were unsure whether they had been involved in any matters where the Pre-Action Protocols had applied and who therefore responded to the general questions only.

Samples and Data Analysis

1.52. The quantitative analysis in this Report is based on the sample from the court file review of medical negligence (n=44) and construction disputes (n=4) lodged in the District and Supreme Courts of South Australia between 1 January 2014 and 30 September 2017, and the quantitative data collected through the online survey of the Bar (n=11). Some of this data is reported using descriptive statistics generated using Microsoft Excel (2016), such as percentages, means, or medians. The mean is a measure of central tendency and is calculated by summing all values and dividing the sum by the number of values. It is sometimes referred to as the ‘average’ amount. The median is also a measure of central tendency and is the middle value in a set of values. For example, in the following sample – 3, 10, 22, 30, 45 – the median is 22. The median is particularly useful in samples with extreme values, which may skew the mean value. The online survey responses were analysed using Qualtrics Survey Software and Microsoft Excel. All of the graphs in the Report were generated using Microsoft Excel.

1.53. Much of the qualitative data used in the Report was obtained from the focus groups and supplementary interviews conducted between December 2017 and May 2018 (n= 13). Other sources of qualitative data included narrative responses provided to open ended questions in the online survey of the bar, the preliminary focus groups conducted during August 2015 (n= 9), and the consultations held with key stakeholders. It was not appropriate to conduct statistical analyses on this data due to the small sample sizes. Rather, a descriptive analysis process was undertaken, which involved reviewing all of the data gathered and identifying common themes. It is reported in narrative form throughout the Report.
Difficulties in Evaluating the Pre-Action Protocols

1.54. A number of difficulties in evaluating the Pre-Action Protocols have stemmed from the small pool of matters that progressed into the court system. This resulted in the project being initially ‘paused’ to enable a larger pool of court cases to be examined. Another issue is that matters that resolve as a result of pre-action requirements are unlikely to enter into the court system. This means that researchers needed to rely on lawyers and insurers to inform them about the use of the pre-action requirements. Initial methodologies were perceived to place too ‘heavy’ a survey load on insurers with a risk that many lawyers and other professionals may not respond to either survey or interview requests. The jurisdictional changes that were introduced in 2014 also made it difficult to determine if some matters were simply being dealt with at a lower jurisdictional level (although court filings do not support this proposition) (see 1.24 and 2.48.).

1.55. It is also noted in this Report that there may have been non-compliance with the Protocols (Chapter 7) and this may have meant that legal and other professionals were less likely to voluntarily be involved in a survey process. The small response from barristers (to the general online survey) was particularly disappointing and may be the result of cultural perception among lawyers and some others that pre-action and ‘early’ Alternative Dispute Resolution (ADR) processes will result in a reduction in revenue. It may also be the result of barristers being less often involved at the pre-action stage in South Australia. Here, the researchers also note that some research participants indicated that the other Rule 33 pre-action protocol (see 2.16.), which continues for all other matters, is rarely enforced because it only has sanctions after a trial. It was suggested that there is no existing culture of compliance and no expectation of judicial management of compliance.

1.56. By far the most significant issue related to the lack of data prior to the Protocols being introduced, and the problems associated with how the terms ‘medical negligence’ and ‘construction’ disputes are defined and recorded by the courts. Observations from judicial officers and the findings made by the District Court (see 1.28.-1.30.) suggest that misdescription by plaintiffs commencing proceedings (for example a construction dispute being described by parties as contract or debt or arising as a counter claim) is common. This restricts access to data and also diverts such cases from compliance with Pre-Action Protocols. Hopefully the data in this Report will result in at least some point in time data being made available and will also highlight the need to track such data through case management definitions into the future. In this regard it is noted that the South Australian courts have been working to improve case management data over the coming years.
Chapter Two – Introduction to Pre-Action Requirements

What are Pre-Action Requirements?

2.1. In this Project, the expression ‘pre-action requirements’ has been interpreted to include requirements that oblige a party to take or consider undertaking certain actions that can promote the resolution or management of a dispute before court or tribunal proceedings are commenced. Pre-action requirements can arise as a result of agreement, legislation, protocols or other regulatory requirements, and as noted in the Australian Law Reform Commission Report, *Discovery in Federal Courts*,¹ they can include a broad spectrum of procedural requirements, including:

- the need to disclose information or documents in relation to the cause of action;
- the need to correspond, and potentially meet, with the person or entity involved in the dispute;
- undertaking, in good faith, some form of alternative dispute resolution (ADR); and
- conducting genuine and reasonable negotiations with a view to settling without recourse to court proceedings.²

2.2. There is great variation in the way in which these requirements work. For example, pre-action requirements can differ according to whether or not they are linked to formal infrastructure or a scheme; whether or not they are linked to court or tribunal processes; and whether they strictly require parties to arbitrate, conciliate, mediate or use some other ADR process, or simply require consideration of ADR. This Chapter considers the range of pre-action approaches that might be employed and provides examples of those that have been used recently in Australia and the United Kingdom. It also outlines the new pre-action protocols operating in South Australia in relation to medical negligence and construction disputes, which are the subject of this Report.

---

Pre-Action Approaches

Heavy-Touch Arrangements

2.3. Pre-action requirements may be broadly categorised as ‘light’, ‘heavy’ or ‘medium touch.’ ‘Heavy touch’ arrangements include those pre-action requirements that are supported by some formal infrastructure or a scheme, or which impose strict dispute resolution or conduct requirements on parties. These arrangements may be set up via legislation or industry-specific regulatory requirements. They may also be set out in contractual agreements that require disputants to use a form of ADR before commencing court proceedings (this is often the case in the commercial and construction areas).

2.4. In Australia, the largest pre-action scheme that requires mandatory attendance by disputants in a dispute resolution process, and that is supported by a significant infrastructure, operates in the family dispute area. It has been set up via legislation. From 2006, initiatives were phased in under the Family Law Act 1975 (Cth) and Family Law Rules 2004 (Cth). They represented a significant change in family law and were heralded as a ‘key change to encourage a culture of agreement making and avoidance of an adversarial court system.

2.5. The 2006 amending Act requires compulsory dispute resolution, pursuant to Subdiv E of Div 1 of Pt VII of the Family Law Act. Section 60I provides for compulsory attendance at family dispute resolution in relation to parenting disputes prior to lodging an application with the court in a range of circumstances. This requirement is subject to certain exceptions, for example, where there is urgency, family violence or the abuse of a child and where delay could have a negative impact.

2.6. The retail lease dispute resolution schemes that operate in both New South Wales and Victoria, Australia, are ‘heavy-touch’ arrangements that have been set up via legislation. For example, in May 2003, the Office of the Victorian Small Business Commissioner (VSBC) was established under the Small Business Commissioner Act 2003 (Vic) to promote greater fairness in business by providing information and education; reviewing government practices; investigating small business complaints; and conducting dispute resolution. The VSBC mediates matters under the Retail Leases Act 2003 (Vic), which requires ‘alternative dispute resolution for retail tenancy disputes’. Issuing proceedings in the Victorian Civil and Administrative Tribunal (VCAT) requires the VSBC to certify in writing that:

... mediation or another appropriate form of alternative dispute resolution under this Part has failed, or is unlikely, to resolve it.

---

4 Ibid XI.
6 See Sourdin, above n 3, 58.
7 Ibid 18-9.
9 Retail Leases Act 2003 (Vic) s 87.
10 Ibid.
2.7. Further, the Retail Leases Act 2003 (Vic) provides that:

If a respondent (or an applicant) declines to participate in mediation, the Small Business Commissioner may issue a certificate under section 87(1) of the Act to the effect that mediation is unlikely to resolve this dispute. The applicant (or respondent) may then present the certificate to the Victorian Civil and Administrative Tribunal (VCAT). It is important to note, however, that section 92(2) of the Act gives VCAT the power to order any party that refuses to take part in a mediation to pay the costs of the other party.11

2.8. Finally, members of certain industries, such as banking, insurance and finance, are required to participate in External Dispute Resolution (EDR) schemes as a result of regulatory and contractual requirements.12 These schemes impose mandatory obligations on ‘members’, but not ‘consumers’; often, the relevant scheme must be used to attempt to resolve disputes before court and tribunal proceedings can be commenced. Examples include the Financial Ombudsman Service, the Telecommunications Industry Ombudsman and the .au Dispute Resolution Policy (auDRP).

2.9. These arrangements are often funded by a cooperative of industry members. Their purpose is to provide low-cost (or free), effective and relatively quick means of resolving consumer complaints to businesses about products and services. They do not usually deal with internal disputes or disputes between businesses and contractors, suppliers, or other business entities.13

Light-Touch Arrangements

2.10. The term ‘light touch’ is used to describe those pre-action requirements that do not create an infrastructure or strict dispute resolution requirements. Rather, these arrangements adopt a ‘do it yourself’ approach, whereby requirements are set out and disputants organise their own compliance.14 This approach emerged in response to the articulation at a policy and government level of a broad view of justice that suggests disputants should attempt to discuss or resolve differences before they commence court proceedings.15 It is predicated on the assumption that disputants are able to make dispute resolution arrangements to suit their own circumstances outside of courts, tribunals and schemes, and on the reality that most disputes are in fact resolved away from the court and tribunal system.16

2.11. ‘Light touch’ arrangements may be supported by professional ethical rules, legal services directions, model litigant or government requirements or may be incorporated into industry protocols.17 They may also be imposed by legislation. For example, the Civil Dispute Resolution Act 2011 (Cth) (CDRA) requires litigants in a range of civil disputes to file a ‘genuine steps’ statement that sets out how they attempted to resolve their dispute before commencing proceedings in the

---

13 Sourdin, above n 3, 43-5.
14 Ibid 40.
16 Sourdin, above n 3, 61.
17 Ibid XI.
Federal Court of Australia or the Federal Magistrates’ Court of Australia. The requirements in the ‘genuine steps statement’ are modelled on the recommendations in the National Alternative Dispute Resolution Advisory Council (NADRAC) report *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction.* Pre-litigation ADR is not required, although it may be encouraged by the indicators noted in section 4 of the CDRA. In other ‘light touch’ arrangements, the nature and extent of steps taken by disputants are not considered by courts and tribunals if litigation commences.

**Medium-touch Arrangements**

2.12. As would be expected, ‘medium touch’ arrangements are those that fall somewhere between the ‘light touch’ and ‘heavy touch’ approaches. Some court-designed protocols can be described as ‘medium-touch’, as they require potential litigants to take certain steps before commencing proceedings (such as to mediate or set out material that may later be used in litigation within specific time frames) and will be more closely supervised by the court if litigation is commenced.

2.13. The South Australian reforms that apply to medical negligence and construction disputes, and which are the subject of this Report, can be characterised as a ‘medium touch’ arrangement. They do not rely on a scheme or organisational approach. However, they do require parties to engage in either an agreed ADR process or some type of pre-action meeting if their dispute is not resolved via an exchange of letters. The reforms are discussed further below from 2.47.

**Pre-Action Requirements in Australia and the United Kingdom**

**Recent History of Pre-Action Requirements in Australia**

2.14. In the recent past, within most of Australia, pre-action requirements have tended to be linked to EDR schemes (discussed above at 2.8.), contract, or a particular class of litigant (for example, personal injury or workers’ compensation). They have not tended to be linked to court or tribunal arrangements. This can be contrasted with some overseas jurisdictions, such as England and Wales, where pre-action requirements that apply to nearly all litigants (subject to exemption categories) require close court supervision and monitoring during the litigation process.

2.15. However, in South Australia, pre-action requirements linked to court processes via court rules have been operating for many years and have undergone significant expansion since 1992. For example, rules requiring a pre-
action exchange of settlement claims and offers were initially confined to personal injury cases and were later extended to all claims for damages in September 2000.24

2.16. Today, parties to a monetary claim must in most instances attempt to reach a negotiated settlement of the dispute prior to court proceedings under Rule 33 of the Supreme Court Rules 2006 (SA) and Rule 33 of the District Court Rules 2006 (SA) (Rule 33 requirements).25 Plaintiffs must give the defendant or their insurer written notice containing an offer to settle within a stipulated timeframe before commencing action.26 The defendant or their insurer must respond to the notice in writing and advise of their acceptance of the plaintiff’s offer, make a counter offer or deny liability.27 When commencing action, the plaintiff must certify that they have complied with the requirements of Rule 33, and if not, explain why they have not.28 The Court may have regard to the parties’ compliance under Rule 33 and the terms of the relevant offers and responses in awarding costs.29 In the Magistrates Court, Rule 27(2) of the Magistrates Court (Civil) Rules 2013 (SA) requires that ‘[a] party must take genuine steps to resolve an action before it is commenced including considering the use of ADR.’ Rule 21A also requires a party to issue a pre-action notice of claim for personal injury actions prior to issuing proceedings in the Magistrates Court.

2.17. In other States, sector-specific legislation encourages would-be litigants to use courts as a last resort by requiring parties to participate in mediation or some other form of ADR before commencing court proceedings. Examples include the Retail Leases Act 2003 (Vic), which is discussed above at 2.6.-2.7.; the Farm Debt Mediation Act 1994 (NSW), which provides that mediation must occur before a creditor can take possession of property or other action under a ‘farm mortgage’; and the Farm Debt Mediation Act 2011 (Vic), which requires ‘... a creditor to provide a farmer with the option to mediate before taking possession of property or other enforcement action under a farm mortgage.’30

2.18. More recently, attempts have been made to extend additional pre-action obligations to broader categories of Federal and State disputes. The CDRA, which requires parties to file a “genuine steps” statement prior to the commencement of certain proceedings in the Federal Court and the Federal Circuit Court of Australia, is an example and is discussed above at 2.11.

2.19. In the Northern Territory, parties to disputes in the Supreme Court of the Northern Territory are urged to comply with a number of pre-action obligations

24 Ibid.
25 The rule is subject to certain exemptions, such as actions where urgent relief is sought, or where the plaintiff intends to seek an injunction to prevent the defendant from removing assets from the jurisdiction: Supreme Court Rules 2006 (SA) r 33(1); District Civil Supplementary Rules 2014 (SA) r 33(1). The new reforms, which are the subject of this report, also provide an exemption to this rule with respect to medical negligence and construction disputes: Supreme Court Civil Supplementary Rules 2014 (SA) r 8; District Civil Supplementary Rules 2014 (SA) r 8.
26 Supreme Court Civil Rules 2006 (SA) r 33(2); District Civil Supplementary Rules 2014 (SA) r 33(2).
27 Supreme Court Civil Rules 2006 (SA) r 33(4); District Civil Supplementary Rules 2014 (SA) r 33(4).
28 Supreme Court Civil Rules 2006 (SA) r 33(6)(a); District Civil Supplementary Rules 2014 (SA) r 33(6)(a).
29 Supreme Court Civil Rules 2006 (SA) r 33(7); District Civil Supplementary Rules 2014 (SA) r 33(7).
set out in Part 2 of Practice Direction No 6 of 2009 (PD6). Part 2 of PD6 stipulates that ‘[p]arties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation’. Parties are encouraged to consider whether alternative dispute resolution would be more suitable than litigation. Failure to comply with these pre-action obligations can impact the determination of costs.

2.20. Attempts to introduce extensive and far reaching pre-action requirements in New South Wales and Victoria have been largely unsuccessful. In New South Wales, legislative amendments made in 2010 were postponed and then subsequently repealed by the Courts and Other Legislation Amendment Act 2012 (NSW). In Victoria, a ‘reasonable steps’ obligation was enacted in the Civil Procedure Act 2010 (Vic). It was articulated as part of the broader scheme relating to civil procedure reform and linked to the overarching obligations that bind courts, lawyers and litigants to a more ‘reasonable’ standard of behaviour. Initially, more extensive pre-action obligations required prospective litigants to take steps, exchange material and documents, and consider dispute resolution options. These obligations were repealed in 2011 following a change of government. However, the remaining changes have enabled courts to make rules relating to pre-litigation requirements. In addition, the legislation still requires parties to certify that they have ‘read and understood the overarching obligations and the paramount duty.’

2.21. Finally, it should be noted that all Australian jurisdictions, with the exception of Tasmania, have implemented overarching obligations in their civil procedure legislation. The ACJI’s Timeliness Report noted that:

Within the court and tribunal system, extensive overarching obligations that support timely dispute resolution have been introduced as a way of supporting behavioural change.

2.22. Although these are not traditionally viewed as ‘pre-action obligations’, in recent years there has been consideration of whether the overarching obligations can apply to disputants before proceedings are issued.

31 Supreme Court of the Northern Territory, Practice Direction No 6 of 2009 – Trial Civil Procedure Reforms pt 2 s 4.
32 Ibid pt 2 s 11.
33 Ibid ss 11, 13.
34 Civil Procedure Act 2010 (Vic) s 41(1).
35 See Federal Court of Australia Act 1976 (Cth) s 37M; Court Procedure Rules 2006 (ACT) r 21; Civil Procedure Act 2005 (NSW) s 56; General Rules of Procedure in Civil Proceedings 1987 (NT) r 1.10; Uniform Civil Procedure Rules 1999 (Qld) r 5; Supreme Court Civil Rules 2006 (SA) r 3; Civil Procedure Act 2010 (Vic) s 7; Rules of the Supreme Court 1971 (WA) r 4B. There are also international examples of obligations, such as Civil Procedure Rules 1998 (UK) and Federal Rules of Civil Procedure 28 USC (2011).
Pre-Action requirements for Personal Injury and Construction Disputes

Personal Injury

2.23. Personal injury disputes, particularly those that relate to employment and motor vehicle accidents, are commonly dealt with through schemes that involve a dedicated infrastructure and organisation. For example, in New South Wales, WorkCover claims are dealt with according to the WorkCover scheme, which is governed by the *Workers Compensation Act 1987* (NSW) and the *Workers Injury Management and Workers Compensation Act 1998* (NSW). The legislation requires various tiers of review such that very few matters are ever referred to a court. After initial reviews, some disputes are referred to conciliation (conducted by telephone) and then arbitration with limited rights to appeal. Other matters may be referred to a medical panel. WorkCover disputes are also subject to extensive pre-action schemes in Victoria, the Northern Territory, Queensland and Western Australia.\(^{38}\)

2.24. Further, in New South Wales, motor accident claims are dealt with according to the *Motor Accidents Compensation Act 1999* (NSW) (MACA), which formally introduced ADR into the Motor Accident Scheme by providing the framework and defining the jurisdiction for the Claims Assessment and Resolution Service (CARS) and the Medical Assessment Service (MAS). It established CARS and MAS as functions of the Motor Accidents Authority (MAA), the scheme regulator. Other pre-action schemes operate in relation to disputes arising out of motor accidents in Victoria, the Northern Territory and Queensland.\(^ {39}\)

2.25. In Queensland, the *Personal Injuries Proceedings Act 2002* (Qld) (PIPA) contains a pre-action obligation scheme for personal injury proceedings. The main purpose of the PIPA is to ‘assist the ongoing affordability of insurance through appropriate and sustainable awards of damage for personal injury.’\(^ {40}\) It sets out an array of pre-action obligations, including notification and response timeframes, disclosure requirements and compulsory conferences.\(^ {41}\)

2.26. In contrast, in the Northern Territory, the pre-action requirements that relate to personal injury disputes (as well as other civil disputes) arise out of the Northern Territory Supreme Court Practice Direction 6 of 2009 (PD6). As noted above at 2.19., the Practice Direction requires parties to civil proceedings commenced by writ to enter into procedures aimed at resolving the dispute before litigation and to consider conducting appropriate forms of ADR.

2.27. Notably, the new South Australian reforms that apply to medical negligence disputes do not rely on a scheme or organisational approach.

---

\(^{38}\) See the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Return to Work Act* (NT); *Workers’ Compensation and Rehabilitation Act 2003* (Qld); *Workers’ Compensation and Injury Management Act 1981* (WA).

\(^{39}\) See the *Transport Accident Act 1986* (Vic); *Motor Accidents (Compensation) Act* (NT); *Motor Accident Act 1994* (Qld).

\(^{40}\) *Personal Injuries Proceedings Act 2002* (Qld) s 4(1).

\(^{41}\) See ibid ch 2 pt 1; see also the commentary in *Broadhead v The State of Queensland* (2006) QDC 273.
Chapter Two – Introduction to Pre-Action Requirements

Construction

2.28. Extensive construction industry ‘security of payment’ schemes, which impose significant pre-action obligations on disputants, exist in New South Wales, Victoria, the Northern Territory, Queensland and Western Australia. For example, the relevant scheme imposed in New South Wales is governed by the Building and Construction Industry Security of Payment Act 1999 (NSW) (BCISPA NSW). The scheme applies to commercial construction contracts and residential construction contracts where the construction is more than four stories in height, as opposed to residential construction contracts covered by the Home Building Act 1989 (NSW). The purpose of the legislation is to ensure that construction workers and suppliers of related goods and services are entitled to receive and able to recover progress payments for their work. The BCISPA NSW sets out a procedure for recovering progress payments. Under this procedure, the claimant serves a ‘payment claim’ on the respondent, specifying the work relating to the progress payment and the claimed amount. The respondent may reply to the claim with a payment schedule specifying the respondent’s proposed amount of payment.

2.29. Failure to provide a payment schedule results in liability to pay the claimed amount. Where the respondent either fails to provide a payment schedule or does not pay the amount specified in the payment schedule, the claimant can either apply for ‘adjudication’ or commence proceedings. If the claimant has not performed their pre-action obligations but commences proceedings under the Act, a court cannot make a judgment in their favour. In court proceedings commenced under the Act, the respondent cannot bring a cross-claim against the claimant and cannot raise a defence in relation to matters arising under the construction contract.

2.30. Again, it is notable that the 2014 Pre-Action Protocols that operate with respect to construction disputes in South Australia operate via court rules and do not rely on a scheme or any dedicated organisational approach.

The United Kingdom

2.31. Pre-action protocols were implemented in the UK in 1999, following Lord Woolf’s Access to Justice Report of 1996. Unlike many of the Australian reforms,

---

44 Ibid s 3(1).
46 Ibid s 13.
47 Ibid ss 14(1)-(2).
48 Ibid s 14(4).
49 Ibid ss 15-16.
50 Ibid ss 15(4)(a), 16(4)(a). Note, however, that the applicant could proceed to sue in contract or in quantum meruit rather than under the Act and would not be precluded from obtaining a final judgement without having complied with the pre-action protocols set out in the Act.
51 The Act does not purport to circumscribe contractual or other defences or cross claims: see ss 32, 34.
52 Ibid ss 15(4), 16(4).
the UK reforms have been fostered by the courts and are often grafted onto broader civil procedure requirements.

2.32. The current UK pre-action protocols form part of the *Civil Procedure Rules* and apply to proceedings in the County Court, High Court and Civil Division of the Court of Appeal. There are a range of specific protocols that apply to particular kinds of disputes. These arrangements vary considerably, with some protocols imposing strict timelines while others operate as a ‘good practice guide.’ For example, the *Pre-Action Protocol for Personal Injury Claims* ‘sets out conduct that the court would normally expect prospective parties to follow’, including processes and timetables for disclosure, exchange of letters of claim and the conduct of pre-action negotiations. The court has the power to impose sanctions for non-compliance with the Protocol. On the other hand, the ‘lighter touch’ *Pre-Action Protocol for Disease and Illness Claims* states that:

> This protocol is not a comprehensive code governing all the steps in disease claims. Rather it attempts to set out a **code of good practice** which parties should follow.

2.33. In addition, a general *Practice Direction Pre-Action Conduct and Protocols* (Practice Direction) contains provisions that apply to all disputes, and covers disputes that do not fall within any of the specific protocols. The Practice Direction came into force on 6 April 2015, replacing the *Practice Direction-Pre-Action Conduct*. Its objectives are articulated as follows:

> Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—

(a) understand each other’s position;
(b) make decisions about how to proceed;
(c) try to settle the issues without proceedings;
(d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
(e) support the efficient management of those proceedings; and
(f) reduce the costs of resolving the dispute.

2.34. Paragraph 6 of the Practice Direction requires claimants to write a letter to the defendant containing the precise details of the claim. The claimant may wish to identify a suitable ADR process in the letter; however, the Practice Direction does not specifically require this. The defendant must respond to the claimant’s letter within a reasonable time. Disclosure requirements also apply to both parties. In terms of compliance, the Practice Direction states that:
If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party’s silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.  

2.35. Although the Practice Direction does not mandate the use of ADR, it states that parties should consider whether ADR might assist in the settlement of the dispute without proceedings. The Practice Direction states that litigation should be a last resort. 

2.36. Lord Justice Jackson considered the efficacy of the specific and general protocols in his 2009 Review of Civil Litigation Costs (see 2.46. and 4.7.).

Issues Relating to Pre-Action Requirements

Pre-Action Requirements, Access to Justice and the Role of the Courts

2.37. As noted in Chapter 1, pre-action requirements are becoming an area of increasing focus in justice reform, often linked to the justice innovation and access to justice agenda. In 1996, Lord Woolf reported on the inadequacies of the United Kingdom’s justice system, stating that:

[i]t is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant.

2.38. These concerns are shared by a number of other common law jurisdictions, including Australia, where much work had been done towards refining the core principles of access to justice. A particular emphasis has been placed on reducing cost and delay in the legal system. In this regard, pre-action obligations have often been regarded as a key tool that may assist in reducing delay in the court system.

2.39. However, reforms have raised concerns among some commentators that ADR may threaten or impinge upon the role and status of judicial adjudication and

---

65 Ibid [8].
66 Ibid [8].
courts. For example, some are concerned that access to the courts may be compromised by the creation of pre-action requirements that may actually increase the levels of cost and delay experienced by litigants. There is also at times some negativity about ADR in general and concern that eroding access to the courts could impact on the role of courts and the rule of law. It has been noted that:

Members of the judiciary have mostly played a key role in introducing and institutionalising ADR processes within and without courts and tribunals. Some have opposed the introduction of ADR and have viewed its relationship to courts and tribunals as a relationship that usurps traditional judicial activity and has the potential to conceal conflict.

2.40. On the other hand, it can be argued that the imposition of pre-action obligations could be viewed as a consistent extension of the behavioural obligations that increasingly require litigants and others within the court system to behave reasonably and are linked to general or overarching objectives usually within civil procedure reforms (discussed above at 2.21.-2.22.).

Civil Procedure Reform or Stand-Alone Legislation?

2.41. One key issue relates to the way in which pre-action requirements have been implemented. As has been discussed throughout this Chapter, some pre-action requirements have resulted from consultation and leadership within the courts. Others have arisen as the result of civil procedure reform or have been incorporated or promulgated in stand-alone legislation. There may be some benefits in dealing with pre-litigation requirements through a series of overarching requirements in civil procedure legislation. However, stand-alone legislation may be more beneficial due to its ability to create a specific and cohesive framework for the pre-action area.

2.42. In terms of the impact of the different approaches there is limited information. However, it has been noted that the stand-alone approach taken at the Federal level has neither produced satellite litigation nor caused any enduring concern amongst the profession. Moreover, the legislation may have led to the resolution of some disputes and aided in the management of others.

---

72 See Productivity Commission of Australia, above n 12, 75.
74 See Sourdin, above n 37, 191-208.
Are Pre-Action Requirements Effective?

2.43. Pre-action requirements are ‘designed to lower costs, encourage cooperation between disputants, and avoid litigation wherever possible.’ However, as suggested above, some commentators are concerned that pre-action requirements can limit access to the courts and increase time and costs when matters do not resolve or where significant costs are ‘front loaded.’ There is also concern that disputants may reach a compromise without adequate legal advice or that, because commencing legal proceedings is too expensive or too difficult, they may be unable to exercise their legal rights.

2.44. These concerns have been explored in a number of reports which suggest that in most areas where pre-action requirements are in place a large number of matters resolve before court entry with significant time and cost savings.

2.45. For example, in 2012, the Australian Institute of Judicial Administration published the ACJI’s report on Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts. It reviewed the Retail Lease Scheme in Victoria; the Supreme Court of the Northern Territory’s Practice Direction 6 of 2009 (PD6); and general perceptions about pre-action requirements, particularly in relation to ‘light-touch’ arrangements such as the CDRA. In relation to first two case study areas, the arrangements were found to be effective ‘in that disputes are resolved, and the resolution and processes are mostly regarded as procedurally fair and just.’ The instances in which the requirements appeared to work ‘less well’ were linked to poor disputant behaviour or instances in which urgent relief was required. In considering the use of pre-action requirements outside these focus areas, the Project reviewed a significant amount of material that supported similar types of findings in respect of other areas where schemes exist (for further discussion of the report’s findings in relation to timeliness, see 3.10.-3.12.).

2.46. The Productivity Commission’s 2014 Access to Justice Arrangements Inquiry Report acknowledged the potential efficacy of imposing pre-action requirements. The report highlighted the adversarial nature of the justice system as a hindrance in relation to the timely resolution of disputes. The Commission proposed that this problem could be addressed by pre-action protocols, which, ‘if well targeted [to certain specific types of disputes], and accompanied by strong judicial oversight, can help resolve disputes early by narrowing the range of issues in dispute and facilitating ADR.’ It referred to

---

78 Sourdin, above n 3, 2; see, e.g., NADRAC, above n 18, 28, citing Roundstone Nurseries Ltd v Stephenson Holdings Ltd [2009] EWHC 1431 (TCC) [1]; Senate Standing Committees on Legal and Constitutional Affairs, Legislation Committee, Parliament of Australia, Civil Dispute Resolution Bill 2010 (2010) ch 3.
79 Sourdin, above n 3, 2; see, e.g., Senate Standing Committees on Legal and Constitutional Affairs, Legislation Committee, n 44, ch 3.
80 Sourdin, above n 3.
81 Sourdin, above n 22,35-36; Sourdin, above n 3, 99.
82 Sourdin, above n 3, 147; Sourdin, above n 22, 35-36.
83 Ibid.
84 Productivity Commission of Australia, above n 12.
85 Ibid 37.
86 Ibid 16.
submissions made to the inquiry and other findings that have been made in relation to a range of pre-action schemes, including:

- A submission made by Legal Aid NSW which considered that:
  
  Pre-action requisites in family law are effective at screening matters prior to court. Legal Aid NSW Family Law service model makes an important contribution to resolving disputes earlier by filtering clients from advice clinics into mediation and where appropriate diverting clients from court;\(^7\)

- A submission made by the National Alternative Dispute Resolution Advisory Council (NADRAC) which reported that pre-action requirements developed by Victoria’s Transport Accident Commission (TAC) to deal with no-fault dispute resolution had reduced the number of matters that needed a final determination in a court or tribunal; and

- Lord Justice Jackson’s 2009 findings in relation to pre-action protocols that have been used in the United Kingdom since 1999 (see 2.31.-2.36.), which said that protocols targeted at specific types of dispute serve a useful purpose, but that general requirements which apply to all cases within a certain jurisdiction could result in substantial delay and extra costs (see further 4.7.).\(^8\)

2014 Pre-Action Requirements in South Australia

Context of Reform

2.47. As noted above at 2.15, pre-action requirements created via court rules have existed for many years in South Australia. They have also existed as part of external schemes in the equal opportunity, consumer, WorkCover and motor vehicle accident areas for some time.

2.48. The recent pre-action reforms that are being examined in this Report form part of a broader reform agenda in South Australia, which is aimed at improving the speed and affordability of civil litigation.\(^9\) The implementation of these new protocols was preceded by jurisdictional changes in July 2013, which lifted the Magistrates Court jurisdiction from $40000 to $100000 and the Minor Civil jurisdiction from $6000 to $25000.\(^10\) This is significant because it means that many matters that might have progressed to the higher courts (where the new pre-action protocols apply) would now be more likely to commence in the Magistrates Court.

2.49. The reforms were also brought in at the same time as the Supreme and District Court Fast Track Stream (FTS) in October 2014.\(^11\) Under this scheme, simple claims for $250000 or less, which are expected to take less than three days’ trial, can be transferred into the FTS. Within the scheme, it is expected that

---

88 Productivity Commission of Australia, above n 12, 425.
90 Ibid.
91 Ibid.
there will only be two interlocutory hearings and applications can be made without affidavits. It is designed to bring matters to trial more quickly and cheaply and to ‘give a fast track trial judge greater flexibility to determine how a trial is conducted.’ However, the researchers note that participants in this research indicated that the Fast Track Scheme has probably not been used. It also coincided with changes to listing procedures in the District Court that meant trial dates could be obtained within months, rather than years. This solved much of the problem that the Fast Track Stream was intended to address and avoids the detriment of the legal fee recovery controls that are linked to the Fast Track scheme.

The Reforms

2.50. The new pre-action requirements contained in the Supplementary Rules replace the Supreme and District Court Rule 33 requirements (discussed above at 2.16.) with more extensive and clearly articulated requirements in relation to medical negligence and construction disputes.

2.51. Construction disputes are regulated by Subdivision 2, Chapter 3 of the Supreme Court Civil Supplementary Rules 2014 (SA) and Subdivision 2, Chapter 3 of the District Court Civil Supplementary Rules 2014 (SA). These rules indicate that before a claimant can initiate proceedings in the District or Supreme Courts of South Australia, they must send a letter of claim to the respondent or the respondent’s insurer. The claim must include an offer to resolve the dispute and propose a date and venue for a pre-action meeting. If the offer is not accepted, the respondent must provide a letter of response with reasons for the response or any counter offer within 21 calendar days after receiving the letter of the claim. If the parties do not reach an agreement through this exchange of letters, they must attend a pre-action meeting.

2.52. At any pre-action meeting parties meet to identify the main issues in dispute, how litigation may be avoided and where litigation is unavoidable, how it can be conducted efficiently and without delay. The pre-action meeting should be attended by each party or their representatives (including an insurer) and lawyers. If a claim has been made or defended on behalf of another party, the other party and/or their lawyer must also attend the pre-action meeting. During this meeting the lawyers will attempt to reach an agreement as to the

---

92 Ibid.
93 Ibid.
94 Supreme Court Civil Supplementary Rules 2014 (SA) r 17(1); District Court Civil Supplementary Rules 2014 (SA) r 17(1).
95 Supreme Court Civil Supplementary Rules 2014 (SA) rr 17(2)(h)-(i); District Court Civil Supplementary Rules 2014 (SA) rr 17(2)(h)-(i).
96 Supreme Court Civil Supplementary Rules 2014 (SA) r 18(1); District Court Civil Supplementary Rules 2014 (SA) r 18(1).
97 Supreme Court Civil Supplementary Rules 2014 (SA) r 20; District Court Civil Supplementary Rules 2014 (SA) r 20.
98 Supreme Court Civil Supplementary Rules 2014 (SA) r 20(1); District Court Civil Supplementary Rules 2014 (SA) r 20(1).
99 Supreme Court Civil Supplementary Rules 2014 (SA) rr 20(4)(a)-(b); District Court Civil Supplementary Rules 2014 (SA) rr 20(4)(a)-(b).
100 Supreme Court Civil Supplementary Rules 2014 (SA) r 20(4)(c); District Court Civil Supplementary Rules 2014 (SA) r 20(4)(c).
likely cost and time scale if the matter is litigated and any appropriate ADR procedure that could be employed.\textsuperscript{101}

2.53. If the parties cannot agree on a way to resolve the dispute other than litigation, they must attempt to agree on a number of procedural matters. These include whether expert evidence is likely to be required, the extent of document disclosure with a view to saving costs and the conduct of litigation with the aim of minimising costs and delay.\textsuperscript{102} If difficulty is anticipated, the parties should consider appointing an independent person to preside over the meeting.\textsuperscript{103} The cost of engaging this independent person is at the joint expense of both parties.\textsuperscript{104} Provision is also made for more than one pre-action meeting to be convened if necessary.\textsuperscript{105} The construction dispute pre-action obligations generally take parties three months to complete, however time can be reduced where parties conduct themselves efficiently.\textsuperscript{106}

2.54. Medical negligence disputes are regulated by Subdivision 3, Chapter 3 of the Supreme Court Civil Supplementary Rules 2014 (SA) and Subdivision 3, Chapter 3 of the District Court Civil Supplementary Rules 2014 (SA). The Protocols require a medical negligence claimant to send the respondent a notice of potential claim as soon as reasonably practicable after the claimant becomes aware of the potential claim.\textsuperscript{107} The respondent must send the claimant an interim response, so far as possible, within 28 days, and a full response within 60 days.\textsuperscript{108} Then, before commencing an action, a claimant must send the respondent or their insurer a letter of claim containing an offer to resolve the dispute and a proposed ADR process and timetable.\textsuperscript{109}

2.55. If the respondent does not accept their offer, they must send a letter of response to the claimant, including a response to the proposed ADR timetable, within 30 days.\textsuperscript{110} Where the matter is not settled through this exchange, but the parties agree on ADR, ADR must be attended within 60 days of the letter of response.\textsuperscript{111} If the parties do not agree on the form and details of ADR, they

\textsuperscript{101} Supreme Court Civil Supplementary Rules 2014 (SA) r 20(2); District Court Civil Supplementary Rules 2014 (SA) r 20(2).
\textsuperscript{102} Supreme Court Civil Supplementary Rules 2014 (SA) r 20(6); District Court Civil Supplementary Rules 2014 (SA) r 20(6).
\textsuperscript{103} Supreme Court Civil Supplementary Rules 2014 (SA) r 20(3); District Court Civil Supplementary Rules 2014 (SA) r 20(3).
\textsuperscript{104} Supreme Court Civil Supplementary Rules 2014 (SA) r 20(3); District Court Civil Supplementary Rules 2014 (SA) r 20(3).
\textsuperscript{105} Supreme Court Civil Supplementary Rules 2014 (SA) r 20(1); District Court Civil Supplementary Rules 2014 (SA) r 20(1).
\textsuperscript{107} Supreme Court Civil Supplementary Rules 2014 (SA) rr 23, 25(1); District Court Civil Supplementary Rules 2014 (SA) rr 23, 25(1).
\textsuperscript{108} Supreme Court Civil Supplementary Rules 2014 (SA) r 24(1); District Court Civil Supplementary Rules 2014 (SA) r 24(1).
\textsuperscript{109} Supreme Court Civil Supplementary Rules 2014 (SA) r 25(1)-(2); District Court Civil Supplementary Rules 2014 (SA) r 25(1)-(2).
\textsuperscript{110} Supreme Court Civil Supplementary Rules 2014 (SA) r 26; District Court Civil Supplementary Rules 2014 (SA) r 26.
\textsuperscript{111} Supreme Court Civil Supplementary Rules 2014 (SA) r 27(1); District Court Civil Supplementary Rules 2014 (SA) r 27(1).
must attend a pre-action meeting (as described above at 2.52) within 30 days of the letter of response.112

2.56. A party to a construction or medical negligence dispute may be excused from complying with the obligations where the claimant seeks urgent relief, seeks a freezing order or where a claim is about to become time-barred or adversely affected by the passage of time.113 Certain construction disputes, such as the enforcement of a binding determination, are also exempted.114

Application to Construction and Medical Negligence Disputes

2.57. Construction and medical negligence disputes were selected as appropriate areas for the pre-action obligation extensions. The reasons for this are probably linked to the legal profession and judicial inputs into the reform approaches adopted in South Australia. For example, during a Productivity Commission Public Hearing in South Australia, a representative from the South Australia Bar Association explained that:

...if they [construction disputes] go off the rails [they] are terrible, so there is a serious impetus to get at it early and to have a structure for getting at it early and it’s a rich area for disputes, and also because in our jurisdiction there are a relatively small number of people that practice in that area, so the chances of getting them to abide by a protocol is high.115

2.58. With regards to medical negligence, one representative stated:

In medical negligence it’s slightly different and one of the reasons we chose that was because there are probably only one or two insurers and we engaged them in the process as well as plaintiffs and we’re rather hoping that they will collect private data about the effectiveness of the pre-action protocols’.116

2.59. Other commentators117 have also explained why these kinds of disputes may be particularly suited to regulation by pre-action obligations or ADR in general.

Construction Disputes

2.60. In relation to construction disputes, it has been noted that:

Construction disputes often involve specialised technical issues that must be reconciled with industry-specific contractual arrangements and terms. Evidentiary issues surrounding scope of work and performance-related matters also commonly prolong interlocutory and trial processes, resulting in greater expense to parties and strain on court resources. Reasons for this

112 Supreme Court Civil Supplementary Rules 2014 (SA) r 27(2); District Court Civil Supplementary Rules 2014 (SA) r 27(2).
113 Supreme Court Civil Supplementary Rules 2014 (SA) r 11(1); District Court Civil Supplementary Rules 2014 (SA) r 11(1).
114 Supreme Court Civil Supplementary Rules 2014 (SA) r 16(2); District Court Civil Supplementary Rules 2014 (SA) r 16(2).
116 Ibid 480.
include a regular need for complex and detailed expert evidence, voluminous
disclosure emanating from a highly administrative industry and in some cases,
a need to explain technical matters to judges who, understandably, might not
be fully cognisant of practical construction issues.\textsuperscript{118}

2.61. It has also been noted that the cost burden of construction disputes can be
disproportionate to their value.\textsuperscript{119} Finally, construction disputes can benefit from
alternative dispute resolution in two key ways. First, alternative dispute
resolution enables settlement by industry expert facilitators or decision makers,
as opposed to a judge.\textsuperscript{120} Second, alternative dispute resolution may assist in
maintaining business relationships, which are especially important in the
interconnected construction industry.\textsuperscript{121}

Medical Negligence Disputes

2.62. Medical negligence disputes can involve potentially catastrophic, physically
and mentally debilitating consequences for plaintiffs who may be left confused
and alienated in terms of what happened and why they were injured.\textsuperscript{122} Such
disputes can be psychologically and personally distressing for the health care
professionals involved, who face challenges to their reputation, competence and
ethic of patient care.\textsuperscript{123} It has been said that the dispute finalisation process can be
captured by an adversarial legal process, whereby medical insurers, plaintiff
litigators, and/or hospital administration take over claims and convert them to
‘zero sum game[s] of evidence, proof, compensation tables, and legal
strategy.’\textsuperscript{124} This can leave plaintiff goals unmet and increase feelings of isolation
and disempowerment. Healthcare professionals may also feel unsupported and
unheard, and unable to meet their primary responsibility as patient carers.
Communication between key stakeholders may also breakdown as disputes
transform into ‘polarising arguments about blame and money.’\textsuperscript{125}

Concerns

2.63. Prior to the introduction of the SA protocols and despite the success of pre-
action requirements in a range of other jurisdictions in areas including medical
negligence and construction disputes, concerns were raised about whether pre-

\textsuperscript{118} Thomas, above n 117, 10.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
\textsuperscript{121} Ibid.
\textsuperscript{122} Castles and Richards, above n 118, citing Thomas B Metzloff, Ralph A Peeples and Catherine T Harris,
‘Empirical Perspectives on Mediation and Malpractice’ (1997) 60 Law and Contemporary Problems 107,
108.
\textsuperscript{123} Castles and Richards, above n 118, citing T Nakanishi, ‘Disclosing Unavoidable Causes of Adverse
Events Improves Patients’ Feelings Towards Doctors’ (2014) 234(2) Tohoku Journal of Experimental
Medicine 161.
\textsuperscript{124} Castles and Richards, above n 118, citing Tony Bogdanoski, ‘Medical Negligence Dispute Resolution: A
Role for Facilitative Mediation and Principled Negotiation’ (2009) 20 Australasian Dispute Resolution
Journal 77, 79.
\textsuperscript{125} Castles and Richards, above n 118, citing T Nakanishi, ‘Reading the Landscape of Disputes: What We Know and
Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society’ (1983) 4 UCLA
Law Review 25; Carol B Liebman ‘Medical Malpractice Mediation: Benefits Gained, Opportunities Lost’ (2011)
14 Law and Contemporary Problems 14; Marie Bismark and Edward A Dauer, ‘Motivations for Medico-Legal Action: Lessons from New Zealand’ 2006 27(1) Journal of
Legal Medicine 55, 58.
action requirements could increase time and cost in the early stages of disputes. There was also a concern about the extent to which parties would meaningfully participate in the processes set out in the new provisions. This Research Project was designed to explore each of these issues and to examine the effectiveness of the new pre-action obligations in the context of evaluations of other arrangements that have been noted throughout this Chapter. The remainder of this Report outlines the relevant findings.

126 See N Anderson, above n 89; Thomas, above n 117, 14.
127 Thomas, above n 117.
Chapter Three – Timeliness

Introduction

3.1. An important rationale behind the introduction of pre-action requirements in a range of jurisdictions relates to the saving of time and costs. With regards to time savings, it is thought that, by prompting earlier dispute resolution, more disputes will be resolved at an earlier time, and where disputes do not resolve during the pre-action stage, early engagement may assist parties to narrow the issues in dispute and enable litigation to progress more smoothly. In this regard, the SA Pre-Action Protocols were intended to ‘facilitate and encourage the resolution of civil disputes by agreement between the parties’ and ‘avoid all unnecessary delay in the resolution of civil disputes.’

3.2. Time savings can result in cost savings, particularly where disputes are resolved early, or where the narrowing of a dispute means that the same issues need not be repeatedly ventilated. More importantly, some research has suggested that faster dispute resolution times can have a positive impact on people by reducing stress and may also result in better medical outcomes (see 3.15.).

3.3. As noted previously, however, time and cost may not always be related. Pre-action requirements can at times result in the ‘front loading’ of costs. That is, costs are incurred at an earlier time and may be incurred needlessly if a dispute was likely to settle in any event. As a result, this Chapter more specifically considers time savings in the context of the SA Pre-Action Protocols and the next Chapter (Chapter 4) more specifically considers cost.

3.4. In assessing the efficiency of court and other dispute resolution process, ‘time’ is often used to describe short-term quantitative factors such as the time taken for a dispute to progress from a point of filing or referral to resolution within a court, tribunal or via an alternative dispute resolution process. It is for this reason that most court systems specify that a certain percentage of disputes be resolved within a certain period of time and it is intended that disputes be processed without delay.

3.5. While time standards are often used to measure timeliness, ‘time’ and ‘timeliness’ are not the same. ‘Timeliness’ is a much more complex and

---

1 District Court Civil Rules 2006 (SA) r 3; Supreme Court Civil Rules 2006 (SA) r 3.
subjective concept, which means that it may be defined differently by disputants, legal and other professionals, academics, court staff, administrators, judges and others.

3.6. The Australian Centre for Justice Innovation (ACJI) has noted that, within the relevant literature, ‘definitions of timeliness’ do not usually refer to objective statements about the meaning of timeliness. Rather, they tend to refer to elements of a process (often court and tribunal processes) and are usually linked to the imposition of time standards.\(^3\) However, in its 2013 Background Report, The Timeliness Project, the ACJI defines timeliness as the extent to which:

(a) those involved in the dispute and within the justice system consider that every opportunity has been taken to resolve the matter prior to commencing or continuing with court proceedings;

(b) processes are efficient and avoidable delay has been minimised or eliminated throughout the processes on the basis of what is appropriate for that particular category or type of dispute; and

(c) the dispute resolution process that has been used is perceived as fair and just and where adjudication within courts and tribunals has taken place, the outcome supports the rule of law.\(^4\)

3.7. This definition takes into account the fact that many disputants resolve their disputes before entering the court system and recognises that efficiency can be viewed from a range of perspectives that go beyond short-term quantitative factors such as the time taken from filing to resolution.\(^5\) It encourages consideration of the relationship between the dispute and the process used to resolve it, and the appropriateness of the latter to the former; the subjective experiences of the parties involved; and the objective fairness of the process itself as measured against the rule of law and other criteria. Finally, in this context, it recognises that ‘time’ is a relative concept and that the principle issue in dispute resolution is not the extent of delay, but its reasonableness.\(^6\)

3.8. In terms of ‘reasonableness’, this Chapter has reported on some issues linked to the reasonableness of the time taken to deal with disputes. In this regard, it is noted that in relation to some disputes it can be ‘reasonable’ for the dispute to take some time to be resolved. With respect to medical negligence disputes, this is particularly the case where an injury may take time to ‘settle’ or where a plaintiff is having ongoing treatment with an uncertain prognosis. In addition, where there are complex issues relating to liability, it is reasonable to expect that time will need to be taken to compile material and witness statements. On the other hand, a lengthy delay that is caused by the time taken to obtain expert reports may be ‘unreasonable’ under the circumstances.

---

\(^3\) ACJI, ‘The Timeliness Project’ (Background Report, ACJI, 2013) 11.

\(^4\) Ibid 14.


\(^6\) ACJI, above n 3, vii.
3.9. This Chapter considers the effectiveness of the Pre-Action Protocols in terms of time savings and from the perspective of timeliness. It considers past research as well as court file data, interview and online survey data.

**Past Research on Timeliness**

3.10. As noted in Chapter 2, some commentators have expressed concern that pre-action requirements can increase the time taken to resolve disputes, particularly where matters do not resolve. Yet, there is a significant body of research that suggests that in most areas where pre-action requirements are in place a large number of matters will resolve before court entry with significant time savings, and that pre-action arrangements can save time even where matters do not resolve.

3.11. In relation to timeliness, the ACJI’s *Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts* found that the Retail Lease Scheme in Victoria and the Supreme Court of the Northern Territory’s *Practice Direction 6 of 2009* (PD6) were very effective in saving time. This is partly because in many cases they resulted in a settlement without litigation being commenced. However, the material gathered also suggested that the arrangements could lead to cost and time savings even when litigation was commenced following the pre-action intervention. As noted in Chapter 2, the instances in which the requirements appeared to work ‘less well’ were linked to poor disputant behaviour or instances in which urgent relief was required.

3.12. The findings were limited by the nature of the arrangements in that the retail lease area had a relatively large sample of matters that were reviewed, and the Northern Territory explored a much smaller sample. However, the report also reviewed a significant amount of material that supported similar findings in respect of other areas where schemes exist. In relation to ‘light-touch arrangements’, the report noted that issues with compliance and court approaches as well as practitioner behaviours could limit the impact or success of such arrangements in terms of time savings. It was also noted that the time taken to resolve disputes or comply with pre-action requirements can vary considerably according to the nature of the arrangements that are in place, the nature of the dispute, the characteristics of the disputants, and other factors such as disputant and practitioner compliance.

3.13. As noted in Chapter 2, the Productivity Commission, relying on submissions made by Legal Aid NSW and NADRAC, for example, as well as past research on

---


8 Sourdin, above n 7.


10 Ibid.
pre-action requirements, has suggested that well-targeted pre-action requirements, accompanied by strong judicial oversight, can help resolve disputes early by narrowing the range of issues in dispute, facilitating ADR, and reducing adversarial behaviour that can hinder the timely resolution of disputes.\(^{11}\) (see 2.46.).

3.14. Finally, the ACJI’s 2015 Innovation Paper, *Improving Timeliness in the Justice System*,\(^{12}\) identified and examined a number of strategies to improve timeliness in the justice system. It noted that the high rate of resolution of civil disputes without the involvement of a judge suggests that most disputes could be resolved without court proceedings ever being commenced. Accordingly, it supported the expansion of pre-action obligations and highlighted the need for increased attention to be paid to this area.

3.15. Other research has considered the impact that delays in dispute resolution processes can have on disputants in terms of health and associated impact costs. For example, Grant et al have considered the stressful aspects of the process of seeking injury compensation under transport and workers’ compensation schemes and whether such stressful experiences are associated with poorer long-term recovery.\(^{13}\) The research involved a prospective cohort study of a random sample of 1010 patients hospitalized in three Australian states for injuries from 2004 through 2006. At the six-year follow-up, 332 participants who had claimed compensation from transport accident or workers’ compensation schemes (‘the claimants’) were interviewed to determine which aspects of the claiming experience they found stressful. 30.4% of claimants reported high levels of stress associated with claim delays. Further, the research found that ‘six years after their injury, claimants who reported high levels of stress had significantly higher levels of disability (+6.94 points, World Health Organization Disability Assessment Schedule sum score), anxiety and depression (+1.89 points and +2.61 points, respectively, Hospital Anxiety and Depression Scale), and lower quality of life (−0.73 points, World Health Organization Quality of Life instrument, overall item), compared with other claimants.’\(^{14}\) The researchers concluded that ‘the finding of an association between stress from process duration and health outcomes provides added impetus for schemes to strive to minimise delays in their handling of claims.’\(^{15}\)

---


\(^{14}\) Ibid 446.

\(^{15}\) Ibid 452.
Findings in Relation to Timeliness

Do the SA Pre-Action Protocols Reduce Time?

3.16. This section explores whether the SA Pre-Action Protocols increase or decrease the time taken to resolve disputes. A key question relating to this issue is whether matters are resolving during the pre-action stage due to the Pre-Action Protocols. Others include whether or not the Pre-Action Protocols:

- save time and promote the early resolution of disputes;
- promote the management of unresolved issues; and
- have other impacts, such as creating barriers to access or delaying the commencement of court processes.

Are Matters Resolving During the Pre-Action Stage? And Are They Resolving Due to the Pre-Action Protocols?

3.17. Views relating to the resolution of disputes during the pre-action stage differed amongst research participants. For example, many lawyers that participated in the December 2017 focus groups were not aware that many construction and medical negligence matters resolve before pre-action processes might even apply and that much of this settlement activity takes place through insurers. In addition, many believed that it is unusual for matters to resolve during the pre-action stage where the Pre-Action Protocols do apply: Most of the time you have to issue and have some sort of preliminary hearing or something in court. I think more often, they settle at the settlement conference or conciliation conference stage, rather than before.16

The more hotly contested matters, which are the ones in the DC and SC, usually get to the filing stage... it [the Pre-Action Protocols] doesn’t avoid the opening of files.17

3.18. Clearly, although some lawyers may consider that matters do not resolve pre-action, the reality is that most do. This was borne out in the preliminary focus groups conducted by Professor Sourdin in 2015. For example, one insurer in the construction area said that they deal with approximately 120-140 disputes per year. Of these, approximately 93% are resolved by internal conciliation processes. The other 7% go to ‘dispute reference’ (a more formal dispute resolution process that occurs after an agreement has failed to be reached by conciliation). Of the 7% that go to ‘dispute reference’, approximately 50% end up in court. This participant noted that this means that only five or six of the construction disputes they deal with per year end up in court. They also noted that, ‘generally, there is not big money involved... most of those would be under $100,000. If there is more than $100,000 involved, the builder generally tends to want to resolve it.’18

---

16 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
17 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
18 Comment at Construction Focus Group (Supreme Court of South Australia, 14 August 2015).
3.19. In addition, one medical negligence insurer explained that, while they might deal with 120 ‘claims’ per year, many of those claims are not litigated and are resolved before the Pre-Action Protocols would apply. They estimated that they would have less than 20 claims per year that would be worth over $100 000 and might become subject to the Pre-action Protocols.\(^\text{19}\)

3.20. Medical negligence lawyers that attended the preliminary focus group had difficulty estimating the number of matters likely to progress through the Pre-Action Protocol system per year. They agreed that it would be more than 10 but less than 200.\(^\text{20}\) They also noted that many complaints are likely resolved at the hospital level: ‘you might get a patient that goes along to the patient complaints person in the hospital and gets their complaint resolved in some way.’\(^\text{21}\) Other patients may go to through the Health Complaints Commissioner before they see a solicitor.

3.21. The difference in views may be partly attributed to lower value claims settling before they might become subject to pre-action requirements. However, there was also evidence that a number of higher value claims also resolve before pre-action requirements might be used (see 3.24.).

3.22. In terms of other material, the AIHW Report\(^\text{22}\) provided statistics relating to medical indemnity claims in the period 2012/13 (the last available date for which statistics are available). Basically, the data shows that, overall, only a small proportion of claims are ever litigated. The mode of claim finalisation data for the 2012/13 period shows that nearly half of all public sector medical indemnity claims were discontinued or settled before court proceedings were commenced (47.3%). The two most common finalisation modes were Discontinued (46%) and Settled—other (40%). Just a small proportion of public sector claims were settled through a Court Decision (3%). This is shown in Table 3.1.

\(^{19}\) Advisory Group Focus Group (Supreme Court of South Australia, 14 August 2015).

\(^{20}\) Medical Negligence Focus Group (Supreme Court of South Australia, 14 August 2015).

\(^{21}\) Comment at Medical Negligence Focus Group (Supreme Court of South Australia, 14 August 2015).

\(^{22}\) Australian Institute of Health and Welfare (AIHW), ‘Australia’s Medical Indemnity Claims 2012-13’ (Safety and Quality of Health Care Series No 15, AIHW, 2014).
Table 3.1: Mode of claim finalisation for closed public sector, states and territories (excluding Western Australia), 1 July 2012 to 30 June 2013

Source: Australian Institute of Health and Welfare (AIHW), ‘Australia’s Medical Indemnity Claims 2012-13’ (Safety and Quality of Health Care Services No15, AIHW).

3.23. In relation to the total public and private sector claims, 5,309 claims were closed during the period. Of these, only 4% were finalised through a court decision. 21% were finalised through negotiation and 75% were discontinued (which might also result from a negotiated settlement). 23 More than half did not result in proceedings ever being commenced.

3.24. There is also evidence that the claims that resolve before proceedings commence are not always ‘small.’ According to data on medical negligence matters, some that resolve are large and might otherwise progress to court. For example, the AIHW reported that, of the 5,309 claims closed during 2012/13, 180 claims (3%) were settled for over $500 000 and 622 claims (12%) were closed for $100 000 to less than $500 000. The proportion closed for $10,000 to less than $100,000 was 22% (1,174 claims). 63% (3,333) of claims closed for less than $10,000, including 13% (695 claims) closed for no cost. 24

3.25. Discontinuation was the most frequently recorded mode of finalisation for claims closed for no cost (667 of 695 claims, 96%) or for a cost of less than $50,000 (3,664 of 3,501 claims, or 88%). Discontinuation was less often recorded for claims closed for $100,000 or more (120 of 802 claims, or 15%). About 71% (572 of 802 claims) with a claim size of $100,000 or more were settled through

---

23 Ibid 51.
24 Ibid 50.
This data is summarised in Table 3.2.

Table 3.2: Total claim size ($) for closed claims, by mode of claim finalisation, public (excluding Western Australia) and private sector claims, 1 July 2012 to 30 June 2013

Source: Australian Institute of Health and Welfare (AIHW), ‘Australia’s Medical Indemnity Claims 2012-13’ (Safety and Quality of Health Care Series No15, AIHW, 2014) 52, Table 5.9

<table>
<thead>
<tr>
<th>Total claim size ($)</th>
<th>Court decision</th>
<th>Negotiated</th>
<th>Discontinued*</th>
<th>Total**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nil</td>
<td>7</td>
<td>20</td>
<td>687</td>
<td>958</td>
</tr>
<tr>
<td>1,000</td>
<td>15</td>
<td>218</td>
<td>2,405</td>
<td>2,638</td>
</tr>
<tr>
<td>10,000-30,000</td>
<td>15</td>
<td>101</td>
<td>519</td>
<td>636</td>
</tr>
<tr>
<td>30,000-50,000</td>
<td>15</td>
<td>72</td>
<td>140</td>
<td>227</td>
</tr>
<tr>
<td>50,000-100,000</td>
<td>30</td>
<td>159</td>
<td>122</td>
<td>311</td>
</tr>
<tr>
<td>100,000-250,000</td>
<td>47</td>
<td>270</td>
<td>80</td>
<td>397</td>
</tr>
<tr>
<td>250,000-500,000</td>
<td>35</td>
<td>163</td>
<td>27</td>
<td>225</td>
</tr>
<tr>
<td>500,000 or more</td>
<td>28</td>
<td>139</td>
<td>13</td>
<td>180</td>
</tr>
<tr>
<td>Total</td>
<td>193</td>
<td>1,142</td>
<td>3,973</td>
<td>5,309</td>
</tr>
</tbody>
</table>

% (excluding Not known mode of finalisation)

<table>
<thead>
<tr>
<th>Total claim size ($)</th>
<th>Court decision</th>
<th>Negotiated</th>
<th>Discontinued*</th>
<th>Total**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nil</td>
<td>1.0</td>
<td>2.9</td>
<td>90.1</td>
<td>100.0</td>
</tr>
<tr>
<td>1,000</td>
<td>0.5</td>
<td>8.3</td>
<td>91.2</td>
<td>100.0</td>
</tr>
<tr>
<td>10,000-30,000</td>
<td>2.5</td>
<td>15.9</td>
<td>81.6</td>
<td>100.0</td>
</tr>
<tr>
<td>30,000-50,000</td>
<td>6.6</td>
<td>31.7</td>
<td>61.7</td>
<td>100.0</td>
</tr>
<tr>
<td>50,000-100,000</td>
<td>9.6</td>
<td>51.1</td>
<td>39.2</td>
<td>100.0</td>
</tr>
<tr>
<td>100,000-250,000</td>
<td>11.8</td>
<td>68.0</td>
<td>20.2</td>
<td>100.0</td>
</tr>
<tr>
<td>250,000-500,000</td>
<td>15.6</td>
<td>72.4</td>
<td>12.0</td>
<td>100.0</td>
</tr>
<tr>
<td>500,000 or more</td>
<td>15.6</td>
<td>77.2</td>
<td>7.2</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>3.6</td>
<td>21.5</td>
<td>74.9</td>
<td>100.0</td>
</tr>
</tbody>
</table>

(a) Includes closed private sector claims coded as ‘Plaintiff does not have legal representation’ (Appendix Table A.2).
(b) Total includes 1 claim closed for $0 by an unknown mode of finalisation.

3.26. It is not clear what impact the SA Pre-Action Protocols may have had in this ‘pre’ pre-action area (that is, before the pre-action arrangements might operate). It is possible that the pre-action arrangements are resulting in even more settlements by insurers – for example, by placing a greater focus on settlement, or by making potential plaintiffs aware that they did not have a ‘direct’ pathway into court. Unfortunately, however, there are no statistics in the post 2013 period that can be considered for comparable purposes. It may also be that the Pre-Action Protocols are having little impact on medical negligence and constructions claims that may have resolved in any event. This was reflected in some of the comments made by participants in the December 2017 focus groups. For example, one medical negligence defendant lawyer commented, ‘a lot of our files resolve early on, but I’m not sure that I would credit the Protocols.’

3.27. In terms of other views, the small number of barristers who participated in the online survey were asked to indicate the extent to which they agreed or disagreed with the statement that ‘The Pre-Action Protocols help parties to settle

---

25 Ibid 51.
26 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
disputes.’ The results are displayed in Figure 3.1. Five of the eight respondents disagreed with the statement.

**FIGURE 3.1: THE PRE-ACTION PROTOCOLS HELP PARTIES TO SETTLE DISPUTES**

3.28. These results can be contrasted with the findings made in relation to barristers’ perceptions of the usefulness of pre-action requirements generally. In the general perceptions section of the online survey, participants were asked to indicate the extent to which they agreed or disagreed with the statement that ‘Pre-action requirements can help parties to settle disputes.’ The results are displayed in Figure 3.2. More than 50% of respondents (n= 8 out of 11) indicated that they agreed with this statement.

**FIGURE 3.2: PRE-ACTION REQUIREMENTS HELP PARTIES TO SETTLE DISPUTES**

3.29. Judicial officers were unable to offer much insight into the number of matters likely to be resolving during the pre-action stage and the impact of the Pre-Action Protocols on this. However, one Supreme Court judicial officer commented that:
I guess the best-case scenario is that we are not seeing as many files because the Protocols are actually working. But we’ve got no way of testing that.27

3.30. In this regard, as noted previously, it should be noted that a shift in jurisdictional limits might also explain a reduction in the number medical negligence and construction cases that are proceeding to the Supreme Court.

Why Might Disputes Not Resolve During the Pre-Action Stage?

3.31. There may be a range of reasons why disputes that do become subject to the Pre-Action Protocols do not resolve during the pre-action stage. Time pressures and statutory periods of limitation, a need to gather evidence, and the attitudes and behaviour of legal practitioners (see Chapter 6) are some reasons that were suggested by lawyers working in both the medical negligence and construction areas. In addition (as noted in Chapters 6 and 7), the lack of court-follow up might impact on how the Protocols are regarded and the extent to which they are ‘effective.’

3.32. For example, one construction defendant lawyer made the following comments:

Often parties are constrained by time limits, so you get parties filing and then we’ll have a conversation.

The difficulty of getting things resolved at that pre-action meeting is that nobody wants to give an inch.28

3.33. One medical negligence plaintiff lawyer noted that difficulties can arise when multiple parties are involved:

As soon as you have multiple defendants, it becomes really difficult... if I can’t get a response, I can’t get a meeting.29

3.34. One barrister who responded to the online survey commented that:

The plaintiff is compelled to comply, only to fall on the deaf ears of the defendant. The timetable in the Protocols is reasonable but it is futile where a defendant is not prepared to engage.

3.35. In relation to pre-action requirements, generally, this barrister also commented that:

I have worked on hundreds of personal injury matters where the plaintiff is required to formulate a claim before issuing proceedings and for the defendant to respond. There has never been a settlement achieved as a result of such pre-action requirements. In most cases the defendant (insurer) does not respond or make any counteroffer. There is no sanction against the defendant to respond or engage properly. A possible sanction of a costs order against a party for failing to respond after trial is illusory where most personal injury matters resolve without trial.

27 Interview with Judicial Officer of the Supreme Court of South Australia (Sir Samuel Way Building, Adelaide, 12 December 2017).
28 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
29 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
3.36. Medical negligence defendant lawyers emphasised that there is a ‘process you have to go through to be in a position to resolve a file’, which involves the gathering of expert evidence that will allow the practitioner to properly advise the client.\(^{30}\) This is discussed further below (at 3.83.).

3.37. The court file review revealed that ‘urgency’ was the most-common reason given by plaintiffs who had not substantially complied with the Pre-Action Protocols prior to commencing proceedings (where a reason was provided) in both the construction and medical negligence areas (see Chapter 7).

3.38. Further, the AIHW Report shows that ‘larger’ medical indemnity claims are likely to take longer to resolve.\(^{31}\) This is unsurprising given that larger medical negligence claims will often involve time to ‘settle down’ injuries, allow time for follow up interventions, and there may be a need to gather additional investigative, medical and other expert (for example, financial expert) reports that may not be accommodated within the limitation period (three years) (this is discussed further below at 3.49.).

**Once Proceedings Are Commenced in Court, When and How Do They Finalise?**

3.39. Data regarding finalisation was collected as part of the court file review.\(^{32}\) This data does not capture those matters that finalised before proceedings were commenced.

**Medical Negligence Matters**

3.40. Only 23% of the medical negligence court files reviewed (n= 10 out of 44) were finalised at the time of the review. The Pre-Action Protocols applied to seven of these matters but had not been complied with in any of them. In relation to the matters that had been commenced in the Courts, the sample size was small, which means that conclusions about the time taken to finalise matters should be made with caution. In terms of the data obtained, the researchers considered not only the date from which proceedings commenced to date of finalisation but also considered the time taken from the date the cause of action arose (often the date of ‘injury’ in medical negligence matters). The period between the date the cause of action arose and finalisation is important as, often for plaintiffs and insurers, timeliness is considered from this broader perspective.

### Table 3.3: Time to Finalisation

<table>
<thead>
<tr>
<th>Time between filing and finalisation</th>
<th>Time Range (days)</th>
<th>Median Time (days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matters filed in the Supreme Court (n=3)</td>
<td>472- 787</td>
<td>645</td>
</tr>
<tr>
<td>Matters filed in the District Court (n=7)</td>
<td>189- 829</td>
<td>416</td>
</tr>
<tr>
<td>All matters (n=10)</td>
<td>189- 829</td>
<td>446.5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Time between date cause of action arose and finalisation</th>
<th>Time Range (days)</th>
<th>Median Time (days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matters filed in the Supreme Court (n=3)</td>
<td>1564-4946</td>
<td>1719</td>
</tr>
<tr>
<td>Matters filed in the District Court (n=7)</td>
<td>1285-4229</td>
<td>1918</td>
</tr>
</tbody>
</table>

\(^{30}\) Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).

\(^{31}\) AIHW, above n 22, 17, 50.

\(^{32}\) The researchers reviewed all available court files for medical negligence and construction disputes filed in the District and Supreme Courts of South Australia between 1 January 2014 and 30 September 2017.
3.41. Table 3.3 shows that there is significant variation in the length of time taken for disputes to finalise (for potential reasons for this, see from 3.46.). The time between filing and finalisation ranged from 189 and 829 days and the median time was 446.5 days, while the time between the date of a cause of action arising and the date of finalisation ranged from 1285 and 4946 days and the median time was 1818.5 days.

3.42. All of the finalised matters were either discontinued (n= 7 out of 10, 70%) or dismissed (n= 3 out of 10, 30%); none proceeded to a final hearing. Of the matters that were discontinued, the court file review indicated that at least one of these matters was finalised by mediation and at least one was finalised at a settlement conference. It is possible that other matters were finalised via mediation, however, there was no court notation to that effect and others may have settled as a result of negotiation between lawyers. It may also be the case that in some matters, plaintiffs ‘gave up’ because of the length of time taken (and the costs incurred – see Chapter 4) or became too ill to continue (or passed away).

3.43. The findings in relation to finalised matters do not necessarily accord with the insights provided by judicial officers during the focus groups. For example, one judicial officer from the District Court commented that:

The hearings are now very fast... there is no longer a long wait for a trial. A few years ago, you had to wait a year or two. Last week [December 2017], they were listing cases for as early as February... So many cases are settling, hardly any go to trial...that they double book and triple book and quadruple book.

Hardly any civil matters proceed to a full-blown hearing... Often, the settlement conference doesn’t work... often we fixed a date for trial before we think it’s ready, because that encourages the parties to settle...33

**Construction Matters**

3.44. As noted in Chapter 1, the way in which ‘construction’ matters are defined can mean that most construction matters do not appear in the construction list held by the courts. Instead, they are regarded as breach of contract cases or dealt with in some other way. These additional files were not made available to the researchers at the time the file reviews took place. Three of the four construction matters that were reviewed were finalised at the time of the review. The Pre-Action Protocols applied in all three finalised matters but were not complied with in any of them (memoranda of compliance not filed). All three matters were discontinued.

3.45. For the two finalised matters that were filed in the District Court, the time between filing and finalisation was 105 and 632 days, and the time between the cause of action arising and finalisation was 125 and 2452 days, respectively. For the finalised matter that was filed in the Supreme Court, the time between filing

---

33 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
and finalisation was 62 days, and the time between the cause of action arising and finalisation was 1157 days.

**Factors Causing Delay in Finalisation**

3.46. The factors that may be preventing dispute resolution during the pre-action stage were considered above (3.31.-3.38.). This section considers the factors that may impact the time taken for disputes to finalise and which may be causing delay once proceedings are commenced. Some of these factors—including claim value and complexity, the need to gather expert evidence, and disputant and practitioner attitudes and behaviour—overlap.

3.47. As suggested above (at 3.38.), delay in the finalisation of medical negligence matters may be attributable to the value and/or complexity of the claim, which in turn can depend on the nature of the injury involved or the amount of time it takes for injuries stabilise. This issue was raised by participants in the focus groups. For example, one judicial officer commented:

> The big problem with personal injury is where injuries haven’t stabilised. You may have to wait until after the limitation period. And of course, the defendant won’t seriously negotiate until you’ve they’ve got answering reports. So, you’ve got to get initiating reports for the plaintiff, answering reports for the defendant, the interlocutory steps such as disclosure of documents, release of expert reports...we try to encourage parties to have a settlement conference before the matter is listed...they might take 12 months, sometimes longer, I’ve had cases go for 10 years.34

3.48. This can be a significant issue in relation to the finalisation of claims that arise due to injuries occasioned at birth. For example, when asked about the time taken to resolve ‘big claims’, one medical negligence lawyer who attended the December 2017 focus group commented that:

> It depends. Normally you can’t predict, in cerebral palsy cases, until the child is about 7, what the future holds for that child...so we’ve settled when the child is aged 7 or 12. Or there is one where the child is 18 or 19 and they are still saying that you can’t predict. But time limits are different, there is nothing forcing them to issue.35

3.49. The AIHW Report provided the following material about the relationship between the length of claims and claim size. It shows, basically, that the larger the claim (or ‘reserve’) estimate, the longer the claim is likely to take to resolve.36 However, as shown in the report, some large claims can still be resolved quickly, as more than 18% of larger claims (over $500,000) were resolved within two years of the cause of action arising (which can be contrasted with the times taken above):

---

34 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
35 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
36 See AIHW, above n 22, 17, 50.
Table 3.4: Length of claim (months) for closed public sector (excluding Western Australia) by total claim size ($), 1 July 2012 to 30 June 2013

Source: Australian Institute of Health and Welfare (AIHW), ‘Australia’s Medical Indemnity Claims 2012-13’ (Safety and Quality of Health Care Series No 15, AIHW, 2014) 17, Table 3.8

Table 3.5: Length of claim (months) for closed public sector claims (excluding Western Australia) and private sector claims, by total claim size ($), 1 July 2012 to 30 June 2013

Source: Australian Institute of Health and Welfare (AIHW), ‘Australia’s Medical Indemnity Claims 2012-13’ (Safety and Quantity of Health Care Series No 15, AIHW, 2014) 50, Table 5.8

3.50. This data is somewhat consistent with the research carried out for this Project in relation to medical negligence matters. The data collected during the court file review also showed that matters which had a longer ‘duration’ involved complex
claims with potentially higher claim values (as indicated by the type of injury, the number of parties involved, and the heads of damages claimed by the plaintiffs). Although, overall, the duration was considerably longer (as shown in Table 3.6 below). However, the data might also suggest that the longer duration is the result of contested liability issues (which could suggest that considering a ‘liability’ hearing at an earlier time in medical negligence matters might reduce delay):

**Table 3.6: Medical negligence: Indicators of claim value and complexity, matter duration**

<table>
<thead>
<tr>
<th>Injury Type</th>
<th>Number of plaintiffs</th>
<th>Number of defendants</th>
<th>Heads of damages claimed by plaintiff</th>
<th>Duration (Time between date cause of action arose and finalisation, days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ankle injury</td>
<td>1</td>
<td>1</td>
<td>General damages</td>
<td>1918</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
</tr>
<tr>
<td>Bacterial infection</td>
<td>1</td>
<td>1</td>
<td>General damages</td>
<td>4229</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
</tr>
<tr>
<td>Knee surgery injury</td>
<td>1</td>
<td>1</td>
<td>General damages</td>
<td>2703</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
</tr>
<tr>
<td>Failure to treat infection</td>
<td>2</td>
<td>3</td>
<td>General damages</td>
<td>2749</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td>Stroke</td>
<td>1</td>
<td>2</td>
<td>General damages</td>
<td>1719</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
</tr>
<tr>
<td>Post-operative infection</td>
<td>2</td>
<td>1</td>
<td>General damages</td>
<td>1285</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
</tr>
<tr>
<td>Cardiac</td>
<td>2</td>
<td>2</td>
<td>Unclear</td>
<td>1564</td>
</tr>
<tr>
<td>Faulty hip system</td>
<td>1</td>
<td>1</td>
<td>General damages</td>
<td>1287</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
</tr>
<tr>
<td>Knee surgery injury</td>
<td>2</td>
<td>1</td>
<td>General damages</td>
<td>1506</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
</tr>
<tr>
<td>Birth defect-brain injury</td>
<td>1</td>
<td>2</td>
<td>General damages</td>
<td>4946</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Past economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Future economic loss</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Other</td>
<td></td>
</tr>
</tbody>
</table>
3.51. It is also not clear whether the lengthier times taken in these matters were related to difficulty in obtaining expert reports. It may be that complex issues (for example relating to infection) required specialist medical input and may require interstate expert input (which may take longer to obtain).

3.52. The need to gather investigative and medical expert reports, and the time this can take, was a recurring issue of concern for focus group participants, particularly in relation to the medical negligence area. It was noted that the delay caused by the need to gather expert reports ‘are a problem.’ One judicial officer commented:

Sometimes you get doctors who just don’t want to do a report about another doctor… sometimes experts in certain issues are hard to find… sometimes you have to go to Melbourne and that can make it very complex… you get delays.

3.53. The medical negligence plaintiffs interviewed had both been told that the delays in their cases had been caused, in part, by the wait for expert reports. In one of these matters, the plaintiff required a report from an expert in Melbourne. Their lawyer contacted a ‘broker’ who ‘sourced out a surgeon who would look at the case.’ This plaintiff believed that ‘the broker is just blocking up the system.’ They also commented that:

The system drags it on… getting all the information, the reports from experts… the preparation for the court case, the submissions from the other lawyer… I’m sure the lawyers could actually short-circuit all that if they really wanted to… I don’t think they do.

3.54. The researchers also considered whether there appeared to be any correlation between the number of interlocutory court events and the time taken to finalisation. Negative correlation between the number of court events and the time taken to finalisation might have indicated that delay was also linked to limited or absent court case management. However, there was little evidence of this. Figures 3.3 and 3.4 show that, in relation to the very small sample of medical negligence files reviewed, there may have been some positive correlation between the number of interlocutory court events and the time taken to finalisation, although, the correlation was quite weak. It is notable, however, that in several files (that varied quite significantly in the time taken to finality) there were no interlocutory court events.

37 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
38 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
39 Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December 2017).
Finally, the District Court judicial officer interviewed raised some concerns about the negative influence that medical expert and lawyer behaviour can have on delay (see 6.39.). Some focus group participants also reported experiencing delay due to the ‘bad behaviour’ of some disputants (see 6.12. - 6.13.).
Do the Pre-Action Protocols Promote Early Resolution or the Management of Issues in Dispute?

3.56. Views differed among legal practitioners who participated in the focus groups as to whether the Pre-Action Protocols saved time by promoting early resolution or narrowing the issues in dispute.

3.57. In relation to construction disputes, one lawyer noted that the Pre-Action Protocols do help to narrow the issues in dispute and focus parties on resolving matters before costs become ‘a sticking point.’ This practitioner commented that:

   Even if they don’t resolve things in their entirety, it helps to narrow down issues and focus our attention.

   The more hotly contested matters, which are the ones in the DC and SC, usually get to the filing stage...doesn’t avoid the opening of files, but forces parties to come together earlier to come up with pragmatic solutions or define issues.

   One of the things that have come out of the pre-action protocols, is that we are looking so carefully at what we can do to minimise the angst and the challenges for parties, and to get matters resolved so that costs don’t become a sticking point. 40

3.58. However, this practitioner also noted that the Protocols are more effective in this regard when ‘there is an experienced person on the other side’:

   Solicitors who do work predominantly in construction disputes will identify the benefits of moving forward in this collaborative process, rather than some others who have not been exposed to all the technical aspects of building litigation that often gets the parties bogged down in the court system. 41

3.59. This was also reflected in the comments made by judicial officers in relation to the pre-action behaviour of specialist building and other lawyers (see 3.63.-3.64.). Issues relating to cultures, attitudes and understanding about the Protocols are also explored in more detail in Chapter 6 and 7 of this Report.

3.60. The experiences of medical negligence practitioners differed significantly. Of the three medical negligence plaintiff lawyers who participated in the December 2017 focus group, one believed that pre-action meetings are ‘productive in some cases in terms of sorting out the issues’; one believed that it was too early to make a definite conclusion on this issue, commenting that the Pre-Action Protocols ‘make matters run more efficiently before you get to the meeting stage... the jury is still out... on whether matters are resolving because of them or if matters that go to trial are running more efficiently because of them’; and the other noted that the Pre-Action Protocols had not alleviated the difficulties he

40 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
41 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
commonly experiences with multiple defendants who ‘deliberately cause delay.’

3.61. Medical negligence defendant lawyers noted that a lot of their files resolve early on but that they would not necessarily credit the Pre-Action Protocols for this. One practitioner commented that:

Maybe matters have a shorter life...but hard files are still hard files with lots of issues...files with less issues tend to resolve quicker. That’s always been the case.

We always try to informally confer very early on. I try to make a decision about a case very early on. If I think it is a case that needs to be resolved, I'll try to put myself in a position where I can at an early time. I'm not going to wait for the court protocols and timeline to do that.

3.62. Again, judicial officers found it difficult to comment because they ‘do not know what happens before matters get to court.’ One judicial officer of the District Court said that:

I have had a huge building case where they had narrowed it a lot.

I certainly think that in the personal injuries [pre-action requirements such as r 33] are working because they are settling, they’re not taking as long...

3.63. However, when asked whether parties appear to be planning litigation in a more collaborative way this judicial officer noted that:

[The parties he deals with don’t seem to do this much on their own before they get to the Master]. I let parties talk for a while at settlement conferences, and if they can’t resolve, I say, “well, what are the issues and which ones are really fundamental and do you want to narrow it to three or four points?”

3.64. When asked whether parties are having a conversation before they come to court, he noted that:

Some are. In the building cases, you tend to get specialist building lawyers and they are very good and they know exactly what they are doing, and they sensibly work out that they are going to have an arbitrator or mediator do this part and the court will do that part. But the others, I don’t get the sense that they know what they are doing until they get to court.

3.65. A judicial officer of the Supreme Court noted that:

42 Comments at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
43 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
44 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
45 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
46 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
47 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
Sometimes it results in a narrowing of issues and sometimes it results in quicker progress through the interlocutory procedure because people have had time to collate their documents and may already have their expert reports.48

3.66. Barristers who participated in the online survey were asked a series of questions regarding the effectiveness of the Pre-Action Protocols in promoting the resolution of disputes and narrowing the issues in dispute. Participants were asked to indicate the extent to which they agreed or disagreed with the following statements:

- The Pre-Action Protocols assist in resolving disputes.
- The Pre-Action Protocols result in the early resolution of disputes.
- The Pre-Action Protocols help to define the issues.
- The Pre-Action Protocols are not helpful in resolving the issues.

3.67. The results are displayed in Table 3.7. Although the response rate was very low, the responses were overwhelmingly negative. Six of the eight respondents (75%) disagreed with the statements that the Pre-Action Protocols assist in resolving disputes and that the Pre-Action Protocols result in the early resolution of disputes. Five of the eight respondents (63%) disagreed with the statement that the Pre-action Protocols help parties to define the issues and agreed that the Pre-Action Protocols are not helpful in resolving the issues.

3.68. Participants were also invited to make a comment about the Pre-Action Protocols with respect to time. One barrister described the Protocols as ‘technical, time consuming and useful only for increasing the amount of interlocutory disputes and technical points being taken.’ Another wrote that the Protocols are an ‘unnecessary, additional waste of time.’

Table 3.7: The Pre-Action Protocols and Time (n=8)

<table>
<thead>
<tr>
<th>Question</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Pre-Action Protocols assist in resolving disputes</td>
<td>50%</td>
<td>25%</td>
<td>25%</td>
<td>0%</td>
</tr>
<tr>
<td>The Pre-Action Protocols result in the early resolution of disputes</td>
<td>50%</td>
<td>25%</td>
<td>25%</td>
<td>0%</td>
</tr>
<tr>
<td>The Pre-Action Protocols help to define the issues</td>
<td>25%</td>
<td>38%</td>
<td>38%</td>
<td>0%</td>
</tr>
<tr>
<td>The Pre-Action Protocols are not helpful in resolving the issues</td>
<td>13%</td>
<td>25%</td>
<td>25%</td>
<td>38%</td>
</tr>
</tbody>
</table>

3.69. Again, these results can be contrasted with the findings made in relation to barristers’ perceptions of the usefulness of pre-action requirements generally. In

48 Interview with Judicial Officer of the Supreme Court of South Australia (Sir Samuel Way Building, Adelaide, 12 December 2017).
the general perceptions section of the survey, participants were also asked to respond to the following statements:

- Pre-action requirements can assist in resolving disputes.
- Pre-action requirements can result in the early resolution of disputes.
- Pre-action requirements can help define the issues.
- Pre-action requirements are not helpful in resolving the issues.

3.70. The results are displayed in Table 3.8. The responses were relatively more positive. Here, eight of the eleven respondents agreed that pre-action requirements can assist in resolving disputes, although, only four of the eleven respondents agreed that pre-action requirements can result in the *early* resolution of disputes. Most respondents (n= 9 out of 11) agreed that pre-action requirements can help parties to define the issues in dispute, although, only six of the eleven respondents disagreed with the statements that pre-action requirements are not helpful in resolving the issues.

3.71. One barrister commented that, ‘the legal obligation on lawyers is to resolve the matter as soon as that is reasonably practical, and the pre-action procedures assist with that.’

### Table 3.8: Pre-Action Requirements and Time (n=11)

<table>
<thead>
<tr>
<th>Question</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-action requirements can assist in resolving disputes</td>
<td>9%</td>
<td>18%</td>
<td>25%</td>
<td>5%</td>
</tr>
<tr>
<td>Pre-action requirements can result in the early resolution of disputes</td>
<td>27%</td>
<td>36%</td>
<td>4%</td>
<td>27%</td>
</tr>
<tr>
<td>Pre-action requirements can help to define the issues</td>
<td>9%</td>
<td>9%</td>
<td>64%</td>
<td>18%</td>
</tr>
<tr>
<td>Pre-action requirements are not helpful in resolving the issues</td>
<td>18%</td>
<td>36%</td>
<td>4%</td>
<td>27%</td>
</tr>
</tbody>
</table>

Do the Protocols Save Time by Providing Guidance for Inexperienced Practitioners?

3.72. One issue raised by medical negligence lawyers in both the plaintiff and defendant representative focus groups was the usefulness of the Pre-Action Protocols as a guide to inexperienced practitioners. Plaintiff lawyers tended to believe that the Pre-Action Protocols provide a useful and effective guide to managing medical negligence disputes, particularly for lawyers less familiar with medical negligence claims.49 Opinions amongst defendant lawyers differed. One defendant lawyer suggested that the Protocols were important for plaintiffs who may not be sure of the direction to take, or the experts to consult, but also considered that the complexity of compliance dates and processes within the

---

49 Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
protocols might be confusing for plaintiffs.\(^{50}\) Another noted that they had hoped that the Protocols would assist in saving time by focusing the attention of inexperienced practitioners on what they need to do in order to resolve a file. However, when asked whether the Protocols had helped with this, they commented:

> It varies. In some ways, I think it helps get people focused on what they have to prove, but I don’t think it gets them to that point any quicker… I think they get to that point when they speak to counsel. Maybe they get focused quicker…but I’m not convinced that files are resolving quicker.\(^{51}\)

3.73. These comments are usefully viewed in the particular practice context. In South Australia, medical negligence claims against doctors and insurers are handled by a small number of firms often with considerable experience. Plaintiffs may be represented by lawyers experienced in the field but may also be represented by lawyers who have less familiarity with medical negligence (as opposed to personal injury claims) or by interstate lawyers who do not have a clear or any understanding of the Pre-action Protocols in South Australia. In this context, the Protocols may have an additional value as a road map for less experienced participants.

Do the Pre-Action Protocols Create Barriers to Access or Delay the Commencement of Court Processes?

3.74. This was not a concern for most of the lawyers that participated in the focus groups. For example, one medical negligence plaintiff representative commented that:

> I was worried that it was going to front-end load more costs and then be more of a burden for plaintiffs early on, but I really can’t say honestly that it has. It may have shuffled the work around a bit, but I don’t think it’s changed much of what I do.\(^{52}\)

3.75. In contrast, one barrister interviewed as part of the research team’s consultation process during December 2017 noted that many members of the Bar believe that the Protocols are merely an extra step in the process that increases time and cost: ‘The [Protocols] are regarded as an impediment rather than a tool.’ However, they indicated that this is because ‘solicitors and the court just pay [them] lip service… [they] are not doing what [they] are intended to do.’\(^{53}\) This participant suggested that the Protocols could work if the profession were to take them seriously, but that this is unlikely to happen unless the Courts enforce them.

3.76. Finally, legal practitioners who participated in the focus groups suggested that it is common for parties to file proceedings to protect their claims and then defer service so that they can comply with the Pre-Action Protocols:

\(^{50}\) Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
\(^{51}\) Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
\(^{52}\) Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
\(^{53}\) Interview with Barrister (15 December 2017).
Often, parties are confined by time limits, so you often get parties filing and then we’ll have a conversation... try and defer service so that we can exhaust all the steps in the pre-action process...but it depends on the lawyers involved.\footnote{Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).}

**Conclusion on Whether the Pre-Action Protocols Reduce Time**

3.77. In relation to settlement activity before proceedings commence, the Pre-Action Protocols may have had some impact. However, the extent of any impact in terms of time savings is unclear. Importantly, the Protocols may have had an impact on insurers, prompting settlement at an earlier time to avoid the pre-action requirements. It is also important to note that there was some evidence from the focus groups that suggests that the Pre-Action Protocols (when used) can save time by assisting parties to narrow the issues in dispute or by guiding inexperienced practitioners.

3.78. In terms of the cases evaluated during the court file review, there was significant variation in the amount of time taken for disputes (that were commenced in court) to finalise. The court file and focus group data suggests that delays may occur where large, complex claims are involved, where there is a need to gather expert evidence, or due to the behaviour of some lawyers, disputants or experts. Although, as noted at the beginning of this Chapter, such delays are not always unreasonable. In terms of whether the Pre-Action Protocols have reduced unreasonable delay, the court-file based data showed that non-compliance was a significant issue. If there had been greater compliance, it might have been possible to determine whether pre-action engagement led to reduced time spent in the court system for those matters where proceedings were commenced. Issues relating to non-compliance are more specifically explored in Chapter 7 of this Report. However, these results should be interpreted with caution due to the small sample size and the lack of data relating to the approach prior to the introduction of the protocols.

3.79. There also appears to be some attitudinal issues relating to the Protocols (particularly amongst the small number of barristers who responded to the survey). These issues are discussed in more detail in Chapters 6 and 7. However, these perspectives suggest that there may be issues insofar as a reduction in time is concerned if the pre-action processes are not being used to narrow issues. The barrister survey suggested that those surveyed thought that pre-action processes (more generally) could help with issue definition, however, the specific protocols did not have this result (these views differed and can be compared with the results from the focus groups which suggested that the pre-action protocols could help to ‘narrow issues’).

**Pre-Action Processes and Timing**

3.80. As noted in Chapter 2, the protocols for construction disputes indicate that before a claimant can initiate proceedings in the District or Supreme Courts of South Australia, they must send a letter of claim containing an offer to resolve...
the dispute to the respondent or the respondent’s insurer. If the offer is not accepted, the respondent must provide a letter of response within 21 days, and if the parties do not reach an agreement within 30 days after receipt of the letter of response, they must attend a pre-action meeting.

3.81. The protocols for medical negligence disputes require a claimant to send the respondent a notice of potential claim as soon as reasonably practicable after the claimant becomes aware of the potential claim. The respondent must send the claimant an interim response, so far as possible, within 28 days, and a full response within 60 days. Then, before commencing an action, a claimant must send the respondent or their insurer a letter of claim containing an offer to resolve the dispute and a proposed ADR process and timetable. If the respondent does not accept their offer, they must send a letter of response to the claimant, including a response to the proposed ADR timetable, within 30 days. Where the matter is not settled through this exchange, but the parties agree on ADR, ADR must be attended within 60 days of the letter of response. If the parties do not agree on the form and details of ADR, they must attend a pre-action meeting within 30 days of the letter of response.

3.82. Several issues were raised during the focus groups relating to the timing and use of these processes that are explored below.

**Appropriateness of the pre-action processes and timing**

3.83. During the focus groups, medical negligence defendant representatives expressed concern regarding the appropriateness of the pre-action processes, and particularly, the expectation that parties might be in a position to resolve cases in such early stages. A general reluctance to engage in pre-action processes prior to the gathering of evidence was also apparent. For example, one medical negligence defendant lawyer commented that:

> Whether you are a plaintiff or defendant, there is a process you have to go through to be in a position to resolve a file... in terms of getting instructions and being in a position to give advice that the matter needs to be resolved...and having some expert support, something I can argue about ... You can’t have an informal conference before you have had an opportunity to look at those issues. Often, they are complicated. You may have a question of liability, a question of causation, and a question of quantum.55

3.84. Similarly, when asked if they thought that pre-action meetings are a good idea, one medical negligence plaintiff said that it would be a good idea, but said that:

> You need all the information... they’ll still go through the process... It’s difficult in some sense because you still need an independent surgeon to assess you before you go to that type of meeting. You need that data before you go, so you’ve got something you can base your facts on.56

3.85. The time limits for the completion of the Protocols also caused concern, especially amongst medical negligence defendant representatives. For example,

55 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
56 Comment at Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December 2017).
one practitioner suggested that the requirement to provide a response to a notice of potential claim within 60 days can be ‘unrealistic’, especially given ‘the processes that parties need to go through in order to be in a position to resolve a file’ (see above) and that ‘the doctor may get the letter and put it in their top drawer for a while before they even send it to the insurer.’ One medical negligence plaintiff representative also noted that the time limits can make it hard for parties, particularly defendants, to comply with the Protocols.

3.86. The nature of the claim may also be a factor – one participant believed that complex, high value claims were unlikely to benefit from the protocols, but that smaller claims might. In relation to these comments, it may well be that the Protocols have not been used to support either the triage of disputes or the planning of future steps (that may or may not be linked to litigation).

3.87. In contrast, some focus group participants believed that the use of these processes during the early stages of disputes can have positive effects. One judicial officer who previously worked as a defendant lawyer believed that requiring plaintiffs to notify defendants of potential claims earlier increases the fairness of processes (see Chapter 5). One medical negligence plaintiff lawyer also identified some positive impacts for plaintiffs:

I do think they are good thing because if you’re acting for plaintiffs who generally don’t have any money...engaging early and determining the issues, determining prospects of success and attitudes early helps to guide the plaintiff.

3.88. A recurring theme related to the benefit of an early meeting (pre-filing) to clarify issues and, in this regard, it was suggested that the effectiveness of the processes established by the Pre-Action Protocols can depend on the parties and practitioners involved (see Chapter 6). For example, one judicial officer was concerned about their effectiveness in relation to ‘difficult and obsessive litigants.’ They suggested that ‘in some cases, there is a need to skip the pre-action protocols... and get straight to court.’ They also noted that ‘young solicitors are often very timid about doing anything before they have consulted a barrister.’

Conclusions

3.89. Issues around timing and timeliness are complex. Lawyers and barristers indicated that the opportunity to focus on issues at an early meeting can be valuable, particularly because this can assist to define issues. The survey work and interview data suggested, however, that the Pre-Action Protocols were at

57 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
58 Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
59 Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
60 Interview with Judicial Officer of the Supreme Court (Sir Samuel Way Building, Adelaide, 12 December 2017).
61 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
62 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
times ignored or not followed. Although, in interviews it was noted that there were time savings where the Protocols were followed.

3.90. In relation to some comments, it was suggested that settlement was not possible until there was a well-developed ‘case’. This view was strongest amongst the small pool of barristers surveyed and some of the medical negligence defendant lawyers that participated in the focus groups. This perspective raises questions about risk and settlement behavior, particularly given that pre-action requirements, where there are doubts and risk relating to a potential outcome, appear to work effectively in many areas – often without the need for a costly evidential or expert inquiry (particularly if practitioners are experienced). In this regard, views of practitioners may also be shaped by the ‘size’ of claim with practitioners considering that smaller claims can be settled at an earlier time while larger claims cannot. As noted above, these views are at odds with the reality that a number of very significant claims settle in the ‘pre’ pre action environment. This perspective raise the question of ripeness in terms of settlement conversations and whether more formal pre-action requirements that involve a third party (for example mandatory mediation) would be more effective than the existing pre-action requirements (that suggest that an ‘informal’ meeting that may or not be held).

3.91. The utility of a pre action meeting (or mediation) in terms of narrowing issues and planning litigation (should resolution not take place) also requires further thought. Whilst those interviewed suggested that this objective was being met, there is a question about whether more can be done and also whether early court supervision (follow up in terms of an agreed action plan) could assist in meeting this objective.

3.92. In this regard, there may also be some fundamental differences between construction and medical negligence matters. For example, in construction disputes it may be that both parties want to resolve the dispute and get on with business while in medical negligence cases there are different interests at stake. In this regard, an early mediation opportunity that focuses on the plaintiff’s present and future interests my not be as attractive to plaintiffs who have suffered significantly, and who consider that significant (and perhaps unobtainable) monetary compensation is essential for a tolerable future. However, a mediation process that is more clearly focused on a litigation plan (as well as resolution) may be perceived to be of greater benefit to some litigants. At the same time, the researchers note that the process of building up the legal and evidentiary case may result in parties taking a more entrenched stance and result in a focus on legal preparation rather than resolution so there are some risks that there may be a further distraction from settlement.
Introduction

4.1. Cost is a significant issue in relation to legal processes and to some extent, as with time, some costs can be unavoidable when a legal dispute occurs. Disputes that require legal attention can require significant professional time and therefore significant professional costs. A number of reforms in the justice system have been introduced in an attempt to reduce cost, however, there is little data in general relating to the cost of court processes from both a public or private perspective. In this Report, the cost of pre-action requirements has been considered by reference to:

- any direct monetary and non-monetary costs incurred by disputants as a result of the requirements;
- whether or not costs were saved (public and private); and
- the direct and indirect costs that may be experienced if a dispute is not resolved or finalised in a timely manner, including loss of opportunity, loss of profit and associated health and family impacts.¹

4.2. The lack of general data relating to the cost of legal proceedings across the justice sector does, however, make it difficult to consider more specifically costs in the pre-action arena. For this reason, in this Report, costs have been considered by reference to court file activity data (which provides little information about cost), focus group interview material and online survey data.

4.3. Importantly, cost has also been considered in terms of notions of proportionality, which can require that the ‘legal and other costs incurred in connection with the proceedings are minimised and proportionate to the complexity or importance of the issues and the amount in dispute.’² In relation to this, rule 12(2) of the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) provides that the extent of steps taken to comply with the Pre-Action Protocols, and which would not otherwise be taken, ‘is to be limited so that the time and costs incurred are proportionate to the amount or value in dispute.’ Rule 12(3) provides that ‘it is likely to be disproportionate for a

¹ Tania Sourdin, ‘Dispute Resolution Processes for Credit Consumers’ (Report, La Trobe University, Melbourne, March 2007) 93; Tania Sourdin, ‘Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts’ (Report, Australian Centre for Justice Innovation, 2012) 103.
party, in compliance with [the Protocols], to incur more than 5% of the estimated cost of a fully contested litigation.’ Overall, the Pre-Action Protocols are intended to ‘minimise the cost of civil litigation to the litigants and the State.’

4.4. Cost is an important measure of effectiveness. Many commentators, judges, practitioners and litigants have noted that the cost of litigation can be prohibitive for many disputants, and, as noted in Chapter 2, a major reason for introducing pre-action requirements is linked to their capacity to reduce the cost of dispute resolution.

4.5. However, despite its importance, cost should not be considered in isolation from other impacts. Blunt measures that emphasise only short-term quantitative impacts or benefits (such as time or cost) may not accommodate other qualitative factors that impact on effectiveness (such as fairness, behaviour, and compliance.) For this reason, the previous Chapter on timeliness and the following Chapters of this Report explore the effectiveness of the Pre-Action Protocols from the perspective of a broader range of measures. This Chapter explores the costs associated with the Pre-Action Protocols and the impact that the Protocols may have had on cost.

Past Research on Cost

4.6. Concerns about cost have been explored in a number of reports. In relation to pre-action requirements, the introduction of ADR processes and case management reforms, there have been concerns about the ‘front loading’ of costs as well as the ‘shifting’ of costs from the public to the private sector. In terms of pre-action requirements, a number of reports have specifically considered costs and pre-action steps, however, most reports have focused only on monetary costs and more specifically on legal costs (with little focus on other costs such as disbursements relating to expert and other costs). In most instances there has been little data about legal costs, partly because of the difficulty in surveying lawyers about costs. Despite this, some reports have reached conclusions about cost reductions and increases as a result of reforms.

4.7. For example, the 2009 Report of Lord Justice Jackson, Review of Civil Litigation Costs (Jackson Review), considered the cost impacts of pre-action protocols in the United Kingdom. It found that ‘there was a high degree of unanimity that the specific [pre-action] protocols serve a useful purpose’. It also noted that earlier use of ADR in the United Kingdom could decrease pre-action costs. On the other hand, it argued that the Practice Direction—Pre-Action Conduct, which was

---

3 District Court Civil Rules 2006 (SA) r 3(e); Supreme Court Civil Rules 2006 (SA) r 3(e).
4 See, eg, VLRC, above n 2, 120-33.
7 Ibid xxii.
introduced as a general practice direction for all types of litigation ‘is unsuitable as it adopts a “one size fits all” approach, often leading to pre-action costs being incurred unnecessarily (and wastefully)’. In this regard, it noted that some lawyers were front loading costs as a result of the protocols, and running up costs by in effect serving draft pleadings and extensive documentation on one another. They were also not considering the principles of proportionality in terms of pre-action costs incurred in certain types of matters.

4.8. The Jackson Review followed a series of studies on case management reforms. The Australian Law Reform Commission (ALRC) noted in its Discovery in Federal Courts Consultation Paper\(^{10}\) that one UK study, which was more focused on case management, concluded that ‘… it seems overall case costs have increased substantially over pre-2000 costs for cases of comparable value’, with the Woolf reforms (including the pre-action requirements) being one possible explanation for this increase.\(^{11}\) However, it is questionable if any increase can be clearly linked to pre-action requirements or other factors.\(^{12}\)

4.9. The ALRC also noted that pre-action protocols may lead to a magnification of costs in complex cases:

> in complex cases where the parties are unlikely to reach early settlement, imposing onerous pre-action requirements may do no more than add to delay and costs for both parties in complying with the pre-action protocols.\(^{13}\)

4.10. It further considered whether or not costs could be increased as a result of satellite litigation, noting:

> 5.11 Additionally, pre-action protocols may open up a battlefield for “satellite litigation”, by way of interlocutory applications as to whether a party has or has not complied with the relevant protocol. This becomes more likely if parties risk adverse cost orders for not complying with the protocol, and has an obvious impact for courts and the judiciary, as well as adding to delay and the cost of litigation.\(^{14}\)

4.11. The ACJI’s 2012 Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts Report\(^{15}\) explored these issues in relation to Victoria’s Retail Lease Scheme, the Supreme Court of the Northern Territory’s PD6, and ‘lighter-touch arrangements’ that operate within the general pre-action context. It found that, in most cases, the pre-action requirements saved parties costs, but that reasonable costs were better supported where ‘supportive’ schemes were in place (rather than more general pre-action requirements where compliance is monitored by lawyers and then courts if settlement does not take place). Such

---

8 Ibid.
9 Ibid 350.
14 ALRC, above n 10, 161-2, citing Legg and Boniface, above n 13, 55; NADRAC, above n 5, 31.
schemes enabled the reduction in the costs of ADR, often by fixing ADR costs.\textsuperscript{16} In relation to the general pre-action context, it noted that the fees charged in some pre-action schemes are manageable for many Australians, but that the legal costs associated with these arrangements (for example, the fees for lawyers preparing the documentation necessary to engage in the pre-action process) can mean that costs become a ‘hurdle’.\textsuperscript{17} PD6 was shown to have resulted in better outcomes with respect to timing and cost, as lawyers’ ‘up front’ work (in preparing to ensure PD6 compliance) tended to ensure parties were better informed if they progressed to litigation (thereby reducing ‘wastage’) and also made dispute resolution processes more efficient.\textsuperscript{18}

4.12. Further, the ACJI research did suggest that pre-action requirements might result in added costs in more complex cases, and identified practitioner compliance, costs proportionality, and the way in which requirements are interpreted and supported by case law, the courts or through guidelines as critical issues likely to impact on cost effectiveness.\textsuperscript{19} As noted above, in some areas, schemes where disputants had access to a supportive framework (including advice and supported and arranged ADR) were more likely to resolve differences and lead to cost savings.

Findings in Relation to Cost

The Prohibitive Monetary Cost of Civil Litigation

4.13. As in previous research,\textsuperscript{20} most participants in the focus groups agreed that the monetary cost of civil litigation is prohibitive for many disputants. The high costs facing medical negligence plaintiffs caused particular concern among lawyers and disputants in this area. Cost was described as an ‘enormous deterrent’.\textsuperscript{21}

4.14. During their focus group interview, medical negligence plaintiff lawyers were asked to estimate the cost of matters that go to full blown trial. One participant responded:

Scary numbers. I quoted a client recently, assuming a two-week trial and the involvement of two or three experts, one from interstate, and the cost was $200 000 for the one side.\textsuperscript{22}

4.15. While some matters are run on a ‘no win, no fee’ basis,\textsuperscript{23} the cost of disbursements, and particularly the cost of expert medical reports, are a

\textsuperscript{16} Ibid 123.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid 124.
\textsuperscript{20} See, eg, VLRC, above n 2.
\textsuperscript{21} Comment at Medical Negligence Defendant Focus Group (University of Adelaide, Adelaide, 14 December 2017).
\textsuperscript{22} Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
\textsuperscript{23} It should be noted that cases run on a ‘no win, no fee’ basis do not protect the plaintiff from an adverse cost orders in the event that their claim is unsuccessful. This can be devasting for plaintiffs and can act as a deterrent to litigation and an effective barrier to access to justice.
significant barrier for plaintiffs. In addition, the risk of a potential adverse cost order can also be a barrier. One plaintiff that participated in the focus groups had been forced to withdraw their proceedings when they were no longer able to attain funding for disbursements in relation to medical reports. Their matter was being run on ‘a no win, no fee’ basis, but they ‘needed another two or three thousand dollars for another surgeon’s opinion and the lawyer said, “on a commercial basis, we can’t go ahead with this.”’ As a result, this plaintiff ‘just gave up.’ Notably, in this matter the Pre-Action Protocols had not been complied with.

4.16. For this plaintiff, and others, the high cost of civil litigation clearly impacted their perception of process fairness (see also 5.41-5.43.). This plaintiff commented:

You have this belief... that you are fighting against the system... the chance of winning medical malpractice is low... and it is going to cost you thousands of dollars... you can lose your car... the house... the lot.25

4.17. A medical negligence plaintiff lawyer also commented that:

Many people don’t find the system easy to work with... lawyers say to them, “I can see why you are unhappy, but we are going to have to spend $3000 on an expert to analyse this case before we can make your complaint.”26

4.18. Medical negligence defendant lawyers described plaintiff lawyers’ costs in Adelaide as ‘outrageous’ and agreed that they tend to be significantly higher than defendant lawyers’ costs.27 They did not believe that the Pre-Action Protocols have had an impact on plaintiffs’ costs, although, presumably the impact would be much more significant if matters resolved before high expert and legal costs were incurred.

4.19. In contrast, in relation to civil matters generally, one judicial officer expressed the view that the system is going in the ‘right direction’ by having moderate pre-action protocols followed by active supervision by the courts with the aim of getting matters off to trial as soon as possible: ‘the wait for trial is not very long... it doesn’t cost a huge amount if it only takes a year. It can cost less if the parties are ready.’28 This comment may not, however, consider expert costs which, as one lawyer noted can ‘vastly outweigh lawyer costs,’ particularly in the earlier stages of a matter.29

---

24 Comment at Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December).
25 Comment at Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December).
26 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
27 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
28 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
29 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
Private/Non-Monetary Costs

4.20. Apart from the monetary costs involved in litigation that include lawyer costs, expert costs (that can include medical, technical, financial and other experts), litigation can involve personal time and the associated costs of preparing a matter for hearing. This time and personal cost can include the time spent attending expert appointments, gathering and furnishing information and meeting with lawyers and others.

4.21. Litigants in focus groups described the impact of these non-monetary and personal costs noting that they had spent ‘hours and hours’ of time. Non-monetary costs also included travel time with one medical negligence litigant, who has significant mobility issues, incurring significant travel costs. A medical doctor also noted that the time spent by doctors could also be significant particularly when there was a lack of certainty about court dates.

4.22. Other non-monetary costs include health and associated impact costs. Past research has shown that such costs can be significant and, as noted in Chapter 3, the longer that a claim takes to be resolved the more significant the cost can be for a litigant. For example, an ongoing study into the relationship between the stressfulness of claiming for injury compensation and long-term recovery (see 3.15.) has found that certain aspects of the process of seeking compensation contribute to significant poor health outcomes among injured claimants. Of the 332 research participants (who were hospitalised in 3 Australian states for injuries occurring between 2004 and 2006, and who subsequently claimed injury compensation under transport and workers’ compensation schemes) ‘33.9% reported high levels of stress associated with understanding what they needed to do for their claim; 30.4%, with claim delays; 26.9%, with the number of medical assessments; and 26.1%, with the amount of compensation they received. Adversarialism was also noted as an aspect of the claim process that could contribute to high levels of stress among claimants. Notably, claimants who experienced compensation-related stress were at increased risk of disability, depression and anxiety 6 years after their injury, experienced poorer recovery from their injuries, and had poorer quality of life compared with those who did not report experiencing compensation-related stress.

4.23. While related to transport and workers’ compensation scheme claimants, these findings may also be important to consider in relation to medical negligence plaintiffs in South Australia, particularly given the concerns raised by participants in this research about delay (3.46.-3.55.), the problems associated with obtaining multiple expert reports, and the adversarialism of some.

---

30 Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December).
31 Medical Negligence Defendants Focus Group (University of Adelaide, Adelaide, 14 December 2017).
33 Grant et al, above n 31, 446.
34 Spittal, above n 31, 1.
35 Ibid 7; Grant, above n 31, 446.
disputants and lawyers (see 6.12.-6.13.). The stressfulness of dealing with a medical negligence dispute may also have significant impacts on the health professionals involved as defendants. As noted in Chapter 2, such disputes can present challenges to a health care professional’s reputation, competence and ethic of patient care, and this can be psychologically distressing. In relation to this, one medical negligence defendant that participated in the focus groups said:

The rate of suicide and the rate of doctors not continuing practice after a complaint is a lot higher than people realise. It causes a lot of stress. A lot of medicos are Type A personalities- people are driven to do well, to do things perfectly.

Public Costs

4.24. The public cost of unresolved disputes is rarely quantified. The Productivity Commission has required Courts to comment on public costs for a number of years in its Government Services Reports. These Reports show that the cost of each matter finalising in the Court can be significant and clearly if pre-action protocols are effective then such costs may be reduced. As discussed previously, there was limited information to support a finding that the number of matters that had commenced in the Supreme and District Courts had reduced as a result of the Pre-Action Protocols. Although the statistics indicated that there was a reduction in matters commenced overall, this reduction may also have been related to changes in jurisdictional limits and an overall decline in civil litigation.

The Impact of Pre-Action Protocols

Front Loading of Costs

4.25. As noted previously, one concern that has been raised in relation to pre-action requirements is a concern that they can ‘front load’ costs. That is, that costs might be incurred at an earlier time and/ or that costs may be incurred ‘unnecessarily’. Issues relating to ‘front loading’, and costs more generally in terms of the pre-action requirements, were explored in the focus groups and interviews.

4.26. In the medical negligence area, a plaintiff lawyer that participated in a supplementary interview during April 2018 expressed concern about the front loading of legal costs and the lack of any ‘return on investment’ for plaintiffs. This practitioner noted that there are about 15 items that need to be covered in the initial notice letter required under the Pre-Action Protocols, and that this requires a document of approximately 15 pages and costs the client about

---


37 Comment at Medical Negligence Defendants Focus Group (University of Adelaide, Adelaide, 14 December 2017).

They commented that, ‘if the letter is responded to, it is worth doing... Where there is no response, there is no return on investment.’  

4.27. However, in contrast, most lawyers who participated in the December 2017 focus groups did not perceive ‘front loading’ as an issue. One plaintiff lawyer believed that the costs had been ‘shifted around’ but had not increased as a consequence of the Pre-Action Protocols. The same participant also noted that the cost of expert reports was a significant early cost; although it was noted that expert reports would be required at some point in any event: ‘my client usually isn’t making a firm decision to progress a claim until they have some expert support in some form.’

4.28. Defendant lawyers indicated that they would engage in communication and conferences early (with or without protocols), as part of their normal management of such claims. One defendant lawyer indicated that a meeting between lawyers and parties early on could be useful in shaping expectations, particularly for plaintiffs. With the exception of early mediation (which participants had some concerns about, and which is discussed in Chapter 7), there was no stated concern about front loading amongst these practitioners.

Have the Pre-Action Protocols Increased or Decreased the Cost of Civil Litigation Overall?

4.29. Past research has shown that there is little evidence that Australian pre-action protocols increase costs or that the front loading of costs causes an overall increase in costs in respect of disputes that may have settled anyway (there may be some exceptions where particularly complex cases are involved). In relation to some disputes there was limited evidence that there may have been cost savings in that disputes settled at an earlier time before proceedings commenced.

4.30. One practitioner who was interviewed and did not understand the Protocols (and did not seem to be aware of them) expressed some concern about them, noting that ‘...while it is necessary to enumerate the client’s claim at some point, doing it too early can mean that the client is “hit twice” with the cost of the document if the claim later changes as the parties ‘get down the line to mediate’. Given the lack of understanding about the Protocols, the researchers concluded that a lack of information about the Protocols may mean that some practitioners were concerned about ‘front loading’ and that if the Protocols were to remain, specific professional education would be desirable.

4.31. In relation to the medical negligence area, it has already been noted (at 4.27.) that most of the lawyers that participated in the focus groups and supplementary

---

39 Interview with Medical Negligence Plaintiff Lawyer (Telephone Interview, 26 April 2018).
40 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
41 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
42 Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
44 Ibid.
45 Interview with Construction Lawyer (Telephone Interview, 5 May 2018).
interviews did not believe that the Pre-Action Protocols had increased costs for parties. However, there were some exceptions. For example, one medical negligence plaintiff lawyer recalled one matter in which the Protocols may have had a negative effect:

The initial letter received a lengthy, legalistic response and that set the tone for how the whole process went... it achieved nothing and racked up a whole bunch of costs...
It’s probably how that defendant and that firm conduct themselves anyway... The Protocols just created that much rubbish on the file. 46

4.32. To some extent, the response in relation to costs and ‘legalistic’ approaches can be considered in the context of compliance with the Protocols and is explored further in Chapter 6 and 7. It is of some concern that some practitioners reported that other practitioners were not taking the Protocols seriously. These issues were raised in the context of cost consequences and it was noted that where there was non-compliance with protocols, there were, by and large, no cost consequences. This was a significant concern for one of the medical negligence plaintiff lawyers interviewed, who noted that a lack of cost consequences seemed to be undermining defendant engagement and compliance with the Protocols. 47 In contrast, defendant lawyer comments about the utility of letters relating to the protocols included the following:

Those letters are largely self-serving...I’ve never had a matter where a failure to comply with a pre-action protocol has resulted in an adverse cost order. 48

Sometimes...I tend to say, have you done a notice before action and write a standard letter, but I’m not going to chase it up hill and down dale...it’s a cost benefit analysis. Normally, I have a self-serving letter on the file, so I can refer to it at an appropriate time, for costs. But the court’s hardly likely to enforce it anyway, it’s a waste of time...my experience is that the Masters are very lenient towards plaintiffs. 49

4.33. The researchers are not aware of any cases in which the Court has imposed a cost sanction against a party for non-compliance with the 2014 Pre-Action Protocols. 50 The Courts have, however, considered non-compliance with the other Rule 33 pre-action protocol (see 2.16.) in relation to the making of cost orders 51 and have imposed cost sanctions against parties for non-compliance

46 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
47 Interview with Medical Negligence Plaintiff Lawyer (Telephone Interview, 26 April 2018).
48 Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
49 Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
50 Rule 12 of the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) provides that ‘(4) The Court may take into account the extent of the parties’ compliance with this Division when giving directions for the management of proceedings and when making orders about who should pay costs.
51 See, eg, Public Trustee as Litigation Guardian for Pinter v Newman (2012) 112 SASR 299 where the Court declined to award costs other than on a party-party basis. The letter sent by the plaintiff before action amounted to a formulation of the plaintiff’s claim, not an offer, as required by r 33(2) and was not placed on the court file as required by r 33(6)(b): [33]-[37]. Further, the Court held that, even if the
with the earlier ‘90-day Rule’ that was contained in r 101 of the District Court (Criminal and Miscellaneous) Rules 1992 (SA) and r 20A of the Magistrates Court (Civil) Rules 1992 and required personal injury plaintiffs to give 90 days’ notice before action to the proposed defendants’ insurer,\(^{52}\) for example.

4.34. While data relating to the construction area is limited, the construction defendant lawyer that participated in the focus groups was of the view that the Pre-Action Protocols can help to increase cooperation between parties to construction disputes and that this may help to control costs: ‘they get parties focused on how to resolve things before legal costs become such a problem’.\(^{53}\) Although, as noted in Chapter 3 (at 3.58.), they were also of the opinion that the Protocols are more effective in this sense when ‘there is an experienced person on the other side’.\(^{54}\)

4.35. Barristers’ perceptions were much more negative. The barrister interviewed as part of the research team’s consultation process during December 2017 described the Protocols as ‘just an extra step that’s increasing costs.’ They noted that the Protocols ‘create turnover (or cashflow) for the Bar’ as it is not unusual for junior barristers to be involved in sending the pre-action letters required by the Protocols.\(^{55}\)

4.36. Barristers who participated in the online survey were asked to indicate the extent to which they agreed or disagreed with the following statements:

- The Pre-Action Protocols have decreased the cost of civil litigation; and
- The Pre-Action Protocols have increased the cost of civil litigation.

4.37. The results are displayed in Table 4.1. Most barristers who responded to this question disagreed that the Pre-Action Protocols had decreased the cost of civil litigation and agreed that the Protocols had increased the cost of civil litigation, although, given the low survey response rate, these results cannot be said to reflect the views of the SA Bar generally.

---

\(^{52}\) See, eg, Stewart & Ors v Jacobsen No. SCGRG-99-1099 [2000] SASC 198 (29 June 2000) where Nyland J (Doyle and Debelle J agreeing) upheld the decision of the trial judge to reduce by 10% the amount recoverable by the plaintiff with respect to costs for failure to comply with the ‘90 day rule’. Nyland J agreed with the trial judge’s remarks and rejection of the plaintiff’s submission that no order should be made because as subsequent events demonstrated even if the notice had been given in due time it would not have led to a settlement or altered the course of the action; ‘some adverse cost consequences need to follow non-compliance without adequate excuse so that the Court upholds the integrity of its Rules and its caseflow management procedures’: [77]-[78].

\(^{53}\) Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).

\(^{54}\) Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).

\(^{55}\) Interview with Barrister (15 December 2017).
Table 4.1: The Protocols have Increased/Decreased the Cost of Civil Litigation

<table>
<thead>
<tr>
<th>Question</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>%</td>
<td>n</td>
<td>%</td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>The Pre-Action Protocols have decreased the costs of civil litigation</td>
<td>60%</td>
<td>3</td>
<td>0%</td>
<td>0</td>
<td>40%</td>
</tr>
<tr>
<td>The Pre-Action Protocols have increased the costs of civil litigation</td>
<td>0%</td>
<td>0</td>
<td>29%</td>
<td>2</td>
<td>29%</td>
</tr>
</tbody>
</table>

4.38. Barristers were also invited to make a comment about the Pre-Action Protocols with respect to costs. Comments included that:

‘They do little more than require parties to do what they should be doing anyway.’
‘Considerable costs are incurred by both parties in complying with the Protocol. The benefit of an earlier settlement thereby saving costs is illusory where defendants (insurers) do not engage in the process.’
‘Must remember to compare to the alternative- protracted negotiation or trial’
‘Unnecessary additional cost’
‘They are largely wasted costs as the Courts do not rely upon them or impose penalties for non-compliance.’

4.39. These results can be compared with the findings made in relation to barristers’ perceptions of the usefulness of pre-action requirements generally. In the general perceptions section of the survey, participants were also asked to indicate the extent to which they agreed or disagreed with the statement that ‘pre-action-requirements can result in cost savings for parties.’ The results are displayed in Table 4.2. Here, most barristers who responded to this question disagreed with the statement.

Table 4.2: Can Pre-Action Requirements Result in Cost Saving for Parties

<table>
<thead>
<tr>
<th>Question</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
</tr>
</thead>
</table>
|          | %   | n | %   | n | %   | n |%
| Pre-action requirements can result in cost savings for parties | 50% | 5 | 10% | 1 | 20% | 2 | 20% | 2 |

4.40. Barristers were also asked to make a comment about this statement. Comments included that:

‘Formulating a claim would be required in any event, so it is costs neutral. However other pre-action requirements involved in the Protocol add to the costs without any benefit.’
‘The more onerous and complex the rules/protocol is, the more parties spend on legal advice to comply.’

‘”Can” do but I doubt that they do.’
‘If the parties replying in good faith they should save time and money. Otherwise they can be abused to stretch out the cost of litigation.’

**Expert Costs in Medical Negligence Disputes**

4.41. As noted previously, the high cost of medical expert reports was a concern for all participants in the medical negligence focus groups. As noted above at 4.15., one of the medical negligence plaintiffs interviewed withdrew from the litigation as a result of an inability to fund the cost of expert reports. This plaintiff indicated that they had required multiple medical reports; ‘some were about $6000… some were about $2000.’ 56 In addition, this plaintiff indicated their lawyer had used a ‘broker’ who ‘sourced out a surgeon who would look at the case’ 57 (see also 3.53.). They noted that ‘the broker got a few thousand dollars just for doing that.’ 58 The other medical negligence plaintiff interviewed indicated that their expert reports had cost about $6000 each. They had obtained ‘two or three’ reports at the time they were interviewed and believed that more would likely be required. 59

4.42. While the Pre-Action Protocols were not complied with in either of these matters, the medical negligence lawyers interviewed did not believe that the Pre-Action Protocols had reduced the need for, or the cost of obtaining, expert reports. As noted in Chapter 3 (at 3.36., 3.82.), some medical negligence lawyers regard expert evidence as necessary to their ability to properly advise their clients. One medical negligence plaintiff lawyer considered that the Pre-Action Protocols ‘do not reduce expert costs because the defendant will not negotiate without expert reports for every element.’ 60 This lawyer also noted that they struggle to get expert reports in South Australia; they indicated that the market for medical experts is small, and that they are often forced use interstate experts, ‘which is expensive.’ 61 Another lawyer indicated that they use both interstate and South Australian medical experts. They noted that ‘the cost varies’, however, they recently paid $8500 for a psychiatric report, for which the doctor saw the patient on two occasions. They suggested that ‘people commenting on life expectancy can be $13 000.’ 62

**Proportionality**

4.43. Finally, there was a perception among some lawyers that participated in the focus group interviews that the Pre-Action Protocols are more appropriately applied in matters where costs proportionality is likely to be an issue than in larger, more complex claims. For example, one medical negligence defendant lawyer commented:

> I think you have to do a cost benefit analysis. This is all well and good in claims that are not very big and everyone knows that the costs are going to be more than the...
claim is worth. But if you’ve got a claim worth $10 million…these sorts of things are not going to settle until the defendant has properly considered all the issues. It’s not going to settle due to a commercial decision…in the smaller claims, worth about $20000, you might throw something at it at an early time, even if you think it has no merit.  

Conclusions

4.44. As in previous research, most research participants agreed that the monetary cost of civil litigation is prohibitive for many disputants and there was evidence that costs in general had serious impacts on litigants. The high costs facing medical negligence plaintiffs and the high cost of medical expert reports were of particular concern, and one of the plaintiffs interviewed withdrew from litigation as they were unable to fund the cost of additional expert reports.

4.45. Non-monetary costs to litigants, such as personal time spent and travel costs, were significant in some cases, and recent research on the health and associated impact costs supports the notion that early resolution should be supported by courts and lawyers as the impact of protracted proceedings on litigants can be extensive.

4.46. In terms of the impact of the Pre-Action Protocols on cost, almost all of the lawyers interviewed considered that, overall, the Pre-Action Protocols had not resulted in a significant front-loading of costs and did not believe that the Protocols had increased cost for parties, primarily on the basis that many of the steps required by the Protocols are steps that would have been taken anyway. Although, most could recall one or two negative examples where the Pre-Action Protocols may have contributed to an increase in costs, these instances tended to be linked to non-compliance or poor behaviour on the part of opposing parties or lawyers and may indicate a need for other conduct requirements and for greater use of cost sanctions in relation to non-compliance with the Protocols (see further in Chapters 6 and 7).

4.47. The responses provided by the barristers who participated in the online survey were a lot more negative and some barristers even indicated that they believed that the Pre-Action Protocols had increased costs. It is not clear whether this is a result of barristers being more likely to be involved in complex cases.

4.48. The pre action requirements were also focused on reducing costs by encouraging more planned approaches where resolution did not occur. There was some evidence that this occurred (see Chapter 3 at 3.57) however there are

---


64 At present rule 12 of the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) provides that ‘(1) This Division is not to be used as a tactical device to secure advantage for one party, delay the commencement of proceedings or generate avoidable costs… (4) The Court may take into account the extent of the parties’ compliance with this Division when giving directions for the management of proceedings and when making orders about who should pay costs.’
questions about whether this objective could be met more effectively. This issue is also related to court follow up as well as expectations relating to cost and issue definition planning (including whether joint expert approaches are feasible).

4.49. Finally, from a public cost perspective, there was no evidence that there were any additional public costs incurred as a result of the Protocols. In addition, the small number of settlements (see 3.26.) and time savings (see 3.56.-3.65, 3.72.) that may have been achieved by the Pre-Action Protocols (either directly or indirectly) would have reduced some public costs.
Chapter Five – Fairness and Justice

Introduction

5.1. An important factor in determining whether or not pre-action requirements are effective is to explore whether or not they are perceived as fair or just. The importance of fairness in dispute resolution processes is recognised throughout the literature relating to court and ADR processes. Benchmarks for complaints handling, Australian Standards, The Access and Equity Strategy and Framework, The Australian Securities and Investments Commission’s ADR scheme policy statements, and leading academic commentary all refer to fairness as a core element in assessing whether disputes have been finalised effectively.

5.2. Fairness can be defined in terms of perceptions of procedural fairness (that is, whether procedures, participation, and the timeliness and cost of arrangements are viewed as ‘fair’) as well as outcome fairness (whether or not this can be assessed by reference to objective or other standards). These concepts have been discussed in a number of reports in the context of pre-action requirements and access to justice and in more detail in the literature.

---

1 For example, NADRAC, ‘A Framework for ADR Standards’ (Report to the Commonwealth Attorney-General, NADRAC, April 2001) 13–14; Supreme Court of Victoria, ‘Courts Strategic Directions Report’ (Report, Supreme Court of Victoria, 2004) 2.
8 NADRAC, ‘Maintaining and Enhancing the Integrity of ADR Processes’ (Research Report, NADRAC, February 2011) 34.
9 See ALRC, above n 6, 162 fn 15. The ALRC referred to the Victorian Law Reform Commission (VLRC), Civil Justice Review, Report 14 (2008) 109–110, and noted that: ‘The VLRC Report identified that the implementation of pre-action protocols may be challenged on the basis that such protocols are a barrier to accessing the courts, and therefore incompatible with the right to “have the charge heard or proceeding decided ... after a fair trial” pursuant to s 24 of the Charter of Human Rights and Responsibilities Act 2006 (Vic). However, this concern was dismissed by the VLRC on the grounds that pre-action protocols: would not bar the commencement of proceedings; are triggered before the commencement of proceedings; and support the facilitation of a fair hearing.’
10 See, eg, Tania Sourdin, Alternative Dispute Resolution (Thomson Reuters, 5th ed, 2016).
terms of procedural fairness, research suggests that having a perception of being heard, of having ‘voice’ in the process, understanding processes (procedural explanation), feeling respected and valued, a perception that there is a lack of bias and a sense of having contributed meaningfully to both process and outcome will be relevant. Procedural justice research suggests that people can consider that a process was fair even if they view the outcome as unfair.\(^\text{11}\)

5.3. Justice is often equated with fairness in the literature, although, it may have a range of additional meanings.\(^\text{12}\) The notion of fairness can also be linked to notions of satisfaction. In this regard, it is often suggested that interest-based processes rather than rights-based processes can be viewed as more fair. This is partly because the interests that may be attended to include not only procedural and content notions of fairness but may also incorporate psychological interests.\(^\text{13}\)

5.4. More specifically, in the context of perceptions of fairness and justice, the SA Pre-Action Protocols are intended to ‘to establish orderly procedures for the just resolution of disputes’.\(^\text{14}\) However, in terms of their capacity to support procedural justice, the focus has been more on ‘orderly’ processes rather than procedural justice indicators that, in the literature, often refer to ‘voice’ and perceptions relating to respect.

5.5. In this Project, the Pre-Action Protocols were evaluated by reference to both procedural and outcome fairness. Data was collected during the focus groups and supplementary interviews and via the online survey of the SA bar. The results should be interpreted with some caution as the sample size is relatively limited, and secondly, there is no larger comparable data-base available to determine whether the results indicate significant outliers.

**Past Research on Fairness Perspectives and Pre-ACTION Requirements**

5.6. Past research has shown that there are mixed views within the legal profession about whether pre-action requirements at a general level are fair. On the basis of submissions received, the ACJI reported in its *Exploring Civil Pre-

---

\(^{13}\) See NADRAC, ‘Issues of Fairness and Justice in Alternative Dispute Resolution’ (Discussion Paper, NADRAC, November 1997) 22. See also Marie Delaney and Ted Wright, ‘Plaintiffs’ Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation’ (Research Report, Justice Research Centre, Law Foundation of NSW, January 1997) which considered the relationships between procedures and personal injury plaintiffs’ perceptions of fairness, satisfaction with their outcomes and satisfaction with the legal system. The research found that the two consensual procedures (pre-trial conference and mediation) were perceived as more satisfying than the two adjudicative procedures (arbitration and trial). The factors that may have influenced plaintiffs’ perceptions of satisfaction are summarised at paragraphs 110-113 of the report and include the time taken to resolution, the amount for which the claim was settled, whether plaintiffs felt that the procedure was comfortable, careful and dignified, and whether the procedure was easy to follow.  
\(^{14}\) District Court Civil Rules 2006 (SA) r 3(e); Supreme Court Civil Rules 2006 (SA) r 3(e).
Action Requirements: Resolving Disputes Outside Courts report\textsuperscript{15} that pre-action requirements in Australia are supported to the extent that they contribute to effective, timely and cost-effective resolution of disputes. However, a small number of survey respondents expressed the view that pre-action requirements may not be ‘fair’ or appropriate for all litigants or all cases.\textsuperscript{16}

5.7. Further, the ACJI found that many regulatory bodies, other authorities, organisations, individuals and members of the legal profession ‘support elements of many pre-action schemes and have concerns about other elements.’\textsuperscript{17} For example, it found that some respondents considered that such processes were fair but were concerned that pre-action requirements could place ‘too large a burden on the parties and would not be fair’ in cases where ‘clear liability is difficult to establish’.\textsuperscript{18}

5.8. Drawing on the perceptions and views that emerged from focus groups and interviews with lawyers, judicial officers and mediators, the ACJI report also suggested that ‘demographics, disputant characteristics as well as other dispute attributes can play a major role in determining whether pre-action requirements are procedurally fair.’\textsuperscript{19} This was also borne out in this research to some extent (see the following section and 5.27-5.29.).

Process Fairness

Perceptions about the Fairness of Resolving ‘Pre-Action’ and the Fairness of Other Dispute Resolution Processes

5.9. Past research has suggested that some dispute resolution processes can be viewed as more ‘fair’ than others. In this regard, disputants may be more likely to consider that mediation is more fair than negotiations between parties (lawyers), arbitration or a court hearing.\textsuperscript{20} Other research has suggested that disputants who want a ‘day in court’ may consider that an opportunity to voice complaints in a formal setting is equivalent to a ‘day in court.’\textsuperscript{21}

5.10. During the focus groups and supplementary interviews, legal practitioners were asked whether their clients were satisfied in terms of resolving disputes during the pre-action stage via pre-action meetings or informal conferences, or whether they tend to prefer to ‘have their day in court.’ Overall, it was suggested that most disputants tend to be satisfied in terms of resolving matters during the pre-action stage and may regard this experience as being equivalent to a day in court (although less costly and less stressful). However, practitioners recognised that expectations regarding the fairness and efficiency of different dispute

\textsuperscript{15} Tania Sourdin, ‘Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts’ (Report, Australian Centre for Justice Innovation, 2012).
\textsuperscript{16} Stasia Tan, ‘Resolving Disputes without Courts – Commentary from Law Council of Australia’ (Submission to ACJI Background Paper, Law Council of Australia, 22 June 2012) 3.
\textsuperscript{17} Sourdin, above n 15, 97.
\textsuperscript{18} Ibid, citing Tan, above n 16, 3.
\textsuperscript{19} Sourdin, above n 15, 97.
\textsuperscript{20} Tania Sourdin and Tania Matruglio, ‘Evaluating Mediation- New South Wales Settlement Scheme 2002’ (Research Report, La Trobe University, 2004); see also Delaney and Wright, above n 13.
resolution processes can differ according to the type of disputant concerned. This outcome is also consistent with some past research about disputant preferences. 22

5.11. In this regard there may be different perceptions in respect of construction and medical negligence disputes. For example, in the construction area, one construction lawyer noted that builders tend to be commercially-minded and therefore content to resolve disputes at an early stage. In contrast, they suggested that home-owners involved in construction disputes often feel quite aggrieved and may wish to pursue a court process. It was noted that these attitudinal approaches can make home-owners more reluctant participants in the pre-action process:

It depends which side of the fence you’re on. Home owners can feel quite aggrieved and they want their day in court. Whereas when I work with builders, they are quite commercial about things and want to engage the process, so it doesn’t cost them time and money. Owners can be more reluctant participants. But then ultimately people start to realise that their day in court is a long way down the track and there is a lot of money that can be spent…and stress. 23

5.12. In contrast, another construction lawyer noted that some of their commercial clients are quite proactive in terms of attempting to resolve disputes themselves, so that by the time they go to see a lawyer they ‘have already had 50 goes at it and are saying, “I need to sue these people.”’ 24

5.13. In relation to medical negligence disputes, defendant lawyers expressed the view that defendant insurers and hospitals almost always want to try and resolve matters early. One defendant lawyer explained that, ‘often it is not about merits, but about whether we can resolve things commercially.’ 25

5.14. On the other hand, plaintiff lawyers suggested that medical negligence plaintiffs can be angry, may have suffered as a result of their injuries and may still be grieving. Due to these factors, they may be less likely to resolve their dispute at an early stage and can be less likely to perceive the pre-action process as fair and be satisfied with that process. One plaintiff lawyer commented that, ‘sometimes, informal processes aren’t as good at soaking up anger as something a little bit more formal.’ 26 Mediation was suggested as an effective, more formal process, that was more likely to be perceived as fair and ‘a really good way for [clients] to actually have their say.’ 27 Although, medical negligence lawyers do not tend to utilise mediation during the pre-action stage, primarily for reasons of

---

23 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
24 Interview with Construction Lawyer (Telephone Interview, 5 May 2018).
25 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
26 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
27 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
5.15. One judicial officer also expressed the view that litigants may value the ‘recognition’ of the court:

I think it sometimes it helps a litigant feel like they have been fairly dealt with if they have actually seen the court, even if it doesn’t go to a final trial...I had a litigant write to me once in a terrible case where the defendant was dragging it out and I made some comments about it...the person wrote that they were very grateful because they could see that I understood the situation and wanted the case to go forward...but that’s just one instance...I think sometimes people want to see the court and they feel that at least their case has been recognised... Although, a lot of people feel quite happy they have resolved it early and don’t have to incur the cost or risk or stress.  

5.16. However, this contrasts with the views expressed by some medical negligence plaintiffs. Notably, none of the medical negligence plaintiffs interviewed had participated in a pre-action meeting. Yet, they tended to believe that pre-action meetings would have been helpful and are a good idea, provided that the parties have enough evidence to support their case, and are open to sharing their views during the pre-action stage:

It would have been a good idea to sit down with the other side... but you need all the information...you still need an independent surgeon to assess you before you go to that type of meeting. You need that data, so you’ve got something you can base your facts on.  

5.17. It was also suggested that doctors who are defendants in medical negligence disputes usually prefer to resolve disputes at an early stage in order to avoid the publicity associated with court hearings. One medical negligence defendant noted that:

Probably 80-90% of doctors just want it to go away. They may well realise that they have made a mistake and may well change their practice as a result. Most doctors would not want to go to court, because they will be publicly exposed....5-10% of doctors would feel as though they have been so flagrantly criticised and criticised, adversely and inappropriately, that they feel they are right and they want their day in court to prove they are right, no matter how much it costs or the time it takes.  

5.18. However, this defendant later commented:

My strong feeling is that the lawyers we pay through our insurance are trying to reduce the amount that we pay out, by any means possible, either by agreement or settlement. Medical people are generally unhappy with that because they take that as an insult to themselves. If they feel that they weren’t negligent, they like to have

---

28 Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017); Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
29 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
30 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
31 Comment at Medical Negligence Defendants Focus Group (University of Adelaide, Adelaide, 14 December 2017).
their day in court to have their persona presented and their professional status...On the other hand, if it doesn’t go to court, it is generally silent.  

**Barrister’s Perceptions**

5.19. Barristers who participated in the online survey were asked to indicate the extent to which they agreed or disagreed with the statement that ‘The Pre-Action Protocols are procedurally fair.’ The results are displayed in Figure 5.1. Five of the eight participants that responded to this question agreed that the Pre-Action Protocols are procedurally fair.

**FIGURE 5.1: THE PRE-ACTION PROTOCOLS ARE PROCEDURALLY FAIR (N=8)**

![Chart showing the results of the survey on perceived fairness of Pre-Action Protocols](image)

5.20. Participants were also asked to indicate the extent to which they agreed or disagreed with the following statements in relation to the Pre-Action Protocols:

- Disputants tend to perceive the pre-action process as fair;
- Disputants are usually happy to resolve their disputes in the pre-action stage; and
- Disputants usually prefer to have their day in court.

5.21. The results are displayed in Table 5.1. While most respondents (n= 7 out of 8) agreed that disputants are usually happy to resolve their disputes during the pre-action stage, many (n= 5 out of 7) strongly disagreed that that disputants perceive the pre-action process is fair.

5.22. Participants were invited to make a comment about the Pre-Action Protocols with respect to fairness. One barrister who disagreed with the statement, ‘disputants tend to perceive the pre-action process as fair’, commented that, ‘clients rarely understand the need for or the use that might be made of these Protocols.’

---

32 Comment at Medical Negligence Defendants Focus Group (University of Adelaide, Adelaide, 14 December 2017).
Table 5.1: Disputants’ perceptions of process fairness- online barrister survey

<table>
<thead>
<tr>
<th>Question</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disputants tend to perceive the pre-action process as fair</td>
<td>43% 3</td>
<td>29% 2</td>
<td>29% 2</td>
<td>0% 0</td>
<td>7</td>
</tr>
<tr>
<td>Disputants are usually happy to resolve their disputes in the pre-action stage</td>
<td>13% 1</td>
<td>0% 0</td>
<td>88% 7</td>
<td>0% 0</td>
<td>8</td>
</tr>
<tr>
<td>Disputants usually prefer to have their day in court</td>
<td>25% 2</td>
<td>75% 6</td>
<td>0% 0</td>
<td>0% 0</td>
<td>8</td>
</tr>
</tbody>
</table>

5.23. These findings can be compared with those made in relation to barristers’ perceptions of the procedural fairness of pre-action requirements generally. In the general perceptions section of the survey, participants were also asked to indicate the extent to which they agreed or disagreed with the statement that ‘pre-action requirements usually create processes which are fair.’ The results are displayed in Figure 5.2. Just over half of the participants who responded to this question agreed that pre-action requirements usually create processes which are fair. One respondent commented that, ‘if used in good faith [pre-action requirements] should not impact on fairness.’ However, another expressed concern about pre-action requirements being completed ‘without all the relevant information and evidence, especially if there has been no pre-action disclosure or where one side holds most of the documents.’

FIGURE 5.2: PRE-ACTION REQUIREMENTS USUALLY CREATE PROCESSES WHICH ARE FAIR (N=11)
5.24. Participants were also asked to indicate the extent to which they agreed or disagreed with the following statements in relation to the pre-action requirements generally:

- Disputants are usually happy to resolve disputes during the pre-action stage; and
- Disputants usually prefer to have their day in court.

5.25. The results are displayed in Table 5.2. While more than half of the respondents (n= 6 out of 10) disagreed that disputants are usually happy to resolve disputes during the pre-action stage, all respondents (n= 10) disagreed that disputants usually prefer to have their day in court.

Table 5.2: Are disputants happy to resolve disputes during the pre-action stage?

<table>
<thead>
<tr>
<th>Question</th>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>% n</td>
<td>% n</td>
<td>% n</td>
<td>% n</td>
<td>n</td>
</tr>
<tr>
<td>Disputants are usually happy to resolve disputes during the pre-action stage</td>
<td>30% 3</td>
<td>30% 3</td>
<td>30% 3</td>
<td>10% 1</td>
<td>10</td>
</tr>
<tr>
<td>Disputants usually prefer to have their day in court</td>
<td>20% 2</td>
<td>80% 8</td>
<td>0% 0</td>
<td>0% 0</td>
<td>10</td>
</tr>
</tbody>
</table>

5.26. The very small response rate in relation to the barrister survey means that the responses cannot be viewed as an indicator of general views in the legal profession. However, the survey results do suggest that there is some professional opposition to pre-action arrangements. This may be the result of a number of factors including the tendency for barristers to become involved when proceedings are already well advanced, or the involvement of barristers in more complex/disputed claims.

Power Imbalance and Plaintiff Experiences

5.27. Some focus group participants expressed concern regarding the power imbalance that can exist between plaintiffs and defendants, particularly in medical negligence disputes. One medical negligence defendant expressed concern for the individual plaintiffs who find themselves involved in disputes with large insurance companies and medical groups:

The doctors’ needs, by and large, are taken care of by those doctors paying an insurance company to do the job. There is no appropriate, parallel organisation for
patients in general terms...the group that has no power is the patients...a powerful medical group and the patient.\textsuperscript{33}

5.28. The medical negligence plaintiffs that participated in the focus group did express a significant sense of powerlessness. One plaintiff, who was generally supportive of the idea of pre-action arrangements, noted that it took a long time for them to go and see a solicitor because, ‘you have this myth or belief that you are fighting against the system... the chance of winning in medical malpractice is low... and it’s going to cost you thousands of dollars.’\textsuperscript{34}

5.29. This plaintiff was forced to withdraw their proceedings because they could not afford the cost of their medical expert reports. They asked, ‘how the hell can someone have justice in the system? ... These lawyers stick together. The surgeons stick together’.\textsuperscript{35} Notably, the Pre-Action Protocols had not been complied with, and this plaintiff was not aware of them. They expressed concern about the lack of information to which they had access regarding their options for dispute resolution, commenting:

If the lawyer had said “we are worried about costs, let’s have a mediation with the other side”, I would have jumped at that. I didn’t know it was a possibility. I just expected the process the lawyer was taking was the normal process.\textsuperscript{36}

5.30. In terms of how the Pre-Action Protocols may work where there is a power imbalance, there are at least two views. On one view, a power imbalance can be magnified once proceedings commence particularly if the imbalance is related to resources, as the more well-resourced party is better able to pursue or defend a litigated action (and a power imbalance may result in poorer quality legal services). On the other hand, if the power imbalance relates to other potential issues areas (status, affiliation, procedural understanding) it is possible that the imbalance could be magnified particularly if there is no third party present.\textsuperscript{37} Notably, in the matters where the pre-action requirements are applied, it is ordinarily assumed that parties will be represented which can support a more ‘level’ playing field.

**The Provision of Advice and Client Perceptions of Fairness**

5.31. The focus group participants also suggested that the provision of information and advice regarding different dispute resolution processes can impact on disputants’ perceptions of fairness. One medical negligence lawyer emphasised the importance of managing client expectations and stated that:

I think to a large extent it is subject to them having an understanding about what they should expect to happen in the process... how the process operates, what the potential outcomes might be, these are your risks, your strengths, what we have got to do is try to achieve this result... if you went into a conference and they had no idea

\textsuperscript{33} Medical Negligence Defendant Focus Group (University of Adelaide, Adelaide, 14 December 2017).
\textsuperscript{34} Comment at Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December 2017).
\textsuperscript{35} Comment at Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December 2017).
\textsuperscript{36} Comment at Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December 2017).
\textsuperscript{37} NADRAC, above n 13, 42.
what they were looking at, I can see them walking away saying, ‘well that wasn’t very fair... it [perceptions of fairness] probably has a lot to do with their knowledge.’

5.32. Several medical negligence lawyers also noted that pre-action meetings and informal conferences can be helpful in managing client expectations, as these processes allow each party to gain an understanding of the other’s perspective. As one lawyer commented:

> It is sometimes helpful for the plaintiff’s lawyer, because the defendant can explain their views... and that can help to lower plaintiff expectations... Then, you can say to the client, ‘well these are the real risks.’

5.33. Another noted that:

> I think the virtual requirement to have a meeting before commencing proceedings is one area where I have noticed a big difference... it has been helpful in... helping my clients understand what is actually going on and what they are getting involved in.

5.34. As can be seen from the above comments, the educative impact of the Pre-Action Protocols, at least in cases where party representatives are concerned to create a smoother pathway, is seen as a valuable outcome of the steps demanded by the Protocols.

**The Negotiation Environment**

5.35. The focus group responses also indicate that the Pre-Action Protocols may have created a ‘fairer’ negotiation environment by supporting more cooperative conduct between practitioners in some instances. In this respect, one construction defendant lawyer commented, ‘I have been quite encouraged by the process. It facilitates lawyers looking at things a bit more collaboratively.’

One medical negligence plaintiff lawyer noted that they have received ‘better responses’ from defendants due to the ‘structured process’ the Protocols create:

> I have two examples where we have served Rule 23 notices but have been unable to file the claim, and we have been able to say to the defendants we can either issue proceedings now, or you can agree to waive or extend the time period, and they have agreed to extend the time period. And I think that’s because they’ve received a formalised Rule 23 notice so it’s a bit more structured and a process, and that’s allowed us to work towards a settlement.

5.36. It was also suggested that the Pre-Action Protocols increase the fairness of the negotiation environment for defendants by requiring claimants to provide earlier notice of their claims and therefore allowing defendants to prepare earlier:

---

38 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
39 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
40 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
41 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
42 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
As a defendant, it was actually very welcome because we would be served with proceedings six months after the limitation period had expired, that had been issued within a day of the limitation period expiring...we would have had no notice of the claim.\textsuperscript{43}

5.37. The Protocols may be assisting to improve the practice of inexperienced practitioners. For example, one experienced practitioner noted that:

It certainly makes a difference when you get a call from another practitioner who hasn’t done much medical negligence before, and you can say, well just go and read the protocols...it’s a good guide...a useful tool.\textsuperscript{44}

5.38. It was also noted that the Pre-Action Protocols ‘enable parties to seek a meeting with the other side without weakening their negotiating position.’\textsuperscript{45}

5.39. On the other hand, despite the predominantly cooperative approach, it was reported that in some cases, the behaviour of legal practitioners during the pre-action stage can lead to negative outcomes (see 6.12.-6.13.). In this sense, the capacity of the Pre-Action Protocols to deliver fair processes may depend on the way lawyers and disputants engage with each other. This issue is discussed further in Chapter 6.

Perceptions of Process Fairness Linked to the Time Taken to Deal with Disputes

5.40. Past research has shown that the time taken to deal with a dispute is a, and in many cases the, critical factor in determining whether or not people consider the justice system just and fair.\textsuperscript{46} This was borne out in the medical negligence focus groups, with plaintiffs uniformly advocating for shorter time frames to resolve disputes: ‘I’m sure the lawyers could actually short-circuit all that if they really wanted to... I don’t think they do.’\textsuperscript{47}

Perceptions of Process Fairness Linked to Cost

5.41. Participants in the focus groups and online survey considered cost alongside their assessment of process fairness (see 4.16.-4.17.). For medical negligence plaintiffs the cost of expert evidence was a particular concern, with the need to come up with many thousands of dollars to obtain evidence from experts, often from interstate (see 4.41.-4.42.). This can be linked to perceptions about frustration about delays in progress whilst evidence is obtained and evaluated. These immediate out of pocket costs were of more concern than lawyers’ fees, which may well be deferred until the end of the case. However, the defendant

\textsuperscript{43} Interview with a Judicial Officer of the Supreme Court of South Australia (Australia (Sir Samuel Way Building, Adelaide, 12 December 2017).
\textsuperscript{44} Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
\textsuperscript{45} Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
\textsuperscript{46} Tania Sourdin, ‘Mediation in the Supreme and County Courts of Victoria’ (Report, The Department of Justice and Australian Centre for Peace and Conflict Studies, 2008) 117-8; Sourdin, above n 15, 127-47.
\textsuperscript{47} Comment at Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December).
lawyers interviewed expressed amazement at the legal (not disbursement) costs habitually incurred by plaintiff lawyers, suggesting that defendant legal costs were significantly lower (see 4.18.). This issue should be considered within the context of how plaintiff and defendant lawyers tend to operate in their practices. Plaintiff lawyers act for a high number of ‘one-off’ litigants, advise their clients of their fee arrangement (often a no win/no fee arrangement with a premium for the lawyer if they succeed), and have them sign a retainer. There is no real equality of bargaining power in the lawyer/client relationship (which has the potential to compound the sense of powerlessness plaintiffs may already face—see 5.27.-5.29.). On the other hand, defendant lawyers may act for a small number of insurers who have a greater ability to dictate what fees they will pay their lawyers and the terms of their retainer.

5.42. With respect to the fairness of the Pre-Action Protocols process, one medical negligence lawyer indicated that they have had clients complain about the cost of compliance with the Pre-Action Protocols, however, this perspective may be linked to a lack of understanding about the pre-action requirements amongst disputants.48 Further, one barrister that responded to the online survey and strongly disagreed with the statement that ‘The Pre-Action Protocols are procedurally fair’ described the Pre-Action Protocols as ‘a massive additional cost to plaintiffs, with no identifiable benefit. Only useful for deep pocketed litigants who wish to engage in endless interlocutory skirmishing.’ As noted previously, there was little evidence of any cost increase with the use of the Protocols (see 4.29.-4.39).

5.43. This perspective can also be contrasted with the perception of another medical negligence lawyer who raised concerns about the difficulty plaintiffs face in needing to ‘spend $3000 on an expert to analyse [their] case…before [they] can make [their] complaint….’ This practitioner noted that, whilst this seems unfair, the ‘the Pre-Action Protocols are not something that adds to that unfairness’, as expert reports would be required in any event.49

Perceptions of Process Fairness Linked to Effectiveness

5.44. For some of those who participated in the focus groups, perceptions of fairness were linked to perceptions of effectiveness and the concern that application of the Pre-Action Protocols to some types of cases would be inappropriate. For example, as previously noted, one medical negligence defendant representative expressed the view that pre-action requirements are not effective in resolving large claims ‘worth millions of dollars’ and that the parties to these claims should not have to comply with the protocols (see comments on proportionality at 4.43.).

48 Interview with Medical Negligence Plaintiff Lawyer (Telephone Interview, 26 April 2018).
49 Comments at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
Outcome Fairness

5.45. Given that many of the lawyers that participated in the focus groups believed that it was unusual for matters to resolve during the pre-action stage due to the Pre-Action Protocols (see 3.17), the researchers’ ability to gather data regarding the fairness of outcomes achieved under the Protocols was somewhat limited. One judicial officer that had worked as a defendant lawyer in the past noted:

Sometimes, resolving earlier [but not necessarily as a result of the Pre-Action Protocols] may favour the insurer. Sometimes, resolving earlier may reduce psychological impacts on plaintiffs... you may end up with less money in your hand but you end up with a much stronger mental health.\(^{50}\)

5.46. One of the medical negligence plaintiffs interviewed had experienced an unsatisfactory outcome in that they were forced to withdraw proceedings due to an inability to fund the cost of medical expert reports (see 4.15., 5.29.). The other medical negligence plaintiff’s matter was still ongoing at the time of the focus group. One of the outcomes they were hoping for was some assurance that what happened to them will not happen to another person. One medical negligence defendant also observed with respect to plaintiffs that, ‘some people want money, but usually plaintiffs want some recognition that, yes, something’s happened and it won’t happen to the next person.’\(^{51}\) In this regard, there is ample evidence in the literature that plaintiffs may seek a range of outcomes that can often not be accommodated in court proceedings that include an apology, confirmation and information about medical treatment\(^{52}\) or even an opportunity to explain and talk about the impact of an event. Past research has found that that the ‘never again’ extra-legal objective (reflected in the comment above that some plaintiffs just want some recognition and understanding that ‘it won’t happen to the next person’) can be a common and important litigation objective for plaintiffs.\(^{53}\)

5.47. Some data regarding outcome fairness was collected via the online survey of the SA bar. However, this data is also limited due to the low survey response rate. Barristers were asked to indicate the extent to which they agree or disagree with the statement that ‘The Pre-Action Protocols result in outcomes which are fair.’ The results are displayed in Figure 5.3. Most barristers that responded to this question (n= 6 out of 8) disagreed that the Pre-Action Protocols result in outcomes which are fair.

\(^{50}\) Interview with a Judicial Officer of the Supreme Court of South Australia (Australia (Sir Samuel Way Building, Adelaide, 12 December 2017).

\(^{51}\) Medical Negligence Defendant Focus Group (University of Adelaide, Adelaide, 14 December 2017).


\(^{53}\) See Tamara Relis, Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties (Cambridge, 2009) 43.
FIGURE 5.3: THE PRE-ACTION PROTOCOLS RESULT IN OUTCOMES WHICH ARE FAIR (N=8)

The Pre-Action Protocols result in outcomes which are fair (n=8)

0% 10% 20% 30% 40% 50% 60%
Strongly Disagree Disagree Agree Strongly Agree

4
2
2
0%

5.48. Barristers were also asked to indicate the extent to which they agreed or disagreed with the statement that ‘Disputants tend to perceive the outcomes achieved under the Pre-Action Protocols as fair.’ The results are displayed in Figure 5.4. and were similarly negative: five out of seven respondents indicated that they disagreed with the statement. It is not clear if this response is influenced by the low use (and therefore lack of outcome) associated with Pre-Action Protocols, or the value of the protocol process itself.

FIGURE 5.4: DISPUTANTS TEND TO PERCEIVE THE OUTCOMES ACHIEVED UNDER THE PRE-ACTION PROTOCOLS AS FAIR (N=7)

Disputants tend to perceive the outcomes achieved under the Pre-Action Protocols as fair (n=7)

0% 5% 10% 15% 20% 25% 30% 35% 40% 45% 50%
Strongly Disagree Disagree Agree Strongly Agree

2 3
2
0%

5.49. Again, these results can be contrasted with the finding made in relation to barristers’ perceptions of the outcome fairness of pre-action requirements generally. In the general perceptions section of the survey, participants were also asked to indicate the extent to which they agreed with the statement that ‘Pre-action requirements can assist in achieving fair outcomes.’ The results are displayed in Figure 5.5. and were more positive: seven of the 11 barristers that
responded to this question agreed that pre-action requirements can assist in achieving fair outcomes.

**FIGURE 5.5: PRE-ACTION REQUIREMENTS CAN ASSIST IN ACHIEVING FAIR OUTCOMES (N=11)**

![Bar chart showing responses to the question of pre-action requirements assisting in achieving fair outcomes.](image)

**Conclusions**

5.50. On the whole, the Pre-Action Protocols were considered ‘fair’ or just.

5.51. With respect to procedural fairness and the ‘establishment of orderly procedures for the just resolution of disputes’, there was some evidence that, where there has been compliance, the Pre-Action Protocols may be having some positive impacts by creating a ‘fairer’ negotiation environment and a ‘more structured process’ that can help parties to work towards settlement. In this regard, some participants recognised a discernable cultural shift that the Protocols had prompted. This suggests that the Protocols may have a valuable influence in the broader sense even if they are of less value in their narrower practical implementation. Although, this will be limited value where rates of compliance with the Protocols are low (see Chapter 7). So far, low compliance suggests that the value is largely indicative of potential but, at this stage, is not necessarily evidence of effectiveness.

5.52. Reflecting past research, results from the focus groups indicate that disputants’ perspectives of process fairness and satisfaction may depend on their objectives and psychological needs, with research participants indicating that ‘commercially-minded’ parties tend to be satisfied in resolving disputes early via pre-action meetings or informal conferences, for example, whereas medical negligence plaintiffs (and, in some cases, defendants) with more complex psychological needs may feel less satisfied with these processes and be less likely to view them as fair. However, it is noted that the provision of information and advice regarding dispute resolution options and risks, as well as early meetings, may be useful in terms of managing parties’ expectations, improving their understanding, and enhancing their sense of involvement in dispute resolution.
processes, all of which may positively impact perceptions of process fairness. Here, the role of legal advisors in explaining, promoting and using the Protocols (with plaintiffs’ needs in mind) is clearly significant.

5.53. Notably, some lawyers framed their responses mainly in terms of the negotiation value of the Pre-Action Protocols, with limited recognition of the other (psychological) values of engaging with plaintiffs pre-action. In relation to the medical negligence area, this may be influenced by the perceived importance of expert evidence in medical negligence claims, and the legalistic procedures that precede and inform the gathering of expert evidence.

5.54. Medical negligence plaintiffs expressed frustration in relation to timeliness, cost (especially in relation to the cost of expert reports) and delays, and, in some cases, the attitude and conduct of defendant lawyers as well as the advice they had been given by their own lawyers. These hurdles contributed to a sense that the playing field was not level and clearly impacted on plaintiffs’ perspectives of process fairness. The sense of taking on ‘the system’ as an inevitably one-sided battle was identified by one plaintiff (see 5.27.-5.29.). This plaintiff also indicated being unaware of the Pre-Action Protocols and their pre-action meeting and mediation options and suggested that they would have pursued such opportunities had they been aware of them.

5.55. The researchers suggest that there may be some issues about whether the pre-action processes could be regarded as procedurally fair, particularly in the medical negligence area, given the lack of focus on party voice, as it seems that few meetings involving parties are facilitated. In this regard, third party facilitated meetings may be regarded as more ‘procedurally fair’ as they are more specifically focused on party voice, participation, procedural explanation and respectful communication. In contrast, meetings between lawyers that may or may not involve clients may not be regarded as procedurally ‘fair’ by some clients. This is also relevant in the context of perceptions of ‘outcome fairness’ (see 5.57 below).

5.56. Some responses indicated that, while the Pre-Action Protocols are perceived as fair, they may be of limited value, particularly in relation to ‘multi-million dollar’ claims. Barristers seemed most antipathetic to the Pre-Action Protocols, which may partly arise from their engagement in disputes at a later point in time. Notably, for most barristers, their experience is more likely to be focused on those cases where negotiation has not resulted in a settlement. As noted in the previous chapters, there was little focus or appreciation for the capacity of the pre action arrangements to narrow issues, assist in planning litigation or reduce time and costs in other ways (for example, by preparing costs budgets or agreeing on joint expert reports).

5.57. With respect to outcome fairness, there was little information available to determine whether outcomes were regarded as fair. There was no evidence (apart from the barristers survey referred to below) to suggest that they were not fair or just. In terms of assessing outcome fairness, it is notable that medical negligence plaintiffs were concerned with gaining acknowledgement, understanding and information and not just compensation for their injuries. Past research on mediation suggests that factors other than compensation can also be relevant to other litigants. As noted above, barristers’ perceptions of the
outcome fairness of the Pre-Action Protocols were particularly negative, although, the low response rate means that this view cannot be extrapolated across the Bar.
Chapter Six – Attitudes and Behaviour

Introduction

6.1. In its 2014 *Access to Justice Arrangements Inquiry Report*, the Productivity Commission considered the impact of party behaviour on the efficiency of dispute resolution processes. It noted:

The behaviour of parties when conducting litigation influences the timeliness and cost of dispute resolution. Unnecessarily adversarial conduct—such as lack of cooperation and disclosure, time-wasting tactics and strategic behaviour designed to wear the other party down—works against the timely and effective resolution of disputes and affects access to justice for the parties directly involved.1

6.2. The Productivity Commission suggested that a cultural shift towards more cooperation would improve access to justice and considered that ‘greater use should be made of pre-action protocols, which if well targeted, and accompanied by strong judicial oversight, can help resolve disputes early by narrowing the range of issues in dispute and facilitating ADR.’2

6.3. However, while pre-action requirements are often regarded as one approach that can assist in reducing difficult and inappropriate party behaviour, the effectiveness of pre-action requirements can also be impacted by the attitudes and behaviours of lawyers, clients, and others (including court staff and judges) involved in managing and resolving disputes.3 For example, it has been noted that the ‘bad’ behaviour of participants in pre-action situations can affect the timeliness of dispute resolution.4 There may be times where a client does not understand the process, what it entails and the costs, and so may try to delay settlement. Alternatively, pre-action requirements may be “sabotaged” by the “obstructive and oppositional” stance of a lawyer.5 Sometimes, it can be difficult to know whether it is the lawyer, the client or another participant in the pre-action process that is causing delay or undermining effectiveness in some other way.

2 Ibid 16.
4 Ibid 146.
5 Ibid.
6.4. This Chapter examines the attitudes and behaviour of lawyers, clients, judicial officers, and others that have been involved in matters where the Pre-Action Protocols have applied and considers the impact that attitudes and behaviour may be having on the effectiveness of the Pre-Action Protocols. Notably, Rule 12 of the *District Court Civil Supplementary Rules 2014* (SA) and the *Supreme Court Civil Supplementary Rules 2014* (SA) provides that the Pre-Action Protocols are ‘not to be used as a tactical device to secure advantage for one party, delay the commencement of proceedings or generate avoidable costs.’

6.5. Data has been drawn from the court file review, online barrister survey, focus groups, and supplementary interviews. While the results should be interpreted with caution given the small sample size, the findings suggest that there are some significant attitudinal issues that have had an impact on the effectiveness of the pre-action processes. Some of these issues are related to a lack of understanding about pre-action requirements and other issues may relate to other motivating factors.

**Behaviour**

**Compliance and Court Involvement**

6.6. One factor that is relevant in assessing the effectiveness of pre-action requirements, and the impact that behaviour has on effectiveness, is compliance. Clearly, if there is a lack of compliance, it is likely that the impact of pre-action requirements will be reduced. Data collected during the court file review, focus group interviews and online survey of the SA Bar suggests that the rate of compliance with the Pre-Action Protocols is probably low, particularly in relation to medical negligence disputes. Research participants indicated that there may be a range of reasons for this, including a lack of awareness of the Pre-Action Protocols, particularly amongst inexperienced and interstate practitioners, an unwillingness on the part of some defendants to engage in the pre-action process, and the potential difficulties that defendants face in complying with the time limits set out in the Protocols.

6.7. A lack of court supervision, enforcement and engagement may be another factor impacting on compliance. Judicial officers interviewed by the research team suggested that judicial officers and Court registry staff do not have time to enquire about compliance and generally do not do so. One court staff member indicated that they do not see it as their role to enforce the Pre-Action Protocols unless a party raises the issue and has been prejudiced by the other party’s non-compliance. In addition, legal practitioners indicated that it may also be rare for

---

6 When commencing an action to which the Pre-Action Protocols apply, the plaintiff is required to file a memorandum concerning compliance in Form 3 stating that ‘(a) the parties have substantially complied with this Division; or (b) the plaintiff has substantially complied with this Division to the extent able but the defendant has not; or (c) the plaintiff has commenced the action without substantially complying with this Division due to urgency under supplementary rule 11; or (d) the plaintiff has not substantially complied with this Division: *Supreme Court Civil Supplementary Rules 2014* (SA) r 29(1); *District Court Civil Supplementary Rules 2014* (SA) r 29(1). The researchers examined the memoranda concerning compliance in the available court files that were reviewed during October and December 2017.
the courts to enforce compliance or impose cost sanctions for non-compliance, even where non-compliance is raised by one of the parties. Issues relating to compliance and court involvement are discussed in more detail in Chapter 7. Without doubt, however, the way in which the courts, through its staff and judicial officers, refer to and engage with the pre-action requirements has an impact on the attitudes and approaches of legal practitioners and litigants.

6.8. The researchers also note that, while the Pre-Action Protocol requirements are set out in Chapter 3, Part 2 of the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA), there is little readily accessible information about the requirements on the court website or otherwise. In general, to understand the requirements (for an explanation of what is required, see 2.50.- 2.56.), legal input would be required and even then, understanding what is required is unlikely to be supported by court web site material, court counter staff or judicial officers. The lack of information and understanding about the Protocols is also explored in Chapter 7 and these factors may impact attitudes if those attitudes are shaped by a lack of knowledge or ignorance (and may lead to both suspicion and confusion about what the requirements involve). The remainder of this section considers the behaviour of legal practitioners and parties when engaged in the Pre-Action Protocols and any court processes that follow.

Legal Practitioner and Party Behaviour

6.9. As noted above, understanding the behaviour of lawyers and clients can be a complex task. This is partly because it can be difficult to separate whether the lawyer or client is driving the actions undertaken. A more sophisticated client, may, for example, understand pre-action requirements and be prepared and even interested in engaging in pre-action meetings and discussions. A less sophisticated client may be guided and dependent on a legal practitioner who may or may not be aware of the protocols and may have clear views about efficacy. In terms of client understanding, as noted above, there is no readily available information about the requirements on the court web site and it is unclear how, and to what extent, lawyers discuss these requirements with their clients.

6.10. In terms of how legal practitioners engage with each other, there was some information available from focus groups. For example, most of the medical negligence lawyers who participated in the December 2017 focus groups perceived most other legal practitioners as cooperative. Comments included that:

Defendants take their position, but they haven’t been obstructive or uncooperative or deliberately tried to rail road it... From my point of view, I think people approach it certainly in good faith and in a constructive way, though not perfectly.  

A lot of people don’t know what to do or are waiting for a report... Often people are well-behaved. Sometimes they make mistakes... I don’t think people generally act in

---

7 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
bad faith. My experience suggests people just try to put their client’s case as best they can.\textsuperscript{8}

6.11. It was also noted by medical negligence plaintiff lawyers that, in some cases, the formal structure of the Pre-Action Protocols has helped them get a better response from defendants (see 5.35).

6.12. However, most participants in these focus groups could also provide at least one example in which they had experienced another lawyer taking a particularly adversarial approach or failing to respond to communication during the pre-action stage. Some participants recalled:

The initial letter received a lengthy, legalistic response that set the tone for how the whole process went. It achieved nothing and racked up a whole bunch of costs... It’s probably how that defendant and that firm conduct themselves anyway... The protocols just created that much rubbish on the file.\textsuperscript{9}

In this matter, we sent the notice to the defendant. They gave us their initial response, and from that point on, nothing. We’ve now reached the stage where we are writing to the defendant saying that you haven’t complied...if we don’t hear from you in 7 days, we will be serving proceedings on you and we will rely on this in relation to costs.\textsuperscript{10}

6.13. One medical negligence plaintiff lawyer also noted that:

Some defendants may be obstructive, particularly where there are multiple defendants, in cases where there is clear negligence, but they delay and delay, saying that they are not going to do anything until all of the reports are in. This wears down plaintiffs, especially when they are in their 70s. They just want to hold onto their money for as long as possible...if they can delay paying for a year, they will...especially when they know reports are coming from overseas, because no one here wants to touch it.\textsuperscript{11}

6.14. The construction defendant lawyer interviewed during the December 2017 focus groups did not raise any concerns about the behaviour of parties or other lawyers and indicated that the Pre-Action Protocols may have increased cooperation between lawyers working in this area (see at 3.57.). Although, this practitioner did suggest that the Pre-Action Protocols tend to work better when experienced legal practitioners are involved (see 3.58.).\textsuperscript{12} In contrast, a construction lawyer that participated in a supplementary interview during April 2018 noted that they have experienced ‘less and less of an ability to deal with things in a commercial way.’\textsuperscript{13} However, while this observation was made in relation to the behaviour of other legal practitioners, it was not linked to the Pre-Action Protocols.

6.15. Some information was also provided by the barristers who participated in the online survey and consultation process. As noted previously, the small response

\textsuperscript{8} Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
\textsuperscript{9} Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
\textsuperscript{10} Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
\textsuperscript{11} Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
\textsuperscript{12} Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
\textsuperscript{13} Interview with Construction Lawyer (Telephone Interview, 5 May 2017).
to the survey means that the responses cannot be taken as indicating a general view across the Bar. However, the responses do indicate that there are some behavioural approaches and perceptions which may have an impact on the effectiveness of the protocols.

6.16. Barristers who participated in the online survey, and who had been involved in matters where the Pre-Action Protocols applied, were asked to indicate the extent to which they agreed with the following statements:

- Legal practitioners usually make a genuine effort to resolve disputes during the pre-action stage; and
- Disputants usually make a genuine effort to resolve disputes during the pre-action stage.

6.17. The results are displayed in Figure 6.1. Just over half of the respondents (n= 4 out of 7) agreed that both legal practitioners and disputants usually make a genuine effort to resolve disputes during the pre-action stage. Three of the seven respondents disagreed.

**FIGURE 6.1: LEGAL PRACTITIONERS/DISPUTANTS USUALLY MAKE A GENUINE EFFORT TO RESOLVE DISPUTES DURING THE PRE-ACTION STAGE (N= 7)**

6.18. Barristers were also invited to make a comment about the Pre-Action Protocols with respect to the attitudes and behavior of legal practitioners and disputants. Comments included:

‘Whether commercial matters settle is invariably a function of the reasonableness of the parties involved. You can’t legislate or make rules about that.’

‘Parties and representatives are usually motivated to resolve matters regardless. In my experience, the PAPs [pre-action protocols] are a significant barrier to doing so.’

‘Legal practitioners are cynical about the use of the Protocols because they are done and then never referred to again. Most disputants would not know what the Protocols are or what they are intended to affect.’

‘Plaintiffs generally make a genuine effort to resolve disputes during the pre-action stage in medical disputes. However defendants, usually insurers, will not engage unless the plaintiff has established an evidential base for the claim and damages. In many
cases the plaintiff is not in that position by the time proceedings need to be instituted due to limitation periods.’

6.19. These results should be considered alongside the responses to the general perceptions section of the survey, which suggest that instances of ‘bad’ behaviour and poor engagement (especially before expert evidence is gathered) are not limited to the application of the Pre-Action Protocols and may also arise in respect of other pre-action requirements and also in respect of ADR processes (regardless of timing).

6.20. Barristers were asked whether they had ever experienced any issues with uncooperative or ‘bad’ behaviour by parties or their legal representatives while fulfilling the requirements of any pre-action process (not necessarily under the Pre-Action Protocols that are the subject of this Report). Nine out of 11 respondents (82%) indicated that they had. One respondent indicated that they had experienced pre-action requirements being used to stall litigation. Others commented that they had experienced parties engaging in ‘formalistic compliance’ only, or taking an ‘over technical approach too (sic) avoid complying.’ Another described the ‘bad’ behavior they had experienced as:

Defendant’s solicitors indicating that they see little utility in participating in alternative dispute resolution absent any expert evidence in support of the claim. In other matters (personal injury claims) the Rule 33 formulation has been ignored and not responded to.

6.21. Barristers were also provided with the opportunity to make a comment about pre-action requirements with respect to legal practitioner and disputant attitudes and behaviour. Again, concerns regarding the genuineness of party engagement were raised. For example, one respondent commented:

There needs to be engagement in the process to work. You cannot compel a party to engage by Rules. I have experienced parties going through the motions without any commitment to the process. In reality a defendant will not consider a claim seriously unless a very real risk by evidence is present.

6.22. Finally, concerns were raised about the utility of the Pre-Action Protocols in cases involving ‘difficult and obsessive litigants.’ One judicial officer emphasised that, ‘in some cases there is a need to skip the pre-action protocols. You always need a way to skip the protocols and get it straight to court.’ In relation to this, the Australian Centre for Justice Innovation (ACJI) has previously noted that persistent, obsessive and difficult behaviour can undermine the timely resolution of disputes. In its Improving Timeliness in the Justice System Report, the ACJI suggested that, while some difficult and inappropriate behaviours may be reduced through education and the imposition of obligations (including pre-action obligations and overarching conduct obligations), many people require support and, in some instances, more effective management within the system.

---

14 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
Chapter Six – Attitudes and Behaviour

Behaviour at Pre-Action Meetings and Informal Conferences

6.23. The solicitors and barristers that participated in the focus group interviews and online survey suggested that it is rare for parties to attend a pre-action meeting or mediation. It is more common for parties and their practitioners to engage in informal conferences (see from 7.99).

6.24. During the focus group interviews, some participants raised concerns about the behaviour of parties at pre-action meetings and informal conferences. For example, one construction defendant lawyer interviewed commented that:

The difficulty of getting things resolved at that pre-action meeting is that nobody wants to give an inch. They don’t want to move from the view that they’ve been told by their representative.16

6.25. One medical negligence defendant lawyer also commented:

From time to time, plaintiffs are upset. They spit at us across the table or scowl at you. I don’t think its normal or acceptable but I don’t take that personally.17

6.26. One medical negligence plaintiff lawyer commented:

I really like mediations because there is this idea that the parties are there to try and resolve it. I hate the informal conference process, where, one party hears something they don’t like, and they just walk out.18

6.27. However, other participants had more positive experiences. For example, another medical negligence plaintiff lawyer commented:

I think the virtual requirement to have a meeting before commencing proceedings is one area where I have noticed a big difference…it has been useful in helping to resolve some cases, in helping my clients understand what is actually going on and what they are getting involved in. It has lead to some people pulling out. It has been productive in some cases in terms of sorting out the issues...It also enables parties to seek a meeting without weakening their negotiating position.19

Should the Pre-Action Protocols Include Additional Behavioural Obligations?

6.28. There are questions that can be raised relating to the material noted above in terms of how behavior that is aligned with the objectives of the Pre-Action Protocols can be supported. Apart from education, web site material, court action (relating to follow-up in relation to compliance) and cost orders (all explored in Chapter 7) there are questions about whether behavioural obligations can be effectively imposed in relation to pre-action requirements.

6.29. Past research has found that pre-action schemes that impose obligations to act in ‘good faith’ or create a scheme structure may support more reasonable

---

16 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
17 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
18 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
19 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
behaviour. However, there are various approaches that have been employed to support more cooperative behavior in relation to forms of ADR and in relation to pre-action schemes. As noted in Chapter 2, pre-action dispute obligations can incorporate:

- the need to disclose information or documents in relation to the cause of action;
- the need to correspond, and potentially meet, with the person or entity involved in the dispute;
- undertaking, in good faith, some form of alternative dispute resolution (ADR); and
- conducting genuine and reasonable negotiations with a view to settling without recourse to court proceedings.

6.30. Often, pre-action requirements require that ‘genuine’ steps or a ‘genuine’ effort be made. For example, Rule 27(2) of the Magistrates Court (Civil) Rules 2013 (SA) requires that ‘[a] party must take genuine steps to resolve an action before it is commenced including considering the use of ADR.’

6.31. For further example, the Civil Dispute Resolution Act 2011 (Cth) (CDRA) essentially requires that disputants in a number of dispute areas file a ‘genuine steps’ statement that lists the attempts made to resolve their differences before commencing litigation in respect of a range of civil disputes. The requirements in these statements are modelled on the recommendations in the National Alternative Dispute Resolution Advisory Council (NADRAC) report, The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction.

6.32. The Commonwealth Act states in s 4:

4 Genuine steps to resolve a dispute

(1A) For the purposes of this Act, a person takes genuine steps to resolve a dispute if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person’s circumstances and the nature and circumstances of the dispute.

(1) Examples of steps that could be taken by a person as part of taking genuine steps to resolve a dispute with another person, include the following:

(a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;

(b) responding appropriately to any such notification;

22 National Alternative Dispute Resolution Advisory Council (NADRAC), The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction (Report to the Attorney-General, NADRAC, 2009).
(c) providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;

(d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;

(e) if such a process is agreed to:

(i) agreeing on a particular person to facilitate the process; and

(ii) attending the process;

(f) if such a process is conducted but does not result in resolution of the dispute—considering a different process;

(g) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.

(2) Subsection (1) does not limit the steps that may constitute taking genuine steps to resolve a dispute.

6.33. In some jurisdictions, behavior in relation to pre-action requirements can be regulated (or potentially regulated) by civil procedure requirements. For example, in Victoria the sub-obligations that were incorporated into the Civil Procedure Act 2010 (Vic) include requirements:23

- to act honestly at all times in relation to a civil proceeding (s17);
- to only make claims or responses to claims that have a proper basis (s18);
- to only take steps to resolve or determine the dispute (s19);
- to cooperate in the conduct of a civil proceeding (s20);
- not to engage in conduct that is, or is likely to be, misleading or deceptive (s21);
- to use reasonable endeavours to resolve the dispute (s22);
- to narrow the issues in dispute (s23);
- to ensure costs are reasonable and appropriate (s4); and
- to minimise delay: s25; and to disclose the existence of documents critical to the dispute (s26).

6.34. In terms of ‘good faith’ requirements, obligations to act in ‘good faith’ in respect of pre-action requirements and ADR processes are now present in many Australian jurisdictions and attempt to support more constructive negotiations among those in dispute.24 Such obligations are considered particularly important where parties who attend ADR or engage pre-litigation are required to do so mandatorily. This is because, under such circumstances, it is arguably less likely that attendance will incorporate an open and honest attitude.25 The concerns raised by some participants in this research regarding instances of ‘bad’ behaviour and poor engagement justifies consideration of whether the SA Pre-Action Protocols should also include good faith or some other additional behavioural requirements.

23 Civil Procedure Act 2010 (Vic) Pt 2.3.
24 Sourdin, above n 20, 29.
6.35. Imposing ‘good faith’ or other additional behavioural obligations may not, however, be popular with some stakeholders. In this research, barristers who participated in the online survey, were asked to indicate the extent to which they agreed with the statement that ‘The Pre-Action Protocols should include good faith requirements.’ Just over half of the barristers that responded to this question (n= 4 out of 7) disagreed with the statement. The results are displayed in Figure 6.2.

**FIGURE 6.2: THE PRE-ACTION PROTOCOLS SHOULD INCLUDE GOOD FAITH REQUIREMENTS (N=7)**

6.36. One barrister commented that ‘good faith requirements would not make any difference.’ The barrister that was interviewed as part of the research team’s consultation process also believed that ‘good faith requirements may not make much difference in practice. Everyone says they are going to [act in good faith] but whether they do is a different issue.’ They noted that the difficulty is in testing whether parties have acted in good faith: it ‘cannot be tested at the time of the statement, only retrospectively, and it is very hard to test objectively.’ It has been noted in the literature that ‘a critical issue in any analysis of “good faith” is how it can be determined that someone has acted in bad faith’, particularly in ‘ADR processes that are intended to be confidential and where evidence of what has transpired… would not otherwise be admissible in court proceedings.’ However, it has also been noted that ‘there are now many examples where courts have considered a limited range of material about what has happened in otherwise confidential ADR processes to explore whether there has been good faith (or a lack of it).’ Further, the difficulties associated with assessing, objectively, whether a party is acting in good faith during a pre-action meeting or other pre-action process (as opposed to retrospectively) might be partially overcome by the setting out of some guidelines that indicate what is expected of parties (see discussion below at 6.37). In relation to this, one

---

26 Interview with Barrister (15 December 2017).
27 Sourdin, above n 25, 909.
28 Sourdin, above n 20, 25.
construction defendant lawyer that participated in the December 2017 focus group interviews stated that:

It would be helpful to have some guidelines concerning how people should behave… Good faith requirements around the parties' behaviours… and perhaps an obligation for lawyers to explain what that means to their clients and to provide the rules and good faith obligations to the client.29

6.37. In terms of what may be appropriate, there is now much more detailed case law30 and other guidance31 relating to good faith and other behavioural obligations.32 It has been noted that good faith is often defined by a lack of good faith– that is, the presence of bad faith– and that other behavioural obligations may be explored in a similar way.33 In terms of those obligations and ADR more generally, it is accepted that emotions impact on behaviour and strong emotional responses are unlikely to be perceived as a lack of good faith and that the test may be akin to a ‘reasonable person’ test while bearing in mind the particular circumstances of the parties involved.34

6.38. Finally, in its Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts Report35, the ACJI considered whether or not additional conduct requirements could help support pre-action requirements. It concluded that such conduct requirements– particularly those that impose obligations to act in ‘good faith’ or exist as part of a scheme structure– may support more reasonable behaviour and could be of assistance. However, what might be critical is ensuring that there is follow-up relating to such requirements and that concerns about confidentiality are managed. These matters are discussed further in Chapter 7 of this Report.

The Impact of Expert and Legal Practitioner Behaviour on Delay

6.39. As noted in Chapter 3, some concerns were also raised regarding the contributions that expert and legal practitioner behavior can make to delay in court processes and by extension to pre-action steps. For example, one of the judicial officers interviewed commented:

One of the difficulties is in working out whether the delays are because of the lawyer or the doctor. You get doctors who just don’t do medical reports on time, and that is very frustrating, and you don’t want to penalise the client for being late when its not their fault, but sometimes you have to. Then you get the lawyers who are slow and overworked and are not doing things, and there are times when you have to order costs

29 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
30 For a consideration of good faith approaches in case law, contract and legislation requiring good faith, see Sourdin, above n 20.
32 See Tania Sourdin, Alternative Dispute Resolution (Thomson Reuters, 5th ed, 2016) and in particular Chapter 11.
33 Sourdin, above n 25, 910.
34 See Backreef Oil Pty Ltd and Oil Basins Ltd/John Watson on behalf of Nyikina and Mangala/Western Australia [2012] NNTTA 98. See also Case Note in (2013) 24 Australasian Dispute Resolution Journal 3 for commentary on this case.
35 Sourdin, above n 3.
against the lawyers personally...not too often, but there are the serial lawyers...and there’s constantly problems.36

6.40. One of the medical negligence plaintiffs that participated in the focus groups believed that lawyers tend to ‘drag things out’: ‘the lawyers could short-circuit the process if they wanted to... but they don’t want to.’37 However, in contrast, the medical negligence defendant interviewed ‘had not ever picked up on lawyers stirring up a process, so that parties go to court.’ In their view, ‘the driving force’ is usually the litigant.38 As noted previously, these different perceptions of behavioural ‘drivers’ makes it difficult to determine how to support more effective pre-action requirements. In general however, as noted above, a clearer articulation of expected behaviour together with prompt judicial follow up may assist to drive behaviour that supports earlier resolution.

Attitudes and Culture

6.41. Attitudes amongst lawyers towards engaging in the Pre-Action Protocols were diverse. Compliance, and consistency in terms of compliance, is low (see 6.6 - 6.8., 7.7. - 7.35.). This may be a function of the mixed value attributed to the Protocols. Some respondents clearly saw limited value. For example, some responses to the online survey of the SA Bar were particularly negative, with some barristers describing the Protocols as ‘a complete and utter waste of time’, or an ‘expensive waste of additional time and costs.’ In relation to these perspectives, as noted below, there was little evidence of compliance or situations where barristers were involved in meetings and it is unclear how these views were formed. On the other hand, other practitioners found the informal meetings or formal negotiation useful:

‘I can see the benefit of engaging earlier... engaging early helps to guide the plaintiff.’39

‘[The Pre-Action Protocols are] a useful tool in encouraging a mechanism by which parties might seek to resolve their disputes before too much money is invested in the legal process.’40

6.42. The cost of the process will be a factor against any engagement if low value is perceived (see, e.g., 4.26.), although as noted in Chapter 4, the 2014 Supplementary Rules specifically provide that:

(2) ‘The extent of the steps required to be taken under this Division that would not otherwise be undertaken is to be limited so that the time and costs incurred are proportionate to the amount or value in dispute.

36 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
37 Comment at Medical Negligence Plaintiff Focus Group (University of Adelaide, Adelaide, 13 December 2017).
38 Comments at Medical Negligence Defendants Focus Group (University of Adelaide, Adelaide, 14 December 2017).
39 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
40 Response to the online survey of the SA Bar: ‘Would you like to make any comments about the Pre-Action Protocols with respect to compliance?’
6.43. The Supreme and District Courts in South Australia have pre-action protocols\(^42\) that apply to non-medical and non-construction disputes across the civil spectrum that may have more consistent use. In terms of interviews, there was often a clear understanding of the Rule 33 requirements but a far less clear understanding of the more specific requirements that relate to medical and construction disputes.

6.44. There are clearly a number of factors that influence attitudes towards pre-action requirements and compliance. These include whether practitioners and judicial officers understand what is required (see Chapter 7 – this is also linked to the availability of material relating to the obligations and the extent to which there has been education about the protocols – see above), the perceived need by practitioners to be fully armed with expert evidence before any negotiation (see 3.36., 3.83., 4.27, 6.12.-6.13., 6.19.-6.20.), perceptions of the Protocol being misused by defendants (see e.g. 6.13. – this can also be linked to behavioural obligations), perceptions of a value /cost imbalance (see e.g. 4.26., 4.30., 4.35.-4.38.), the perceived inappropriateness of the Pre-Action Protocols in relation to large, complex disputes (see 3.86., 4.43., 7.60.), and the lack of court follow up in relation to compliance (see Chapter 7).

6.45. A more general issue might relate to the way pre-action meetings/engagement are framed. Participants all discussed negotiation processes grounded in merit, risk, evidence and outcome that were led by legal practitioners and there was little evidence that mediation was used despite the fact that this is clearly envisaged in the Rules: ‘If the parties or their solicitors anticipate difficulty in achieving the aims of the pre-action meeting, the parties should consider appointing at their joint cost an independent person to chair the meeting. In the interests of proportionality of cost, such independent person should not ordinarily be expected to do any extensive reading or preparation before the meeting.’\(^43\) In addition, interest-based negotiation, less clouded by legalistic imperatives, may not be the preferred approach of some practitioners although clients (as noted previously: 5.16., 5.29.) may have a different perspective.

6.46. While the low response rate means that the results of the online barrister survey cannot be said to reflect general attitudes across the bar, most barristers (n= 9 out of 11; 82%) who responded to the general perceptions section of the survey indicated that they agreed that ‘Pre-action requirements that promote the resolution of disputes before proceedings are commenced are a good idea.’ However, comments also included that:

‘In small claims in the Magistrates Court, the Pre-Action Notice followed by mediation has been an effective method of resolving disputes. Such disputes are usually about

\(^{41}\) District Court Civil Supplementary Rules 2014 (SA) r 12; Supreme Court Civil Supplementary Rules 2014 (SA) r 12.

\(^{42}\) The District Court Rules 2006 (SA) r 33 and Supreme Court Rules 2006 (SA) rule 33 protocols apply to all civil matters with rare exceptions.

\(^{43}\) District Court Civil Supplementary Rules 2014 (SA) r 20(3); Supreme Court Civil Supplementary Rules 2014 (SA) r 20(3).
debts. In more complex litigation involving medical negligence or personal injury claims, they are not so effective.’

‘But don’t always work. We are often just “going through the motions” and no genuine compromise comes until mediation and/or offers filed at a later point in time.’

6.47. Therefore, whilst there was little direct antipathy towards the Protocols, with most respondents indicating broad in principle approval, it seems that diverse barriers might work against uptake. In this regard, it was noted in the ACJI Pre-Action Report that “[I]awyers may face a conflict of interest in that ‘recommending mediation before litigation would result in lower fees for their firm.”44 The Productivity Commission has noted that there are incentives among some professionals to delay resolution where they charge on a time-costing basis.45

Conclusions

6.48. The interviews, focus group inputs and online survey material revealed an extensive variation in terms of attitudes towards the Pre-Action Protocols. This is to be expected partly because there was often little understanding about the pre-action requirements (although the more general Rule 33 requirements appeared to be better understood). Overall, there was in principle support for the idea of early engagement prompted by the Protocols that was somewhat diluted by perceptions of lawyer/party behaviour (adversarialism; delaying tactics) and perceptions relating to the value of the process. In relation to behaviour, Chapter 7 explores strategies that can be employed should the pre-action requirements be retained or amended.

6.49. In respect of the value of the processes more generally, there is some limited evidence. As noted in Chapter 4, there is evidence that there were no cost increases (in that costs would have been incurred in any event and there was a suggestion that some lawyers ‘would have been doing this anyway’) and, at times, there was value in terms of early settlement or even earlier identification of issues (see Chapter 3) and a cost decrease. The impact on the large number of disputes that may never progress into a pre-action stage may also be significant. It is noted that parties may have different perceptions from lawyers with parties generally supportive of an early meeting / negotiation (see 5.16., 5.29.).

6.50. Variables which influence engagement and quality of engagement may be exacerbated by the self-compliance aspect of the protocols. Different levels of understanding, commitment, knowledge, and trust in the process might be better managed by greater oversight of the informal or formal meetings by Judicial officers or mediators. This is broadly supported by comments made in focus groups and is explored in greater detail in Chapter 7.

6.51. The depth of engagement between parties and lawyers in respect of the potential benefits of the protocols is not clear. Whilst defendant lawyers indicated that they would take any steps possible to resolve the cases early, this

---

44 Sourdin, above n 3, 145.
45 Productivity Commission, above n 1, 10.
did not translate into consistent use of the Protocols. It appears that lawyers’ experience in the area is relevant in terms of Protocol use. Those familiar with the Protocols will use them if it suits their strategy, while less experienced/knowledgeable legal representatives may not use or understand the processes.
Chapter Seven – Effectiveness and Future Options

Introduction

7.1. The objectives of this Research Project were set out in Chapter 1 of this Report and are essentially to assess whether the Pre-Action Protocols:

- establish[ed] orderly procedures for the just resolution of civil disputes; and
- facilitate[ed] and encourage[d] the resolution of civil disputes by agreement between the parties; and
- avoid[ed] unnecessary delay in the resolution of civil disputes; and
- promote[d] efficiency in dispute resolution so far as that object is consistent with the paramount claims of justice; and
- minimize[d] the cost of civil litigation to the litigants and the State.\(^1\)

7.2. Research data in relation to each of these objectives have been explored in previous Chapters. This Chapter summarises those findings and considers each objective. In addition, in this Chapter there is some discussion about factors that may have an impact on the effectiveness of the protocols and also considers options that may assist the objectives to be reached in the future.

7.3. In terms of efficiency’ and ‘effectiveness,’ it is noted that in general, these are broad evaluation criteria. The Australian Law Reform Commission (ALRC) has noted that, when considering dispute resolution processes and their objectives, efficiency and effectiveness can be viewed from a number of perspectives, including:

- The need to ensure appropriate public funding of courts and dispute resolution processes that avoid waste.

- The need to reduce litigation costs and avoid repetitive or unnecessary activities in case preparation and presentation.

---

\(^1\) District Court Civil Rules 2006 (SA) r 3; Supreme Court Civil Rules 2006 (SA) r 3.
• The need to consider the interests of other parties waiting to make use of the court or other dispute resolution process.²

7.4. In addition, the effectiveness of pre-action requirements can be considered by reference to rates of compliance, the broader costs of unresolved conflict, and a range of other factors, including whether or not the pre-action requirements:

• Assist to resolve or limit disputes;

• Are perceived by parties, their representatives and other stakeholders as just or fair;

• Assist accessible dispute resolution processes;

• Use resources efficiently and promote lasting outcomes;

• Achieve outcomes that are effective and acceptable; and

• Foster better relationships between parties and decrease litigious or adversarial behaviour.³

7.5. The impacts that the Pre-Action Protocols have had on litigation costs, the time taken to resolve disputes, fairness, and party behaviour, were considered in the preceding Chapters of this Report. This Chapter considers compliance and the impact that non-compliance may be having on the effectiveness of the Pre-Action Protocols. It also considers the impact that the extent of court supervision and enforcement, and the ‘medium touch’ nature of the protocols, may have on both compliance and effectiveness. It examines other ‘effectiveness’ issues such as outcome quality, the appropriateness of the Protocols in relation to different types of disputes, and the perceived efficacy of pre-action meetings in comparison to other dispute resolution processes.

Objective One: Did the Protocols Establish Orderly Procedures for the Just Resolution of Civil Disputes?

7.6. There is evidence that the 2014 Rule change may have contributed to the establishment of ‘orderly procedures’ by creating a ‘more-structured’ and ‘fairer’ negotiation environment, at least where the Protocols have been complied with (see Chapter 5). The 2014 Supplementary Rules also appear to have established fairly clear processes in that they seem to be fairly easy to follow. Although, one medical negligence plaintiff lawyer indicated that they can be ‘cumbersome for plaintiffs.’⁴ Another indicated that they had found it difficult to work out what

---

⁴ Interview with Medical Negligence Plaintiff Lawyer (Telephone Interview, 26 April 2018).
their obligations were and raised concerns about the difficulties that others may have with this:

We found it very difficult to work out what our obligations are because of the way they have worded the rules. You’ve got to work out what the last day is that you can issue proceedings and then, from that, start calculating all of these backward calculations, assuming the defendant complies with their obligations, to get a start date of when you first have to send your notice to be able to comply with the Protocols. If someone is not very familiar with the rules, how are they going to work out how to comply? 5

7.7. In Chapter 5, it was also noted that on the whole, the Pre-Action Protocols were ‘fair’ or just. However, there was evidence that despite this, the Protocols were not complied with, and therefore, there is a significant issue regarding whether this objective can be said to have been met. The issue of compliance is discussed further below. In this Project, compliance was considered by reference to court file statistics, the online survey of the SA Bar and comments made during the focus group and supplementary interviews.

7.8. The data collected during the court file review indicated significant non-compliance with the Pre-Action Protocols, particularly in relation to medical negligence disputes where there was evidence of non-compliance in more than 50% of medical negligence files reviewed. Whilst non-compliance is permitted in the case of urgency, 6 and in other limited circumstances, 7 there was evidence in less than half of the examined medical negligence court files that this was a reason for non-compliance. That is, it was relatively common for there to have been non-compliance with no reason given for that non-compliance (and no court follow-up).

7.9. These findings were supported by information gathered during the focus group and supplementary interviews, where all medical negligence lawyers agreed that there has been significant, ongoing non-compliance with the Pre-Action Protocols. Participants indicated that there may be a range of reasons for this, including a lack of awareness of the Pre-Action Protocols, an unwillingness on the part of defendants to engage in the pre-action process, and the potential difficulties defendants face in complying with the time limits set out in the Protocols.

7.10. The findings drawn from the court file review and focus group interviews are limited in that the court file review could not capture the cases that resolved during the pre-action stage, and as a result, parties that may have complied with the Pre-Action Protocols, and subsequently did not commence proceedings, could not be contacted and invited to participate in a focus group or supplementary interview. The data regarding compliance in construction matters

---

5 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017) (this comment was made in relation to this lawyer’s experience working as a plaintiff lawyer).
6 District Court Civil Supplementary Rules 2014 (SA) r 33(1)(a); Supreme Court Civil Supplementary Rules 2014 (SA) r 33(1)(a).
7 For example, where the plaintiff reasonably believes that there is a risk that the defendant will take action to remove assets from the jurisdiction and intends to seek an injunction to prevent the defendant from removing assets from the jurisdiction: District Court Civil Supplementary Rules 2014 (SA) r 33(1)(b); Supreme Court Civil Supplementary Rules 2014 (SA) r 33(1)(b).
is also extremely limited. As explained in Chapter 1, only 4 construction files were identifiable and available for review when the court file review was conducted in October and December 2017. Subsequent data provided by the District Court indicates that constructions cases may be described as debt or breach of contract cases (not construction cases).

7.11. The online survey of the SA Bar was designed to capture broader data regarding compliance with the Pre-Action Protocols. Responses support the finding that the rate of compliance with the Pre-Action Protocols is probably low. Participants also indicated that non-compliance is often due to a lack of awareness of the Pre-Action Protocols or the failure of one party to participate in the pre-action process. Other reasons may include urgency, ‘habit’, and a belief that ‘the rules are unnecessary and add enormously to cost without tangible benefit.’ However, the data obtained via the online survey is also limited due to the low survey response rate.

7.12. Responses to the online survey, focus groups and supplementary interviews also suggest that a lack of enforcement by the courts may be contributing to the low rate of compliance with the Pre-Action Protocols. This may be linked to ‘medium touch’ nature of the pre-action arrangement and its location outside of the court system. All of these findings are set out in more detail below:

Compliance

Court File Statistics

7.13. When commencing an action to which the Pre-Action Protocols apply, the plaintiff is required to file a memorandum concerning compliance in Form 3 stating that —

(a) ‘the parties have substantially complied with this Division; or
(b) the plaintiff has substantially complied with this Division to the extent able but the defendant has not; or
(c) the plaintiff has commenced the action without substantially complying with this Division due to urgency under supplementary rule 11; or
(d) the plaintiff has not substantially complied with this Division.’

7.14. During the court file review, the researchers manually extracted information from hard copy court files using the Court File Audit Sheet (see Appendix D). For each file, they recorded:

- whether the Pre-Action Protocols applied;
- whether a memorandum of compliance (form 3) had been filed;
- whether the memorandum of compliance indicated that there had been substantial compliance with the Pre-Action Protocols; and
- the reason provided for non-compliance where the parties had not substantially applied with the Pre-Action Protocols.

---

8 Supreme Court Civil Supplementary Rules 2014 (SA) r 29(1); District Court Civil Supplementary Rules 2014 (SA) r 29(1).
Medical Negligence Disputes

7.15. In relation to medical negligence disputes, the data collected during the court file review indicates a very low rate of compliance with the Pre-Action Protocols. The researchers reviewed the court files for 44 medical negligence matters lodged in the District and Supreme Courts of South Australia between 1 January 2014 and 30 September 2017. The Pre-Action Protocols applied in 40 of these matters (90.91%). A memorandum of compliance (form 3) was filed in 18 of these 40 matters (47.50%). The memorandum of compliance indicated that the parties had substantially complied with the Protocols in only one of the matters reviewed (2.50%). This means that the Pre-Action Protocols were not ‘substantially complied’ with, and/or or the plaintiff failed to file a memorandum of compliance in accordance with the Supplementary Rules, in 39 of the 40 matters in which they applied (97.50%). These results are displayed in Table 7.1.

Table 7.1: Medical Negligence Compliance Data- Court File Review (n=44)

<table>
<thead>
<tr>
<th>Medical Negligence Compliance data- Court File Review (total files = 44)</th>
<th>n</th>
<th>% (percentage of total files)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Pre-Action Protocols applied</td>
<td>40</td>
<td>90.91</td>
</tr>
<tr>
<td>Memorandum of compliance filed</td>
<td>19</td>
<td>47.50</td>
</tr>
<tr>
<td>Matters in which the parties ‘substantially complied’ with the protocols</td>
<td>1</td>
<td>2.50</td>
</tr>
<tr>
<td>Matters in which the protocols were not complied with and/or a memorandum of compliance was not filed</td>
<td>39</td>
<td>97.50</td>
</tr>
</tbody>
</table>

7.16. Where there was a reason provided for non-compliance (the minority of cases), the most common reason provided for non-compliance in the memoranda of compliance was urgency (n= 14 out of 18). In one matter, the plaintiff stated that the plaintiff had substantially complied with the Division to the extent able, but the defendant had not. In another, the plaintiff indicated that they had not substantially complied with the Protocols as they had not yet served a cost estimate in form 2 on the defendant in accordance Supplementary Rule 25(2)(q). In the final two matters where a memorandum of compliance was filed but the parties had not substantially complied with the Pre-Action Protocols, no reason was provided for non-compliance. These results are summarised in Table 7.2.

Table 7.2: Reason for non-compliance provided in the memorandum of compliance (n=18)

<table>
<thead>
<tr>
<th>Reason for non-compliance provided in the memorandum of compliance</th>
<th>n</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urgency</td>
<td>14</td>
</tr>
<tr>
<td>The plaintiff substantially complied but the defendant did not</td>
<td>1</td>
</tr>
<tr>
<td>Form 2 not served on defendant</td>
<td>1</td>
</tr>
<tr>
<td>No reason provided</td>
<td>2</td>
</tr>
</tbody>
</table>
Construction Disputes

7.17. The Pre-Action Protocols applied in the four construction files that were reviewed by the research team. A memorandum of compliance was filed in only one of these matters. It indicated that the parties had not complied with the Pre-Action Protocols due to urgency and that proceedings had been issued mid-way through the Protocols. In one of the other matters, the plaintiff sought an order in the statement of claim excusing them from complying with the Pre-Action Protocols due to urgency.

Focus Groups and Supplementary Interviews

7.18. As noted above, all of the lawyers that participated in the medical negligence focus group and supplementary interviews agreed that there has been significant, ongoing non-compliance with the Pre-Action Protocols. One medical negligence plaintiff lawyer that participated in the December 2017 focus groups commented:

About a year ago, I filed an application for an extension of time to serve some District Court Proceedings [in order to comply with the Pre-Action Protocols]. The judicial officer concerned said, do you realise, that [you and one other practitioner] are the only people I know that follow these Protocols.9

7.19. The participants indicated that there may be a range of reasons for the high rate of non-compliance, including an early lack of familiarity with the Protocols. For example, one medical negligence plaintiff lawyer noted that:

Even though I was aware of the Protocols when they were introduced, my adherence to them happened very gradually... I’d pick up a file and think, ‘Oh I forgot all about them’… Over time, I got better at it and make an honest and concerted effort to comply with them most of the time, now.10

7.20. However, three years after their introduction, non-compliance still appears to be an issue. One medical negligence defendant lawyer noted that most practitioners, especially those who do not specialise in medical negligence, are still following the older Rule 33, rather than the new Pre-Action Protocols.11 A lack of awareness amongst interstate practitioners also appears to be an issue and the court file data indicated that interstate practitioners and regional practitioners were not likely to comply. One medical negligence plaintiff lawyer commented:

We’ve been caught a couple of times in our firm...we’ve had instructions come in at the last minute from interstate practitioners and we’ve had to issue proceedings last minute without any compliance at all...Interstate practitioners just don’t know about

---

9 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
10 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
11 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
it. It takes a long time to try and explain it to them...I don’t know how to solve it. They are just interstate.\textsuperscript{12}

7.21. Other participants indicated that many, but not necessarily all, of the activities envisaged in the Protocols are undertaken in the normal course, but not necessarily in the order proposed. For example, one medical negligence defendant lawyer commented that:

We always try to informally confer very early on. I try to make a decision about a case very early on. If I think it is a case that needs to be resolved, I’ll try to put myself in a position where I can meet at an early time. I’m not going to wait for the court protocols and timeline to do that.\textsuperscript{13}

7.22. Some medical negligence plaintiff lawyers indicated that they had difficulty getting defendants to engage in the pre-action process. One noted that they rarely received a response to notice letters and that ‘when responses are provided, it is usually a denial.’\textsuperscript{14} Another noted that they have had particular difficulty in cases where multiple defendants have been involved, commenting, ‘as soon as you have multiple defendants, it becomes really difficult. If I can’t get a response, I can’t get a meeting.’ This may be linked to the general reluctance of medical negligence defendant lawyers to engage in the pre-action process before expert evidence has been obtained (see 3.36., 3.83., 6.13.). However, it was also suggested that the time limits for the completion of the Pre-Action Protocols may make it difficult for medical negligence defendants to comply (see 3.85.) and there may also be issues that are linked to insurer willingness to comply with the protocols.

7.23. In relation to construction disputes, the construction defendant lawyer interviewed during the 2017 focus groups suggested that the Protocols are being used by many lawyers in this area, but that they tend to work more effectively when experienced solicitors who work predominantly in construction disputes are involved. Another construction lawyer that participated in a supplementary interview did not seem to be aware of the new Pre-Action Protocols.

Online Survey of Barristers

7.24. Barristers who participated in the online survey, and who had been involved in matters where the Pre-Action Protocols applied (n=8), were asked whether:

(i) The parties they acted for usually complied with the Protocols; and
(ii) The other parties usually complied with the Protocols.

7.25. Four of the 8 respondents (50%) indicated that the parties they acted for usually complied with the Pre-Action Protocols, while 6 of the 8 respondents (75%) believed that the other parties usually did not comply.

7.26. Barristers who participated in the online survey, and who had been involved in matters where the Pre-Action Protocols applied, were asked to indicate how often parties who complied with the protocols attended a pre-action meeting.

\textsuperscript{12} Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).

\textsuperscript{13} Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).

\textsuperscript{14} Interview with Medical Negligence Plaintiff Lawyer (Telephone Interview, 26 April 2018).
Three of the seven respondents indicated that the parties they had been involved with never attended a pre-action meeting (43%); three indicated that this had rarely occurred (43%); and one said that it occurred very often (14%). The results are displayed in Figure 7.1.

**FIGURE 7.1: WHERE THERE HAS BEEN COMPLIANCE, HOW OFTEN DID THE PARTIES ATTEND A PRE-ACTION MEETING? (N=7)**

7.27. These barristers were also asked to indicate what they believed to be the most common reason for non-compliance with the Pre-Action Protocols. Three respondents believed that a lack of awareness of the Protocols was the most common reason for non-compliance (38%). Two respondents believed non-compliance is most commonly caused by the failure of one party to participate in the pre-action process (25%). One respondent believed that non-compliance is most commonly the result of urgency (13%). Of those who answered ‘other’, one suggested that the problem may be one of ‘habit’ and the other indicated that they believed that it is because ‘the rules are unnecessary and add enormously to cost without tangible benefit.’ These results are displayed in Figure 7.2.
FIGURE 7.2: WHAT DO YOU THINK IS THE MOST COMMON REASON FOR NON-COMPLIANCE? (N=8)

<table>
<thead>
<tr>
<th>Reason</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urgency</td>
<td>0%</td>
</tr>
<tr>
<td>The failure of one party to participate in the pre-action process</td>
<td>15%</td>
</tr>
<tr>
<td>The parties being unaware of the Pre-Action Protocols</td>
<td>37.5%</td>
</tr>
<tr>
<td>Other</td>
<td>25%</td>
</tr>
<tr>
<td>I have not experienced non-compliance</td>
<td>0%</td>
</tr>
</tbody>
</table>

Court Supervision and Enforcement

7.28. A key factor that may be impacting on compliance is a lack of enforcement by the courts.\(^{15}\) Barristers who participated in the online survey were also asked to indicate how often Masters or Judges enquire about compliance with the Pre-Action Protocols. Two out of eight respondents indicated that Masters and Judges never enquire about compliance (25%). Three respondents indicated that this rarely occurs (38%). Two respondents indicated that it occurs sometimes (25%), and one respondent indicated that Masters and Judges always enquire about compliance (12.50%). These results are displayed in Figure 7.3.

\(^{15}\) Rule 12 of the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) provides that ‘(4) The Court may take into account the extent of the parties’ compliance with this Division when giving directions for the management of proceedings and when making orders about who should pay costs. (5) The Court will expect the parties to have complied with this Division. The Court may ask the parties to explain what steps were taken to comply before commencement of the action. If a party fails to comply, the Court will ask that party to explain the noncompliance...’
7.29. The lack of enforcement was raised during the focus group and supplementary interviews. Lawyers from both the construction and medical negligence areas noted that, although judicial officers usually support compliance with the Protocols by granting extensions for service in order to allow parties time to comply, they rarely enquire about compliance. 16

7.30. This was also reflected in the comments made by the judicial officers interviewed during the focus group consultations. The judicial officers indicated that they do not question compliance with the Pre-Action Protocols unless this is raised by one of the parties. They also indicated that the Court registry is not charged with noting or following up compliance with the Protocols. One judicial officer suggested that this is because judicial officers and Court registry staff do not have time to enquire about compliance:

We won’t have a chance to ask about it until the first directions hearing before us. Part of our problem is that we have four lists a week... and there are five minute intervals and within those five minutes, we’ve got to pick up the file, quickly get on top of what’s going on, quiz the parties, make orders... we don’t really have time to quiz the parties about what’s gone on before... we are very limited in what we can do to monitor the pre-action protocols. And the registry staff just don’t have time. 17

7.31. Another judicial officer indicated that they do not see it as their role to enforce the Pre-Action Protocols unless a party raises the issue and has been prejudiced by the other party’s non-compliance:

Judges don’t get involved unless someone complains about it... this is something that regulates the relationship between the parties and if the parties aren’t complaining about the way that the relationship has developed, it is difficult for the judge to come and say, “now hang on a minute, you didn’t comply with this, there is going to be a

---

16 Comments at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017); Comments at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).

17 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
sanction,” in the face of the other side saying, “well we don’t care, we’re not prejudiced”… It does make it difficult from a judicial perspective to tread that line.  

7.32. However, barristers and solicitors that participated in the online survey and focus group interviews suggested that it is also rare for the courts to enforce the Protocols or impose sanctions for non-compliance, even where non-compliance is raised by one of the parties. In the online survey, barristers were asked whether they had been involved in any matters where a lack of compliance with the Pre-Action Protocols had been raised by one of the parties, and if so, what the consequences were. Five out of eight respondents (62.5%) had been involved in at least one matter where a lack of compliance had been raised by one of the parties.

7.33. One respondent noted that their matter was stayed until the Pre-Action Protocols were completed. However, two of the other respondents indicated that there was no consequence; one described the consequence as ‘unnecessary interlocutory skirmishing’; and the other noted that there was no consequence except for delay. None of the respondents suggested that non-compliance had resulted in an adverse cost award.

7.34. Lawyers that participated in the medical negligence focus groups were asked whether they were likely to raise the issue of non-compliance with the Pre-Action Protocols. Most of the lawyers interviewed indicated that they would raise the issue if they thought it would advantage their client, and many said that they send letters informing non-complying parties of their need to comply with the Protocols, which they keep on file to later refer to in an argument for costs. However, some participants also believed that doing so is ‘a waste of time.’ For example, one medical negligence defendant lawyer commented:

I tend to say, have you done a notice before action and write a standard letter, but I’m not going to chase it up hill and down dale. It’s a cost benefit analysis. Normally, I have a self-serving letter on the file, so I can refer to it at an appropriate time for costs. But the court’s hardly likely to enforce it anyway, it’s a waste of time...my experience is that the Masters are very lenient towards plaintiffs.

7.35. One of the medical negligence plaintiff lawyers interviewed indicated that they had difficulty getting defendants to engage in the pre-action process and believed that the lack of cost consequences for defendants contributed to this. As noted at 4.33, the researchers are not aware of any cases in which the Courts have imposed a cost sanction against a party for non-compliance with the 2014 Pre-Action Protocols. However, the Courts have considered non-compliance with the other Rule 33 pre-action protocol and the ‘90 day rule’ in r 101 of the District Court (Criminal and Miscellaneous) Rules 1992 (SA) in relation to the making of cost orders.

---

18 Interview with a Judicial Officer of the Supreme Court of South Australia (Australia (Sir Samuel Way Building, Adelaide, 12 December 2017).
19 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
20 Interview with Medical Negligence Plaintiff Lawyer (Telephone Interview, 26 April 2018).
Court Supervision, Enforcement and the Effectiveness of ‘Light’ and ‘Medium Touch’ Arrangements

7.36. The above comments above are consistent with past research regarding judicial and court supervision of pre-action requirements located outside of courts. In Chapter 2, it was noted that pre-action requirements may be broadly categorised as ‘light’, ‘heavy’ or ‘medium touch.’ ‘Heavy touch’ arrangements are those pre-action requirements that are supported by some formal infrastructure or a scheme, or which impose strict dispute resolution requirements on parties. ‘Light touch’ arrangements are those that adopt a ‘do it yourself approach’, where pre-action requirements are set out and disputants and their lawyers organise their own compliance. ‘Medium touch’ requirements are those that fall between these two approaches. 21 The Pre-Action Protocols were characterised as ‘medium touch’ as they do not form part of a scheme, are conducted outside of court before proceedings are commenced, but do require parties to undertake certain steps and attend a pre-action meeting.

7.37. In its 2012 Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts Report, the Australian Centre for Justice Innovation (ACJI) noted that, in the general pre-action context, judicial officers and courts seem to be more likely to enforce compliance where pre-action requirements are conducted under the auspices of a scheme (while schemes usually set up strict compliance procedures in any event). The idea of the courts having an active role in ‘policing’ whether or not parties have engaged in pre-action requirements before engaging in formal litigation has otherwise received limited support from judicial officers. 22

7.38. There may be a range of reasons for this. The ACJI suggested that it may partially reflect a view about the timing and location of ADR which assumes that parties are more likely to decide to use ADR themselves, and are more likely to resolve their disputes following ADR, after they consider or commence litigation and realise ‘how expensive and barren the alternative of litigation is.’ 23 It may also reflect a view about the utility and timing of ADR in respect of certain disputes and the reality that the court and judicial officers are more concerned with what happens in matters after they have commenced in the court (and not necessarily before). 24 As noted above, time pressure and a reluctance to intervene in parties’ pre-litigation relationships in the absence of any perceived prejudice were the reasons provided for a lack of court intervention by judicial officers in this Research. A reluctance to actively insist upon compliance may also be motivated by a concern about creating more court events and thereby increasing time and costs for parties. 25

7.39. The ACJI also emphasised that no matter where they are located (whether within schemes, within court or tribunal processes, or outside schemes, courts and tribunals), pre-action requirements are unlikely to be effective unless there is compliance and unless there are compliance processes in place. 26 Its findings suggested that, when pre-action requirements form part of a ‘heavy touch’

---

21 Sourdin, above n 3.
22 Ibid 166.
23 Ibid 167.
24 Ibid.
25 Ibid.
26 Ibid 169.
scheme, ongoing monitoring, quality improvement, support infrastructure and time standards are more likely to be present and more visible, which can impact positively on compliance and thus effectiveness. 27 In relation to ‘light’ and ‘medium touch’ pre-action requirements that are not part of dedicated schemes, the ACJI found that the following factors may be important in encouraging understanding and compliance, and may thereby support effectiveness:

- Clearly articulated conduct or behavioural standards; 28

- Case precedent and other information about expectations and compliance requirements that can assist to ensure that practitioners and disputants understand their obligations; 29

- Education and training as well as web-based material directed at the judiciary, lawyers and litigants; 30

- Relating the pre-action requirements to other longer-term case management strategies; 31

- Cost sanctions for non-compliance that are invoked and imposed by the courts promptly and at an early time (that is, not just when proceedings are concluded); 32 and

- Internal and external reporting on compliance. 33

7.40. At least some of these recommendations reflect some of the reasons for non-compliance in SA: lack of understanding of purpose and potential benefit of protocols; lack of understanding of diverse approaches to ADR; and, a lack of simple understanding regarding the existence of the Protocols.

Objective Two: Did the Protocols Facilitate and Encourage the Resolution of Civil Disputes by Agreement Between the Parties?

7.41. In terms of this objective, it was noted in Chapters 3, 4 and 5 that it was unclear whether or not the Protocols had resulted in the resolution of many disputes. There was some evidence that the Protocols may have had an impact on some cases and that there had been a decline in litigated medical negligence and construction cases. However, this finding must be considered in light of jurisdictional changes that may have resulted in a reduction in filings. It is also possible that the Protocols exerted a ‘halo’ effect and resulted in the resolution

27 Ibid 100.
28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
32 Ibid 124.
33 Ibid 148.
of some matters before the pre-action regime was required. The overall low compliance level with the Protocols (see preceding section) suggested that any impact would have been reduced (due to non-compliance) and, where there was compliance it may be that earlier settlements were more likely, although, the data sample was too small to adequately test this.

7.42. What appears to be more relevant in terms of assessing resolution is whether the Protocols had an impact on the behaviour of litigants and participants. As noted in Chapter 6, there was evidence that in some circumstances there may be a disinclination to resolve disputes at an early stage that is due to a number of factors.

7.43. Further, there was very little evidence that mediation was used in the pre-action setting (despite the fact that it is referred to in the Protocols). As noted in previous chapters (see 5.16., 5.29.), litigants often considered that early mediation was desirable, although, legal practitioners were concerned about cost and the utility of early mediation (see further below at 7.99). As noted below (see 7.97. and 7.105.), a number of pre-action schemes (including in the personal injury and more specifically in relation to medical negligence) utilise pre-action mediation with some success.

Objective Three: Did the Protocols Avoid Unnecessary Delay in the Resolution of Civil Disputes?

7.44. As noted in Chapter 3, there was no evidence that the Pre-Action Protocols increased delay and, where they resulted in earlier resolution, they would have had a positive impact on timeliness. The question of the impact overall that the Protocols had on timeliness was explored in some detail in Chapter 3 and it was noted that some members of the Bar were concerned that they could waste time and result in additional interlocutory applications. As noted previously, a lack of compliance with the Protocols did not appear to result in any specific protocol related interlocutory applications. This can be contrasted with the small number of decisions that have been made relating to pre-action requirements in other jurisdictions. In relation to these matters, there is no evidence that the pre-action arrangements resulted in additional delay.

7.45. For example, at the federal level, rather than the state level (where there are a small number of court decisions relating to mandatory pre-action requirements), the CDRA has already received very limited judicial attention which suggests that fears that there may be excessive satellite litigation may be unfounded. In *Whirlpool (Australia) Pty Ltd v Castel Electronics Pty Ltd*, Justice Beach made orders in the Federal Court restraining a party from taking any steps in relation to Supreme Court proceedings. The matter involved a dispute where the plaintiff had purportedly pursuant to s 4 of the *Civil Dispute Resolution Act 2011* (Cth) (the CDR Act), sought to ascertain Castel’s legal representatives for

---

34 *Supreme Court Civil Supplementary Rules 2014* (SA) r 20(3); *District Court Civil Supplementary Rules 2014* (SA) r 20(3).
36 *Whirlpool (Australia) Pty Ltd v Castel Electronics Pty Ltd* [2015] FCA 906.
the purposes of taking apparently genuine steps to resolve the dispute set out and identified in a proposed statement of claim for proceedings to be instituted in the Federal Court.’ That is, the plaintiff contacted the other side in order to take steps under the CDRA. A meeting was then arranged by the parties, however, at some point between the notification and the meeting, the defendant commenced proceedings in the Supreme Court of Victoria.

7.46. In making an order to restrain steps being taken in the Supreme Court, Justice Beach commented on the CDRA and noted that:

[the defendant’s] objective tactical conduct in my view undermined or had the capacity to undermine the processes of the CDR Act, which was a process preliminary to bringing proceedings in this Court. In my view I have inherent jurisdiction and power to protect such processes, which I view as an ancillary and necessary process to the Court’s own processes.

7.47. And:

I should add that it is important for the Court to protect its processes and the processes under the CDR Act. It is quite undesirable for one party to transparently invoke such processes under the CDR Act and to hold off on instituting Federal Court proceedings to allow those processes to occur, thereby allowing another party with a complete lack of transparency to take advantage of the first party’s conduct by launching proceedings elsewhere. Of course, there is nothing under the CDR Act preventing the other party from doing so. But if they are to do so, they should be frank about it rather than to allow the other party to proceed on a mistaken assumption.

Objective Four: Did the Protocols Promote Efficiency in Dispute Resolution So Far as That Object is Consistent with the Paramount Claims of Justice?

7.48. Both plaintiff and defendant lawyers interviewed during the December 2017 focus groups were somewhat ambivalent about the efficiency of the Pre-Action Protocols. Some considered that it was still too early to comment on the full effect of the Protocols. In this regard, one medical negligence plaintiff lawyer noted:

It is still really early days... it makes matters run more efficiently before you get to the meeting stage...the jury is still out for me on whether matters are resolving because of them or if matters that go on to trial are running more efficiently because of them... the jury is still out on the informal meeting and whether more matters are going to resolve and costs are going to be kept down.38

7.49. However, there were some positive perceptions about the impact the Protocols can have on the engagement between parties, in particular through the meeting process that the Protocols require. As noted in Chapter 3, the construction defendant lawyer interviewed believed that the Pre-Action Protocols had encouraged lawyers to work together in a more collaborative way. Medical negligence plaintiff lawyers valued the opportunity for a meeting

---

37 *Whirlpool (Australia) Pty Ltd v Castel Electronics Pty Ltd* [2015] FCA 906 at 36 and 44.
38 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
between the parties and their lawyers, or a mediation, both as a way to ensure their clients are informed about the process, as a forum to focus on issues and communicate face to face—a opportunity to ‘feel the other party out.’:

From my perspective, complying with the protocols hasn’t made much difference to my practice because they are things I was doing anyway. But I have found that there have been cases where I have got a better response from defendants ... I think the virtual requirement to have a meeting before commencing proceedings is one area where I have noticed a big difference...it has been useful in helping to resolve some cases...in helping my clients understand what is actually going on and what they are getting involved in...it has led to some people pulling out...it has been productive in some cases in terms of sorting out the issues...It also enables parties to seek a meeting without weakening their negotiating position.39

7.50. This practitioner later commented:

My summary is that it doesn’t seem to increase the cost, and I have seen some pearls of benefit in different little spots. I can’t say, overall, it’s been magical, but there are some spots...to me it has brought some pluses and not the negatives I was expecting.40

7.51. In contrast, the barrister interviewed as part of the research team’s consultation process in December 2017 expressed a much more negative view of the Pre-Action Protocols, commenting that the Protocols ‘are regarded as an impediment rather than a tool... solicitors and the court just pay [them] lip service... [they] are not doing what [they] are intended to do.’41 However, as noted at 3.74., this participant suggested that the Protocols could work if the profession were to take them seriously, but that this is unlikely to happen unless the Courts enforce them.

7.52. The District Court Judicial Officer interviewed was relatively positive about efficacy of the current system, that is, moderate pre-action protocols followed by active court supervision (see further 4.19. and 7.75.)

7.53. These findings can also be compared with the findings made in relation to barristers’ perceptions of the efficiency of pre-action requirements generally. All barristers who participated in the online survey were asked to indicate the extent to which they agreed or disagreed with the statement that ‘Pre-action processes can be efficient.’ The results are displayed in Figure 7.4. Eight of the 11 respondents indicated that they agreed with this statement. Participants were also asked to make a comment in relation to this statement. Comments included:

‘Can be so in small claims.’

‘In the right case. They will never work in others.’

‘When undertaken properly they ensure the clients have amassed evidence necessary to dispose of the case fairly and without the significant to increasing costs such as filing fees, formal documents, court attendances and the like.’

39 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
40 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
41 Interview with Barrister (15 December 2017).
7.54. As noted above, in terms of interview and focus group material, most people considered that the Protocols promoted efficiency. However, the views from the very small number of surveyed barristers differed, suggesting that although in general pre-action arrangements may be both efficient and just, the Protocols did not necessarily achieve this objective.

Outcome Quality

7.55. Further, and more specifically, it has been noted previously that efficiency is linked to time, cost and fairness (justice) and this has been explored in previous Chapters in this Report. The notion of efficiency can also be linked to the acceptability and durability of any outcome, because, unless an outcome is accepted by the parties and lasts over time, it is unlikely to be effective or efficient in any broader context.  

7.56. Barristers who participated in the online survey and who had been involved in matters where the Pre-Action Protocols applied were asked to indicate the extent to which they agreed or disagreed with the statement that, ‘In my experience, the Pre-Action Protocols have assisted parties to reach lasting outcomes.’ While the response rate was low, the results were overwhelmingly negative, with six of the eight respondents indicating that they disagreed with the statement. These results are summarised in Figure 7.5.

---

In my experience, the Pre-Action Protocols have assisted parties to reach lasting outcomes (n=8)

Again, these results can be contrasted with the findings made in relation to barristers’ perceptions of the efficacy of pre-action requirements generally. All barristers who participated in the online survey were asked to indicate the extent to which they agreed or disagreed with the statement that, ‘Pre-action processes can result in outcomes which are lasting.’ Most respondents (n= 9 out of 11) indicated that they agreed with the statement. The results are displayed in Figure 7.6.

Pre-action processes can result in outcomes which are lasting (n=11)

These barristers were also asked to indicate the extent to which they agreed or disagreed with the statement that, ‘Pre-action requirements can assist parties
to reach outcomes that are effective and acceptable.’ Most respondents (n= 8 out of 11) indicated that they agreed with this statement. The results are displayed in Figure 7.7.

FIGURE 7.7: PRE-ACTION REQUIREMENTS CAN ASSIST Parties TO REACH OUTCOMES THAT ARE EFFECTIVE AND ACCEPTABLE (N=11)

7.59. It is not clear from the survey response why some members of the Bar considered that pre-action requirements were effective and just but that the 2014 requirements might not be. It may be that a simpler protocol, which included supportive schemes and did not require the same exchange of documentation, or that the Rule 33 requirements were regarded by these stakeholders as more effective. These issues may also be linked to the types of disputes covered by the Protocols.

Appropriateness of the Pre-Action Protocols to Different Types of Disputes

7.60. As noted in Chapter 4, in terms of the appropriateness of the Protocols to specific types of disputes, one of the medical negligence defendant lawyers who participated in the December 2017 focus groups expressed concern about the appropriateness of the Pre-Action Protocols in relation to ‘big claims.’ This participant commented that:

I think you have to do a cost benefit analysis. This [the Pre-Action Protocols] is all well and good in claims that are not very big and everyone knows that the costs are going to be more than the claim is worth. But if you’ve got a claim worth $10million...these sorts of things are not going to settle until the defendant has properly considered all the issues. It’s not going to settle due to a commercial decision... In the smaller claims, worth about $20000, you might throw something at it at an early time, even if you think it has no merit. I don’t think the big claims should be part of any of this... I think they should just be removed.43

43 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
7.61. The stakeholder (above) does not appear to value the pre-action requirements in terms of the capacity for the pre-action arrangements to assist the parties in planning and managing litigation (where they do not result in litigation). In large value claims, as the past ACJI research 44 has found, there can be significant efficiencies, even if no settlement is reached, if the pre-action arrangements result in the narrowing or defining of issues that may then progress to litigation.

7.62. All barristers who participated in the online survey were asked to indicate the extent to which they agreed or disagreed with the statement that, ‘Pre-action requirements are inappropriate in some types of matters.’ Nine of the eleven respondents agreed with this statement. The results are displayed in Figure 7.8. Participants were also invited to make a comment in relation to this statement. The comments indicate again that pre-action requirement benefits are not perceived to extend to managing and planning litigation processes (agreed case management) if a resolution does not take place. Comments included that:

- Pre-action requirements are inappropriate in relation to ‘injunctions’.
- Pre-action requirements are ‘inappropriate in medical negligence/personal injury cases where they fail to achieve resolution.’
- ‘The court rules make appropriate exceptions.’
- ‘I cannot conceive a situation where you would withhold information for the forensic purpose of surprisingly opposition at trial (other than perhaps surveillance film in a fraud case) otherwise waiting until proceedings [where] you then provide documents is a pointless waste of money and time.’

**FIGURE 7.8: PRE-ACTION REQUIREMENTS ARE INAPPROPRIATE IN SOME TYPES OF MATTERS (N=11)**

7.63. Barristers were also asked to indicate the extent to which they agreed or disagreed with the statement that, ‘Pre-action requirements can divert cases away from the courts that should be there.’ More than half (n= 6 out of 10)

---

44 Sourdin, above n 3.
respondents disagreed with this statement. The results are displayed in Figure 7.9. Of the respondents that disagreed with the statement, one noted that they disagreed ‘with the exception of the Pre-action Notice procedure in the Magistrates Court. However, that procedure involves mediation in the court system and does not divert cases away as such.’ The other commented that:

The matter will only be diverting from the court if it settles. Settlement is by consent and so it has to be acceptable and that's fair – to some degree – Or the matter will not settle. It is difficult to conceive of the case that would be better dealt with as a result of full litigation than settled.

7.64. One respondent who agreed with the statement commented that pre-action requirements that divert cases away from the courts ‘probably need to be backed up by more accessible mediation facilities.’ This comment suggests that the efficiency of the Protocols could be increased if mediation was used more frequently (and was supported).

FIGURE 7.9: PRE-ACTION REQUIREMENTS CAN DIVERT CASES AWAY FROM THE COURTS THAT SHOULD BE THERE (N=10)

Should the Pre-Action Protocols be extended to other types of disputes?

7.65. Barristers who participated in the online survey and who had been involved in matters where the Pre-Action Protocols applied were asked to indicate the extent to which they agreed or disagreed with the statement that, ‘The Pre-Action Protocols should be used in other types of disputes.’ While the response rate was low, the results were largely negative, with six of the eight respondents indicating that they disagreed with the statement. The results are summarised in Figure 7.10.
7.66. The two judicial officers interviewed during the December 2017 focus groups were also asked whether the Pre-Action Protocols could be usefully extended to other types of disputes. Both Judicial Officers considered whether the Protocols should be extended to commercial disputes. The District Court Judicial Officer did not believe that the Protocols should be extended into this area, primarily due to concerns regarding complexity. This respondent commented:

It’s the other cases that are more complicated - the commercial litigation. It would be harder to have pre-action because they are so complex... The best thing is to get them into court as soon as possible and then have a trial come up and that’s when they’ll settle...With a minimum. Have your rule 33, but that’s about as far as you go. Put your claim in. They can respond. If they don’t settle, then it goes to court. Then we can give them all the weapons, get their cases ready and give them a judge as soon as possible.45

7.67. In contrast, a Supreme Court Judicial Officer indicated that they would be interested to see whether the Protocols could be extended to commercial disputes ‘because that is what [the Court] deal[s] with the most.’46 They also considered whether there might be scope to extend the Protocols to testamentary matters. However, they noted that the time limits that operate in relation to testamentary matters may make it difficult for parties to comply with any pre-action requirement, and that disputants in this area can behave obstructively, which would likely render any pre-action requirement ineffective. They concluded that ‘different matters will likely demand different approaches.’47

---

45 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
46 Interview with Judicial Officer of the Supreme Court of South Australia (Sir Samuel Way Building, Adelaide, 12 December 2017).
47 Interview with Judicial Officer of the Supreme Court of South Australia (Sir Samuel Way Building, Adelaide, 12 December 2017).
7.68. The researchers note (see Chapter 2) that pre-action processes have been used successfully in a range of areas (including commercial disputes) for some years in both the UK and within Australia.

**Comparing the Pre-Action Meeting to Other Dispute Resolution Processes**

7.69. Throughout the focus group interviews, participants considered the efficacy of the Pre-Action Protocols, and particularly the pre-action meeting required under the Protocols, in relation to other dispute resolution processes.

7.70. As noted in Chapter 5, in the medical negligence area, one plaintiff lawyer indicated that mediation or other ‘formal processes’ may be more effective than ‘informal processes’, such as informal conferences or pre-action meetings, commenting that:

A number of my clients start off with a bit of anger, as well as suffering. Somehow, that anger must be addressed. Sometimes, informal processes, aren’t as good at soaking up anger as something a bit more formal. 48

7.71. This participant also believed that ‘mediation is the best way of addressing the whole combination of issues - personal, emotional and legal.’ 49 Many medical negligence plaintiff and defendant lawyers recognised the potential benefits of early mediation but indicated that they do not usually hold mediations during the pre-action stage, primarily for reasons of expense (see below at 7.99).

7.72. One plaintiff lawyer noted that ‘it can be helpful for the lawyer if the matter has been to the coroner or to AHPRA [the Australian Health Practitioner Regulation Agency] ... but they run their own show.’ 50

7.73. Medical negligence plaintiff lawyers also raised concerns about the effectiveness of court settlement conferences. One lawyer noted that court settlement conferences are often seen as a ‘tick the box exercise.’ 51 Another commented that ‘the court doesn’t really give you enough time.’ 52

7.74. In the construction area, the defendant lawyer interviewed expressed a preference for the use of facilitated expert determination. This lawyer explained that they try to get the experts to sit down during the pre-action stage to work out a joint position paper, which can help to narrow the issues in dispute and lead to costs saving later on. They commented:

In some of the larger building disputes, expert determination is quite useful to cut through the issues that will cost more to argue about than it will to deal with through

---

48 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
49 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
50 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
51 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
52 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
the expert. Although, clients must agree to use something external to the court process.  

7.75. In comparison, a District Court Judicial Officer believed that the system is ‘going in the right direction’ by having moderate pre-action protocols followed by active supervision by the courts. This Judicial Officer saw value in pre-action requirements that provide parties with the opportunity to settle or narrow the issues in dispute prior to commencing proceedings, but also emphasised the advantages of getting matters to court where they can be monitored, particularly in cases where querulous litigants are involved. They also noted that there is ‘a fair bit of flexibility in the system’, which allows the court to provide parties with a range of dispute resolution options over the lifecycle of their dispute: We are going in the right direction by having moderate pre-action protocols and then coming to court and having active supervision and getting it on to trial as soon as possible... I think there is a fair bit of flexibility in the system... It’s flexible enough to give them a mediation... quite often we can give a pre-mediation or the parties can go to a professional mediator... Otherwise, you can get a trial relatively quickly... I view that as being relatively good. 

Objective Five: Did the Protocols Minimize the Cost of Civil Litigation to the Litigants and the State?

7.76. As noted in Chapter 4, there is mixed evidence relating to the costs of Pre-Action Protocols, although, on the whole they are viewed as ‘cost neutral.’ The evidence shows that the Protocols did not appear to increase cost for litigants and if they did, this had a minimal impact as costs would have been incurred in any event. From a public cost perspective, there was no evidence that there were additional public costs and the small number of settlements that may have been prompted by the pre-action requirements (either directly or indirectly) would have reduced some public court (as well as private monetary and non-monetary) costs.

Future Options

7.77. In terms of the findings discussed in this Report a number of options emerge in terms of creating more effective arrangements into the future. These are listed below and have been developed with reference to the findings, discussion and analysis in this Report. On balance, the Researchers consider that Option One or Option Two below would be most effective in terms of meeting the objectives outlined in this Chapter. In terms of a preferred option, the researchers consider

53 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
54 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
55 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
56 Interview with Judicial Officer of the District Court of South Australia (Sir Samuel Way Building, Adelaide, 11 December 2017).
that serious consideration should be given to Option Two, however, it is noted that for this option to be effective close collaboration will be required with the profession and that some additional infrastructure set up will be required.

Option One: Retain the Pre-Action Protocols and strengthen the supporting infrastructure

7.78. One option is to retain the Pre-Action Protocols and strengthen the arrangements that support the Protocols to increase compliance and improve effectiveness. Potential improvements could be undertaken in three main areas relating to education and information, court supervision, the imposition of behavioural guidelines and the simplification of the protocols.

Education and information

7.79. As noted above, lawyers that participated in the focus group interviews indicated that a lack of awareness of the Pre-Action Protocols may be a key factor contributing to the low rate of compliance. Some lawyers also raised concerns about the difficulty they have had working out what their obligations are under the Protocols and when certain steps need to be taken (see 7.6.). In the view of the researchers, the requirements appear to be fairly simple. However, these issues may indicate that there is a need for accessible information (for example, additional information and clear flow charts on the court website) as well as greater education for lawyers and parties about their obligations under the Protocols. There was also an issue relating to court staff and judicial officer understandings about the requirements. In this regard, it was noted that most court staff and judicial officers appeared to be completely unaware of the requirements (although they were generally well aware of the Rule 33 requirements).

7.80. The diverse attitudes towards engaging in the Pre-Action Protocols, the low levels of compliance, and research participants’ negative experiences of lawyer/party behaviour (adversarialism, delaying tactics) also indicate a need for information about expectations and compliance requirements and better education of lawyers and parties, not only about the availability of ADR, but also about the concept of ADR, and particularly, the value of early facilitative ADR. In terms of the value of ADR in large matters, a focus on preparing a matter for litigation (not just resolution) may also be useful and a pre-action meeting process could focus on matters that include an agreed plan for the exchange of evidence and the development of options relating to joint experts.

7.81. Many of the lawyers that participated in the focus groups and interviews believed that better education and information for lawyers and parties could assist in improving the effectiveness of the Pre-Action Protocols. For example, one of the construction lawyers interviewed suggested that the introduction of a simplified guide concerning the process parties need to go through, the different steps they can take and the consequences of not taking certain steps could be helpful in ensuring that ‘practitioners who don’t often practice in this area might
actually comply... it could also be helpful to direct clients to this.’ One of the medical negligence lawyers commented:

We need education for the profession. A lot of [other lawyers] aren’t aware of [the Pre-Action Protocols] until they get a letter saying you haven’t complied. I suspect it’s hard for smaller practitioners to keep up.58

7.82. Another suggested that having a flow chart on the court website could be helpful and ‘would save a lot of time.’59

7.83. Medical negligence plaintiffs also indicated that having more information about the process and alternative dispute resolution options would have been helpful (see 5.29.)

7.84. Barristers who participated in the online survey were asked to indicate the extent to which they agreed or disagreed with the statement that ‘Greater education for legal practitioners regarding the Pre-Action Protocols would help to support the earlier resolution of disputes.’ The results were mixed, with four of the eight respondents indicating that they agreed with the statement and four indicating that they disagreed.

7.85. Notably, one medical negligence defendant lawyer commented:

I’m not convinced that just having this [information online] will result in compliance... I think it depends on a lot of other factors I don’t think it’s just, what do the rules require you to do? It can be a multitude of factors...it can be the practitioner, the client, their ability to information gather.60

Greater court supervision and support

7.86. As indicated above, there may be a need for greater court supervision and enforcement of the Pre-Action Protocols to promote compliance. A number of practitioners commented that the Court was not interested in compliance and this resulted in a lack of compliance by practitioners. Greater court supervision could include more rigorous checking by the registry staff in relation to compliance when matters are commenced, together with prompt referral if required. The referral could involve a referral to a judicial officer for early mediation referral. It is anticipated that the new case management system that has been developed with the courts may assist with this.

7.87. In addition, judicial officers may need more education and greater clarity relating to their roles. In view of the fact that the Protocols were introduced by the Court, it is notable that judicial officers considered that they should not inquire about compliance (see above at 7.30.-7.31.). A clear direction to judicial officers about compliance at the first directions hearing (or on referral from the Registry) would in all likelihood increase compliance rates and practitioner understandings about the Protocols. The situation in South Australia can be

57 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
58 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
59 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
60 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
contrasted with the approach in some other jurisdictions where judicial officers may be much more active in terms of inquiries about non-compliance (although the ACJI report also noted that this can be an issue).

7.88. The development of checklists for judicial officers and registry staff and consideration of how costs or referral orders (or both) can be made are also relevant matters to consider. The ACJI Report also noted that having the capacity to make cost orders and referral orders (for example to mediation) where there was non-compliance with pre-action requirements was an important feature of successfully introduced protocols.

7.89. There were diverse opinions amongst research participants as to whether the courts should be doing more to support the Pre-Action Protocols. The barristers that participated in the online survey were asked to indicate the extent to which they agreed or disagreed with the statement that, ‘The courts should do more to support the Pre-Action Protocols.’ Four of the barristers that responded to this question disagreed with the statement and four agreed. The results are displayed in Figure 7.11. One of the barristers that agreed with the statement commented:

The courts should not leave the process to the parties but be pro-active in engaging the parties. It is one thing for the courts to have such rules but the courts should play a more active role in the process by facilitating settlement conference or holding mediations.

FIGURE 7.11: THE COURTS SHOULD DO MORE TO SUPPORT PRE-ACTION PROTOCOLS (N=8)

7.90. In contrast, some of the lawyers that participated in the focus groups indicated that they would prefer the courts not to ‘meddle’ or believed that it would not be productive for the courts to ‘go back over things’ once the parties are in court:

By the time the parties get to a Master, they have a pretty defined view of what they are trying to do...the defendants may say this hasn’t gone through the protocol...the

---

61 Sourdin, above n 3, 166-7.
62 Ibid 147.
judges seem to be focused on what we are doing now, not going back over things...and I don’t think that at that point, it would be very productive, unless one of the parties was complaining about it.  

7.91. However, several participants commented on the need for increased provision of cost consequences for parties who fail to comply with the Protocols. One medical negligence plaintiff lawyer expressed significant concerns about the lack of cost consequences for defendants who fail to comply and the impact that this may be having on compliance. One barrister that responded to the online survey recommended:

Strengthening cost consequences for parties who refuse a pre-action offer and giving financial incentives to parties who make genuine compromises might improve the system. Give plaintiffs a discount on their filing and setting down fees if they have offered more than a 33% discount on their total claimed loss!

**Conduct requirements (good faith)**

7.92. As noted in Chapter 6, some conduct or behavioural standards may need to be articulated in respect of the requirements (for example, ‘good faith’ or some other standard), and court and practitioner input and supervision into defining appropriate standards can support compliance and reduce costs (see also Chapter 3). However, such requirements will, in all probability, require court follow up (see above) and action. Notably, one of the barristers who responded to the online survey commented, ‘failure to undertake them in good faith should be vigorously enforced by the courts.’

**Simplify the Protocols**

7.93. At present, the Pre-Action Protocol specifies fairly strict time lines relating to the exchange of material. There was some evidence that the timelines were not necessarily effective and may be problematic for some stakeholders. It may be possible to simplify the Protocols and add some greater flexibility in terms of protocols. Whilst the researchers do not suggest that the CDRA approach should be adopted, it is possible that some distinction could be made between ‘large’ claims and ‘other’ claims. At the same time, the interview and other data in this Report suggests that simpler protocols may work more effectively and introducing any additional complexity may be likely to introduce more non-compliant behavior.

7.94. There are also other options. For example, participants could exchange very simple documentation and opt to attend a mediation within six weeks (with a certificate from an accredited mediator relating to attendance) and forgo requirements in relation to the exchange of other material to meet the protocol requirements.

7.95. Some other suggestions emerging from the research included the following:

The Rules and Supplementary Rules should be amalgamated so that there is only one set of Rules. The pre-action protocols are honoured in their breach.

---

63 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
64 Anonymous response to the online survey of the SA Bar.
7.96. There were also suggestions for additional structural support and even a ‘staged process’ (recommended by a medical negligence expert/defendant):

Perhaps... a process where there was initially a way to register an adverse medical outcome. It could then be looked at reasonably quickly by an ombudsmen or experts (like the coroner has). There could be some advice to the potential plaintiff at this stage about whether they have a case and some cases could be screened out. The plaintiff and doctor could be given some support.65

Option Two: Amend the Pre-Action Protocols and Incorporate a Mandatory Pre-Action Requirement to Mediate

7.97. The Pre-Action Protocols could be replaced with a mandatory pre-action requirement to mediate coupled with a basic exchange of claims information (perhaps using the current protocol requirements as amended per Option One). Within Australia, such arrangements are in place in respect of other types of disputes. For example, as noted in Chapter 2, the Retail Leases Act 2003 (Vic) requires parties to participate in mediation or another appropriate form of ADR prior to issuing proceedings in the Victorian Civil and Administration Tribunal (VCAT) for retail tenancy disputes. In its Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts Report, the ACJI found that most matters that passed through this scheme settled, that the associated processes and outcomes are mostly regarded as procedurally fair and just, and that this type of arrangement can lead to cost and time savings even if litigation is commenced following the pre-action intervention.66

7.98. Outside Australia, a mandatory pre-suit mediation program for medical malpractice disputes, known as the Florida Patient Safety and Presuit Mediation Program (FLPSMP), was put into effect across the University of Florida (UF) Health system in the United States on January 1, 2008. The early mediation is said to ‘foste[r] confidential and candid communication between doctors and patients, which promotes early fact-finding and candid discussion’.67 An analysis of the program was conducted 5 years after its implementation and found that it had resulted in ‘faster resolution of claims, lower legal expenses, and greater compensation to patients with meritorious claims.’68 The PIPA legislation in Queensland (see 2.25 and below) also supports early mediation in medical negligence matters.

7.99. At present, the Pre-Action Protocols envisage parties engaging in a meeting or even a formal mediation prior to proceedings commencing. Results from the focus groups indicated that, in the medical negligence area in particular, it is unusual for a mediation to be held, primarily for reasons of expense. For example, one medical negligence plaintiff lawyer, generally supportive of the Pre-Action Protocols, was more cautious about early mediation:

---

65 Comment at Medical Negligence Defendant Focus Group (University of Adelaide, Adelaide, 14 December 2017).
66 Sourdin, above n 3, 99.
68 Ibid 20.
There is a cost associated with it... at the early stage, do I want to pay a mediator or half a mediator’s fee to go and along and get told by a defendant that they are not paying any money under any circumstances? I would have just blown several thousand dollars for a mediator.  

7.100. One of the medical negligence defendant lawyers interviewed had a similar view on the timing of mediation:

Normally, we like to reserve mediation as another option. We like to have the informal conference first, because that is without the cost... also try and come to an understanding about what the real issues are that are contentious. Then, if you can’t get a resolution, we start the litigation process along, make sure that everyone gets all the information they need and reserve that mediation option for later on down the track, because of the expense, and because it gives you the option later to say to your client, “this is another thing we can do to try and avoid a trial.”

7.101. Another medical negligence defendant lawyer considered that mediation might be appropriate in a big case, but not in smaller cases:

Mediation is an expensive process...it depends how much your claim is worth...if your claim is worth lots, it may be a legitimate thing, but you’re not going to use it if the claim is small, and you’re just going to throw some money at it on a commercial basis.

7.102. These issues relating to the size of the claim and also the need for expert evidence could be attended to if, where the pre-action mediation did not result in a resolution, required the development of a litigation plan that included cost estimates, options relating to joint expert evidence and provided that the ‘joint plan’ was explored by the Court at an early time. Such a plan would need to be reviewed by the Court at an early time (see previous discussion relating to compliance).

7.103. In terms of a preference for mediation, various survey respondents considered that medical negligence defendants and defendant lawyers tend to prefer informal conferences over pre-action meetings or mediations. For example, one barrister that participated in the online survey commented, ‘institutional litigants prefer to attempt to resolve claims by negotiation or mediation at a far later stage.’ During the research team’s consultation with the Joint Rules Advisory Committee in April 2018, one member commented that informal conferences play a large role in South Australia, noting that this may be due to the small size of the South Australian legal profession and the cost associated with mediation. One medical negligence plaintiff lawyer noted that defendants tend to want an informal conference without necessarily wanting a mediator.

---

69 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
70 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
71 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
72 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
7.104. Yet, as noted above (7.70.) and in Chapter 5, when comparing the informal conference process with mediation, medical negligence plaintiff lawyers found some value in early engagement via mediation. Other comments included:

I really like mediations because there is this idea that the parties are there to try and resolve it. I hate the informal conference process where one party hears something they don’t like, and they just walk out.73

Sometimes, the reason you need a mediator is your own client…your own client is difficult… the mediator may carry a judicial air that assists you in talking sense into your client.74

7.105. So, whilst recognising the benefits that mediation offered, both medical negligence plaintiff and defendant lawyers noted that the cost of mediation needed to be balanced against the likelihood of a successful outcome, particularly at an early stage in proceedings, when evidence issues and positions are not finalised. Some participants recognised the value of mediation but in practice did not actually use it until much later in proceedings. One medical negligence plaintiff lawyer commented, 'I think mediation comes down to last chance, before you get to the trial.'75 Whilst the opportunity to meet informally and exchange information was generally seen as a positive, overall, the responses indicate ambivalence about the value of engaging in (and paying for) mediation at the pre-action stage.

7.106. These results suggest a bifurcation between the value of mediation as an opportunity to define issues, gauge the other party’s perspective, and enhance communication earlier in proceedings, and the value of mediation as a focused dispute resolution process. The comments are of particular interest when compared to the use of mediation in some other pre-action arrangements concerning personal injury and medical negligence. For example, most compulsory conferences conducted under the Personal Injuries Proceedings Act 2002 (QLD) in Queensland are conducted as mediations in the medical negligence area.76

7.107. Despite these mixed views, some lawyers in both the medical negligence and construction areas expressed support for the idea of including mediation as a step in the pre-action stage, particularly if mediations were to be conducted by mediators with expertise in the relevant field. For example, when asked whether they had any recommendations about how the Pre-Action Protocols could be improved or changed, one construction lawyer suggested that:

A mediation after the pre-action process, where the issues are defined, but before the first directions hearing might be helpful... an expert determination process may also be something that would be useful.77

73 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
74 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
75 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
76 Margaret Brain and Sarah Vallance, LexisNexis Practical Guidance Personal Injury Qld, Document: Pre-Court Procedures (LexisNexis, Australia).
77 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
One medical negligence plaintiff lawyer commented:

My dream is...when I wake up in the middle of the night thinking about the various things that are going on with my files...is that you would have an impartial mediation service that has some very experienced sort of medical input – I don’t think that just a mediator is going to change things much, but I think that if you had some expert input, so there’s someone there saying, ‘I hear what you’re saying, but a patient shouldn’t come out of this procedure like this’, or conversely.78

7.108. Medical negligence defendant lawyers emphasised that their support for pre-action mediation would ‘dep[end] on who the person [the mediator] is.’79 One noted, ‘that’s really important.’80

7.109. Interestingly, the construction defendant lawyer who participated in the focus groups indicated that they often use expert determination to narrow the issues in dispute during the pre-action stage. They conduct pre-action meetings without the help of a mediator but also thought that mediation with an expert may be a helpful step that may promote the resolution of construction disputes after parties go through the Pre-Action Protocols and before they commence proceedings.81

7.110. However, it should also be noted that there were some negative responses to the question of whether mediation should be included as a mandatory step in the pre-action process. For example, one medical negligence plaintiff lawyer believed that this would be a ‘step back’ as ‘not enough work will likely have been done’ and would likely lead to a ‘deadlock mediation.’82 One construction lawyer said, ‘anything that is mandatory... I don’t think works.’83 Barristers who participated in the online survey and who had been involved in matters where the Pre-Action Protocols applied were asked to indicate the extent to which they agreed or disagreed with the statement that ‘Mediation could be usually added as a step in the pre-action process.’ Five out of the eight participants that responded to this question either disagreed or strongly disagreed with the statement. In contrast, the barrister interviewed as part of the research team’s consultation process believed that mediation should be compulsory and suggested an ‘opt out’ mediation requirement that would place the onus on parties to show why they should not be required to attend mediation. It is noted that in terms of these comments, the utility of mediation was perceived to only relate to the potential that it may have in terms of settlement. That is, the utility of mediation as a triage and planning tool had not been considered.

7.111. Overall, the findings suggest that mediation may be more likely to be used if it cost less and was ‘easier’ to access. Thus, to be effective, any mandatory requirement to mediate should be accompanied by a basic infrastructure that

78 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
79 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
80 Comment at Medical Negligence Defendant Lawyers Focus Group (Jeffcott Chambers, Adelaide, 15 December 2017).
81 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
82 Interview with Construction Lawyer (Telephone Interview, 5 May 2018).
83 Interview with Construction Lawyer (Telephone interview, 5 May 2018).
ensures that such processes are easy to access at an appropriate cost. The retail lease schemes in place in Victoria and NSW provide examples here. Mandatory mediation occurs on a fixed cost basis (subsidised in Victoria but not in NSW) within these schemes. Further, as noted above, the question of who should conduct mediation is an important consideration and may be complicated by the need to keep costs down.

7.112. The researchers note that to support fixed fee mediation, it would also be desirable to set up a panel of mediators who are accredited and have relevant subject matter expertise. In this regard, a number of lawyers commented on the effectiveness of the Magistrate Court processes which could be adopted in the pre-action area. For example, one construction lawyer noted:

Having someone like the Magistrates Court expert (a general building consultant well versed in the court system, but not an engineer) available in the DC may be helpful.84

7.113. A medical negligence plaintiff lawyer noted that there may be particular issues with medical negligence mediation in South Australia which relate to the cost of mediators and the pool of available mediators although: ‘early access to genuinely impartial and objective evidence would be a major plus for claimants.’85 A medical negligence defendant noted that, ‘mediation at that early stage would help to filter out cases that clog up the process. Parties would need access to competent experts.’86

7.114. This option would also need to be supported by an education campaign, court supervision and enforcement, and good faith or other conduct requirements with associated cost consequences for failing to mediate in good faith or comply with conduct guidelines (see above in relation to Option 1). In addition, the preparation of guidance material for mediators and parties in relation to the use of mediation for planning purposes (defining and narrowing issues, agreeing on experts and even joint experts) and to ensure that cost estimates are made available to clients will require input from the court as well as follow up in terms of compliance.

Option Three: Abandon the Pre-Action Protocols

7.115. Another option is to abandon the Pre-Action Protocols altogether and simply return to the Rule 33 arrangements. In relation to this option, the researchers note that there was some evidence that the Protocols had been helpful and there was some support for their continued operation. However, issues relating to compliance meant that the Protocols may not have been used effectively.

7.116. From the perspective of the Research Team, this option is probably the least effective as stakeholders agreed that early intervention in these types of matters was important and could be effective although the current requirements and

84 Comment at Construction Defendant Lawyers Focus Group (Supreme Court of South Australia, Adelaide, 13 December 2017).
85 Comment at Medical Negligence Plaintiff Lawyers Focus Group (Jeffcott Chambers, Adelaide, 14 December 2017).
86 Comment at Medical Negligence Defendant Focus Group (University of Adelaide, Adelaide, 14 December 2017).
surrounding infrastructure might not enable the Protocols to be as effective as they could be.
Selected References


Anderson, N, ‘SA Courts Working to a New Motto’ (2014) 78 *In Business South Australia* 88


Australian Centre for Justice Innovation, ‘The Timeliness Project’ (Background Report, ACJI, 2013)


Australian Institute of Health and Welfare (AIHW), ‘Australia’s Medical Indemnity Claims 2012-13’ (Safety and Quality of Health Care Series No 15, AIHW, 2014)


Australian Securities and Investments Commission (ASIC), ‘Approval of External Complaints Resolution Schemes’ (Policy Statement No 139, ASIC, 1999)


Castles, Margaret, and Bernadatte Richards, ‘Medico Legal Mediation: Developing an Interdisciplinary Roleplay’ (unpublished, 2018)


Grant, Genevieve M et al., ‘Relationship Between Stressfulness of Claiming for Injury Compensation and Long-term Recovery’ (2014) 71(4) *JAMA Psychiatry* 446


Legg, Michael and Dorne Boniface, ‘Pre-action Protocols in Australia’ (2010) 20
*Journal of Judicial Administration* 39


National Australia Dispute Resolution Advisory Council, ‘A Framework for ADR Standards’ (Report to the Commonwealth Attorney-General, NADRAC, April 2001)

National Australia Dispute Resolution Advisory Council, ‘Maintaining and Enhancing the Integrity of ADR Processes’ (Research Report, NADRAC, February 2011)


National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Report to the Attorney-General, NADRAC, 2009)


Relis, Tamara, Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties (Cambridge, 2009)


Senate Standing Committee on Legal and Constitutional Affairs, Legislation Committee, Parliament of Australia, Civil Dispute Resolution Bill 2010 (2010)


Sourdin, Tania, Alternative Dispute Resolution (Thomson Reuters, 5th ed, 2016)


Sourdin, Tania, ‘Mediation in the Supreme and County Courts of Victoria’ (Report, The Department of Justice and Australian Centre for Peace and Conflict Studies, 2008)
Sourdin, Tania, ‘Dispute Resolution Processes for Credit Consumers’ (Report, La Trobe University, Melbourne, March 2007)


Supreme Court of Victoria, ‘Courts Strategic Directions Report’ (Report, Supreme Court of Victoria, 2004)

Tan, Stasia, ‘Resolving Disputes without Courts – Commentary from Law Council of Australia’ (Submission to ACJI Background Paper, Law Council of Australia, 22 June 2012)

Thomas, M, ‘Protocols to Fast Track Disputes’ (2014) 36(6) Bulletin (Law Society of South Australia) 10


Appendix A: Project Team

Professor Tania Sourdin, Project leader, Principle researcher and writer

Professor David Bamford, Academic partner

Margaret Castles, Academic partner, researcher and writer

Madeline Muddle, Senior researcher, writer

Jacqueline Meredith, Researcher

John Woodward, Editing

Blake Grierson, Research Assistant
Appendix B: Project Steering Committee

Honourable Justice Dart
Master Blumberg
Registrar Roder
Mr Alan Lindsay
Appendix C: Expert Advisory Group

Professor David Bamford
Nick Anderson
Master Mark Blumberg
Margaret Byrnes
Robert Fenwick-Elliott
Robert Harding
Michael Hutton
Michael King
Alan Lindsey
Virginia Martindale
Cheryl McDonald
Alan Shanks
Professor Tania Sourdin
Joanne Staugas
Appendix D: Court File Audit Sheet

<table>
<thead>
<tr>
<th>Date collection information</th>
<th>Checked</th>
<th>Entered</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Code</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 Date coded</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Claim details</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 File No.</td>
</tr>
<tr>
<td>4 Type of matter</td>
</tr>
<tr>
<td>5 Date cause of action arise</td>
</tr>
<tr>
<td>6 Date of originating process (SC only)</td>
</tr>
<tr>
<td>7 Response filed?</td>
</tr>
<tr>
<td>8 Cross-claim filed?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Pre-action protocols</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do the protocols apply?</td>
</tr>
<tr>
<td>(Matter initiated after</td>
</tr>
<tr>
<td>1/1/2015)</td>
</tr>
<tr>
<td>10 Form 3 filed?</td>
</tr>
<tr>
<td>11 Date form 3 filed</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Plaintiff details</th>
</tr>
</thead>
<tbody>
<tr>
<td>12 Number of plaintiffs (if more than 1, complete separate sheet)</td>
</tr>
<tr>
<td>13 Plaintiffs type</td>
</tr>
<tr>
<td>14 Gender</td>
</tr>
<tr>
<td>15 Date of birth</td>
</tr>
<tr>
<td>16 Education</td>
</tr>
<tr>
<td>17 Occupation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Where relevant:</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 Action by carer</td>
</tr>
<tr>
<td>19 Incapacitv</td>
</tr>
<tr>
<td>20 Deceased</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Defendant details</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 Number of defendants (if more than 1, complete separate sheet)</td>
</tr>
<tr>
<td>22 Defendant/s type</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Where relevant:</th>
</tr>
</thead>
<tbody>
<tr>
<td>23 Gender</td>
</tr>
<tr>
<td>1 Male / 2 Female</td>
</tr>
<tr>
<td>Question</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Date of birth</td>
</tr>
<tr>
<td>Education</td>
</tr>
<tr>
<td>Occupation</td>
</tr>
<tr>
<td>Claim information - heads of damage for plaintiff</td>
</tr>
<tr>
<td>Plaintiff</td>
</tr>
<tr>
<td>General damages</td>
</tr>
<tr>
<td>Past economic loss</td>
</tr>
<tr>
<td>Future economic loss</td>
</tr>
<tr>
<td>Costs</td>
</tr>
<tr>
<td>Other (specify)</td>
</tr>
<tr>
<td>Claim information - heads of damage for defendant</td>
</tr>
<tr>
<td>Defendant</td>
</tr>
<tr>
<td>General damages</td>
</tr>
<tr>
<td>Past economic loss</td>
</tr>
<tr>
<td>Future economic loss</td>
</tr>
<tr>
<td>Costs</td>
</tr>
<tr>
<td>Other (specify)</td>
</tr>
<tr>
<td>Status of file</td>
</tr>
<tr>
<td>Has the matter been finalised?</td>
</tr>
<tr>
<td>Terms of settlement/award</td>
</tr>
<tr>
<td>Final settlement/award amount</td>
</tr>
<tr>
<td>General damages</td>
</tr>
<tr>
<td>Past economic loss</td>
</tr>
<tr>
<td>Future economic loss</td>
</tr>
<tr>
<td>Costs</td>
</tr>
<tr>
<td>Other (specify)</td>
</tr>
<tr>
<td>Total award</td>
</tr>
<tr>
<td>Case processing/management</td>
</tr>
<tr>
<td>How was the matter finalised?</td>
</tr>
<tr>
<td>What other processes were used in this case?</td>
</tr>
<tr>
<td>Was the matter mediated?</td>
</tr>
<tr>
<td>Did the Court or the parties refer the matter to mediation?</td>
</tr>
<tr>
<td>How many mediation sessions were attended in total?</td>
</tr>
<tr>
<td>What was the date of mediation?</td>
</tr>
<tr>
<td>Did all the parties attend mediation?</td>
</tr>
<tr>
<td>Was the matter mediated internally or externally?</td>
</tr>
<tr>
<td>What was the outcome of mediation?</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td>1)</td>
</tr>
<tr>
<td>2)</td>
</tr>
<tr>
<td>3)</td>
</tr>
<tr>
<td>4)</td>
</tr>
<tr>
<td>5)</td>
</tr>
</tbody>
</table>

41. If a final hearing was attended, what was the duration? [ ] hours/minutes

42. Were the proceedings dismissed by consent? [ ]

1=Yes 2=No 3=Don't know

Case disposition: settlement/mediation/hearing

43. Date finalised: dd-mm-yyyy
Appendix E: Interview Guide

INTERVIEW GUIDE

PROJECT TITLE: Evaluation of Pre-action Processes in South Australia

Estimated interview time: 60 to 90 minutes
Brief introduction to research by the researcher
Participant Information form read: Y/N
Consent form signed: Y/N

*Specific questions to be adapted depending on participant type (plaintiff or defendant; lawyer; judge; expert):

Warm up question:

1) Please describe the alleged injury, how the dispute arose, and the steps that were taken to resolve the dispute.

Time:

2) Have the Pre-action Protocols resulted in the early resolution of disputes? Can you provide a specific example?

Costs:

3) Have the Pre-action Protocols increased or decreased the costs of civil litigation?

Fairness:

4) If the matter was settled, do you think the outcome was fair? Why/why not?
5) If the matter did not settle, what were the reasons for this?

Attitudes:

6) What was the perspective of the disputants in relation to the use of the Pre-action Protocols?

Efficiency:

7) Do you think there is a better process to support the resolution of these types of disputes?

Final question:

8) Do you have any other concerns or suggestions for improvement you would like to raise?
PARTICIPANT INFORMATION SHEET
(Potential Plaintiffs and Defendants)

PROJECT TITLE: Evaluation of Pre-action Processes in South Australia
HUMAN RESEARCH ETHICS COMMITTEE APPROVAL NUMBER: H-2017-178
CO-INVESTIGATORS: Margaret Castles and Tania Sourdin

Dear Participant,

You are invited to participate in the research project described below.

What is the project about?
This project is designed to explore and analyse the effectiveness of pre-action protocols in the Supreme Court of South Australia which currently operate in the areas of Medical Negligence and Construction and Building disputes. In order to determine whether the pre-action processes are achieving their stated objects, we seek to interview plaintiff and defendant legal representatives, judges, experts, and potential plaintiffs and defendants themselves.

Who is undertaking the project?
This project is being conducted by Ms Margaret Castles of the University of Adelaide and Professor Tania Sourdin of the University of Newcastle. The project is funded jointly by the Supreme Court of South Australia and the Law Foundation of South Australia.

Why am I being invited to participate?
Because you have had some experience in the application of the pre-action protocols as a result of being a party to litigation where these protocols have applied. Your personal details were sourced from court files held by the Supreme Court of South Australia which the research team had permission to access. Your participation or non-participation in this project will not impact your legal rights and/or obligations in any way.

What will I be asked to do?
Participate in a semi-structured interview to be held on campus at the University of Adelaide or the Supreme Court of South Australia. The interview will be audio recorded and you will be asked about your views on the pre-action protocols. You will not be required to answer any question that you do not wish to answer, or discuss any topic that you do not wish to discuss.

How much time will the project take?
The interview will take approximately 1 to 1.5 hours. There is no reimbursement for this time.
Are there any risks associated with participating in this project?
There are no foreseeable risks associated with participation in this project apart from
the possibility that you will be asked some questions in relation to your experience in
the court system which may bring up some unavoidable emotions.

What are the benefits of the research project?
This research project aims to enhance the court system in order to provide a better
service to the South Australian public. Although the following benefits cannot be
guaranteed, this research project aims to establish procedures which: facilitate and
courage the just resolution of civil disputes by agreement between the parties,
minimise the cost of civil litigation to the litigants and the State, promote efficiency in
dispute resolution, and avoid unnecessary delay in the resolution of civil disputes.

Can I withdraw from the project?
Participation in this project is completely voluntary. If you agree to participate, you can
withdraw from the study at any time. It will only be possible to withdraw your interview
data before the research report is drafted.

What will happen to my information?
The audio recording and any notes taken during your interview will be de-identified and
confidentially stored in electronic format in a password protected folder within
Adelaide/Newcastle universities. Only the project investigators and research assistants
will have access to this data. The findings of this research will be outlined in a report
submitted to the Law Foundation of South Australia and to the Courts Administration
Authority. All names and other identifying material will be excluded from the report,
and participant stories will be adapted to ensure participants are not identifiable. There
is a possibility of a publicly available summary outlining the key recommendations
arising out of this report. This publicly available summary will not contain any
identifiable information. You will be offered the opportunity to review the extracts of
any of your own quotes that might be used in any publication or report resulting from
this research. You will also be provided with a brief summary of the research findings
and can request access to any publication or report that results from this project. The
interview results will be kept for a period of 5 years and may be used for subsequent
research by way of review of the raw data.

Who do I contact if I have questions about the project?
If you have any questions please contact:
Ms Margaret Castles, Margaret.castles@adelaide.edu.au, (08) 8313 5722; or
Professor Tania Sourdin, Tania.Sourdin@newcastle.edu.au, (02) 4921 5119.

What if I have a complaint or any concerns?
The study has been approved by the Human Research Ethics Committee at the
University of Adelaide (approval number H-2017-178). If you have questions or
problems associated with the practical aspects of your participation in the project, or
wish to raise a concern or complaint about the project, then you should consult the
Principal Investigators. If you wish to speak with an independent person regarding a
concern or complaint, the University’s policy on research involving human
participants, or your rights as a participant, please contact the Human Research
Ethics Committee’s Secretariat on:
Phone: +61 8 8313 6028
Email: hrec@adelaide.edu.au
Post: Level 4, Rundle Mall Plaza, 50 Rundle Mall, ADELAIDE SA 5000
Any complaint or concern will be treated in confidence and fully investigated. You will be
informed of the outcome.
If I want to participate, what do I do?

If you wish to participate in this project please sign and return the consent form to Margaret Castles at Margaret.castles@adelaide.edu.au. The researchers will then contact you to arrange a time for your interview.

Yours sincerely,

Ms Margaret Castles and Professor Tania Sourdin
Dear Participant,

You are invited to participate in the research project described below.

**What is the project about?**

This project is designed to explore and analyse the effectiveness of pre-action protocols in the Supreme Court of South Australia which currently operate in the areas of Medical Negligence and Construction and Building disputes. In order to determine whether the pre-action processes are achieving their stated objects, we seek to interview plaintiff and defendant legal representatives, judges, experts, and potential plaintiffs and defendants themselves.

**Who is undertaking the project?**

This project is being conducted by Ms Margaret Castles of the University of Adelaide and Professor Tania Sourdin of the University of Newcastle. The project is funded jointly by the Supreme Court of South Australia and the Law Foundation of South Australia.

**Why am I being invited to participate?**

Because you have had some experience in the application of the pre-action protocols, as a result of being a legal representative of one of the parties in proceedings where these protocols applied. Your personal details were sourced from court files held by the Supreme Court of South Australia which the research team had permission to access.

**What will I be asked to do?**

Participate in a semi-structured interview to be held on campus at the University of Adelaide or the Supreme Court of South Australia. The interview will be audio recorded and you will be asked about your views on the pre-action protocols. You will not be required to answer any question that you do not wish to answer, or discuss any topic that you do not wish to discuss.

**How much time will the project take?**

The interview will take approximately 1 to 1.5 hours. There is no reimbursement for this time.

**Are there any risks associated with participating in this project?**

There are no foreseeable risks associated with participation in this project apart from the possibility that you will be asked some questions in relation to your experience in the court system which may bring up some unavoidable emotions.

**What are the benefits of the research project?**

This research project aims to enhance the court system in order to provide a better service to the South Australian public. Although the following benefits cannot be guaranteed, this research project aims to establish procedures which: facilitate and encourage the just resolution of civil disputes by agreement between the parties,
minimise the cost of civil litigation to the litigants and the State, promote efficiency in
dispute resolution, and avoid unnecessary delay in the resolution of civil disputes.

Can I withdraw from the project?
Participation in this project is completely voluntary. If you agree to participate, you can
withdraw from the study at any time. It will only be possible to withdraw your interview
data before the research report is drafted.

What will happen to my information?
The audio recording and any notes taken during your interview will be de-identified and
confidentially stored in electronic format in a password protected folder within
Adelaide/Newcastle universities. Only the project investigators and research assistants
will have access to this data. The findings of this research will be outlined in a report
submitted to the Law Foundation of South Australia and to the Courts Administration
Authority. All names and other identifying material will be excluded from the report,
and participant stories will be adapted to ensure participants are not identifiable. There
is a possibility of a publicly available summary outlining the key recommendations
arising out of this report. This publicly available summary will not contain any
identifiable information. You will be offered the opportunity to review the extracts of
any of your own quotes that might be used in any publication or report resulting from
this research. You will also be provided with a brief summary of the research findings
and can request access to any publication or report that results from this project. The
interview results will be kept for a period of 5 years and may be used for subsequent
research by way of review of the raw data.

Who do I contact if I have questions about the project?
If you have any questions please contact:
Ms Margaret Castles, Margaret.castles@adelaide.edu.au , (08) 8313 5722; or
Professor Tania Sourdin, Tania.Sourdin@newcastle.edu.au , (02) 4921 5119.

What if I have a complaint or any concerns?
The study has been approved by the Human Research Ethics Committee at the
University of Adelaide (approval number H-2017-178). If you have questions or
problems associated with the practical aspects of your participation in the project, or
wish to raise a concern or complaint about the project, then you should consult the
Principal Investigators. If you wish to speak with an independent person regarding a
concern or complaint, the University’s policy on research involving human
participants, or your rights as a participant, please contact the Human Research
Ethics Committee’s Secretariat on:
Phone: +61 8 8313 6028
Email: hrec@adelaide.edu.au
Post: Level 4, Rundle Mall Plaza, 50 Rundle Mall, ADELAIDE SA 5000
Any complaint or concern will be treated in confidence and fully investigated. You will be
informed of the outcome.

If I want to participate, what do I do?
If you wish to participate in this project please sign and return the consent form to
Margaret Castles at Margaret.castles@adelaide.edu.au. The researchers will then
contact you to arrange a time for your interview.

Yours sincerely,
Ms Margaret Castles and Professor Tania Sourdin
PARTICIPANT INFORMATION SHEET (Judges)

PROJECT TITLE: Evaluation of Pre-action Processes in South Australia

HUMAN RESEARCH ETHICS COMMITTEE APPROVAL NUMBER: H-2017-178

CO-INVESTIGATORS: Margaret Castles and Tania Sourdin

Dear Participant,

You are invited to participate in the research project described below.

What is the project about?
This project is designed to explore and analyse the effectiveness of pre-action protocols in the Supreme Court of South Australia which currently operate in the areas of Medical Negligence and Construction and Building disputes. In order to determine whether the pre-action processes are achieving their stated objects, we seek to interview plaintiff and defendant legal representatives, judges, experts, and potential plaintiffs and defendants themselves.

Who is undertaking the project?
This project is being conducted by Ms Margaret Castles of the University of Adelaide and Professor Tania Sourdin of the University of Newcastle. The project is funded jointly by the Supreme Court of South Australia and the Law Foundation of South Australia.

Why am I being invited to participate?
Because you have had some experience in the application of the pre-action protocols, as a result of being a member of the judiciary who has been involved in cases where the pre-action requirements have applied. Your personal details were sourced from court files held by the Supreme Court of South Australia which the research team had permission to access.

What will I be asked to do?
Participate in a semi-structured interview to be held on campus at the University of Adelaide or the Supreme Court of South Australia. The interview will be audio recorded and you will be asked about your views on the pre-action protocols. You will not be required to answer any question that you do not wish to answer, or discuss any topic that you do not wish to discuss.

How much time will the project take?
The interview will take approximately 1 to 1.5 hours. There is no reimbursement for this time.

Are there any risks associated with participating in this project?
There are no foreseeable risks associated with participation in this project apart from the possibility that you will be asked some questions in relation to your experience in the court system which may bring up some unavoidable emotions.

What are the benefits of the research project?
This research project aims to enhance the court system in order to provide a better service to the South Australian public. Although the following benefits cannot be guaranteed, this research project aims to establish procedures which: facilitate and encourage the just resolution of civil disputes by agreement between the parties,
minimise the cost of civil litigation to the litigants and the State, promote efficiency in dispute resolution, and avoid unnecessary delay in the resolution of civil disputes.

**Can I withdraw from the project?**
Participation in this project is completely voluntary. If you agree to participate, you can withdraw from the study at any time. It will only be possible to withdraw your interview data before the research report is drafted.

**What will happen to my information?**
The audio recording and any notes taken during your interview will be de-identified and confidentially stored in electronic format in a password protected folder within Adelaide/Newcastle universities. Only the project investigators and research assistants will have access to this data. The findings of this research will be outlined in a report submitted to the Law Foundation of South Australia and to the Courts Administration Authority. All names and other identifying material will be excluded from the report, and participant stories will be adapted to ensure participants are not identifiable. There is a possibility of a publicly available summary outlining the key recommendations arising out of this report. This publicly available summary will not contain any identifiable information. You will be offered the opportunity to review the extracts of any of your own quotes that might be used in any publication or report resulting from this research. You will also be provided with a brief summary of the research findings and can request access to any publication or report that results from this project. The interview results will be kept for a period of 5 years and may be used for subsequent research by way of review of the raw data.

**Who do I contact if I have questions about the project?**
If you have any questions please contact:
Ms Margaret Castles, Margaret.castles@adelaide.edu.au, (08) 8313 5722; or Professor Tania Sourdin, Tania.Sourdin@newcastle.edu.au, (02) 4921 5119.

**What if I have a complaint or any concerns?**
The study has been approved by the Human Research Ethics Committee at the University of Adelaide (approval number H-2017-178). If you have questions or problems associated with the practical aspects of your participation in the project, or wish to raise a concern or complaint about the project, then you should consult the Principal Investigators. If you wish to speak with an independent person regarding a concern or complaint, the University’s policy on research involving human participants, or your rights as a participant, please contact the Human Research Ethics Committee’s Secretariat on:
Phone: +61 8 8313 6028
Email: hrec@adelaide.edu.au
Post: Level 4, Rundle Mall Plaza, 50 Rundle Mall, ADELAIDE SA 5000
Any complaint or concern will be treated in confidence and fully investigated. You will be informed of the outcome.

**If I want to participate, what do I do?**
If you wish to participate in this project please sign and return the consent form to Margaret Castles at Margaret.castles@adelaide.edu.au. The researchers will then contact you to arrange a time for your interview.
Yours sincerely,

Ms Margaret Castles and Professor Tania Sourdin
CONSENT FORM
(Potential Plaintiffs and Defendants)

1. I have read the attached Information Sheet and agree to take part in the following research project:

<table>
<thead>
<tr>
<th>Title:</th>
<th>Evaluation of Pre-action Processes in South Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethics Approval Number:</td>
<td>H-2017-178</td>
</tr>
</tbody>
</table>

2. I have had the project, so far as it affects me, fully explained to my satisfaction by the research worker. My consent is given freely.

3. I have been given the opportunity to have a member of my family or a friend present while the project was explained to me.

4. Although I understand the purpose of the research project it has also been explained that involvement may not be of any benefit to me.

5. I have been informed that, while information gained during the study may be published, I will not be identified and my personal results will not be divulged.

6. I understand that I am free to withdraw from the project at any time.

7. I agree to the interview being audio recorded.

   Yes ☐  No ☐

8. I am aware that I should keep a copy of this Consent Form, when completed, and the attached Information Sheet.

Participant to complete:

Name: ____________________ Signature: ____________________

Date: ____________________
CONSENT FORM
(Professionals: Lawyers; Judges; Experts)

1. I have read the attached Information Sheet and agree to take part in the following research project:

<table>
<thead>
<tr>
<th>Title:</th>
<th>Evaluation of Pre-action Processes in South Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethics Approval Number:</td>
<td>H-2017-178</td>
</tr>
</tbody>
</table>

2. I have had the project, so far as it affects me, fully explained to my satisfaction by the research worker. My consent is given freely.

3. Although I understand the purpose of the research project it has also been explained that involvement may not be of any benefit to me.

4. I have been informed that, while information gained during the study may be published, I will not be identified and my personal results will not be divulged.

5. I understand that I am free to withdraw from the project at any time.

6. I agree to the interview being audio recorded.

   Yes ☐  No ☐

7. I am aware that I should keep a copy of this Consent Form, when completed, and the attached Information Sheet.

Participant to complete:

Name: ____________________ Signature: ____________________
Date: ____________________
Appendix H: Online Barrister Survey
Preamble and Questions

PARTICIPANT INFORMATION

PROJECT TITLE: Evaluation of Pre-Action Processes in South Australia HUMAN RESEARCH ETHICS COMMITTEE
APPROVAL NUMBER: H-2017-178
CO-INVESTIGATORS: Margaret Castles and Tania Sourdin

Pre-action requirements oblige disputing parties to take or consider undertaking certain actions that can promote the resolution or management of a dispute before court or tribunal proceedings are commenced; they may narrow issues in dispute or enable litigation to progress more smoothly. Pre-action requirements can require parties to disclose certain information, correspond or meet with each other, or undertake some form of alternative dispute resolution.

The University of Newcastle and the University of Adelaide are conducting research into the effectiveness of reforms to the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) which introduced new pre-action processes for construction and medical negligence disputes. The findings of this research will be outlined in a report submitted to the Law Foundation of South Australia and to the Courts Administration Authority.

Your answers to the following survey questions will help us understand whether these processes are effective from cost, time, efficiency and fairness perspectives, and if there are any areas in which improvements can be made. The survey will take approximately 15 minutes to complete. Your participation is voluntary. All responses will be de-identified. However, your completion and submission of the survey indicates your consent to being involved in the research project.

The study has been approved by the Human Research Ethics Committee at the University of Adelaide (approval number H-2017-178). If you have any questions or complaints about the research or survey, please contact the Principle Investigators, Professor Tania Sourdin at Tania.Sourdin@newcastle.edu.au or on (02) 4921 5119, or Ms Margaret Castles at Margaret.castles@adelaide.edu.au or on (08) 8313 5722. If you wish to speak with an independent person regarding a concern or complaint, the University’s policy on research involving human participants, or your rights as a participant, please contact the Human Research Ethics Committee’s Secretariat on:

Phone: +61 8 8313 6028
Email: hrec@adelaide.edu.au
Post: Level 4, Rundle Mall Plaza, 50 Rundle Mall, ADELAIDE SA 5000

Any complaint or concern will be treated in confidence and fully investigated. You will be informed of the outcome.
Please review and indicate your agreement to the following statements:

1. I have read and understood the Participant Information.
2. I am aware that completing this survey is voluntary.
3. I understand that completing and submitting this survey indicates my consent to being involved in the research project.
4. I understand that the answers I give will not be identified or linked back to me in publication.
5. I consent to the use of my de-identified responses to contribute to the research into the pre-action protocols.
   - I agree and wish to complete the survey.
   - I do not agree and wish to exit the survey. [exit]

[Demographics]
Thank you for responding to our survey. Firstly, we want to ask some questions about you and your background.

Q1 What is your gender?:
   - Male
   - Female
   - Other

Q2 What is your age?:
   - 21-30
   - 31-40
   - 41-50
   - 51-65
   - Over 65

Q3 How many years have you worked as a lawyer? [comment box]

Q4 Please specify up to three areas of practice: [comment box]

Q5 Have you been involved in more than 10 pre-action or alternative dispute resolution processes?
   - Yes
   - No

[The Pre-Action Protocols]
In this Survey, the term ‘Pre-Action Protocols’ refers to the new pre-action requirements contained in the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) and which apply to Medical Negligence and Construction disputes.

Q6 Pre-Action Protocols apply to Medical Negligence and Construction matters initiated in the District or Supreme Court of South Australia after 1/1/2015.

Have you worked on any matters where these Pre-Action Protocols have applied?
   - Yes
   - No [skip to Q43]
   - Not Sure [skip to Q43]
Appendix H: Online Barrister Survey Preamble and Questions

Specific questions for practitioners who have worked on matters where the Pre-Action Protocols applied

Questions 7-42 are intended to gather information regarding your views and experiences of the new Pre-Action Protocols contained in the District Court Civil Supplementary Rules 2014 (SA) and the Supreme Court Civil Supplementary Rules 2014 (SA) and which apply to Medical Negligence and Construction disputes.

Q7 Please estimate the number of matters you have worked on where these types of Pre-Action Protocols have applied. [comment box]

Compliance

In relation to the matters you have worked on where these Pre-Action Protocols applied:

Q8 Do you think that the parties you acted for usually complied with the protocols?
   - Yes [Skip to Q11]
   - No

Q9 Do you think that the other parties usually complied with the protocols?
   - Yes [Skip to Q11]
   - No

Q10 If there has been non-compliance at any time, what do you think is the most common reason for non-compliance?
   - Urgency
   - The failure of one party to participate in the pre-action process
   - The parties being unaware of the Pre-Action Protocols
   - Other, please specify: [comment box]
   - I have not experienced non-compliance

Q11 Where there has been compliance, how often did the parties attend a pre-action meeting?
   - Never
   - Rarely
   - Sometimes
   - Very often
   - Always

Q12 How often do Masters or Judges enquire about compliance with the Pre-Action Protocols?
   - Never
   - Rarely
   - Sometimes
   - Very often
   - Always

Q13 Have you worked on any matters where a lack of compliance with the Pre-Action Protocols has been raised by one of the parties?
   - Yes
   - No [skip to Q15]

Q14 What were the consequences of a lack of compliance being raised? [comment box]

Q15 Would you like to make any comments about the Pre-Action protocols and compliance? [comment box]

The following questions are designed to gather information about the effectiveness of these new Pre-Action Protocols. Please indicate how strongly you agree or disagree with the following statements.
**Time**

**Q16** The Pre-Action Protocols assist in resolving disputes.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q17** The Pre-Action Protocols result in the *early* resolution of disputes.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q18** The Pre-Action Protocols help parties to settle disputes.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q19** The Pre-Action Protocols help to define the issues.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q20** The Pre-Action Protocols are not helpful in resolving the issues.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q21** Would you like to make any comments about the Pre-Action Protocols with respect to time efficiency? [comment box]

**Cost**

**Q22** The Pre-Action Protocols have *decreased* the costs of civil litigation.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q23** The Pre-Action Protocols have *increased* the costs of civil litigation.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q24** Would you like to make any comments about the Pre-Action Protocols with respect to cost efficiency? [comment box]

**Fairness**

**Q25** The Pre-Action Protocols result in outcomes which are fair.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q26** The Pre-Action Protocols are procedurally fair.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q27** Disputants tend to perceive the outcomes achieved under the Pre-Action Protocols as fair.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree

**Q28** Disputants tend to perceive the pre-action process as fair.

- Strongly Disagree
- Disagree
- Agree
- Strongly Agree
Q29 Disputants are usually happy to resolve their disputes in the pre-action stage.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q30 Disputants usually prefer to have their day in court.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q31 Mediation and other settlement conference processes are more effective once evidence has been filed.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q32 Would you like to make any comments about the Pre-Action Protocols with respect to fairness? [comment box]

Attitudes and Behaviour

Q33 Legal practitioners usually make a genuine effort to resolve disputes during the pre-action stage.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q34 Disputants usually make a genuine effort to resolve disputes during the pre-action stage.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q35 The Pre-Action Protocols should include good faith requirements.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q36 Would you like to make any comments about the Pre-Action Protocols with respect to the attitudes and/or behaviour of legal practitioners and disputants? [comment box]

Efficiency and improvements

Q37 In my experience, the Pre-Action Protocols have assisted parties to reach lasting outcomes.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q38 The Pre-Action Protocols should be used in other types of disputes.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q39 Greater education for legal practitioners regarding the Pre-Action Protocols would help to support the earlier resolution of disputes.

Strongly Disagree  Disagree  Agree  Strongly Agree

Q40 Mediation could be usefully added as a step in the pre-action process.

Strongly Disagree  Disagree  Agree  Strongly Agree
Appendix H: Online Barrister Survey Preamble and Questions

Q41 The courts should do more to support the Pre-Action Protocols.

Strongly Disagree    Disagree    Agree    Strongly Agree

Q42 Would you like to make any other comments about the Pre-Action Protocols or ways they might be improved? [comment box]

[General questions regarding pre-action requirements for practitioners who have and have not worked on any matters where the Pre-Action Protocols have applied.]

Questions 43-66 are intended to gather information regarding your views and experiences of pre-action requirements, generally.

Here, the term ‘pre-action requirements’ is interpreted to include requirements that oblige a party to take or consider undertaking certain actions that can promote the resolution or management of a dispute before court or tribunal proceedings are commenced.

Pre-action requirements may incorporate requirements to disclose certain information, correspond or meet with the other party other, or undertake some form of alternative dispute resolution.

Your experience may relate to a variety of pre-action protocols, obligations and/or schemes that exist in various forms across Australia. Examples include the “genuine steps” requirement that operates under the Civil Dispute Resolution Act 2011 (Cth); the dispute resolution requirements that operate in relation to Family disputes; and dispute resolution requirements that arise because of contractual agreement between parties.

Q43 Have you worked on any matters where pre-action requirements have applied?

○ Yes. Please specify which pre-action requirements applied: [comment box]

○ No

Please indicate how strongly you agree or disagree with the following statements.

Time

Q44 Pre-action requirements (for example requiring people to take ‘genuine steps’, attend an FDR process in Family disputes or use mediation in farm debt or retail lease disputes) can assist in resolving disputes.

Strongly Disagree    Disagree    Agree    Strongly Agree

Q45 Pre-action requirements can result in the early resolution of disputes.

Strongly Disagree    Disagree    Agree    Strongly Agree

Q46 Pre-action requirements can help parties to settle disputes.

Strongly Disagree    Disagree    Agree    Strongly Agree

Q47 Pre-action requirements can help to define the issues.

Strongly Disagree    Disagree    Agree    Strongly Agree

Q48 Pre-action requirements are not helpful in resolving the issues.

Strongly Disagree    Disagree    Agree    Strongly Agree
Q49 Would you like to make any comments about pre-action requirements with respect to time efficiency? [comment box]

Cost
Q50 Pre-action requirements can result in cost savings for parties.
Strongly Disagree    Disagree    Agree    Strongly Agree

Q51 Would you like to make any comments about pre-action requirements with respect to cost efficiency? [comment box]

Fairness
Q52 Pre-action requirements can assist in achieving fair outcomes.
Strongly Disagree    Disagree    Agree    Strongly Agree

Q53 Pre-action requirements usually create processes which are fair.
Strongly Disagree    Disagree    Agree    Strongly Agree

Q54 Disputants are usually happy to resolve disputes during the pre-action stage.
Strongly Disagree    Disagree    Agree    Strongly Agree

Q55 Disputants usually prefer to have their day in court.
Strongly Disagree    Disagree    Agree    Strongly Agree

Q56 Mediation and other settlement conference processes are more effective once evidence has been filed.
Strongly Disagree    Disagree    Agree    Strongly Agree

Q57 Would you like to make any comments about pre-action requirements with respect to fairness? [comment box]

Attitudes and behaviour
Q58 Pre-action requirements that promote the resolution of disputes before proceedings are commenced are a good idea.
Strongly Disagree    Disagree    Agree    Strongly Agree

Please comment: [comment box]

Q59 Have you experienced any issues with uncooperative or “bad behaviour” of parties or their legal representatives while fulfilling the requirements of any pre-action process?
   o Yes. Please comment: [comment box]
   o No
Q60 Would you like to make any comments about pre-action requirements with respect to legal practitioner and disputant attitudes and behaviours? [comment box]

Please indicate how strongly you agree or disagree with the following statements.

Efficiency

Q61 Pre-action processes can be efficient.
Strongly Disagree Disagree Agree Strongly Agree
Please comment: [comment box]

Q62 Pre-action requirements can result in outcomes which are lasting.
Strongly Disagree Disagree Agree Strongly Agree

Q63 In my experience, pre-action requirements can assist parties to reach outcomes that are effective and acceptable.
Strongly Disagree Disagree Agree Strongly Agree

Q64 Pre-action requirements can divert cases away from the courts that should be there.
Strongly Disagree Disagree Agree Strongly Agree
Please comment: [comment box]

Q65 Pre-action requirements are inappropriate for some types of matters.
Strongly Disagree Disagree Agree Strongly Agree
Please comment: [comment box]

Q66 Would you like to make any other comments about pre-action requirements? [comment box]

Thank you for your time and participation.