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Respondent



Time to complete



This is a public consultation by the Civil Justice Council.

The consultation is open until 24 December 2021 at 10am. **UPDATE - The CJC's consultation on pre-action protocols has been extended for 4 weeks. The consultation will close on Friday 21 January at 12 noon.**

Consultees do not need to answer all questions if only some are of interest or relevance. This form contains branching so you will be able to skip sections that you do not wish to respond to.

Answers should be submitted through the online form. Please note that responses are limited to 4,000 characters per question (around 650 words). Any individual question response longer than 4,000 characters will be cut off at 4,000 characters. If you want to supply any response not in text form please email [cjc.pap@judiciary.uk](mailto:cjc.pap@judiciary.uk) for details on how to do so.

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We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If you is anonymous we will not include your name in the list unless you have given us permission to do so.

More options for Responses

Please let us know if you wish your response to be anonymous or confidential.

1. My response is: \*

- ☒ Public
- ☐ Anonymous
- ☐ Confidential

## About you

2. First Name \*

3. Last Name \*

4. Your location (name of town/city) \*

5. Your role \*

- ☐ Judge
- ☒ Lawyer
- ☐ Insurer
- ☐ Paralegal/Legal Assistant
- ☐ Litigant
- ☐ Policy maker/civil servant
- ☐ Other

6. Your job title

7. If relevant, whose interests do you predominantly represent? \*

- ☐ Claimants
- ☐ Defendants
- ☒ Not applicable

8. Your organisation

9. Are you responding on behalf of your organisation? \*

- ☒ Yes
- ☐ No

10. Your email address \*

## Questions relevant to all protocols

11. Do you agree that the Overriding Objective should be amended to include express reference to the pre-action protocols (PAPs)?

- ☐ Yes
- ☒ No
- ☐ Other

12. Do you agree that compliance with PAPs should be mandatory except in urgent cases? Do you think there should be any other exceptions generally, or in relation to specific PAPs?

Litigation varies greatly and there is a danger to applying a one-size-fits-all approach where a lower value less complex claim in a County Court may require a more prescriptive approach to what is appropriate pre-action compared to a high value complex multi-party case where all parties are represented and a more nuanced approach might be preferable.

We already have PAPs and the PD where there is no area specific PAP. Parties are already expected to comply and there is no reason why this should change. It is difficult to tell what the difference would be between an expectation to comply and mandatory compliance but with various exceptions such as in cases of urgency whether because of a limitation deadline or the need for urgent relief such as an injunction, freezing injunction, search order or interim payment.

There should be the ability to explain why steps were taken without compliance and for there to be no penalties in those circumstances. Further, legally represented or sophisticated parties should be allowed to dis-apply a PAP by consent.

However, the principle of the PAP is to encourage the parties to exchange positions and key documents prior to launching Court proceedings therefore avoiding the additional expense of litigation this is to be encouraged. Adding more rules and procedures to a PAP would defeat the latter purpose by adding additional front-loaded costs.

13. Do you agree there should be online pre-action portals for all cases where there is an online court process and that the systems be linked so that information exchanged through the PAP portal will be automatically accessible to the court (except for those designated as without prejudice)?

- ☐ Yes
- ☒ No
- ☐ Other

14. Do you support the creation of a new summary costs procedure to resolve costs disputes about liability and quantum in cases that settle at the PAP stage? In giving your answer, please give any suggestions you might have for how such a costs procedure should operate.

If there is no automatic entitlement to pre-action costs, it is not clear what jurisdiction the Court would have for this. Is there to be a change to the recoverability of pre-action costs?

That said, there are cases where significant work is done at an early stage to settle pre-action. In high value, complex clinical negligence matters for example, generally a great deal of work is carried out at an early stage, obtaining expert evidence and undertaking disclosure.

Any pre-action costs assessment could be based on the current provisional assessment procedure or where costs are (say) £25,000.00 or less, a simple application could be made accompanied by written submissions limited to two sides of A4.

15. Do you agree that PAPs should include mandatory good faith obligation to try to resolve or narrow the dispute? In answering this question, please include any views you have about the proper scope of any such obligation and whether there are any cases and protocols in which it should not apply.

There is no settled concept of good faith in English law so it would be contrary to English law to extend a duty of good faith to all parties by quasi-statutory procedural means, especially where such parties are by definition potential litigants in an adversarial system of justice.

Furthermore, while the term "good faith" has a superficially attractive ring to it, what it requires of a party is unclear and ultimately wholly subjective. It would be impossible for parties and their legal advisors to assess, when considering what good faith steps they need to take, what could later be held to have been required of them. That uncertainty would be amplified by the proposals to make compliance with the PAPs mandatory and to introduce very broad discretion over sanctions for failure to act sufficiently in "good faith", including striking out of claims/defences. This is a recipe for satellite litigation over the meaning of good faith and whether someone's actions were good enough.

In the event that without prejudice privilege cloaks everything after the initiation step that would render the requirement of "good faith" almost useless.

In the context of commercial litigation of any complexity, an assumption that a General PAP would increase pre-action settlement rates would be misplaced. The reason that complex commercial cases often cannot be settled pre-action is not a lack of negotiation, but rather because the factual and legal issues and the relative strength of the parties' respective positions do not become crystallised sufficiently to allow meaningful informed negotiation until various steps have been taken.

We agree that the benefits of consensual dispute resolution are beyond doubt. However, those are available under the current rules and can be engaged in at whatever stage they are more appropriate and most likely to be successful. These appear sufficient as they stand. They provide the Court with the flexibility to ensure that the parties engage at the appropriate time in complex commercial matters.

16. Do you agree that, unless the parties clearly state otherwise, all communications between the parties as part of their good faith efforts to try to resolve or narrow the dispute would be without prejudice? Invitations to engage in good faith steps could still be disclosed to the court demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36.

☐ Yes

☐ No

☒ Any discussions aimed at compromising a party's

17. Do you agree that there should be a requirement to complete a joint stocktake report in which the parties set out the issues on which they agree, the issues on which they are still in dispute and the parties' respective positions on them? Do you agree that this stocktake report should also list the documents disclosed by the parties and the documents they are still seeking disclosure of? Are there any cases and protocols where you believe the stocktake requirement should not apply? In giving your answer please also include any comments you have on the Template Joint Stocktake Report in Appendix 4.

Absolutely not. This would be a complete waste of time and add additional expense for no purpose.

Listing issues is helpful to the parties and the Court but not at the pre-action stage prior to the development of the issues through the pleading process, at least in cases of any complexity. The process of pleading a case is an essential discipline which forms and shapes the issues, so as to enable them to be identified and summarised in both the List of [Common Ground and] Issues (required by the Commercial and Chancery Court guides) and the List of Issues for Disclosure under the Disclosure Pilot. There is no sensible way of cutting the pleading process out from the identification of the agreed and disputed issues in cases which involve complex wide-ranging fact patterns, large volumes of documents, multi-faceted disagreements, and complex legal issues. In such cases, a list of issues prepared prior to pleading would either lack utility or be counterproductive.

Introducing a further pre-action list of issues and the substantial costs and satellite disputes that will arise from it is impractical and highly undesirable.

For similar reasons, the suggestion that the stocktake report should list documents which have been disclosed and (particularly) those which the parties wish to be disclosed is completely unrealistic in complex commercial litigation. The scope of disclosure cannot be determined prior to the pleading process. Pinning the need for disclosure (and its scope) to the particular pleaded issues at the outset is the whole point which the elaborate Court-controlled mechanism under the Disclosure Pilot is intended to address. It is not realistic to propose to cut multiple procedural steps out of the equation with an expectation that would enable a party to jump ahead at the pre-action stage to a list of documents to be disclosed by the opponent(s).

The suggestion seems more suited to some types of dispute involving a very limited set of documentation (a consumer contract or a simple debt dispute, perhaps), but an attempt to extend it to complex commercial litigation would be impractical and counterproductive.

18. Do you agree with the suggested approach to sanctions for non-compliance set out in paragraphs 3.26-3.29? In particular please comment on:

- a) Whether courts should have the power to strike out a claim or defence to deal with grave cases of non-compliance?
- b) Whether the issue of PAP compliance should be expressly dealt with in all Directions Questionnaires, or whether parties should be required to apply to the court should they want the court to impose a sanction on an opposing party for non-compliance with a PAP?
- c) Whether the PAPs should contain a clear steer that the court should deal with PAP compliance disputes at the earliest practical opportunity, subject to the court's discretion to defer the issue?
- d) Whether there are other changes that should be introduced to clarify the court's powers to impose sanctions for non-compliance at an early stage of the proceeding, including costs sanctions?
- e) Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why?

(a) A power to strike out claims/defences is not proportionate even in cases of grave non-compliance. Costs sanctions are a sufficient deterrent, and there is no evidence presented in the Interim Report to show that this is not the case. In any case, access to justice should not be removed for pre-procedural reasons. The Court has sufficient powers and sanctions available to it without introducing such draconian measures. That is particularly so when the proposed sanctions would be coupled with compliance with at-best woolly concepts such as good faith. Litigants and their representatives would face a high degree of uncertainty, and the introduction of a potential 'knock-out blow' would incentivise satellite disputes around compliance.

(b) If there is to be a mechanism for reporting on (non)compliance, the Directions Questionnaire is the obvious place to include a question about PAP compliance. However, a party who wishes to advance a complaint and seek sanction should be required to lodge an application and bear the costs risks. To do otherwise would be an open invitation to vexatious counterparties. Parties should be made to think carefully about applications made to the Court, rather than reducing an application to a box ticking exercise.

(c) If this proposal of additional court intervention would require an additional hearing it would be undesirable. The suggestion itself demonstrates the potential for satellite litigation which the proposals would introduce. However, this could either be dealt with at a CMC or at Trial so that the trial judge could determine whether a failure of compliance actually had any bearing on the outcome.

(d) Any changes should be made through amendments to the CPR, as expanded upon as required in Practice Directions. There is no realistic way of resolving uncertainties in any such amendments that are introduced to the procedural rules other than through litigating them in the usual way through interlocutory applications and thereby forming precedent through decisions of the Court.

If there are to be costs sanctions they could be incorporated into the costs budgeting process (where costs budgeting applies) with some of the incurred costs of a non-compliant party being disallowed or recording that some of the incurred costs should be reduced on detailed assessment. Likewise costs orders could be made, to be paid at the end of the claim, regardless of the outcome.

(e) No – they should all involved a degree of discretion

19. Do you agree that PAPs should contain the guidance and warnings about pre-action conduct set out in paragraphs 3.8-3.13?

- ☐ Yes
- ☐ No
- ☒ If there are going to be changes, it would be sent:

20. Do you think there are ways the structure, language and/or obligations in PAPs could be improved so that vulnerable parties can effectively engage with PAPs? If so, please provide details.

Plain English should be used throughout. Even things like 'letter of claim' can be confusing, so there should be bullet points explaining that a letter should be sent setting out what the claim is, background information, a chronological account of what went wrong, how the loss was suffered etc.

21. Do you believe pre-action letters of claim and replies should be supported by statements of truth?

- ☐ Yes
- ☒ No
- ☐ Other

22. Do you believe that the rule in the Professional Negligence Protocol giving the court the discretion to impose sanctions on defendants who take a materially different position in their defence to that which they took in their pre-action letter of reply should be adopted in other protocols and, if so, which ones?

Again, there will be different answers depending on the type of litigation involved. In a simple matter that might be appropriate, however, in complex, high value commercial litigation, the parties may not know enough about the full landscape of documents and factual and legal issues in the case at the pre-action stage. It would be inappropriate to penalise a defendant for being inconsistent with its pre-action position, when the prospective claimant will not yet have fully developed its own position through the pleading process.

This proposal does not take account the characteristics of complex commercial litigation involving wide-scale complex fact patterns, large to vast amounts of documents, and a wide array of legal issues. In those circumstances, it is inevitable that the parties' positions take some time to bed down, and the existing steps in the litigation procedure are the means by which that is achieved.

Such a rule could also encourage additional satellite disputes about the meaning of materiality.

In any event, CPR Part 14 allows for admissions to be made at a pre action stage and to be withdrawn. There is therefore, existing scope for significant changes to be flagged and challenged.

23. Do you think any of the PAP steps can be used to replace or truncate the procedural steps parties must follow should litigation be necessary, for example, pleadings or disclosure? Are there any other ways that the benefits of PAP compliance can be transferred into the litigation process?

No. The aim of the PAP is to avoid the need for litigation not to replace litigation. This is particularly the case in matters involving complex high value disputes.

If these proposals are intended to replace the existing steps set out in litigation, then the parties will either have to try to conduct pleadings and disclosure properly at the pre-action stage of their own volition (to the extent is possible to do so) and to ensure the other side does so, with no assistance and supervision from the Court. The result would be a significant front-loading and potential duplication of costs.

It is our view it would be a serious mistake to try to truncate proper court procedure by relying on what would inevitably be somewhat make-shift and inevitably much less rigorous pre-action steps in place of the well-established and carefully designed existing procedures. If the pre-action steps were not less rigorous, then they would of course simply be an exercise of shifting what is really the litigation procedure proper to a time before the claim form is issued, which would be a somewhat circular form of reform.

We prefer to maintain the current status, which is that pre-action conduct is suitably defined in the pre-action protocols, however, this remains a matter of best practice and can be applied where it is appropriate.

## Practice Direction - Pre-Action Conduct

24. Do you wish to answer questions about Practice Direction - Pre-Action Conduct? \*

☒ Yes

☐ No

25. Do you support the introduction of a General Pre-action Protocol (Practice Direction)? In giving your answer please do provide any comments on the draft text for the revised general pre-action protocol set out in Appendix 4.

There is already a general PAP PD and it serves its purposes well. Complex high value claims typically involve wide-scale complex fact patterns, large to vast amounts of documents, and a wide array of legal issues that need to be developed and worked through during the litigation proceedings (and in some cases, resolved by the Court).

At the pre-action stage, the parties will have visibility of the headline differences between them, but overall there is limited clarity as to what the facts and legal issues are and therefore the strength of the parties' positions. The steps within English litigation procedure provide the means for forensically establishing and testing the respective strengths of those positions, which then enables the informed assessment of risk and therefore the basis for a settlement of often high value claims and counterclaims. It would be wrong to approach reforms with an assumption that the factual and legal issues (and evidence to support them) are known quantities from the outset.

The more common situation in commercial litigation is that the factual and legal issues (and evidence to support them) need to be established through the rigorous procedures for which the English legal system is rightly renowned. The initial process of process of pleading back, replying, and asking and answering requests for further information identifies the agreed and disputed issues for the List of Issues and the List of Issues for Disclosure. Those lists of issues are themselves substantial documents, commonly many pages long. The parties then establish the factual documentary position by reference to those pleaded issues by conducting disclosure against them (now under the Disclosure Pilot). Disclosure in this type of complex commercial dispute usually involves the collection and searching of large populations of documents (not infrequently in the millions) to identify the required disclosure, commonly of tens of thousands of documents, often more. The review of disclosure very often leads to amendments to pleadings (and therefore to the agreed and disputed issues, and further specific disclosure on those).

These are steps in a sophisticated incremental process that far more often than not leads (at some point during it) to the parties reaching a sufficient understanding of the strength of their respective positions in complex multi-faceted disputes so to be able to reach an agreed settlement. It is telling that whilst the issue of a claim is common, it is decidedly uncommon for a claim to run to a full trial.

As theoretically desirable as it might seem to avoid litigation by making prospective parties agree pre-action to agree a list of agreed and disputed issues between them, provide disclosure to each other, and then enter into good faith discussions, this would be to ignore reality in all but the simplest of commercial cases.

26. Do you agree parties should have 14 days to respond to a pre-action letter of claim under the general PAP, with the possibility of a further extension of 28 days where expert evidence is required? In cases of extension, the defendant would still be required to provide a reply within 14 days disclosing relevant information they had in their possession and confirming that a full reply would be provided within a further 28 days. Claimants would have 14 days to respond to any counterclaim. If you do not agree with these timeframes, what timeframes would you propose?

No. In circumstances in which a pre-action letter of claim might be the first time a defendant is aware of the claim against it, and where the events in dispute might have occurred almost six years ago, this truncated timetable is unrealistic and unwieldy. The existing time frames set out in the PAP and PD are already often extended by consent, shortening the time period will only result in more requests for extensions.

In our view, the introduction of a quasi-pleading process is undesirable, duplicative of costs, and will lead to satellite disputes.

27. Do you think that the general PAP should incorporate a standard for disclosure, and if so, what standard? For example, documents that would meet the test for standard disclosure under CPR 31, or meet the test for "Initial disclosure" and/or "Limited Disclosure" under Practice Direction 51U for the Disclosure Pilot. In giving your answer we are particularly interested in respondents' views about whether the standard should include disclosure of 'known adverse documents'.

We consider it would be actively unhelpful to incorporate any standard for disclosure or any additional provisions on disclosure at the pre-action phase in anything but the simplest of cases (perhaps in the County Courts). The general points which are already applicable to letters before action and responses to them under the current rules are satisfactory. The reference to standard disclosure under CPR 31 is unhelpful in light of the disapplication of CPR 31 in favour of the Disclosure Pilot under PD51U.

The Interim Report suggests that PAP disclosure might stand as the parties' disclosure in the proceedings, subject to a power of the Court to order further disclosure.

It is simply unreal to suggest that the scope of disclosure in a commercial case of any complexity could be listed out in a stocktake form prior to commencement of proceedings and such a proposal is in direct contradiction to the disclosure process recently introduced in the Disclosure Pilot, which for good reason proceeds by reference to the pleaded issues. Attempting to bring forward disclosure to a point in advance of pleadings is impractical in substantial cases. If it was achieved, it would simply front-load costs by creating an interim disclosure exercise, conducted without Court supervision and in advance of the definition of agreed and disputed issues on the pleadings. There was a very good reason in the Disclosure Pilot for allowing a party to unilaterally dispense with the requirement for Initial Disclosure under PD51U para 5.1(3) in cases involving Initial Disclosure of even small volumes of documents (200 documents or 1000 pages) and for allowing the parties to agree by consent to dispense with Initial Disclosure under PD51U para 5.1(8).

In anything but the simplest cases it is unclear how much if any benefit would be obtained by trying to impose an obligation to disclose known adverse documents before the issues in respect of which a document can be adverse have even been set out.

## Personal Injury Protocols

The sub-committee were very conscious, as a final point worth stressing, that there is a need for evidence to underpin any changes that might be suggested in response to the questions below.

28. Do you wish to answer questions about the personal injury (PI) protocols? \*

☐ Yes

☒ No

## Housing Protocols

29. Do you wish to answer questions about housing protocols? \*

☐ Yes

☒ No

## Judicial Review Protocol

30. Do you wish to answer questions about the judicial review (JR) protocol? \*

☐ Yes

☒ No

## Debt Protocol

31. Do you wish to answer questions about the debt protocol? \*

☐ Yes

☒ No

## Construction and Engineering Protocol

32. Do you wish to answer questions about the construction and engineering protocol? \*

☒ Yes

☐ No



33. Would you support aligning the time limits for responding to the pre-action letter of demand to those suggested for the revised general PAP (14 days with a right to extend for a further 28 days to obtain further information?)

☐ Yes

☐ No

☒ - The protocol has been prepared by constructic

34. Do you support the retention of the referee procedure?

☐ Yes

☐ No

☒ - Again, industry specialists wrote and agreed th

35. Would you support the formal incorporation of a standard of disclosure and, if so, which standard?

No as this means we are just front loading the litigation process. Construction claims are notoriously document heavy and disclosure is invariably an expensive element of litigation. If a claim can be disposed of pre-action, one of the attractions is to avoid the very costly disclosure process.

## Professional Negligence Protocol

36. Do you wish to answer a question about the professional negligence protocol? \*

☒ Yes

☐ No

37. Would you support aligning the time limits for responding to the pre-action letter of claim to those suggested for the revised general PAP (14 days with a right to extend for a further 28 days to obtain further information)?

☐ Yes

☐ No

☒ No – there is no one size fits all for litigation. The

## Proposed low value small claims track

38. Do you wish to answer a question about the proposed low value small claims track protocol? \*

☐ Yes

☒ No

Any other comments

39. Please include here any other comments you wish to make not covered by the questions already posed.

The danger in imposing a revised general PAP with prescriptive steps to be taken is that whilst it might assist cases with simple facts and lower values, it will not assist with more complex cases involving multiple parties, in multiple jurisdictions with complex facts, concealment of issues and high values. Litigation is wide ranging and one size will not fit all. If there is a concern that, for example, County Court claims would benefit from a more robust pre action stage, then consider applying new measures in the County Courts alone, rather than trying to fix one area of the system with rules applying across the board.

