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Respondent



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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 for details on how to do so.

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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?

In the context of substantial commercial disputes (whether in the Commercial Court or otherwise), we do not support any proposal to increase the degree to which the applicable PAPs are treated as 'mandatory', beyond the current position.

As an overarching comment, our impression is that the proposals canvassed in the Interim Report have been prepared without specific consideration of their appropriateness in substantial commercial disputes. The Report rightly recognises that civil litigation covers an extremely broad range of disputes, and that some of the proposals suggested may not be practical in some types of disputes. However, surprisingly, it does not go on to recognise commercial disputes as potentially falling within this category and appears to contemplate the reforms applying to all commercial claims.

It is our strong view that, for commercial disputes generally, the substantive proposals canvassed are unnecessary and would be unworkable. We do not support any changes to the current PAP regime that would make the processes more prescriptive and less flexible, or would extend the potential consequences of alleged non-compliance (including the suggestion that, when deciding whether to impose any costs sanctions for non-compliance with a PAP, the court should apply the Denton criteria).

In the majority of commercial cases (excluding those where prior notice could prejudice the claimant's rights), it is clearly sensible that there be some exchange of information and documents before commencement, in an attempt to clarify the scope of the disputed issues and explore any potential for the matter to be resolved without litigation. In our experience, that is well recognised by the majority of clients and their representatives in such disputes, and was the general practice even before PAPs were introduced.

However, commercial cases generally involve complex issues that require a party to undertake substantial factual investigation and document review in order to assess its position. As noted below, with significant sums and other interests at stake it is rare that the issues can be clarified in the pre-action stage to a sufficient degree to enable settlement to occur.

We note that it was for this reason the Commercial Court Long Trials Working Party decided not to introduce a specific pre-action protocol for Commercial Court cases, and instead recommended that it should be sufficient for commercial parties to comply with the minimum expectations of the pre-action protocol regime - with only key documents exchanged, no expectation of lay or expert evidence being assembled by that stage, and recognising the possibility of commencing proceedings without following pre-action procedures in appropriate cases. Those recommendations have since been reflected in the Commercial Court Guide, which emphasises that the parties "are not required, or generally expected, to engage in elaborate or expensive pre-action procedures, and restraint is encouraged." We note that the Long Trials Working Party found that many of its recommendations could also be applicable to shorter and less complex commercial cases, and we agree with that conclusion.

The current pre-action regime applicable to general commercial claims under the general pre-action protocol already requires action that can in some cases merely delay the progress of the matter and lead to duplication of costs. In any event, it certainly results in a significant front-loading of costs. (We note the Interim Report's argument that increasing pre-action costs does not inevitably involve front-loading, because it can potentially result in the avoidance of later costs if the matter settles. However, settlement at this stage is very unlikely in commercial litigation and any increase in the work required at pre-action stage will therefore almost invariably have the effect of front-loading 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.

This is unlikely to be relevant in most commercial claims. In any case where a substantial dispute was able to be resolved at the pre-action stage, the settlement agreement would almost invariably include a resolution of the costs position.

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.

We would oppose the introduction of a new 'mandatory good faith obligation' of the type proposed in the interim report. Although this is described as 'non-prescriptive', it seems clear that it envisages as a minimum a pre-action meeting between party representatives as a pre-condition to the commencement of proceedings.

This firm has long been a leading industry voice promoting 'alternative' (ie. out-of-court) resolution in commercial litigation. However, we consider that the above proposal is not only unwarranted in commercial litigation but would have detrimental effect on attitudes to ADR, seriously undermining the efforts currently being made by the judiciary and the government to embed such processes fully within the civil justice system.

Our experience in commercial cases, both in the Commercial Court and elsewhere, is that parties broadly tend to be knowledgeable about ADR (primarily mediation) and its role in the court system, and generally motivated to engage in it where appropriate. That view has been reinforced by several reviews conducted in recent years (including Lord Justice Briggs' 2016 Civil Court Structure Review) which have found that party understanding and uptake of mediation at the higher value end of the commercial dispute spectrum is generally satisfactory, and that the focus of reforms should be on claims of more modest value.

In most substantial commercial disputes in the English courts, the issue around mediation is not whether to mediate but when. Identifying an appropriate stage at which to mediate commercial claims involves balancing (i) the obvious benefits of early mediation in terms of costs savings, against (ii) the need for the parties to have sufficient information to feel comfortable in making settlement decisions (even if not fully informed decisions).

In general the parties and their lawyers will be best placed to assess this. We do consider that that assessment should be actively prompted, challenged and revisited by enquiries from the judge managing the case, with a view to identifying the earliest possible stage at which the proceedings could reasonably be mediated. We believe that there is scope for increased judicial intervention in this regard. However, we would strongly discourage any attempt to be too prescriptive in specifying at what stage mediation should take place. Particularly in complex cases, there will be numerous factors and contingencies that will inform this decision.

In by far the majority of large commercial disputes, the parties and their legal representatives will have carefully considered the potential for an out of court resolution (via a formal ADR process or otherwise) before proceedings are commenced – not only in order to comply with pre-action protocols but because it is in their interests to do so given the costs involved in commercial litigation and other factors. However, given the complexity of the factual and legal issues typical of such cases, and the interests at stake, it is rare that both parties will have sufficient information to feel comfortable in settling at that stage.

An approach that forces commercial parties into mediation prematurely risks not only wasting time and costs (which are not trivial in substantial commercial claims), but jeopardising the overall prospects of settlement if it entrenches the parties in their positions and discourages further discussions at what would have been a more opportune time.

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

☒ As noted above, we would oppose the introducti

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.

No. In commercial claims of even a moderate size and value, the identification of the factual and legal issues, and the parties' respective positions on those issues, continues to be refined and evolve substantially over the course of the proceedings though the case management of pleadings, disclosure and witness statements. Requiring commercial parties to prepare such a document at the pre-action stage would be premature and add substantially to the time and costs that would need to be invested at that stage. It would be inconsistent with the established approach in commercial claims (as reflected in the Commercial Court Guide) that pre-action steps should not involve elaborate or expensive pre-action procedures, and would also cut across the established disclosure regime.

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) No. At least in substantial commercial disputes, we believe that the existing case management system includes the necessary mechanisms by which the court can deal with failure to provide adequate particulars, information or documents – including strikeout of claims or defences for extreme cases. A separate standalone strikeout power specific to pre-action information would cut across the finely tuned approach to such issues that has been developed in the context of unless orders and relief from sanctions applications.

(b) Non-compliance by a party should be raised in an application to court. As noted below, however, in commercial cases it will very rarely be appropriate for alleged non compliance to be determined at an early stage in the proceedings.

(c) No. In commercial disputes, it will frequently not be appropriate for the court to deal with any alleged PAP non-compliance 'at the earliest practical opportunity' – if that is intended to mean as soon as a complaint is raised by the opposing party. Given the complexity of the factual and legal issues in most commercial cases, the court will usually be very limited in its ability at an early stage to make a considered assessment of the parties' competing arguments as to why any particular pre-action stance was or was not justified. The detailed commercial case management procedures for pleadings, disclosure and evidence are the more appropriate context for the court to consider any alleged lack of cooperation by a party.

In addition, we would have particular concerns about the court making any early determination regarding compliance with PAP requirements in respect of ADR (either existing or amended). Specifically, we would oppose any change that would encourage a conclusive determination of whether a party has unreasonably refused to engage in ADR to be made by the court 'midstream' - during the course of the proceedings - rather than at their conclusion as is currently the position. While we appreciate that there may be arguments in favour of such contemporaneous assessments in some categories of civil disputes, they would not be appropriate in most commercial proceedings.

As outlined in question 6, the question of when it will be appropriate to mediate a commercial dispute depends on multiple factors, which will differ in each case. It would be very difficult or impossible for the court to examine properly all the factors that bear on the timing of a mediation, in order to judge a party's stance on that issue (i) at a stage when the issues are still being refined and, most importantly (ii) without lifting the cloak of confidentiality and without prejudice protection that is so critical to the success of the mediation process.

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
- ☐ Other

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.

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

- ☐ Yes
- ☐ No
- ☒ In substantial commercial disputes – no. Given th

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?

In substantial commercial disputes – no (for the same reasons as why statements of truth and formal 'stocktake' statements of positions would be unduly burdensome and not workable in these types of disputes).

As noted elsewhere, inappropriately extending the more prescriptive elements of some of the protocols into a general protocol would lead to parties having to carry out steps that are of no particular benefit to their case and hence add to the expense of litigation.

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?

In substantial commercial disputes - no.

The pre-action exchanges of information and documents that already occur in most such matters do inform the drafting of the statements of case. That work is not 'lost' in the way the Interim Report suggests. However, given the substantial and detailed nature of the pleadings and disclosure process required in commercial cases, it is not feasible that they could be replaced by the pre-action documents.

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.

We do not see the need for the wholesale replacement of the existing general/default protocol (ie the PD-PAC) by a new version of that document.

In any event, for the reasons outlined in response to other questions, we do not support the substantive changes proposed in the draft document to the extent that they are intended to apply in substantive commercial claims (whether in the Commercial Court or otherwise).

As the CJC has previously recognised when considering the amalgamation of the pre-action protocols, the ultimate objectives of a general/default pre-action protocol can only be fulfilled if the common denominator of core elements are relevant to all of the types of claim to which it would apply, and not outweighed by the specific requirements of any particular type of dispute. Inappropriately extending the more prescriptive elements of some of the protocols into a general protocol would lead to parties having to carry out steps that are of no particular benefit to their case and hence add the expense of litigation.

In our view, creating a "one-size fits most" regime which does not in fact fit a major category of disputes (commercial claims) would seriously undermine the support for pre-action protocols generally.

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?

In substantial commercial disputes - no. Given the extensive work required to investigate and consider a letter of claim in most commercial disputes (involving historical factual enquiries and document recovery within sometimes very large organisations, and the need to instruct and take advice from legal advisers), we would not support any contraction of the current time periods. A claimant will in most cases have had a substantial period of time to prepare its case and it is unfair to a defendant to impose very tight response times on them.

We note in this regard that the Commercial Court Guide provides that "It should often be possible to respond [to a letter of claim] sufficiently within 21 days. A potential defendant who needs longer should explain the reasons when acknowledging the letter of claim."

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’.

No. To the extent that the general protocol would apply to commercial disputes, this would:

- (i) be inconsistent with the principles expressed in the Commercial Court Guide (and generally adopted in commercial cases outside that court) that ‘only essential documents’ should be exchanged at pre-action stage; and
- (ii) completely cut across the detailed regimes for disclosure in place under Part 31 and the Disclosure Pilot in PD 51U.

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

31. Do you agree or disagree with the approach set out by the subcommittee in chapter 4?

We broadly agree with the approach set out by the sub-committee at 4.52-4.60. We agree that there should be a bespoke Pre-Action Protocol for judicial review that is more flexible than the General Pre-Action Protocol. We endorse the sub-committee's analysis at 4.52 of the unique characteristics of judicial review that lead to this conclusion.

We see that the sub-committee will not take an overly ambitious approach to reform, but instead keep an open mind and implement changes as issues arise. We agree with this approach. We consider that the current Pre-Action Protocol for judicial review is working well and a complete overhaul is unnecessary at this stage.

32. Are there any factors specific to JR that should be considered?

We would add two things to the list of characteristics at 4.52:

First, the position in relation to disclosure in judicial review is different from other types of proceedings in that disclosure is not automatic – rather, judicial review relies primarily on the duty of candour.

Secondly, judicial review uniquely has a permission stage designed to sift out unmeritorious claims. In our view, these are additional reasons why an overly prescriptive approach, which may be necessary in other Pre-Action Protocols, is not appropriate in the context of judicial review.

33. Do you agree or disagree that there should continue to be a separate and bespoke PAP for judicial review?

- ☒ Agree
- ☐ Disagree
- ☐ Other

34. What elements of the proposed General Principles in Chapter 3 do you consider it is possible and/or desirable to include in the JR PAP?

In the event that any of the proposed general principles in Chapter 3 were incorporated into the PAPs (we are opposed to their adoption in commercial cases - see our response to question 1), it may be appropriate to include some of them in the Pre-Action Protocol for Judicial Review (for example, reference to the Protocol in the Overriding Objective and the need for accessible non-technical language). However there are certain elements described in Chapter 3 which may not be appropriate in judicial review. For example, there are a high proportion of litigants in person in judicial review which may require caution in mandating the use of an online portal. Further the costs position in judicial review is often different to other litigation and therefore the same costs rules should not be automatically applied in judicial review.

We note that there is already an acknowledgement at 4.56 that the prescriptive proposals in relation to the good faith duty and stocktake duty would be impractical and serve little purpose in judicial review and we agree with that important recognition.

Debt Protocol

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

- ☐ Yes
- ☒ No

Construction and Engineering Protocol

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

- ☐ Yes
- ☒ No

Professional Negligence Protocol

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

☐ Yes

☒ No

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.

We note that a very large proportion of the civil disputes in which Herbert Smith Freehills LLP acts are high value commercial disputes at the larger and more complex end of the civil justice spectrum. Except where otherwise indicated, our responses to the consultation questions are informed by that experience and intended to be confined to such claims.

In the context of general commercial litigation, for the reasons outlined in response to specific questions, we believe that it is neither necessary nor appropriate to make any changes to the applicable PAP processes that would have the effect of making the processes more prescriptive and less flexible, or extending the potential consequences of alleged non-compliance. As noted below, we do not support any changes that would elevate the status of the PAPs applicable to general commercial disputes, or increase the degree to which they are considered 'mandatory'.

In particular, we consider that the substantive new obligations proposed to be included in the general/default protocol (including a 'good faith step', a formal 'stocktake' report, contracted response times, and statements of truth) are unnecessary and would be unworkable in substantial claims. They would be counter to the Commercial Court Guide clear instruction that pre-action exchanges should be minimal.

