

View results

Respondent

[REDACTED]

[REDACTED]

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 for details on how to do so.

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Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

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
- ☒ Consultations Chair COMBAR

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?

- No - recognising that this response is focused on claims in the Commercial Court and not specific PAPs.

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
- ☒ - No. COMBAR does not see the need for the

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.

No. The addition of a stand-alone procedure which enables parties to litigate costs issues in the event that claims settle at the pre-action stage is likely, in COMBAR's view (and expressly with regard to commercial disputes), to create satellite costs litigation meaning that parties who might otherwise have settled the entirety of a dispute at the pre-action stage end up issuing and fighting costs-only claims. Accordingly, creating the option of a summary costs procedure is likely to undermine the early settlement of disputes in circumstances where the question of costs at the pre-action stage is rarely a barrier to settlement in the Commercial Court (given that many of the claims are high-value disputes where costs are relatively low at the pre-action stage by comparison with the value of the claims).

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.

- No.

- The addition of such an obligation is likely to create litigation about pre-action conduct. It would be difficult to police and there are a range of measures already in place which encourage parties to engage in ADR (whether pre-action or otherwise).

- It is recognised that PAPs for specific courts (TCC) and specific categories of claims (professional negligence) are very helpful. However, imposing further obligations on the parties in respect of PAPs is unnecessary in the context of commercial disputes more generally.

- In that regard, the Commercial Court Guide encourages the parties to avoid "elaborate or expensive pre-action procedures" and exercise "restraint" and the imposition of additional obligations is likely to undermine that approach to PAP correspondence for claims issued in the Commercial Court – adding to costs, creating delay and further areas for disputes at the first CMC (a stage which already imposes significant procedural burdens on litigants in the Commercial Court).

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

☒ - COMBAR understands this question to prop

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. The Commercial Court Guide already contains a detailed framework for pleadings, lists of issues and disclosure early in the life of the claim, once claims are issued. In particular, the Disclosure Pilot now means that both a list of substantive issues and list of issues for disclosure are required early on in litigation. Imposing further work on the parties at the pre-action stage is unlikely to assist the parties and would be disproportionate. It would also be difficult to effect given that the parties would not have the benefit of formal pleadings.

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?

- No. The current PAP provides a framework for pre-action communications which is suitable for claims issued in the Commercial Court. See earlier answers.

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.

- No. Those warnings are unnecessary in the context of commercial litigation. Again, the position may be different in other divisions and in different types of claims (especially those which more frequently involve litigants-in-person).

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?

No. The PAP framework for professional negligence claims sets out specific steps with which parties are required to comply. As a result, under the Professional Negligence PAP there is a rationale for and solid basis on which to impose sanctions on defendants who change their case. The position may well be different in other categories of commercial claims meaning a general rule is not appropriate. In addition and in any event, parties can raise issues of this nature on the question of costs without a general rule.

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. Further emphasis on the pre-action stage is likely to result in additional front-end costs and it is difficult to see how pre-action communications or exchanges would save the need to serve pleadings or provide full disclosure in the context of commercial litigation (which almost always requires full pleadings and extensive disclosure).

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.

- COMBAR does not object in principle to the introduction of a Practice Direction ("PD") concerning PAPs. However:

o COMBAR considers that any PD should not impose an obligation to negotiate in good faith before commencing proceedings. See answers above.

o COMBAR considers that the paragraphs concerning false statements and contempt of court are unnecessary – there are adequate measures in place (including the risk of cost sanctions) for parties that fail to conduct correspondence (at any stage in the life of a claim) on a proper or honest basis.

o The steps set out in paragraph 19 should only apply in the bespoke PAPs and should not apply to all claims. See answers above and the current approach in the Commercial Court Guide.

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. The current approach in the Commercial Court Guide is the best approach for claims in the Commercial Court.

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. Disclosure should be carried out after pleadings per the current framework. Additional pre-action obligations will serve only to add costs and result in delay to the efficient management and resolution of claims; and is likely to undermine early settlement of claims.

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

Professional Negligence Protocol

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

☐ Yes

☒ No

Proposed low value small claims track

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

☐ Yes

☒ No

Any other comments

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

