Bar Council response to the Civil Justice Council Pre-Action Protocol Consultation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Civil Justice Council (CJC) Pre-Action Protocol Consultation.[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Introduction

4. This response is necessarily preliminary because:

   1) The Consultation itself is far-ranging and, in some respects, at a high level. It is understood that the Report from which the Consultation arises is an interim one and the Working Group is not making any recommendations at this stage. There will, necessarily, be specific proposed Rule changes that will be consulted upon by the CJC, it is assumed, and then by the Civil Procedure Rules Committee that will allow for detailed and concluded responses.

[1] https://www.judiciary.uk/wp-content/uploads/2021/11/CJC-PAP-QUESTIONS-FOR-CONSULTATION.pdf

2) Notwithstanding the extension of time provided, for which the Bar Council is grateful, the time allowed for consultation has been insufficient given the nature and scope of the Consultation.

3) On the whole questions posed by the CJC are heavily practice focussed with many concerning specialist areas of practice that are best answered by the various Specialist Bar Associations (SBAs). It is of concern to the Bar Council that a number of SBAs have been unable in the time available to consult upon, prepare and submit responses.[2]

5. In relation to the questions concerning specific areas of practice (Requests 28 to 75) it is generally not appropriate for the Bar Council to purport to have a Bar-wide response and it is appropriate, therefore, for the Bar Council to defer to the knowledge and expertise of the SBAs in the relevant area.

6. In relation to the questions of general application (11 to 27) the Bar Council is aware from soundings taken that many of the positive proposals canvassed:

   1) Would, if effected, require substantial change to civil litigation and are sweeping in nature (for example, the proposals underpinning requests 11 and 12). A multitude of considerations arise in the case of most of the proposals which, the Bar Council considers are not all reflected upon in the Interim Report and may not have been considered. The more substantial changes require careful and measured analysis by the Law Commission or ought to be the subject of an equivalent degree of consideration before proposals are brought forward for further consultation.

   2) They are inappropriate for the 'tick box' style of the consultation as presented and the time-limit provided (even as extended).

   3) Do not appear to be underpinned by an established evidenced need for change. The Interim Report talks of change being considered due to, and to reflect, "*an increasingly digitalised justice system*"[3] However, most of the changes canvassed do not concern digital working in the Courts, but are far more wide-ranging. The Interim Report is generally not clear about the need for change and, in each case, does not identify the mischief that it is intended is to be addressed by given proposals. Certainly, so far as the Bar Council is aware, the

[2] Questions 28 to 45 concerning personal injury protocols; Questions 46 to 58 concerning housing protocols; Questions 59 to 63 concerning the judicial review protocol; Questions 64 to 69 concerning the debt protocol; Questions 70 to 73 concerning the construction and engineering protocol; and Questions 74 and 75 concerning the professional negligence protocol.

[3] Interim Report, paragraph 1.3.

imperative for change has not come from any substantial group of practitioners.

4) Another motivation appears to be a desire for consistency in the content of PAPs across civil litigation, however, that desire for consistency is not by itself an advantage sufficient to justify the substantial change proposed. The Interim Report, rightly, identifies that there is considerable variation in the content of the 18 PAPs and identifies that some of the variation is clearly attributable to the different needs of particular types of litigation. However, the Report then comments that other variations are hard to explain "*and may be the result of some PAPs being developed in isolation, without regard to the content of other PAPs.*"[4] It is, however, unclear whether the Working Group have investigated the origins and reasons for particular developments of each PAP and taken these into account. Rather than relying upon a lack of knowledge about the reasons for the content of specific PAPs as drafted, the Bar Council respectfully suggests the Working Group establish for itself, with SBAs, specialist judiciary, specialist solicitors, relevant consumer/client groups in each case, the reasons for the content, prior to proposing sweeping changes to that content.

5) It is unclear to us whether issues such as the increased front-loading of costs of litigation and reduced access to justice/ access to the courts that almost all of the proposals necessitate have been fully considered.

General responses

7. Generally, the Bar Council welcomes any changes to the Pre-Action Protocols (PAPs) that encourage greater use of different methods of dispute resolution where appropriate.

8. Although it is clearly a good idea for all PAPs to encourage prospective litigants to consider ADR, the Bar Council does not support compulsion; certainly not at this stage, without further research and regulation of ADR providers, as there may be significant differences and requirements for each of the different practice areas where compulsion may or may not be effective. ADR processes are inherently consensual. Compelling a party to consider ADR is one thing. Compelling them to participate is quite another. In terms of general policy, the Bar Council suggests the PAPs need to firmly emphasise the need for parties to in good faith consider ADR process, stopping short of compelling them to participate in it. If compulsory ADR processes are to be included in the future this should be done after further research into each of the relevant practice areas and consultations with users etc.

[4] Interim Report, paragraph 1.2.

as if done is haste mandatory requirements would potentiate injustice, delay, or cause barriers to rightful access of justice. Further, proper regulation or accreditation of ADR providers would be required in order to protect litigants and make sure all providers have professional indemnity insurance in place.

9. Most of the proposals, however, are probably best informed by the widest spread of experience. For example, on first consideration, the Bar Council is concerned about more front loading of costs and effort by way of the stocktaking proposal and the proposal for more extensive mandatory disclosure, which bring with them potential for (yet more) side-skirmishes on compliance to add to the early litigation side-battles already being held on costs budgeting and disclosure.

10. Finally, regarding use of technology by creating new linked online pre-action "portals", any use of technology in ADR processes or in court processes must always take account of those in society who are digitally excluded. If it does not, a significant number of people may be denied access to justice.

Preliminary responses to Consultation questions

These are the Bar Council's responses to general Consultation questions 11 to 27.

Q11. Do you agree that the Overriding Objective should be amended to include express reference to the pre-action protocols?

A11. This is highly controversial and the Bar Council has received a range of views on this topic. The overriding objective is intended as high level statement of the objective of the rules and it seems to us that is already sufficiently widely drawn to cover use of PAPs when that is appropriate.

Q12. 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?

A12. This, too, is controversial. Were it to be contemplated it is evident that exceptions must extend beyond merely 'urgent' cases to allow, where appropriate, immediate access to the Courts. We consider that such a fundamental change should not be made unless and until there are proper estimates of the likely additional cost to litigants which can be compared with estimates of the likely saving of cost by litigants as resulting of making PAPs mandatory. Otherwise, there is a risk that a policy is pursued which is driven by a perception that court time and cost will be saved, but only by shifting that expense to litigants. That would decrease access to justice and would be a retrograde step.

Q13. 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)?

A13. Yes, subject to the general point made in paragraph 12 above.

Q14. 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.

A14. We note that there is a mix of views on this question as between differing SBAs/groups of practitioners.

Q15. 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 are there are any cases and protocols in which it should not apply.

A15. This topic, too, is highly controversial. The issue of the existence and scope of such an obligation is itself a major topic, illustrated by the law in jurisdictions where "good faith" obligations are more common.[5] Again, responses from and consultation with SBAs will hopefully allow a more detailed and nuanced picture of the views of practitioners.

Q16. 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.

A16. Yes, so far as our understanding is that the proposition reflects the existing position in law. Where parties are unrepresented there would be a need for it to be made clear what "without prejudice" means and when it ceases to apply, similarly the meaning of the "save as to costs" qualification.

Q17. 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

[5] A useful summary and discussion can be found in the note of a lecture delivered by Sir Rupert Jackson to the Society of Construction Law in Hong Kong on 22 November 2017. https://www.scl.org.uk/papers/does-good-faith-have-any-role-construction-contracts

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 6.

A17. We have not seen evidence that such a sweeping requirement would have benefit outweighing the costs that would arise. The Courts are best placed to determine what is relevant to take into account for the purposes of case management.

Q18. Do you agree with the suggested approach to sanctions for non-compliance set out in general principles from para 3.26? 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?

A18. These proposed changes are highly controversial. The Bar Council generally defers to the views of practitioners in different sectors. However, we are concerned that some of the proposals suggested are draconian in nature, limit access to the Courts, and all have a front-end costs and court time implication.

Q19. Do you agree that PAPs should contain the guidance and warnings about pre-action conduct set out in paragraphs 3.8-3.13?

A19. Appropriate guidance and warnings should be given within the PAPs.

Q20. 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.

A20. The language probably could be improved. Again, responses from and consultation with SBAs will hopefully allow a more detailed answer to be provided to this question.

Q21. Do you believe pre-action letters of claim and replies should be supported by statements of truth?

A21. No. It would dilute the significance of the Statement of Truth and elevate pre-action exchanges to having the same status as pleadings. This would add cost to the process and provide yet another barrier to access to the Courts.

Q22. 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?

A22. This is a controversial proposition. Responses from and consultation with SBAs will hopefully allow a more detailed, nuanced answer to this question.

Q23. 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?

A23. Certainly, the Bar Council would welcome measures that provide for ready, cost-effective and speedy justice. It is far from clear that placing greater significance for the purposes of litigation upon pre-action steps will assist with this aim. Indeed, it would seem highly likely that cost and complexity will follow.

Questions specifically related to Practice Direction - Pre-Action Conduct

Q24. Do you wish to answer questions about Practice Direction – Pre-Action Conduct?

A24. Yes.

Q25. 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.

A25. We consider that SBAs and other groups of practitioners are best placed to respond to this question.

Q26. Do you agree parties should have 14 days to respond to a pre-action letter of claim under the general pre-action protocol, 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 counter claim. If you do not agree with these timeframes, what timeframes would you propose?

A26. Existing PAPs currently have differing time limits which, broadly, appear to work and have practitioners' support. If the purpose is simply to encourage, without compulsion, exchanges of information then a general Protocol with a short timetable as canvassed might well be appropriate. If there are to be sanctions applied or the content of the Protocol is to have some significance carried into the litigation then what is proposed is, effectively, a pre-pleadings stage pleadings process the benefits of which are very far from clear and the disbenefits in terms of cost, time and oppression of the party in receipt of the Letter of Claim manifest. In the latter case the timescales proposed would be plainly too short for a host of obvious reasons (staleness of the claim; relevant persons away; need to involve insurers, and others).

Q27. 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'?

A27. We are concerned about imposing extensive and potentially costly disclosure obligations on parties at a pre-action stage. Disclosure obligations normally only arise post issue of proceedings, when the disclosure is likely, ultimately, to be at the expense the party who eventually loses. Very careful consideration needs to be given to any regime in which a party can effectively force early disclosure without being at risk of having to pay the costs associated with that. However, once again, responses from and consultation with SBAs will hopefully allow a more detailed, final, answer to be provided to this question.

Bar Council
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