REVIEW OF PRE-ACTION PROTOCOLS

INTERIM REPORT

NOVEMBER 2021

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1 EXECUTIVE SUMMARY

1.1 The Civil Justice Council (CJC) commenced a review of pre-action protocols (PAPs) in late 2020. The Council established a main working group and three subcommittees to deal with personal injury (PI) related PAPs, housing related PAPs and the Judicial Review (JR) PAP respectively. The members of the working groups and terms of reference for the review can be found in Appendix 1. The CJC also conducted a preliminary survey to gauge court users' views of PAPs. A summary of the results of this survey, and a full list of respondents, can be found in Appendix 2.

1.2 PAPs are a relatively modern feature of the litigation landscape. They were part of Lord Woolf's vision for the new Civil Procedure Rules (CPR). It was hoped that by establishing sensible norms of pre-action conduct, this would contribute to the CPR's broader objectives of embedding into the civil justice system proportionality, greater economy and greater efficiency, whilst also reducing the level of adversarial conduct in litigation. A brief history of PAPs is set out in Appendix 3. As that history shows, PAPs have developed considerably in the two decades since their introduction, multiplying in number and evolving in nature. There are now 18 different PAPs, some of which are more integrated into the CPR than others, and there is also considerable variation in the content of PAPs. Some of this variation is clearly attributable to the different needs of particular types of litigation, but other variations are harder to explain, and may be a result of some PAPs being developed in isolation, without regard to the content of other PAPs.

1.3 This report considers what role PAPs should play in the civil justice system in the 2020s including their role in an increasingly digitalised justice system. It canvases a number of reform options to the Practice Direction-Pre-Action Conduct (PD-PAC), the existing PAPs, and the creation of new PAPs in certain areas. This is an interim report; the Working Group is not making any recommendations at this stage. The report is published for the purposes of allowing the CJC to consult as widely as possible, and allow everyone to submit their views about the future direction of PAPs, the reform options and consultation questions set out in the report.

1.4 Key reform options canvassed in this report include:

- Making all PAPs available online via portals, so that they are easier to use for litigants, or encouraging the creation of portals that incorporate PAPs in their processes so that litigants automatically comply simply by following the on-screen instructions. Ensuring such portals are electronically joined up to the relevant court so that non-confidential pre-action exchanges, including pre-action letters of claim and replies, would be accessible to the court should litigation ensue.
- Formally recognising that compliance with PAPs would be mandatory, except in urgent cases where immediate court intervention is necessary.
- Introducing a good faith obligation to try to resolve or narrow the dispute at the pre-action stage. This would be a non-prescriptive obligation. Compliance could include engaging in formal alternative dispute resolution (ADR) processes but also informal negotiations such as without prejudice discussions between the parties, or formal settlement offers. PAPs would also identify possible dispute resolution processes that parties might engage in, including ombudsman schemes.
- Introducing a requirement to complete a joint stocktake report/list of issues as a final step before the start of proceedings. The report would identify the issues the parties agree on, and the issues they disagree on and their respective positions regarding same. The joint stocktake report would also identify what disclosure the parties have already provided, and what documents they are still seeking disclosure of.
- Introducing a summary costs procedure, independent of Part 8, for costs liability and quantum disputes for cases that are resolved at PAP stage. Courts would make their determinations without a hearing and written submissions would be restricted in length.
- Expanded powers for the courts and new processes for raising compliance issues to facilitate a more robust, consistent and timely approach to non-compliance with PAPs.
- Guidance to the courts to consider ways of streamlining directions and the litigation process to reflect the progress already made by parties who have complied with the relevant PAP.
- Making PAPs more user friendly through greater use of non-technical language, and by providing information about the pre-action and litigation process to litigants in person

(LIPs). This includes diagrams explaining the relationship between pre-action processes and litigation; links to relevant court forms (specifically N242A on offers of compromise) and template documents; lay descriptions of key rules (Part 36) and principles (proportionality), and clear warnings about the potential consequences of dishonesty in light of the Court of Appeal's decision in *Jet2 Holidays Limited* v *Hughes & Hughes* [2019] EWCA Civ 1858.

- Creating a new general PAP[1] with more concrete time frames and disclosure standards for pre-action letters of claim and replies. The general PAP would continue to be the default protocol where no litigation specific protocol applied, and could be used by any litigant in person who was unsure which protocol applied to their dispute.

1.5 The Working Group would like to hear from respondents about the merits of these reform proposals, including the circumstances and protocols in which any of these proposals should not apply. Although there is a strong case for greater consistency across PAPs, a one size fits all approach would be highly undesirable. All of the PAPs were individually considered by the Working Group, sometimes by subcommittee. The Working Group recognised there were a number of protocols where the main reform proposals outlined above should not apply except in modified form, or that their introduction should be conditional on individual litigants having access to legal assistance to help them navigate those PAP processes requiring greater engagement between the parties. The report also canvasses a number of reform options for litigation specific PAPs as outlined in Chapter 3 and associated appendices, as well as the creation of new PAPs to handle sexual abuse claims, international travel personal injury claims, and a new PAP for small track claims worth £500 or less which the CJC's working group on Small Claims[2] is actively considering.

1.6 I should make clear that not all Working Group members support all the reform options set out in this report. Some options that are strongly supported by some Working Group members are strongly opposed by others. This divergence of views is probably inevitable given the sheer range of litigation covered by the PAPs, and that those engaging with them often have different

[1] See Appendix 4 which includes the draft text for the revised General Pre-Action Protocol (Practice Direction).
[2] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/small-claims/

experiences and perspectives, and in some cases represent different interests. Nonetheless, there is some support for all of the options outlined in this report either amongst the Working Group and/or respondents to the Preliminary Survey and the Working Group believes they are worthy of further consideration and consultation. References to the 'Working Group' include the subcommittees although the balance of opinion on particular issues was not always the same across the main Working Group and its three subcommittees.

1.7 Respondents should bear in mind that the CJC is not formally responsible for the drafting of the PAPs; this is the Civil Procedure Rule Committee's (CPRC) responsibility. The CJC is responsible for making policy recommendations about the operation and future direction of civil justice in England & Wales, including the role of PAPs. Accordingly, when the Working Group does issue its final report, it will be making recommendations at the level of principle. However, to assist interested persons understand how these principles might look in practice, in some instances the Working Group has developed possible text that could be used when revising the PAPs.[3] Whether the CPRC adopts that text, and the extent to which it does so, is ultimately a matter for the CPRC.

1.8 I would like to thank all the members of the main Working Group, and subcommittees, and in particular John Sorabji, who drafted the history of PAPs; Masood Ahmed, a member of the CPRC who produced the draft text for a revised general PAP, and Master Stevens, Diane Astin and Jo Hickman who chaired the subcommittees on the Personal Injury, Housing and JR PAPs respectively, and drafted the corresponding sections and appendices of this interim report. I must also thank Justice John Middleton of the Federal Court of Australia, Jennifer Egsgard and Anna Koo for their insights into pre-action processes and mandatory ADR in Australia, Ontario and Hong Kong respectively.

1.9 Consultation on this document will be run until 10am on 24 December 2021. Those wishing to respond to any or all of the questions can do so via Microsoft Forms (https://forms.office.com/r/ReAVrWvscB). Please note that responses are limited to 4,000 characters per question (around 650 words). If you want to supply any part of your

[3] See Appendix 4 of this report.

response not in text form (e.g. data/tables), please email cjc.pap@judiciary.uk for details on how to do so. Consultees do not need to answer all questions if only some are of interest or relevance.

Dr Andrew Higgins
Associate Professor of Civil Procedure,
University of Oxford On behalf of the Civil Justice Council

2 THE ROLE OF PAPS IN THE CIVIL JUSTICE SYSTEM

2.1 PAPs occupy a critical space in the civil justice system in relation to the time they are engaged and the role they perform. A well-functioning justice system should facilitate proportionate litigation where appropriate, but it should also encourage people with legal disputes to try to resolve them consensually wherever possible.

2.2 In the Working Group's view, fostering consensual dispute resolution processes and proportionate litigation are complementary objectives, rather than in tension with each other:

- Mutually acceptable resolutions to legal disputes, negotiated against the backdrop of a clear legal framework, have obvious social and economic benefits, to the parties themselves, to others who depend on them or do business with them, and to the public.
- Accessible court adjudication plays a critical role in underpinning everyday economic and social relations by encouraging a culture of respect for legal rights, where people can deal with each other secure in the knowledge that legal obligations and rights can be readily enforced if required.[4]

2.3 Litigation sometimes serves a broader public interest, enabling the courts to develop the law in response to changing social and economic trends. In this way, litigation can limit the scope of future disputes by letting similarly situated persons know where they stand legally.[5]

2.4 Litigation should not be viewed as a failure of economic or social relations, but nor should consent based settlements be viewed as a failure of the legal system to deliver substantive justice. The relationship between adjudication and consensual dispute resolution is a symbiotic one, and PAPs are both an important conceptual and practical bridge between these processes. When PAPs work well, they promote both these objectives. Co-operative exchanges and

[4] *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51 [71].
[5] Ibid

negotiations between the parties can facilitate fair settlements, or assist them to prepare and narrow their dispute so that it can be adjudicated in a more proportionate manner.

2.5 Switching metaphors, PAPs are often the first legal gate that parties pass through when a dispute arises between them. For PAPs to fulfil their objectives they need to be accessible to all; set out clear, proportionate steps towards dispute resolution and effective case management; and, be consistently followed by parties and consistently enforced by the courts.

2.6 The consultation pleasingly revealed widespread consensus about the objectives of PAPs, which have changed little from those originally outlined by Lord Woolf in his access to justice report. Those objectives are to provide sufficient notice and information to parties to enable them to meaningfully engage in formal or informal dispute resolution processes, and where a full resolution is not agreed, to help narrow the dispute so that any subsequent litigation is limited to resolving those issues that need to be determined by the court. The Working Group believes these objectives can be converted into three concrete pre-action protocol steps, each of which would be dependent on compliance with the previous step:

a) Notice and timely information exchange
b) A good faith obligation to try to resolve or narrow the dispute, which may include formal ADR processes but can also include formal or informal settlement negotiations
c) A requirement to produce a list of agreed issues, and issues still in dispute, as part of a formal stocktake before formal litigation is commenced.

2.7 Each of these steps can already be found in the Practice Direction - Pre-action Protocol (PD-PAC) and most other PAPs. In this respect, the options for reform canvassed by the Working Group in this report are evolutionary rather than revolutionary, building on the existing rules and providing further concrete guidance to the parties about what compliance with those steps involve. However, steps b) and c) above, in the form they presented, are new. Accordingly, the case for introducing them in this form is elaborated on below.

The good faith obligation to resolve or narrow the dispute

2.8 All existing PAPs recognise the value of ADR and encourage the parties to consider it. The courts have also made it clear, repeatedly, that the potential for ADR is not fully appreciated by litigants' representatives, and when it is offered, it is often not pursued decisively and expeditiously.[6] In the Working Group's view, the benefits of consensual dispute resolution are beyond doubt, even if litigation is sometimes necessary or even desirable. It is also generally understood that inequalities between the parties can be exacerbated in some ADR processes, especially where one of the parties is unrepresented. However, in appropriate cases – which are most cases - and under appropriate conditions, the public and private benefits of consensual dispute resolution dwarf the costs of foregoing court adjudication. Where such efforts are successful, they are very likely to reduce the costs of dispute resolution to the parties themselves, or the public purse, and usually both. It speeds up the dispute resolution process and is usually far less stressful than the litigation process. It also provides the parties with an opportunity to craft solutions to the specific circumstances of their dispute.[7] Moreover, even where dispute resolution processes do not lead to settlement, when utilised at the pre-action stage, or even early post-issue, they can facilitate more proportionate litigation, by narrowing the issues in dispute.

2.9 One historical brake on the greater use of ADR has been a belief that requiring ADR, or pressuring parties to use ADR through the threat of sanctions, would be counter-productive[8] or could amount to a breach of the implied right of access to court under European Convention on

[6] See, for example, *PGF II SA v OMFS Company* [2014] 1 WLR 1386; *Thakkar and Anr v Patel and Anr* [2017] EWCA Civ 117 and *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21.

[7] In *Faidi v Elliott Corporation*[2012] EWCA Civ 287, a neighbour dispute, Jackson LJ J explained at [34] that a moderate degree of carpeting might have reduced noise penetrating into the neighbouring flat but still enabled enjoyment of the timber floor and that this was "precisely the sort of outcome which a skilled mediator could achieve, but which the court will not impose." More recently, in *DSN v Blackpool Football Club Limited* [2020] EWHC 670 Griffith J explained at [28] the practical benefits offered by settlement procedures when he said "Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if money is paid, that amount may compare favourably with the irrecoverable costs of an action that has been successfully fought. The judge also stated that trials typically involve a significant expenditure of time and costs, and take a toll on the witnesses even for successful parties which a settlement could avoid. Further, a settlement could include statements that fall short of accepting legal liability, which may still be of value for the claimant."

[8] Some respondents expressed this view when responding to the Preliminary Survey, including the Law Society.

Human Rights (ECHR), Article 6.[9] The legality of compulsory dispute resolution processes is considered in some detail in the CJC report on mandatory ADR published on 12 July 2021.[10] In summary, that report concluded:

> *"8. …[A]ppropriate forms of compulsory ADR, where a return to the normal adjudicative process is always available, are capable of overcoming the objections voiced in the case law and elsewhere and could be introduced.*
>
> *9. The rules of civil procedure in England and Wales have already developed to involve compulsory participation in ADR at a number of points. These compulsory processes are both successful and accepted.*
>
> *10. Provided certain factors are borne in mind in designing the scheme, a procedural rule which requires parties to attempt ADR at a certain point or points, and/or empowers the court to make an order to that effect, is, in our opinion, compatible with Article 6. The factors requiring consideration whenever compulsion is being considered will include:*
>
> *the cost and time burden on the parties;*
>
> *whether the process is particularly suitable in certain specialist areas of civil justice;*
>
> *the importance of confidence in the ADR provider (and the role of regulation where the provider is private);*
>
> *whether the parties engaged in the ADR need access to legal advice and whether they have it;*
>
> *the stage(s) of proceedings at which ADR may be required; and*
>
> *whether the terms of the obligation to participate are sufficiently clear to the parties to encourage compliance and permit enforcement.*
>
> *11. It is appropriate to permit sanctions for breach of a rule or order requiring participation in ADR. If ADR is no longer "alternative" or external to civil justice, then parties can surely be compelled to participate in ADR as readily as they can be compelled to disclose documents or explain their cases."*[11]

2.10 We do not intend to go over the same ground in this report, but several points emerging from the report on Compulsory ADR should be stressed for the purposes of considering what

[9] https://www.echr.coe.int/documents/convention_eng.pdf
[10] Civil Justice Council (2021) *Compulsory ADR.* Available at: https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf
[11] Ibid

dispute resolution obligations are appropriate at the pre-action stage. To be compliant with ECHR, Art. 6, any dispute resolution obligation needs to be proportionate so that it does not undermine the right of effective access to court.[12] Presently, the civil justice system is some way away from being able to offer regulated, free or near free and timely, ADR processes to all prospective litigants. Until such processes are available, any good faith obligation to resolve a dispute at the pre-action stage should be non-prescriptive and include such elementary processes as confidential discussions between the parties in order to be compatible with ECHR, Art. 6.

2.11 A number of ADR lawyers and academics have forcefully argued that the encouragement of ADR under the current PAPs is a form of de facto compulsion. For example, under the Practice Direction – Pre-action Conduct (PD-PAC) the court is expressly empowered to treat an unreasonable refusal to use a form of ADR, or failure to respond at all to an invitation to do so, as non-compliance with the PAP, which it must take into account when making case management directions or costs orders, and which enlivens its jurisdiction to impose a sanction or order a stay: paras 13 - 16.[13] There is, however, a degree of inconsistency in the case law on where a refusal to mediate will be deemed unreasonable for the purposes of imposing costs sanctions.[14]

2.12 By converting the encouragement of ADR backed up by the threat of (costs) sanctions, into a good faith obligation to try to resolve the dispute, which may involve something other than a formal ADR process, the PAPs could provide greater clarity to the parties about the nature of the obligation to engage in appropriate dispute resolution efforts, and greater flexibility in the way they give effect to that obligation.

[12] Ibid, p 28 citing *Rosalba Alassini* [2010] 3 C.M.L.R. 17

[13] For discussion see M. Ahmed 'Implied Compulsory Mediation' (2012) 31(2) *Civil Justice Quarterly* 151-175; D. De Girolamo 'Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales' (2016) 35(2) Civil Justice Quarterly162-185; D. K. Schaffer 'An examination of mandatory court-based mediation' (2018) 84(3) Arbitration 229-238. For a comparative analysis of court approaches to compulsory ADR and the use of sanctions, see A. Cheevers 'Voluntarism in court-connected mediation in Ireland - is it time for a rethink?' (2018) 37(1), 98-123 and B. Billingsley and M. Ahmed 'Evolution, Revolution & Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada' (2016) 45(2) *Common Law World Review* 186–213.

[14] Compare *Gore v Naheed* [2017] EWCA Civ 369 at [30] with *Thakkar v Patel* [2017] EWCA Civ 117 at [49]

2.13 As for the desirability of compelling dispute resolution initiatives, including at the pre-action stage, this also depends on precisely what is being compelled. The good faith obligation canvassed in this report is non-prescriptive: it does not mandate any particular dispute resolution process or require parties to compromise their claims or even offer to do so. Instead, what it requires is that the parties meaningfully engage with each other, with the benefit of having exchanged the key information and documents about their dispute as required by the protocols, with the aim of exploring whether a resolution is possible or alternatively, whether the issues in dispute can be narrowed. While not all disputes will be suitable for resolution at the pre-action stage, it is difficult to imagine a case where some narrowing of the issues is not possible. This will allow the court to focus on resolving the real issues in dispute once litigation is started.

2.14 The proposal for a good faith obligation to try to resolve or narrow dispute at the pre-action stage is also consistent with, even if not identical to, pre-action or immediate post-issue dispute resolution obligations in comparable common law jurisdictions including Australia (at the Federal level), Hong Kong and Toronto. The obligation is also on all fours with the European Law Institute-Unidroit Model European Rules of Civil Procedure which adopted an obligation on parties to co-operate in seeking to resolve their dispute consensually.[15]

The requirement to undertake a stocktake

2.15 One of the original objectives of the PAPs as envisaged by Lord Woolf was to help narrow issues in dispute should litigation become necessary. Although the ideal outcome of parties following PAPs was a mutually agreed settlement without the need for litigation, Lord Woolf recognised that establishing norms of pre-action behaviour could still produce material benefits to the parties and the courts, even if the parties could not resolve their dispute. In all but the most polarised disputes, which are sometimes exacerbated by our adversarial system of

[15] European Law Institute-Unidroit Model European Rules of Civil Procedure, Rule 9 provides that:
(1) Parties must co-operate in seeking to resolve their dispute consensually, both before and after proceedings begin.
(4) When a consensual settlement as a whole cannot be reached, parties must take all reasonable opportunities to reduce the number of contested issues prior to adjudication.

litigation, sensible pre-action exchanges should help narrow the issues in dispute to some degree, or at the very least, the process can help prepare the case for litigation so that it can be dealt with in a more proportionate manner.

2.16 The Working Group believes a formal stocktake requirement can play a useful role in transforming the efforts that parties have put into outlining and then resolving or narrowing their dispute, into more streamlined and proportionate litigation if litigation is necessary. As such the stocktake acts as a pivot point between two key objectives of PAPs: fostering fair settlements and promoting more proportionate litigation.

2.17 Most, but not all, PAPs recognise the value of parties engaging in a stocktake as a final step before commencing any litigation. For example, the current PD-PAC states:

> *"Stocktake and list of issues 12. Where a dispute has not been resolved after the parties have followed a pre-action protocol or this Practice Direction, they should review their respective positions. They should consider the papers and the evidence to see if proceedings can be avoided and at least seek to narrow the issues in dispute before the claimant issues proceedings."*

2.18 Based on present practice, however, the Working Group believes there is a risk that if a case does not settle at the PAP stage, the benefits of engagement with the PAPs may not be fully capitalised on in the subsequent litigation between the parties.[16] The stocktake requirement is so under-utilised in practice that even some on the Working Group were unaware of it. In layperson's terms, rather than being a springboard to quicker and cheaper litigation, there is a risk that the PAP becomes a cul-de-sac if the case does not settle, requiring the parties to effectively start again once the dispute moves to the litigation stage.

2.19 The Working Group feels the stocktake requirement could be improved by making it concrete. As part of the stocktake the parties should be required to produce a report, which specifies the issues on which they agree and the issues that are still in dispute and the parties' position in respect of them. The stocktake could also record the parties' pre-action disclosures with a view to assisting the court in deciding what further disclosure, if any, is needed.

[16] See M. Ahmed 'An investigation into the nature and role of non-settled ADR' (2017) 7(2) *International Journal of Procedural Law* 216-249.

Appendix 4 sets out what a template stocktake report might look like. It is partly based on the concise statement used in Family Law proceedings in Financial Dispute Resolution cases (Family Procedure Rules 9.14[17]).

2.20 There are similar processes for resolving disagreement between experts (notably CPR 35.12 provides for joint expert reports), so the task of completing a stocktake should be straightforward for professional lawyers. Online portals should also make it easier for parties, especially LIPs, to understand which sections of the report each party needs to fill out or jointly complete. A more difficult question is the extent to which LIPs will be able to engage effectively with the stocktake report i.e. use it for the purposes for which it is intended. The value of the stocktake may be diminished where neither party is represented, but there should be real practical benefits in encouraging the parties to work out what they do and do not agree on, as opposed to an exclusively adversarial process where the parties focus only on telling 'their side of the story'.

2.21 Some on the Working Group have expressed concern about the non-adversarial nature of such a joint list of issues and whether the contents of the stocktake might reflect the power imbalances between the parties. The PAP should make clear that the parties will not have the power to write their opponent's case for them,[18] nor do they need to agree with their opponent how they put their case. It is not intended to be a contentious document. Rather, the parties have an obligation to accurately map the parameters of their dispute. In this way, the stocktake builds on the obligation to co-operate in the Overriding Objective,[19] in circumstances where the parties have already engaged with each other through the initial PAP steps.

2.22 There may be cases where a stocktake report is not appropriate given the nature of the litigation. The JR PAP, for example, does not recognise any stocktake obligation. JR litigation is subject to short limitation periods, and often involves complex legal questions, with limited or no factual disputes. This makes it more difficult to complete stocktake reports and reduces

[17] https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_09#IDAYCLMC
[18] Online portals should assist in this regard as it would become physically impossible for a party to complete those sections that their opponent must fill out.
[19] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01

their utility. Moreover, JR has its own distinct procedures for narrowing the issues in dispute.[20] Similarly, a stocktake requirement may be disproportionate in very low value disputes, including in the small claims track.

Consistency and specialisation

2.23 The Working Group accepts that a one size fits all approach rarely works for litigation and that is true of PAPs as well. Accordingly, there may be specific types of disputes or specific instances where the PAP steps outlined above need to be varied. Some protocols are also more fully integrated into the CPR than others, both through the commencement of proceedings under CPR 8 and the fixed costs regimes under CPR 45.21. On the other hand, it is not unreasonable to ask whether 18 different PAPs are necessary when all purportedly share the same objectives. Balancing these conflicting considerations, we believe that there is a strong case for unifying the general guidance and architecture that applies to all PAPs (such as guidance and warnings to the parties about pre-action behaviour that is appropriate, powers to impose sanctions and costs procedures), but allow variation for the concrete steps parties must take when complying with the individual PAPs. For example, while we think identical timeframes across all PAPs would be undesirable given the range of complexity and evidence involved in different types of proceedings, the extent to which third parties may be affected, and time limits governing actions, we do believe there is greater scope for more consistency across different PAPs. Similarly, while the Working Group believes that most types of proceedings would benefit from the introduction of a good faith obligation to try to resolve or narrow the dispute and the requirement to complete a joint stocktake report recording the outcomes of the PAP process, there are some types of proceedings where a different approach is necessary. The unique constitutional role of JR litigation, and the very short limitation periods in JR in recognition of the impact that such litigation can have on third parties, mean that these requirements should be modified to ensure that the JR protocol has sufficient flexibility to

[20] See appendix 8 of this document.
[21] In particular the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims and Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

address the specific needs of the instant case. Variation in the PAP steps may also be required for other reasons set out below.

Making PAPs work in practice

2.24 If PAPs are to promote fair settlements or more proportionate litigation in practice, there are important practicalities that must be addressed, in relation to the content of the PAPs, parties' incentives to comply with them, and their ability to constructively engage with them.

Disclosure

2.25 First, parties may be extremely reluctant to make or consider settlement proposals if they do not have accurate information relevant to the dispute, or if they believe that relevant information is being withheld by their opponent. There was strong support across the Working Groups for robust, but proportionate disclosure (and candour), at the pre-action stage. Much of the detail of this report, as set out in the appendices, addresses the timing and content of disclosure obligations under the PAPs. Although there are some protocols where the primary concern has been about disproportionate disclosure (notably construction and engineering), in most areas the Working Group felt that more, and more timely, disclosure was desirable as a way of increasing the likely success of pre-action dispute resolution efforts.

Compliance

2.26 The most common complaint made in response to the preliminary survey (80% of respondents) was that courts did not consistently enforce the PAPs and apply appropriate sanctions. The topic of sanctions led to spirited debate across the Working Groups about the appropriate powers the courts should have to deal with compliance, what non-compliance should result in sanctions, and the process for dealing with compliance disputes.

2.27 The Working Group considered a number of reform options designed to strengthen the enforcement tools available to the courts to appropriately sanction parties who are in substantive rather than technical breach of the protocols. A sanctions regime should be proportionate, applied consistently, and at the right time, whilst also recognising that there

may be good reasons for non-compliance. The purpose of these reforms is not to punish defaulting parties but to promote a culture of routine compliance with PAPs. This in turn should lead to fewer compliance disputes.

2.28 Effective dispute management requires not only the credible threat of sanctions for non-compliance, but also concrete incentives (and the removal of disincentives) for the parties to comply with PAPs, and realise the benefits that go with it. Accordingly, the Working Group has also included options to incentivise parties to fully engage with the PAP process. This includes a summary costs procedure to allow courts to resolve costs disputes where cases settle at the pre-action stage, and streamlined litigation processes for parties who have appropriately outlined their claims (and defences), and provided disclosure of relevant documents, during the PAP process. These measures will reduce incentives to commence litigation solely for costs reasons, and to limit duplication and wastage involved in requiring parties to repeat steps that were in substance undertaken at the PAP stage.

Accessibility

2.29 PAPs should be made as user friendly as possible, be written in clear plain English with lay explanations of any unavoidable technical terms, and helpful information explaining the process (including through diagrams) as well as links to relevant forms (including official offers of compromise forms) and template documents, or online forms, that litigants can fill out to comply with their PAP obligations. All of this is uncontroversial. More contentious is the extent to which PAPs should use accessible language even if that comes at the expense of legal precision. Moreover, there is always a risk that in striving for both legal accuracy and lay intelligibility, a PAP fails to achieve either.

2.30 The proof of accessibility of language is always in the text itself. Drafting of PAPs is the responsibility of the CPRC, but we have prepared a draft text of a revised General PAP (Practice Direction) in Appendix 4, much of which could also be easily incorporated into online portals. Wherever possible the text tries to explain legal rules and principles simply. Some on the working group felt the language could be more user friendly, while others felt some legal concepts were too complicated to give lay explanations without potentially misleading some

users. The Working Group would strongly welcome feedback on the accessibility of the proposed general PAP, both for LIPs and vulnerable parties, and suggestions on how it might be improved.

Access to Legal Assistance

2.31 No matter how accessible and user friendly PAPs could be made to non-lawyers, both the underlying legal dispute and the pre-action process may involve an irreducible degree of legal or factual complexity that litigants will struggle to navigate without the benefit of legal assistance. Pre-action processes that mandate greater engagement between the parties carry a risk of delivering unjust outcomes for the weaker party if they do not have access to legal assistance to help them complete those processes. These power imbalances could also undermine the objectives of PAPs generally. While it would be clearly wrong and unsustainable to say legal assistance is needed or appropriate to resolve all disputes with a legal dimension, there will be many instances where the availability of legal advice is likely to be the difference between the PAPs working as intended or failing in their objectives. Although governments and some court users will understandably be attracted to dispute resolution initiatives that reduce the number and costs of cases being litigated in the courts, law makers should be fully conscious of the fact that initiatives designed purely to divert parties away from courts will not deliver just outcomes unless the parties have the necessary support to navigate pre-action dispute resolution processes.

2.32 There are some instances where the Working Group believes that the case for adopting some of the reforms canvassed in this report is conditional upon the parties having access to appropriate legal assistance. In particular, in housing and debt matters there is usually substantial inequality between the parties, the weaker party is often vulnerable, and the outcome of the case has critical welfare implications for the litigant concerned. Accordingly for these areas, the Working Group believes that the case for introducing a good faith requirement to try to resolve or narrow the dispute, or complete a joint stocktake, is dependent on individual litigants having access to legal assistance to complete these steps. This analysis applies equally to vulnerable parties, regardless of the subject matter of the litigation, as defined in Practice Direction 1A. While the needs of vulnerable parties will differ depending on

the nature of their vulnerability, in many cases it would be reasonable for a party to decline to participate in a dispute resolution process, or complete a stocktake report, without the benefit of legal assistance.

2.33 The Working Group is conscious of the fact that there are different categories of publicly funded legal assistance available ranging from 'representation' to 'help'. The latter is likely to be unsuitable for the type of additional pre-action steps outlined in this report. 'Legal Help' which is a form of 'Controlled Work', is not designed for complex pre-action correspondence, stocktakes or ADR. It is limited to the provision of advice and limited assistance and expressly excludes more formal processes such as those under consideration.

Availability of technology

2.34 Any discussion about the accessibility of the justice system in the 2020s must begin with a discussion about access to technology. As Lord Briggs has observed, one of the aims of the online court he outlined in his Civil Courts Structure Review was to "liberate court users from having to read, learn or understand [procedural rules]" because "users (lay as well as professional) will only have to obey one rule: do what it tells you to do on the screen."[22]

2.35 This ambition could apply equally to pre-action exchanges as it does to the conduct of litigation. Technology must, and is already beginning to, play a key role in promoting access to justice. The availability of pre-action online portals is currently patchy but there are well known successful examples,[23] and recent initiatives,[24] as well as a significant number of online ombudsman schemes[25] and industry sponsored, and regulator certified, online dispute resolution platforms.[26] There is also an increase in private providers creating online complaints tools to help consumers solve their disputes with a range of manufacturers and service

[22] Lord Briggs, Foreword to A Higgins (ed) *The Civil Procedure Rules at 20* (OUP 2020).
[23] Notably https://www.claimsportal.org.uk/ is an independent portal led by a balanced board of compensators and representatives of the claimant community as the mandatory mechanism for making claims that fall under the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims and Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.
[24] See in particular https://www.officialinjuryclaim.org.uk/ for whiplash claims.
[25] See for example https://www.financial-ombudsman.org.uk/contact-us/complain-online (Financial Services Ombudsman) and https://www.ombudsman-services.org/sectors/energy (Energy Ombudsman)
[26] See for example https://www.aviationadr.org.uk/ which is accredited by the Civil Aviation Authority.

providers from phone companies to banks and others.[27] These initiatives all bode well for the further creation and integration of a network of online portals specifically designed to assist parties to resolve their disputes or, failing that, help prepare their case for court. It would be hugely advantageous if such portals were constructed in a way that would allow the prospective litigant lodging a complaint to automatically comply with approved pre-action conduct simply by following on-screen instructions. Parties would then know that by using such a platform, their attempts to resolve their dispute would meet a court's approval if litigation could not be avoided. Potential LIPs would no longer need to be concerned with meeting the requirements of PAPs. The knowledge that those with whom they are in dispute are abiding by the instructions of the same online gateway may also instil in LIPs greater confidence that pre-litigation conduct is being conducted in good faith. This also applies to vulnerable parties. However, to make online portals truly accessible to vulnerable parties, technical support (assisted digital support) will need to be available for those who do not have access to the internet, or struggle to effectively use technology unaided. One potential advantage of online platforms is that they can provide a platform to communicate information to parties about the rules on vulnerability (CPR 1.6 and PD1A) whilst allowing parties to report their vulnerability to the other side, and to the court should litigation become necessary.

2.36 The creation of online portals that incorporate approved pre-action processes also offers an opportunity for the harmonisation of the array of online, pre-litigation dispute resolution mechanisms and for their integration with an online court system, as envisaged by the Master of the Rolls in his speech at the London International Disputes Week 2021 and in his lecture to the GEMME conference in Dublin.[28] If the providers of such portals could be encouraged to adopt common data standards, disputes that remain unresolved after the relevant portal's PAP-complaint processes are completed could then progress seamlessly – via application

[27] One example is the partnership between Resolver UK https://www.resolver.co.uk/ and a comparison website. Some technology companies operate their own dispute resolution processes to resolve complaints between buyers and sellers using their platforms.

[28] The Right Hon. Sir Geoffrey Vos, Master of the Rolls, London International Disputes Week 2021, 10 May 2021 p 3; 'Mediated interventions within the Court Dispute Resolution Process', 28 October 2021, p 4.

programming interface technology – to the online court. Parties could be spared having to draft statements of case or re-entering the facts of their dispute.

2.37 The majority of online portals will continue to be created and maintained by industry. Whether they satisfactorily incorporate PAPs and integrate with online courts – and whether they meet the requisite standard of fairness – will require assessment. The governance of this new online space may be a responsibility that the proposed Online Procedure Rule Committee (OPRC), Part 2 of the Judicial Review and Courts Bill[29] that is currently before Parliament, would be well placed to assume. The OPRC could be established as the integrating body, clearly linking the processes of the online court to the digital efforts 'pre-action' to resolve the dispute in question. This task currently falls to the CPRC, for example in relation to the recent work preparing the new whiplash portal, which follows a bespoke PAP. Just as the CJC has a statutory role in providing advice to the CPRC, including regarding the design of PAPs, the Working Group believes the CJC can play an equally important function in referring proposals for changes to the OPRC.

2.38 Both the implementation of Lord Briggs' mooted universal rule – "do what the computer screen is telling you to do" – and the confidence that users ought to have in the relevant portal as a result is critically dependant on prospective litigants accessing the correct portal. The value of joined up processes will be diminished if prospective litigants inadvertently use the wrong portals, which are not connected to the right court. However, just as choosing between some 18 different paper based PAPs can be challenge for some litigants, that choice does not get easier when presented with 18 different links. The importance of clear sign-posting suggests there is a need for an official front-end website and associated app that can guide users to the relevant portal – a single common site that prospective LIPs, SMEs, practitioners or anyone else looking to resolve a dispute can access to find out where and how they may lodge their complaint and, if necessary, make a claim. As with paper-based PAPs there may also be a case for such a website including a general and default online portal so that litigants who remain unsure which PAP-complaint portal to use, can use the default option, safe in the knowledge that pre-action exchanges will not disappear into the cybersphere, but instead remain

[29] Judicial Review and Courts Bill 2020-21, as introduced, clauses 18-31.

accessible to the appropriate court. To instil and maintain users' confidence in such portals, their inclusion on an official dispute resolution online gateway would depend on their meeting required standards, both technical and legal. Here there would be a need for government intervention in the form of the creation of some official body to regulate and accredit portals. This too could be a role for the proposed OPRC.

2.39 A second challenge is ensuring online portals appropriately distinguish between, and treat accordingly, pre-action exchanges that are intended to be accessible to the court, such as pre-action letters of claim and replies and documents that have been disclosed, and confidential, without prejudice exchanges between the parties designed to explore ways of resolving or narrowing the dispute. Of course, parties should be free to hold their without prejudice discussions offline, but to increase the utility of online portals it would also be desirable if the parties could engage in without prejudice discussions through the portal. We are confident that the technology exists to allow parties to communicate with each other in a legally secure way through online portals that also store exchanges and documents that are intended to be available to the court should litigation ensue.

2.40 Ultimately, however, the technical design and operation of online portals is a matter beyond the expertise of this working group. Instead, what the Working Group has focused on, and what this interim report is principally concerned with, is the constituent processes that parties must and should engage in at the pre-action stage, whether it occur through online portals or more traditional methods of communication. The fact that most of the discussion in this report is technology neutral should not detract from the importance that the Working Group attaches to technology in achieving the objectives of PAPs.

What does success look like?

2.41 A thrust of this interim report is that PAPs should be designed to encourage everyone to take legal obligations (and complaints about breaches of them) more seriously, and for parties in a legal dispute to co-operatively engage with each other in good faith to try to resolve or narrow their dispute for the purposes of any subsequent litigation.

2.42 If these objectives are to be achieved, it will involve bringing forward some of the work that would have otherwise happened in litigation. Doing more at the pre-action stage does not inevitably result in the "front loading" of costs if that term is understood as incurring costs which would otherwise be avoided. PAPs will achieve the objectives of resolving disputes at proportionate cost, if they bring forward certain steps but at the same time allow the parties and the court to avoid other expensive and/or time-consuming steps that are part of the litigation process. Similarly, steps that are brought forward to the pre-action stage should not need repetition post-issue. This is an area where we think more could be done to ensure that, whatever the applicable PAP, the benefits of compliance are transferred into the litigation process. Disclosure and pleadings are two obvious areas that could be truncated where parties fully complied with the PAPs, but we are interested in hearing further from respondents about whether and how they think PAP compliance can springboard the parties into more streamlined case management processes.

2.43 As for the success of any PAP reforms more generally, this is one area where defining success is much easier than measuring it. The goal of promoting consensual dispute resolution cannot be measured by settlement rates alone. If litigants are to accept settlement outcomes as legitimate, any agreement needs to be perceived as fair, be grounded in a clear understanding of the parties' rights and obligations as they apply to the evidence relevant to the dispute, and parties need to feel they had some meaningful control over the process. These outcomes are difficult to measure quantitatively.

2.44 Similarly, while the goal of more proportionate litigation can be universally endorsed, because the law uses a multi-factorial definition of proportionality which includes incommensurable factors,[30] proportionality cannot be quantitatively measured. Subject to that major qualification, proportionality is clearly designed in most cases to reduce the costs of litigation relative to the value of the claim. Thus, while measuring the success of any reforms to PAPs will be difficult, through a combination of qualitative feedback from users and quantitative data on settlement rates and legal costs relative to awards or settlement amounts (where available) it would be possible to present at least a rough picture of how PAPs are

[30] CPR 44.3(5).

working in practice. This report shows that data on pre-action settlements is patchy with good data in some areas (e.g. personal injury) and none in others.

2.45 The need for better data collection has been a recurring theme of the CJC's work for a number of years. We would again urge the MoJ and HMCTS to seek to obtain better data, especially from LIPs, about their experience of using the system. Greater availability of pre-action online portals would also make it significantly easier to collect quantitative data about pre-action conduct.

3 PROPOSED GENERAL PRINCIPLES FOR PAPS AND A NEW GENERAL PAP

The relationship between a general PAP and litigation specific PAPs

3.1 One of the challenges faced by the Working Group was deciding what the relationship should be between the general PAP and litigation specific protocols. Strong arguments both for and against greater streamlining and consolidation of the PAPs and greater specialisation leading to greater divergence and possibly even more PAPs can be advanced. The history of the PAPs set out in Appendix 3 demonstrates that this debate between consolidation and greater specialisation is not new.

3.2 A significant number of lawyers working in specific fields – regardless of the field – believe that there should be a litigation specific PAP covering that field. As set out in the history of PAPs in Appendix 3, the proliferation of PAPs has also partly been driven by governmental policy initiatives, aimed at reducing the amount of litigation and/or the costs of litigation in particular areas. On the other hand, some believe that a multitude of PAPs is confusing to LIPs and even lawyers in the field - *Jet2* is an example of represented parties using the wrong protocol[31] - and led to unnecessary duplication or undesirable variation in some instances.

3.3 The history of PAPs shows that approaches at both ends of the spectrum – creating a single PAP or having only litigation specific PAPs – have not commanded sufficient support or succeeded, and the working group also rejected them now. Time has moved on, however, since the debates of the early 2010s when these questions were last considered, in part because of greater recognition of the value of ADR,[32] and the case for incorporating pre-action dispute resolution processes into digital justice initiatives as well.[33]

[31] *Jet2 Holidays Ltd v Hughes* [2019] EWCA Civ 1858
[32] See for example Civil Justice Council (2021) *Compulsory ADR.* Available at: https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf.
[33] See for example Sir Michael Briggs, *Civil Court Structure Review, Preliminary Report*, (2016); *Civil Court Structure Review, Final Report*, (2016).

3.4 Instead, where there was a degree of consensus was around establishing a common architecture, language and objectives for all the PAPs, whilst recognising where there would need to be divergence in the nature and details of the PAP steps required across different types of litigation. Obvious examples of this variation would include the details of the information that must be included in a pre-action letter of claim or reply, the timeframes for responding and what documentation needs to be exchanged. In some cases, this variation might extend to modifying the good faith obligation to resolve or narrow the dispute, or the stocktake requirement, and/or introducing a different step that is particularly well suited to the needs of that specific litigation.

3.5 In putting forward a proposal for a General PAP, the Working Group is not intending to change the existing legal infrastructure supporting PAPs. The existing PD-PAC would instead be converted into a General Pre-action Protocol (Practice Direction), for which draft text is set out in Appendix 4. We reiterate, however, that how to give effect to any proposals for PAPs recommended by the CJC is a matter for the CPRC to decide. Further detailed discussion of the thinking behind the general principles, many of which are also relevant to litigation specific PAPs, is also set out in Appendix 5.

Relationship between PAPs and the overriding objective

3.6 Despite the importance that PAPs have assumed in dispute resolution and the subsequent conduct of litigation, they are not expressly referred to in the Overriding Objective. There was widespread support for remedying this omission. For example, the requirement to deal with cases justly and at proportionate cost in CPR 1.1 could include in (2)(f) 'enforcing compliance with rules, practice directions, orders *and any applicable pre-action protocol*.' Similarly, the obligation to actively manage cases in CPR 1.4 could include in (2)(a) 'encouraging the parties to co-operate with each other in the conduct of the proceedings *and in complying with any applicable pre-action protocol*'.

Accessibility and Guidance

3.7 The language for the General PAP should be as user friendly as possible for LIPs, whilst still being clear to lawyers. Lay terms will be used wherever possible and in preference to more technical legal terms, even if the latter may have the benefit of greater precision.

3.8 All digital court processes should provide, or be linked to, portal/s for online pre-action exchanges of correspondence and documents. While this will ensure the courts have access to the PAP documents, this joined up process must also provide a secure sphere in which parties can freely explore settlement options on a confidential basis.

3.9 The PAPs should emphasise that litigation should be a last resort, and parties have an obligation to resolve their disputes fairly, within a reasonable time, and at proportionate cost, and that these obligations apply equally to pre-action conduct as well conduct once a formal claim is commenced. Guidance should stress that parties should engage with each other fairly to resolve their disputes – to deal with complaints promptly and allow enough time for complaints to be dealt with – before even raising the prospect of litigation.

3.10 A number of people on the Working Group commented that a great deal of time and resources can be wasted trying to identify not only the correct defendant, but just who within an organisation was responsible for handling pre-action letters of claim. Accordingly, the Working Group felt it desirable to include specific guidance that large organisations (e.g. public bodies and corporations) should publish on their websites contact information for sending pre-action letters of claim.

3.11 There should be a clear *Jet2 Holidays Limited v Hughes & Hughes* [2019] EWCA Civ 1858 related warning about the consequences of providing knowingly false information. In *Jet2* the Court of Appeal held that providing knowingly false information in purported compliance with a PAP could constitute a criminal contempt of court. Ensuring that all parties, and especially LIPs, clearly understand the potential consequences of providing dishonest information as part of the PAP process accords with basic principles of natural justice.

3.12 Parties would be referred to the litigation specific PAPs to follow where applicable, and advised if they are unsure which PAP to follow, they must comply with the General PAP.

PAP compliance should be mandatory except in urgent cases

3.13 Compliance with the PAP should be mandatory, except in urgent cases including where immediate court intervention is necessary.[34] Where the urgency is created by the need to comply with a time limit, the parties should apply to stay the proceedings to allow the relevant PAP process to be completed.

Proportionality and costs

3.14 As with the present PD-PAC, the guidance should include a proportionality statement including a warning that disproportionate costs incurred in complying with the PAP may not be recoverable. Examples of conduct the courts would consider reasonable and proportionate, and unreasonable and disproportionate conduct, should be given. This proportionality statement should also make clear that where a party has acted dishonestly, or asserted a claim or defence that discloses no reasonable grounds for bringing or a defending claim, they may be ordered to pay the other party's reasonable costs whether or not they are proportionate to the claim.

3.15 Parties should be reminded of their ability to make a formal offer of compromise as a means of limiting the amount of costs they might have to pay, or increasing the amount of costs they can recover. Every PAP should include a link to form N242A to allow parties to make a valid Part 36 offer.

3.16 There should be a new summary costs procedure, independent of Part 8, which would allow the court to determine disputes over costs liability and quantum where disputes settle at the pre-action stage.

[34] Several PAPs have express carve outs for urgent cases including the PAP for Judicial Review (para 6) and the PAP for Disease and Illness Claims (para 2.7).

3.17 The guidance on using expert evidence sparingly, and jointly where appropriate, would remain from the current PD-PAC.

Pre-action protocol steps

3.18 Compliance with the PAP would involve three sequential steps, each of which is dependent on compliance with previous steps. This is designed to ensure that no one is obliged to engage in the more time/resource intensive steps – the good faith obligation to try to resolve or narrow dispute/the stocktake requirement – if one of the parties does not engage with the PAP at all.

3.19 There should be a notice and information exchange, where parties provide details of their claim and defence, including a timeline of events, and key documentation in support, through a pre-action letter of claim and pre-action letter of reply.

3.20 The Working Group believes that under the new general PAP the defendant should be given 14 days to respond to the claimant's pre-action letter of claim but this can be extended by the defendant for further 28 days if additional information, usually expert evidence, is needed for its response. The defendant would still be required to provide whatever relevant information it was in a position to provide within 14 days in a letter of acknowledgement in cases where it did invoke the extra 28-day period to obtain additional information. If the defendant makes a counterclaim in its Pre-action letter of reply, the claimant should have 14 days to respond to it. Parties are free to agree further extensions. The PAP will make clear that parties must disclose the key documents on which it relies in support of their claims or defences, and any other key documents that would enable the other side to understand the case they have to meet. There should be a clear statement in the PAP that neither the pre-action letter of claim nor pre-action letter of reply are subject to legal professional privilege.

3.21 A good faith obligation to try to resolve or narrow the dispute. The PAPs would include a non-exhaustive list of good faith steps parties could engage in to try to resolve the dispute, including making offers of compromise, or engaging in a dispute resolution process such as:

- A meeting between the parties, either virtually, in person, or by telephone, to discuss the scope of their dispute and ways it might be resolved
- Mediation with the assistance of a neutral third party
- Non-binding evaluations by an independent lawyer who advises the parties on the strengths and weaknesses of their respective cases
- Participation in any applicable Ombudsman Scheme
- Participation in any ADR scheme including, but not limited to, schemes that the parties have already joined. Organisations often advertise the ADR schemes they have joined, and consent to using, on their websites.

3.22 The good faith steps must be initiated within 14 days of receipt of the pre-action letter of reply, or agreed within 14 days where the parties opt for a formal ADR process such as mediation or early neutral evaluation. The good faith steps must be completed within 8 weeks of receipt of the pre-action letter of reply, but extensions can be agreed by the parties. There will be a presumption that all communications between the parties in discharging this good faith obligation are confidential and without prejudice communications, except in the case of formal offers of compromise which are governed by the privilege rules set out in Part 36. In all cases, the parties can change the default position where the parties use clear words in their correspondence.

3.23 A requirement to engage in a formal stocktake, where the parties prepare a joint list of issues, which sets out:

- The issues on which the parties agree
- The issues on which the parties disagree and the parties' respective positions in relation to each of them
- A list of the documents that have been disclosed by the parties, and a list of documents the parties are still seeking disclosure of.

3.24 The stocktake report must be completed within 14 days of the conclusion of the good faith step to resolve or narrow the dispute. A template stocktake report should be made available which the parties can use to complete the stocktake.

3.25 If the dispute does not settle at the pre-action stage, the claimant must file the joint stocktake report at the commencement of the proceeding. If the defendant failed to provide a pre-action letter of response or failed to co-operate in completing the stocktake report within the 14-day timeframe, the claimant need only file their pre-action letter of claim at the commencement of the proceeding.

Sanctions for non-compliance

3.26 If the PAP obligations are not complied with, the court should have a full range of sanctions available to it, including the power to strike out a claim or defence in grave cases of non-compliance.

3.27 In deciding whether to impose a sanction for non-compliance the court will consider whether the breach is serious or significant, whether there was a good reason for the non-compliance and all the circumstances. Due leeway should be given to LIPs where non-compliance is the result of a lack of legal knowledge, in accordance with the case management principles developed by the courts for dealing with LIPs.

3.28 The process for raising compliance issues should be formalised. This could be achieved by including a separate question on Directions Questionnaires (DQs) addressing PAP compliance, or requiring parties to formally apply to the court for a sanction to be imposed for non-compliance. The court should retain the power to impose a sanction of its own motion.

3.29 A decision on whether to impose a sanction should be taken at the start of the proceeding, not the end, unless the court considers there to be good reason to postpone the issue.

Case management benefits of compliance

3.30 The court shall have regard to the parties' compliance with the relevant PAP when giving directions for the management of proceedings. Directions should be tailored to reflect the steps undertaken by the parties at the pre-action stage.

3.31 The CPRC should be tasked with the goal of identifying procedural rules that can be modified to avoid the parties duplicating steps, the substance of which were effectively completed at the PAP stage. This might include allowing the parties to rely on the PAP letter of demand or response as their pleadings in appropriate cases, and allowing documents exchanged during the PAP process, to stand as the parties' disclosure in the case.

4 REFORM OPTIONS FOR LITIGATION SPECIFIC PAPS

4.1 In this chapter we set reform options considered by the Working Group that relate to specific PAPs.

Personal Injury

4.2 This is the largest group of PAPs and they provide for over 500,000 new claims per year. Of these, about 80% are already resolving without involving court resource, indicating a good degree of success. Those using the personal injury (PI) protocols are generally legally represented on both sides.

4.3 An early view was reached by the subcommittee that reforms should be approached cautiously, whilst the benefit of improving co-operation was uncontroversial. Modernisation of format was not a contentious proposition especially if there is a new consistency in layout, style and wording.

4.4 Current efficacy in some regards is hampered by issues that are not specific to PI protocols, and those are addressed elsewhere in this report.

4.5 Newer protocols for lower value (sub-£25k damages) injury claims have been developed for specific areas and the subcommittee considered those were not ripe for early reform as they are not obviously "broken". Care will be needed when designing the interface between any revised PI protocols and the low value claim processes.

4.6 Sanctions for non-compliance were debated at length. Whilst requests for extensions are still commonplace it was considered that shortening time frames further within the main protocol would seem to be a recipe for failure. Consideration of elapsed time in the pre-action phase when granting extensions is already part of judicial discretion.

4.7 As to common structure, any revision to the protocols would do well to start with a simple statement of navigation identifying the three consequential steps of information exchange,

good faith efforts to resolve or narrow the dispute and stocktake. This could then be followed by the objectives specific to PI litigation. The dispute resolution section could benefit from being updated and amended to reflect all the available dispute resolution processes, and the benefits of those processes.

4.8 There was a level of support for an overarching injury protocol (as opposed to a general protocol) with users being directed to a subject specific "Part B" for each specialist injury area. Opinion was divided about the virtues of retaining individual injury protocols for each sub-specialism.

4.9 Rehabilitation was an important theme across all the PI protocols; either through the Rehabilitation Code, to facilitate rehabilitation, or to encourage early interim payments for claims with merit. Fuller alignment with, and prominence for, the Rehabilitation Code and Serious Injury Guide in the protocols was commended. This alignment would extend to provisions for better levels of co-operation around evidence gathering too so that duplication of effort was avoided wherever possible.

4.10 Regarding disclosure, its adequacy if liability is denied, and agreed joint route-mapping to resolve disputes, were targets for reform. Some considered that improved compliance with disclosure pre-action would enable the removal of the vast majority of disclosure directions in fast-track claims. Shorter timetables at the case management stage could result.

4.11 Any changes to disclosure of medical evidence pre-action remains a divided issue. Defendants would like some reform in order to level the playing field. Claimants however were markedly uneasy about mandating significant change via the protocols. The subcommittee agreed any reforms would require great care especially if they involved any fundamental changes to current processes. Some were concerned about any potential overlap with the well-established doctrine of legal professional privilege. The majority believed evidence would be required first to validate any proposed changes as necessary and desirable. A number of issues for possible further consultation are contained in Appendix 6.

4.12 On the narrowing of issues, suggestions that correspondence should be attached to the Directions Questionnaire, as proof of protocol compliance, together with a statement of truth found some favour. The problem of parties altering their positions once the claim was subsequently litigated was noted as a particular feature of PI litigation. The subcommittee considered the filing of a mandatory stocktake/list of issues from the pre-action phase with DQs would nonetheless be helpful. There was support for the case summary being front loaded into the stocktake to help to narrow issues, support a timetable, highlight good (or poor) behaviour and help with budgeting. It was mooted that it could even replace the DQ.

4.13 Some considered the ability to obtain judicial directions pre-issue, which is likely to require an expansion of the court's jurisdiction, in cases where parties cannot agree a way forward, might be beneficial.

The Personal Injury Protocol

4.14 This protocol is expressly stated to be aimed at fast-track cases with a "nudge" towards good practice for higher value ones, ranging from moderate injuries to catastrophic injury claims. It may therefore be appropriate to include case-specific and/or multi-track workflow sections in this protocol.

4.15 The process for nominating experts was said by some to require review.

4.16 The protocol as it stands only deals with schedules of loss if liability is admitted. Many cases do settle without full admissions so it may be a good time to revisit the current wording on this point.

4.17 The specialist High Court asbestos list "show cause" procedure was much praised for its success in narrowing issues, reducing costs and achieving greater chance of settlement. It was queried whether this could be adopted to address primary liability in all PI cases outside fixed recoverable costs.

The Clinical Negligence Protocol

4.18 This protocol suffers from many of the issues identified in the personal injury protocol which are more fully set out in Appendix 6.

4.19 Improved transparency around the collation and indexing of medical records by claimants was noted, with a specific request that there be disclosure at the time of serving the letter of claim so both parties know which records are currently available and those still to be obtained and reviewed.

4.20 It was also noted that the protocol requirement to provide details of financial losses at letter of claim stage is not always complied with. The focus can be on liability issues before expending too much time on quantum. On the other hand, some identified quantum being too fully worked up at the pre-action stage in some cases. A possible remedy could be through amplification of the letter of notification to set out steps taken already and those still intended, all subject to a timetable for overall progression. In addition, provision of early information giving at least ballpark quantum brackets would be welcomed by defendants.

4.21 As these cases require expert evidence to assist with liability and causation issues in addition to quantum, the problem of expert availability within the current time limits for letters of response is more keenly felt than for some of the other protocols.

4.22 The appropriate number of expert reports to be obtained before writing letters of claim was a moot point. It may be possible for a future protocol to provide more guidance in this regard.

4.23 Claimants sometimes need to issue proceedings after a full admission, for example where there is disagreement over interim payments for rehabilitation. Defendants expressed a desire to receive advance warning of such a step, with a view to the saving of costs.

The Disease Protocol

4.24 These cases may have a variety of liability issues (limitation, defendant identity, duty of care/employment, breach of duty, causation and apportionment/contribution proceedings) which tend to set them apart from the PI PAP where liability is less frequently in issue.

However, concern was noted amongst claimants that in some cases defendants focus too heavily on contribution proceedings, to the detriment of their obligations to respond on their own liability. Defendants countered they are often given insufficient detail to enable them to investigate properly. Clearly practices vary widely but earlier exchange of information and disclosure should be encouraged wherever possible to help narrow the issues.

4.25 The timing of service of both medical reports and medical records was also an issue identified by some defendants, sometimes arriving too late for any realistic prospect of response in the protocol period. It should be possible to find a workaround solution for this eventuality which may arise without any delay on the part of the claimant.

4.26 Procedures where an insured company has been dissolved currently lead to additional costs burdens so this could be an area where some changes would be helpful.

4.27 The overall view of reform to this protocol was that as it has taken a long time to bed down it would probably be inappropriate at this stage to seek significant changes. The scope for an overarching framework was acknowledged.

The Package Travel Protocol

4.28 The general view was that it would be premature to make any changes to the protocol, which has only relatively recently been embedded into the civil litigation architecture.

4.29 Both claimants and defendants expressed some dissatisfaction with the pre-action disclosure process. In the consultation there were strong calls for reductions in time limits to comply with deadlines to meet specific limitation requirements.

Specific changes considered by the subcommittee for individual protocols

4.30 Recommendations for additional protocols were considered and found favour for the specialisms of abuse work and overseas accident claims.

4.31 Further detail about these possible changes to the PI PAPs and the subcommittee's consideration of them are set out in Appendix 6.

Housing

4.32 The Housing PAPs comprise the Disrepair/Housing Conditions PAP (with one version applying in England and one in Wales) the Possession Claims by Social Landlords PAP and the Possession Claims for Mortgage Arrears PAP. Taking each in turn, the subcommittee's views are summarised below.

Disrepair/Housing Conditions PAP

4.33 Because the vast majority of disrepair/housing conditions claims are brought by individual tenants against social landlords there is usually a significant power imbalance. While acknowledging the lack of any data/experience of unrepresented litigants using the protocol, it was agreed that the current protocol works reasonably well and fulfils the stated aims; the experience was of a very high proportion of cases settling under the protocol. The main problem identified was the recovery of costs when a potential claim settles under the protocol. From the landlords' perspective the problems reported were: (1) protocol correspondence not reaching the relevant department promptly and claims being issued at the first opportunity, and (2) excessively high costs claimed for work carried out under the protocol, including for the instruction of out of area experts. From the tenants' perspective, the main issue was the difficulty of recovering costs when claims did settle under the protocol, giving a perverse incentive to issue a claim to secure the right to a costs order.[35]

4.34 Two possible changes to the protocol could address the issues identified: (1) the introduction of a simplified procedure to determine costs when cases settle under the protocol, one which would determine both liability and quantum. This could be modelled on the current procedure to determine costs 'on the papers' when a JR claim settles prior to permission being granted, but would require a breakdown of the costs claimed; (2) the introduction of a requirement on landlords to specify an address at which PAP letters should be sent.

[35] A combination of restrictions to the scope of legal aid (which covers only the removal of a serious risk of harm to health and safety and not the damages part of a claim) and the rules on track allocation mean that if works are carried out prior to issue, it may be impossible to have any funding arrangement in place to issue the claim at all (where damages are likely to be less than £10,000).

Possession Claims by Social Landlords

4.35 This protocol currently applies only to claims for possession brought by social landlords and comprises three parts. Part 1 deals with reasonable adjustments for vulnerable tenants and capacity issues; Part 2 applies to claims based on rent arrears; and Part 3 applies to claims based on mandatory grounds, requiring an exchange of correspondence where human rights, public law or equality matters may be at issue.

4.36 Again, since a high proportion of social tenants are likely to be classed as vulnerable there is usually a significant power imbalance between the social landlord and the tenant.

4.37 It was generally agreed that compliance was good. Some courts require landlords to file a pro forma checklist confirming compliance which helped to remind landlords of their obligations, which was particularly helpful when proceedings are conducted by housing or rent recovery officers. There was some evidence that in relation to issues of vulnerability and capacity, housing officers sometimes indicated that they had no knowledge of any special needs when in fact such information was known within a different department. In relation to issues of capacity, a checklist, including guidance on the court rules, would be of assistance.

4.38 On the issue of sanctions for non-compliance, the court has the opportunity to consider this at the first hearing but the limited time for each case means that judges, and duty advisers are limited in how much they can scrutinise pre-issue steps. The court generally has extensive discretion as to the orders made at the first hearing and adjournments are common, often giving the parties the opportunity to resolve issues and possibly to reach agreement.

4.39 To improve compliance, consideration should be given to amending the Claim Form and Particulars of Claim (form N119) to require a landlord to confirm compliance with the protocol. An amendment to the protocol giving guidance on litigation capacity would be helpful and this could also be specifically confirmed in an amended Claim Form/Particulars of Claim.

4.40 The subcommittee saw no reason why Parts 1 and 2 of the protocol should not apply to claims brought by private landlords (excluding those brought under the accelerated procedure). However, minor adaptations would be needed to Part 2 as private landlords do not have access

to the same information as social landlords. The increasing incidence of unregulated companies seeking to conduct possession proceedings means that guidance in the protocol on the rules about which bodies are authorised to conduct litigation would be useful. Similarly, the guidance on capacity would be of particular value to private landlords.

4.41 The subcommittee also saw no reason why the protocol should be limited to claims brought on rent arrears grounds. The protocol would be particularly useful in cases based on anti-social behaviour when issues of capacity and vulnerability are often relevant. As with all of the protocols, if a case was sufficiently urgent to require a landlord to apply for an interim injunction, compliance would not be needed.

Possession Claims by Mortgagees

4.42 Again, compliance by claimants is generally good. A Protocol Compliance Checklist (form M23) must be produced at the hearing and this practice could be extended to possession claims against tenants.

4.43 The main problem identified was the lack of clarity about the application of the protocol to 'unregulated agreements'. Commercial mortgages are not covered by the protocol even when the mortgage is secured against people's homes. Also, buy-to-let loans are not covered and the tenants of borrowers often have no forewarning of proceedings that will result in their eviction.

4.44 It was agreed that the protocol should apply to all mortgage claims which involve a property occupied as a home and that compliance should be mandatory.

4.45 It was also agreed that the protocol should be extended to ensure that any occupiers who are not Defendants are informed of steps taken under the protocol which may lead to the loss of their home.

4.46 The subcommittee noted the lack of engagement and attendance by borrowers at possession hearings and recommended consideration be given to requiring protocol correspondence to stress the importance of attending the hearing. The current PAP for Social

Landlords requires the landlord to write to the tenants informing them of the time and date of the hearing. This could also be adopted under the Mortgage Protocol.

4.47 It was also noted that Defendants sometimes put forward unrealistic and impossible defences. Information could also be given under the protocol informing Defendants about the issues the court can and cannot consider and the limits of the courts' powers.

4.48 Further detail about these possible changes to the Housing PAPs and the subcommittee's consideration of them are set out in Appendix 7.

Judicial Review

4.49 The responses to the Preliminary Survey so far as they related to JR highlighted the importance of the PAP process which is well established in JR having been the subject of its own PAP[36] since 4 March 2002. The PAP itself is backed up by the Administrative Court Judicial Review Guide[37] ("Guide") which operates as an authoritative and up to date source on the Court's approach the procedural matters.

4.50 Generally, respondents considered that the current PAP works well in JR in narrowing and sometimes resolving the issues in dispute between parties. Where weaknesses were identified they related to the constraints imposed by the tight JR time limits, failures in early disclosure and the duty of candour and the lack of enforcement consequences where parties erroneously failed to comply with the PAP.

4.51 JR is regarded as a special type of proceeding. It is an ancient common law jurisdiction, to which section 31 of the Senior Courts Act 1981 applies. It is a supervisory jurisdiction, concerned with the accountability to law of public authorities. Public interest considerations pervade. Special remedies are available. One of the reasons why JR proceedings are different from private law proceedings is "because the interests in play are typically not just those of the

[36] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv
[37] The Current 2021 version can be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022369/HMCTS_Administrative_Court_Guide_2021_Final_Web.pdf

parties to the litigation"; they include affected "third parties"; and they include "the public interest" (Guide 2.1.1). It is a jurisdiction which is intensely fact-specific and context-specific. It is a jurisdiction judicially managed through a careful balance of procedural rigour and procedural flexibility.[38]

4.52 Key characteristics of JR mean that bespoke requirements are needed to ensure that the PAP operates effectively and in the interests of justice. These characteristics include:

- The pervading public interest considerations in the operation and subject matters of JR claims
- The wide and sometimes unique range of remedies available which only rarely even include the monetary remedies most common in other litigation
- The tight time limits imposed by the urgency and promptness requirements (including the fact that parties cannot between themselves agree extensions of time and stays on proceedings)
- The established principle – and supporting case-law – as to steps which do and do not constitute an "alternative remedy", whose consequence is that JR is inappropriate
- The existence of legal constraints in some cases whereby an order of the court is required and the parties cannot simply reach a negotiated settlement
- The frequent and often severe power imbalances between claimant and defendant (both in terms of resources and knowledge/information)
- The combination of procedural rigour and procedural flexibility applied and managed by the courts depending upon the interests of justice and the wider public interest.

4.53 These factors mean that a higher degree of flexibility and a less rigid mandatory approach is necessary in the JR PAP. Other factors which may inform a flexible approach on a case by case basis would include whether or not formal ADR is practicable or desirable (it rarely is in JR for the reasons set out more fully in Appendix 8) and whether or not a party is legally represented.

[38] Judicial Review Handbook (7th edition, 2020) at §3.2 (Hart Publishing, 2020).

4.54 Nevertheless, the subcommittee concluded that a new JR PAP should align as closely as possible with the approach in a new General PAP. In particular it should:

- embrace the philosophy and lexicon of the new General PAP
- enthusiastically adopt the proposed 'good faith' principle, and
- adopt the enforcement, costs and proportionality principles.

4.55 JR fits neatly with the philosophy of the new enhanced PAP. It is characterised as a recourse of "last resort". In the context of the JR PAP it is recognised that "so far as reasonably possible, an intending claimant should try to resolve the claim without litigation", so that "starting litigation should be a last resort" (Guide 6.2.1). This links with the principle stated in the particular context of the JR "alternative remedy" principle, again, that JR is "a remedy of last resort" (Guide 6.3.3.1)

4.56 However, where it should depart is in building in flexibility, avoiding prescriptive pre-action steps in performance of the good faith duty and, in particular, excluding the stocktake duty which would be impractical within the time constraints and would serve little purpose in the JR, where the permission stage provides a filter and a further venue for narrowing the issues.

4.57 Subject to this inbuilt flexibility in the JR PAP, the duty of good faith, combined with the enforcement and costs mechanisms, would be particularly well-suited to JR and could assist with addressing the concerns expressed by respondents to the Preliminary Survey relating to failures in the exchange of information and the duty of candour. It would also chime well with the importance of these duties emphasised in the Guide (Guide 7.5, 15.3.2).

4.58 The Administrative Court is familiar, through the M v Croydon jurisdiction (Guide 24.5), with assessing the costs consequences of early resolution on the papers, having regard to all the circumstances including pre-action conduct. The costs and proportionality principles, and in particular the summary costs assessment process, could be readily and easily absorbed and adapted in JR.

4.59 As for early judicial consideration of compliance and the imposition of sanctions, the JR procedure also has a ready-made mechanism for the early consideration of claims – the

permission stage. Any such matters could be raised and considered, to the extent appropriate, at the permission stage.

4.60 Finally, the subcommittee would also provisionally recommend that:

- the Administrative Court is closely involved in the development and drafting of the new JR PAP in conjunction with CPRC, and
- The MoJ is asked to review the availability of Full Representation Legal Aid Funding at the PAP stage of JR litigation in order to best ensure that objectives of the proposed new enhanced PAP can be met.

4.61 All these issues are more fully explored in the subcommittee's full paper at Appendix 8 of this Report.

Debt

4.62 The responses to the Preliminary Survey in relation to the PAP for Debt Claims tended to be polarised along creditor representative and debtor representative/advice agency lines. Those representing creditors felt the time given to respond to the pre-action letter of claim was too long, and that the PAP was used by defence solicitors to mount arguments about compliance with the PAP in order to delay consideration of the underlying debt claim. By contrast, debtor representatives complained that there were no effective sanctions for creditors who failed to comply with the PAP, it was not prescriptive enough in terms of the information creditors should be required to provide to debtors, and that the PAP was too long and confusing for LIPs (albeit that the appendices to the PAP, such as the Information Sheet, did provide helpful information in a user friendly format).

4.63 The PAP for debt claims includes steers towards ADR (para 6) and a requirement to engage in a stocktake (para 8). The Working Group believes that most, if not all, of the general principles set out in chapter 3 would be equally applicable to debt claims. However, this is a field of litigation which is almost always characterised by substantial inequality between claimant and defendant, partly because of its business to consumer structure. The outcome of debt claims can also have significant welfare implications for individual debtors. For these

reasons this is one area where the Working Group believes the case for introducing the good faith obligation and the stocktake requirement is dependent on individual litigants being able to access legal assistance to complete these steps.

4.64 There are also a number of areas of reform specifically related to the debt protocol that the Working Group is considering. The first issue is the time frames for responding to the PAP letter of demand, and timeframes before litigation can be commenced after the PAP process. Is there a case for aligning the time to respond to the letter of demand to the timeframes under the proposed general PAP; namely 14 days with the ability to extend for a further 28 days to obtain further information, specifically in the debt context, legal advice about the debtor's position? It should be recalled that these time frames assume the creditor has already communicated with the debtor about the issue, in accordance with general principle 3.10, so the pre-action letter of claim should not come as a surprise. The creditors failure to communicate with the debtor earlier would certainly be something the court could and should take into account in deciding whether to impose a sanction. Another important consideration about time limits for the debt protocol is whether the guidance on when litigation can be commenced could be clearer and what the time frame should be? The Working Group has not formed any provisional opinions on this issue, but note that some respondents felt that there was ambiguity as to when time begins to run. We would be keen to hear from respondents on this topic particularly if the time frames for pre-action letters of claim and replies are aligned with the timeframes for the general PAP.

4.65 The second issue is whether the content of the letter of claim should be more prescriptive, including requiring the production of certain documents, such as consumer credit agreements where applicable, and identifying possible legal defences debtors may have including limitations defences? Given the business to consumer structure of the PAP there is a reasonable case for regulating the content of the pre-action letter of claim in a manner consistent with that relationship, rather than treating the PAP process as merely facilitating the resolution, or narrowing, of a purely private dispute between formally equal parties. The current protocol already does this to a significant degree. The question is whether it should go further.

4.66 The third issue is the language and length of the PAP. The PAP is undoubtedly long and uses dense legal language. On the other hand, the PAP is principally directed towards businesses using it, and the information that must be included in the pre-action letter of claim is designed to be user friendly for debtors. Would making the language of the PAP more user friendly be helpful for individual debtors? Relatedly, should the language of creditor and debtor be changed to claimant and defendant taking into account the stigmatising effect of the term 'debtor'?

4.67 The fourth issue relates to the integration of the protocol into the MCOL portal (or any successor platform). We doubt this is a controversial suggestion, for all the reasons articulated in paragraphs 2.34-2.49, but we would like to hear from respondents about the value of incorporating the Debt PAP into MCOL, such that the pre-action letters of claim and reply, would become automatically available to the court in the event of litigation.

Construction and Engineering

4.68 The Construction and Engineering PAP underwent reforms relatively recently in 2016. Respondents to the Preliminary Survey who had experience of the protocol were broadly satisfied with it, and perhaps not surprisingly some of those involved in the 2016 reforms felt no further reform was required. However, some respondents had concerns and suggestions relating to some aspects of the reforms, or matters that the reforms did not address. As with responses to other PAPs, concerns about a lax approach to non-compliance was a recurring theme.

4.69 The Working Group is not minded to make major changes to the PAP in light of the relatively recent changes to it, and general satisfaction with it. However, we believe some changes are worth considering. Although the option was introduced only recently, we do not believe that parties should have the right to opt out of the pre-action process. The PAP process is not just designed to assist the parties, but to also assist the court to resolve it justly.

4.70 The Construction and Engineering PAP is one protocol that already has provisions closely resembling a good faith obligation to resolve or narrow the dispute. Incorporating a good faith

obligation would in practice, therefore, constitute business as usual for construction and engineering litigation, although it would convert an expectation to engage in a prescribed ADR process into a formal requirement to take good faith steps which can include, but need not be, a without prejudice meeting between the parties. Previously there was a mandatory obligation to have a without prejudice between the parties, but this was relaxed in 2016, so that there is now only an expectation that parties will usually engage in a without prejudice meeting. The current protocol also envisages a report back to the court under paragraph 9.5 of the protocol on the existence and outcomes of the without prejudice meeting, so the foundations of a stocktake report are arguably already recognised in the protocol.

4.71 The Working Group is also considering aligning the timeframes under the construction and engineering protocol to those proposed for the revised general PAP - 14 days with a right to extend for a further 28 days, and ability to agree further extensions - given some respondents argued in favour of more time. On the other hand, the recent reforms were clearly designed to tighten and shorten the exchange process. Accordingly, we would like to hear from respondents on this issue.

4.72 A further issue to consider is the referee procedure which was also introduced in the recent reforms (see Para 11). While a number of respondents felt no reform of the PAP was required, the comments made about the referee procedure were critical. The CJC would like to hear from respondents as to whether they support the retention of the referee procedure for determining compliance disputes with the protocol.

4.73 The possibility of mandatory disclosure was also raised in responses to the Preliminary Survey. There is, of course, an e-disclosure protocol for disputes in the TCC, and there is a steer towards this in the PAP. However, the Working Group would like to hear from interested parties as to whether a standard for disclosure should be formally incorporated into the PAP and, if so, what standard?

Professional Negligence

4.74 The general principles proposed for the revised general PAP are broadly consistent with current professional negligence PAP with one obvious outlier: the timeframes for responding to a pre-action letter of claim. Professionals are given 3 months to respond which is prima facie excessive given that many other types of litigation also require the collection of expert evidence on multiple questions but do so on a considerably quicker timescale. A number of respondents to the Preliminary Survey with experience of the professional negligence PAP also thought the 3-month time frame was excessive.

4.75 The Working Group is considering aligning the timeframes for responding to the pre-action letter of claim to the proposed timeframes for the revised general PAP. This means defendants could still take up to 3 months to respond with the agreement of the claimant, however the defendant would only have an automatic right to 6 weeks to provide a response where expert evidence or additional information was required to provide it.

4.76 The Working Group believes the good faith obligation to try to resolve or narrow the dispute and requirement to complete a joint stocktake report apply equally to the professional negligence protocol as it does to disputes covered by the general PAP. The Working Group would like to hear from respondents about these proposed changes to the Professional Negligence PAP, or other changes that respondents think should be considered.

Media and Communications

4.77 The CJC did not receive any responses to the survey that addressed the PAP for Media and Communication Claims. The protocol was only recently updated in 2017 following the creation of the Media and Communications List. The structure of the PAP is consistent with the General PAP and therefore the suggested steps could be incorporated into the PAP without any difficulty. The most significant point of difference is that in media and communication claims time is frequently 'of the essence'. This explains why the time limit for responding to the pre-action letter of demand is just 14 days. The Working Group is not minded to recommend any changes to that time limit.

Low Value Small Claims Track

4.78 The CJC published an interim report on small claims in June 2021 and is now working on a final report on the same subject. This Working Group understand that the Small Claims Working Group is actively considering recommending the creation of a new more streamlined track, within the small claims track, for claims worth £500 or less, and a new PAP to accompany it. Most of the general principles could be readily incorporated into this new PAP although some of the key steps could be disproportionate for very low value disputes. This is certainly true of the stocktake requirement. The case for inclusion or exclusion of the good faith obligation to try to resolve or narrow the dispute is more finely balanced.

4.79 The Small Claims Working Group is also contemplating mandatory post-issue mediation for claims under £500. For this reason, the PAP should highlight the need to consider pre-issue mediation/ADR. Given the good faith obligation is non-prescriptive and includes both formal ADR and informal dispute resolution processes, the Working Group believes the obligation would be suitable for inclusion in the new low value small claims PAP.

5 LIST OF QUESTIONS FOR CONSULTATION

Questions relevant to all protocols

1. Do you agree that the Overriding Objective should be amended to include express reference to the PAPs?

2. 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?

3. 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)?

4. 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.

5. Do you agree that PAPs should include a 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.

6. 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 to demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36. In answering this question please do include any suggestions you have as to other ways parties can be incentivised to meaningfully participate in dispute resolution processes at the pre-action stage.

7. 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.

8. 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?

9. Do you agree that PAPs should be based on the accessibility principles and contain the guidance and warnings about pre-action conduct set out in paragraphs 3.8-3.13?

10. 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.

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

12. 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?

13. 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?

Questions specifically related to Practice Direction - Pre-action Conduct

14. 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 PAP set out in Appendix 4.

15. 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?

16. 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'.

Questions specifically related to personal injury protocols

The subcommittee considered the following questions should be consulted on further:

17. Do you agree that there should be a generic PI protocol that incorporates relevant general principles from the general PAP but also identifies PI specific objectives not applicable to other litigation (Part A) with users being directed to a subject specific "Part B" rules for each specialist area?

18. Do you agree that all PI protocols should include a good faith obligation more prominently in the introduction to try to resolve or narrow the dispute?

19. Do you agree that all PI protocols should include an obligation to a complete a joint stocktake report/list of issues and should this be: a) before or after ADR and/or b) filed with the Directions Questionnaire?

20. Do you agree that any revisions to the PI protocols need to be approached with great care to ensure workstreams for multi-track cases are clearly separated out from fast-track work? If so:

a) How could there be effective, referencing to and integration with the Serious Injury Guide where appropriate?

b) How can the current protocols be updated to reflect moderately severe cases as well as catastrophic injury cases despite workflows for each being significantly dissimilar?

21. Do you agree that there should be better integration of each protocol with the Rehabilitation Code? If so, should the protocols require a claimant to identify any rehabilitation they consider would be beneficial, with estimated costs if possible and should it require a defendant to supply reasons if they refuse, or fail to provide assistance with rehabilitation.

22. Do you agree the transitional integration clauses for injury claims exiting fixed recoverable processes and slotting into the main injury protocol require greater clarity?

23. Is there value in being more specific within protocols about the level of quantification work to be undertaken without a route map agreed with the other party and the timetable for commencing proceedings following an admission of liability?

24. Do you agree the management of disclosure pre-issue needs to be strengthened to encourage greater compliance with the protocol? Paragraph 7.1 of the protocol expects the claimant to identify which documents are relevant and why. Should there be equal obligations on defendants to give reasons why they consider a document is not relevant/why they will not disclose a document?

25. Should the claimant's letter of claim state what medical records have been obtained and are available for disclosure and what medical records are still to be obtained?

26. Do you agree that a working group should be established, as a priority, to consider a specific protocol for abuse claims?

27. Do you agree that a working group should be established to consider a specific protocol for foreign accident cases?

28. Should initiatives with third party organisations such as the expert witness community and HMRC be considered to reduce delays in the resolution of injury disputes?

29. Should the PI PAPs deal with the question of what to do where a Claimant obtains medical evidence prior to issue but elects not to serve, and if so, what steps should be open to the Defendant?

30. Prior to commencement of proceedings by the Claimant should the Defendant be entitled to obtain a medical report on the Claimant if the Claimant does not disclose a medical report?

31. Do you agree that the protocol should include provision that for the purposes of rehabilitation the claimant solicitors should give reasonable access for medical assessment when requested by the defendant insurer?

32. If you consider any change to the PI PAP expert evidence process in multi-track cases would be beneficial what would the new process look like?

33. Would an ability to have pre-litigation court case management help dispute resolution in multi-track PI cases?

The subcommittee 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 above.

Questions specifically related to housing protocols

Disrepair/Housing Conditions PAP

34. Do you agree that large corporate landlords should be required to publish an address to which PAP letters should be sent?

Landlord Possession Claim PAP

35. Do you agree that the existing PAP should include information for landlords relating to the rules and procedure when a Defendant may lack capacity?

36. Do you agree that the existing PAP should be amended to require landlords to file a checklist at court when issuing a claim, confirming compliance with the PAP and/or that the Claim Form or Particulars of Claim be amended to require the landlord to confirm compliance?

Extending the PAP to private landlords and non-rent arrears grounds

37. Do you agree that the Landlord possession PAP should be extended to apply to possession claims brought by a private landlord (with the exception of claims brought under the accelerated procedure)?

38. If so, do you agree that such a PAP should include information for landlords about the rules as to which bodies are authorised to conduct litigation?

39. Do you agree that the existing PAP should apply to claims for possession on grounds other than rent arrears grounds?

Mortgage Possession PAP

40. Do you agree that the PAP should be mandatory?

41. Do you agree that the PAP should apply to all mortgage possession claims relating to residential property, including 'buy to let' mortgages?

42. Do you agree that the PAP should be amended to require that occupiers are notified of steps taken under the Protocol that are likely to lead to a possession claim being made?

43. Do you agree that the PAP should be amended so as to provide standard information to borrowers about the powers of the court?

44. Do you agree that the PAP should be amended to require lenders to write to the borrowers to inform them of the time and date of the hearing and the importance of attending?

45. Do you agree that the PAP should be amended to make reference to other forms of ADR available, such as the Business Banking Resolution Service?

Questions specifically related to the JR protocol

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

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

48. Do you agree or disagree that there should continue to be a separate and bespoke PAP for JR?

49. 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?

Questions specifically related to the debt protocol

50. Do you support the introduction of a good faith obligation to try to resolve or narrow the dispute and the requirement to file a joint stocktake report, on condition that debtors have access to legal assistance to complete both requirements?

51. 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 including legal advice)? What changes, if any, would you make to the rules on when litigation can be commenced?

52. Do you think the contents of the pre-action letter of claim should be more prescriptive and, if so, what content should be prescribed?

53. Do you think the language of the pre-action protocol should be made more user friendly and do you support changing the terms creditor and debtor to claimant and defendant?

54. Do you support integrating the PAP for debt claims into the MCOL portal (or any successor platform)?

Questions specifically related to the construction and engineering protocol

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

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

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

Questions specifically related to the professional negligence protocol

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

Questions specifically related to the proposed low value small claims track

59. Would you support the exclusion of the stocktake requirement and the inclusion of the good faith obligation to try to resolve or narrow the dispute in a new PAP for low value small claims case worth £500 or less?

TABLE OF ACRONYMS

Acronym	Expanded description
ADR	Alternative dispute resolution
CFA(s)	Conditional fee arrangement(s)
CJC	Civil Justice Council
CPR	Civil Procedure Rule(s)
CPRC	Civil Procedure Rule Committee
DQ(s)	Directions Questionnaire(s)
DWP	Department for Work and Pensions
ECHR	European Convention on Human Rights
FRC	Fixed recoverable costs
HMRC	Her Majesty's Revenue and Customs
HMCTS	Her Majesty's Courts and Tribunals Service
JR	Judicial review
LIP(s)	Litigant(s) in person
MCOL	Money claims on-line
MoJ	Ministry of Justice
OPRC	Online Procedure Rule Committee
PAP(s)	Pre-action protocol(s)
PD	Practice Direction
PD-PAC	Practice Direction – Pre-action Conduct
PI	Personal injury
SME	Small and medium-sized enterprise

APPENDIX 1 – WORKING GROUP MEMBERS AND TERMS OF REFERENCE

Main working group members:

Chair: Dr Andrew Higgins – Academic and Civil Justice Council Member
Diane Astin – Housing Representative and Civil Justice Council Member
Nicola Critchley – Insurance Representative and Civil Justice Council Member
Daniel Easton – Personal Injury Lawyer, Leigh Day
District Judge Judy Gibson – Civil Justice Council Member
Oliver Hallam – Civil Mediation Council
Deputy District Judge Jonathan Hassall
Andrew Skelly – Bar Council
District Judge Sunil Iyer
Masood Ahmed – Associate Professor, University of Leicester, member of the Civil Procedure Rule Committee
Master Victoria McCloud
His Honour Judge Richard Roberts
Dr John Sorabji – Barrister, 9 St John Street Manchester
Sara Stephens – Law Society

Housing subcommittee:

Chair: Diane Astin – Deighton Pierce Glynn & Brunel University
Sara Stephens – Anthony Gold
Dan Fitzpatrick – Hodge, Jones and Allen
Jamie Saunders – Coastal Housing Wales
Rosemary Keczkes – Leeds City Council & Chair of the Law Society's Housing Committee
Angus King – Housing Lawyers Practitioners Association
Sally Morshead – Shelter
District Judge Judy Gibson – Civil Justice Council Member
David Smith – JMW Solicitors

Judicial review subcommittee:

Chair: Jo Hickman - Public Law Project
Polly Glynn – Deighton Pierce
John Halford – Bindmans
Maurice Sunkin – University of Essex
Mr Justice Fordham

Personal injury subcommittee:

Chair: Master Amanda Stevens
His Honour Judge Richard Roberts
Nicola Critchley – DWF Law and Civil Justice Council Member
Dan Easton – Leigh Day
Brett Dixon – Association of Personal Injury Lawyers
Andrew Underwood - Keoghs

Terms of Reference:

1. What amendments to the PAPs, or associated guidance to litigants in person (LIPs), would be desirable to draw litigants' attention to the effects of *Jet2*?
2. Are there any PAPs that are not fulfilling the purposes of PAPs as originally envisioned by Lord Woolf and/or the purposes currently set out in 'CPR PD-PAC'. What function should PAPs perform in the 2020s?
3. Are there major inconsistencies between PAPs and are these justified by the differences in the litigation to which they relate?
4. Are the "soft sanctions" for non-compliance with voluntary PAPs – case management directions and costs orders – being regularly and consistently applied?
5. Should all PAPs be mandatory? Should any PAPs be mandatory? What should the sanctions for non-compliance be?
6. Are any PAPs overly technical or burdensome to litigants and can they be streamlined?
7. Are any PAPs lacking key steps that ought to be required of parties, or prohibit initiatives that should be allowed?
8. Are PAPs a mechanism for de facto compulsory ADR prior to commencement of litigation? Should they be?
9. What are the ratios of cases settled at the PAP stage compared to post-issue mediation?
10. Should there be any changes to PAPs as a result of the HMCTS reform programme and the digitisation of the civil justice system generally? To what extent are PAPs already online? Should there be further digitisation of PAP steps and guidance?

APPENDIX 2 – PRELIMINARY SURVEY RESULTS AND RESPONDENTS

1. The CJC conducted a preliminary survey to gauge the views of court users on PAPs; how they were working in practice, what their role should be, and priorities for reform. The consultation was opened in October 2020 and closed in December 2020. We received 148 responses, including from barristers, solicitors including claimant and defendant representatives, academics, representative organisations, advice centres, and judicial members. There were also some responses from litigants including LIPs, but the number of LIPs was very low. Any survey raises questions about how representative it is. There is a risk that voluntary surveys of this kind attract a disproportionate number of people who are dissatisfied with the current system. However, these responses undoubtedly provide useful insights into people's experiences of, and views about, the PAPs. A complete summary of all responses to multiple choice questions can be found at the CJC website.[39] In this section we outline some key headlines from the survey including illustrative comments from respondents.

2. Although views were split as to the primary objective of PAPs, when combined with responses to questions about subsidiary purposes of PAPs it is clear that there is general consensus that PAPs serve multiple objectives and the goals of promoting co-operation between the parties, facilitating settlement efforts, narrowing issues in dispute, and helping reduce the overall costs of dispute resolution are particularly important.

Q6: What do you think the primary purpose of PAPs are?

Answer Choices	Responses as percentage	Responses as number
Allow the parties to confirm there is a legal dispute between them	5.15%	7
Narrow any issues in dispute between the parties	24.26%	33

[39] See the Civil Justice Council, Pre-Action Protocol preliminary survey results at: https://www.judiciary.uk/wp-content/uploads/2021/05/CJC-PAP-Preliminary-Survey-Results.pdf

Promote co-operation between the parties	17.65%	24
Reduce the overall costs of resolving the dispute	9.56%	13
Ensure the parties engage in appropriate alternative dispute resolution (ADR) methods to try to settle their dispute before going to court	25.74%	35
To stop people with unmeritorious claims from going to court	2.94%	4
To ensure strong claims are paid/settled without the need for litigation	5.15%	7
Other	9.56%	13
Total	-	136

Q7: What do you think the subsidiary purposes of PAPs are?

Answer Choices	Responses as percentage	Responses as number
Allow the parties to confirm there is a legal dispute between them	30.60%	41
Narrow any issues in dispute between the parties	56.72%	76
Promote an atmosphere of co-operation between the parties	52.24%	70
Reduce the overall costs of resolving the dispute	55.22%	74
Ensure the parties engage in appropriate alternative dispute resolution (ADR) methods to try to settle their dispute before going to court	39.55%	53
To stop potential unmeritorious claims from going to court	50.75%	68
To ensure strong claims are paid/settled without the need to go to court	49.25%	66
Other (please specify)	21.12%	35
Total	-	134

3. Equally significantly, the majority of respondents thought that PAPs had been partially successful in achieving these objectives, and as a consequence most respondents believed that the PAPs do not require major reform and instead minor reforms would be desirable.

Q8: To what extent do you think PAPs have achieved these objectives?

Answer Choices	Responses as percentage	Responses as number
Fully successful	5.76%	8
Partially successful	72.66%	101
They're sometimes counterproductive	15.11%	21
Not at all	6.47%	9
Total	-	139

Q30: Do you believe PAPs require reform?

Answer Choices	Responses as percentage	Responses as number
No reform required	7.89%	9
Minor reforms would be desirable	53.51%	61
Significant reforms required	29.82%	34
Major reforms required	8.77%	10
Total	-	114

4. As for reform priorities, many respondents' suggestions focused on technical amendments to specific PAPs, e.g. changes to particular forms and timings for responses. Some of these suggestions have been taken up by the working group and dealt with in subsequent sections dealing with changes to specific PAPs: see Chapter 4 of this report. This chapter focuses on issues that are likely to be relevant across PAPs including the general PD-PAC.

Compliance and enforcement

5. There was a widespread belief amongst respondents that compliance with the PAPs was variable and non-compliance was higher in the case of LIPs. The possible reasons for this are considered further below, but one question on which there was a surprisingly high degree of

consensus was a belief that the courts were not consistent when enforcing PAPs and applying sanctions for non-compliance.

Q23: Do you believe prospective parties comply appropriately with PAPs?

Answer Choices	Responses as percentage	Responses as number
Compliance is routine	18.18%	22
Compliance is variable depending on the identity of the parties & whether they are represented	67.77%	82
There is often disagreement between parties whether they have complied	14.05%	17
Total	-	121

Q24: Do you believe courts deal consistently with non-compliance with PAPs when making case management directions or imposing costs orders?

Answer Choices	Responses as percentage	Responses as number
Yes	19.63%	21
No	80.37%	86
Total	-	107

6. The comments added by respondents were illuminating and sometimes scathing. Some respondents felt that approaches to compliance varied across different types of cases, and between different judges. By contrast, one respondent observed that a literal reading of this question and a purposive reading would result in two different answers from their point of view. They agreed that the courts did deal with non-compliance consistently, but they did so consistently badly:

> *"[W]e believe that the courts deal with noncompliance consistently, however the way in which they deal with it is wrong. When the defendant's non-compliance is raised as part of a Case Management Conference, judges fail to deal with it appropriately by imposing the sanctions which are available."*

7. A recurring theme is that many courts were reluctant to deal with arguments about PAP compliance at the beginning of the proceeding, instead deferring the issue until the end of the proceeding. Examples include:

> *"Our experience is that there is a lack of consistency in how the courts approach a failure to comply with the protocols and our internal survey suggests we have had very little success in seeking enforcement or any sanctions for a failure to comply. Having said that, by the time a case is litigated, attention tends to turn to the steps required in the litigation process rather than a review of whether there has been compliance with a PAP. Non-compliance can occasionally result in an extension of time for service of a defence."*
>
> *"There is little consistency amongst the judiciary when considering non-compliance. It is often the case that non-compliance will be overtaken by other issues as the claim progresses, resulting in sanctions not being pursued against the defaulting party."*
>
> *"It is rare that costs orders for breach are made - largely because the issue of non-compliance is largely forgotten by the time a matter is resolved."*
>
> *"Despite bringing the matter up on several cases for CMC it has been brushed aside as a lessor issue when time ran out and not brought up later."*
>
> *"I've seen a lot of cases that went to court due to the opponent not complying with the PAP (usually due to failure to respond to the letter of claim). I always raise it at the end of pleadings and in the DQ but I have yet to see cost sanctions being imposed by the party which fails to comply."*

8. The Law Society, which submitted a separate response to the consultation, was also supportive of a more robust and consistent approach to sanctions:

> *"Any changes to PAPs should, therefore, include clear consequences for non-compliance, which could make them far more effective and claims would be much more efficient. The weakness here may not lie with the wording of the PAP itself but in the management and governance of the protocol when it is not adhered to."*

9. Sometimes the concern about a lax approach to sanctions was linked to a failure to promote specific objectives of PAPs, like greater use of ADR.

> *"Litigation is still not considered the last resort but the first. ADR is too infrequently attempted at the PAP stage. The soft sanction of costs is only required by the current PAPs for those not engaging in ADR in exceptional circumstances. Whereas*

if ADR is supposed to be the normal step undertaken at the PAP stage then every defaulter should suffer a costs sanction surely?"

10. A number of respondents felt that the courts' approach to non-compliance was so problematic that a system of automatic sanctions should be introduced. On the other hand, some respondents (albeit a minority) were comfortable with the courts' reluctance to impose sanctions. For example, one respondent stated: "In 15 years of dealing with prof neg claims I do not think I have ever really heard of a sanction for non-compliance. I am pleased about this since on the whole compliance is good and sanctions are usually undesirable."

11. Concern was expressed by some respondents that there were sometimes disputes about whether the parties had complied, but the issue was not raised because there was a lack of judicial guidance about what constitutes significant non-compliance. For example:

"Such issues are for the large part not taken routinely as a contentious point between the parties despite occurring often and there appears to be little judicial guidance as to what constitutes a significant noncompliance, its severity and what sanctions should be applied, if any. Unfortunately, the current sanctions imposed under the CPR for breach or noncompliance with PAPs are inadequate."

12. There was also concern that there was particularly lenient treatment for non-compliance by LIPs.

Finding & Using PAPs for LIPs

13. Opinion was divided as to whether PAPs were easy to locate for LIPs but there was a clear majority who felt aspects of the PAPs were difficult to understand or inaccessible to LIPs.

Q21: To what extent do you consider PAPs to be comprehensible to LIPs?

Answer Choices	Responses as percentage	Responses as number
Very clear and easy to read	18.03%	22
Some aspects are difficult to understand	55.74%	68
They are inaccessible	26.23%	32
Total	-	122

Q22: Do you believe PAPs are easy to locate for LIPs?

Answer Choices	Responses as percentage	Responses as number
Yes	44.44%	53
No	55.56%	65
Total	-	117

14. Respondents felt some PAPs were easier to understand than others and some easier to follow than others due to the availability of helpful template letters. One PAP cited as not user friendly for LIPs was the debt PAP. One respondent to the survey stated:

> *"The debt PAP is 17 pages. it is written in the third party tense, and does not address the person in debt directly. In addition, it refers to the defendant as "the debtor" which is a term that we would consistently argue is not helpful. It stigmatises people with debt problems who are already dealing with shame and stress of dealing with their debt problems. The PAP is not written in plain English and would be incomprehensive to most people. There should be a summary in the letter of claim using prescribed plain English wording that is directive to the defendant as to what steps they need to take. The Information sheet is much better, and addresses the defendant directly, and tries to encourage people to seek debt advice."*

15. There was general acceptance that the PAPs were not drafted with LIPs in mind and hence there was considerable room for improvement in terms of their length, language used, streamlining to make PAPs more consistent, and use of online portals where LIPs could be walked through the process by following onscreen instructions:

> *"In fairness they do not appear to have been drafted with LiP's in mind. This is where streamlining and portals would help e.g. by walking the parties through the process, and thereby steering people to a settlement or to narrow the issues and get the dispute ready for a swift passage through the court process."*

Management

16. A majority of respondents thought PAPs did lead to better case management to some degree.

Q26: To what extent does compliance with PAPs lead to more efficient case management if litigation is necessary (e.g. through narrowing of issues in dispute)

Answer Choices	Responses as percentage	Responses as number
A lot	32.14%	36
A moderate amount	40.18%	45
A little	22.32%	25
None at all	5.36%	6
Total	-	112

17. The JR PAP was cited as an example of how PAP compliance can lead to more streamlined management, and therefore more proportionate litigation:

> *"The PAP process generally ensures that issues are narrowed before a claim is issued. This allows for a proportionate approach to the drafting of grounds, witness evidence, additional disclosure and so on. It allows ensures that case management directions can be properly focused. Hence, while it is not common in JR for claims to settle at a very early stage (in the way that, say, the pre-action process may encourage early settlement in a damages claim), the JR PAP does help to reduce costs overall."*

18. As for what else could be done to transfer the benefits of PAP compliance into better more streamlined case management, respondents were divided. A number of respondents re-iterated the need for courts to deal with compliance disputes at the first case management conference, and in the event of non-compliance consider staying the proceeding to allow parties to take steps that should have been followed at the PAP, especially settlement negotiations. Some respondents doubted anything further could be done to improve case management where claims did not settle. Some practical suggestions put forward by respondents to streamline case management processes on the back of full PAP compliance, included the following:

> *"A formal document or form that sets out what allegations have been accepted by the Defendant in the PAP stage (if any); - CPR disclosure other than the documents that have already been disclosed during the PAP stage."*

> *"If proper compliance has taken place the vast majority of disclosure directions could be removed in Fast Track value claims as one benefit and that could be added as a specific directions questionnaire question."*

"Follow the lead set in part 36 with the claimant's 'win bonus'. You could have a Protocol compliance bonus of some sort."

"[N]arrowing issues is the most useful thing that comes out of matters that are issued – this then moves into the list of issues"

Costs & Proportionality

19. Costs & Proportionality was perhaps the topic that produced clearer divisions than any other topic, though here too there were issues on which there was a degree of consensus.

Q13: Do you believe PAPs help resolve disputes at proportionate cost?

Answer Choices	Responses as percentage	Responses as number
Yes	14.96%	19
Most of the Time	30.71%	39
Some of the Time	40.16%	51
No	14.17%	18
Total	-	127

20. A majority of respondents thought that the PAPs did promote dispute resolution at proportionate cost. Some respondents stated that this was only likely to be true of cases that settle at the pre-action stage, and that where cases did not settle, PAPs tended to have a frontloading effect.

21. A few respondents thought that some cases had been over prepared at the pre-action stage, or rushed to the PAP stage, bypassing internal complaints procedures, or deliberately prolonged at the PAP stage to increase costs.

22. The topic of frontloading produced a perfect split between respondents who felt PAPs frontloaded costs and those that felt it saved costs overall.

Q14: Do PAPs have the effect of frontloading of costs in cases that are not resolved without reaching court? By "court" we mean the formal commencement of a claim in the civil courts. By

"frontloading" we mean the incurring of additional costs that would have been avoided had the claim been directly issued in court.

Answer Choices	Responses as percentage	Responses as number
Yes	50.00%	61
No	50.00%	61
Total	-	122

23. Opinion was also evenly divided on whether the costs recoverable for PAP related work (where costs are recoverable) were fair or not.

Q15: Where costs are recoverable for complying with PAPs, do the costs fairly reflect the amount of work involved?

Answer Choices	Responses as percentage	Responses as number
Yes	36.21%	42
No	37.93%%	44
Not Applicable (Costs not Recoverable)	25.86%	30
Total	-	116

24. By contrast there was a clear consensus that the amount of legal aid allocated to comply with PAPs (where legal aid was available) was too low to cover the costs of the work:

Q16: If you are reliant on legal aid to cover compliance with PAPs does this cover the cost of the work?

Answer Choices	Responses as percentage	Responses as number
Yes	16.67%	9
No	83.33%%	45
Total	-	54

Fitness for Purpose and Flexibility

Q17: To what extent do you believe that PAPs are well adapted to the key issues in the litigation to which they relate?

Answer Choices	Responses as percentage	Responses as number
Very well adapted	27.64%	34
Could be improved	61.79%%	76
Not well adapted	10.57%	13
Total	-	123

25. A majority of respondents thought that PAPs were fit for purpose but could be improved. Here again, there were repeated calls for the courts to scrutinise compliance more carefully and apply sanctions where appropriate.

26. A majority of respondents thought that PAPs were sufficiently flexible, but a significant minority disagreed.

Q18: Are PAPs sufficiently flexible to meet the needs of the prospective parties?

Answer Choices	Responses as percentage	Responses as number
Yes	62.50%	75
No, more flexibility is needed	37.50%	45
Total	-	120

27. Some individual respondents felt that there was too much technicality and variation between PAPs even in areas covering similar issues, and that a more uniform approach would be beneficial, particularly for individuals and consumers. Some respondents thought the PD-PAC was too unstructured and too “woolly” to be of practical use in business to business cases.

28. Pleasingly, a clear majority of respondents thought PAPs were neither overly onerous nor too light in the burdens that they placed on the parties.

Q10: How burdensome are the requirements of PAPs?

Answer Choices	Responses as percentage	Responses as number
Overly burdensome	16.91%	23
About Right	71.32%	97
Too Light	11.76%	16
Total	-	136

PRELIMINARY SURVEY RESPONDENTS

List of respondents and affiliations if response is on behalf of an organisation:

1. A Burn
2. Adam Ballard – Association of British Insurers
3. Adrian Hurlock
4. Alan Hamblett - Beswicks Solicitors LLP
5. Alison Tunwell
6. Andrea Ward – DAC Beachcroft
7. Angela McClean – Credit Services Association
8. Ann Dixon
9. Anna Kelly – GreenSquare Group
10. Anonymous
11. Ben Oliver
12. Brenden Delaney
13. C Steele
14. Caroline O'Hare
15. Caroline Pope
16. Cherie Langschied
17. Chris Bone
18. Christopher MacCafferty – Small Claims Portal LTD
19. Claire Hall – Child Poverty Action Group
20. Claire Prescott – Northwards Housing
21. Claire Williams
22. David Johnston-Keay – Irwin Mitchell
23. David Knapp
24. David Powell – Support Through Court
25. David Withers – Irwin Mitchell
26. Diane Rostron – Addies Solicitors
27. Dr Lisa Whitehouse – Housing Law Practitioners Association (HLPA)
28. Elizabeth Acheson
29. Elizabeth Chan
30. Elizabeth Hargreaves – Midland Heart LTD
31. Ellie Staniforth
32. Frank Marchione
33. Ginny Newman
34. Grant Evatt
35. Guy Platon
36. Harminder Bains – Leigh Day
37. Heather Palmer - Land Law Solutions LTD
38. Heather Stubbs
39. Helen Jackson
40. Henrietta Jackson-Stops – Civil Mediation Council

41. Iain Wightwick
42. Ian Christian – Irwin Mitchell
43. Imran Benson
44. Jack Cantwell
45. Jack McConville
46. James Hall
47. James Ladner
48. Jan Grimshaw
49. Jasper Osei
50. Jenni Wade – Selwood Housing Society
51. Jenny Hutchinson – Wynterhill LLP
52. Jessica Strode - Child Poverty Action Group
53. John Cuss – Hudgell Solicitors
54. John Pugh-Smith
55. John Saville
56. Jon Rowling
57. Jonathan Barker – St Phillips
58. Judge Martin Rodger QC - Upper Tribunal, Lands Chamber
59. Julie Allen – Housing Law Services
60. Katrina Robinson MBE – Shepherd's Bush Housing Association
61. Kevin
62. Kwame McEyeson – Hillingdon Council
63. Laurence Besemer – Forum of Insurance Lawyers (FOIL)
64. Lee Gartside
65. Leigh Day
66. Lianne – Irwin Mitchell
67. Louise Jenkins
68. Lucy Cobb
69. Marie Matthews
70. Maxyne Brown
71. Meg van Rooyen
72. Meyer Hazard – Association of Personal Injury Lawyers (APIL)
73. Michael R Watson
74. MW
75. National Residential Landlords Association (NRLA)
76. Niamh Millross
77. Nicola Critchley – DWF Law LLP
78. Olivia Crowther - Shearer and Co Solicitors
79. Paul Nicholls – Motor Accident Solicitors Society
80. Philip Williams
81. Phillip Copley
82. Phillip Patterson
83. Pierre Haincourt
84. R. Honey
85. Ranjeet Johal Mills – Chody Solicitors LLP

86. Rebecca Maby
87. Richard Anderson
88. Roaihan Khoyratee
89. Rob Thompson – Civil Court Users Association
90. Ron Platt
91. Rosalind Hodder Compton – Coram Children's Legal Centre
92. Rosalind Hodder Compton – The Refugee and Migrant Children's Consortium (RMCC)
93. Rosemary Carroll
94. Sandra Piaskowska
95. Sara Williams
96. Scott Greenwood
97. Sheena Muir Parry
98. Shilpi Jairath
99. Shirley Denyer – FOIL
100. Simon Prew – Irwin Mitchell
101. Simon Thomas
102. Simon Tolson – Fenwick Elliot
103. Sophie Samani
104. Stefan Piechnik
105. Stephen Haythorne
106. Sue Rixon
107. Susan Brown – Claims Portal LTD
108. Tanya Barrett
109. Thomas Lillie – Aberdein Considine
110. Tim Nightingale
111. Tom Short – Leigh Day
112. Tony Guise – DisputesEfiling.com LTD
113. Tony Guise – The Academic Dispute Resolution Working Group
114. Wendy Patricia Beale – Birmingham City Council
115. William Featherby QC
116. Yara Ali-Adib
117. Zenab Valli - Leicester City Council

APPENDIX 3 – A BRIEF HISTORY OF PRE-ACTION PROTOCOLS

1. The PAPs have formed part of civil litigation since the CPR's introduction in 1999. They were one aspect of the Woolf reforms' focus on embedding proportionality, greater economy and greater efficiency into the civil justice system, whilst also reducing the level of adversarial conduct in litigation. Their importance to the reforms cannot be under understated. Lord Woolf viewed them as forming an 'important part of the [reformed] system'.[40] Just as significantly, Lord Irvine LC understood them to be 'key to the success' of the CPR, which in turn would be undermined if they failed to work effectively.[41] They were to 'set effective and enforceable standards for the efficient conduct of pre-action litigation.'[42]

2. The reason behind both these viewpoints was that the PAPs would, if implemented effectively, promote early, satisfactory, and low-cost settlement. Thus achieving proportionate dispute resolution for the parties, as well as ensuring that disputes did not needlessly settle 'at the door of the court' and thus saving court resources, which could more beneficially be allocated to other disputes.[43] The PAPs were to achieve these aims by serving four specific purposes identified by Lord Woolf. Those were:

> *"(a) to focus the attention of litigants on the desirability of resolving disputes without litigation;*
>
> *(b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or*
>
> *(c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and*
>
> *(d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings."44*

[40] Lord Woolf, Access to Justice – Final Report (1996), chapter 10, para.6.
[41] Lord Irvine LC, comments on the launch of the Personal Injury PAP and Clinical Disputes PAP (1998) cited in *The White Book* 2018, Vol. 1, para. C1-A003.
[42] Lord Irvine LC as cited in para. 1.1 of the Pre-Action Protocol for Defamation Claims, dated 3 December 2000.
[43] Lord Woolf, Access to Justice – Final Report (1996), chapter 10, para.3.
[44] Lord Woolf, Access to Justice – Final Report (1996), chapter 10, para.1.

3. The last of the four purposes was given particular emphasis as a means to promote effective case management within the Final Access to Justice Report. The need for compliance with the PAPs was noted as being of specific importance to claims to fast track claims, as it would help to promote the effective operation of the 'tight standard timetable' for such claims.[45]

4. The PAPs were not, however, to form part of the CPR itself or its Practice Directions (PDs). Rather they were intended to take the form of statements of best practice, i.e., soft law[46] for 'specific problems in specific areas'[47] such as personal injury, medical negligence or housing.[48] They were thus not intended to 'provide a comprehensive code for all pre-litigation behaviour'. Once approved by the Head of Civil Justice, on the advice of the CJC, they were then to be incorporated into a 'relevant practice guide'.[49]

5. The main reason for this approach was that Lord Woolf concluded that the PAPs could not be incorporated into the CPR because there was no lawful basis for either to purport to apply to disputes before proceedings had commenced. As he put it, they were, 'outside the scope of the formal rules of procedure, which in the main apply only to proceedings in court.'[50] The CPR only applies to court proceedings,[51] i.e., following the court's jurisdiction over the parties has arisen.[52] One consequence of this is that PAPs cannot be prescriptive i.e., they cannot mandate conduct in the way that rules of court can. To enable the CPR or its PDs to form part of the formal rules of court provision would have needed to be added to the Civil Procedure Act 1997 to enable the CPRC[53] to issue rules governing pre-action conduct or to provide for pre-issue settlement schemes.

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[45] Lord Woolf, Access to Justice – Final Report (1996), chapter 10, para.6
[46] Lord Woolf, Access to Justice – Final Report (1996), chapter 10, recommendation 99, '*Pre-action protocols should set out codes of sensible practice which parties are expected to follow when faced with the prospect of litigation.*'
[47] Lord Woolf, Access to Justice – Final Report (1996), chapter 9, para. 6.
[48] Lord Woolf, Access to Justice – Final Report (1996), chapter 10, recommendation 99.
[49] Lord Woolf, Access to Justice – Final Report (1996), chapter 10, para.14 and recommendation 100.
[50] Lord Woolf, Access to Justice – Final Report (1996), chapter 9, para. 2.
[51] Civil Procedure act 1997, s.1.1. The Civil Procedure Rule Committee has power to make rules to govern the procedure in the civil courts.
[52] *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [17]: the court's jurisdiction over an individual arises when they have notice of proceedings, which for a defendant occurs when service of the claim form, or a pre-action application, occurs. For a claimant it occurs once they issue a claim form or pre-action application.
[53] Similar provision could now be included in any powers to be given to the proposed Online Procedure Rule Committee should the provisions contained in the Courts and Tribunals (Online Procedure) Bill 2019 be reintroduced to Parliament.

6. While the PAPs were not to be introduced into the CPR, they were to be integrated into the CPR indirectly. Compliance and non-compliance with the best practice guidance in the PAPs was to be taken account of by the court in assessing costs should litigation be commenced. It would also be taken account of by the court in managing proceedings post-issue, particularly in considering whether to grant extensions to the case management timetable.[54] Specific reforms were also envisaged which would enable greater use of pre-action disclosure. Applications for pre-action disclosure under powers set out in the Senior Courts Act 1981[55] were then limited to potential claims for personal injury or death.[56] Lord Woolf recommended this power be expanded to enable pre-action disclosure to be ordered by the court in all cases.[57] This expansion was to aid, where necessary, early exchange of information between parties to potential litigation under the PAPs.[58]

The First Generation PAPs

7. The first PAPs, each of which followed the approach articulated by Lord Woolf in the Final Access to Justice Report, were introduced in 1999 with the CPRs' introduction. They were prepared by a number of expert working parties while the Final Access to Justice Report was being drafted.[59] As noted in the White Book:

> *"Soon after publication of the final report, the Law Society took over the further development of the personal injury protocol, setting up a working party of representatives of the Association of Personal Injury Lawyers, the Forum of Insurance Lawyers, of insurers, and the Association of British Insurers, District Judges and the Lord Chancellor's Department. This group refined the draft protocol and arranged for it to be piloted during 1998.*
>
> *The clinical disputes protocol was developed by the Clinical Disputes Forum, an umbrella organisation set up in 1996 in response to Lord Woolf's recommendations that a think-tank on improving the resolution of clinical negligence disputes was*

[54] Lord Woolf, Access to Justice – Final Report (1996), chapter 10, recommendation 101.
[55] Then known as the Supreme Courts Act 1981.
[56] Supreme Courts Act 1981, s.33 as originally enacted.
[57] The recommended statutory amendment was introduced in 1999: The Civil Procedure (Modification of Enactments) Order 1998, art.1(5).
[58] Lord Woolf, Access to Justice – Final Report (1996), chapter 9, para. 6.
[59] Lord Woolf, Access to Justice – Final Report (1996), chapter 9, para. 7-8.

necessary. This draft protocol was subject to wide consultation in 1998/9 with medical, legal and patient bodies.

The personal injury and clinical dispute protocols were published by the Lord Chancellor's Department in July 1998. The aim was to give solicitors, insurers, and healthcare providers in particular, an opportunity to become familiar with the concept and the content of the protocols and to begin to put them into practice."[60]

8. Completed drafts were then considered by Sir Richard Scott VC, then Head of Civil Justice.[61] The first examples of this type of PAP are set out in Table A.

Table A – The Initial First Generation PAPs

Pre Action Protocol	Date on which it came into force
Clinical Negligence	26 April 1999
Personal injury	26 April 1999
Professional Negligence	16 July 2000
Construction and Engineering	2 October 2000
Defamation	2 October 2000
Judicial Review	4 March 2002
Disease and Illness	8 December 2003
Housing Disrepair	8 December 2003

[60] *The White Book* 2018, Vol. 1, para. C1-A003.
[61] White Book 2018 Vol. 1 para.C1A-003.

9. Subsequently, further first generation PAPs were approved by the Master of the Rolls as Head of Civil Justice. They were either promoted by specific interest groups in the relevant field,[62] the Civil Justice Council,[63] or by the Government.[64] They are set out in Table B.

Table B – Later First Generation PAPs

Pre Action Protocol	Date on which it came into force
Possession Claims for Rent Arrears	2 October 2006
Possession Claims for Mortgage Arrears	19 November 2008
Dilapidation of Commercial Property	1 January 2012
Debt Claims[65]	1 October 2017
Resolution of Package Travel Claims	7 May 2018
Media and Communications Claims[66]	1 October 2019
Housing Condition Cases (England)[67]	13 January 2020
Housing Disrepair (Wales)	13 January 2020
Possession Claims by Social Landlords[68]	13 January 2020

[62] See the Pre-Action Protocol for Dilapidation of Commercial Property, which was originally issued by the Property Litigation Association in 2002 albeit not approved in that form by the Master of the Rolls. Following work between the PLA, the Royal Institution of Chartered Surveyors and the Civil Justice Council was approved and issued as a formal Pre-Action Protocol by the Master of the Rolls in 2012: see https://www.pla.org.uk/2017/04/the-dilapidations-protocol/.

[63] See the Pre-Action Protocol for Mortgage Arrears, which originated from proposals by the Civil Justice Council's, then, Housing and Land Committee. See the Civil Justice Council, *Mortgage Arrears Protocol – Consultation Paper*, (2008) https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/consultation+papers/CJC+Consultation+paper+mortgage+arrears+pre-action+protocol.pdf.

[64] See the Pre-Action Protocol for the Resolution of Package Travel Claims, which was the product of Government concerns regarding such claims and its *Call For Evidence On Personal Injury Claims Arising From Package Holidays And Related Matters*, dated 13 October 2017 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652419/gastric-illness-call-for-evidence.pdf and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/724326/Secretary_of_State_signed_letter.PDF>

[65] This PAP originally formed part of the Practice Direction – Pre-Action Conduct, as discussed below.

[66] This PAP replaced the Defamation PAP issued on 2 October 2000.

[67] This PAP, and the equivalent one for Wales, replaced the Housing Disrepair PAP issued on 8 December 2003.

[68] This PAP replaced the Possession Claims for Rent Arrears issued on 2 October 2006.

10. While they did not form part of the CPR, for the reason Lord Woolf gave in the Final Access to Justice Report, they were – again as he anticipated – integrated into it indirectly. First, pre-action conduct, as had been established prior to the CPR's introduction,[69] was taken account of by courts in assessing litigation costs under what is now CPR r.44.2(5)(a). Secondly, costs incurred due to pre-action conduct, including those incurred by CPR Pt 20 defendants,[70] carried out further to the PAPs are recoverable costs in litigation.[71] Thirdly, when giving case management directions the court may take account of compliance or non-compliance with the PAPs or the Practice Direction – Pre-Action Conduct under CPR r.3.1(4)-(6). Fourthly, non-compliance with the PAPs may also justify the imposition of a stay on proceedings.[72] In 2019, their integration with the CPR was taken further by the Court of Appeal in *Jet2 Holidays Ltd v Hughes* [2019] EWCA Civ 1858. It explained how the PAPs were 'an integral and highly important part of litigation architecture', and as such contempt of court proceedings could be brought for where a dishonest witness statement is given by a party purporting to comply with obligations arising under a PAP.[73]

11. They were also indirectly integrated into the CPR through the Practice Direction – Protocols (PD-Protocols), which came into force with the CPR and its PDs on 26 April 1999. It specified, as the Final Access to Justice Report had set out, that PAPs were to be approved by the Head of Civil Justice and that they had three objectives: to promote the early exchange of information between parties to prospective claims, to facilitate early settlement pre-issue; and to promote the efficient case management where litigation could not be avoided.[74]

12. Notwithstanding the fact that the PAPs were not intended to apply to all types of claim, the PD – Protocols also provided that, further to the CPR's overriding objective, the court would expect parties to have acted ' reasonably in exchanging information and documents relevant to the

[69] *Groupama Insurance Company Ltd v Overseas Partners Re Ltd* [2003] EWCA Civ 1846 at [29] – [32].
[70] *Daejan Investments v Park West Club* Ltd [2003] EWHC 2872.
[71] *McGlinn v Waltham Contractors Ltd* [2005] EWHC 1419 (TCC); [2005] 3 All ER 1126 at [10]-[15]; *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC); [2009] 5 Costs LR 787 at [48].
[72] *Cundall Johnson & Partners v Whipps Cross University NHS Trust* [2007] EWHC 2178 (TCC).
[73] For an analysis of the decision see M. Ahmed 'The pre-action protocols are a significant procedural aspect of the English civil justice system but reform is required: Jet2 Holidays Ltd v Hughes [2019] EWCA Civ 1858' (2020) 39(3) Civil Justice Quarterly 193-202.
[74] PD – Protocols, paras. 1.1 and 1.4.

claim and generally in trying to avoid the necessity for the start of proceedings.'[75] The spirit of the PAPs was thus expected to apply more broadly than the application of specific PAPs. As with the PAPs themselves, and the lack of vires to govern litigant conduct before the court's jurisdiction was invoked, the PD – Protocols did not contain any mandatory language.

13. The PAPs and PD - Protocols were subject to periodic reform in October 2005 and April 2006. In 2005, the Practice Direction was amended to include provision encouraging parties to consider the use of ADR. In 2006, the Practice Direction was further amended to emphasise the need to take active steps to consider settlement. The importance of considering ADR was also emphasised by way of amendment to the existing PAPs in 2006.

From General Protocol to Practice Direction – Pre-Action Conduct

14. In 2007, the Master of the Rolls gave the Civil Justice Council the primary responsibility for the future development of PAPs. As a consequence from that time until 2014, it was responsible for considering any proposed amendments to the existing PAPs, whether from the government or interested parties, as well as proposals for new PAPs. The CPRC was also given at that time responsibility for reviewing any such proposals in order to ensure that they were integrated effectively into, and consistently with, the CPR, its PDs and existing PAPs.[76] Oversight of PAPs for the Civil Justice Council was carried out by its PAPs subcommittee until its abolition in 2010 by Lord Neuberger MR as part of wider reforms of the Council's governance structure.

15. The first significant development to the PAPs that the CJC proposed was one of consolidation. By 2007, nine PAPs were in use with the introduction of more anticipated. Concerns were raised that rather than being focused on specific problems in specific types of litigation, PAPs were increasing in number unnecessarily. As a consequence there was an increasing amount of duplication across them, as they all contained the same generic, core, guidance. The PAPs subcommittee thus recommended the PAPs be replaced by a single, consolidated PAP. It was to

[75] PD – Protocols, para. 4.
[76] As noted in, Civil Justice Council, Consultation on Consolidated Pre-Action Protocol (2007) at 3 <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/consultation+papers/CJC+Consultation+on+consolidated+pre-action+protocol.pdf>.

contain the core guidance to each of the PAPs, with subject specific guidance set out in Appendices.[77] While 48% of consultation responses favoured consolidation, the majority opposed it.[78] Reasons for opposition ranged from the time and effort expanded by interested parties in developing the PAPs to concerns that a consolidated PAP would reduce the efficacy of the pre-action guidance.

16. Given the opposition to consolidation, the CJC recommended that its proposal not be taken forward, but rather consideration should be given to developing and introducing a general PAP. That would then become, if introduced, the default PAP for all forms of litigation where there was no discrete PAP. It would also to form a template against which the existing and future discrete PAPs could be benchmarked, and if necessary reformed.[79] The introduction of such a General PAP had previously been considered in 2001 by the Lord Chancellor's Department. Following a consultation on the subject then the idea was rejected on the grounds that such a PAP would be too general and would lead to duplication and confusion. Steps were though taken as a consequence of that 2001 Consultation to extend the content of the PD – Protocols.[80]

17. In 2008 the CJC issued a further consultation on its proposal to introduce a General Pre-Action Protocol. The consultation made two substantive recommendations. First, that a General PAP be introduced to apply to all disputes not subject to a specific PAP.[81] Secondly, the PD– Protocols should subsequently be amended to focus on the courts' power to sanction litigants for non-compliance with the PAPs. It would also contain other generic information, such as the

[77] Civil Justice Council, Consultation on Consolidated Pre-Action Protocol (2007) at 4.
[78] Civil Justice Council, Consultation on Consolidated Pre-Action Protocol (2007) – Summary of Responses.
[79] Civil Justice Council, Consultation Paper – General Pre-Action Protocol and Practice Direction On Pre-Action Protocols (2008) <https://www.judiciary.uk/wp-content/uploads/2021/03/20210301-Consultation-paper-FINAL-02-08.pdf>.
[80] Civil Justice Council, Consultation Paper – General Pre-Action Protocol and Practice Direction On Pre-Action Protocols (2008) at 7 and Annex A (the Practice Direction – Protocols as amended following the 2001 Consultation) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/consultation+papers/CJC+Consultation+A.pdf>.
[81] A draft was published as Annex C to the 2008 Consultation <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/consultation+papers/CJC+Consultaion+C.pdf>.

approval process for PAPs, the objectives of pre-action conduct, the interaction between PAPs and limitation periods.[82]

18. The 2008 proposals were overwhelmingly rejected by respondents to the consultation. 75% of respondents opposed the proposal to introduce a General PAP. The main focus of opposition was that the proposals would introduce an inflexible, prescriptive approach. It was also noted that the drafts General PAP and revised PD – Protocols had used mandatory language, which was considered to be inappropriate where guidance in respect of pre-action behaviour was concerned.[83] It was not, as it should have been, noted or considered by the Civil Justice Council at the time that the use of permissive rather than mandatory language in the PAPs flowed from the lack of vires to mandate behaviour prior to the court having jurisdiction over the parties.

19. While the 2008 consultation did not result in the adoption of a General PAP, it did result in reform to the PD – Protocols. It was revised for a second time, and again its content expanded. That expansion in effect turned it into a general PAP, albeit it was re-issued as the Practice Direction – Pre-Action Conduct, with guidance in three new Annexes covering guidance on pre-action behaviour where no PAP applied, guidance on the provision of pre-action information in debt claims, and guidance on instructing experts. The first of the three Annexes contained, in essence, the content of the proposed General PAP. Consideration was given before the new Practice Direction was issued whether it ought to be issued as a further Practice Direction to CPR Pt 3. Ultimately, it was issued, in April 2009, as a further free-standing Practice Direction.[84]

The Second Generation Protocols – Beyond Best Practice to Quasi-Mandatory Schemes

20. The first generation PAPs were primarily focused on promoting pre-action best practice. The second generation of PAPs differed from these in a number of ways. There are currently three such PAPs: the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic

[82] A draft was published as Annex B to the 2008 Consultation <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/consultation+papers/CJC+Consultation+B.pdf>.
[83] Civil Justice Council, Consultation Paper – General Pre-Action Protocol and Practice Direction On Pre-Action Protocols – Response to Consultation (2008) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Pre-action+protocols/CJC+General+Pre-Action+Protocol+and+Practice+Direction+on+Protocols+-+Response+to+consultations.pdf>.
[84] See Practice Direction – Pre-Action Conduct (April 2009).

Accidents (the RTA Protocol), which was introduced by CPR Update 52 in March 2010 and then revised in July 2013 via CPR Update 65; the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (the EL/PL Protocol), which was introduced by CPR Update 60 in July 2013; and the Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents (The RTA Small Claims Protocol), which was introduced by CPR Update 129 in May 2021.

21. The first generation PAPs were focused on improving early settlement in specific areas of litigation, and were generally developed by stakeholders. Each of the three second generation PAPs were Government-led initiatives to divert claims in specific areas from the courts via providing a quasi-mandatory settlement scheme.[85] This is most obviously seen in the latest of the three PAPs, which forms part of an overall scheme to that effect and which included amendments to the small claims track limit for such claims in CPR Pt 27, a new PD 27B and legislation to introduce tariff damages for whiplash injuries.

> *One consequence of this difference in origin and nature of these PAPs is that, while they too are written in non-prescriptive language, they are quasi-mandatory; a half-step towards mandatory pre-action ADR. This difference with the first generation PAPs arises due to their close integration with CPR Pt 36 and specific fixed cost rules applicable to them in CPR Pt 45.[86] The nature of the difference is best articulated in the following passage from The White Book when discussing the RTA Protocol:*
>
> *"Normally, CPR rules are supplemented directly by practice directions and indirectly by pre- action protocols. Here these relationships are reversed. The RTA Protocol is the primary source governing party behaviour in the claims to which it applies;*

[85] The RTA Protocol was the ultimate result of the DCA's 2007 consultation paper, Case track limits and the claims process for personal injury claims, (CP 8/07) <https://webarchive.nationalarchives.gov.uk/ukgwa/+/http:/www.dca.gov.uk/consult/case-track-limits/cp0807.pdf>; The EL/PL Protocol's introduction followed an announcement by the Prime Minister, as noted in the Minutes of the Civil Procedure Rule Committee, CPR 12/46, 5 October 2012, 'In January 2012 the Prime Minister announced that the RTA Protocol limit was to be increased from £10,000 to £25,000 and extended to employers' liability and public liability claims.' The RTA Small Claims Protocol was introduced as part of wider Government reforms to reform the whiplash claims process: see https://www.gov.uk/government/publications/whiplash-reform-programme-information-and-faq/whiplash-reform-programme-information-and-faq

[85] See Practice Direction 8B; CPR Pt 36, section 11; CPR Pt 45, Section III. The Resolution of Package Travel Claims PAP is a hybrid form of PAP as it is broadly modelled on the Personal Injury PAP albeit, like the second generation PAPs, it provides for the application of a fixed costs regime under CPR Pt 45 where the claimant is legally represented.

[86] See Practice Direction 8B; CPR Pt 36, section 11; CPR Pt 45, Section III. The Resolution of Package Travel Claims PAP is a hybrid form of PAP as it is broadly modelled on the Personal Injury PAP albeit, like the second generation PAPs, it provides for the application of a fixed costs regime under CPR Pt 45 where the claimant is legally represented.

Practice Direction 8B builds on [it] and provides special and limited court procedures for the purpose of determining the claim if settlement is not achieved (and for some other purposes); and Section II of CPR Pt 36 (RTA Protocol Offers to Settle) and Section VI of Pt 45 (Fixed Costs) provide the legal framework, not only for the [the final part of its procedure] but also for the pre-action negotiating processes, in effect supplementing Practice Direction 8B and the RTA Protocol."[87]

22. These differences between the first and second generation PAPs led to Lord Neuberger MR raising the question with the CPRC subcommittee that was working on PAPs whether the second generation PAPs ought not to be called PAPs. That matter was not taken forward.

The Jackson Review and Partial PAP Reform

23. The next phase in development of the PAPs arose as a consequence of the Jackson Costs Review. The Jackson Preliminary Report called for a radical rethink of the PAPs as there were concerns that they had become counter-productive and were resulting in unnecessary costs.[88] The Review's final recommendations were that the Construction and Engineering PAP be amended to render it less prescriptive, the PD – Pre-Action Conduct be revised to, in effect, return it to its original scope as the PD – Protocols. This latter recommendation was to be carried out by abolishing sections III and IV of the Practice Direction and omitting Annex B, which would be re-issued as a discrete Debt PAP.[89] The repeal of sections III and IV, which set out the General PAP material, was to be put into effect as the Review concluded that it 'served no useful purpose': its 'one size fits all' approach was of no utility. It was also noted as generating unnecessary costs and had been opposed at the time it was introduced.[90] That opposition was, as noted above, to the proposal for a General PAP, which was sidestepped by the introduction of the content of that proposed PAP into the Practice Direction – Pre-Action Conduct. Specific recommendations were also made to simplify and update various PAPs, such as the Defamation PAP, Personal Injury PAP.

[87] The White Book 2019, Vol. 2 at C13A-005, and see C15A-009.
[88] Sir Rupert Jackson, *Review of Civil Litigation Costs: Preliminary Report*, (2009), Vol. 2 at 426.
[89] Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report, (2009) at 354.
[90] Ibid at 353.

24. The Jackson Review recommendations were implemented by a Civil Justice Council Working Party, during 2011-2012, in liaison with Sir Rupert Jackson.[91] It was initially responsible for finalising, with stakeholders, the PAP on Dilapidation of Commercial Property. Its form and structure were intended to provide a template for the review and reform of the existing PAPs and for future PAPs. The Working Group also prepared a draft Debt PAP, a revised draft Practice Direction – Pre-Action Conduct and draft General PAP, a revised draft Defamation PAP (to be renamed as the Publications PAP), and a substantially revised Personal Injury PAP. The draft General PAP was prepared in order to enable consideration by the Master of the Rolls whether to implement Sir Rupert Jackson's recommendation for its abolition.

25. In 2012, responsibility for reviewing and revising existing PAPs and devising new ones was, however, transferred by Lord Dyson MR to the Civil Procedure Rule Committee. The Civil Justice Council was, however, to retain responsibility for a general responsibility for keeping PAPs as a whole under review. One particular consequence of that transfer was that responsibility for finalising the various revised draft PAPs, and completing a review of all the other PAPs, was transferred to a subcommittee of the Civil Procedure Rule Committee. Its revisions did not go as far as the Jackson Report might have envisaged. It, for instance, concluded that while the Practice Direction should be revised to make it less prescriptive, its general PAP provisions should be retained rather than be abolished or, as the Civil Justice Council set out as an option for reform, be placed into a discrete General PAP.[92] The ultimate conclusion of the revision process was the publication of revised versions of the existing PAPs,[93] a revised Practice Direction on Pre-Action Conduct and the publication of the Debt PAP.

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[91] HH Graham Jones, John Sorabji, David di Mambro <https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/archive/pre-action-protocol/>.

[92] The White Book 2019, Vol. 1 at C1A-015 '*In 2012 the Civil Justice Council considered these [the Jackson Review] recommendations and drafted a very short General Protocol. This was passed to the Civil Procedure Rule Committee who decided, on balance, that a Pre-action PD continues to have a role as there are categories of cases for which there is no specific protocol, including contractual disputes and debt, wills, probate, some land and neighbour disputes, and Trusts of Land Act claims, in many of which parties are increasingly unrepresented, and need guidance on appropriate pre-action steps. However, CPRC accepted that the PD could not be as prescriptive as the protocols that apply to particular types of claims. The Practice Direction was amended and came into force in April 2015.*'

[93] Revised versions of the Personal Injury, Clinical Negligence, Professional Negligence, Housing Disrepair, Possession Claims, Mortgage Possession Claims were issued in 2015.

The Briggs Review

26. The final stage of the PAPs development arose within Lord Justice Briggs' (as he then was) Civil Court Structure Review. It recommended the introduction of a discrete online court, which would have a three-stage process governing civil litigation. Its recommendations are in the process of being implemented, albeit a discrete online court is not to be introduced. The reform process recommended is, however, being implemented by way of digitisation of civil procedure generally.

27. One particular recommendation made by the Briggs Review involved the abolition of the PAPs.[94] With the implementation of a three stage online procedure, Stage 1 of the process, which would provide the means to assist litigants, and particularly litigants-in-person, would help to promote settlement. PAPs would no longer be necessary. Their role would be overtaken by the structure of the online process, which would thus give effect to their objectives in a new form.

28. The HMCTS Reform Programme, including the various digitisation initiatives that form part of it, has not wholly incorporated Lord Justice Brigg's vision for a single online court. But whatever the shape of England & Wales online justice system, which is continually evolving, there will continue to be a need for pre-action procedures (whether known by that name or something else) that assist the parties in identifying the parameters of their dispute, facilitate dispute resolution efforts, and help prepare the case for litigation should that become necessary.

[94] Sir Michael Briggs, *Civil Court Structure Review, Preliminary Report*, (2016) at 76; *Civil Court Structure Review, Final Report*, (2016) at 52.

APPENDIX 4 – REVISED DRAFT TEXT AND JOINT STOCKTAKE TEMPLATE FOR GENERAL PRE-ACTION PROTOCOL (PRACTICE DIRECTION)

Title	Number
The Protocols[95]	Para. 1-9
False statements and contempt of court	Para. 10-11
Proportionality	Para. 12-18
Steps to be taken before starting court proceedings	Para. 19
Compliance with this protocol and the specific protocols	Para. 20-24
Limitation	Para. 25

The Protocols

1. The PAPs set out the steps the parties must take before starting proceedings. The parties must not start court proceedings without first complying with a protocol. Compliance with a protocol is mandatory except in urgent cases. An urgent case would include, for example, where a limitation period (i.e. the time limits for a starting a claim) is about to expire or where a party is applying for an urgent injunction (i.e. an order from the court that the defendant do something or stop doing something). If proceedings are started, then the court may require that the parties have complied with the relevant protocol.

[95] PRACTICE DIRECTION – PRE-ACTION CONDUCT AND PROTOCOLS - Civil Procedure Rules (justice.gov.uk)

2. The protocols are intended to encourage the early exchange of information between the parties and to provide a framework within which the parties, acting in good faith, can explore the early resolution of their dispute without the need to start proceedings, or narrow their dispute so that any proceedings can be resolved more quickly and at lower cost.

3. Litigation should be a last resort. Parties should engage with each other (e.g. discuss the dispute) to try to resolve their dispute before raising the prospect of litigation. Claimants should give defendants a reasonable time to deal with complaints, and defendants should deal with complaints promptly. Nothing in this guidance prevents a claimant from starting court proceedings if their complaint is not resolved by a defendant.

4. Large organisations (e.g. public bodies and companies) should publish contact information, including an email address, for handling pre-action letters of claim.

5. By engaging with the protocols, the parties must try to resolve their dispute fairly, within a reasonable time, and at proportionate cost. The parties must actively cooperate with each other to achieve the overriding objective (Civil Procedure Rule 1.1(1)) which is to enable the court to deal with cases justly and at proportionate cost. These obligations apply equally to conduct before as well as after proceedings have started and include complying with the relevant protocol, the Civil Procedure Rules, court orders and court directions.

6. There are specific protocols for certain types of disputes. If a specific protocol applies to a dispute, then that protocol must be followed. The specific protocols are:

    - Pre-Action Protocol for Resolution of Package Travel Claims
    - Pre-Action Protocol for the Construction and Engineering Disputes
    - Pre-Action Protocol for Debt Claims
    - Pre-action Protocol for Media and Communications Claims
    - Pre-Action Protocol for Personal Injury Claims
    - Pre-Action Protocol for the Resolution of Clinical Disputes
    - Pre-Action Protocol for Professional Negligence
    - Pre-Action Protocol for Judicial Review

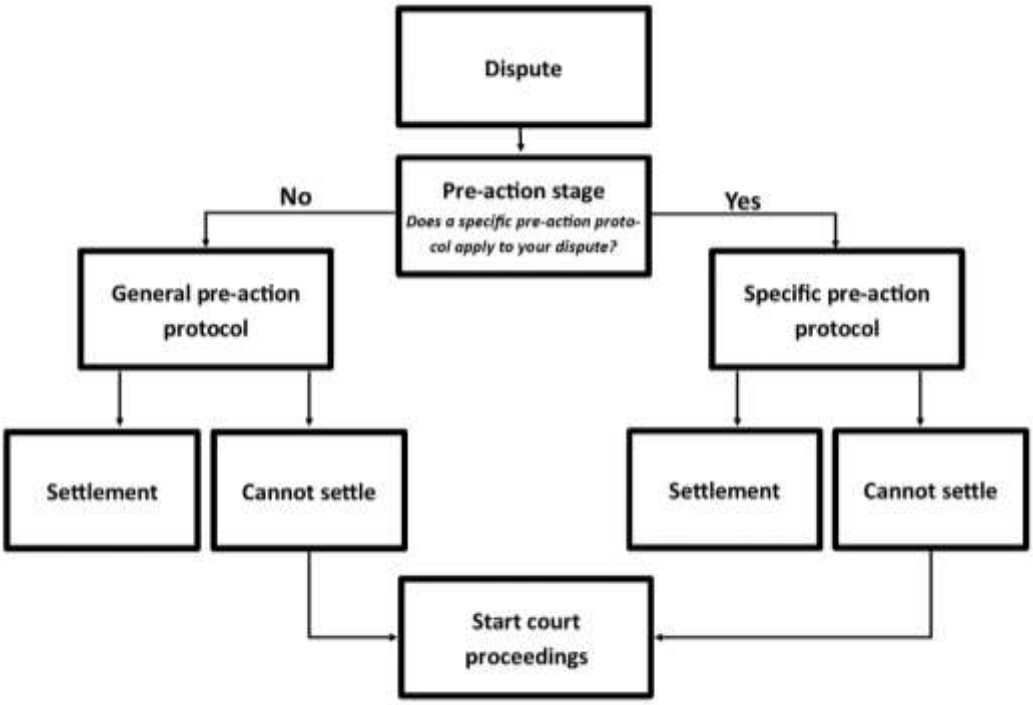
- Pre-Action Protocol for Disease and Illness Claims
- Pre-Action Protocol for Housing Conditions Claims (England)
- Pre-Action Protocol for Housing Disrepair Cases (Wales)
- Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property
- Pre-Action Protocol for Possession Claims by Social Landlords
- Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents
- Pre-Action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy (the 'Dilapidations Protocol')
- Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims
- Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents ("The RTA Small Claims Protocol")

7. If there is no specific protocol that applies, or where the parties are unclear on which protocol should apply, then the parties must comply with this protocol before starting proceedings.

8. The general principles set out in this protocol also apply to the specific protocols, but do not, in any way, change the specific procedural steps which the parties are required to take in those protocols. The general principles are:

    - Starting court proceedings should be a last resort.
    - There must be an early exchange of relevant information.
    - The parties should behave reasonably and proportionately.
    - The parties should negotiate in good faith to try to settle their dispute or narrow the issues.

9. Below is a diagram setting out the processes that parties must follow at the pre-action stage before starting court proceedings.



False statements and contempt of court

10. Co-operating with each other means that the parties must be honest with each other at all times. Providing false information without an honest belief in its truth can lead to severe sanctions, including criminal sanctions.

11. Proceedings for contempt of court may be brought against any person who provides false information in a document which contains a statement of truth, whether prepared before proceedings have started or during proceedings.

Proportionality

12. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal or factual issues.

13. Examples of reasonable and proportionate steps include:

- describing the relevant law in objective and clear terms to LIPs (people who do not have a lawyer representing them), and providing them with a copy of the relevant protocol;

- offering to agree relevant facts in order to narrow the issues between the parties.

14. Examples of unreasonable or disproportionate steps include:

    - requesting information or documents that are already in a party's possession, or are irrelevant or of marginal relevance to the dispute;
    - requesting information or documents for ulterior purposes (i.e. unrelated to resolving the specific dispute between the parties);
    - withholding relevant information that would, if given to the other party, avoid them incurring additional expense in preparing their case.

15. The costs incurred in complying with this protocol or a specific protocol should be proportionate to the dispute. Proportionality takes into account a range of factors including the sums and issues involved and the complexity of the dispute. Where parties incur disproportionate costs in complying with a specific protocol or this protocol, those costs may not be allowed as part of the costs of the proceedings.

16. It should be noted that the court must give permission before expert evidence can be relied upon in proceedings and the court may limit the fees recoverable. Many disputes can be resolved without expert advice or evidence. If it is necessary to obtain expert evidence, particularly in low value claims, the parties should consider using a single expert, whom they jointly instruct, with the costs shared equally between them.

17. Parties should be aware that they can make a formal offer to settle the dispute under Part 36 of the Civil Procedure Rules. The primary benefit of a formal settlement offer is that even if the offer is not accepted, if the party who made the offer obtains a better outcome from the court than their offer, they will obtain protection against the amount of costs they have to pay if they lose the case, or increase the amount of costs they can claim if they win the case. To make a formal settlement offer, the parties can use this form N242A – Offer to settle (Section I – Part 36) (publishing.service.gov.uk). Parties are free to make offers to settle their dispute by other methods e.g. writing a letter setting out the proposed terms of settlement.

18. If a party is found to have acted dishonestly, or made a claim or defence that shows no reasonable grounds for bringing or defending the claim, that party may be ordered to pay the other party's reasonable costs whether or not they are proportionate to the claim.

Steps to be taken before starting court proceedings

19. The parties must take three sequential steps before starting a claim; each subsequent step is dependent on compliance by both parties with the previous step. The three steps are:

(i) Early exchange of information

The claimant must provide the defendant with a letter which concisely sets out the details of the claim. The defendant must then respond, in writing, to the claimant's letter within 14 days and provide whatever information it may have in response to the claimant's letter. Where the defendant requires more time to provide a full response, in order to obtain expert evidence for example, it must write to the claimant within 14 days stating that it will respond fully within a further 28 days. If the defendant makes a counterclaim, then the claimant must serve a reply to the counterclaim within 14 days of receiving it. The parties may agree to reasonable extensions to these timeframes.

The defendant's reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed.

The claimant's and defendant's letters must disclose and attach any key documents on which the parties rely in support of their claims or defences (e.g. a copy of the contract, receipts) and the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

All parties must provide sufficient information to enable each party to understand each other's position and to meaningfully engage in good faith efforts to resolve or narrow the dispute.

The claimant's letter and the defendant's reply are not privileged (i.e. they can be used in court proceedings) and will stand as the parties' disclosure in court proceedings. This is subject to the court having the power to order further disclosure where appropriate in accordance with the relevant rules.

(ii) Good faith obligation to try to resolve or narrow the dispute

Where the parties have complied with (i) above, they must, in good faith, try to resolve or narrow the dispute in a timely manner and at proportionate cost. This good faith obligation does not require the parties to compromise the claim or defence, but rather it requires the parties to engage with each other co-operatively with the aim of exploring ways of resolving or narrowing the dispute. Not acting in good faith includes, for example, causing unnecessary delays in organising and engaging with a dispute resolution process or failing to cooperate in completing a stocktake report.

Good faith steps to resolve or narrow the dispute include, but are not limited to, making formal settlement offers to resolve the dispute, or engaging in a dispute resolution process such as:

- A meeting between the parties, either virtually, in person, or by telephone, to discuss the scope of their dispute and ways it might be resolved;
- Mediation: a neutral third party (called a 'mediator') assists the parties to try to resolve their dispute;
- Early neutral evaluation: non-binding evaluations by an independent lawyer who advises the parties on the strengths and weaknesses of their respective cases;
- Any applicable Ombudsman Scheme;
- Participation in any ADR scheme including, but not limited to, schemes that the parties have already joined. Organisations often advertise the ADR schemes they have joined, and consent to using, on their websites.

Parties must initiate a good faith step, which may include inviting the other party to participate in a dispute resolution process, within 14 days of receipt of the defendant's letter of reply. Any dispute resolution process must be completed within 8 weeks of receipt of the defendant's letter of reply, but the parties are free to agree further extensions.

Formal settlement offers are without privilege except as to costs (i.e. they cannot be used against the party who made them if the matter goes to court but they can be taken into account when the court is making costs orders). All other communications between the parties when engaging in good faith steps to resolve or narrow the dispute are privileged. Invitations to the other party to engage in a dispute resolution process are not privileged (i.e. they can be used if the matter goes to court) and can be shown to the court to demonstrate compliance with the protocol.

If parties wish to rely on their communications in court proceedings, they must clearly indicate this in their correspondence.

Even if taking these good faith steps does not resolve the dispute at this stage, positive engagement can, nevertheless, help to narrow the issues between the parties, avoid misunderstandings, and help the parties to appreciate each other's cases. It may also assist the parties to settle the dispute in future.

(iii) Stocktake

Where the parties have complied with (i) and (ii) above but are unable to resolve the dispute, the parties must review their positions before the claimant starts court proceedings. The parties should continue to co-operate and should prepare a joint pre-action report, or list of issues, which concisely sets out the following:

- The issues on which the parties agree;
- The issues on which the parties disagree;
- The claimant's position on the issues still in dispute;

- The defendant's position on the issues still in dispute.
- A list of the documents that have been disclosed by the parties, and a list of documents the parties are still seeking disclosure of.

The parties can use the template stocktake report [a link would be provided once published] to complete the report.

The stocktake report must be completed within 14 days of the conclusion of the good faith step to resolve or narrow the dispute, and be filed by the claimant with its statement of case (i.e. the document that sets out the claimant's case) when proceedings are started. The claimant can commence proceedings without filing a stocktake report 14 days after the conclusion of the good faith step to resolve or narrow the dispute if the defendant fails to co-operate in completing a stocktake report.

The parties are not required to complete a stocktake report where the claim amount is £500 or less.

Compliance with this protocol and the specific protocols

20. The court will consider whether all parties have complied in substance with the terms of a specific protocol or this protocol, and is not likely to be concerned with minor or technical infringements.

21. The court may decide that there has been a failure to comply with a protocol when a party has:

a) not complied with one or more steps referred to in paragraph 14; or

b) acted unreasonably in such a way as to undermine the objectives of the protocol.

Where there has been non-compliance with a protocol, the court may order that:

a) the parties are relieved of the obligation to comply or further comply with a protocol;

b) the proceedings are stayed while particular steps are taken to comply with a protocol;

c) sanctions are to be imposed.

22. When deciding whether to impose any sanctions, the court will consider whether the breach was serious or significant, whether there was a good reason for it, and all the circumstances of the case. The court may impose one or more of the following sanctions:

a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;

b) an order that the party at fault pay those costs on the indemnity basis (i.e. at a higher rate than would otherwise be the case).

c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;

d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate (not exceeding 10% above base rate) than the rate which would otherwise have been awarded;

e) strike out a claim or defence (as the case may be).

23. The court will decide whether there has been non-compliance with the protocol and whether to impose a sanction at the earliest practical opportunity after compliance has been properly raised by one of the parties , unless the court considers it appropriate to defer the issue until a later stage.

24. The Court will take into account compliance with this or any specific protocols when giving directions. Directions shall be tailored to reflect the steps undertaken by the parties at the pre-action stage.

Limitation

25. This protocol and the specific protocols do not alter the statutory time limits for starting court proceedings. If a claim is started after the relevant limitation period has expired, the defendant will be entitled to use that as a defence to the claim. If proceedings are started to comply with the statutory time limit before the parties have followed the steps in a protocol, the parties should apply to the court for a stay of the proceedings in order to allow them to comply with a protocol.

General Pre-Action Protocol (Practice Direction) Joint Stocktake Template

Note: This document should be completed only after the parties have completed all previous PAP steps, namely (1) Early Exchange of Information and (2) Good faith obligation to try to resolve or narrow the dispute. See paragraph 17 of the General Pre-Action Protocol (Practice Direction) for further details.

Section 1 – The Parties

Claimant(s)	
Defendant(s)	

Section 2 – Good Faith Steps to Try to Resolve or Narrow the Dispute

Please indicate the good faith step or steps the parties engaged in to try to resolve or narrow the dispute. Only one step is required, but please tick all that were undertaken:

Steps	**Yes**
A meeting between the parties, either virtually, in person, or by telephone, to discuss the scope of their dispute and ways it might be resolved	
Mediation: a neutral third party (called a 'mediator') assists the parties to try to resolve their dispute	
Early neutral evaluation: non-binding evaluations by an independent lawyer who advises the parties on the strengths and weaknesses of their respective cases	
Any applicable Ombudsman Scheme	
Any dispute resolution scheme that the defendant has joined and advertised on its website	
An offer of compromise	
Other (Please specify)	

Section 3 - List of Agreed Issues

The parties agree on the following matters relevant to their dispute

	Details
1	
2	
3	
4	
5	
6	
7	
8	

Create additional rows or continue on separate sheet if required

Section 3 – List of Issues in Dispute

	Issue	Claimant(s)' position	Defendant(s)' position
1			
2			
3			
4			
5			
6			
7			
8			

Create additional rows or continue on separate sheet if required

Section 4 – Disclosure

4A Documents Disclosed by the Parties

(NB: There is no need to attach the documents to the stocktake report)

	Documents disclosed by the Claimant(s)	Documents disclosed by the Defendant(s)
1		
2		
3		
4		
5		
6		
7		
8		

Create additional rows or continue on separate sheet if required

4B Documents the Parties have requested but have not yet been disclosed

	Documents requested by the Claimant(s)	Reason for the request	Defendant(s)' reason for not disclosing
1			
2			
3			
4			
5			

Create additional rows or continue on separate sheet if required

	Documents requested by the Defendant(s)	Reason for the request	Claimant(s)' reason for not disclosing
1			
2			
3			
4			
5			

Create additional rows or continue on separate sheet if required

Section 5 – Signatures

Signature on behalf of Claimant(s)	Date
Signature on behalf of Defendant(s)	Date

APPENDIX 5 – FURTHER EXPLANATION OF THE GENERAL PRINCIPLES

1. While most of the proposed general principles set out in Chapter 3 are self-explanatory, some warrant elaboration to explain the thinking behind them, partly because a number of the principles are also relevant to litigation specific PAPs and some principles generated significant debate and discussion amongst the Working Group.

Mandatory Nature of PAPs

2. There are reasonable grounds for thinking the PAPs are already de facto mandatory, due to the various sanctions that courts can apply for non-compliance. Although it may be conceptually defensible to argue that PAPs should constitute guidance only, and some members of the Working Group still feel that is the ideal position, most believe that the benefits of PAPs will not be fully realised unless compliance with them is mandatory. It is not suggested that PAPs should be mandatory in all cases. Urgent cases requiring immediate court intervention should certainly be exempt. A more difficult question is whether the exceptions should extend further to include claims considered so lacking in merit that they will be the subject of a summary judgment procedure. The Construction and Engineering PAP includes such an exception. From a purely legal standpoint, this exception is entirely sound as it may be unfair, and in many cases disproportionate, to require a party to engage with hopeless claims (and defences). On the other hand, such an exception might rob PAPs of their social utility in forcing parties to engage with each other to explore the root causes of their dispute, help parties understand their legal obligations and rights, and explore creative solutions if parties are having difficulty complying with their obligations. On balance, we think that a weak cases/summary judgment exception should not be incorporated into the general principles, but applied to particular PAPs where appropriate, but we would like to hear from interested parties on this point.

Costs & Proportionality – Summary Costs Procedure

3. This proposal was originally put forward by the subcommittee looking at housing PAPs. The Working Group considered it may be potentially helpful in a broader range of disputes. The case for a new summary costs procedure to resolve costs disputes for cases that do settle at the pre-action stage is designed to eliminate a perverse incentive not to settle at the pre-action stage – that to do so prejudices a party's costs position. A new procedure that allows parties to litigate about costs is not a perfect solution to deterring parties from litigating for costs related reasons, but a new summary procedure will limit the scope of any costs dispute and avoid the wasted expense of litigating the underlying claim when the parties are already in effective agreement about what the substantive outcome should be. There are similar procedures already in place, but none fully cover disputes about liability and quantum for claims resolved at the pre-action stage. The CPR provides for costs only proceedings under CPR 46.14, in combination with CPR 8, but the limitation with that procedure is that it relates only to quantum disputes where the parties have already agreed who is liable to pay costs. The Administrative Court also has a procedure for claims settled prior to permission being granted, in which the court determines costs on the basis of written submissions. However, in such cases the claim has already been issued, in contrast to claims settled at the PAP stage. It was acknowledged that the current Part 8 procedure may remain the best solution for such cases, but some find the Part 8 procedure to be unnecessarily complex and onerous, and a simplified paper-based procedure would be a proportionate way of resolving costs disputes.

4. There was some concern on the Working Group that if settlement were to open up a defendant to unknown adverse costs liability, it may incentivise them not to settle and instead take their chances with court adjudication. The risk of costs affecting litigant behaviour in undesirable ways is very real in the English system,[96] and one of the reasons for recommending a new summary costs procedure. The procedure would allow defendants to contest their liability to pay costs and/or the quantum of such costs, however defendants would still be able to make

[96] For a critique of the way cost rules in England & Wales tend to generate more costly litigation, and more satellite litigation about the costs of litigation, see A Zuckerman, *Zuckerman on Civil Procedure* (4th Ed, Sweet & Maxwell 2021) Ch 27.

settlement offers that are conditional on resolving costs issues e.g. each party bear their own costs, costs are inclusive, costs are fixed etc. As a consequence, the summary costs procedure is only likely to be useful where parties are willing to settle the underlying claim whilst referring the issue of costs to a judge. It is difficult to know how many cases might fall into this category and whether it is large enough to justify a summary costs procedure, which is why the Working Group is keen to hear respondents' views on this question. In order to ensure that costs disputes remain proportionate, and the workload on judges tolerable, the rules regarding this procedure, such as length of submissions, will need to be tightly circumscribed. Any appeal process would also need to be severely restricted. Given the summary nature of the jurisdiction, and the fact that it will cover many claims of modest value, it may be justifiable to have no rights of appeal at all.[97]

5. Finally, the relationship between summary costs procedures and fixed recoverable costs (FRC) must also be acknowledged. The government has recently announced its extension to expand the use of fixed recoverable costs.[98] If the extended use of FRC also covers resolution of claims at the pre-action stage this will reduce the number of cases with outstanding costs disputes over quantum. However, the fact that the costs procedure in CPR 46.14 applies to cases with FRC regimes shows that such procedures still have a role to play in disputes subject to FRC.

Pre-action Protocol Steps

Notice and information exchange

6. There was widespread consensus amongst the working group that guidance on time frames for responding to a pre-action letter of cases should be as clear as possible. Whilst it was acknowledged that extensions may be justified in some cases, it was felt that these extensions

[97] Another option is to adopt some version of the procedure under CPR 47.15 (CPR47.15) which provides for provisional papers assessments of costs in detailed assessment proceeding. Parties can request an oral hearing after the paper assessment, but there are costs sanctions if the oral hearing does not improve the position of the party by a significant degree (20%). The procedure works well in relation to quantum of costs; however, it is not well suited to disputes about liability to pay costs, which the summary costs procedure is also intended to cover.

[98] https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/results/extending-fixed-recoverable-costs-civil-cases-government-response.pdf

should be circumscribed to those cases where they were really needed, namely cases requiring expert evidence.

7. Given the PAP will include guidance that claimants and defendants should engage with each other to resolve disputes before raising the prospect of litigation, it should be a very rare case where a pre-action letter of claim comes as a surprise to a defendant. Accordingly, the Working Group believes that 14 days will usually be a sufficient period of time for the defendant to provide their pre-action letter of response, with the right to take a further 28 days to collect additional information. This right should not, however, allow the defendants to delay any response; information that can be provided within 14 days must be provided within 14 days, even if a full response requires more time. The parties are free to agree further reasonable extensions.

8. To increase the likelihood of parties' willingness to settle or narrow their dispute at the pre-action stage, and to ensure that any agreed outcomes are fair, the parties need access to accurate information about the strengths and weaknesses of each other's cases. Negotiations in the dark are inherently difficult and rarely lead to just outcomes. The Working Group believes that one of the strengths of the PAP process is that the exchange of information as part of the letter of claim and reply is appropriately tailored to the goal of allowing parties to explore settlement options. The current PD-PAC expressly links the information that is required to be exchanged to this objective. There was substantial discussion among the working groups about the extent and method of disclosure at the pre-action stage. There was general support for requiring more, but proportionate disclosure at the pre-action stage across most PAPs, recognising that in some areas disclosure had become too onerous and deliberately scaled back (Construction and Engineering being one example). One of the benefits of litigation specific PAPs is that it enables the identification of very specific categories of documents that should be exchanged, e.g. medical reports in personal injury cases. Prescriptive disclosure of certain types of documents becomes more difficult, however, in a general PAP which covers different types of disputes. An important question is whether it is appropriate to incorporate a general standard for disclosure, given the array of standards available under CPR 31 and the new Disclosure Pilot. The wording set out in the proposed general PAP is taken partly from the

standard for Initial Disclosure under the Disclosure Pilot in Practice Direction 51U but also includes “known adverse documents”, language which is also taken from the Disclosure Pilot. For some types of disputes that test goes beyond what parties would ordinarily be required to disclose if litigation was commenced (e.g.in small claims track cases, though the court does have power to order further disclosure even on the small claims track), but falls short of what would be required for cases subject to CPR 31 where standard disclosure is ordered. However, we consider this wording is likely to be more helpful to parties than the current, somewhat ambiguous wording in the PD-PAC that the parties disclose “key documents relevant to the issues in dispute.” We note the standard of disclosure does vary across PAPs. For example, the PAP on Professional Negligence incorporates the test in CPR 31.16 (pre-action disclosure) as an outer marker of what should be exchanged through the letter of claim and reply. We would like to hear from respondents as to whether a standard for disclosure should be included in the general PAP, and what that standard should be, given the general PAP will cover claims to which CPR 31 apply as well as those that do not.

9. The rule stating that pre-action letters of claim and reply are not privileged would amount to an abrogation of privilege and would require primary legislation to abrogate what is a common law right. This proposed change is designed to deal with the specific problem raised in the recent case of *Victorygame Limited, Surjit Singh Pandher v Ahuja Investments Limited* [2021] EWCA Civ 993. Ordinarily the question of privilege would not arise in the context of PAP exchanges between the parties who go on to become the first tranche of disclosure between parties to litigation. A pre-action letter of claim and reply are not intended to be confidential as between the parties, and hence no issue of privilege could ever arise between them.

10. However, in *Victorygame* the claimants sought information from their former solicitors using the Professional Negligence PAP. The claimants did not subsequently commence an action against their former solicitors but instead brought an action against the defendants for damages in respect of misrepresentations said to have been made in the context of a property transaction. This alone would not constitute abuse. It is perfectly conceivable that the outcome of the PAP process is that it becomes clear that the claimant does not have a claim against the proposed defendant but instead has a claim against a third party. Indeed, an important

function of the PAPs is to clarify who is the correct defendant and/or insurer on risk for an action where the recipient of a pre-action letter of claim asserts that they are not the right entity.

11. However, cases where the PAP process sheds light on who are the proper parties to a dispute can be distinguished from cases like *Victorygame* where the claimant subsequently admitted that the PAP process was not used for the purposes of pursuing a claim against the former solicitors, but to deceive them into supplying information they were seeking for a claim against a third party.[99] The claimants used the PAP to extract information from their former solicitors, judging that the solicitors would not voluntarily disclose the information unless litigation was threatened against them. Using PAPs to trick people in supplying information in support of claims against third parties is an abuse of the PAP process. The rules provide options to obtain pre-action disclosure, including from third parties, where that is necessary in order to dispose fairly of the claim or to save costs.[100] Importantly, these rules require the court's permission, and the court has a discretion over whether to order disclosure.

12. One option considered by the Working Group was whether to require pre-action letters of claim and replies to be verified by a statement of truth. Their inclusion at the PAP stage would be intended to perform the same function statements of truth fulfil for court documents and witness statements: to discourage parties from making knowingly false or unsupportable claims and defences. In light of the Court of Appeal's decision in *Jet2*[101] that knowingly false statements in pre-action correspondence can constitute a contempt, a statement of truth would also provide an important warning function to the parties about the necessity for honesty in pre-action exchanges. On balance, however, the Working Group felt that statements of truth should not be required at the pre-action stage on the grounds that it might lead to parties being overly cautious in pre-action stages, to engage in defensive litigation behaviour

[99] The claimants admitted the deception in order to maintain a claim to litigation privilege over the PAP correspondence, which the Court of Appeal upheld.
[100] See CPR 31.17.
[101] *Jet2 Holidays Limited v Hughes & Hughes* [2019] EWCA Civ 1858

and/or incur additional legal costs. This is a matter the Working Group would like to hear respondents' views on.

Good Faith Obligation to Resolve or Narrow the Dispute

13. The legality of mandatory dispute resolution obligations, and the case for imposing them, is set out in Chapter 2.

14. It is important to stress that a good faith obligation to try to resolve or narrow the dispute would not compel the parties into a specific ADR process. Nor would it require the parties to compromise their claim or defence. ADR and offers of compromise would be sufficient but not necessary steps to discharge a parties' good faith obligation. Instead, the parties' obligation is to engage and co-operate with each other in exploring ways of resolving or narrowing the dispute. Only in extreme cases would a party's conduct in an ADR process constitute bad faith – for example, where it amounts to a de facto failure to engage in the process.[102]

15. A critical question is whether there are cases where a good faith obligation to resolve or narrow the dispute should not apply? Chapter 2 sets out categories of litigation where the Working Group believes the obligation should be conditional on individual litigants having access to legal assistance. However, it is also important to consider whether there are scenarios or litigants to which the obligation should not apply, regardless of the category of case. As set out in chapter 2, the Working Group believes that some vulnerable parties should be able to decline to participate in dispute resolution processes, or to complete a joint stocktake requirement, without the benefit of legal assistance. Relatedly, in types of litigation where there are severe power imbalances, could a mandatory obligation of this kind be used by stronger parties to intimidate weaker ones into not suing/not defending claims? The answer to this question is partly dependent on the content of the good faith obligation, and whether it would require in person contact (physically or virtually) with or without a neutral party. The non-exhaustive list

[102]Accordingly, we think the decision of *Carleton (Earl of Malmesbury) v Strutt & Parker (A Partnership)* [2008] EWHC 424 at [72] where the successful party was penalised for their unreasonable conduct in mediation is wrong. The court stated: "[A] party who agrees to mediation but then causes the mediation to fail by his reason of unreasonable position in the mediation is in reality in the same position as a party who unreasonably refuses to mediate." The decision is arguably better explained by the court's discretion to take into account offers of compromise that are not privileged, or privilege has been waived by the parties, when making cost orders.

set out above mandates some form of engagement with the other side in addition to the information exchange through the Pre-action letter of demand and response. While there are some on the Working Group who think a further exchange of letters would be sufficient to fulfil this good faith requirement, the reason it was omitted from the indicative list is because there is a risk it would lead to some parties merely repeating their exchanges at step 1. The philosophy behind the good faith obligation is that where the information exchanged at step 1 has not resolved the dispute, the parties should be required to try something different.

16. Jurisdictions that do something similar to the proposed good faith obligation have tended to keep the list of exceptions relatively narrow. For example, Australia imposes, at a federal level, a requirement to take 'genuine steps' to resolve a dispute before commencing proceedings. Section 4 of the Civil Dispute Resolution Act 2011 (Cth) provides that:

> *"…[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."*

17. The Act provides a non-exhaustive list of genuine steps.[103] The list of exceptions to the genuine steps requirement predominantly focuses on criminal or regulatory proceedings, certain administrative proceedings and proceedings under legislation which have their own ADR processes.[104]

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[103] Which includes 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;
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.

[104] Civil Dispute Resolution Act 2011 (Cth) section 15 and 16.

18. Ontario imposes a more prescriptive requirement of mandatory mediation but only once actions have been commenced and pleadings closed.[105] Its list of exemptions is also relatively narrow. These include family law proceedings; commercial list actions; mortgage actions; Construction Lien Act actions, except trust claims; Bankruptcy and Insolvency Act actions; class actions and actions which are exempt pursuant to a court order. Ontario has been reluctant to relieve parties of the obligation to mediate on a case by case basis. One judge explained the judicial reluctance this way:

> *"I have discretion under Rule 24.1.05 of the Rules of Civil Procedure to make an order exempting the action from mandatory mediation. However, it is an order that courts typically granted sparingly. Mediations are not only about settling an action (although that is typically their goal). They also serve the important function of distilling and narrowing issues for determination, and often result in resolution of specific issues, even if the balance of disputed matters proceed through litigation."*[106]

19. In O.(G.) v H.(C.D.) (2000), the court produced a helpful list of criteria to be considered when deciding whether to exempt parties from mandatory mediation:

> ***"****Whether the parties have already engaged in a form of dispute resolution, and in the interest of reducing cost and delay, they ought not to be required to repeat the effort;*
>
> *whether the issue involves a matter of public interest or importance which requires adjudication in order to establish an authority which will be persuasive if not binding on other cases;*
>
> *whether the issue involves a matter of a modest amount with little complexity which is amenable to a settlement conference presided over by a judicial officer without examination for discovery;*
>
> *whether or not one of the litigants is out of the province and not readily available;*
>
> *whether the exemption for any other reason would be consistent with the stated objectives of reducing costs and delay in litigation and facilitating early and fair resolution."*[107]

[105] Rule 24.1 of the Ontario Rules of Civil Procedure. The requirement is confined to the district comprising Toronto.
[106] *Allen v Kumar* [2021] ONSC 5529 [21].
[107] *O. (G.) v H. (C.D.)* (2002) 50 O.R. (3d) 82 [13].

20. Cases in which the discretion has been exercised include cases where the judge concluded there was no real prospect of issues being narrowed, cases where there had already been ADR processes or other efforts to resolve the dispute, or already in progress.[108] By contrast, judges have declined to exercise their discretion where one party was in fear of the other, stating that a skilled mediator could appropriately deal with such concerns.[109]

21. Two final observations on mandatory dispute resolution obligations in other jurisdictions are worth making. First, they are sometimes clouded in controversy when first introduced. In Ontario, for example, the requirement was formally opposed by some members of the rules committee when it was first introduced. However, over time the obligation becomes part of the litigation landscape even if they do not enjoy universal support.[110] Secondly, it is widely appreciated that the success of these obligations cannot be assessed by reference to settlement rates alone,[111] but also to the that extent that they foster certain norms of pre-action conduct and improve the litigation process where litigation becomes necessary.[112]

22. Although the international experience is insightful, because there is no exact precedent for a good faith obligation of the kind considered in this report, we are especially keen to hear from respondents about the scope of this proposed good faith obligation, the suggested timings to complete it, and the cases in which it ought not to apply. One factor that we think is relevant in deciding whether the obligation should apply is the settlement rate once litigation is commenced. If court adjudication is rarely necessary in a particular field, it is not unreasonable to infer that such cases are likely to benefit from pre-action efforts to resolve the dispute. Of course, some cases may need judicial intervention that falls short of a full trial on the merits.

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[108] *Allen v Kumar* [2021] ONSC 5529; Scott v George Weston Ltd [2004] ONSC 11880

[109] *O. (G.) v H. (C.D.)* (2002) 50 O.R. (3d) 82

[110] Jennifer Egsgard, 'Mandatory Mediation in Ontario: Taking Stock After 20 Years' 16 July 2020 (Ontario Bar Association) https://www.oba.org/Sections/Alternative-Dispute-Resolution/Articles/Articles-2020/July-2020/Mandatory-Mediation-in-Ontario-Taking-Stock-After

[111] One jurisdiction with good data on settlement rates is Hong Kong. Like Ontario, Hong Kong operates a system of de facto compulsory mediation immediately post-issue for all claims except personal injury cases where mediation must occur at the pre action stage. According to the Hong Kong Ministry of Justice, between 50 and 60% of cases are resolved at the mediation stage: Hong Kong Judiciary, 'Mediation Figures and Statistics' https://mediation.judiciary.hk/en/figures_and_statistics.html

[112] R Haan et al "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months" (2001), p. 2 (Available at https://digitalcommons.osgoode.yorku.ca/faculty_books/115/

For example, parties may need preliminary decisions on points of law, or would be assisted by early neutral evaluation from a judge. However, even these categories of cases may benefit from pre-action attempts to narrow the dispute.

The stocktake report

23. The case for a concrete stocktake obligation has also been set out in Chapter 2. A requirement to complete a stocktake report/list of issues will allow the parties to conduct a final check before litigation as to the status of their dispute; identifying what has been agreed between them, and the issues that are still in dispute. In some instances, it may become apparent that the parties are so close together that the stocktake might prompt renewed efforts to fully resolve all aspects of the dispute. In other cases, the stocktake becomes the first step towards transferring the benefits of the PAP process into the litigation process, by mapping the parameters of their (remaining) dispute. The stocktake could also perform the practical function of recording the parties' pre-action disclosure with a view to assisting the court identify what further disclosure, if any, is needed.

24. One concern raised during consultation was whether the work involved in a stocktake report would be disproportionate in very low value disputes. The Working Group agrees that a de minimis threshold is appropriate and thinks claims worth £500 or less should be exempt from the requirement. This figure would align with proposed changes to the procedures for handling low value small claims currently under consideration by the CJC's Small Claims Working Group.[113]

25. The possibility of a formal stocktake report draws attention to an issue that already exists under the current PAPs – the extent to which parties should be free to adopt different positions in litigation to those which they took in their PAP letters of claim and replies. In principle, there are five main ways of approaching the issue of whether parties can change positions taken at the PAP stage in subsequent litigation (with variations on each also possible):

    - Changing positions could be made impossible without permission of the court

[113] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/small-claims/

- Parties could change their positions but could be estopped from resiling from any admissions made during the PAP process.
- Parties could change their position but may face a costs sanction for doing so, especially where the change causes delays or prejudice to the other party
- PAP documents could have no protected status either preventing parties from changing positions, or allowing parties to change positions; they would constitute a PAP document that the court may take into account when giving directions.
- PAP documents could be made formally without prejudice; they would amount to working documents to help parties understand what the other side might argue in any subsequent litigation, if the dispute cannot be settled at the pre-action stage.

26. All of these options have their strengths, but the weaknesses of the options at both ends of the spectrum are also clear. Precluding any change at all without permission is likely to lead to a significant frontloading of costs, as parties convert the PAP process into formal pleadings. On the other hand, privileging all PAP documents would mean the value of the PAP process is principally confined to giving the parties an opportunity to settle the case. In cases where there was no settlement, the PAP process would become an effective cul-de-sac with limited or no material benefits to the litigation process.

27. The question of whether and, if so, when parties should be estopped from resiling from pre-action admissions is properly a matter for the courts. A court could take into account a party's change in position when giving directions as part of its overriding obligation to deal with cases justly and at proportionate court. As for the possibility of costs sanctions, we note the PAP for professional negligence claims expressly confers the court with a discretionary power to impose a sanction. Paragraph 9.2.2 of that PAP[114] states: "The Letter of Response is not intended to have the same formal status as a Defence. If, however, the Letter of Response differs materially from the Defence in subsequent court proceedings, the court may decide, in its discretion, to impose sanctions." Whether a similar rule should be adopted for the stocktake report, if a

[114] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_neg#Response

requirement to produce a report were adopted, is a question on which we would like to hear interested parties' views.

28. Finally, one concern raised during working group discussions was the possibility of delay caused by a failure to agree the stocktake report. There is nothing in the proposed stocktake requirement that would give one party a veto over the contents of the report. While the parties are encouraged to find agreement on as many issues as possible, in some cases the list of agreed issues may be very short and the list of issues in dispute rather long. The parties may even dispute the relevance of an issue. The stocktake report is not meant to be a contentious document. It allows the parties to record all their differences; it is not a contract, but a map of the parameters of the parties' dispute. In cases where a defendant fails to co-operate in producing a stocktake report, the claimant would be free to start court proceedings without a stocktake report.

Sanctions for non-compliance

29. The most common complaint made during the preliminary consultation was that there was considerable variation in the courts' enforcement of PAPs, and too often no sanctions were imposed for non-compliance. There was a perception that non-compliance among LIPs was particularly high. Difficulties in accessing and understanding the PAPs are likely to be a contributing factor to this.

30. It is difficult to say whether there is a culture of optional compliance with PAPs amongst 'repeat players' (i.e. parties who often litigate in the courts) and represented parties. Only a minority of respondents felt compliance with PAPs was routine, so it is arguable that the potential benefits of PAPs are being realised in an uneven way, and the court's variable approach to sanctions could be a contributing factor to the variable levels of compliance.

31. Despite 80% of respondents to the preliminary survey saying that the courts did not deal with compliance consistently, and most of those respondents wanting a more robust approach to enforcement, there was lively debate amongst the Working Group about whether this was a

desirable objective and how it should be given effect to in relation to the court's powers, the principles governing their exercise, and the process for determining compliance disputes.

Powers

32. The courts already have extensive powers to deal with non-compliance with a PAP. A court may order that:

    - the proceedings are stayed while particular steps are taken to comply with the PAP;
    - the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;
    - the party at fault pay those costs on an indemnity basis;
    - if the party at fault is a claimant who has been awarded a sum of money, it may make an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;
    - if the party at fault is a defendant, and the claimant has been awarded a sum of money, it may make an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.

33. Some Working Group members believed that the sanctions already available were sufficient. While it is possible that the real problem lies not in the courts' lack of powers, but rather their preparedness to use them, a number of Working Group members felt that the courts should have the full range of powers available to it – including strike out powers to deal with grave cases of non-compliance – and that this issue should at least be consulted on. Ensuring the courts have the full range of sanctions in their armoury to deal with non-compliance will give them greater flexibility to impose proportionate sanctions, and send a signal to all court users that the PAPs must be taken seriously, and in cases of grave non-compliance can even result in striking out of statement of case or defence (as the case may be).

34. Not all sanctions incentivise compliance in the same manner, or are equally fair in the burdens they impose. For example, a stay may be a strong deterrent for claimants, but have little effect on a prospective defendant who may in fact welcome a further delay in resolving the dispute.

Principles regarding sanctions

35. The debates amongst the Working Group about the proper approach to sanctions essentially took the same form as the historical debates over decades, both prior to and following the introduction of the CPR and the subsequent Jackson reforms, about the proper approach to non-compliance with rules and court orders. On the one hand, there are those who think that a stricter approach to non-compliance will lead to more satellite litigation, litigants will engage in opportunistic and tactical behaviour, and compliance disputes will consume more judicial time and effort, all of which increase costs and delays in litigation. On the other hand, there are those who think that one of the root causes of high costs and delays in dispute resolution is the failure to comply with the relevant procedural rules, and PAPs, and that stricter enforcement of these requirements will lead to higher compliance, and in turn, lower costs and fewer delays. In a common law system, any change in the approach to sanctions is likely to lead to some litigation in the short term as the boundaries of the new approach are tested by litigants. It should also be acknowledged that introducing strike out powers increases the risk of satellite litigation because the stakes in compliance disputes becomes higher. There are, however, sound reasons to believe that any uncertainty about the court's approach to compliance in the PAP context, is likely to be relatively short, largely because the Court of Appeal has already gone through the difficult process of refining its approach to sanctions, and relief from sanctions, for non-compliance with rules and court orders. Readers will recognise that the suggested principles for deciding whether to impose a sanction are derived from the case law on granting relief from sanctions for non-compliance under CPR 3.9: see in particular *Denton v TH White* [2014] EWCA Civ 906. Significantly, those principles are similar to the guidance in the current PD-PAC which states courts will 'consider whether the parties have complied in substance with the terms of the relevant pre-action protocol or this Practice Direction and is not likely to be concerned with minor or technical infringements:' (para 13). Similarly, para 16 requires the court to take into account the effect of non-compliance when imposing a sanction.

36. The courts are the appropriate place to develop this guidance on the proper approach to sanctions, including for non-compliance with PAPs. Noting, however, that a stricter but not technical approach to enforcement will require a culture change from both parties and the courts, we think there is some value in getting the legal conversation started and setting out in this report some general observations regarding how these well established principles might apply to disputes about PAP compliance. As one respondent to the Preliminary Survey stated, there is still a lack of guidance as to what constitutes a serious breach of a PAP.

37. In our view defects in the quality of compliance would rarely be sufficiently serious to warrant a sanction at the severe end of the scale being imposed, e.g. a stay or strike out, unless the relevant PAP makes clear that certain information or a document must be provided. Sometimes the material exchanged by a party can be so lacking or derisory that it amounts to a de facto failure to complete a pre-action step, and in those circumstances we think a stay or even strike out may be warranted depending on the circumstances of the case. It follows that we believe that a failure to comply with any of 3 PAP steps where they do apply (i.e. a failure to provide a pre-action letter of demand or pre-action letter of response; a failure to make a good faith attempt to resolve the dispute, or a failure to complete the stocktake joint list of issues) would prima facie constitute a serious breach. Ordinarily, in such cases, the courts inquiry would then move to consideration of whether there was a good reason for the non-compliance and all the circumstances of the case.

38. We are not suggesting that a failure in the quality of compliance could never result in a sanction. Generally speaking, however, a failure to provide sufficient information or a document, or delays in providing same, should ordinarily lead to a costs sanction only (if any), which is proportionate to the additional costs and time wasted by the other side occasioned by the non-compliance. Finally, it would be a very rare case indeed where a failure to produce a document or information of a type that is not expressly referenced in the guidance to the relevant PAPs, but is requested by the other side, would amount to non-compliance worthy of a sanction.

39. Ultimately, however, whether to impose a sanction, and if so what sanction, is a matter for the court in each case.

Sanctions and LIPs

40. Finally, when considering the subject of sanctions, the position of LIPs cannot be overlooked. Despite the concerns of some respondents that courts were being overly lenient to LIPs, the CJC believes a more forgiving approach to non-compliance by LIPs will sometimes be justified, and consistent with the courts approach to case management generally. Notably CPR3.1A(2) provides that 'when the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented.' On the other hand, there is clear jurisprudence indicating that the fact that a party was unrepresented at the time they failed to comply with a procedural rule is not itself a reason for declining to enforce it against them.[115]

41. The Court of Appeal's decision in *Jet2* is also relevant to this discussion.[116] If pre-action conduct in purported compliance with a PAP can result in a contempt of court, then on one view the Court of Appeal has unequivocally declared that the PAPs can be enforced in the same way as any ordinary procedural rule, and lead to the same, very serious consequences for non-compliance, whether or not the claim is subsequently litigated.

42. We think all these considerations can be reconciled through a careful understanding of the nature of the obligation in issue. In *Jet2* the prospective claimants made false representations about their holiday experience. The requirement to be honest is universally understood, and should be universally applied regardless of the identity of the litigant. The same is true of using PAPs for improper purposes.

43. By contrast, it is readily understandable that a litigant in person may not fully appreciate what constitutes relevant and irrelevant information to their dispute, and thus omit some of the former and include some of the latter in their pre-action letter of claim or pre-action letter of response. In short, where there is a question over the quality of compliance by a LIP, and that defect in quality can be attributed to a lack of legal knowledge, we think a court is entitled to give greater leeway to the LIP.

[115] *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 at [44].
[116] *Jet2 Holidays Limited v Hughes & Hughes* [2019] EWCA Civ 1858

44. The fact that there are multiple PAPs, and it may not always be easy for litigants to work out which PAP covers their dispute is something that must also be taken into account at the sanction stage. This confusion should not arise in the case of online portals, where the prospective parties need only follow onscreen instructions. However, in other instances it would be readily understandable if the LIP failed to take a PAP step required by one PAP, but not another, if the LIP was genuinely confused about which PAP applied to their dispute. However, the proposed steer in a revised general PAP, that when in doubt, a party should comply with the general PAP, should reduce the number of instances in which litigants use an inappropriate PAP.

Timing & Procedure

45. The requirement to deal with non-compliance at the beginning of the proceeding is consistent with the current PD-PAC which requires the court to take into account non-compliance when giving directions for the management of proceedings (see para 13 of PD-PAC and CPR 3.1(4) to (6). There was significant concern expressed in the Preliminary Survey that judges rarely deal with compliance at the beginning of a claim. The deferral of questions of compliance means the court cannot take into account non-compliance when making case management decisions. Accordingly, the only sanction the court can realistically impose for non-compliance is a costs sanction, and such sanctions are not often imposed as the issue of PAP compliance is forgotten by the time the case has resolved.

46. On the other hand, some judges have expressed concern about the extra burden a compliance investigation at an early stage of proceedings would place on them. There are two parts to this concern. First, that there is not enough judicial time to properly deal with PAP compliance issues at case management conferences, and that the focus should instead be on preparing the case for trial (or pre-trial settlement). Of course, deferring compliance questions will not save judicial time if the judge does in fact address the issue at a later stage. How much time is taken in compliance disputes, whether at an early or late stage in proceedings, is partly a function of how settled the principles on sanctions for non-compliance are (this is considered above). But the pressure on judicial time is real and, in the short term, it is likely to increase if a new approach to sanctions is adopted. Secondly, it may be difficult for judges to address compliance

questions in disputes where directions are made on the papers, and courts do not have adequate information about PAP compliance.

47. To address these problems there was widespread agreement amongst the Working Group that the process for raising compliance questions should be formalised. This could be achieved in two different ways. First, DQs could have a section specifically dedicated to PAP compliance. Alternatively, parties could be required to make a formal application requesting a sanction be imposed. Both options have strengths and weaknesses. Using DQs as a compliance audit mechanism could encourage parties to make lengthy complaints over what amount to minor or technical infringements. Requiring parties to make formal applications would discourage parties from raising anything other than significant breaches, but it would also limit the court's ability to take into account non-compliance when making case management directions and it may disproportionately affect weaker parties who themselves have complied with the PAP but do not feel they have the resources to bring a formal application seeking a sanction against their opponent. Under either option, it was widely agreed that the court should retain the power to impose a sanction of its own motion.

48. Both mooted procedures for raising compliance disputes might also go some way to addressing the complaint that the courts too often defer and forget issues of non-compliance. Nevertheless, there is still a case for giving the court an express steer to deal with compliance disputes at the earliest practical opportunity whilst also retaining the discretion to postpone consideration of compliance disputes where appropriate.

49. The Working Group would like to hear from respondents about which of these two procedures they consider to be preferable, or alternative approaches for dealing with compliance disputes, and how the issue of timing should be addressed.

50. Another issue that affects the appropriate timing for dealing with compliance disputes is the nature of the sanctions the court can impose. While the courts have extensive powers to impose costs sanctions, a number of Working Group members observed that these powers are geared towards re-allocating the costs of the proceeding to the detriment of the defaulting party. Because costs sanctions are linked to the costs of proceedings there is an understandable

tendency on the part of the judiciary to only consider costs sanctions once the outcome of the case and the costs of the proceeding are known. While it is theoretically possible for a court to make an order that a party pay part or all of the costs of the proceedings before the quantum has been determined or the outcome of the case is known, this is unheard of. It may be that, in practice, the only sanction that a court will contemplate imposing at the start of a proceeding is a stay or a strike out in cases of grave of non-compliance. However, the Working Group would like to hear from interested parties as to whether the court's powers to impose a costs sanction should be clarified so that a proportionate costs sanction can be imposed even before the outcome of the proceedings is known.

Case management benefits of compliance

51. As previously outlined, one area where we think there is greater potential to capitalise on the benefits of PAP compliance is in streamlining the subsequent case management processes. The responses to the preliminary survey suggest that the litigation benefits of PAP compliance vary across different types of litigation. In principle the Working Group believes that there is no litigation where parties should be effectively required to start again at the issue stage if the dispute has not yet settled. Moreover, we think an efficient justice system should be more ambitious than encouraging parties to use the cut & paste tool to extract information from their PAP documents when completing interlocutory steps.

52. A formal stocktake report should go some way to streamlining the case management process by giving the parties and the court a clear outline of the issues that a court needs to resolve, so that it can tailor its directions accordingly.

53. Whether more can be done is a contentious question. One possibility is to allow the parties to rely on their pre-action letter of claim, or reply as the case may be, in combination with the joint stocktake report as their pleading. Where these processes function well, they arguably better fulfil the primary function of a pleading: giving parties notice of their respective cases, and clearly delineating what is and is not in issue between them. Some PAPs already recognise the inter-relationship between PAPs and pleadings. For example, the Professional Negligence Protocol provides for the possibility of sanctions if a defence materially differs from the pre-

action letter of reply.[117] Similarly, CPR 63 recognises that PAP compliance can significantly shorten the pleadings process in Intellectual Property and Enterprise Court matters. Part 63 provides that where the PD-PAC has not been complied with, the defendant gets a much longer time period (70 days instead of 42 days) to file a defence.[118]

54. In considering options for streamlining pleadings, it is also important to recognise that pleadings have already undergone significant changes in some areas. A notable example is MCOL (Money Claims Online portal) where "pleadings" are completed by the parties simply outlining the details of their dispute, including a timeline of events, and uploading key documents in support. Ordinarily, all of this information should have been exchanged at the PAP stage, suggesting that in some types of litigation at least, separate pleadings are duplicative and wasteful.

55. There are also partial precedents from other jurisdictions where "concise statements" – similar to that which the pre-action letter of claim or reply would set out – are preferred to conventional pleadings. "Concise statements" are commonly used in the Federal Court of Australia for all types of proceedings other than class actions.[119] The Senior Judge responsible for co-ordinating case management practices by Federal Courts, Justice John Middleton, advised the Working Group that he would recommend the use of concise statements for most types of cases.

56. There are risks in adopting this proposal in the context of England & Wales' PAPs. Any option to use PAP documents as pleadings should avoid the unintended consequence of encouraging parties to convert pre-action letters of demand and responses into traditional pleadings. While some of the options outlined in this report would formalise some aspects of the PAP process, they are not intended to extend the litigation process, by adding new layers to it. One possible way of mitigating this risk is to allow the parties the option of relying on their PAP documents

[117] Paragraph 2.2 "The Letter of Response is not intended to have the same formal status as a Defence. If, however, the Letter of Response differs materially from the Defence in subsequent court proceedings, the court may decide, in its discretion, to impose sanctions."
[118] CPR 63.20(2), CPR 63.22(2) and (3).
[119] It is felt that the definition of the class needs to be properly and precisely pleaded given all members of the class would be bound by the judgment unless they elect to opt out of the proceeding.

or filing a conventional pleading. Hence parties will not feel pressured into thinking the PAP process will be their only chance to plead their case. In addition, the court should retain the power to order conventional pleadings where appropriate, for example where the court considers particular allegations are unclear or otherwise lacking in detail.

57. Disclosure is another area where there may be scope for streamlining to reflect the information exchange that has occurred at the pre-action stage. One option is for parties who have complied with the PAP to be relieved from having to provide any further disclosure except where the courts believe there is a need to order specific disclosure.

58. The Working Group is minded to refer this issue for further consideration to the CPRC given the CPRC's role in drafting both the PAPs and the rules of procedure, however we are keen to hear respondents' views on this subject and any practical suggestions they may have for converting PAP compliance into more streamlined case management that avoids wasteful duplication.

APPENDIX 6 – REPORT OF PI SUBCOMMITTEE

Personal Injury Related PAPs background

1. This is the largest group of PAPs and they provide for over 500,000 new claims each year. Of these, about 80% are already resolving without involving court resource, indicating a good degree of success. Those using the injury protocols are generally legally represented on both sides.

2. An early view was reached by the subcommittee that reforms should be approached cautiously, whilst the benefit of improving co-operation was uncontroversial. Modernisation of format was not contentious with particular benefit.

3. Current efficacy in some regards is hampered by issues that are not specific to PI protocols, and those are addressed elsewhere in this report.

4. Newer protocols for lower value (sub-£25k damages) injury claims have been developed for specific areas and the subcommittee determined those should not be considered for early reform as they are not obviously "broken". Care will be needed when designing the interface between any revised PI protocols and the low value claim processes.

The Personal Injury Protocol

5. This protocol is expressly stated to be aimed at fast-track cases with a "nudge" towards good practice for higher value ones, ranging from moderate injuries to catastrophic injury claims. It may therefore be appropriate to include case-specific and/or multi-track workflow sections in this protocol.

6. The Serious Injury Guide[120] methodology of planned route mapping meetings which encourage discussion/resolution of outstanding issues in a progressive manner could be considered for wider roll-out.

[120] http://www.seriousinjuryguide.co.uk/

7. Stylistically the protocol is rather verbose. The scope of the protocol and the preamble take up several pages before the overarching objectives section, which is unfortunate.

8. Good faith dispute resolution processes are scantily referred to in the overall objectives and only fleshed out in section 9 of the protocol, by which time the reader has already become "buried" in the minutiae of each step to be taken in evidence gathering and claims notification. This is considered below at paragraph 13.

9. Comments/suggestions considered by the PI subcommittee include:

    - The protocol as it stands only deals with schedules of loss if liability is admitted. Many cases do settle without full admissions so it may be a good time to revisit the current wording on this point.
    - The protocol allows the claimant significant control over expert medical evidence and the timing of its disclosure. There is no provision for defendants to initiate their own reporting if claimants have not yet disclosed reports for a significant period of time, say 6 months from examination.
    - Claimant representatives submit that their clients' desire for speedy resolution of their dispute is the dominant and effective driver for the earliest possible release of medical reporting. On the other hand, Defendant representatives point to the delayed disclosure of medical reports stifling attempts to negotiate a settlement, causing difficulties with setting suitable reserves and sometimes creating a sense of distrust between the parties. This can have adverse repercussions for rehabilitation and make legal proceedings more likely, especially where limitation dates loom.
    - Defendant representatives say that late disclosure of evidence, particularly medical reports is a real issue. Claimants' representatives say that in the vast majority of cases, non-disclosure of medical reports is not an issue. They say that legal professional privilege has been established over the centuries as necessary for the efficient dispatch of all litigation. Such a radical change to litigation privilege could only be justified if there was weighty evidence that a change was needed.

- Access to medical records needs to be dealt with differently in multi-track cases, with access being encouraged at an early stage, for example to address issues over causation.
- Duplication of effort increases costs and causes delay which can be avoided with a little planning and subsequent prompt sharing of evidence, for example police reports.
- The Serious Injury Guide methodology of planned route mapping meetings which encourage discussion/resolution of outstanding issues in a progressive manner could be considered for wider roll-out.
- The specialist High Court asbestos list "show cause" procedure could be adopted to address primary liability in all personal injury cases outside fixed recoverable costs. The process has the benefit of narrowing issues and thereby reducing costs and achieving greater chance of settlement.
- The ability to obtain judicial directions pre-issue, which is likely to require an expansion of the court's jurisdiction, in cases where parties cannot agree a way forward might be beneficial (rather like early neutral evaluation). The threat of such directions could encourage co-operation. A view was expressed that in cases where parties have been unable to collaborate prior to issue of proceedings, it was notable that an agreed timetable and case summary was reached when faced with a hearing before a judge.

Issues identified in the Preliminary Survey

10. Aside from issues identified by the subcommittee there were not many other specific comments about this protocol emanating from the Preliminary Survey.

11. The nomination of experts under the PI protocol was said not to be occurring and long delays following the admission stage were also reported by one respondent and said to drive up costs.

The Clinical Negligence Protocol

12. This protocol suffers from many of the same features as the injury one.

13. The beginning has long sections on scope before objectives and ADR is somewhat "buried" towards the back of the document. Whilst it is acknowledged that there is a much greater focus now on resolving issues, and even whole disputes, much sooner than in 1999 when the first

protocol was drafted, the wording requires modernisation, and the language should be updated in accordance with the proposed general PAP.

Issues identified in the consultation

14. Improved transparency around the collation and indexing of medical records by claimants was noted with a specific request that there be disclosure at the time of serving the letter of claim so both parties know which records are currently available and those still to be obtained and reviewed.

15. It was also noted the protocol requirement to provide details of financial losses at letter of claim stage is rarely complied with. The focus of the claimant tends to be more on liability issues before expending too much time on quantum. As proportionality is so key to the overriding objective, more thought could usefully be given to tweaking the protocol requirements so they do not frontload costs, but achieve a greater awareness of at least ballpark quantum brackets.

16. As these cases require expert evidence to assist with liability and causation issues in addition to quantum, the problem of expert availability within the current time limits for letters of response is more keenly felt than for some of the other protocols.

17. It was felt by some that there should not be criticism by defendants of claimants obtaining expert evidence before writing letters of claim, as otherwise they are not coherent documents. In reality, the criticism may be that too many experts are engaged early on rather than the fact of getting at least some evidence on liability and causation.

18. Some defendants expressed the view that claimants fully work up their quantum case before sending a letter of claim so there is no opportunity for joint instructions or to explore settlement without the need for a full raft of expert evidence. However, it must be recognised that a balance needs to be struck between suggesting the protocol require more precise information as to financial losses while criticising quantum being too fully worked up at the pre-action stage.

19. A suggested solution to the foregoing was for the letter of notification to be amplified, setting out steps taken by the claimant and those still intended to be taken before any further work was carried out (all subject to a timetable for overall progression).

20. Another comment was that most of the requirements under the protocol would be required at some stage under court rules and so the protocols ensure cases are not issued on a "wing and a prayer".

21. Defendants expressed some frustration that claimants issued proceedings even after a full admission without prior reference to defendants. Claimants' legal advisers on the other hand consider that they have professional obligations towards their client in respect of securing interest on damages and getting into court queues early enough to be able to deploy interim payment applications that may be needed to meet clients' reasonable rehabilitation needs (there being no application of the Serious Injury Guide currently to clinical negligence actions).

The Disease Protocol

22. The terminology 'disease' covers a wide spectrum of different types of injury claim such as deafness, vibration white finger and asbestos diseases, to stress at work claims and gives rise to a wide range of both complexity and quantum. The nature of disease claims, especially (but not exclusively) long-tail disease claims, is that there may be a variety of liability issues (limitation, defendant identity, duty of care/employment, breach of duty, causation and apportionment/contribution proceedings). This complexity tends to set the cases apart from the PI PAP where liability is less frequently in issue (or the dispute is more easily identifiable) and highlights the potential benefit of the PAP in narrowing issues which in turn reduces costs and promotes settlement.

23. It was noted that in disease cases there is a marked contrast between claims that may subsequently be managed through the specialist asbestos list in the High Court and other types of disease claim.

24. Those in the asbestos group tend to be run more efficiently but claimants have the perception that there is apathy amongst some insurers to respond and engage with claims and/or refusal

to admit their insured even employed a claimant. As these concerns extend to other types of disease claims and practices vary widely between insurers, claimants see this as an area where improvement may be made.

25. There is also concern among claimants that in some cases defendants focus too heavily on contribution proceedings, to the detriment of their obligations to respond on their own liability.

26. Whilst accepting that these criticisms may be valid in a small number of cases, defendants counter that by their very nature, long-tail disease claims pose a unique set of problems. Defendants report problems in the level of detail made available by the claimants' representatives pre-issue; they say it is insufficient to enable them to investigate and evaluate the claim, and potentially settle it pre-issue. Early exchange of information and disclosure should be encouraged to help narrow the issues.

27. Other issues include cases where there are multiple defendants and identifying which of those defendants may have liability.

28. Defendants point to delays in production of claimed work history in legacy cases, although this was understood to be significantly contributed to by slow HMRC processes for release of national insurance work histories.

29. Defendants state there can be delay on the part of claimants in serving medical reports and medical records and that the disclosure of medical records is a fundamental requirement to assist in evaluation of a claim, but they sometimes are not disclosed pre-issue. They say there is a tendency with some claimant representatives not to serve this material when it becomes available but to delay service until it is too late in the protocol period for the defendant to have any realistic prospect of responding.

30. In portal claims in disease cases, defendants also feel that the timescale allowed is far too short to react in old legacy cases (accepting the overall view of the subcommittee that reform of low value protocols is out with the scope of this paper).

31. It has taken the disease protocol a long time to bed down and it would probably be inappropriate at this stage to seek significant changes; as above the focus should be on minor incremental amendments rather than wholescale revisions. The disease protocol has been working reasonably well and covers lower value claims as well as multi-track claims. There could be some scope for an overarching framework, perhaps building on the model developed in more serious injury cases discussed above.

32. Considering the 'complaints' noted above on behalf of both sides, the benefits of early disclosure and openness on both sides is evident and needs to be encouraged. The stocktake could be a particularly useful tool in narrowing issues and highlighting for the court where key areas of dispute lie (or may be readily resolved).

33. Asbestos cases were identified as a distinct category, notably due to the benefits of the Asbestos List in the High Court which has wide respect from both claimant and defendant communities and is recognised as progressing cases swiftly and helping to save costs. The PAP already recognises that in terminal disease claims *"the claimant may not be able to follow the protocol".* With that in mind, any changes which could inhibit the ability to issue proceedings (thereby reducing access to a specialist court list) should be slow to be adopted, if at all.

Issues identified in the Preliminary Survey

34. In addition to matters identified by the subcommittee, respondents to the Preliminary Survey made a number of comments.

35. Compliance with the protocol varies across both insurers, type of claim and the number of defendants but it was recognised that the protocol has worked well to bring early compromise in a number of these cases.

36. It was felt by some that there is little incentive for defendants' representatives to carry out full, meaningful investigations before proceedings are issued. It can be seen from paragraph 29 that this is countered by defendants' suggestions that claimants do not provide key information on time.

37. One respondent had concern about the costly requirement for claimants to restore companies to the register when defendants have been dissolved and exposure ceased prior to 2016. It was recognised that to side-step the current legal requirements would require an irrevocable agreement to sidestep the procedure and legal formalities which otherwise apply.

38. Claimants were also critical of insurers who refuse to nominate solicitors to accept service of a claim form when the insured is dissolved, thereby forcing the claimant to make an application for permission to serve. Similarly, there was criticism of insurers who refuse to accept they hold an insurance policy for a defendant but after issue of proceedings they do accept that they have a policy which was in force.

39. Defendants argue that there should be indices of all documents provided and that it should be mandatory for all documents served to be decipherable with sanctions in default (but query the practicability of this given the often historic nature of claims and historical records involved).

40. In disease cases it was said that where there are allegations of exposure and breach for historic claims those claimants are often requested to provide evidence, primarily in the form of witness statements, and the work required will be undertaken prior to full disclosure but that work is often held against claimants at the budgeting stage.

41. It was also said by one respondent that the most notable issue giving rise to increased costs is a failure by defendants to identify their case on liability at an early stage, often resulting in court proceedings needing to be issued.

The Package Travel Protocol

42. The general view of the subcommittee was that it would be premature to make any changes to the protocol, which has only relatively recently been embedded into the civil litigation architecture.

43. Having said that, both claimants and defendants have concerns about how effective the current PAP is. On the one hand, claimants' representatives express dissatisfaction with the pre-action disclosure provided by tour operators, which they argue is not consistent; is often inadequate; and late disclosure is commonplace. Although defendant documents may come from several

sources, claimants argue that the named defendant should be able to obtain and disclose all relevant documents at the PAP stage because they have access to those documents.

44. On the other hand, defendant representatives and their tour operator clients report claimants making unreasonable and unjustified demands for documents, followed by pre-action disclosure applications, even where it has been stated that no further documents exist. At the same time, defendants feel that claimants are failing to preserve and disclose, at this stage, the types of documents that the PAP envisages they will disclose.

45. The onus should be on both parties to provide full and proper disclosure at the appropriate times.

46. Defendants are also concerned that some claimant representatives are not adhering to the guidance issued by the Solicitors Regulation Authority in 2017 and updated in November 2019[121] in relation to this type of claim, both as to being satisfied that the claim is genuine and with regard to disclosure.

47. Since the introduction of the new PAP, ABTA (The Tour Association) and tour operators already report a significant decrease in the total number of claims made, (Covid aside) as well as a decrease in the number of fraudulent claims which the development of this protocol was largely directed towards.

Issues identified in the Preliminary Survey

48. It was felt by some to be too early to bring in changes as smaller numbers of claims than anticipated have been through the protocol to date following Covid travel restrictions.

49. APIL (The Association of Personal Injury Lawyers) however expressed the view that this protocol needs the most reform as it is too onerous on the claimant and the time limit to comply is too long for Montreal and Athens Convention cases due to the reduced limitation periods that apply. They also wished to see express reductions in time limits to comply with cases to meet specific limitation deadlines.

[121] https://www.sra.org.uk/solicitors/guidance/holiday-sickness-claims/

50. There was a recommendation that additional fixed recoverable costs need to be allowed for:

    (a) translation of documents from a foreign language;
    (b) the accessing of medical records from abroad; and
    (c) wide social media disclosure cost.

51. These recommendations were considered to be out with the terms of reference for this review alongside other fixed costs submissions.

52. Also in respect of travel claims it was specifically stated that much of the disclosure requirement would be the same whatever stage the claim settles at. This comment could apply equally to the other PAPs.

Generic reforms considered

53. The subcommittee considered the overarching terms of reference for this review as follows:

Simplicity for LIPs

Whilst it was recognised this is an overarching objective for this review, it was considered that in the PI space it is extremely rare (outside the low value protocols) for litigants to be unrepresented. Therefore, whilst plain English is to be encouraged, there is already a good level of accessibility for those seeking to handle claims covered by these protocols. Certain technical terminology is required/essential for this area of practice.

Sanctions for non-compliance

54. This was debated at length, the subcommittee first having noted specific consultation suggestions from respondents to the survey. Each idea put forward that is specific to injury claims and the resulting discussion is summarised below.

Lessen the number of extensions

55. It had been suggested in consultation that a review of delays, and elapsed time periods for steps to be completed pre-action, could be given greater attention judicially when considering further extensions of time. The clinical negligence protocol in particular has longer time periods than many for completion of steps. Requests for extensions are still commonplace. Overall, it was considered that shortening time frames further within the main protocol would seem to be

a recipe for failure. The granting of extensions however is already part of judicial discretion; it seems difficult to mandate changes or give them greater prominence. However, there could be a warning in the protocols that such conduct may be taken into consideration with adverse impact for defaulters. Opinion was divided on the subcommittee as to the desirability of such a warning.

56. When viewed alongside any resulting delayed rehabilitation it might seem undesirable to make no positive recommendations for change. However, it was considered critical that judges take notice not merely of delay but also the reasons for this.

Common structure

57. It was felt that greater emphasis in the opening paragraphs of the protocols on the core themes of this consultation would be beneficial. The general principles in Chapter 3 are all compatible with the objectives of the PI protocols, as is the language used for the steps before proceedings in the proposed general PAP. Any revision to the protocols would do well to start with a simple statement of navigation such as:

> *"Compliance with the Protocol involves three consequential steps, each subsequent step dependent on compliance by all parties with the previous steps. The three steps are:*
>
> a) *Information exchange*
> b) *Good Faith efforts to resolve or narrow the dispute*
> c) *Stocktake"*

58. This could then be followed by the objectives specific to personal injuries litigation, along the lines of a more generic PAP structure and wording.

59. The dispute resolution section could benefit from being updated and amended to reflect all the available dispute resolution processes, and benefits of those processes, as set out in the draft general PAP. Namely:

- the importance of ADR and the different types of ADR procedures available/suitable for the dispute, including Joint Settlement Meetings, early neutral evaluation, mediation, and negotiations.

- the value of a stocktake pre-litigation so the court process is a forum of "last resort"
- narrowing and clarification of issues
- proportionality.

60. One option discussed was having an overarching injury (as opposed to a general protocol) with users being directed to a subject specific "part B" for each specialist injury area. Consideration was given to whether this would assist with navigation to the correct pre-action steps for each sub-speciality and avoid repetition. The benefit of a generic over-arching injury protocol would be the appropriate level of customisation and sensitivity in choice of common wording around topics such as rehabilitation which would not fit well within a generic protocol more commonly utilised for business disputes. Similarly, Joint Settlement Meetings have become a well-known term of art in the injury space which does not translate so well to other areas of dispute resolution.

61. Opinion was divided about the virtues of retaining individual injury protocols for each sub-specialism and ultimately it was considered that there was merit in trying to draft a generic injury introduction first which could then either be:

    - tweaked slightly as required (whilst retaining a common format and sequence), or
    - fully adopted when incorporated into the individual protocols (if the concept of one overriding injury protocol split simply into parts A and B did not find favour).

Rehabilitation

62. Another purpose of the injury protocols was said to be the facilitation of early interim payments for claims with merit and implementation of rehabilitation.

63. This was not a view with which the subcommittee could disagree. It loops back into earlier comments about bringing the voluntary Rehabilitation Code and Serious Injury Guide into fuller alignment and prominence within the protocols.

64. The Serious Injury Guide states that the "claimant solicitor should give **reasonable** access for medical facilities when requested". This measured approach should be reflected in any protocol

and should promote the provision of necessary funds to be used, for example, for rehabilitation.

Adequate disclosure

65. There was another common theme that the purpose of protocols is to provide adequate disclosure if liability is denied and to agree a route forward to resolving the dispute.

66. The subcommittee noted that the only enforceable costs orders currently for the pre-litigation phase relate to disclosure applications to the court. These occur not infrequently in injury cases although the specificity of what is required in the protocols has reduced volumes. However, making such applications creates delay and incurs the expense of court proceedings. Rules about such applications could be strengthened to direct judges towards more punitive costs assessment on such applications.

67. It was also felt by some respondents that if there was proper compliance with disclosure pre-action, the vast majority of disclosure directions could be removed in fast-track claims. Such claims represent a large number of issued injury cases in the County Courts. This could then shorten timetables at the case management stage and the subcommittee therefore recommends that further consideration be given to this.

Narrowing of issues

68. Responses contained a recommendation that there should be a requirement to attach correspondence with the DQ as proof of protocol compliance and the correspondence should contain a statement of truth. Ideas about achieving this that would be generally applicable across protocols are discussed in Appendix 5.

69. The practice referred to in Appendix 5 (paragraphs 25-27) of the report whereby parties alter the positions they had taken at the pre-action stage when the issue is subsequently litigated is a particular feature of PI litigation. The subcommittee considered that this was a very real difficulty with the way injury claims handling processes and teams are structured but not one that should block progress towards better practice and a mandatory stocktake/list of issues from the pre-action phase being filed with DQs.

70. It was further suggested by the subcommittee that if the case summary was front loaded into the stocktake it would help to narrow issues, support a timetable, highlight good behaviour and help with budgeting, thus saving time and costs generally, and could even replace the current DQ. It was noted that there would need to be control over the length of the stocktake and different approaches for cases of different values e.g. fast track and multi-track claims would need different approaches.

Speeding up third party material required to resolve and/or quantify disputes

71. There were calls for:

    - a fast-track mechanism obliging HMRC to disclose National Insurance contributions schedules; and,
    - longer timescales for letters of response requiring expert evidence input or better management of experts.

72. The subcommittee considered that any changes which could reduce delay would be welcome but as they involved third parties such changes would require separate initiatives with third party organisations to bring about change. Injury litigation is generally heavily reliant on the use of expert witnesses.

Disclosure of medical evidence

73. The Defendants' view is that some reform in this area is necessary in order to level the playing field. Claimant representatives were markedly uneasy about mandating significant change via the protocol for the reasons expressed earlier at paragraph 9 of this chapter.

74. A suitable "middle ground" for the resolution of the issue as to pre-action disclosure of medical reports may be found in strengthening the information exchange within the protocol but the subcommittee has identified a number of issues for possible further consultation below.

Specific changes considered by the subcommittee for new individual protocols

75. Recommendations for additional protocols were considered and found favour for the specialisms of abuse work and overseas accident claims.

Abuse protocol

76. The reasons supplied in consultation (with which the subcommittee did not disagree) for a separate abuse protocol were:

    - The generic personal injury protocol does not fit the cases leading to challenging disputes over non-compliance. It was also said that confusion as to which protocol is relevant in abuse cases does not encourage compliance with any of them.
    - It would help with early resolution and apologies where appropriate and also bring about greater transparency for those abuse survivors who are considering making a civil claim.
    - It is not uncommon to see very high costs budgets presented at the initial case management conference because some firms routinely undertake significant levels of work over lengthy periods before their letter of claim. “Failure to remove” cases were said to have a significant volume of documentation and costs can far exceed the level of any potential damages but if there was a specific protocol with early narrowing of issues it would assist and remove the blanket requests for disclosure of all records which are seen by some defendants

Overseas protocol

77. The reasons supplied for a separate overseas accident protocol were:

    - the need for steps and timeframes not catered for by other protocols such as (i) expert opinion on the law in the country where the accident occurred (liability and limitation) (ii) interpreters which lead to more costly and protracted litigation
    - the need to involve (and bind into timescales) other layers of dispute management such as English handling agents for the compensating parties
    - the lack of familiarity with rehabilitation protocols in this jurisdiction
    - the early need to determine *forum conveniens*

78. However, it was noted that post-Brexit many more overseas insurers are unlikely to have UK handling agents so the ability to control or influence the behaviours of parties overseas may be more limited whether there is a protocol or not. This would need to be examined further by a more specialist group.

Product liability and noise-induced hearing loss protocols

79. Although consultation survey responses had contained isolated calls for:

    - a product liability protocol, and
    - a protocol for noise induced hearing loss claims .

80. These did not meet approval from the subcommittee as the number of cases involved seemed too low for the effort involved.

Credit hire protocol

81. Credit hire is a head of loss frequently linked to a separate PI claim in motor claims. It is recognised that the CPRC has recently agreed a model order for such cases; a bespoke protocol is outside the scope of this subcommittee.

Summary of questions for consultation

82. The subcommittee considered the following questions should be consulted on further:

    - Do you agree that there should be a generic PI protocol that incorporates relevant general principles from the General PAP but also identifies PI specific objectives not applicable to other litigation (Part A) with users being directed to a subject specific "Part B" rules for each specialist area?
    - Do you agree that all PI protocols should include a good faith obligation more prominently in the introduction to try to resolve or narrow the dispute?
    - Do you agree that all PI protocols should include an obligation to a complete a joint stocktake report/list of issues and should this (i) be before or after ADR and/or (ii) be filed with the DQ?

- Do you agree that any revisions to the PI PAP need to be approached with great care to ensure workstreams for multi-track cases are clearly separated out from fast-track work? If so:
- How could there be effective, referencing to and integration with the Serious Injury Guide where appropriate?
- How can the current protocol be updated to reflect moderately severe cases as well as catastrophic injury cases despite workflows for each being significantly dissimilar?
- Do you agree that there should be better integration of each protocol with the Rehabilitation Code? If so, should the protocol require a claimant to identify any rehabilitation they consider would be beneficial, with estimated costs if possible and should it require a defendant to supply reasons if they refuse, or fail to provide assistance with rehabilitation.
- Do you agree the transitional integration clauses for injury claims exiting fixed recoverable processes and slotting into the main injury protocol require greater clarity?
- Is there value in being more specific within protocols about the level of quantification work to be undertaken without a route map agreed with the other party and the timetable for commencing proceedings following an admission of liability?
- Do you agree the management of disclosure pre-issue needs to be strengthened to encourage greater compliance with the protocol? Paragraph 7.1 of the protocol expects the claimant to identify which documents are relevant and why. Should there be equal obligations on defendants to give reasons why they consider a document is not relevant/why they will not disclose a document?
- Should the claimant's letter of claim state what medical records have been obtained and are available for disclosure and what medical records are still to be obtained?
- Do you agree that a working group should be established, as a priority, to consider a specific protocol for abuse claims?
- Do you agree that a working group should be established to consider a specific protocol for foreign accident cases?
- Should initiatives with third party organisations, such as the expert witness community and HMRC, be considered to reduce delays in the resolution of injury disputes?

- Should the PI PAPs deal with the question of what to do where a Claimant obtains medical evidence prior to issue but elects not to serve, and if so, what steps should be open to the Defendant?
- Prior to commencement of proceedings by the Claimant should the Defendant be entitled to obtain a medical report on the Claimant if the Claimant does not disclose a medical report?
- Do you agree that the protocol should include provision that for the purposes of rehabilitation the claimant solicitors should give reasonable access for medical assessment when requested by the defendant insurer?
- If you consider any change to the PI PAP expert evidence process in multi-track cases would be beneficial what would the new process look like instead?
- Would an ability to have pre-litigation court case management help dispute resolution in multi-track personal injury cases?

83. The subcommittee 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 above.

APPENDIX 7 – REPORT OF HOUSING SUBCOMMITTEE

1. The group met three times to discuss the housing Pre-Action Protocols (PAPs): the Disrepair/Housing Conditions PAP (in fact there are two of these, one for England and one for Wales but they are substantially the same); the Possession Claims by Social Landlords PAP and the Possession Claims for Mortgage Arrears PAP.

Disrepair/Housing Conditions PAP

2. In practice, the majority of disrepair and housing conditions claims are brought against social landlords. This is likely to be for two reasons: (1) only social tenants have security of tenure, and (2) it is often difficult to enforce damages and costs awards against private landlords which means claims are not economically viable for solicitors to pursue, particularly under conditional fee arrangements (CFAs) (legal aid no longer being available for damages claims based on disrepair/poor housing conditions).

3. In most disrepair claims, there is likely to be a significant power imbalance: an individual tenant pursuing a claim against a large corporate body which, in relation to disrepair litigation, is a 'repeat player' and will often have an in-house legal team to advise and represent.

4. It was broadly agreed that the current protocol works reasonably well and fulfils the stated aims. This is consistent with the preliminary survey findings in relation to the protocols generally. However, some problems in practice were identified.

Problems identified

5. The issue of 'claims farmer' firms acting for tenants who sought to issue claims as soon as possible, giving landlords insufficient time to respond under the protocol. It was reported that such firms often sent PAP letters to the housing offices and not to the legal department which caused a delay in the legal department becoming aware of the claim. However, the tenants' advisers reported that it was often difficult to know exactly where to send such letters as the legal department would not be instructed at the point of the initial correspondence under the

protocol. All agreed that it would help both landlords and tenants if landlords were required to publish an address to which such correspondence should be sent.

6. It was also felt that the issuing of claims at the earliest opportunity was in breach of the protocol requirements for the parties to 'take stock' of the outstanding issues prior to issuing the claim.

7. Another reported practice of 'claims farmers' was their use of expensive and non-local experts, which added to disproportionate costs being claimed when cases settled. The problem for landlords is that to dispute the amount of costs being claimed risks increasing their overall costs liability.

8. The tenants' representatives reported the issue of large social landlords in London (both local authorities and other Registered Providers of Social Housing) failing to follow the protocol; they would often fail to reply to letters of claim sent under the protocol and/or respond by sending in-house surveyors or housing officers to inspect, and seek to agree a schedule of works directly with the tenant. This approach is in breach of the protocol which recommends the appointment of a single joint expert or the agreement of a joint inspection (joint inspections are common as social landlords will often wish to have their in-house surveyors carry out the inspection and agree the schedule of works).

9. A further issue reported by the tenants' representatives was of landlords agreeing to carry out works and in some cases even to pay compensation while denying liability for the tenant's legal costs, so that a Part 8 application was required for the tenant's advisers to recover their costs.

10. It was clear that some of the issues were geographically specific and the reported conduct of London based landlords was surprising to the landlord representatives who were based outside of London. Similarly, the prevalence of 'claims farmers' taking on disrepair cases on CFAs was far more common outside of London. This may be because there are more firms with specialist housing practices and legal aid contracts to provide specialist services in London and a dearth in some parts of the country. See for example the Law Society report on Legal Aid, published on

27 September 2021: 40% of the population of England and Wales have no housing legal aid provider in their local authority area.

11. The experience of the group was that a significant proportion of cases settle prior to issue and almost all issued claims are settled prior to a final hearing. This means that the issue of sanctions for non-compliance and the approach of the courts was not one raised by the group. Where landlords fail to comply with the protocol and claims are issued and settled at a later date, this means the landlords are responsible for a higher level of costs than would be the case had the case been settled under the protocol.

12. In conclusion, it was agreed that although the protocol works well in encouraging settlement of claims, the main problem was the issue of costs when claims are settled prior to issue. The rules on track allocation for disrepair claims, and the case law operate to provide an incentive to tenants' representatives to issue claims as soon as possible. Where a landlord completes works of repair but makes no offer of compensation, a defended claim will be allocated to the Small Claims Track if the likely damages are less than £10,000. The case of *Birmingham* v *Lee* makes clear that only pre-allocation costs will be awarded in such cases. Because legal aid is not available for damages claims in disrepair, the only way of funding such claims is under a CFA but these costs provisions mean that pursuing such claims is not economically viable for solicitors.

13. It was agreed that a summary procedure under which the court could determine both liability and quantum in relation to costs would address both the issue of disproportionate costs being claimed by tenants' advisers, and of landlords agreeing to carry out works and compensation but denying liability for costs. The subcommittee's deliberations on this issue have informed the main working group's consideration of, and support for, a summary costs procedure.[122]

14. Concern was raised by the tenants' representatives that the introduction of FRC will significantly impact on the viability of claims for disrepair and poor housing conditions. Increasing the amount of work to be carried out under the protocol while capping the fees for

[122] See 3.16 and Appendix 5 [3] of this report.

such work at uneconomic rates, will make it more difficult for tenants to find lawyers willing to undertake such cases.

Key points which the group agreed upon

- Consideration should be given to whether a simpler procedure could be introduced for the determination of liability and quantum in relation to a tenant's costs when cases settle under the protocol;
- Landlords should be required to specify an address at which PAP letters should be sent (similar to the requirements of certain government departments under the JR PAP).

Possession Claims by Social Landlords

15. This protocol currently only applies to claims for possession brought by social landlords and comprises three parts: Part 1 sets out the Aims and Scope of the Protocol and provides that landlords should make reasonable adjustments for vulnerable tenants and consider the tenant's capacity and possible Equality Act issues at an early stage; Part 2 relates to claims based on rent arrears; and Part 3 relates to mandatory grounds, with the aim of ensuring that there is an early exchange of information where human rights, public law or equality matters are likely to be raised so that the court has sufficient information to either deal with cases summarily or appropriate directions made.

16. The context of possession claims by social landlords is that a high proportion of social tenants can be classed as 'vulnerable', including being disabled. There is therefore a significant power imbalance between the social landlord and the tenant. The procedure for such claims is distinct from most civil claims in that there is an early hearing at which the court considers the claim and could scrutinise protocol compliance. Further, in most cases the court has considerable discretion and flexible powers: the court may adjourn the proceedings for such periods as it thinks fit and, if making a possession order must be satisfied that it is reasonable to do so, and, may stay, suspend or postpone the date of possession, as it thinks fit. This gives the court a range of powers to enforce compliance with the protocol. Most county courts have the benefit

of a duty advice scheme under which a specialist housing adviser is available at court for unrepresented tenants.

17. It was generally agreed that the protocol requirements on social landlords were not too onerous and that compliance was good. In one area the District Judges require a pro forma checklist to be completed by landlords confirming compliance. This was felt to be helpful to landlords, particularly when proceedings were being conducted by housing officers.

18. With regard to Part 1 of the Protocol, some tenants' representatives experienced landlords who treated the requirements as a "tick-box exercise", with compliance technically but not in spirit. Landlords may claim to be unaware of a tenant's learning difficulties or mental health problems but on disclosure being provided it is clear the information was known to the local authority, though possibly by a different department. This was thought to happen more frequently when cases were conducted by rent/income recovery officers who may see their role as being only about income recovery and not about supporting tenants. However, there was also experience of very good social landlords who make a lot of effort to support their tenants. Much depends on the nature and size of the landlord and it seems that smaller, rural social landlords may have better practice, with the housing officers knowing the tenants personally and taking their responsibilities very seriously. All of the tenants' advisers had experience of landlords making great efforts to offer support to tenants who nevertheless failed to engage.

19. It was noted that landlords/housing officers do struggle to deal appropriately with issues around tenants' capacity, both litigation capacity and more generally the capacity to deal with their financial affairs. There was strong support for a checklist to be developed as part of the PAP to focus the minds of potential Claimants to any issues relating to the capacity of the potential Defendant, and inform them of the relevant tests. It may be that the rules and/or PDs need to be amended to provide that in cases where the Defendant's capacity is in issue, and the Claim is commenced, the matter needs to be considered by the court at the earliest possible stage so that appropriate directions can be given. It was pointed out that a checklist would be of particular value if the PAP were to be extended to Private Landlord claims, see below.

20. Reference was made to a large London authority that had introduced a practice of locating housing benefit officers within the housing offices which improved compliance because benefit checks could be done at an early stage.

21. On the issues of compliance, it seems that differences between different landlords' conduct related more to the size and organisation of the landlord rather than the way the protocol is drafted.

22. On sanctions, as mentioned above, the court has the opportunity to consider compliance at an early stage because possession claims proceed under the Fixed Summons procedure. However, if cases are 'over-listed' this limits the amount of time a judge has to consider each case. Prior to the interim arrangements made during the Covid 'lock-down' it often happened that listings gave a judge no more than 5-10 minutes per case (30 or more cases to be heard between 10:30 and 13:00 is common). Similarly, such heavy listing makes it difficult for duty advisers to focus on protocol compliance. Though 'block listing' offers flexibility it is understood that the structure of listings and the points at which there will be judicial involvement is currently under review and it is hoped there will be no return to the heavy block listing of the past. It is essential to have realistic listing practices if judges are to consider compliance with PAPs at the first hearing (as well as what order or case management directions to make).

23. It was noted that most District Judges apply more careful scrutiny of compliance in the mandatory 'Ground 8' claims but may be more relaxed in cases in which they have a wide discretion.

24. One protocol provision that was often overlooked is the provision that if agreement is reached and kept to, no possession order should be made. So, in such a case it would be appropriate to adjourn on terms instead. Housing associations are often surprised at being told this. Also, at a Court Users meeting in one area it has been made clear that landlords are expected to apply for direct payments from the Department for Work and Pensions (DWP) in appropriate cases, and if they don't, they will be told to by the District Judge. It is clear that Court Users meetings can be very important in promoting compliance with the protocols.

25. One very experienced duty adviser felt that the interim arrangements, under which the court listed a Review Hearing prior to a Substantive Hearing, had improved compliance as the landlord was required to file a detailed bundle for the Review Hearing. Also, the information the courts were sending to tenants had improved (under the interim arrangements) and this had improved the take-up of advice and attendance at court by the tenants. However, the issue of non-attendance/participation by tenants remains.

26. It was announced on 3 November 2021 that the practice of listing a Review Hearing will not continue,[123] but the subcommittee agreed that provision for a judge to review the papers at an early stage is beneficial in both case management and scrutiny of protocol compliance.

27. In Wales, the government message under the Covid restrictions had been very clear: social landlords needed to put the brakes on possession claims. This has improved social landlord's pre-issue conduct; there is evidence of more effort being put into resolving issues at an early stage which avoids having to make a claim for possession.

28. As to the sanctions appropriate for non-compliance, most judges will readily adjourn a case to enable the landlord and tenant to deal with benefit or other financial issues (which the protocol states should be done prior to issue). However, with the shift from housing benefit (managed by the local housing authorities who may also be the landlord) to Universal Credit (managed by the DWP) it can be harder and take longer for a landlord to obtain information about benefit issues. Further, it may require a duty adviser or the tenant's own solicitor to secure the adjournment and the tenant will often need help to resolve the benefit issues before the adjourned hearing. Since welfare benefits were taken out of the scope of legal aid in 2013, there is a dearth of advisers to assist tenants in this respect.

Extending the application of the PAP on Possession Claims of Rented Property to Private Landlords

29. The group agreed that the protocol should be extended to apply to claims brought by private landlords with the exception of claims brought under the Accelerated Procedure. Adaptations

[123] https://www.judiciary.uk/announcements/statement-from-the-master-of-the-rolls-the-end-of-the-possession-proceedings-overall-arrangements/

would be needed in relation to Part 2, some of which relates to the access local housing authorities have to information held by the DWP, which is not available to private landlords. But Part 1, relating to vulnerable tenants and the 'reasonable adjustments' duty, would be applicable; duties under the Equality Act, and in relation to a tenant's capacity, apply equally to private landlords. Part 3 would not apply save for the reference to defences based on discrimination under the Equality Act 2010.

30. An increase in the number of private landlord claims in which unregulated bodies purport to conduct the litigation on a landlord's behalf was noted. Extending the protocol to claims by private landlords could assist in giving information to private landlords about how to issue claims in person and/or which bodies are authorised to conduct litigation on behalf of a landlord; the distinction between conducting litigation and undertaking pre-proceeding steps such as serving notices needs to be made clear. The point was made that a general checklist for private landlords may be necessary if the protocol is to be extended to the private sector.

Extending application to claims based on grounds other than rent arrears

31. Part 2 of the protocol applies only to claims brought on the grounds of rent arrears. The subcommittee agreed that the protocol should apply to all grounds and would be particularly useful in cases based on anti-social behaviour when issues of capacity and vulnerability are often relevant. As with all of the protocols, if a case was sufficiently urgent to require a landlord to apply for an interim injunction, compliance would not be needed.

Key points which the group agreed upon

- Consideration should be given to amending the Claim Form and Particulars of Claim (form N119) to require a landlord to confirm compliance with the protocol;
- Consideration should be given to amending the protocol to give guidance to all landlords regarding the CPR provision on litigation capacity;
- Consideration should be given to extending the protocol to apply to possession claims brought by private landlords, with the exception of claims brought under the

Accelerated Procedure. Amendments will be needed to specify some parts of the protocol that do not apply to private landlords;

- If the protocol is extended to cover private landlord claims, specific information could be included in the protocol to inform private landlords as to which bodies are authorised to conduct litigation;
- Consideration should be given to requiring landlords to complete a pre-action compliance checklist to be provided to the court in advance of the first hearing.

Possession Claims by Mortgagees

32. It was generally felt that compliance by Claimant lenders is good. There is a Protocol Compliance checklist (form M23) which must be produced at the hearing to confirm compliance. This is something that should be considered for other types of possession claim.

33. The main problem identified was that there is a lack of clarity about the application of the protocol to 'unregulated agreements'. Unregulated mortgages are said to be covered by the protocol but there is much confusion between borrowers, lenders, and the courts as to when the protocol applies. Commercial mortgages are not covered by the protocol even when the mortgage is secured against people's homes. Also, buy-to-let loans are not covered and tenants of borrowers often have no forewarning of the proceedings that will result in their eviction.

34. It was agreed that the protocol should apply to all mortgage claims which involve a property occupied as a home.

35. It was also agreed that where there were occupiers of a property subject to a mortgage, the protocol should be extended to ensure that the occupiers, who are not Defendants in the Claim, are informed of the outcome of steps taken under the protocol which may lead to the loss of their home. For example, the protocol could be amended to ensure that occupiers are notified of the failure or breach of an agreement made between the lender and the borrower which is likely to lead to a claim for possession.

36. The issue of non-attendance at hearings by borrowers was also reported (in addition to the non-attendance of tenants at possession hearings, see above). Consideration should be given to

requiring pre-proceedings correspondence to stress the importance of Defendants attending the hearings. The current PAP for Social Landlords requires the landlord to write to the tenants informing them of the time and date of the hearing, and the importance of attending and this could also be adopted under the Mortgage PAP.

37. It was also noted that Defendants often put forward unrealistic defences, sometimes on the advice of unqualified advisers, or based on information obtained from the internet. Information could also be given under the protocol about the issues that the court can and cannot consider and the limits of the courts' powers.

38. The issues as to the use of the sanction of strike-out for non-compliance is the same as for rented properties: it may not be in the interests of the borrowers to postpone the making of a possession order. However, it was pointed out that adjournments may also adversely affect both tenants and borrowers, as any arrears are likely to increase, and in some cases an adjournment simply postpones the inevitable. However, it was pointed out that it was unlikely that any power of strike out would be used often by judges, but the existence of the power may increase compliance.

Key points which the group agreed upon

- Consideration should be given to amending the protocol to make clear it is mandatory (currently it is stated to set out "the behaviour the court will normally expect of the parties prior to the start of a possession claim");
- Consideration should be given to extending the protocol to apply to all mortgage possession claims relating to residential property, including 'buy to let' mortgages;
- Consideration should be given to amending the protocol to ensure that occupiers are notified of steps taken under the protocol which are likely to lead to a possession claim being made;
- Consideration should be given to amending the protocol to give standard information to borrowers about the powers of the court, specifically the limits to what the court can order;

- Consideration should be given to amending the protocol to make reference to other forms of ADR available, such as the Business Banking Resolution Service.

APPENDIX 8 – REPORT OF JUDICIAL REVIEW SUBCOMMITTEE

1. This appendix to the Interim Report has been prepared by the JR subcommittee of the main working group.[124] Throughout this appendix, reference is made to features of JR as discussed in the *Administrative Court Judicial Review Guide 2021* ("Guide"),[125] as an authoritative and up to date source.

2. Three points need to be made at the outset. The first is that the JR PAP[126] is a significant and well-understood feature of JR practice and procedure (Guide 6.2). It reflects the four specific purposes which Lord Woolf gave for PAPs. The JR PAP is a bespoke protocol apt for evolution and improvement, borrowing from the virtues and experience in civil litigation more generally. Nothing in JR stands still, and the JR PAP should be no exception.

3. Secondly, the dual idea of (i) the establishment of a common architecture, common language and objectives for all PAPs, (ii) while at the same time recognising the need for divergence in the nature and details of PAP steps required in certain specific types of litigation, is a dual idea which readily fits JR. Reasons why that is so are explained in this appendix.

4. Thirdly, it is a cardinal truth that JR – with all of its special features and with the public interest considerations which underpin it – can frequently be conducive to a resolution, or a narrowing, of issues. Given that cardinal truth, it promotes the interests of justice and the public interest if that resolution or narrowing of issues can take place at the earliest reasonable stage. In JR, the importance of following the JR PAP is based on recognition of the value of the parties being able to "*resolve the issue without need of litigation or at least to narrow the issues in the litigation*" (Guide 6.2.3).

[124] See Appendix 1.
[125] The Administrative Court Judicial Review Guide 2021 (publishing.service.gov.uk)
[126] Pre-Action Protocol for Judicial Review - Civil Procedure Rules (justice.gov.uk)

The "good faith obligation" and JR

5. One key idea put forward in this Interim Report is the promotion of a "good faith obligation" at the pre-action stage to try and resolve or narrow the issues. There are several reasons why – as an important principle – this enhanced pre-action obligation would fit well within JR.

6. First, JR proceedings recognise, in an increasing number of ways, the importance of "procedural rigour" (Guide 2.1.3). The good faith obligation would reflect high expectations of procedural rigour at the pre-action stage.

7. Secondly, JR recognises a "duty of candour and co-operation" (Guide 7.5, 15). Candour is concerned with transparency in the disclosure of relevant information and documents. Co-operation is concerned with constructive liaison between the parties, as well as with the court. These are twin virtues.

8. Thirdly, there are strong reasons of justice and principle why it may be said – in the public interest – that neither candour nor co-operation (between the parties) should be duties which are 'switched-on' only when JR proceedings have been commenced. Each, when applied at the pre-action stage, can promote the interests of justice and the public interest. Accordingly, the "duty of candour has been recognised as applying at, or even before, the permission stage" (Guide 15.3.2). One consequence of the enhanced good faith obligation could be in cementing the recognition of the duty of candour and co-operation as applicable at the pre-action stage.

9. Fourthly, JR is characterised as a recourse of "last resort". In the context of the JR PAP it is recognised that "so far as reasonably possible, an intending claimant should try to resolve the claim without litigation", so that "starting litigation should be a last resort" (Guide 6.2.1). This links with the principle stated in the particular context of the JR "alternative remedy" principle, again, that JR is "a remedy of last resort" (Guide 6.3.3.1).

10. It follows from all of this that principles which promote JR being instigated as a last resort, having first sought to resolve and narrow the issues, fit with the philosophy of JR. Pre-action procedure in JR readily embraces the ideas of engagement between the parties to resolve or narrow the issues before proceedings are commenced. It also readily embraces candour and

co-operation on all sides at the pre-action stage, as well as early identification of any mechanism to which resort should properly be had as an "alternative remedy".

The "alternative remedy" principle

11. Reference has been made to the "alternative remedy" principle in JR. This principle involves the identification of any mechanism to which resort should properly be had as an alternative to JR. The "alternative remedy" principle is a very well-established and freestanding principle in JR. One of the features which a putative JR defendant is expected to point out in its pre-action letter of response under the JR PAP is any recourse available to the putative claimant which is said to fall within the "alternative remedy" principle. Often, the recourse will have been communicated even earlier, in the decision document which would constitute the impugned target of any JR claim.

12. The "alternative remedy" principle has been stated thus (Guide 6.3.3.1): "If there is another route by which the decision in issue can be challenged, which provides an adequate alternative remedy for the claimant, that alternative remedy should generally be used before applying for JR". The idea that the parties should engage, candidly co-operatively and in good faith, at the pre-action stage on the question of whether there is or is not an adequate alternative remedy as that term is understood in the case-law is eminent good sense and would reflect current expectations of the JR PAP procedure.

13. The JR case-law grapples with the sorts of mechanisms which can constitute an "alternative remedy" and the circumstances in which that is so.

14. One of the problems with seeking in a PAP to prescribe mandatory recourse which a putative claimant must pursue before JR proceedings are commenced is that this is cutting across pre-existing, evolving and meticulously worked-out principle. To take examples, if a complaints mechanism or a statutory appeal or statutory review or a right of recourse to the ombudsman constitutes – which it may or not - an "alternative remedy" then the putative claimant is already required to pursue that course and not JR. But if that or some other recourse is not an

"alternative remedy" it is because the Courts – applying public interest principles – have determined that the pursuit of JR is open to the claimant notwithstanding that other recourse.

15. The "alternative remedy" principle is just one of the relevant features of JR which reflect this unique, carefully circumscribed jurisdiction. There are others.

The nature of JR

16. JR is regarded as a special type of proceeding. It is an ancient common law jurisdiction, to which section 31 of the Senior Courts Act 1981 applies. It is in nature a supervisory jurisdiction, concerned with the accountability to law of public authorities. Public interest considerations pervade. Special remedies are available. One of the reasons why JR proceedings are different from private law proceedings is "*because the interests in play are typically not just those of the parties to the litigation*"; they include affected "third parties"; and they include "the public interest" (Guide 2.1.1). It is a jurisdiction which is intensely fact-specific and context-specific. It is a jurisdiction judicially managed through a careful balance of procedural rigour and procedural flexibility.[127]

Urgency and promptness

17. Like other claims, many JR claims are brought with compelling urgency. JR has an urgent cases procedure, using Form N463. The reconciliation of considerations of urgency, appropriate pre-action behaviour and appropriate procedural rigour are addressed by the practice and procedure and in the judgments of the Administrative Court. Rigid and prescriptive pre-action requirements need to be capable of disapplication in urgent cases.

18. Alongside considerations of special urgency, it is a general feature of JR in England and Wales that proceedings must be started "promptly" and "in any event" not later than 3 months after the grounds first arose. Thus, the primary requirement is promptness and the claim may be out of time although commenced within 3 months (Guide 6.4.1). This requirement is embodied in

[127] Judicial Review Handbook (7th edition, 2020) at §3.2 (Hart Publishing, 2020).

CPR 54.5(1). In most cases, the Court can grant an extension of time. There is a body of case-law which addresses when an extension of time may be appropriate.

19. Some JRs have tight time limits and do not permit any extension of time at all (Guide 6.4.4.3).

20. The requirement of promptness is itself fact specific. One consequence is that there can be uncertainty and it may be an action of virtuous prudence for a claimant to commence the claim for JR well within the long-stop 3 months referred to in the rules.

21. In JR, the PAP process "does not affect the [] time limits", and "the fact that a party is following the steps set out in the [Pre-Action] Protocol would not, of itself, be likely to justify a failure to bring a claim within the time limits set by the CPR, nor would it provide a reason to extend time" (Guide 6.2.4).

22. It is important also to appreciate what it is that the putative claimant is required to do, promptly. A further feature of JR is that proceedings are commenced "by filing a Claim Form that meets the requirements set out in CPR Part 54" (Guide 6.4.1). There are detailed rules which govern the documents which the claimant must file with the Court. These include grounds for JR, supporting witness statements and documentary evidence. The duty of candour applies. This deliberately front-loaded procedure means far more is required of the claimant at an early stage than in any other form of civil litigation.

23. One consequence of this is that a JR claimant cannot, for example, simply file a claim form (N461) protectively, so as to 'stop the clock', assuming that the Court will be willing to treat the proceedings as having properly been commenced.

24. Linked to this is the fact that the prudent JR claimant cannot assume that the Court will be prepared to "stay" JR proceedings, while time is allowed for some step to be taken. Whether the Court will do so can be expected to depend on all the circumstances, the interests of justice and the public interest.

No extension of time by agreement

25. This is a feature of JR which is especially important when considering additional pre-action steps and duties. Such is the nature of the overriding duty of promptness, and the public interest considerations underpinning it, that the parties cannot agree to extend time or agree to suspend the running of time. This prohibition is the subject of an express rule: CPR 54.5(2). The position is this. The time limit "may not be extended by agreement between the parties", although "prior agreement not to take a time point can be relevant to the exercise of that discretion" i.e. the Court's discretion to extend time (Guide 6.4.2.1).

The problem with mandatory and prescriptive pre-action steps

26. There is therefore in JR a combination of these features: (i) a tight long-stop time limit (3 months); (ii) an overriding duty of promptness (with primacy over the 3 months long-stop); (iii) a prohibition on the parties agreeing to postpone the running of time or mandate an extension of time; and (iv) the need for compliant papers to be filed in commencing JR. JR retains the flexibility, on a case-specific basis, to deal with the individual circumstances of the case. But this combination of features can be seen necessarily to limit the extent to which prescriptive, mandatory pre-action steps can appropriately be identified for JR cases.

27. In the light of the features and considerations discussed above, the good faith pre-action obligation ought not to carry with it steps which are prescriptive and rigid in their application and enforcement.

28. The point can be put in a different, more positive, way. In the context of JR – with its special features – the public interest imperatives which apply at the pre-action stage can be accommodated within a flexible, case-specific operation of the pre-action correspondence required by the JR PAP.

The idea of 'negotiated settlement'

29. As has been explained, many JR cases can be resolved without a ruling from the Court. Sometimes claimants recognise that they cannot succeed. Sometimes defendant authorities recognise that they cannot defend their impugned action. Sometimes, there is a step or development which means that the claim is no longer needed.

30. It may be that in many private law cases, resolution without the Court's intervention can involve 'negotiated settlement'. Such cases may involve public authorities. Examples are false imprisonment claims against the Home Office and clinical negligence claims against NHS authorities. Cases which in essence involve monetary remedies are in principle always capable of resolution, if the parties can agree whether and what payment should be paid. They can conduct a cost/benefit analysis, taking into account the risks of succeeding or failing in Court, and taking into account the legal costs which can be avoided.

31. It is very rare for JR cases to be of this nature. Instead, JR cases concern the lawful or unlawful exercise of public powers. The issue is whether there is a public law wrong and, if so, whether a remedy is appropriate. Monetary remedies arise only where they are linked to a public law wrong.

32. As has been explained, JR cases may be capable of resolution. And, where they are, they may be capable of resolution at an early stage. But there are things that can stand as impediments to that course. The public law nature of the decisions being impugned means that public authorities are constrained by their powers, by how they perceive the limits of those powers, and by how they assess the merits and the wider consequences of a case. A public authority may have and perceive a public duty to make decisions and take actions which it judges as the correct course on the merits.

33. Resolution may be possible, because a public authority may come to recognise that some different action is, in law, necessary or appropriate. Sometimes, a public authority may be able to accommodate a grievance for pragmatic reasons, being satisfied that to do so is within its powers. But JR cases are not like monetary claims, where in principle it is always possible to pay an amount to 'do a deal' and to 'see off a claim'.

34. Moreover, sometimes in JR there is a legal constraint where the public body is *functus officio*. While this does not prevent the public authority from agreeing to resolve a case at the PAP stage – if persuaded that it has acted unlawfully – that resolution cannot take place without an order from the Court. Proceedings must be issued to have the decision quashed.

Enforcement & Proportionate Costs

35. The Administrative Court is familiar, through the *M v Croydon* jurisdiction (Guide 24.5), with assessing on the papers the costs consequences of early resolution on the papers, having regard to all the circumstances including pre-action conduct. The proposed costs and proportionality principles, and in particular the summary costs assessment process, could be readily and easily absorbed and adapted in JR.

36. As for early judicial consideration of compliance and the imposition of sanctions, the JR procedure also has a ready-made mechanism for the early consideration of claims – the permission stage. Any such matters could be raised and considered, to the extent appropriate, as part of the permission application.

Other points

37. The features of JR identified above stand as principled reasons why a bespoke JR PAP is needed, and why prescriptive or mandatory steps and a 'stocktake duty' would not fit well for JR. Instead of a the three-stage process as is proposed for the revised general PAP, what is needed is a simplified and integrated pre-action process which can be undertaken at appropriate speed. This should include the enhanced duty of good faith to narrow and (where possible and appropriate) resolve the case without recourse to litigation. There are, however, other relevant points to be made.

Power imbalance

38. First, although it will not always be the case, and albeit that this can also be a feature of a private law action (e.g. a claim for damages for false imprisonment), there is in JR often a significant imbalance or asymmetry of power and resources. JR can be a species of proceedings where there are "severe power imbalances". That alone can militate against the appropriateness of mandatory pre-action obligations. Once proceedings have been commenced, there is a judicial forum. That affects the way in which parties, whatever the power imbalance, present and behave.

39. Where there is an imbalance of resources, there may be an inability to afford to take part in third-party facilitated options listed as the proposed 'good faith steps'. An impecunious claimant may be able to secure access to the court through the level of court fees or a waiver of fees, when they may be unable to afford mandatory pre-action steps. This calls for careful consideration.

40. There may be asymmetry in knowledge and information. It was in JR that Lord Donaldson MR famously spoke of "most of the cards" being in the defendant public authority's hands. This point brings into sharp focus whether JR defendants are to be expected – and can be relied on – to make full disclosure at the pre-action stage. Where public authorities treat candour as triggered only by proceedings – or, based on some of the authorities, triggered only by the grant of permission for JR – resolution at earlier stages is undermined.

LIPs

41. LIPs are not, of course, peculiar to JR. Moreover, the general expectation in JR is that "LIPs must comply with the requirements" of the rules, PDs and guide (Guide 1.5.4, 4.2.1, 20.6.1, 20.5.1). In JR, as in other areas of the law, the Court "may make allowances" (Guide 4.3.6). But LIPs are expected to engage in the pre-action correspondence required by the JR PAP. They are expected to abide by the 'alternative remedy' principle. They can be expected to approach the pre-action stage in 'good faith'. Having said that, it is important to give careful consideration to whether any newly prescribed pre-action stage can be expected to be complied with by a LIP, especially given the other features of JR.

Structural changes

42. It is right to recognise that it would be possible to make structural changes to JR, so as to make JR more amenable to rigid and prescriptive pre-action steps. The rules on delay and promptness could in principle be revised. The rule preventing the parties from agreeing to defer or extend time could be abrogated. The principles as to 'alternative remedy' could be re-evaluated. But these would be ambitious suggestions. All of these features of JR, and the organic development of the case-law regarding each of them, have been introduced and have developed for sound

public interest reasons. There are strong reasons why pre-action procedures should fit with JR, as it has been designed and operated, to promote the public interest.

Legal aid

43. The challenges and implications of the scope of legal aid are not peculiar to JR. Many JR cases are 'in scope' for legal aid funding, subject to 'merits', 'means' and 'no alternative remedy or funding source' tests being satisfied. However, the primary form of legal aid used in JR, 'Full Representation', is intended for litigation, not pre-action steps. The main alternative, 'Legal Help' which is a form of 'Controlled Work', is not designed for complex pre-action correspondence, stocktakes or ADR. It is limited to the provision of advice and limited assistance and expressly excludes more formal litigation processes such as those under consideration. Usually, a PAP letter before claim must be sent, and a reasonable time must be given for a response, before a Full Representation legal aid certificate will be issued to fund steps necessary to litigate the case.[128] Funding for ADR is in theory available at this second stage, but only after the PAP process has been completed.

44. The adoption and promotion of a new enhanced PAP will bring into sharp focus the need for legal representation to be more readily available in JR at the PAP stage. Unless Full Representation is to be extended to the pre-action stage, unrepresented putative claimants facing an imbalance of power may have little enthusiasm and less ability to comply with burdensome pre-action obligations. Put another way, if enhanced pre-action steps were contemplated for JR, then there is a strong case for adopting the position that – as part of the picture – those JR cases for which legal aid is available should, in principle, attract Full Representation funding at the pre-action stage.

Responses to the PAP Preliminary Survey

45. The subcommittee were informed both by the responses to the survey from public law practitioners and available empirical studies. Whilst a quarter of all survey respondents suggested that the primary purpose of issuing a PAP is to encourage or ensure that ADR is

[128] Investigative Representation is another form of legal aid certificate available where the prospects of success are uncertain but is rarely granted in judicial review cases and does not cover ADR steps.

pursued, this was not the view of any of the respondents working in the field of JR. Instead three out of four suggested that the primary purpose is to narrow down the relevant issues and identify areas of dispute. Whilst a small sample, it aligns with the perceptions of those contributing through the subcommittee.

46. Several members of the subcommittee had direct experience of the effectiveness of the JR PAP in the early resolution of disputes. Academic literature suggests that this is replicated more widely across the JR sector.[129] Research suggests that a high proportion of potential cases are resolved at the PAP stage. An independent evaluation of Deighton Pierce Glynn's PAP Project reported that 85% of such cases were resolved without further action.[130] According to one report, around 60% of potential JR cases do not proceed further following the exchange of communications between parties.[131] Overall, and at least in cases in which parties have access to adequate legal advice or assistance, the current PAP for JR can be said to be working effectively. As respondents to the survey noted, proper use of the PAP procedure can lead to positive results, and a saving in time and money for all parties.

47. The empirical data suggests that a significant number of JR applications are settled prior to a formal hearing and the highest proportion of these settlements occur either before permission is determined on the papers or very quickly after the grant of permission.[132]

48. Overall, respondents to the preliminary survey were of the view that proper use of the current PAP procedure met the original objectives and could lead to early resolution of issues, and a saving in time and money for all parties.

49. Where concerns were widely voiced by survey respondents, these mirrored the wider concerns amongst respondents to the survey concerning compliance with the PAP and the inconsistency or absence of sanctions consequential upon failure to comply, leading to the process sometimes being little more than a box-ticking exercise. This was particularly cited in the

[129] Varda Bondy and Maurice Sunkin, T*he Dynamics of Judicial Review Litigation* (Public Law Project, 2009), 25-7.
[130] See Richard Malfait and Nick Scott-Flynn, "Evaluation of the Pre-Action Protocol Project", available at https://pollyglynn1.wixsite.com/paps
[131] Varda Bondy and Linda Mulcahy, *Mediation and Judicial Review*, (Public Law Project, 2009), 18-19
[132] Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation* (Public Law Project, 2009), 29, 33-47.

context of candour and the perceived reluctance of public bodies to provide disclosure or documentation at the PAP stage (for example by responding to PAP requests with an invitation to make separate GDPR or Freedom of Information Act requests, or by withholding relevant information and documents on the grounds that disclosure at PAP stage is disproportionate). Similarly, claimants and their lawyers have increasingly been the subject of judicial criticism for breaches of candour in recent years.

Conclusion

50. In the light of the features of JR identified above, a principled conclusion would support, in JR proceedings:

    a) the embracing of the general PAP philosophy and lexicon;
    b) the enthusiastic recognition of the proposed 'good faith' duty;
    c) the avoidance of prescriptive pre-action steps (in performance of that 'good faith' duty);
    d) the avoidance of a 'stocktake' duty;
    e) the maintenance of a bespoke JR PAP developed in conjunction with the Administrative Court; and
    f) the ongoing open-minded consideration as to whether JR pre-action process can be further improved and enhanced, borrowing from the experience of progress in other areas of law.

JR in Tribunals

51. Finally, JRs in the tribunal have their own characteristics which may or may not make them suitable for a similar PAP (for example there are much higher levels of LIPs in the Upper Tier Tribunal - Immigration Chamber). Any changes would fall under the jurisdiction of the Senior President of the Tribunals and it may be desirable for the President to be invited to consider similar changes and consult stakeholders.