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Respondent



Time to complete

This is a public consultation by the Civil Justice Council.

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

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

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

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1. My response is: *

- ☒ Public
- ☐ Anonymous
- ☐ Confidential

About you

2. First Name *

3. Last Name *

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

5. Your role *

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

6. Your job title

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

- ☐ Claimants
- ☒ Defendants
- ☐ Not applicable

8. Your organisation

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

- ☒ Yes
- ☐ No

10. Your email address *

Questions relevant to all protocols

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

- ☒ Yes
- ☐ No
- ☐ Other

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

Compliance is already de facto mandatory.

If a step is mandated, by implication failure to follow it would attract some form of sanction. The current rules already empower the courts to impose a range of sanctions for failure to comply with the relevant PAP. Those powers are set out conveniently in Appendix 5, paragraph 32 of the CJC report.

The court is required to take into account whether or not a party has complied with the relevant PAP and Practice Direction when setting directions and when determining costs. Available sanctions include staying proceedings until specified steps are taken to comply.

Compliance is, in the circumstances, de facto mandatory even if the PAPs are not framed in those terms and we agree with that. Parties should follow the protocols and those protocols already state (in differing wording and at different places) that failure to do so may attract sanctions.

If what is proposed is changing the fundamental nature of PAPs from codes of best practice to expressly mandatory obligations on the same footing as the civil procedure rules themselves, with heightened powers to penalize non-compliance, we consider that would encourage the (increased) involvement of lawyers pre-issue, increasing costs with little obvious benefit. It would bestow on each provision of each protocol a gravity that can and will be exploited by parties. That would be contrary to the important, current, injunction in the Practice Direction to Pre Action Conduct And Protocols that "A Pre Action Protocolmust not be used by a party as a tactical device to secure an unfair advantage over another party. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal, factual or expert issues." (PD 4).

The better question is whether the courts use their existing powers adequately. We believe the courts could and should take a more active role in considering compliance at the earliest stage of litigation. In more extreme cases, the existing power to stay proceedings until appropriate steps have been taken would be sufficient.

The report identifies the potential problem presented by weak/entirely unmeritorious claims should compliance become mandatory, with time, effort and costs wasted by Defendants jumping through the hoops of PAP compliance to avoid sanction. Rather than attempting to create a "weak cases/summary judgment exception" to otherwise mandatory obligations, which would no doubt be difficult to define and enforce, we recommend resisting the push to make compliance with PAPs a mandatory obligation, for the reasons discussed. It might also be asked: how would one define a weak case? How weak? Surely, the only way to deal with such cases is to allow for an early strikeout application, so that the merits of the claim can be assessed by the court. That is the current position.

There is a considerable danger that, by introducing changes to make compliance with protocols on the same footing as compliance with the CPR, you simply bring forward the litigation work. The pre-action steps become litigation by another name, entirely undermining the original intention to the detriment of all.

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

- ☐ Yes
- ☐ No
- ☒ Yes. The creation of online pre-action portals for

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

We consider that the existing Part 8 procedure is fair and reasonable and have no experience other than it being straightforward and effective. The introduction of a new summary assessment procedure with the possibility of no appeal would only lead to poor conduct habits and potentially remove access to justice for paying parties. The existing assessment, and particularly summary assessment, with the sanctions for unsuccessful challenges within CPR 47.15 (7) provides for a fair and balanced system. CPR 52 also provides a redress for appeals from a Detailed Assessment. The extension of fixed recoverable costs and the likely application to pre action matters would further reduce the numbers that pass through the existing Part 8 procedure. A new system would in our view provide for a greater opportunity for costs disputes or unfair and unjust costs decisions without recourse. We do not recognise the proposition within the CJC report that the current system does not provide an incentive to settle pre issue. It is, of course, incumbent on a legal representative when advising their client about settlement to consider costs implications at the same time as quantum or substantive claim resolution. The current system does not prevent this happening. The introduction of many of the areas discussed within this response will ensure greater success in usage of the PAPs to resolve both the substantive action and costs.

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

Introducing a clearly expressed "good faith" step may be beneficial, but the obligation implies sanctions for failing to engage which would, we feel, be counter-productive beyond those which already exist, for the reasons discussed in response to Q12.

Currently, all PAPs encourage parties to consider ADR and failure to do so can attract sanctions. See, for example, Practice Direction – Pre-Action Conduct and Protocols, section 11 and the Personal Injury PAP, section 9.1.3. Wording across the PAPs is however inconsistent. Introducing a good faith obligation may heighten awareness of the importance of consensual dispute resolution and the various forms of possible engagement.

Making such engagement mandatory, however, would likely be counterproductive. Unreasonable refusal to engage in ADR can be penalised under the current rules. If a claim is largely or entirely without merit, requiring the parties to engage in any form of ADR would simply increase costs. The intervention of a neutral third party, whether by way of mediation or ENE may help to bring meritless claims to an early halt, but any step to mandate ADR is, we feel, unnecessary and potentially highly counter-productive. Consent is an essential pre-requisite to such engagements if they are to be productive.

A key area that does require attention is the often inadequate information received by Defendants from Claimants. This is a problem experienced across a range of litigation types. It is a prerequisite of any form of ADR that the parties have sufficient information available to them to form a view on risk and value.

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

- ☒ Yes
- ☐ No
- ☐ Other

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

The preparation of JSR could prove useful. It would focus the minds of both parties on the key issues. It could potentially reduce the cost of subsequent litigation, having identified those issues which were agreed and the nature of any remaining areas of dispute. It would focus the parties' minds on what actually matters and where time ought to be devoted. Recording pre-action disclosure may, in certain cases, remove the need for a formal disclosure stage or at least narrow its scope.

The key would be to ensure that such a step was not overly burdensome or seen as an opportunity to create an advantage over the opposing party, as unfortunately even the production of a joint case summary prior to trial can sometimes become.

The Template JSR is a reasonable attempt to balance the need to capture all relevant, key, information without creating a document which is too intimidating for non-lawyers or otherwise excessively time-consuming to complete. We would question the inclusion of "An offer of compromise" on the list of possible steps, as the parties might legitimately wish to ensure that the making of an offer remains confidential.

Beyond that, we would not suggest any particular amendments to the template other than the need to provide a box at step 2 to record why no good faith step has been taken to try to resolve or narrow the dispute, should either party believe that attempting any such step was inappropriate, for reasons they can explain in the document. We would propose: "If no Good Faith step has been taken, please explain why."

The proposed time-scales (completion within 14 days of conclusion of good faith step) is unnecessarily tight given the need to consider, take instructions and liaise with the opposite party. We would propose 28 days.

We would recommend that parties and mediators are encouraged to include in mediation agreements provision for the mediator to assist the parties in drafting the JSR if the mediation fails to achieve a resolution.

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

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

a) We believe the current sanctions are sufficient. A power to strike out for non-compliance would, we believe, inevitably generate satellite litigation (what is "grave non-compliance"?) and may well promote "opportunistic and tactical behaviour", as suggested by some on the working Group (Appendix 5, para 35). In general, a shift in the character of PAPs from standards of behaviour designed to promote sensible and constructive conduct to mandatory rules with excessive sanctions for non-compliance should be avoided.

b) Yes.

If amended to incorporate relevant comment, the DQ provides a convenient way for parties to highlight material failures they wish to bring to the court's attention at an early stage, and which can be considered at the first CMC. It should be amended to enable parties to identify any material PAP non-compliance by their opponents (what and why it matters).

In lower value cases, it may be possible to evidence the failure adequately at DQ stage and invite the court to make a suitable order requiring compliance or staying proceedings until identified steps have been completed.

c) Yes.

d) The PAPs should include a statement, identically worded and prominently positioned, which summarises the court's powers to impose sanctions for non-compliance and the nature of the sanctions available.

As the Interim Report notes, there is an inconsistency across the current PAPs in terms of the "ADR" wording and the positioning of that wording within the Protocol. Some effort to improve clarity would be sensible.

e) No.

The currently available sanctions are sufficient. The vast majority of claims settle without litigation. The current system is, largely, working well. There is perhaps a need for greater clarity and consistency of application.

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

- ☒ Yes
- ☐ No
- ☐ Other

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

PAPs should certainly be written in as clear and comprehensible a way as possible. There is always a risk that, in attempting to remove "legalese" to make documents comprehensible to non-lawyers, ambiguity is inadvertently introduced. Clearly, care needs to be taken to ensure the text is both comprehensible and, so far as possible, indisputable.

The format and language of individual PAPs does differ and there is scope to standardise some of the text and structure to make them easier to follow.

The suggestion made in the interim report that PAPs could be made available on-line and linked to available digital court processes is, we think, interesting and potentially beneficial, although we do have concerns that around preserving the without prejudice nature of pre-litigation exchanges. See response to Q13.

Also, as with the broader debate around "on-line justice", it must be recognized that there will continue to be a segment of society who struggle to engage with on-line services and will require additional support. What provision is to be made for such people if they are to benefit from the increasing shift on-line and not find their access to justice is undermined? The ongoing discussion about on-line justice does seem to ignore this group and perhaps the inevitable conclusion is that there will be those who require guidance from legal professionals even while online processes increase accessibility for the majority. Subject to that concern, making PAPs available on-line provides an opportunity to present the Protocol in easy-to-follow flows, guiding the user through the process and presenting the text in a more digestible, accessible, form.

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

- ☐ Yes
- ☒ No
- ☐ Other

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

The Professional Negligence Protocol makes the same statement in respect of the Letter of Claim/Claimant's Statement of Case. It is not limited to the Response/Defence. We assume that the question is intended to apply to both Claim and Response.

The provisions at 6.3 and 9.2.2 of the PN Protocol are reasonable and sensible, allowing the court discretion to determine whether the differences are material and, even if they are, whether they justify sanctions. There seems to us no good reason why similar provisions ought not to be included in all PAPs, to encourage care on the part of both parties when formulating their positions and avoiding the inevitable wasted costs if Statements of Case differ materially from pre-litigation statements.

Similarly, it would be sensible to adopt the same approach to a Joint Stocktake Report. Should a party's position shift materially post-issue of proceedings from that set out in the JSR, then the court ought to consider exercising one or other of its existing powers, as conveniently set out at Appendix 5, para 32. The existing powers are sufficient and, importantly, the court has the discretion to consider whether any shift in case is sufficiently material to justify sanction, and the most appropriate sanction.

There needs to be some discretion to accommodate developing arguments as further evidence and documents come to light and are analysed. Shortening timescales for response cuts down on the scope for amendment of positions in light of new evidence.

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

Potentially, yes.

Currently, the personal injury Protocols place a disclosure burden on Defendants with little or no commensurate obligation on Claimants to collate and provide relevant documentation in support of their case. If Claimants were required to engage in early disclosure, providing copies of relevant documents in the Claimant's possession or control, with the Letter of Claim, then there is the potential to reduce the scope of subsequent, post-issue, disclosure if not remove the need for such a step entirely. The parties would, we suggest, need to agree that they are satisfied with their opponent's disclosure and do not require a List endorsed with a Disclosure Statement, but there may well be cases, particularly at the lower value end, where pre-action could be played through to subsequent litigation and save time and cost. It would be sensible to amend the current list of documents precedent to make clear what was disclosed pre-issue and what is new.

The current imbalance in pre-action disclosure would need to be addressed, however. Why, for example, should a Claimant not be required to secure and disclose relevant medical records with the Letter of Claim? The delay Defendants experience in obtaining medical records is a considerable impediment and cause of delay, particularly where there are potential causation issues.

We are more concerned about the suggestion that Letter of Claim and Response could stand as the parties' Statements of Case in subsequent litigation. We oppose that. It seems inevitable that, should that be the case, both parties would seek (further) assistance from lawyers, pre-issue. Currently (certainly in the personal injury context), Responses are formulated by insurance company claims teams or other insurance claims handling professionals with little or no input from lawyers, whereas Claimants are usually legally represented. Defendant representatives may well conclude that legal advice was required to assist with the Response if it were to stand as the defence should the claim litigate. That would surely be a retrograde step.

Any pre-action process should be designed to achieve certain key objectives: a clear exchange of the parties' positions so that the Defendant knows precisely the basis upon which the Claimant says he is legally liable for the Claimant's losses and, so far as is reasonably possible at that stage, what those losses are; an exchange of documentary evidence sufficient to enable each side to form a sensible, early, view on the merits of their respective positions and the risk of losing; and sensible mechanisms to allow the parties to negotiate and either settle or at least identify and reduce areas in dispute. If the Protocol encourages compliance with these simple objectives then, if litigation prove necessary, it should not feel like the parties are starting again. They will understand what is agreed and what is not. They will have an appreciation of the likely claim value. They will possess most if not all of the key documents and will have had opportunity to consider them. All of this should, if followed in a spirit of cooperation, should help reduce the cost and time of any subsequent litigation.

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

☒ Yes

☐ No

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

It is not obvious why there is a need for a General PAP, rather than a review and possible amendment of the existing Pre-Action Conduct Practice Direction. It is short but includes the key steps proposed in the new General PAP (notice and exchange at 6; good faith steps at 8-11; stocktake at 12). That said, we have no objection to its introduction.

We consider the proposal that there be three sequential steps, each of which is dependent on compliance with previous steps, to be attractive, particularly where the first stage emphasises an obligation on both sides, not only the Defendant, to exchange key documentation in support of their position. The requirement for the preparation of a timeline would also be welcome.

Subject to our concern over time for response, discussed elsewhere in this response, the 3 sequential step approach could usefully be incorporated into most if not all PAPs.

The draft Protocol states: "The claimant can commence proceedings without filing a stocktake report 14 days after the conclusion of the good faith step....if the defendant fails to co-operate in completing a stocktake report." This could encourage game-playing, with disputes about whether or not there has been proper co-operation. It would then be for the Defendant to argue that proceedings had been issued prematurely/in contravention of the PAP at the first CMCC, flagging the issue in the DQ (as per response to Q18).

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

The proposal that the Defendant have 14 days to respond, extended to 28 days if expert evidence (or "additional information") is required is unrealistic and unnecessary. A process which allows the Claimant as much time as they wish to take, subject to limitation, to undertake detailed investigations, collate relevant documentary evidence and secure expert evidence, before sending a Letter of Claim, but allows the Defendant only 14 – 28 days to respond, is absurdly lop-sided and runs the risk of causing greater delay and cost further down the line as the Defendant's position is necessarily refined and amended as further information comes to light. Far better to allow more time at the front of the process to allow for a proper defendant investigation and response. The idea that expert evidence can be obtained within the periods mooted smacks of academic rather than practical experience. Suitable experts are often in high demand and lead extremely busy professional lives. It would be highly unusual to be able to identify a suitable expert, instruct them appropriately, with all relevant documentation, allow them time to consider the evidence and prepare a report within the periods suggested.

Response times are dictated by the nature of the case and complexity of the issues. The individual PAPs can reflect the differing requirements. For a default position, whether set out in the existing PD or some new General PAP, flexibility is key. The current PD states that the steps to exchange relevant information will "usually include.. the defendant responding within a reasonable time – 14 days in a straight-forward case and no more than 3 months in a very complex one." That remains a sensible approach, in our view.

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

We believe the current provision within the Pre-Action Conduct PD, that the parties "disclose key documents relevant to the issues in dispute" is sufficient direction for a default process not already covered by one of the specific PAPs.

Personal Injury Protocols

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

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

☒ Yes

☐ No

29. 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?

- ☒ Yes
- ☐ No
- ☐ Other

30. 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?

- ☐ Yes
- ☐ No
- ☒ Good Faith text to be provided, but not an obligation

31. Do you agree that all PI protocols should include an obligation to 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?

a) After ADR, should the parties elect to engage in ADR. See our observations on the need to avoid this becoming a burdensome, tactical, exercise. This is particularly so in the context of personal injury litigation, where QOCS applies.

b) Yes.

32. 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?

Yes.

a) Incorporation of a statement, under a clear sub-heading "Conduct of cases involving serious injury" early in the PAP, which directs parties to the Serious Injury Guide, conveniently annexed to the PAP, and advises that the parties are encouraged to follow the Guide in cases with a claim value in excess of £250,000 or other cases where the parties consider that compliance with the guide would be in their client's best interests.

b) The question refers to the "current protocol", whereas this section is headed "Questions specifically related to personal injury protocols" (plural). It is assumed that this question has in mind the PAP for Personal Injury Claims.

The statement at 1.1.1 that the Protocol is primarily designed for personal injury cases which are likely to be allocated to the fast track is something of a dead letter and is in any event inconsistent with the requirements to consider rehabilitation and the securing of an immediate needs assessment report. The fast-track reference should be removed.

The Protocol is sufficiently flexible to accommodate a range of injury values and integration of the Serious Injury Guide, as referred to above, provides the additional process requirements needed to manage large and catastrophic injury claims.

33. 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?

The Rehabilitation Code is already referenced at section 4 of the personal injury Protocol. We consider that it is already adequately integrated. This would be strengthened, for cases at the higher end, by incorporation of the Serious Injury Guide as discussed in response to Q32 (a).

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

- ☐ Yes
- ☐ No
- ☒ We are yet to see the draft amendments to deal with

35. 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?

- ☐ Yes
- ☐ No
- ☒ Yes. The current PAPs for personal injury claims are

36. 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?

There is a serious need to address the disclosure imbalance between Claimant and Defendant pre-issue. The current emphasis is entirely focused on the Defendant's obligation to provide disclosure to the Claimant during the response stage. This is an odd imbalance, particularly given that Claimants will typically have considerable time to prepare their case and control over when to serve the Letter of Claim.

Claimants should be required to disclose relevant medical records with the Letter of Claim, both GP and hospital, including Fast Track cases. In cases involving serious and ongoing symptoms, it would greatly assist the Defendant's assessment of causation and quantum, and the progress of the case, if signed forms of authority for disclosure of GP and hospital records were provided with the Letter of Claim. The Protocol could helpfully provide for this.

Personal Injury claims are dogged by a lazy, cut and paste, approach to disclosure demands by Claimants. Almost invariably, rather than carefully considering what documentation may be in the Defendant's possession or control and which documents are likely to be relevant to the claim, the Letter of Claim will (literally) include cut and paste chunks from Annex C of the Protocol, frequently including reference to documents the Defendant cannot possibly hold or are otherwise irrelevant to the issues at stake. The Protocol should be amended to discourage such behaviour and encourage Claimants to apply more thought to those documents they reasonably require sight of. There needs to be much greater focus.

Similarly, both sides should be required under the PAP to exchange documentation in their control relevant to quantum. The Claimant will hold or be able to obtain documentary evidence relevant to expenses incurred and would be equally able to obtain evidence to support a past and projected loss of earnings claim in the personal injury context. There is no good reason why the PAP should not require the Claimant to disclose such documentary evidence with the Letter of Claim and sensible reasons to do so. Early disclosure will help the Defendant to calculate an informed estimate of the likely claim value which will inevitably feed into their assessment of tactics and, in particular, whether the value and liability risk justifies a denial or supports the making of an early offer. Enabling the Defendant to reach a reasonable estimate of claim value is in everyone's interests.

More particularly, in both the personal injury and non-personal injury contexts, cases cannot be resolved by mediation unless quantum is properly substantiated.

37. 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?

- ☒ Yes
- ☐ No
- ☐ Other

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

- ☐ Yes
- ☐ No
- ☒ We have limited experience of handling such claims

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

- ☒ Yes
- ☐ No
- ☐ Other

40. 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?

- ☒ Yes
- ☐ No
- ☐ Other

41. 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?

Yes.

The PAP should discourage expert shopping. The requirement on parties in the current personal injury Protocol (para 7.3) to nominate experts before instructing one is routinely ignored by Claimants.

In cases where the Claimant has obtained medical evidence prior to the filing the CNF or serving the LOC, or otherwise instructed an expert and are awaiting the report, they should be required to state in the CNF/LOC that they have done so. Should they elect not to rely on that medical evidence subsequently, the principles in *Edwards-Tubb v JD Wetherspoon* [2011] EWCA Civ 136 would apply. The court cannot override privilege in the report but ought, in normal circumstances, require waiver of privilege as a condition of granting permission to adduce evidence from a different expert.

42. 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?

- ☒ Yes
- ☐ No
- ☐ Other

43. 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?

- ☒ Yes
- ☐ No
- ☐ Other

44. 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?

The Protocol should entitle a Defendant to seek its own medical expert evidence should the Claimant delay in serving their own expert evidence for a significant period of time. What is considered significant would depend on various factors, but a failure to serve report(s) obtained prior to LOC within 4 weeks of service of the LOC should mean that the Defendant is entitled, pursuant to the Protocol, to make arrangements for examination of the Claimant by its own selected expert(s) and the process stayed should the Claimant refuse to submit to examination. This would be achieved by the Defendant refusing to engage further with the Claimant and, should proceedings be issued, bringing the Claimant's failure to serve medical evidence already obtained timeously and refusal to submit to medical examination to the attention of the court at the first opportunity.

Our defendant medical negligence team observe that frequently a Claimant has taken between 6 months – 2yrs to investigate their case, get expert reports and other evidence before sending the LOC but expects the Defendant to respond within 4 months despite the fact that they are typically extremely busy medical practitioners. There is a perhaps an erroneous assumption that the Defendant has easy access to experts whereas the reality is that, in a number of areas of specialism, it is very difficult to get an expert at all and those available are often conflicted or take 6 – 12 months + to report.

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

- ☐ Yes
- ☐ No
- ☒ Perhaps, but it would introduce a time-consuming

Housing Protocols

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

- ☐ Yes
- ☒ No

Judicial Review Protocol

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

- ☒ Yes
- ☐ No

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

We agree that the approach set out in chapter 4 is broadly sensible albeit it is stated in somewhat general terms and much will depend on the detail of the JR PAP to be developed.

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

We would suggest that the following aspects be considered in respect of the JR PAP:

- We agree that the context of JR means that flexibility is essential, rather than an approach based mainly on mandatory provisions.
- The position of potential interested parties. These are typically included only at the issue stage, and are not usually recipients of letters before action. That might be said to be anomalous. If an entity has sufficient interest to be an interested party, at least arguably it should be involved at the pre-action stage, in particular given the elevated importance to that stage apparently being given by these proposals.
- The position regarding the disclosure of documents and the duty of candour in particular on the part of the Defendant. It would be helpful to have an unambiguous and comprehensive description of the extent of the duty of documentary disclosure at the pre-action stage.
- It would be useful to understand how the duty of candour and the new duty of good faith interact and in particular whether the duty of good faith enhances the existing duty of candour. We think it will be difficult for public authorities to comply with the suggested approaches in paragraph 3.21 in the short timescales applicable in JR.
- The position regarding costs is anomalous in JR. We would like to see further development of:
 - o What happens for complaints settled at the pre-action stage;
 - o A single approach to costs capping (recognising the existing limited jurisdiction under the Aarhus Convention);
 - o The limited application of Part 36 and ADR.

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

- ☒ Agree
- ☐ Disagree
- ☐ Other

51. 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?

Subject to the points made at question 49 above, we agree with the assessment at paragraph 4.54.

Debt Protocol

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

- ☐ Yes
- ☒ No

Construction and Engineering Protocol

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

- ☒ Yes
- ☐ No

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

- ☐ Yes
- ☐ No
- ☒ Please note that our response to this question is

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

- ☐ Yes
- ☐ No
- ☒ Our experience is that the referee procedure is b

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

We would support the use in other Protocols of language similar to section 10 of the Professional Negligence Protocol.

Section 10.2 of that Protocol provides that the pre-action disclosure that can be ordered pursuant to a request under CPR 31.16 is the maximum extent of the obligation to disclose: it does not set a standard of disclosure in itself.

An acceptable alternative to the use of language similar to the Professional Negligence Protocol would be to adopt the approach currently taken in Practice Direction 51U Section 5. The relevant language would require the Letters of Claim and Response to make sufficient disclosure for the other party to understand clearly the case that is made against it. The text should also make it clear that there is no requirement at this stage to disclose documentation that is adverse to the author's case or which the author could not be ordered to produce if requested by way of pre action disclosure under CPR 31.16.

We refer to the full text of Practice Direction PD51U Section 5.

Professional Negligence Protocol

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

☒ Yes

☐ No

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

☐ Yes

☐ No

☒ Please note that our response to this question is

Proposed low value small claims track

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

☒ Yes

☐ No

60. 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?

☐ Yes

☐ No

☒ Other

Any other comments

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

We have mentioned in several places the undesirability of wording which enables a Claimant to avoid providing sufficient detail to enable issue to be joined on duty, breach, loss and causation and for ADR to have a good prospect of success. This is all the more serious if no provision is made for time limits to be extended while proper particularisation is provided.

It is also our perception that the composition of the Working Body, whilst no doubt appropriate in relation to a review of the general Protocol and many of the individual Protocols, did not include fully equivalent representation from those responsible for running cases under the Construction & Engineering and Professional Negligence Protocols. We also note that no sub-committee was formed to discuss these two Protocols. The changes proposed to these Protocols require proper, separate, debate. Whilst the extension to 21 January is appreciated the overall time allowed for responding at the busiest time of the year for professional indemnity insurers, in particular, has not been sufficient for this to take place. Our suggestion is that a further 3 months is allowed for consultation before a final view is taken on changes to the Construction & Engineering and Professional Negligence Protocols. We would be happy to participate in that consultation if that is thought helpful.

