

View results

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.

About the Civil Justice Council:

The Civil Justice Council (CJC) is a non-departmental advisory body, which was established by the Civil Procedure Act 1997, to advise the Government and the Judiciary on the civil justice system in England and Wales.

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Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

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

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If you are anonymous we will not include your name in the list unless you have given us permission to do so.

Please let us know if you wish your response to be anonymous or confidential.

1. My response is: *

- ☒ Public
- ☐ Anonymous
- ☐ Confidential

About you

2. First Name *

3. Last Name *

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

5. Your role *

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

6. Your job title

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

- ☒ Claimants
- ☐ Defendants
- ☐ Not applicable

8. Your organisation

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

- ☒ Yes
- ☐ No

10. Your email address *

Questions relevant to all protocols

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

- ☒ Yes
- ☐ No
- ☐ Other

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

It is questionable whether the existing law requires an additional requirement that PAPs are mandatory. A formulaic approach could prove unhelpful if there is correspondence which broadly provides the information required. The ability of the Courts to stay proceedings for compliance exists now as a discretionary power and it would not be appropriate for draconian sanctions like striking out to be introduced taking account of the inexperienced like litigants in person or even lawyers conducting cases who are unaware of the requirements of the PAPs.

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

- ☒ Yes
- ☐ No
- ☐ Other

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

It would potentially be very helpful to have such a summary costs procedure especially in view of the highly technical skills needed to operate the CPR Part 47 procedure and the electronic Bill of Costs. A costs adjudication procedure where fees are proportionate to the amount in dispute would be a sensible way forward along the lines of the PNBA adjudication scheme <https://pnba.co.uk/pnba-adjudication-scheme/>

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.

It is questionable whether such a mandatory good faith obligation would add anything to the existing law. Enforcement would need to be clear by way of sanctions for failure to comply. An obligation to resolve or narrow the dispute appears likely to be very difficult to apply in practice. The particular issues whether factual or legal in disputes can be highly individual and rely on the perception of the parties. Further in practice breach of this type of obligation is likely only to become apparent after a judgment with the benefit of hindsight and sanctions controversial by way of costs awards. Unless the judiciary or CPRC are ready and willing to provide a clear pathway for such sanctions at an early stage then even if introduced this obligation could well be ineffective in PAPs. In the type of case like professional negligence claims with well resourced insured defendants and highly experienced legal teams such an obligation with clear early stage costs sanctions for failure to comply could assist the Courts to deter deliberate and tactical obstructive behaviour to drive up claimant costs.

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.

Practical experience from the Professional Negligence Pre Action Protocol is that the existing stocktake section is unpopular and often ignored. This type of claim often involves extensive and complex factual and legal issues as well as voluminous disclosure starting with the professional's file. The protocol procedure is however used and generally efforts are made by both parties to comply with the PAP requirements, including disclosure of documents, in the claim letter and response. The stocktake stage is repetitive and would simply drive up the costs in that regard without gaining any progress in the outcome presumably sought to encourage a further stage to take place to resolve or narrow the dispute. On the contrary in professional negligence claims the parties will be entrenched in their positions by the time the stocktake stage is reached if the PAP procedure has by that time failed to achieve a settlement or narrow the issues.

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?

3.26 This is not agreed. It is a step too far to strike out a claim or defence for failure to comply. Such a sanction would wholly undermine the litigation process which involves an opportunity for the parties to develop their claim as the stages for providing evidence are complied with. It is frequently the case that parties engage lawyers and especially Counsel for the first time when statements of case are required and this can involve further new or different issues to be pursued. If it became necessary to instruct them at an earlier stage to draft all the PAP correspondence this would simply drive up the pre-action costs. Far better to retain some flexibility in the PAP stage for exploration of the case to allow a chance for settlements at lower costs and without adding this threat. 3.27 It is agreed that the Courts should when imposing a sanction give consideration whether a breach of the PAP is serious or significant and whether there was a good reason for non-compliance in the circumstances. However it is inherent in doing so that those who are inexperienced like litigants in person or lawyers unaware of the PAPs that in itself would be a 'reason' for non-compliance. It creates confusion and uncertainty however if the Courts could regard ignorance of the PAP procedure as a 'good reason' or not for applying a sanction. 3.28 It is agreed that an early case management stage to apply sanctions for PAP non-compliance would be of assistance to the parties. It is not agreed that this should be delayed until the Directions Questionnaires because by that time most of the costs of the statements of case have been incurred and in practice many lawyers will have prepared much of their evidence. If sanctions are to be requested and applied then this should be assessed shortly after issue eg at the acknowledgment of service stage where a stay for compliance could still achieve the objectives of the PAP. 3.29 Agreed as above - a decision on a sanction should be taken at the start of the proceedings not the end. In response therefore as above: a) not agreed b) not agreed - Directions questionnaires are too late c) agreed d) The Courts powers to apply sanctions should include costs sanctions. It would be very helpful if such a sanction could be imposed at a very early stage post issue. For example in cases where ADR has been suggested in the PAP correspondence by one party (the Professional Negligence Pre Action Protocol requires the claim letter to include an invitation to adjudicate for example) but refused. The current system only allows for such costs sanctions to be applied at detailed assessment stage which is after all the costs have been incurred which ADR could have avoided. e) The Professional Negligence PAP applies in cases where the defendant is usually insured and highly experienced insurer panel firm lawyers are instructed. Rigorous compliance to the PAP therefore should be expected by them in this background. In contrast claimants are often individuals, potentially financially ruined by the negligence concerned, facing difficult and often impossible funding hurdles (eg payment of CFA success fees and ATE premiums from their winnings). Different sanctions therefore should be applied taking this commercial reality into account and applying the overriding objective notably 1.1 2(a) ensuring that the parties are on an equal footing and (c) (iv) the financial position of each party.

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.

Generally the Professional Negligence Pre Action Protocol has operated in practice for vulnerable parties and is regarded as understandable to the inexperienced. Two changes are suggested to provide parity between the claimant and defendant: 6.2(i) An indication of whether the claimant wishes to refer the dispute to adjudication. If they do, they should propose three adjudicators or seek a nomination from the nominating body. If they do not wish to refer the dispute to adjudication, they should give reasons. There should be a requirement that defendants have the same obligation in the response letter regardless of the claimant's position. Defendant professionals and their insurers are far more experienced in knowing whether adjudication might resolve either the whole or certain issues in dispute. Their reasons for refusing could well be very valuable to a Judge examining compliance with the PAP for sanction purposes. In practice consideration of adjudication is often ignored or deferred summarily currently when it could well be usefully deployed as a pre-action stage. The PNBA adjudication scheme has been developed especially for this type of dispute and it would assist vulnerable parties if they were directed to it to enable them to understand the process and see the list of available accredited adjudicators <https://pnba.co.uk/pnba-adjudication-scheme/> (see reference by Mr Justice Fraser para 152 Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd [2021] EWHC 1116 (TCC) (30 April 2021) <http://www.bailii.org/ew/cases/EWHC/TCC/2021/1116.html>) 6.4 If the claimant has sent other Letters of Claim (or equivalent) to any other party in relation to the same dispute or a related dispute, those letters should be copied to the professional. There should be a requirement that copies of their response letter are also provided to such interested parties by the defendant.

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

- ☐ Yes
- ☒ No
- ☐ Other

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

No comment

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?

It would undermine the litigation process if parties were obliged essentially to litigate their case in the PAP stage. At worst this would favour the well resourced and experienced lawyers who could use tactical ways to derail claims which may well have merit. As things stand the PAP procedure has the scope to lead to cases being settled and the issues narrowed because it is seen as informal and can be used by parties acting in person and solicitors without engaging specialist counsel. This is the attraction for all parties concerned. There is a grave danger in elevating the PAP procedure to the litigation itself that this will simply reverse what the PAP's have achieved up to now as a cost effective way for disputes to be explored and settled without litigation being necessary.

Practice Direction - Pre-Action Conduct

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

- ☒ Yes
- ☐ No

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

This appears helpful save for the Stocktake requirement (page 95 et seq). This is a repetitive step at a time when the parties positions are likely to be entrenched after exchanging claim and response letters. It is beyond most claimants and many solicitors to isolate the issues in many cases. This is what Counsel are normally required to advise upon. If the aim is for PAP to be a low cost stage and a way to resolve disputes before the escalation of costs then the stocktake should do no more than summarise what has already emerged from the correspondence and exchange that has been done and there is some doubt that this has any value save to increase the costs unnecessarily. The stocktake is frequently ignored in practice in the Professional Negligence Pre Action Protocol and is regarded as unpopular.

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

In Professional Negligence Claims it is usual that indemnity insurers act for the defendant. For the insurer to obtain the file and instructions about the claim can take time. It is not usual for any claimant to wish to force a response letter to be provided until the insurer has properly considered all the evidence. As far as expert evidence is concerned in practice it would be impossible to obtain a report in 28 days from many experts. It seems likely that similar issues apply in other areas of litigation. The question to ask is whether stringent time limits are helpful in cases which are often complex factually and legally if there is a chance that with sufficient time a proper review can take place and a settlement is more likely. The default position if deadlines are too short will simply be for a summary rejection of the claim. Long delays are not to be encouraged, but flexibility for realistic agreed timescales should be included if that would improve the chance of a successful outcome for the PAP procedure.

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'.

This is not agreed. It is not until statements of case are exchanged, normally drafted by Counsel, that the issues can be identified. Indeed it is only recently after the CPR51U Disclosure Pilot and the Disclosure Review Document that parties have had to consider how cases are pleaded with the requirements for disclosure sought in mind. Many solicitors in practice find it hard even at that stage to marry up the documents held by their client and the other parties with the issues in this way. The PAP should remain an informal stage where the parties endeavour to provide disclosure to support their letters and as required. In professional negligence claims it is normal that professionals (and their insurers) will disclose the relevant file at the preliminary notice stage. This is extremely helpful all round to ensure that the claim letter when it emerges is supported by the evidence on the file. However the approach as posed would deter any such free disclosure until after the claim letter has been served and restricting it to issues raised. This would create a feeling of distrust and once the full file is disclosed, potentially widening the scope for the claim, much time would be lost and much confusion created.

Personal Injury Protocols

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

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

- ☐ Yes
- ☒ No

Housing Protocols

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

- ☐ Yes
- ☒ No

Judicial Review Protocol

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

☐ Yes

☒ No

Debt Protocol

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

☐ Yes

☒ No

Construction and Engineering Protocol

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

☐ Yes

☒ No

Professional Negligence Protocol

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

☒ Yes

☐ No

34. 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

☒ In simple cases there is an argument that the exis

Proposed low value small claims track

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

☐ Yes

☒ No

Any other comments

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

Generally the Professional Negligence Pre Action Protocol has operated in practice for vulnerable parties and is regarded as understandable to the inexperienced. Two changes are suggested to provide parity between the claimant and defendant: 6.2(i) An indication of whether the claimant wishes to refer the dispute to adjudication. If they do, they should propose three adjudicators or seek a nomination from the nominating body. If they do not wish to refer the dispute to adjudication, they should give reasons. There should be a requirement that defendants have the same obligation in the response letter regardless of the claimant's position. Defendant professionals and their insurers are far more experienced in knowing whether adjudication might resolve either the whole or certain issues in dispute. Their reasons for refusing could well be very valuable to a Judge examining compliance with the PAP for sanction purposes. In practice consideration of adjudication is often ignored or deferred summarily currently when it could well be usefully deployed as a pre-action stage. The PNBA adjudication scheme has been developed especially for this type of dispute and it would assist vulnerable parties if they were directed to it to enable them to understand the process and see the list of available accredited adjudicators <https://pnba.co.uk/pnba-adjudication-scheme/> (see reference by Mr Justice Fraser para 152 Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd [2021] EWHC 1116 (TCC) (30 April 2021) <http://www.bailii.org/ew/cases/EWHC/TCC/2021/1116.html>) 6.4 If the claimant has sent other Letters of Claim (or equivalent) to any other party in relation to the same dispute or a related dispute, those letters should be copied to the professional. There should be a requirement that copies of their response letter are also provided to such interested parties by the defendant.

