

## View results

Respondent



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](mailto: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.

For information about how the CJC handles your personal data, please see our privacy notice at <https://www.judiciary.uk/wp-content/uploads/2019/12/CJC-PRIVACY-POLICY-Nov-2019-f.pdf>.

Information provided to the Civil Justice Council: We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications, or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation.

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 your response is 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?

Yes  
I don't think there should be any other exceptions

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.

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.

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.

Yes.

Of particular importance is a statement of truth relating to the disclosure of ALL documents, both supportive and harmful to each sides case.

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) yes
- b) should be dealt with in all Directions questionnaires
- c) yes
- d) yes
- e) no

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.

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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?

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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?

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## 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.

yes

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?

yes

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’.

The current rules provide that the standard rules for disclosure (CPR 31) do not apply to claims allocated to the Small Claims Track.

This position means that neither party to a ‘Small Claim’ is obliged to disclose a document that adversely affects their claim or supports the other party’s claim.

We believe that this rule is highly prejudicial to claimants, who bare the burden of proving their case, but do not benefit from receipt of documents that may be absolutely crucial to their claim.

This rule allows parties to hold on to ‘smoking gun’ documents to the detriment of the opposing party and can lead to entirely unjust results.

For instance, we have issued over 65,000 court claims for flight delay compensation cases and 99.99% of these have been allocated to the Small Claims Track. In order to defend a claim the airline must show that the disruption was caused to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

In these cases the defendant airline holds the entirety of the evidence available and the claimant is at the mercy of the airline to disclose relevant documents. Crucially however they have no obligation to disclose detrimental documents.

In financial mis-selling cases it is often alleged that a commission was paid without the knowledge and informed consent of the consumer. Again the claimant consumer is entirely at the mercy of the defendant lender to disclose details of the commission payment. The claimant is once again prejudiced by the rules on disclosure.

We believe that parties in a Small Claims Track case should also be obliged to disclose documents that adversely affect their claim or support the other party’s claim.

This disclosure should be provided before proceedings have been issued in order to ensure that both parties are aware of the evidence available prior to court proceedings being issued.

There is no clear reason on why the disclosure rules should not also apply to Small Claims Track cases, although it is anticipated that the reason is one of costs and proportionality. It is submitted however that this approach affectively ‘throws the baby out with the bath water’ by avoided any disclosure whatsoever.

Any amendment could therefore safeguard the position by ensuring that disclosure strikes a better balance between justice and proportionality.

## Personal Injury Protocols

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

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

- ☐ Yes
- ☒ No

## Housing Protocols

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

- ☐ Yes
- ☒ No

## Judicial Review Protocol

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

- ☐ Yes
- ☒ No

## Debt Protocol

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

- ☐ Yes
- ☒ No

## Construction and Engineering Protocol

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

- ☐ Yes
- ☒ No

## Professional Negligence Protocol

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

- ☐ Yes
- ☒ No

## Proposed low value small claims track

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

- ☐ Yes
- ☒ No

## Any other comments

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

to expand on the answer "yes" to Q 21

We find in flight delay compensation cases that an airline will give one version of events in their pre-action correspondence and then another in their defence.

Likewise, in mis-sold financial services claims a defendant's pre-action response will also differ from their defence. For instance the defendant may alter their position in relation to the amount of commission paid or the nature of the commission arrangement, both of which are absolutely critical to the merits of the claim.

This conflicting information can significantly affect the claimant's prospects of success and lead to a claim having been issued when in fact it shouldn't have been. This causes the claimant to incur significant unnecessary costs and is also a waste of the court's valuable resource.

Requiring the pre-action letter of claim and replies to be supported by a statement of truth will encourage (if not ensure) that the parties are providing more accurate and truthful information before proceedings are issued.