

View results

Respondent

88

Anonymous

10:57

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 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 *

Mark

3. Last Name *

Ashley

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

Leeds

5. Your role *

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

6. Your job title

Partner

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

- ☐ Claimants
- ☒ Defendants
- ☐ Not applicable

8. Your organisation

DAC Beachcroft LLP

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

- ☒ Yes
- ☐ No

10. Your email address *

mashley@dacbeachcroft.com

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
- ☒ The response given here and to all questions is s

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?

As discussed in our answer to question 11, clinical negligence claims involve factors that can make it difficult to comply with the timescales set out in the pre-action protocol. Compliance should be mandatory, but there should be scope to extend deadlines where necessary.

Question 11 answer is repeated here because the text box on the webform does not permit the full text to be entered:

The response given here and to all questions is solely in respect of clinical negligence claims.

Parties should comply with the letter and the spirit of the pre-action protocols and we agree that this message should be reinforced.

There are however occasions where compliance with the protocol-set time limits is not possible. To take a hypothetical example from the clinical negligence setting, if a case is presented to an NHS organisation there will often be a need to obtain expert evidence and to obtain factual evidence in the form of comments from witnesses (i.e. clinical staff). The availability of expert evidence is variable particularly in shortage areas (e.g. neonatology, paediatric neurology). It can be difficult to locate clinical staff (e.g. junior doctors may have moved elsewhere), or staff shortages may make access to clinical staff difficult, resulting in unavoidable delays. In turn, cases may take longer to investigate than the protocol period allows, despite the best efforts of all those involved. As such, whilst we agree parties should comply with the pre-action protocols, there should be flexibility around timeframes.

It is important that there is good communication between the parties about timescales and delay must be kept to a minimum. Waiting for a Response will be an additional source of worry and anxiety for Claimants and so whilst it is important that the Response is based on appropriate evidence delay must also be kept to a minimum. If there is good communication then usually a realistic timescale for the Response can be agreed. However it would also be helpful for the clinical negligence protocol to include a provision that claimants will not unreasonably refuse a defendant's request for an extension of the period for provision of a Letter of Response.

We do not consider that the overriding objective should be amended, and there is a risk that doing so would give rise to satellite litigation. For instance, an amendment to r.1.1(f) to add the words "pre-action protocols" could result in parties seeking orders where the other is perceived to have not complied with the protocol.

One solution may be to emphasise the relevance of protocol compliance to the assessment of costs. For instance, whilst r.44.4(3)(i) does require the Court to have regard to pre-action conduct, this could be expanded upon to expressly include compliance or otherwise with the pre-action protocol and the reasons for any non-compliance.

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.

We support the creation of a new summary costs procedure, but it must be a simple process that allows the parties to resolve the costs dispute with minimal additional cost. It should not result in significant expense, and must not reduce the efficiency of or discourage pre-action resolution. It should of course be designed so as to minimise the risk of satellite litigation.

Any new procedure should focus on summary assessment, and on limiting the costs incurred in pursuing it. The procedure should be based on a desktop approach, and not require substantial documentation. Attendance at hearings should be exceptional. The applicant should be required to briefly set out what they say on liability for costs or on quantum and the respondent would then briefly set out their position, for judicial consideration without a hearing.

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 important that parties recognise the purpose and spirit of the protocol and conduct themselves accordingly. We agree the clinical negligence pre-action protocol could encourage that by including such a provision. However, its scope should not be so wide as to permit or encourage satellite litigation around the extent of compliance or precisely what is meant by "good faith" in the circumstances of any particular case.

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
- ☒ This should be left for the parties to determine.

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.

We agree that the clinical negligence pre-action protocol would benefit from the requirement for the parties to complete a joint stocktake report as proposed. We do not agree that this report should deal with disclosure given that in our experience most clinical negligence claims do not require substantial disclosure beyond the medical records, and in general those records will have been shared between the parties during the pre-action phase.

As regards the joint stocktake report shown at appendix 4, we consider that the two lists of issues shown in section 3 are duplicative, and that only the second of these lists should be retained. As noted above, we do not consider there to be a general need for a focus on disclosure in clinical negligence cases and so for those cases we would suggest that section 4 be omitted, or be included on the express proviso that the section need not be completed unless there is a significant disclosure issue between the parties.

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?

In general, we agree that the sanctions for non-compliance should be strengthened, but they must apply equally to default by either party. As we note above in our response to question 11, compliance with the deadline for provision of a properly evidence based Letter of Response can be difficult or impossible in many clinical negligence claims, and therefore we consider it important that there is scope for deadlines to be extended.

We also repeat the point made in responses above (question 11, question 15) that any strengthening of sanctions must be balanced against the risks posed by satellite litigation. The pre-action phase of a claim has different characteristics to litigation, and these risk being lost or diluted if it is redesigned as a more formal regime. The emphasis of the protocols should be on both parties adequately explaining their position and engaging constructively so that issues can be narrowed, litigation be avoided, and claims resolved fairly.

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.

Yes. PAPs (general and specific) should be clearly accessible, or signposted, from <https://www.justice.gov.uk/courts/procedure-rules/civil/rules>, rather than requiring user to navigate up a level (<https://www.justice.gov.uk/courts/procedure-rules/civil>). Because at present the pre-action protocols are not obviously "with" the remainder of the CPR, unrepresented litigants often fail to notice them.

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

- ☐ Yes
- ☐ No
- ☒ No. Provided parties recognise and conduct then

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. There are many reasons why a party's case may change between the pre-action phase and litigation. For example, the parties will reflect on the position taken in the pre-action correspondence and conduct further investigations and obtain additional evidence. This may lead to a decision not to pursue a claim or if it is to be pursued it may cause a change in position. This may clarify or narrow issues or properly introduce new points but it should not be discouraged.

The same dynamic applies to both parties. Claimants often amend their case between Letter of Claim and Particulars of Claim, yet the question envisages sanctions only on defendants; in our view this would be unfair.

We note also that there is no formal sanctions regime for amendments to statements of case in litigation. To impose a sanctions regime as envisaged by the question would in some respects be to impose a stricter regime on pre-action claims than on litigated claims.

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?

No.

Practice Direction - Pre-Action Conduct

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

- ☐ Yes
- ☒ No

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.

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

- ☒ Yes
- ☐ No

26. 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
- ☒ No, this would be duplicative and would have the

27. 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
- ☐ Other

28. 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?

We agree this would be appropriate for clinical negligence cases. This should be completed within 4 months of the Letter of Response being served.

29. 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?

30. 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?

31. 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
- ☐ Other

32. 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
- ☒ No. Whilst advantageous for defendants in clinic;

33. 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?

We do not consider this to be necessary in the clinical negligence setting, for the reasons set out in our response to question 17.

34. 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

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

- ☐ Yes
- ☐ No
- ☐ Other

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

- ☐ Yes
- ☐ No
- ☐ Other

37. 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

38. 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?

39. 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
- ☒ In clinical negligence claims, particularly those in

40. 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

41. 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?

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

- ☐ Yes
- ☒ No
- ☐ Other

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

☐ Yes

☒ No

Judicial Review Protocol

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

☐ Yes

☒ No

Debt Protocol

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

☐ Yes

☒ No

Construction and Engineering Protocol

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

☐ Yes

☒ No

Professional Negligence Protocol

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

☐ Yes

☒ No

Proposed low value small claims track

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

☐ Yes

☒ No

Any other comments

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



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

- Yes
- No
- Other

Other

The response given here and to all questions is solely in respect of clinical negligence claims.

Parties should comply with the letter and the spirit of the pre-action protocols and we agree that this message should be reinforced.

There are however occasions where compliance with the protocol-set time limits is not possible. To take a hypothetical example from the clinical negligence setting, if a case is presented to an NHS organisation there will often be a need to obtain expert evidence and to obtain factual evidence in the form of comments from witnesses (i.e. clinical staff). The availability of expert evidence is variable particularly in shortage areas (e.g. neonatology, paediatric neurology). It can be difficult to locate clinical staff (e.g. junior doctors may have moved elsewhere), or staff shortages may make access to clinical staff difficult, resulting in unavoidable delays. In turn, cases may take longer to investigate than the protocol period allows, despite the best efforts of all those involved. As such, whilst we agree parties should comply with the pre-action protocols, there should be flexibility around timeframes.

It is important that there is good communication between the parties about timescales and delay must be kept to a minimum. Waiting for a Response will be an additional source of worry and anxiety for Claimants and so whilst it is important that the Response is based on appropriate evidence delay must also be kept to a minimum. If there is good communication then usually a realistic timescale for the Response can be agreed. However it would also be helpful for the clinical negligence protocol to include a provision that claimants will not unreasonably refuse a defendant's request for an extension of the period for provision of a Letter of Response.

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One solution may be to emphasise the relevance of protocol compliance to the assessment of costs. For instance, whilst r.44.4(3)(i) does require the Court to have regard to pre-action conduct, this could be expanded upon to expressly include compliance or otherwise with the pre-action protocol and the reasons for any non-compliance.

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?

As discussed in our answer to question 11, clinical negligence claims involve factors that can make it difficult to comply with the timescales set out in the pre-action protocol. Compliance should be mandatory, but there should be scope to extend deadlines where necessary.

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

Yes

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 support the creation of a new summary costs procedure, but it must be a simple process that allows the parties to resolve the costs dispute with minimal additional cost. It should not result in significant expense, and must not reduce the efficiency of or discourage pre-action resolution. It should of course be designed so as to minimise the risk of satellite litigation.

Any new procedure should focus on summary assessment, and on limiting the costs incurred in pursuing it. The procedure should be based on a desktop approach, and not require substantial documentation. Attendance at hearings should be exceptional. The applicant should be required to briefly set out what they say on liability for costs or on quantum and the respondent would then briefly set out their position, for judicial consideration without a hearing.

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 important that parties recognise the purpose and spirit of the protocol and conduct themselves accordingly. We agree the clinical negligence pre-action protocol could encourage that by including such a provision. However, its scope should not be so wide as to permit or encourage satellite litigation around the extent of compliance or precisely what is meant by “good faith” in the circumstances of any particular case.

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

Other. This should be left for the parties to determine.

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 6.

We agree that the clinical negligence pre-action protocol would benefit from the requirement for the parties to complete a joint stocktake report as proposed. We do not agree that this report should deal with disclosure given that in our experience most clinical negligence claims do not require substantial disclosure beyond the medical records, and in general those records will have been shared between the parties during the pre-action phase.

As regards the joint stocktake report shown at appendix 4, we consider that the two lists of issues shown in section 3 are duplicative, and that only the second of these lists should be retained. As noted above, we do not consider there to be a general need for a focus on disclosure in clinical negligence cases and so for those cases we would suggest that section 4 be omitted, or be included on the express proviso that the section need not be completed unless there is a significant disclosure issue between the parties.

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

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

In general, we agree that the sanctions for non-compliance should be strengthened, but they must apply equally to default by either party. As we note above in our response to question 11, compliance with the deadline for provision of a properly evidence based Letter of Response can be difficult or impossible in many clinical negligence claims, and therefore we consider it important that there is scope for deadlines to be extended.

We also repeat the point made in responses above (question 11, question 15) that any strengthening of sanctions must be balanced against the risks posed by satellite litigation. The pre-action phase of a claim has different characteristics to litigation, and these risk being lost or diluted if it is redesigned as a more formal regime. The emphasis of the protocols should be on both parties adequately explaining their position and engaging constructively so that issues can be narrowed, litigation be avoided, and claims resolved fairly.

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

Yes.

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.

Yes. PAPs (general and specific) should be clearly accessible, or signposted, from <https://www.justice.gov.uk/courts/procedure-rules/civil/rules> , rather than requiring user to navigate up a level (<https://www.justice.gov.uk/courts/procedure-rules/civil>). Because at present the pre-action protocols are not obviously "with" the remainder of the CPR, unrepresented litigants often fail to notice them.

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

- Yes
- No
- Other

No. Provided parties recognise and conduct themselves in accordance with the spirit of the protocol,

acting in 'good faith' as discussed earlier introducing the need for 'statements of truth' should be unnecessary. To do risks introducing a formality into the protocol which we believe is better left for those claims that move into litigation. Introducing a further procedural requirement which must be met before a Letter of Claim or Response can be sent is likely to lead to delay and additional costs.

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. There are many reasons why a party's case may change between the pre-action phase and litigation. For example, the parties will reflect on the position taken in the pre-action correspondence and conduct further investigations and obtain additional evidence. This may lead to a decision not to pursue a claim or if it is to be pursued it may cause a change in position. This may clarify or narrow issues or properly introduce new points but it should not be discouraged.

The same dynamic applies to both parties. Claimants often amend their case between Letter of Claim and Particulars of Claim, yet the question envisages sanctions only on defendants; in our view this would be unfair.

We note also that there is no formal sanctions regime for amendments to statements of case in litigation. To impose a sanctions regime as envisaged by the question would in some respects be to impose a stricter regime on pre-action claims than on litigated claims.

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?

No.

28. Do you wish to answer questions about the personal injury 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

No, this would be duplicative and would have the potential to cause confusion. The existing regime of specific protocols (e.g. for clinical negligence) should continue.

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
- Other

Yes.

31. 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?

We agree this would be appropriate for clinical negligence cases. This should be completed within 4 months of the Letter of Response being served.

32. Do you agree that any revisions to the Personal Injury Protocol 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 protocol be updated to reflect moderately severe cases as well as catastrophic injury cases despite workflows for each being significantly dissimilar?

No response.

33. 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.

No response.

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
- Other

No response.

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
- Other

No. Whilst advantageous for defendants in clinical negligence claims to know more about extent of a claimant's financial losses, a formal requirement beyond that stated in the existing protocol may cause delay and lead to unnecessary costs being incurred prematurely. We also question how well a protocol could define the necessary level of quantification work given this will often vary considerably between cases. In our experience, financial losses often can be estimated without substantial quantities of evidence.

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?

We do not consider this to be necessary in the clinical negligence setting, for the reasons set out in our response to question 17.

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**

Yes.

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

- **Yes**
- **No**
- **Other**

No response.

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

- **Yes**
- **No**
- **Other**

No response.

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**

No response.

41. Should the personal injury 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?

No response.

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**

In clinical negligence claims, particularly those involving substantial damages, it is important for the defendant to be able to obtain its own independent expert evidence addressing the claimant's condition and prognosis. Very often this is an essential element of the defendant's quantification of the claim, and sight of expert will often allow a defendant to make an early offer of settlement. Disclosure of a claimant's expert evidence, whilst helpful, will not always provide the information that the defendant needs, e.g. because the claimant's report is or may be out of date, or does not address particular questions relevant to the defendant.

We accept that claimants should not be unduly inconvenienced by this entitlement. For example, it would normally be inappropriate to expect a claimant to travel long distances, and as such any provision here should be in terms that the claimant is expected to make themselves reasonably available for assessment by the defendant's expert.

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

No response.

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?

No response.

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

- Yes
- No
- Other

No.