

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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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 provide an anonymous response 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 - but there needs to be greater clarity concerning what constitutes failure to comply. I work as consultant with firms who represent tenants under the Housing Conditions Protocols. Arguments of alleged failure to comply and in particular to consider ADR sometimes take up more time and costs than the underlying dispute.

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.

Yes - Paragraph 11 of the Housing Conditions Protocol entitles a tenant to costs if the matter resolves under the protocol. It would add great certainty if this was backed by such a procedure.

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.

Yes. There is a risk that arguments around compliance with the PAP can aggravate the dispute and increase costs. This would help to mitigate the risk of tactical use of arguments over alleged breaches of the PAPs.

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 - particularly in Housing Conditions cases this will identify genuine areas where litigation is necessary. The stocktake template in Appendix 4 covers the issues fully. Thought will need to be given to what happens if a matter is litigated and issues are raised that were not mentioned during the stock take.

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) The problem here is that it could result expensive satellite litigation about what amounts to a 'grave case' of non compliance. In cases under the Housing Conditions Protocols it is common for some landlords to raise arguments over non compliance including reference to details within a letter of claim, or alleged failure to use an in-house complaints procedure without evidence that this would have resulted in work being done. The courts should have this power but there need to be robust sanctions if allegations of non compliance are made for tactical reasons, (b) As with (a) there is a risk of satellite litigation but this is a reasonable proposal alongside the above, (c) Yes (d) Some issues, such as disagreements over experts in Housing Conditions Cases cannot be resolved until conclusion of the proceedings, at detailed assessment. But where there is clear evidence of non compliance, yes costs sanctions are appropriate. This should include costs sanctions against a party who unreasonably refuses to engage under the protocol because of alleged failures by the other party. Again this is to reduce the risk of tactical use of alleged non compliance. (e) No - except where referred to above.

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.

No

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?

Yes. The Housing Conditions Protocols acknowledge that the letters are not to be treated as pleadings and that new matters can come to light. But subject to this, yes there should be a discretion in these circumstances.

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 I do not think that this is necessary. If the parties have engaged under the protocols in good faith then this can be dealt with by consent co-operation under the standard directions.

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. It is good practice to introduce a consistent use of protocols across all actions. There are cases in which it is unclear which, if any protocol is relevant to the particular claim. The draft text in Appendix 4 seems appropriate.

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?

14 days appear to be too short for a reply. This could result in there being more cases where extensions are requested than not. I would suggest a primary response time of 28 days with the possibility of a further 28 days where expert evidence is required. I would amend other references to 14 to 28 days.

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'.

No comment on this question.

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

30. Disrepair/Housing Conditions PAP - Do you agree that large corporate landlords should be required to publish an address to which PAP letters should be sent?

☒ Yes

☐ No

☐ Other

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

☒ Yes

☐ No

☐ Other

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

☒ Yes

☐ No

☐ Other

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

☒ Yes

☐ No

☐ Other

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

☒ Yes

☐ No

☐ Other

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

☒ Yes

☐ No

☐ Other

36. Mortgage Possession PAP - Do you agree that the PAP should be mandatory?

- ☒ Yes
- ☐ No
- ☐ Other

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

- ☒ Yes
- ☐ No
- ☐ Other

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

- ☒ Yes
- ☐ No
- ☐ Other

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

- ☒ Yes
- ☐ No
- ☐ Other

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

- ☒ Yes
- ☐ No
- ☐ Other

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

- ☒ Yes
- ☐ No
- ☐ Other

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

☐ Yes

☒ No

Debt Protocol

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

☐ Yes

☒ No

Construction and Engineering Protocol

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

☐ Yes

☒ No

Professional Negligence Protocol

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

☐ Yes

☒ No

Proposed low value small claims track

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

☐ Yes

☒ No

Any other comments

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

