

## **Response of the Association of HM District Judges (“the ADJ”) to the Civil Justice Council’s Interim Report “Review of Pre-Action Protocols” (November 2021)**

The Association of HM District Judges (“the ADJ”) represents 378 District Judges sitting in the County and Family Courts of England and Wales. The ADJ welcomes the CJC’s comprehensive report on the role PAPs should play in the civil justice system in the 2020s including their role in an increasingly digitalised justice system.

The ADJ supports the views expressed that:

- PAPs occupy a critical space in the civil justice system
- The justice system should facilitate proportionate litigation where appropriate, but should also encourage consensual resolution wherever possible
- Fostering consensual dispute resolution processes and proportionate litigation are complementary objectives, rather than in tension with each other
- The relationship between adjudication and consensual dispute resolution is a symbiotic one, and PAPs are both a conceptual and practical bridge between these processes

The ADJ proposes to respond to the Consultation Questions relevant to all protocols (Qs 1 to 13, other than Q12). It does not at this stage propose to respond to the Consultation Questions specifically related to individual protocols (including the Practice Direction – Pre-action Conduct).

1. Do you agree that the overriding objective should be amended to include express reference to the PAPs ?

Yes. The ADJ agrees that given the importance of PAPs in achieving the joint objectives of promoting consensual resolution and narrowing the issues in litigation encouraging and enforcing compliance with PAPS should form part of the overriding objective in CPR 1.1.

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

The ADJ agrees that compliance with PAPs should be mandatory except in urgent cases. The court should retain discretion to disapply any sanction for non-compliance in appropriate cases.

3. Do you agree there should be online pre-action portals for all cases where there is an online court process and that the systems should 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, although the ADJ strongly supports the view expressed at para 2.35 of the Interim Report that to make online portals truly accessible to vulnerable parties, technical support (assisted digital support) will need to be available for those who do not have access to the internet, or who struggle to use technology effectively unaided. Clear sign-posting is also essential.

The ADJ would want to be reassured that a challenge mechanism would be in place in order to safeguard against any inadvertent accessing of pre-action information at an inappropriate stage of the claim.

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

Yes. Such a procedure should involve resolution without a hearing, on the basis of clearly defined and limited documentation.

5. Do you agree that PAPS should include a 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. This must be subject to the obligation being flexible, proportionate, and non-prescriptive.

6. 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 to demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36. In answering this question please do include any suggestions you have as to other ways parties can be incentivised to meaningfully participate in dispute resolution processes at the pre-action stage.

Yes (although the appropriate designation may be without prejudice save as to costs, rather than entirely without prejudice). While the existence (or non-existence) of efforts to engage in pre-action resolution may be disclosed to the court to demonstrate compliance (or non-compliance), the content of those efforts must remain without prejudice (other than in possibly in relation to issues of costs) if the incentive to engage in good faith efforts is not to be undermined.

7. 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 you answer please include any comments you have on the Template Joint Stocktake Report in Appendix 4.

The ADJ agrees that a formal stocktake requirement may play a useful role in transforming efforts to narrow the dispute into more streamlined and proportionate litigation (if such litigation is necessary). It is, however, unlikely to be proportionate in small claims track disputes, and, as in all cases involving vulnerable and/or digitally challenged litigants, would require support.

8. 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 ?

The ADJ agrees with the suggested approach to sanctions for non-compliance set out at paragraphs 3.26 to 3.29, including the availability of the power to strike out in grave cases of non-compliance. It is the ADJ's view that this is not a disproportionate fetter on the right of access to the court.

In the view of the ADJ, there is a danger of unnecessary satellite litigation concerning PAP non-compliance, as can occur currently in the RTA Portal. While this may be mitigated if the issue of compliance is required to be

dealt with in the Directions Questionnaire, and PAP compliance disputes identified and resolved as early as possible, there will remain many cases in which issues of alleged non-compliance may not be capable of fair resolution until the conclusion of the case.

9. Do you agree that PAPs should be based on the accessibility principles and contain the guidance and warnings about pre-action conduct set out in paragraphs 3.8-3.13 ?

Yes. In the view of the ADJ it is vital that the language of all PAPs should be as user friendly as possible. While linking all digital court processes portal(s) for online pre-action exchanges of correspondence and documents is a desirable objective, based on current experience the ADJ doubts that this is likely to be achievable.

10. 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.

The ADJ does not propose to comment on the wording or structure of specific PAPS. As set out above, the ADJ strongly supports the view expressed at para 2.35 of the Interim Report that to make online portals truly accessible to vulnerable parties, technical support (assisted digital support) will need to be available for those who do not have access to the internet, or who struggle to use technology effectively unaided. Clear sign-posting is also essential. These points also apply to the structure, language and/or obligations in PAPs, particularly if the principal method of accessing PAPs is digital.

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

Given the current state of the law as set out in *Jet2 v Hughes* [2019] EWCA Civ 1858, it would be beneficial for formal pre-action documents to be supported by a statement of truth. This would emphasise the potential consequences of advancing a knowingly false case.

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

The ADJ does not wish to respond on this issue at this stage.

13. 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 ?

The ADJ would not support the use of PAP steps to replace or truncate the procedural steps in litigation. While supporting the promotion of effective pre-action conduct, in the view of the ADJ it is important to maintain a clear demarcation between pre-action conduct and the necessary procedural steps once litigation has commenced.

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