

CJC Pre-Action Protocol Consultation Questions – Nov 2021

Please note this document is provided to enable you to consider all the questions on the online form and prepare your responses. **All responses should be submitted through <https://forms.office.com/r/ReAVrWvscB>**

The consultation is open until 24 December 2021 at 10am.

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 [REDACTED] 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.

Please do not hesitate to contact me should you wish to discuss my comments or require any further information.

Email [REDACTED]

I WOULD BE GRATEFUL IF FULL CONSIDERATION IS GIVEN TO THE THREE ISSUES RAISED IN THE 'OTHER COMMENTS' AT Q78, WHICH I AND OTHERS BELIEVE OF ARE OF GREAT IMPORTANCE TO LITIGANTS AND OTHERS.

1. Your response is:
 - Public
 - Anonymous
 - Confidential
2. Your first name [REDACTED] Please do not hesitate to contact me if you require clarification on any of the comments.
3. Your last name [REDACTED]
4. Your location (town/city) CARDIFF
5. Your role:
 - Judge
 - Lawyer
 - Insurer
 - Paralegal/legal assistant
 - Litigant
 - Policy maker/civil servant
 - Other
6. Your job title
7. If relevant, whose interests to you predominantly represent?
 - Claimants
 - Defendants
 - N/A
8. Your organisation
9. Are you responding on behalf of your organisation?
10. Your email address [REDACTED]

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?
 - Yes
 - No

- Other

12. Do you agree that compliance with PAPs should be mandatory except in urgent cases? **YES**

Do you think there should be any other exceptions generally, or in relation to specific 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. **NO. Please see the statement at**

‘any other comments - question 78A’ - for an explanation as to why this is one of the two very contentious items in the proposals, with its resulting disastrous unintended consequences.

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**

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?

Yes

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?

Yes.

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.

18. Do you agree with the suggested approach to sanctions for non-compliance set out in general principles from para 3.26? **YES**

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? **YES – BUT ONLY GRAVE NON_COMPLIANCE**
- b) Whether the issue of PAP compliance should be expressly dealt with in all Directions Questionnaires **YES**
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? **NO – WASTED COST AND TIME**
- 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? **YES**
- 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?

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. **??????**

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. ALL PROTOCOLS**

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. There is a danger that overloading the PAP will disadvantage LIPs and make them decide the task is too onerous, before even starting legal action to get justice.

Questions specifically related to 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.

Please see the statement at ‘any other comments’ - Question 78B

26. Do you agree parties should have 14 days to respond to a pre-action letter of claim under the general pre-action protocol, 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 counter claim. If you do not agree with these timeframes, what timeframes would you propose? **14 Days does not allow for holidays/travel abroad.**

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. **YES - Standard**

In giving your answer we are particularly interested in respondents’ views about whether the standard should include disclosure of ‘known adverse documents’? **YES**

Questions specifically related to 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 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

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

31. Do you agree that all PI protocols should include an obligation to 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?

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?

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.

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

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

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?

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

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

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

- Yes
- No
- Other

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 Why HMRC? They will certainly delay matters. They are not known for working quickly,

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? YES

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

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

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?

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

- Yes
- No
- Other

Questions specifically related to housing protocols

46. Do you wish to answer questions about housing protocols?

- Yes
- No

Disrepair/Housing Conditions PAP

47. Do you agree that large corporate landlords should be required to publish an address to which pre-action protocol letters should be sent?

- Yes
- No
- Other

Landlord Possession Claim PAP

48. 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

49. 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

50. 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

51. 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

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

- Yes
- No
- Other

Mortgage Possession PAP

53. Do you agree that the PAP should be mandatory?

- Yes
- No
- Other

54. 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

55. 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

56. 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

57. 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

58. 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

Questions specifically related to the JR protocol

59. Do you wish to answer questions about the judicial review protocol?

- Yes
- No

60. Do you agree or disagree with the approach set out by the sub-committee in chapter 4?

61. Are there any other factors specific to judicial review that should be considered?

62. Do you agree or disagree that there should continue to be a separate and bespoke PAP for judicial review?

- Agree
- Disagree
- Other

63. What elements of the proposed General Principles in Chapter 3 do you consider it is possible and/or desirable to include in the JR PAP?

Questions specifically related to the debt protocol

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

- Yes
- No

*****DANGER*****

THE INCOME AND EXPENDITURE DECLARATION IS AN INVASION OF PRIVACY AT THIS STAGE, BEFORE PROPER LEGAL ACTION HAS EVEN STARTED, and should be removed from the Proposals. The Declaration can be included at the pre-trial management stage.

This Declaration will allow ANYONE to obtain details of ANY other person's financial data, just by sending them a PAP.

You, my neighbour, MP, Local District Judge, High Court Judge, any member of the Royal Family, except HM the Queen) are all at risk of having their financial details exposed, even just for nosiness, or malicious purposes.

It is possible that it may even breach some Human Rights or ICO laws

This part of the debt PAP should be removed, as it is effectively a snoopers charter.

65. Do you support the introduction of a good faith obligation to try to resolve or narrow the dispute and the requirement to file a joint stocktake report, on condition that debtors have access to legal assistance to complete both requirements?

- Yes
- No
- Other

66. Would you support aligning the time limits for responding to the Pre-action Letter of Demand to those suggested for revised general PAP (14 days with a right to extend for a further 28 days to obtain further information including legal advice)? What changes, if any, would you make to the rules on when litigation can be commenced?
NO - 14 Days does not allow for holidays/travel abroad.

67. Do you think the contents of the pre-action letter of claim should be more prescriptive and, if so, what content should be prescribed?

68. Do you think the language of the pre-action protocol should be made more user friendly and do you support changing the terms creditor and debtor to claimant and defendant?

- Yes
- No
- Other

69. Do you support integrating the PAP for Debt claims into the MCOL portal (or any successor platform)?

- Yes
- No
- Other

Questions specifically related to the construction and engineering protocol

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

- Yes
- No

71. Would you support aligning the time limits for responding to the pre-action letter of demand 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 - 14 Days does not allow for holidays/travel abroad.
- Other

72. Do you support the retention of the referee procedure?

- Yes
- No
- Other

73. Would you support the formal incorporation of a standard of disclosure and, if so, which standard?

Questions specifically related to the professional negligence protocol

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

- Yes
- No

75. 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)?

No - 14 Days does not allow for holidays/travel abroad.

Questions specifically related to the proposed low value small claims track

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

- Yes
- No

77. Would you support the exclusion of the stocktake requirement and the inclusion of the good faith obligation to try to resolve or narrow the dispute in a new PAP for low value small claims case worth £500 or less? YES

Q78 – Any other comments - on next page.

Any other comments

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

YES – THREE SEPERATE COMMENTS - 78A, 78B and 78C (Below)

78A

The inclusion of costs at the PAP stage will seriously affect self represented Litigants in Person, and small businesses, who are likely to be deterred from, and forgo taking any action to obtain justice.

Example Scenario

A small business or LIP has a dispute with another party.

Currently, the participation in the PAP is like any other ordinary ‘back and forth’ dispute, where no costs are involved to either party. Consequently, the issue may be resolved at this stage, with no costs and no Court Administrative or Judicial Costs either.

THEREFORE - Re. Question 14 of the consultation.

Creating a new summary of costs procedure has serious disadvantages:

1. When one party has large financial resources e.g. Large organisations eg Public Limited Companies, Local Authorities, Public Bodies, and the other party is a private individual or small business with limited resources, then, if a new costs procedure is implemented there would be a major deterrent to seeking justice, as the costs from the larger party, even if it never reached court, could easily have a big effect on their modest life savings, or even the livelihood of a small business owner.

That is very likely to deter even starting a PAP for many individuals.

It would disenfranchise a large portion of the population.

UNITED NATIONS REPORT – ACCESS TO JUSTICE

Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

2. It flies in the face of having a low cost small claims system.
3. It contradicts CPR1 - **The overriding objective**
 - (2)(a) ensuring that the parties are on an equal footing;
 - (2)(b) saving expense;
 - (2)(c)(iv) to the financial position of each party;
4. Currently, a typical costs summary will be charged at rates an individual would be exposed to, just from a PAP - even if the dispute was resolved before court action was even needed.

Below are the actual costs that an LIP would be at risk of, from a recent case in Cardiff, over a simple dispute between a private Litigant in Person and a Local Authority. If the PAP costs proposal is implemented.

Just for the first hearing, the Council (the Defendant) issued the Claimant (a Litigant in person) with a Statement of Costs for the same work they would have done at the pre-action stage, which currently both parties would absorb themselves – as is the case currently.

If the PAP costs proposal is implemented, no sane individual would risk even sending a Pre-Action Letter, knowing they could be liable for over £3000, even before negotiations had concluded to resolve the issue, before any legal action was even necessary.

Grade A £169

Grade B £142

Grade D £106

Telephone calls

£412.20

Emails	£308.50
Schedule of work done on documents	<u>£2508.20</u>
	<u>£3228.90</u>

In the normal course of disputes, Companies, organisations and individuals carry on written disputes without the other party ever being subject to any financial cost implications or threat thereof.

Each party absorbs its own costs, whether it is Joe Bloggs v Pete Smith, or Joe Bloggs v a FTSE100 Corporation, or between two Companies/ Public bodies etc.

The PAP is merely a preliminary, testing/attempt at resolution stage of that dispute.

If implemented, the PAP costs proposal would be a serious deterrent to anyone with limited resources seeking justice.

The PAP has been, and should continue to be, an opportunity for each party to gather their evidence and disclose any documents, with no cost submission being necessary.

Only if the parties cannot agree and action is formally started with a claim form, should any costs submission arise for either party.

This proposal will hand those with large resources the ability to financially crush a small claimant even before any legal action is taken.

It is argued that, if parties to a dispute were at risk of adverse costs orders due to work carried out before a claim or action had started, this would have a “chilling effect” and lead to parties with small resources them being denied justice for fear of risk of losing life savings or even bankruptcy.

This proposal would give well resourced parties a definite incentive to start a PAP during preliminary discussions, with the intention of frightening off smaller parties, who could not risk proceeding any further, and incurring large costs, not even proportionate to the dispute at issue..

Contd

78B

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You the reader, my neighbour, MP, Local District Judge, High Court Judge, any member of the Royal Family, except HM the Queen) are all at risk of having their financial details exposed, even just out of nosiness, or malicious purposes.

It is possible that it may even breach some Human Rights or ICO laws

This part of the debt PAP should be removed, as it is effectively a snoopers charter.

78C

Having different PAPs for different types of claim (litigation specific PAPS) will definitely result in wasted time if a party, particularly an LIP, accidentally sends the wrong PAP form to the other party.

To resolve this, there should be a very clear and itemised list on each PAP, at the top (before any fillable boxes) listing all of the different PAPS, so a party can decide upon and obtain the correct one.

OR

a Referral to PAGE(s) XX in the General Protocol Guide, as in Page 90/91 of the Interim Report -November 2021.

If using the second option, then the PAP FORM number should accompany each claim category, for clarity.

Please choose the appropriate Pre-Action Protocol form for your potential claim.

Reason for Claim	Form to be Used
Monetary Claim under £xxxxx	N***
Consumer Goods dispute	N***
Property dispute	N***
Landlord and tenant dispute	N***
Negligence	N***
Nuisance	N***
Construction and Engineering	N***
Personal Injury Claim (under £xxxx)	N***
Professional Negligence	N***
Breach of Contract	N***
Defamation	N***
Fraud	N***
Medical Malpractice	N***
Trusts, Mortgages.	N***
Media and Communications	N***
Judicial Review	N***
PLUS others on p90/91 of the	Interim Report – November 2021

THERE SHOULD BE NO COST DETRIMENT AGAINST A LITIGANT WHO ACCIDENTALLY SUBMITS THE WRONG PAP FORM.