

Issuing department: Civil Justice Council

Review of pre-action protocols

Closing date 10am 24th December 2021

Contact details

If you want to supply any response not in text form (e.g. data/tables) please email [REDACTED] for details on how to do so.

Answers should be submitted through the [online form \(link, opens in a new tab\)](#). 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.

Responses to individual questions

Questions relevant to all protocols

- 1. Do you agree that the Overriding Objective should be amended to include express reference to the PAPs?**

We agree that the overriding objective should be amended to include express reference to the PAPs as suggested in the paper.

- 2. 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?**

We are not able to comment on the individual PAPs and whether they should be mandatory on all parties. This may depend upon the nature of the parties to the case, and whether they will be disproportionately likely to have an imbalance of justice between parties. For example, if the defendant is unlikely to have access to legal advice or be eligible for any form of legal aid as is the case with debt cases, it seems unfair to make compliance mandatory.

If sanctions that apply for non-compliance with the PAP will fall disproportionately upon the more vulnerable individual in debt then we cannot support such a move. It is difficult to

strike a balance but a large commercial consumer credit firm will have comparatively vast resources available to them. It seems fairer if the creditor is sanctioned for non-compliance, but less fair if a person in debt is sanctioned in the same way.

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 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, we agree that there should be online pre-action portals where there is an online court process. This should be put in place as soon as practicable for civil money claims as MCOL does not currently have any pre-action portal built in.

The debt PAP needs to be built into the portal as soon as practicable to avoid disadvantaging people in debt who are using MCOL but will not be aware of their rights and obligations through the PAP. This means that a person in debt completing the online response within civil money claims is disadvantaged and may well get a different level of access to justice.

Where online court processes are put in place, it is vital to provide assisted digital support to people who are unable to interact with a digital portal.

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 the PAP stage? In giving your answer, please give any suggestions you might have for how such a costs procedure should operate.

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.

We do not see how this would function in the debt PAP or the housing PAPs. These are examples of court cases where there is no equality in arms between the parties. The action is being taken against a potentially vulnerable individual who is in debt, mortgage or rent arrears. There is not necessarily a legal dispute which is to be resolved or the issues crystallised by equal parties in the case.

The paper acknowledges that this is an issue that may lead to certain types of PAPs being excluded from the mandatory good faith obligation unless legal help and support is put in place.

We have set out more details of our concerns in our response to the debt PAP below.

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.

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

As we have said in our response to question five, we do not see how this would function in the debt PAP or the housing PAPs. These are examples of court cases where there is no equality in arms between the parties. Our clients would be very unlikely to engage with such a process or be able to participate without legal 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?

We would suggest that compliance with PAPs need to be mandatory for creditors and the sanctions for creditor non-compliance should be strengthened. There is an imbalance in access to justice for defendants using the PAP. They will be at a serious disadvantage in navigating the requirements and risking costs by taking action, which will prolong the stressful experience of litigation and risk substantial expenses.

We believe that the PAP should prescribe sanctions more clearly and exactly. This should include the court imposing a stay with directions to follow the protocol and the power to strike out a claim after 'x' days for non-compliance. It should be mandatory for lenders to have to apply for relief from those sanctions if they fail to follow the debt or landlords' protocols. The PAP should make it clear a case cannot progress without the protocol having been followed except for urgent / exceptional reasons (maybe where a limitation period is set to expire). You could have a 'pause' rule whereby limitation times are paused during this time. It should be mandatory to discuss ADR as a possible route and evidence that discussion, and this should include all forms of ADR like complaints resolution and ombudsman schemes.

There is an acute disparity of legal knowledge and access to justice for people in debt who are defendants in a debt claim. In theory the same sanctions apply to the defendant under the debt PAP as the creditor. This seems unfairly balanced against the litigant in person. The sanctions for non-compliance should apply to the creditor/claimant only in a debt case, or at least be at the court's discretion.

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?

We would very much favour PAPs being based on accessibility principles. We generally welcome guidance as long as it is in clear, simple English and structured in a helpful manner.

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.

We are extremely supportive of updating the language used in the PAPs to ensure they are more user friendly and use plain English. Many defendants will be unaware of how the PAPs work or understand their requirements, as they are not written in plain and simple English.

We would also recommend that user research is carried out to inform any changes and make sure people will understand what is required of them.

As a general point, we do not think the use of the term “debtor” is helpful and we would fully support changing the word debtor to defendant. The term “debtor” tends to stigmatise people with debt problems who are already dealing with shame and stress of dealing with their debt problems – if at all possible, it would be better to use ‘consumers’ or ‘people in debt’ but in this context, defendant might be the best option as suggested.

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

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?

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?

Questions specifically related to Practice Direction - Pre-action Conduct

14. 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 PAP set out in Appendix 4.

15. 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?

16. 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’.

Questions specifically related to personal injury protocols

The subcommittee considered the following questions should be consulted on further:

17. 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?

18. 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?

19. 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?

20. 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?

21. 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.

22. Do you agree the transitional integration clauses for injury claims exiting fixed recoverable processes and slotting into the main injury protocol require greater clarity?

23. 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?

24. 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?

25. 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?

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

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

28. 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?

29. 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?

30. 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?

31. 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?

32. 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?

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

The subcommittee 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 above.

Questions specifically related to housing protocols

Disrepair/Housing Conditions PAP

34. Do you agree that large corporate landlords should be required to publish an address to which PAP letters should be sent?

Yes, we would think this is an eminently sensible requirement for large landlords to publish an address for PAP letters to be sent to.

Landlord Possession Claim PAP

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

This would seem to be a measure that can only help to improve the potential for defendants who may lack capacity to receive the help and assistance they need.

36. 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, we agree the PAP should be amended to require landlords to file a checklist at court when issuing a claim. This might help to identify and flag up issues of vulnerability or capacity to the court. As there are instances of courts using a pro forma checklist already then these should be evaluated and used as a base for a new standard checklist.

In addition, the claim form should be amended to require the landlord to confirm they have complied.

Extending the PAP to private landlords and non-rent arrears grounds

37. 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, we very much agree that the possession PAP should be extended to apply to possession claims brought by a private landlord but adapted to ensure that only the relevant sections apply. Private tenants have fewer tenancy protections as compared to tenants of social landlords. An extension to the landlord possession PAP to cover private tenants is a measure that seems overdue.

38. 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?

It would seem eminently sensible to include information on the rules as to which bodies are authorised to conduct litigation to deter unregulated companies from seeking to conduct possession proceedings.

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

If it has been established that the existing PAP works well, then we can see no good reason not to extend its use to claims that are brought on other grounds. Again, this might help to identify issues of vulnerability or capacity to the court.

Mortgage Possession PAP 55

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

We very much agree that the mortgage possession PAP should be mandatory on all lenders and all mortgage claims.

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

Yes, we agree that the PAP should apply to all mortgage possession claims including buy to let mortgages. It is vital that tenants of borrowers are aware in advance of proceedings that may affect their home.

42. 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, we agree that this makes sense where the occupier is not the defendant in the mortgage claim but is their tenant or licensee.

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

It is vital that any amendments to the PAP to provide standard information to borrowers should be in clear plain English. The information should be in a prescribed format and be subject to research with borrowers to ensure that the information is easy to understand.

However, the paper refers to defendants that sometimes “put forward unrealistic and impossible defences”. It is difficult to envisage what information needs changing regarding the powers of the court without having a better understanding of what constitutes an “impossible” defence in this context.

44. 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?

We agree that the PAP should be amended to require lenders to write to borrowers about the time and date of the hearing.

It is vital that borrowers understand how important it is to attend the possession hearing. We agree that lenders should be required to tell borrowers why they should attend. However, this would be better set out in a standard format that all lenders are required to send, using a prescribed form of wording that is plain English and easy to understand. We would not like to see it open to lenders to adopt their own approach to such messaging which could send out mixed messages or be open to interpretation.

45. 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?

Questions specifically related to the JR protocol

46. Do you agree or disagree with the approach set out by the subcommittee in chapter 4?

47. Are there any other factors specific to JR that should be considered?

48. Do you agree or disagree that there should continue to be a separate and bespoke PAP for JR?

49. 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

50. 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?

We cannot see how the introduction of a good faith obligation and requirement to file a joint stocktake report will help people in debt to deal with their creditors.

Generally, claims for money in the County Court are between commercial consumer credit firms and individuals in debt who may be vulnerable due to their financial circumstances, and dealing with a multiple debt situation, mental or physical health problems and a range of other issues. This means that there is a substantial inequality between the status of claimants and defendants in debt claims.

There is an imbalance in access to justice for defendants using the PAP. They will be at a serious disadvantage in navigating the requirements and risking costs by taking action, which will prolong the stressful experience of litigation and risk substantial expenses.

Generally, money claims are not contested by defendants. Even if there may be a defence case relating to the balance owed, fees and charges, the debt being statute-barred and so on, in many cases defendants do not engage or reply to the court claim, resulting in a forthwith judgment for the full amount owed.

We do not wish to restrict access to justice, but without legal advice, we see no possibility that our clients could or would interact with lenders to resolve the matter before claim or file a stocktake report. All defendants with debt claims would need to be provided with free legal advice screening to establish whether there is a legal defence to the claim.

In the alternative, where there is no legal dispute and to avoid the court claim and associated costs, and resulting court judgment, there would need to be a mechanism to work out if there were any contractual disputes, and to put in place an affordable payment arrangement for the defendant. We would be very much in favour of a pre-court mechanism to allow for a debt claim settlement using the Standard Financial Statement to establish a reasonable and affordable payment arrangement without a court judgment and associated costs for the defendant and mark on their credit file. This would not require legal advice as such but would require substantial resources for the debt advice sector to provide such a comprehensive service for defendants.

We do not see either of these prospects as realistic, which leads us to conclude that there should not be extra obligations placed on people in debt along these lines. If the obligations proposed were put in place then vulnerable people in debt, in stressful circumstances, could be subject to court sanctions for non-compliance with processes they may not understand. We cannot see how this would be helpful.

51. 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 including legal advice)? What changes, if any, would you make to the rules on when litigation can be commenced?

We would not support aligning the time limits for the debt PAP to 14 days plus 28 days' extension. The debt PAP allows for 30 days for a response to the letter of claim. We would point out that this may need looking at again in the light of the breathing space regulations which came into force in May 2021. The 30 days allowed under the debt PAP is not compatible with the 60 days allowed under breathing space for the person in debt to seek debt advice. We would put forward the idea that the response time needs to be aligned to the breathing space time period.

It is likely to be extremely difficult for defendants to obtain a debt advice appointment within 14 days. There are very restricted resources in the debt advice sector and high levels of demand. This can lead to an extended waiting period for casework appointments. It may be possible to obtain telephone advice but again, services are in high demand.

It would not make sense to us to reduce the time limits for the debt PAP in the way suggested given the current resources. As we have said in our response to question 50, this would not work well with an expectation that all defendants have access to legal advice or debt advice for all claims to respond to the PAP and avoid sanction.

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

As we said in our response to the previous consultation, a particular flaw in the debt PAP is that there is no standard communication template that firms must use to send the PAP to a defendant. This means the communications will not clearly state what is required, or why the letter is being sent. It is impossible for advice agencies to be sure what has been sent to clients, as the contents will all differ.

The debt PAP requires the template information sheet and reply form to be sent to the defendant but does not require a prescribed template pre-action letter. This appears to be an imbalance that should be addressed.

The contents of the template for the letter of claim should include the information required under part 3 of the debt PAP in a common format. In addition, there should be prescribed wording referring to the information sheet, and how the defendant should respond. There should also be prescribed wording on how to seek free, independent debt advice. We would suggest using wording that is already in place on other court forms or the FCA information sheets.

We think a standard communication template using prescribed terms would be a simple correction to the debt PAP and help defendants to understand what they are being asked to do.

53. 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?

We are extremely supportive of updating the language used in the debt PAP to ensure it is more user friendly and uses plain English. As we have said previously, the information sheet is much more helpful and easier to read. Many defendants will be unaware of how the PAP works or understand its requirements as it is not written in plain and simple English.

We would be happy to help in any work to simplify the PAP in the future. We would also recommend that user research is carried out to inform any changes and make sure people will understand what is required of them.

As a general point, we do not think the use of the term “debtor” is helpful and we would fully support changing the word debtor to defendant. The term “debtor” tends to stigmatise people with debt problems who are already dealing with shame and stress of dealing with their debt problems – if at all possible, it would be better to use ‘consumers’ or ‘people in debt’ but in this context, defendant might be the best option as suggested.

We are less convinced by suggestions to change creditor to claimant. Most people will be more familiar with the word “creditor” in the context of owing money to a lender. If the decision is taken to use “claimant” there should be an explanation included as to what this means in the context.

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

Yes, we support integrating the PAP for debt claims into the Money Claims Online portal (MCOL) portal. Indeed, we have raised our concerns about its absence with HMCTS through our membership of LiPeg. The current MCOL does not even reference the PAP for debt, the information sheet, referring to debt advice, or how to complete the reply form with a summary Standard Financial Statement (SFS) to accompany this. We are not aware of any imminent plans to ensure that it is integrated.

The debt PAP needs to be built into the portal as soon as practicable to avoid disadvantaging people in debt who are using MCOL but will not be aware of their rights and obligations through the PAP. This means that a person in debt completing the online response within civil money claims is disadvantaged and may well get a different level of access to justice.

Questions specifically related to the construction and engineering protocol

55. 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)?

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

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

Questions specifically related to the professional negligence protocol

58. Would you support aligning the time limits for responding to the pre-action letter of claim to those suggested for revised general PAP (14 days with a right to extend for a further 28 days to obtain further information)?

Questions specifically related to the proposed low value small claims track

59. 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?

Any other comments

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