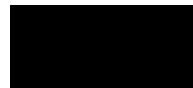


## View results

Respondent



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](mailto:cjc.pap@judiciary.uk) for details on how to do so.

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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 are anonymous we will not include your name in the list unless you have given us permission to do so.

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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
- ☒ CEO of the Forum of Insurance Lawyers

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
- ☒ Yes, it is important that the new emphasis on effe

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, PAP compliance should be mandatory, with proceedings stayed where necessary to allow the relevant PAP process to be completed. FOIL agrees with the CJC view that a weak cases/summary judgment exception should not be incorporated into the general principles.

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
- ☒ Ideally, moving the pre-action process to an onlin

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.

The creation of a new summary costs process will put in place an entirely new costs jurisdiction and FOIL is concerned it will lead to a new satellite claims industry. At present, many claims are brought forward and settled without the need for legal representation or legal proceedings. Commonly they are for special damages only in specified sums. These claims are handled by the litigants themselves and therefore no legal costs are incurred. This allows smaller claims to be resolved cost effectively and quickly: it is to the benefit of both claimants and defendants that this status quo is preserved. Sometimes lawyers act in these straightforward uncontested claims and seek costs; a rise in this unnecessary behaviour was sparked by the fixed costs regime in 2003, but the jurisprudence shows that the same issue has been recurring for a long time. Generally, by paying the claim but not agreeing to pay costs this minority issue was controlled. However, opening up jurisdiction for lawyers to argue that they should recover costs between the parties for the straightforward pre-litigation work will lead to exploitation.

It is recognised, quite rightly, within the interim report that "the risk of costs affecting litigant behaviour in undesirable ways is very real in the English system". There is a risk that a new process to formalise the recovery of costs pre-issue will encourage lawyers to seek to get involved in more claims pre-issue, on the basis that they are arguably costs bearing. It has the potential to create costs litigation and increase the burden on the court system, without discernible benefit.

FOIL does not believe there are real deterrents in the current system which discourage parties from settling. In practice, defendants will generally recognise that if there was a reasonable expectation that the settled claim, if issued, would have been costs bearing, it will be agreed that costs in principle are payable. Usually, costs can be agreed but CPR 46.14, with Part 8, works well to deal with disputes over quantum.

In the experience of FOIL's Costs Sector Focus Team, made up of costs specialists across member firms, very few claims are settled pre-issue which would meet the criteria for use of the new process, with the need to refer all costs issues to a judge. FOIL does not believe that the volume of such cases would justify the development of a new process. Instead, the new process would create a new category of straightforward settled cases where claimants will sue for costs, where previously no cause of action existed or was thought to be needed by any of the senior courts cases that have examined this corner of law.

On the issue of costs paid pre-issue, the process of assessing and agreeing costs is often protracted by a lack of transparent, reliable information from the receiving party. The process could be improved and made more cost-efficient by including in Part 45 a provision echoing the statement in Form N260: "Where there is a contract of compromise giving rise to an entitlement of costs, the costs should be set out in a letter and certified as being accurate and compliant with the indemnity principle."

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, FOIL agrees, subject to two important considerations.

One of the main complaints raised by FOIL members about the current PAP regime is the paucity of information received by the defendant. The extends across many of the PAPs. In many claims insufficient information is made available to allow for a decision on liability and for meaningful discussions on quantum. Too often, information and details are "TBC". Without full disclosure of information attempts at resolving or narrowing the dispute will be hampered, and at worse rendered pointless.

Whilst there is focus in the interim report on the good faith obligation and the stocktake, there is much less focus on the need for cards to be on the table. However, the general support in the interim report (Appendix 5, para 8), for "requiring more, but proportionate disclosure at the pre-action stage across most PAPs" is welcomed.

There is a need for balance and proportionality. FOIL is also concerned at claims which are notified which then emerge fully worked up several years later with full medical evidence, with significant pre-issue costs already incurred and no opportunity for the defendant to be involved in agreement on a route-map for the claim, experts and rehabilitation.

The new wording on disclosure of information in the draft general pre-action protocol requires parties "to provide sufficient information to enable each party to understand each other's position and to meaningfully engage in good faith efforts to resolve or narrow the dispute". There are concerns that this is similar to the current requirement to disclose information "to make decisions on how to proceed and to try to settle without proceedings".

The value of the good faith obligation will rest upon the development of a fresh mind-set amongst legal representatives and the judiciary, which recognises the sharing of information as the keystone of the new process.

To that end, it is disappointing that the guidance on what might constitute a breach of a PAP and therefore warrant a sanction, set out in Appendix 5, paras 35- 39, takes a limited view of the importance of early information.

There will be cases where a party has not been able to produce requested information or documents pre-issue with good reason, where a sanction would not be appropriate. In general, however, where documents are available but not disclosed, this enforcement regime is not likely to encourage the open-handed exchange of information which is needed for meaningful ADR. If the obligation to engage in settlement or to narrow the issues is to be of good faith, the obligation to disclose information must be the same.

FOIL welcomes Appendix 5, para 14, that a good faith obligation would not mandate a specific ADR process. FOIL believes strongly that there must be flexibility. FOIL welcomes the range of methods set out in the General PAP Joint Stocktake Template and would like to see JSM added as a specific option.

The proposed timescale for commencement of the good faith steps (14 days from receipt of the letter of reply) is tight, considering the need to obtain instructions and for preliminary contact between the parties to agree the approach. 28 days would be better. It is important that sufficient time is allowed for the three stages to be completed: if parties are put under too much time pressure they are unlikely to be able to give the process the attention it needs.

Allowing eight weeks for completion is also a relatively short period especially for the more involved forms of ADR, however it is noted that further time will be allowed by agreement. There is the potential for genuine difficulties in starting and completing the process to be characterised as a failure to co-operate, leading to premature issue. The PAPs should require the parties to allow a reasonable timeframe, with the court having power to impose a sanction for premature issue, as with other breaches of the protocols.

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

☒ Where parties are legally represented, it should b

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, FOIL supports the requirement to complete a joint stocktake report as proposed.

Yes, FOIL agrees that the report should list the documents disclosed by the parties and those that are still sought.

FOIL welcomes the inclusion within the report of a number of steps which could indicate that good faith steps have been taken to try to resolve the dispute or narrow the issues. In addition to those listed, JSM should be expressly noted, being materially different in practice to a normal meeting between the parties. The reference to "offer of compromise" should be removed. Reference to an offer reveals too much about the pre-issue negotiations and may discourage parties from making an offer. There is the potential for its inclusion to encourage gaming through the making of token offers. In addition, a 'bald' offer in writing does not meet the requirement that the parties should engage with each other, as set out in the General PAP.

The proposed timescale, requiring the joint stock report to be completed within 14 days from the conclusion of the good faith step is very tight, particularly where the completion of the report requires a meeting between the parties, perhaps liaison with clients, and the preparation of the report. Allowing too little time undermines the aim of the report, to give the parties the opportunity to review their position and potentially settle their dispute. FOIL believes that 28 days would be more appropriate, with provision included within the rules for further time by agreement.

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?

FOIL supports the introduction of a meaningful and effective sanctions regime to ensure compliance with the new, more prescriptive, pre-action approach to be included in the PAPs. The current tendency for the consideration of costs sanctions for breaches of PAPs to be left until the conclusion of the claim is seen as a major problem in encouraging adherence.

a) Yes.

b) In an ideal situation, parties to litigation would set out details and issues around PAP compliance in the Direction Questionnaire, with the judge considering the points raised and making orders as appropriate. In reality, bearing in mind the scant attention often given to pre-issue conduct at present, it seems likely that, as predicted in the interim report, such an approach would encourage lengthy complaints and the time required to deal with detailed submissions would deter judges from addressing the issue (particularly as it is noted in the interim report that judges have already raised concerns at the additional burden a compliance investigation at the outset would place upon them.)

FOIL believes that the most appropriate approach would be the option of requiring a party alleging breach to make a formal application. Such an approach would encourage proper consideration of whether a breach had occurred which was serious enough to warrant a sanction, deter speculative point-raising, and focus judicial time on specific issues rather than general complaints.

c) Yes. If adherence to the PAPs is to be seen as compulsory and if the new regime is to have teeth, breaches must be dealt with at the outset wherever possible. The issues raised in Appendix 5, para 50 are of concern. It is already noted in the interim report that, rightly, the most serious sanctions should be limited to serious breaches. The more usual sanction will therefore be a costs sanction. Para 50 indicates that whilst it is theoretically possible for a costs sanction to be imposed before the quantum has been determined or the outcome of the claim known, "this is unheard of" and "it may be that, in practice, the only sanction a court will contemplate imposing at the start of a proceeding is a stay or a strike out in cases of grave non-compliance." Such an approach seems doomed to entrench the current practice of no action being taken on breach until the end of the claim, which will embed the current problems firmly within the new regime. FOIL believes that the courts' powers should be clarified to allow a costs sanction to be imposed even before the outcome of the proceedings is known.

It is disappointing that the guidance on what might constitute a breach of a PAP and therefore warrant a sanction, set out in Appendix 5, paras 35- 39, takes a limited view of the importance of early information. "The quality of compliance would rarely be sufficiently serious to warrant a sanction at the severe end of the scale being imposed". "Generally speaking, a failure to provide sufficient information or a document, should ordinarily lead to a costs sanction only (if any) which is proportionate to the additional costs and time wasted by the other side occasioned by the non-compliance. Finally, it would be a very rare case indeed where a failure to produce a document or information of a type not expressly referenced in the guidance to the relevant PAPs, but is requested by the other side, would amount to non-compliance worthy of a sanction (our emphasis).

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

☒ FOIL agrees that the proposed guidance and war

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.

FOIL agrees that the PAPs should be accessible to vulnerable parties but as recognised in the interim report this must be balanced with the need for the PAPs to set out clear and unambiguous requirements on pre-issue conduct. Engaging with the civil justice process can be complex, even pre-issue, and it may not be possible to ensure that all wording is suitable for vulnerable parties. The interim report raises the question of the extent to which it is appropriate to use accessible language where that comes at the expense of legal precision. FOIL believes that, particularly for the specialist PAPs where the parties are more likely to be legally represented, the balance should tilt towards legal precision. The balance may be different in, for example, the new proposed PAP for claims worth under £500 and there may be a need for separate guidance for vulnerable LIPs on how the PAPs operate, outside of the formal PAP wording.

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

☐ Yes

☐ No

☒ In general, no. FOIL would echo the concerns exp

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, the courts will have sufficient general powers to deal with this issue appropriately should it arise, without the need for a specific rule.

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?

FOIL does not believe that the letter of claim and letter in reply should automatically be used as pleadings post-issue but there may be circumstances where it is convenient and cost efficient for them to be so used and in these circumstances the parties should be permitted to do so. There would seem to be potential for the details of disclosure in the joint stocktake report to stand in for at least part of the disclosure process, particularly in lower value claims where disclosure requirements are limited and straightforward.

## 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.

Para 3: the word 'complaint' is confusing. It seems that the reference to defendants having "a reasonable time to deal with complaints" is referring to an informal stage pre-PAP. The indication that "nothing in this guidance prevents a claimant from starting court proceedings if their complaint is not resolved by a defendant", appears to indicate that the PAP is not mandatory. Clearer wording would be helpful.

Para 13: in the examples of reasonable and proportionate good faith steps that might be taken, the inclusion of "describing the relevant law in objective and clear terms to LIPs" is of concern. There is the potential for the wording to encourage LIPs to request legal advice and information from the defendant; for allegations of breach to arise where it is not provided; and for disputes where information is provided but is perceived not to be objective and clear. The reference to provision of a copy of the appropriate protocol should remain.

Para 19:

(ii) Good faith obligation to resolve or narrow the dispute.

Stating that failure to cooperate in completing a stocktake report is not acting in good faith is confusing. The PAP indicates that it includes three sequential steps "with each subsequent step dependent upon compliance by both parties with the previous step". The obligation to prepare a joint stocktake report only arises when the good faith obligation has been complied with: a failure to prepare a report cannot be a breach of the previous step.

There are concerns that including a formal offer of settlement as a good faith step may lead to gaming of the system through token offers, a tactic which has been seen in other situations. FOIL would argue that to send a bald offer with no further engagement does not meet the requirement for good faith engagement.

All communications between the parties when engaging in good faith steps are to be privileged. The words, "unless clearly marked otherwise" should be added, to allow the parties to engage in open correspondence if they wish to do so.

The stocktake report must be completed within 14 days of the conclusion of the good faith step: a very short period. Allowing too little time undermines the aim of the report, allowing parties to review their positions and potentially settle the dispute. FOIL believes that 28 days would be more appropriate, with further time by agreement.

Under the protocol, "The claimant can commence proceedings without filing a stocktake report 14 days after the conclusion of the good faith step...if the defendant fails to co-operate in completing a stocktake report." In these circumstances the claimant will file the pre-action letter of claim at the commencement of proceedings.

The provision as drafted tilts the level playing field and allows a claimant opportunities to game the system and start proceedings on the basis of alleged non-co-operation. As indicated above provisions should be included to allow more time to be requested where required. If proceedings are commenced without a joint stocktake report, it should be open to the defendant to raise the issue of premature issue, in the same way as other breaches of the PAPs are to be addressed.

It is unclear whether the pre-action letter of claim will be filed at the commencement of proceedings only when there is no joint stocktake report. There are concerns at any requirement for the pre-action letters of claim or reply to be used automatically as court documents. Whilst a party should be able to use a letter as part of a pleading, filing the pre-action letters should not be mandatory, to discourage an overly cautious, legalistic approach.

On the status of the information contained in the joint stocktake report, FOIL believes the parties should be able to change their positions but may face a costs sanction for doing so without justification. The position on admissions in the stocktake report must be made clear. The position in CPR r.14 will presumably apply.

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?

The timeframes are very tight for defendants and shorter than is generally allowed at present. Even within the OIC for low value RTA claims compensators are allowed 30 business days to respond.

It should be remembered that claimants have as much time as required to investigate and prepare their claim pre-notification and the imposition of tight timescales must not prevent the defendant from having a full opportunity to investigate and respond. The interim report indicates that the additional time for a letter of reply may also be available when additional information is required, not just when expert evidence is required as set out in the question: it is important that additional time is available to obtain further information in general, not limited to expert evidence.

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'.

One of the main complaints raised by FOIL members about the current PAP regime is the paucity of information received by the defendant. The concern is not limited to a particular type of litigation but extends across many of the PAPs. Either through a failure by claimants to get to grips with the details of the claim early, or through a tactical decision to keep information confidential, in many claims insufficient information is made available to allow for a decision on liability and for meaningful discussions on quantum. Too often, information and details are "TBC". Without full disclosure of information attempts at resolving or narrowing the dispute will be at best hampered, and at worse rendered pointless. The general support in the interim report (Appendix 5, para 8), for "requiring more, but proportionate disclosure at the pre-action stage across most PAPs" is welcomed.

Most of the specific disclosure requirements under the current PAPs are concerned with disclosure by the defendant. The focus of reform should be on levelling that obligation, to require the claimant to also disclose full information and documents upfront.

FOIL is wary of introducing provisions within the PAP regime which turn the process into quasi litigation. It has reservations over introducing a litigation standard of disclosure into the pre-action regime. That said, the detail of Initial Disclosure under PD 51U might give a useful steer on the type of disclosure which would be appropriate:

(1) the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and

(2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

## 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

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

☒ Yes at Appendix 6, para 9, the interim report men

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?

FOIL agrees that, in-line with the general PAP principles, an obligation to complete a joint stocktake report should be included in the PI PAPs. Although the term 'list of issues' is also used this is misleading as it is noted in the general PAP that a list of issues would also be required to include information on disclosure of documents. To avoid confusion, it would be better for a single term to be used, recognising that the extent of the joint stocktake report will vary depending upon the size of the claim, to ensure a proportionate approach. The explanatory term 'list of issues and documents' might be included in parenthesis as a guide for LIPs.

The joint stocktake report should be the third sequential step, after the good faith obligation and ADR, in-line with the general principle.

It states in the draft general PAP (page 96 of the interim report) that the joint stocktake report must be filed by the claimant with its statement of case. To avoid too many variations in process the same rule should apply in personal injury claims.

32. 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?

Yes, it is important that it is recognised in the PAPs that pre-action conduct in Fast Track claims will be different from that in Multi Track claims. A failure to reflect that is likely to lead to excessive costs in lower value claims and/or an overly simplistic approach in high value claims. It is important, in particular, that the differences in the obtaining of medical reports and expert evidence in claims of different values is reflected in the PAP: the current provisions, as stated in the PAP, are focused on the Fast Track.

(a) FOIL, having been instrumental in the introduction of the Serious Injury Guide, and actively involved in its promotion and development, is very supportive of it. The Guide provides an important steer on the handling of major injury claims, focusing on positive collaboration. Although a large number of insurers and claimant representatives are signatories to the guide, giving a commitment that they will follow the guide, the introduction to the Guide recognises its limitations. It states that it will work in parallel with the CPR and it is recognised that there will be occasions when the defendant insurer or an agent cannot commit a commercial client to comply with the guide; and on occasions parties may be unable to comply with the guide. To ensure that the Guide can continue to be used effectively in those claims where it can provide significant benefits, it is preferable for it to remain as a separate regime rather than being integrated into the PAPs.

(b) It is difficult to provide a comprehensive answer to this part of the question until it is known how the PAPs are to be structured and drafted. The new extended FRC regime will apply to moderately severe claims up to £100k, which will also impact upon PAP provisions. One area where it is important that specific guidance is provided for medium value claims and catastrophic claims is in the obtaining of medical evidence.

33. 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?

The Rehabilitation Code is already referenced in the PI PAP and should also be referred to in the new version. The code is very detailed and it would not be appropriate for there to be significant integration of it with the PAP, but the reiteration of the general principles would be useful, including the need for early communication and the adoption of a collaborative approach. As a basic requirement a PAP obligation on the claimant to identify any rehabilitation considered to be beneficial and estimated cost before it is commenced, together with evidence to justify the rehabilitation being sought, would be in keeping with the general principles and reduce the potential for disagreements over the need for /cost of rehabilitation to hamper the prospects of settlement.

In lower value claims where the claimant has outlined rehabilitation needs, the Rehabilitation Guide already places on the compensator an obligation to either agree to the request or give reasons for rejecting it. If an obligation is introduced on the claimant as set out above it would be appropriate for the defendant to be required to respond.

In significant claims where an INA will be prepared, the obtaining of the assessment should be a joint exercise, which will usually be funded by the defendant. In these circumstances the PAP should indicate, as an exception to the principle set out above, that the claimant should not seek to set out rehabilitation needs independently but should liaise with the defendant with a view to a joint INA being obtained.

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

☒ Yes, to avoid overlap and duplication it should be



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
- ☒ Yes. One of the problems of the current pre-action

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?

Yes. As indicated above, one of the main complaints raised by FOIL members about the current PAP regime is the paucity of information received by the defendant. The concern is not limited to a particular type of litigation but extends across many of the PAPs. Either through a failure by claimants to get to grips with the details of the claim early, or through a tactical decision to keep information confidential, in many claims insufficient information is made available to allow for a decision on liability and for meaningful discussions on quantum. Too often, information and details are "TBC". Without full disclosure of information attempts at resolving or narrowing the dispute will be at best hampered, and at worse rendered pointless.

It is of some concern that whilst there is much focus in the interim report on the good faith obligation and the stocktake, there is much less focus on the need for cards to be on the table. However, the general support in the interim report (Appendix 5, para 8), for "requiring more, but proportionate disclosure at the pre-action stage across most PAPs" is welcomed.

Most of the specific disclosure requirements under the current PAPs are concerned with disclosure by the defendant. The focus of reform should be on levelling that obligation, to require the claimant to also disclose full information and documents upfront.

The joint stocktake report will make it clear which documents have been disclosed and which have been requested but not disclosed. Whether non-disclosure of significant documents/information is a breach of the PAP significant enough to attract a sanction should be a matter for the court. There should be no formal obligation on the defendant to respond as proposed to the claimant's list of documents it considers relevant.

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
- ☒ Yes. The defendant may not always require disclo

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

- ☐ Yes
- ☐ No
- ☒ Yes FOIL agrees that a working party should be s

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

- ☐ Yes
- ☐ No
- ☒ No Although the Executive Summary of the inter

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
- ☒ Yes. Many types of expert report are subject to si

41. 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?

Disclosure of medical reports by the claimant before issue is a mixed picture. In catastrophic claims they are more likely to be disclosed, with issues arising around interim payments and rehabilitation. In other types of claim they are often not disclosed. Whilst there is no obligation to disclose medical reports pre-issue, it is to be hoped that the new proposed process will foster a new mindset, under which disclosure becomes more routine. It is hard to see how the good faith obligation can be delivered upon effectively if the claimant fails to disclose medical evidence relevant to the issues being considered, particularly when it is evidence that will be relied upon post-issue.

The issue is not only one of disclosure. In practice the defendant is often kept in the dark when the claimant is examined making it difficult to know how the claim is progressing and to respond accordingly. It would be a significant step forward if the claimant representative were obliged to disclose when the claimant has been medically examined with a view to a report being obtained, and by whom.

In practice, many of the claims on the Fast Track have fallen out of the RTA portal/Low Value RTA PAP. Greater alignment between the two regimes on the issue of medical evidence would be helpful. For example, if the PI PAP echoed the requirement of the Low Value PAP in requiring any medical report recommending a second report to be disclosed before the second report is obtained.

If medical evidence is not disclosed voluntarily pre-issue in accordance with the principle of 'cards on the table' information exchange, it must be disclosed at the earliest opportunity once proceedings are issued. A requirement, for all expert evidence to be relied upon (including that pertaining to liability) which exists at the date of issue to be disclosed by the claimant upon issue, would reduce the potential for gaming during the pre-action stages and encourage adherence to the PAPs.

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
- ☒ No, although under the proposed 'cards on the t

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
- ☒ No. The issue is already adequately dealt with in

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?

FOIL agrees that changes to the PI PAP expert evidence process are required for multi-track cases. The most important requirement for a new process is the adoption of sequential exchange, which saves time, costs and judicial resource. At present, many of the more peripheral reports obtained by both parties are non-controversial and if seen by the defendant before they obtained their own medical evidence would be accepted.

FOIL would propose, with a view to agreeing evidence and removing the need for additional experts, that the PAPs require, where feasible,

a) parties to disclose core evidence on a 'without prejudice' basis, and

b) with regard to secondary evidence, parties consider sequential exchange on the same 'without prejudice' basis

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

- ☐ Yes
- ☐ No
- ☒ No. Court case management pre-issue would blu

## Housing Protocols

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

☐ Yes

☒ No

### Judicial Review Protocol

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

☐ Yes

☒ No

### Debt Protocol

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

☐ Yes

☒ No

### Construction and Engineering Protocol

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

☒ Yes

☐ No

50. 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

☒ No, FOIL would not support the proposed change

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

☐ Yes

☐ No

☒ No. The process is not generally used by claimants

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

No. This will significantly increase pre-action costs. Construction and engineering disputes are often document-heavy, with voluminous contractual and other documents to be considered. Any pre-issue formal disclosure process will front load costs, could act as a deterrent to bringing claims in the first place, and will significantly increase the costs burden on defendants. The exchange of documents to assist the parties in understanding each other's position should continue to be encouraged and it should be a requirement that parties disclose any documents referred to in letters of claim or letters of response.

## Professional Negligence Protocol

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

☒ Yes

☐ No

54. 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)?

☐ Yes

☐ No

☒ FOIL would not support aligning the time limits f

## Proposed low value small claims track

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

☐ Yes

☒ No

## Any other comments

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

