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Respondent



Time to complete



This is a public consultation by the Civil Justice Council.

The consultation is open until 24 December 2021 at 10am. **UPDATE - The CJC's consultation on pre-action protocols has been extended for 4 weeks. The consultation will close on Friday 21 January at 12 noon.**

Consultees do not need to answer all questions if only some are of interest or relevance. This form contains branching so you will be able to skip sections that you do not wish to respond to.

Answers should be submitted through the online form. Please note that responses are limited to 4,000 characters per question (around 650 words). Any individual question response longer than 4,000 characters will be cut off at 4,000 characters. If you want to supply any response not in text form please email cjc.pap@judiciary.uk for details on how to do so.

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More options for Responses

Please let us know if you wish your response to be anonymous or confidential.

1. My response is: *

- ☒ Public
- ☐ Anonymous
- ☐ Confidential

About you

2. First Name *

3. Last Name *

4. Your location (name of town/city) *

5. Your role *

- ☐ Judge
- ☒ Lawyer
- ☐ Insurer
- ☐ Paralegal/Legal Assistant
- ☐ Litigant
- ☐ Policy maker/civil servant
- ☐ Other

6. Your job title

7. If relevant, whose interests do you predominantly represent? *

- ☒ Claimants
- ☐ Defendants
- ☐ Not applicable

8. Your organisation

9. Are you responding on behalf of your organisation? *

- ☒ Yes
- ☐ No

10. Your email address *

Questions relevant to all protocols

11. Do you agree that the Overriding Objective should be amended to include express reference to the pre-action protocols (PAPs)?

- ☐ Yes
- ☐ No
- ☒ Generally, we believe it to be the case that parties

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?

As indicated in answer to question 11 above, whilst we can agree that protocols ought to be followed, having the only caveat as 'except in urgent cases' feels very narrow indeed. As the interim report outlines, some of the pre-action protocols are more integrated than others, there is also significant variation in content, which we believe is appropriate given that they are designed to cater for very different types of action. There is a world of difference in the nature, issues and indeed the parties likely involved in a serious injury claim as opposed to a corporate construction dispute as opposed to an action for professional negligence.

We would urge any attempt at streamlining to recognise that there are 18 different pre-action protocols for a reason and not to try and 'shoehorn' them into the same approach inappropriately.

As we all know, no two legal disputes are the same, even when they are of the same type or nature and so allowing the courts flexibility to apply the overriding objective in the most appropriate and way in order that justice is achieved at a proportionate cost is of paramount importance.

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
- ☒ Whilst this may be a laudable aim, if it is possible

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.

Unfortunately, there is insufficient detail in respect of the proposed summary costs procedure spoken of in the interim report. We note that it was a proposal from the housing sub-committee and accordingly, we would urge caution in applying a 'one size fits all' approach. Many high value personal injury and medical negligence cases for example settle in the pre-action process for significant sums. The costs in such matters can be incredibly involved and whilst we would very much support any improvements which cut through the need to obtain a court order under part 8 before being able to assess a bill of costs, we wouldn't be supportive of an absolute summary approach as it can be very important for a claimant to have their costs assessed at a detailed assessment hearing.

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.

In our view the current situation is not that far removed from a mandatory good faith obligation already in respect of pre-action behaviour and efforts to narrow issues in a dispute. Between the wording of the Practice Direction on Pre-Action Conduct and Protocols (see para 3 for example on Objectives of Pre-Action conduct and protocols), and a solicitors' duty to act in the best interest of their clients, it is most often appropriate that efforts are made pre-action to resolve or narrow elements of a dispute.

As the interim report highlights, all pre-action protocols recognise the value of ADR and encourage the parties to consider it. We do however believe that the report is correct to highlight that any such process needs to be proportionate and available to all users and so ought to be widely defined.

We can certainly support the reports proposals that a 'good faith obligation' should not be prescriptive, but should leave parties (in light of all the circumstances of their dispute) to enter into a meaningful engagement with each other, with the benefit of having exchanged key information and documents as required by the protocols, with a view to exploring whether a resolution or even narrowing of issues is possible.

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

☒ The consultation is relatively quiet on the reasoni

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.

We are concerned about the behaviours which might flow from the introduction of a joint stocktake procedure. We often find that the only way to get a defendant to engage is to issue court proceedings. Indeed some solicitors seem to be incentivised only to engage post litigation where they are working on fixed fee structure or on lower value work. The introduction of a stocktake procedure may make engagement even worse as a defendant would know that they don't need to do much at all but will have opportunity to suddenly engage before proceedings are commenced.

We do not share the optimism around the stocktake report not becoming contentious, in some disputes it absolutely will be. We are very concerned about delay in dealing with an additional process, especially where 'slow-balling' the engagement suits the defendant.

This proposal is another example of potentially significantly increasing the amount of legal work which must be undertaken post the setting of Fixed Recoverable Costs rates as per the Government's consultation response on this subject in September 2021.

18. Do you agree with the suggested approach to sanctions for non-compliance set out in paragraphs 3.26-3.29? In particular please comment on:

- a) Whether courts should have the power to strike out a claim or defence to deal with grave cases of non-compliance?
- b) Whether the issue of PAP compliance should be expressly dealt with in all Directions Questionnaires, or whether parties should be required to apply to the court should they want the court to impose a sanction on an opposing party for non-compliance with a PAP?
- c) Whether the PAPs should contain a clear steer that the court should deal with PAP compliance disputes at the earliest practical opportunity, subject to the court's discretion to defer the issue?
- d) Whether there are other changes that should be introduced to clarify the court's powers to impose sanctions for non-compliance at an early stage of the proceeding, including costs sanctions?
- e) Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why?

a) If the court's power were to be extended in this respect, much will turn on the definition of the word 'grave'. We are very concerned about unintended consequences in this regard.

Since the introduction of s.57 of the Criminal Justice and Courts Act 2015, defendant insurers and their solicitors have increasingly made what we believe to be unfounded allegations of fundamental dishonesty in the hope that it either unsettles the claimant (let's be clear it is very unsettling to be called a liar in any context) to the point that they decide not to continue, or in the hope that something 'sticks'.

We have seen such allegations levelled when a claimant stated that they had 3 days off work, when in reality it was 2 and 2/3rd because they tried to work on the first day but had to go home shortly after arriving. We are very concerned that such allegations will only increase where procedures encourage litigants to pursue matters for themselves.

Obviously, some of the PAPs are very detailed in their requirements, which may extend over many years of pre-action work and so we can certainly see situations where allegations of failure to comply are 'banded about' in the hope of serious sanctions, putting at jeopardy the spirit of the protocols which generally work well and are followed today.

b) In light of the comments made above, we believe an application process would be more appropriate.

c) This is typically how the courts would deal with such issues today, given that the directions questionnaire allows for non-compliance to be flagged. In light of our comments in a) above, we would be very concerned that any additional round of dispute (about PAP compliance) might become an expensive and time consuming issue if dealt with separately by the court.

d) None

e) None

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
- ☒ Yes, subject to our separate answers dealing with

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.

Unfortunately, this is a very difficult question indeed. In much the same way that making the court procedure rules accessible is difficult, the same is true of pre-action protocols. That said, PAPs do tend to be written in more straight forward language than many of the rules and practice directions. The PAPs tend not to constantly cross refer to other paragraphs, but rather they tend to be a list of provisions under clear headings, which must be more accessible than the rules or PDs.

We must guard against an over simplification such that clarity is lost.

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

- ☐ Yes
- ☐ No
- ☒ No. It is also important that there is clear distinct

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. Please see both the comments in the answer immediately above and also the section dealing specifically with the Professional Negligence Protocol and the difficulties involved in responding to very detailed pre-action protocols in short order (question 75).

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?

- a) In our view, if liability is admitted, the parties should be required to agree Directions and work through them. If there is a disagreement which cannot be overcome through collaborative discussion, Court proceedings should be issued. Unfortunately however, the likely delays in listing a hearing may create a challenge to this proposition. Regardless of work being done with pre-action protocols and around dispute resolution, if it of paramount importance that the courts catch up their current backlogs and get to a position of being able to deal with issues in a swift and efficient manner.
- b) If liability is denied, the parties should certainly exchange relevant documents and consider if witnesses of fact and expert evidence can be exchanged at an early stage to facilitate a sensible discussion/ADR before Court proceedings are considered. A material factor, however, is whether the Defendant is willing to fund rehabilitation (to give a personal injury example). If not, Claimants often want to start Court proceedings as soon as possible. In our view, they should be permitted to do so as the lack of rehabilitation input should be seen as a good reason to depart from the protocol.

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.

a) Subject to points made elsewhere within our response to discrete elements of the proposed general pre-action protocol (PD), we believe that the practice direction is a sensible step to underpin the relevant Pre-Action Protocols.

b) On the joint stocktake template report, we think that there should be provision for issues which are at too early a stage to be have crystallised. On serious cases, where the final prognosis may not be known for a number of years, it is difficult to state categorically pre-action what issues may be in dispute in the fullness of time, often these would depend on a prognosis yet to be determined.

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?

These time frames may cause different difficulties depending on the claim in question. In a personal injury context, there is often reliance on third parties such as the police or the Health & Safety Executive. Claimants may send a letter of claim which Defendants would indicate that they cannot respond until they have seen the totality of the evidence. This creates immediate tension between the parties as often there is a requirement for rehabilitation or for funds to alleviate financial hardship.

Other case types may involve very complex disputes, please see our comments in respect of the construction and engineering protocol on this subject.

Whilst we agree that there should be timeframes for compliance with obligations under the protocol, the provision of an additional 28 days may well not be sufficient to allow for expert evidence to be obtained, depending on the circumstances.

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'.

On the basis that the general PAP is designed for cases which don't fit within another PAP, it may well over complicate matters to deviate from definition within the CPR31 in terms of standard disclosure. It would not be benefit to have a potential conflict between limited disclosure and obligations to act in good faith. It is also likely to drive up costs if and when Court proceedings are issued as parties will have to respond to evidence that was not within their possession when other material aspects of the case were developed.

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

☒ Pre-Action Protocols for Personal Injury claims cc

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

☒ Please see the answer given to the earlier question

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?

A stocktake procedure is not appropriate in respect of low value personal injury claims. They are already subject to a prescriptive process with fixed costs largely in place to define what work needs to be done (i.e. through the use of mandatory procedures where key information has to be exchanged) to ensure that both parties are aware of the other parties position.

To implement additional steps/work into these processes would result in duplication of effort and therefore unnecessary and inappropriate expense.

For high value claims (by which we certainly mean any claims outside of the intended extension of fixed recoverable costs), we believe a 'stocktake' procedure may well help in narrowing issues and ought to assist the court in arriving at the right directions more quickly. We have referenced separately that in many matters there are a number of unknowns both pre-action and also at the point of litigation and so it is important that these are catered for.

The question about timing is again a difficult one, because personal injury cases vary greatly in their complexity and the reasons why they are being litigated. It may not be possible to have ADR for example pre-action (i.e. where litigation is being commenced before of Limitation) and so to have to file a stocktake report/list with referenced to dispute resolution would not work. We believe the protocols would need to cater for different eventualities in this regard dependent on the circumstances of the action.

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, this distinction is very important indeed.

a) The interaction between the Serious Injury Guide, the Rehabilitation Code, the Pre-action protocol for Personal Injury Claims (including the the PAP for the resolution of Clinical Disputes), the Guide to Best Practice at the Interface between Rehabilitation and the Medico-Legal Process etc is complex and must be approached with significant caution.

It is certainly not as simple as integrating the Serious Injury guide into the relevant PAPs and given that the different guides and codes mentioned have been worked out separately over a number of years, we would recommend that any effort towards integration should be the subject of separate focus by a skilled and experienced working party. Irwin Mitchell is certainly well placed and happy to help in this regard should that be of assistance.

b) Achieving this would not be straight forward and separate protocols may be the answer. This is particularly true given the government's stated intention of bringing in fixed recoverable costs in most personal injury claims worth up to £100,000.

Unfortunately, we feel it important to repeat a theme which runs through our response, less protocols in terms of number should not be the aim, having separate protocols for separate case types which are meaningfully different may well still bring greater clarity and therefore effectiveness to pre-action efforts.

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?

Please firstly see our response to the question above dealing with integration with the Serious Injury Guide.

Seeking to amalgamate or integrate what are separate guides/codes which have developed independently over time for different reasons cannot be approached lightly. We believe that if such integration is to be taken forward, it would need to be the focus of a separate working party and again, Irwin Mitchell is happy to help with this given our range of expertise in different personal injury claim types/values.

In terms of a claimant being required to identify 'any rehabilitation they consider would be beneficial', this is of course a situation which can change significantly over time. One important factor which is an unknown early in any personal injury claim is how well – or not – a claimant is likely to recover and progress with their injuries. How well they may respond to treatment or rehabilitation, what other therapies or clinical input may be required over time etc. Equally, it isn't for the claimant to identify any rehabilitation needs, this is most certainly for clinicians to determine. A claimant is always under a duty to mitigate their losses, which extends to rehabilitation and accordingly, if treatment is needed it would be sought and if appropriate from the defendant and at their expense, it would therefore be known in turn whether or not this had been accepted or refused.

At present a claimant who fails to mitigate does face a sanction, conversely a defendant who unreasonably refuses to engage in rehabilitation does not (apart from potentially having to ultimately meet a larger claim as a result of the claimant's increased suffering or delayed recovery). This is a disparity which ought to be addressed.

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. It is not always clear which protocol a claim c

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
- ☒ (a) It is risky to have a protocol which dictates sp

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?

(a) Disclosure is often a contentious area. Claimants are often asked to voluntarily disclose quantum documents even when liability is denied in full and no rehabilitation funding is made available. We are of the view that if reasonable rehabilitation funding is made available, the Claimant should be required to provide disclosure of all relevant documents relating to their medical condition and circumstances which are relevant to the rehabilitation need. Where there is a dispute on a liability issue or any other issue, we agree that Defendant should also be obligated to disclose relevant documents. This would assist the parties in preparing a list of issues to be filed and served if and when Court proceedings are commenced. It would also make cost budgets more accurate as the parties would be aware of the relevant documentation.

(b) If the case is likely to be dealt with by way of a split trial to resolve liability first, the only circumstances we think it would be fair, just and reasonable for a Claimant to disclose quantum documents would be if there is rehabilitation funding which is reasonable and ongoing.

(c) In our experience, there is generally good cooperation when it comes to disclosing liability documents before Court proceedings are issued. The main issue to address, in our view, is quantum disclosure. The Claimants are often concerned that Defendants will use the information to make a Part 36 offer at a very early stage. This creates defensive practice which might be seen as unhelpful. However, Claimants would argue that there is no benefit in providing quantum documents if liability is denied and rehabilitation funding is not forthcoming.

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
- ☒ No. This may create a prejudice to the claimant ;

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 and Irwin Mitchell would be happy to provide

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

- ☐ Yes
- ☐ No
- ☒ Yes and Irwin Mitchell would be happy to provide

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. (a) HMRC delays are causing very significant

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?

No, our firm view is that it must be open to the Claimant to obtain evidence to fully investigate their injuries. The protocol should not override legal professional privilege, which is a fundamental legal principle. Similarly, it must not be forgotten that a personal injury action is adversarial, even if liability is admitted; one party is seeking to recover the full amount, whilst the other is seeking to limit liability and pay out as little as possible. A claimant should be allowed to gather sufficient evidence to meet the burden of proof which rests with them in this context, rather than disclose it piecemeal.

There are of safeguards in common law for Defendants in respect of the disclosure of medical evidence, where for example a Claimant obtains a report and then seeks to rely upon another expert of the same discipline at a later stage. Further detail available within *Ricky Edwards-Tubb -v- JD Weatherspoon Plc* [2011] EWCA Civ 136.

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. In high value claims, we take the view that 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
- ☒ Please see our response to question 42 immediat

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?

We take the view that liability should be resolved as quickly as possible and rehabilitation should be implemented.

We would like the parties to identify a roadmap on serious cases which are unlikely to be allocated to the fast track. We believe that the parties should try to identify the key experts and also the timing of the experts reporting. There should be a commitment to a broad timeframe for a resolution discussion. No Part 36 offers should be made until the parties have engaged in ADR. This would then mean that fewer experts were instructed at an early stage which would drive down costs. There would be one or two lead experts who would comment independently on the proposed rehabilitation. The remaining experts could be instructed in due course once rehabilitation had been implemented. This would also enable the parties to consider whether the peripheral issues needed two experts, one on each side. It may be the case that joint experts can be considered or the injuries and the effects can be agreed if they do not go to the heart of the case.

We also believe that the parties should set out their objection in respect of proposed disciplines that a party is intending to rely upon as part of the Pre-Action Protocol road mapping exercise. This would avoid arguments being subsequently taken later down the line at the first case management conference.

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

☐ Yes

☐ No

☒ Claimants typically issue early to obtain disclosure

Housing Protocols

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

☒ Yes

☐ No

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

☐ Yes

☐ No

☒ Yes, subject to the method of publication of the PAP

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

☐ Yes

☐ No

☒ Not applicable to our current work.

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

☒ Not applicable to our current work.

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
- ☒ No. An extension would increase the costs incurr

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
- ☒ Not applicable due to our response to question 5

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

- ☐ Yes
- ☐ No
- ☒ Not applicable to our current work.

53. Mortgage Possession PAP - 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
- ☒ No. Typically those with 'buy to let' mortgages a

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
- ☒ No. This would simply require additional work of

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

☒ No. This is an additional unnecessary step. We w

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

☒ No. The BBRS was not designed with this sort of

Judicial Review Protocol

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

☒ Yes

☐ No

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

We agree with the approach set out by the sub-committee.

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

No.

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?

We agree with the approach set out by the sub-committee.

Debt Protocol

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

☒ Yes

☐ No

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

☒ Please see our earlier answers dealing with the pr

66. 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 be happy to support this change for this protocol.

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?

We do not believe that the contents of the pre-action letter of claim should be more prescriptive.

68. Do you think the language of the PAP 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 Money Claims Online (MCOL) portal (or any successor platform)?

☐ Yes

☐ No

☒ This is not applicable for work that we undertake

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

☒ No. As is referenced elsewhere in our response, '

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

☐ Yes

☐ No

☒ Yes. It can prove a useful procedure to resolve di

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

No. In light of the nature of the disputes in question, there is often good sharing of documents pre-action, not necessarily as a result of a disclosure process, but because the parties have usually worked together on a project before the dispute arose. We would not be keen to risk a bespoke, judge led approach to disclosure which currently works well.

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)?

☐ Yes

☐ No

☒ No. The detail in this context is very important a

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
- ☐ No
- ☒ Other

Any other comments

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

The form had an error at qu 77, in that selecting 'Other' did not provide an additional field to share the detail. I will do that here:

Qu 77 - Low Value Small Claims Track re: Stocktake and Good Faith on claims under £500.

Ans 77 - Good faith should exist in any event.

It is not commercially viable for further steps to be introduced into a process where there is almost no costs recovery available. It is often the case with such matters that the only way to get a defendant to take a claim seriously is to issue court proceedings. Some institutional defendants will simply ignore correspondence on such matters and only deal upon the issue of proceedings. A 'stocktake' procedure may well exacerbate this and in any event, loading more work into a small claims process where costs recovery is zero outside of litigation is wrong.

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Re: the Professional Negligence Protocol. More detail was necessary that was possible in the field given.

Qu 75 - re: aligning time limits for responding to pre-action letters of claim.

Ans 75 - Professional negligence claims are complex in that a complete review of the underlying case needs to take place before the Letter of Claim can be considered and reviewed. This means that a forensic review needs to take place and consideration given to breach of duty, causation and any potential loss. This can take some time to come to a decision on whether there is a claim to answer. Typically, the claimant has had as long as they require drafting a letter of claim and there is an inequality in setting down such a short time for response.

In many cases, the underlying claim was dealt with a significant time ago. Witnesses have commonly left the firm and need to be contacted and this takes time to be able to review their evidence and the underlying file and to put together a robust letter of response.

In addition, professional indemnity claims are technically difficult and experts may need to be instructed to provide a view before the Letter of Response can be finalised. The time limit does not give enough time for this.

It is not unusual for letters of claim to be sparse, badly drafted and do not contain all the information that is required to be protocol compliant. This often increases the time needed to respond because the onus for reviewing is on the defendant.

Quite often the files have been closed some time ago and are paper rather than electronic files. They can take over a week to locate/recover them and the firm could even be a successor practice. This leaves an inadequate period of time to properly review papers.

Depending on the nature of the underlying claim, the papers are frequently voluminous, especially in complex commercial and personal injury/litigation matters and there is a danger that facts will be missed because of the short timescale given for a review.

Any revised time limit is detrimental to the defendant. Issues can be missed if working to a tight timetable. Once a letter of response is issued, commonly, the claimant can then take as long as they like to put in any response which leads to unfairness on the defendant; ie they have 14 days to respond but the claimant can take as long as they like to then come back to us.

Normally, professional indemnity insurers will instruct panel solicitors. The first you know of a claim is when the Letter of Claim arrives. There is inadequate time to locate the file, instruct external solicitors and get the papers to them to review. Conflict checks have to be undertaken and the file physically copied or scanned on to a data room, all of which eats in to the protocol time period and leaves no time (even on a 28 day deadline) to properly put forward the defendant's case.

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Any Other Comments:

It is so important that any changes are reflected in the approach to FRC.

Less PAPs do not equal better PAPs. You usually only use one protocol at once.

Many fields were limited to less characters than published, which is very frustrating!