

## View results

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

About the Civil Justice Council:

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Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If you are anonymous we will not include your name in the list unless you have given us permission to do so. [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 \*

David

3. Last Name \*

Greene

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

[REDACTED]

5. Your role \*

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

6. Your job title

[REDACTED]

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

- ☒ Claimants
- ☐ Defendants
- ☐ Not applicable

8. Your organisation

[REDACTED]

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

- ☐ Yes
- ☒ No

10. Your email address \*

[REDACTED]

## Questions relevant to all protocols

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

- ☐ Yes
- ☒ No
- ☐ Other

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?

No. Making them mandatory will allow for costly defence challenges; potentially forestalling reasonable claims and restricting access to justice.

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
- ☒ I see no problem with this but the automatic ava

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.

In concept I can support this concept but it means building a new expensive procedure when most cases resolve in any event.

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.

No this would be a disaster and lead to much expensive satellite litigation over whether there had been compliance. The concept of 'good faith' is a much litigated subject.

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
- ☒ There should be no 'good faith' obligation. Discl

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.

No. This will simply lead to further costs being incurred and parties being tied up in knots pre-action unable to agree a report. This should certainly not apply to ordinary commercial litigation.

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?

No. The present possible sanctions in place in costs are quite sufficient. Any further machinery will simply lead to further argument and cost.

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
- ☒ As above

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.

I'm sure there are but it's not my skill set to offer improvement. The important thing is that access to justice for the vulnerable should not be impeded and the proposed new machinery has the huge potential to do that.

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

- ☐ Yes
- ☒ No
- ☐ Other

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

This should be in the discretion of the court generally but I do not agree new machinery is needed for this.

23. Do you think any of the PAP steps can be used to replace or truncate the procedural steps parties must follow should litigation be necessary, for example, pleadings or disclosure? Are there any other ways that the benefits of PAP compliance can be transferred into the litigation process?

No such a step would be open for abuse.

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.

In principle I have no opposition to a PAP PD but the CJC/CPRC should be very careful of making new rules and procedure that simply allow the vulnerable to be tied up in knots and others to incur costly process that adds little or no benefit to the process and restricts access to justice.

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 time frames that exist are quite sufficient. Stop tinkering.

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'.

No. It will simply lead to more argument. This is a litigation process prior to litigation and will add to the expense.

## 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

## Housing Protocols

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

☐ Yes

☒ No

## Judicial Review Protocol

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

- ☒ Yes
- ☐ No

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

No. Leave well alone. The PAP works well.

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

JR is a right to challenge administration and government. The proposals will simply make that more difficult and reduce access to justice. JR is time limited and subject to a permission stage. That is quite sufficient policing of the process. Leave well alone.

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

- ☒ Agree
- ☐ Disagree
- ☐ Other

34. 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?

None. It works well as it is.

## Debt Protocol

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

- ☐ Yes
- ☒ No

## Construction and Engineering Protocol

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

- ☐ Yes
- ☒ No

## Professional Negligence Protocol

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

- ☐ Yes
- ☒ No

### Proposed low value small claims track

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

- ☐ Yes
- ☒ No

### Any other comments

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

The theme of this paper is to create greater machinery pre-action which will lead to greater cost and greater tripping points for those seeking to enforce their rights. The idea that you add a 'good faith' obligation is madness and will lead to huge arguments in front of the court. This is building a costly litigation process on a litigation process. There is quite sufficient policing of pre-action conduct as things stand. This is an idea created in a laboratory that may look good in that environment but not in actual practice. It is noted that the Group itself suggests there is insufficient data. This is a paper created without evidence of the evil it addresses. I strongly urge the CJC (of which I was a member) to abandon these ideas and re-think them when it has the appropriate evidence of the problem it seeks to address.

