

## View results

Respondent

[REDACTED]

Time to complete

[REDACTED]

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:

The Civil Justice Council (CJC) is a non-departmental advisory body, which was established by the Civil Procedure Act 1997, to advise the Government and the Judiciary on the civil justice system in England and Wales.

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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 \*

3. Last Name \*

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

5. Your role \*

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

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
- ☐ 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?

Yes. However this is subject to ensuring fair and balanced treatment by the courts to compliance by both claimants and defendants.

13. Do you agree there should be online pre-action portals for all cases where there is an online court process and that the systems be linked so that information exchanged through the PAP portal will be automatically accessible to the court (except for those designated as without prejudice)?

- ☒ Yes
- ☐ No
- ☐ Other

14. Do you support the creation of a new summary costs procedure to resolve costs disputes about liability and quantum in cases that settle at the PAP stage? In giving your answer, please give any suggestions you might have for how such a costs procedure should operate.

Yes

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 where there is a dispute but see our comments generally about the distinction between the debt claims PAP and other PAPs. The key distinction is that the majority of debt claims are undisputed. The important factor in these claims is encouraging engagement from the defendant.

16. Do you agree that, unless the parties clearly state otherwise, all communications between the parties as part of their good faith efforts to try to resolve or narrow the dispute would be without prejudice? Invitations to engage in good faith steps could still be disclosed to the court demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36.

- ☒ Yes
- ☐ No
- ☐ Other

17. Do you agree that there should be a requirement to complete a joint stocktake report in which the parties set out the issues on which they agree, the issues on which they are still in dispute and the parties' respective positions on them? 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.

This requirement should only apply when there is a dispute. It should not apply to the majority of debt claims that are undisputed. There should also be a limit in value to ensure that low value claims are not subject to disproportionate and onerous requirements or bureaucracy that will not be in the interests of either the claimant or defendant.

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?

Strike out may be appropriate where parties completely disregard protocols but if there is merit in the claim and/or only minor issues of non-compliance this would not be appropriate. Courts would also have to use this power in a balanced way between claimants and defendants. Although the Interim Report suggests that litigants in person may be disadvantaged our members have experienced courts extending leniency towards the defendants which is not offered in the same way to the claimants. Some of our members therefore have concerns about how the courts, by trying to take account of the fact that a defendant may not be represented, could apply this power in a less than even handed way to the prejudice of the claimant.

The wording in the debt claims PAP that "The court will consider whether all parties have complied in substance with the terms of the Protocol and is not likely to be concerned with minor or technical infringements, especially when the matter is urgent" should continue to apply.

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 comments 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.

The CSA was very involved in the discussions on the debt protocol during the period of 2014 to 2016 including at the Debt Pre-Action Protocol subcommittee meetings of the Civil Procedure Rule Committee where we were represented through the CSA's then president who attended the meetings on behalf of his then employer, Arrow Global. At that time the view of both the CSA and its members was that the language of the pre-action protocol was not written in a very consumer friendly way. Likewise the content could be reduced and/or condensed and simpler wording used. Nothing has changed our view since that time. We therefore agree that the language should be more user friendly but the devil will be in the detail and we would wish to be involved on behalf of our members on any work on amending the wording.

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?

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?

As above for the debt claims PAP the majority of claims are low value and undisputed so this does not seem appropriate. Our members are concerned that there would be a risk that this could lead to disproportionate and unnecessary front loading of costs.

## Practice Direction - Pre-Action Conduct

24. Do you wish to answer questions about Practice Direction - Pre-Action Conduct? \*

- ☐ Yes
- ☒ No

## 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.

25. Do you wish to answer questions about the personal injury (PI) protocols? \*

- ☐ Yes
- ☒ No

## Housing Protocols

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

- ☐ Yes
- ☒ No

## Judicial Review Protocol

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

- ☐ Yes
- ☒ No

## Debt Protocol

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

- ☒ Yes
- ☐ No

29. 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
- ☒ We would suggest that the report's focus in relat

30. 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?

Yes. This question was again one that was vigorously debated at the time the debt protocol was introduced and the position under the existing debt protocol was the compromise position.

Since then however it is worth noting that, particularly in relation to regulated credit agreements, there have been further developments in the regulated debt sector and the FCA has strengthened its stance in relation to legal claims being issued against customers with the result that litigation should be seen as an absolute last resort. CSA member firms that are regulated by the FCA are therefore already subject to significant requirements through FCA Handbook rules (namely CONC 7) to support customers in financial difficulty, offer appropriate tailored forbearance, signpost to sources of free and independent debt advice and offer informal breathing space direct to customers as well as action any formal requests received under the recent Debt Respite Scheme Regulations. The scope of the Debt Respite Scheme is obviously much wider than regulated credit agreements and extends to other types of debt recovery such as utilities and government debts. The impact of the pandemic on customers has also brought this issue under increased scrutiny both by regulators and firms themselves.

It follows therefore that in many cases a customer will have been through an exhaustive process with creditors attempting to reach a good outcome with the customer before any pre-action protocol letter of claim is issued. This process is also likely to have taken some considerable time.

Both CSA and its members support the customer's right to be able to obtain relevant information and advice but the customer will have had considerable time to obtain such advice throughout the process and is then also given the opportunity as part of the timeframe under the proposals to obtain further information or advice. Our members question whether the additional time actually increases engagement or simply leads to further delay.

We have had some representations that a longer period might be more appropriate for some customer bases which engage more slowly. While we believe that a 14-day period is the appropriate time frame balancing the rights and interests of both parties we would welcome confirmation that the proposal does not prevent a creditor from adopting a longer waiting period if they believe it is more reflective of their particular customer base's behaviour, or where individual circumstances would indicate that doing so would be reasonable.

Litigation should be able to commence when there is no engagement or where the dispute cannot be resolved under the measures of the protocols.

31. 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 support the provision to customers of information which is relevant and necessary, and in an easily understood format. In our view the suggestions now being made would not achieve that goal. If anything the amount of information currently provided and the format in which it is provided can be overwhelming for defendants. There is a case for reducing the amount and complexity of the contents and allowing claimants scope to decide how best to communicate with defendants.

In relation to the provision of the written agreement the Civil Procedure Rules Committee concluded on 9 December 2016 that: "8. The Committee agreed that it should not be a requirement to send the document with the pre-action material but that it should be made available on request of the parties." No evidence appears to have been produced to suggest that that conclusion was wrong.

In our view it remains both inappropriate and unnecessary to include a copy of the written agreement for the following reasons:

- proportionality –in the majority of debt claim cases the defendant does not dispute the debt. The new proposals appear to be based on a mistaken belief that the debt is always disputed. Therefore requiring a document such as the credit agreement with every letter of claim would be disproportionately burdensome and is likely to conflict with the Overriding Objective of the CPR to deal with cases justly and at proportionate cost.
- duplication –in addition to statutory and regulatory requirements placed on firms through the FCA regime and under the Consumer Credit Act 1974 (CCA), regulated consumer credit agreements are underpinned by statutory rights. Under the CCA, legal mechanisms are already in place to allow customers to request and receive their credit agreement. Any requirement to include a copy within the Letter of Claim will only duplicate this and may create further confusion for the customer.
- information overload – the size of the document may discourage customers (particularly vulnerable customers) from both reading the letter and responding. It is not in the customer's interests to receive documentation they don't require as this level of information can be both confusing and raise levels of anxiety at what may be a difficult time. It is also likely to work against the engagement our members are seeking to achieve to reach a solution with the customer, does not appear to be in line with the aim of the PAP i.e. to reach a solution without recourse to litigation and seems to contradict the stated aims of the review.
- cost – to businesses and the environment including carbon footprint. The production of unnecessary and potentially duplicate information would appear to be at odds with the FCA's increasing focus on environmental sustainability within regulated firms.

In relation to the proposal for claimants to advise defendants about defences open to them there is a recognised balance to be achieved between not disadvantaging the claimant improperly by forcing such disclosure and not permitting the claimant to capitalise on customer ignorance by claiming action will be taken in the courts when legally it cannot. This balance has been considered at length by the OFT and the FCA in relation to the regulation of debt collection and we believe is already achieved. As a question of balance we cannot agree that the debt protocol should be used as a vehicle for claimants to effectively argue the case for the defendant against themselves as claimant.

32. 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

33. 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 appropriate where there is no dispute

## Construction and Engineering Protocol

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

- ☐ Yes
- ☒ No

## Professional Negligence Protocol

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

- ☐ Yes
- ☒ No

### Proposed low value small claims track

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

- ☐ Yes
- ☒ No

### Any other comments

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

The debt protocol was only introduced in October 2017. It was discussed extensively at the time not least at the Civil Procedure Rules Committee. We are concerned that the work carried out in 2014-16 may not be taken into account now. In particular, the CSA provided a large amount of information about the way the debt collection process works which is obviously key to understanding what occurs prior to any consideration of court action. We would be happy to re-provide this information and/or meet to discuss this if that would be helpful to inform your current review.

That said, we welcome any review that aims to make improvements. In the case of the debt claims PAP there must be a recognition that there is no dispute in the majority of debt claims and that the focus therefore needs to be on the encouragement of engagement with the defendant rather than addressing a dispute. From our own recent industry statistics and member data the proportion of undefended claims is almost exclusively above 90%, with the majority indicating that closer to 95% of claims are undefended.

As well as recognising that the debt claims protocol is very different in character to the other protocols which are based on disputes we would like to address the question of the perceived inequality between the claimant and the defendant highlighted in your report. In reality there are already a large number of protections built into the debt recovery process for defendants. Since the introduction of the debt protocol, if anything, regulatory focus has increased on the treatment of customers in debt and particularly those that are vulnerable and litigation of any kind is very much a last resort. That perceived inequality highlighted in your report is addressed in the debt recovery process long before there is any consideration of court action.

Over and above that in the court process itself the experience of our members is that the court often, perhaps unwittingly, favours the defendants (particularly where they are not represented) in their application of the requirements of the existing PAP to the detriment of the claimants. Their experience is that it is the claimants that are in fact disadvantaged and the PAP requirements are not applied in a way that is fair and balanced between the parties. We would be concerned if any of the changes proposed in this review would contribute to the perceived imbalance in the application of PAP requirements by courts against our members as claimants.

