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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.

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
- ☐ 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
- ☒ Yes. However, see the concerns set out in answer

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, we do have concern regarding these proposals generally and particularly how they relate to debt claims. The entire thrust of the proposals assumes the existence of a "dispute" as well as issues which need to be narrowed. This is actually extremely rare in the case of debt claims, so care needs to be taken that a regime is not implemented which is actually inappropriate for a huge number of claims. Most debt claims actually require communication and engagement between the parties. Any further requirements which do not directly assist with that, and which prematurely assume the existence of a dispute which does not in fact exist, risk creating a situation which is actually disproportionate and which in practice would actually run contrary to the overriding objective.

As regards debt claims, many proposals here could be seen to be prejudicial against Claimants and/or parties with legal representation, and thereby a barrier to justice, continuing a trend which has been ongoing for some time, including-

- Forcing Claimants to follow pre-action processes which are inappropriate, burdensome, overly lengthy, expensive and unnecessary.
- Imposing sanctions against Claimants which are rarely implemented against Defendants, such as for non-compliance with PAP, even where there has been no genuine issue raised and particularly where the Defendant has failed to engage. There is rarely any sanction imposed against a non-cooperative Defendant in a debt claim, even where their actions (or lack of action) have been prejudicial to the interests of the Claimant and/or the progression of the case.
- Claimants often have their claims struck out for the slightest indiscretion, such as being a day late in paying a hearing fee, whereas Defendants are often given the benefit of the doubt regarding any indiscretion, multiple opportunities to remedy the situation and rarely have sanctions taken against them.
- The paper talks about inequality between parties with legal representation as against litigants in person. The paper states that the inequality is in favour of represented parties. We would argue that it is often in practice the other way around. Litigants in person are often allowed to deviate hugely from the rules sometimes at considerable detriment to the interests of the other party. They are more often than not given the benefit of the doubt, even when it is fairly apparent that they did know what they were doing and their motives may not have been entirely honourable.

This has created a culture which can sometimes lead to a significant imbalance between the parties, which the CJC seems unaware of. Various assumptions are made in these proposals which often run contrary to what actually occurs in practice. Whilst this may be due to a lack of awareness, this means that these proposals risk being considered from a prejudiced position. There should be more awareness of the realities often experienced, particularly as regards debt Claims.

The Association is generally supportive of a reform of the PAPs, but only on the basis that the requirements provide real benefit. As far as debt claims are concerned, some of the requirements being considered serve no genuine purpose. We are concerned that these may possibly have come about due to arguments presented to the CJC by elements whose true agenda is actually more one of debt avoidance.

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, summary assessment.

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.
There should be no initial presumption of a dispute in a debt claim.

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.

Yes, but only in cases where a genuine dispute has been raised or is known to exist, so part of a second stage of PAP for use in disputed cases only – see later answers. Also, documents should be clearly limited to those necessary to prove the claim or defence, it should not turn into a limitless fishing trip.

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) Based on experience, there is concern that there is more likelihood that claims will be struck out, whilst the court will not have the appetite to deny an opportunity to Defend, even on a Defence with no previous engagement? As far as Money Claims are concerned, this proposal seems to ignore the realities regularly experienced within claims, whereby the Claimant usually acts in accordance with PAP but the Defendant often fails to engage at all. In any event, if a Claim or a Defence has merit, we doubt that it would serve the interests of justice to strike it out. We would suggest that it would be more proportionate to address the situation with a costs order or a similar sanction.

A more important consideration is how to obtain more engagement from defendants in debt claims. Simply piling more and more obligations upon the Claimant has consistently proven not to assist with that. There does need to be a genuine incentive or penalty directed towards the defendant. Maybe pre-warned costs consequences, ordered to be payable forthwith, would assist with this. The CUA has argued for many years that the CPR more generally are fairly toothless in many situations. Pre-warned, transparent cost consequences, payable forthwith, for any party who fails to comply would seem a proportionate approach to vastly improving adherence to the Rules, and we believe that should extend to within small claims track cases.

b) On application, otherwise unnecessary bureaucracy and will sow the seed for spurious arguments.

c) Yes.

d) How is it intended to deal with a Defendant on a debt claim who doesn't engage? Deny them the right to defend even when they have a Defence with a reasonable prospect of success? That does not seem just. Order costs against them, payable forthwith? Based on past experience, it seems unlikely that the court would have the appetite. Could these proposals therefore end up being applied mainly against Claimants, and thereby effectively biased against Claimants?

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
- ☐ Other

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.

Yes, some are very poorly drafted currently. This includes the Debt PAP, the drafting of which was a classic example of a fudge which suited nobody and which ended up being unnecessarily bureaucratic and unwieldy.

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?

Yes, but again, in reality will the court actually have the appetite to do so, particularly in debt claims? There has been a historic reluctance to apply such penalties, for example it is rare to be awarded costs for unreasonable behaviour under CPR 27.14(2)(g), even where extreme situations occur.

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.

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.

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?

Yes.

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'.

Yes.

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

Debt Protocol

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

☒ Yes

☐ No

32. 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

☒ There should be a genuine "2 tier" process. The v

33. 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, the current limits are counter-productive, they are too long, remove any sense of importance or urgency and are detrimental to achieving engagement. Litigation should be allowed to commence immediately there is no engagement, or where a dispute has been raised and cannot be resolved, as soon as it becomes clear that the court's decision will be required.

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

No, the letter of claim should be much shorter and clearer than currently – identify the debt, details for communicating proposals or payment, details of any other material facts such as vulnerability, signposting to assistance and finally the opportunity for them to say that the debt is actually disputed (only at which point, and not before, the case can move to the second tier for the Claimant to provide proof of the debt). A more prescriptive approach will encourage time wasting and spurious defences and will run entirely contrary to the Overriding Objective. Sending a copy of the agreement/ contract is irrelevant unless and until a dispute actually exists, so should clearly not be a requirement of the initial letter. Suggesting possible defences would be patently ridiculous. Some of these suggestions seem determined to create disputes where they do not exist or widen the issues between the parties. It is difficult to understand how they are in any way seen to align with the overriding objective when they appear designed to achieve the exact opposite. The motives of those suggesting these ideas are questionable to say the least. These proposals seem designed to delay and hinder legitimate claims and seem to have more to do with debt avoidance than any genuine interest in a proportionate approach or a just outcome. We repeat that there is no objection to having to prove the claim if and when that is required, but that should be on the rare occasion a dispute is raised, not merely for the sake of bureaucracy or to satisfy the ulterior motives of those suggesting otherwise.

35. 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

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

☐ Yes

☐ No

☒ No, not where no dispute has been raised. The v

Construction and Engineering Protocol

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

☐ Yes

☒ No

Professional Negligence Protocol

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

- ☐ Yes
- ☒ No

Proposed low value small claims track

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

- ☒ Yes
- ☐ No

40. 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

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

The question about narrowing the scope of PAP for small claims cases gave no opportunity for comment. The question is deeply flawed again, assuming the existence of a dispute which may well not exist.