

## 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.

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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
- ☐ 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?

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.

We support the creation of a new summary costs procedure. The new procedure will only be successful if it is a simple process that allows the parties to resolve the costs dispute with minimal additional cost. The new procedure should not lead to the parties being able to incur significant additional expense: we would not want to see it leading to satellite litigation about "the costs of the costs", as has happened with the existing procedure now under rule 46.14. One of the problems with rule 46.14 is that it normally requires a detailed assessment of the costs. Any new procedure should focus on summary assessment, to avoid further costs being incurred. In order to make the process simple and cost effective, we consider that it should be a paper based procedure. The applicant should be required to set out (briefly) what they say on liability for costs or on quantum and the respondent would then set out their position (briefly), for judicial consideration on the papers.

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.

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.

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?

With one important caveat, we agree that the sanctions for non-compliance should be improved – provided that they apply equally to default by either party. Our experience is that the current approach lacks teeth and is also inconsistently applied. The caveat is that that unless proper controls are in place around the application of sanctions, a more rigorous regime would risk turning the pre-issue parts of a claim into more formal pre-litigation steps and that is not the right focus. In those early stages, the emphasis needs to be more on both parties adequately explaining their position and engaging constructively, to try to narrow the issues and avoid litigation, rather than focusing on planning for its eventuality. We have dealt with the issues related to disclosure in our response to question 27.

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.

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?

We disagree that there should be sanctions for changing position between the PAP stage and formal pleading. There can be a myriad of reasons for that and the idea that the parties have to fully plead their case before the Particulars of Claim are served might well only lead to further costs being incurred. From our experience of claims under the Professional Negligence Protocol, this provision is not currently being followed in such cases in practice. It is also worth remarking that although the provision must have been negotiated during the Protocol's conception, a situation where one party risks being penalised for certain actions and the other does not carry the same risk is not fair or appropriate. For any sanctions to operate in a fair manner, they must be applicable equally to actions or default by either party.

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?

## 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.

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?

We do not agree that the parties should have 14 days to respond to a pre-action letter of claim. These claims do not fall under any of the other pre-action protocols and are likely to be of a diverse nature. 14 days does not give sufficient time for a respondent to make meaningful investigations and respond in detail to the allegations set out in the letter of claim. We consider a more reasonable timeframe to be a minimum of 42 days with the option of an extension of a further 42 days, especially wherever expert input is likely to be needed to respond: see for example the Professional Negligence Protocol. The importance should be placed on the quality of the response and not the timing of it. We have dealt with this in more detail in our response to question 75. Our proposed minimum period of 42 days matches the period allowed for a liability response in the new RTA Small Claims Protocol (30 working days), where the process is automated and the issues for the most part straightforward. The intention is that a longer period gives the defendant time to make a reasoned decision and only to dispute liability where it is merited and supported by evidence. Early evidence from the official OIC data releases shows that it is working, with high levels of admissions reported. The option of an extension for a further 42 days would allow almost three months, providing the flexibility currently already found in many protocols. Allowing more time at the outset minimises costs as the parties are dealing with all issues in one go rather than dealing with them on a piecemeal basis and duplicating costs. We suggest that the time for responding to a letter before claim should not start to run until appropriate pre-action disclosure has been provided by the claimant. This should normally be completed at the same time the letter of claim is sent to the respondent. For the reasons set out in our response to question 27, the pre-action disclosure process is critical to ensuring there is a good quality letter of claim and a good quality response.

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'.

We agree that the general PAP should incorporate a standard for disclosure and that it should be documents that would meet the test for standard disclosure under CPR 31. Disclosure on this basis at the outset will assist both parties to understand each other's position. The requirement for standard disclosure further supports our view that the time frame of 14 days to respond to a letter before claim is too short a timeframe. The defendant will need sufficient time to understand the claim, consider arguments and evidence in response and identify and obtain the documents they are required to disclose. If the time frame to comply with standard disclosure is too short it will lead either to requests for extensions of time becoming common place, or to the requirements being largely ignored. Disclosure issues are notorious for generating costs, see for example the reports of Sir Rupert Jackson. The application of a standard for disclosure will only work if it is accompanied by suitable controls on the costs incurred prior to the letter of claim by the claimant. As the questions and observations on the personal injury protocol indicate, claimants often approach disclosure generically without real thought as to the core documents needed. A suitable warning as to costs incurred ahead of the letter before claim being sent might focus the minds of claimants on ensuring that disclosure at such stage is kept to a proportionate level and cost.

## Personal Injury Protocols

The sub-committee were very conscious, as a final point worth stressing, that there is a need for evidence to underpin any changes that might be suggested in response to the questions below.

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

- ☒ Yes
- ☐ No

29. Do you agree that there should be a generic PI protocol that incorporates relevant general principles from the general PAP but also identifies PI specific objectives not applicable to other litigation (Part A) with users being directed to a subject specific "Part B" rules for each specialist area?

- ☐ Yes
- ☐ No
- ☐ Other

30. Do you agree that all PI protocols should include a good faith obligation more prominently in the introduction to try to resolve or narrow the dispute?

- ☐ Yes
- ☐ No
- ☐ Other

31. Do you agree that all PI protocols should include an obligation to a 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?

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?

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?

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
- ☐ Other

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
- ☐ Other

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?

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
- ☐ Other

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

- ☐ Yes
- ☐ No
- ☐ Other

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

- ☐ Yes
- ☐ No
- ☐ Other

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
- ☐ Other

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?

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
- ☐ Other

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
- ☐ Other

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?

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

- ☐ Yes
- ☐ No
- ☐ Other

## 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
- ☐ Other



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
- ☐ Other

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
- ☐ Other

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
- ☐ Other

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
- ☐ Other

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

- ☐ Yes
- ☐ No
- ☐ Other

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
- ☐ Other

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
- ☐ Other

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
- ☐ Other

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
- ☐ Other

## 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?

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

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?

## 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
- ☐ Other

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?

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?

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
- ☐ Other

## 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
- ☐ Other

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

- ☐ Yes
- ☐ No
- ☐ Other

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

## 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
- ☐ Other

### 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.

Question 75- We do not support the aligning of time limits with the revised general PAP. Whilst we can appreciate the desire to harmonise time limits for response across the protocols, we consider that the rationale for this is flawed. Many of the protocols produced so far have been negotiated by those representing claimants and defendants, creating a balance between the interests of both parties of which the response period is an integral part. Harmonisation also overlooks the substantial differences in complexity which exist between different types of dispute. The Professional Negligence Protocol is, broadly speaking, working well. This proposal does not take into consideration that this protocol has been negotiated to reflect what claimant and defendant representatives consider to be reasonable time periods. It also appears to be premised on the idea that defendants are always aware of a likely claim and have had a significant opportunity to consider their position in advance of a letter of claim being served. In our experience that is often not the case in claims alleging professional negligence. A good quality letter of claim and a good quality response are far more important than a short time limit for response. A rush to respond to the letter of claim is likely to lead to the respondent being unable to engage fully with the allegations. That will result in respondents either reserving their position on key issues, only partially addressing important points or simply deciding to await sight of a fully pleaded claim. This will in turn lead to claimants issuing proceedings rather than properly exploring the extent to which there are genuine issues between the parties and the opportunities that may exist to avoid full-scale litigation by means of direct negotiation or other alternative dispute resolution techniques. Such an approach would run counter to the Master of the Rolls' view that alternative dispute resolution is in no sense "alternative", but should be a mainstream part of the dispute resolution process. A key part of any dispute resolution mechanism is for the parties to understand the issues between them and fully explain their position. The CJC working party on fixed costs on noise induced hearing loss claims found that letters of claim and letters of response had both become generic: the claimant would usually provide only brief factual details accompanied by a list of generic allegations and disclosure requests, to be met with a standard response letter containing more questions than responses. The CJC working party agreed on new formats for letters before claim and response to improve how the claim is presented [Page 14- <https://www.judiciary.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf> ]. A key factor in being able to prepare a meaningful response to the letter before claim and to make early decision about the claim is having sufficient time to consider the information provided. The Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents allows 30 working days for a compensator to respond to a claim. The recent data released by Official Injury Claims covering the period 1 September to 30 November shows that 82% of claimants had liability admitted in part or in full by the at-fault compensator. [Page 10- <https://www.officialinjuryclaim.org.uk/media/1228/oic-2nd-quarter-data-publication-document-081221.pdf>]. The time period prior to the introduction of this protocol was only 15 days. This demonstrates that allowing further time will lead to fewer disputes having to be litigated. The time frame for responding to the letter before claim is inextricably linked to the disclosure provided. We have set out our position on disclosure for the general PAP in our response to question 27.