

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 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.

For information about how the CJC handles your personal data, please see our privacy notice at <https://www.judiciary.uk/wp-content/uploads/2019/12/CJC-PRIVACY-POLICY-Nov-2019-f.pdf>.

Information provided to the Civil Justice Council: We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications, or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation.

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
- ☒ Professional Indemnity Insurance Broker

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.

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?

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?

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?

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

Construction and Engineering Protocol

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

☐ Yes

☒ No

Professional Negligence Protocol

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

☒ Yes

☐ No

31. 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

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

☐ Yes

☒ No

Any other comments

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

We consider that it would be undesirable for the time for a defendant's response to be shortened. This would have the effect of undermining support for the Pre-Action Protocol for Professional Negligence (PAP).

The process of creating the defendant's letter of response under the PAP requires time. A typical process could be summarised as follows. A member of a professional firm receives claims correspondence; the correspondence is passed internally within the firm to the individuals responsible for dealing with professional indemnity insurance (PII); those individuals notify a PII broker; the PII broker notifies the insurer(s); the insurers analyse the subject matter & decide whether to appoint a solicitor; the solicitor runs a conflict check; the solicitor makes contact with the professional & arranges a letter of engagement; the professional transfers its file to the solicitor; the solicitor assimilates the case paperwork; expert witness evidence is often required; an expert is identified & approached; the expert agrees to act; the expert considers the papers; the expert provides their report; the position is considered by solicitor & professional with decisions made regarding the allegations, & whether defence or admission is appropriate; the solicitor drafts a letter of response; the draft letter is discussed between the professional & solicitor; the draft letter is finalised; the solicitor seeks authority from the insurer; the insurer discusses the position with the solicitor; the letter of response is issued to the claimant.

This process requires time. This is underlined by consideration of ways that steps in the process outlined above may need to be repeated or can be more complicated. For example:

- The broker may need to consider the drafting of the notification carefully to ensure that it is valid & sufficiently comprehensive
- There may be multiple insurers requiring notification, & coordination of an agreed strategy.
- The solicitor or expert approached might be conflicted & the appointment process repeated
- The professional's file can be considerable & therefore lengthy for the professional to collate & the solicitor assimilate
- The process of drafting the response letter can be iterative with many versions going backwards & forwards between professional, insurance broker, solicitor & insurer

The three months allowed under the present PAP is often extended, which underlines that the time needed to prepare the defence is not short.

Experience of dealing with claims under the 2nd edition of the Pre Action Protocol for Construction & Engineering Disputes ("Construction PAP") has demonstrated that shorter timescales for issuing a letter of response are undesirable. The maximum 8 weeks permitted is often insufficient to allow the response to be properly considered & drafted.

The fundamental reaction by participants to a stark choice between breaching the Construction PAP or rushing the defence is that the Construction PAP has to be breached. This is undermining adherence to the Construction PAP & the weight it carries in professional negligence claims against construction sector professionals.

It would be disheartening for the Pre Action Protocol for Professional Negligence to be undermined in the same way. There are many insurers, PII brokers & PII defence solicitors who are strong advocates of the PAP process as it allows a rational, commercial & balanced approach to be taken to claims. Experience of the PAP process contrasts favourably with experience in those jurisdictions where there is no PAP or its PAP process is voluntary.

Nevertheless many professional negligence claims are too financially sizeable for insurers, brokers & the professionals themselves not to take the necessary time to prepare an appropriate defence.

It is inequitable to the defendant not to allow them adequate time to prepare their defence, & a PAP process which does not allow this will be sidelined.