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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.

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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?

Agreed, though there should be scope not to comply with the PAP, particularly in cases which have a degree of urgency, such as because of a limitation deadline or where there is need for urgent relief such as freezing assets, search orders or interim payments. There should be an ability to explain to a Court and/or opponent why steps were taken without complying with a PAP and for there to be no penalty in those circumstances.

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
- ☒ This does not seem necessary or proportionate. I

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.

Whilst having access to a quick and simple costs assessment procedure would be helpful, this should not be a mandatory procedure. There is not a one-size-fits all in terms of pre-action work and, with particular reference to high value cases, there are often instances where significant work is done at an early stage to settle pre-action and avoid incurring the issue fee. In high value, complex clinical negligence matters, generally a great deal of work is carried out at an early stage, obtaining expert evidence and disclosure to identify breaches. If there is no automatic entitlement to pre-action costs, it is not clear what jurisdiction the Court would have for this. If issues of liability and quantum have been capable of settlement, then the parties can generally settle costs at the same time. If the Court were minded to implement a new summary costs procedure, we would suggest simply extending the current provisional assessment procedure to give parties the option to have PAP costs provisionally assessed, even if costs exceed £75,000.00. Again, this should not be mandatory and parties should have the option to choose this procedure. Alternatively, an application to the Court for summary assessment for costs of £25,000.00 or less, accompanied by written submissions limited to two sides of A4.

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.

This should absolutely be the point of the PAP. However, this could be used by a defendant to drag out the process, so whilst there should be an obligation to try to settle, it should not be to the detriment of a claimant who wants to get on with the claim. If a defendant does not engage or gives no good reason for the delay claimants should have the ability to give notice that they will be proceeding with a claim unless the defendant takes various steps within a certain period. Additionally, a party should not be penalised for subsequently widening the scope of the claim at the point of issue. It is sometimes the case in Clinical Negligence claims that an early Letter of Claim is sent in instances where there should be an early admission by the Defendant. If there isn't one, it is sometimes necessary to widen the scope of the claim at the point of issue, once expert evidence is obtained.

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.

No. This will just add to the costs incurred by parties. This is part of the CMC process already and obliging a defendant to engage with this in circumstances in which a claim has not and might never be issued would be disproportionate.

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) Whether courts should have the power to strike out a claim or defence to deal with grave cases of non-compliance? Agree, but the usual test of whether there are prospects of success should be taken into account. Otherwise there are issues of access to justice and HRA issues which would arise. Again, there should be some (but not endless) allowance for litigants in person who have to navigate a complex area without assistance. 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? Complaints should be included in the Directions Questionnaire. It should be automatic that the Court's consider whether there has been non-compliance and whether sanctions should be imposed, but it should also be open for parties to make an application too. Pre-action correspondence should be a section in the bundle for the CMC. 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? PAP compliance should be dealt with at the CMC at the latest. That is often the first time the Court has active involvement in the case, so there is an obvious opportunity. A stay for PAP completion can be built into directions. However, if there are earlier applications in proceedings the Court should consider PAP compliance then. Once you're past the stage of CMC this seems too late. One concern of dealing with it at a CMC is that, when costs budgeting is also factored into these hearings, the timeframe for these hearings can be tight and this aspect may not get the time it requires. 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? Costs sanctions would be sensible. This is something which could be incorporated in costs budgeting, with the Court disallowing some of the incurred costs of a non-compliant party or making comments that this aspect of the incurred costs needs to be taken into account at detailed assessment. Where there is no costs budgeting, costs orders could be made, but to be paid at the end of a claim regardless of the outcome. e) Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why? No. They should all involve the Court's discretion.

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.

Plain English should be used throughout. Even things like 'letter of claim' can be confusing, so there should be bullet points explaining that a letter should be sent setting out what the claim is, background information, a chronological account of what went wrong, how the loss was suffered etc.

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

- ☐ Yes
- ☐ No
- ☒ This elevates them too much. There can be warni

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. Probably all of them.

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. The aim of the PAP is to avoid litigation. Adding stages in increases costs and time and runs the risk of driving the parties further apart because of costs, therefore making litigation more likely. However, the exchange of relevant documents as part of the PAP process is really valuable so that should definitely stay.

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, and the text is good. It all seems clear, but note comments above about the proposed stocktake which we think is a bad idea.

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?

I would suggest other than simple debt claims it should be 28 days – 14 days is not very long and pass very quickly.

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'.

In light of the disclosure pilot, we don't consider that there is 'standard disclosure' any more. In any event, we don't agree that it should be incorporated. At PAP stage the parties are still working out their cases, they need to provide copies of the documents they rely on, but that should be it.

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?

Both. If you get to ADR before issuing then it would be helpful. I suppose the costs docs / case summary doc that is filed with budgets already details the issues.

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?

This is hard, because it isn't about value. Complex issues occur in low value work. I'm not sure that the workflows are dissimilar for moderate severe cases and catastrophic injury work. I think if a firm is a signatory to SIG then there could be a part of the protocol that required compliance.

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?

I don't think it should be on the Claimant to set out what rehab they need. The protocol under SIG requires an independent assessment, and that seems sensible. If the Defendant refuses to comply with those recommendations then yes, they should set out reasons.

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
- ☒ Not applicable to the work we do

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?

Yes, the obligations on both parties should be equal. At an early stage it can be hard for a Claimant to identify what is relevant and the Defendant has more power relating to this usually.

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
- ☒ No – not relevant to every claim and might overc

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?

No, the Defendant is usually in a much stronger position here, having their own clinicians commenting, for example, and it would be an inequality of arms to penalise the Claimant for not serving when they don't know what the Defendant's case will be.

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

Judicial Review Protocol

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

- ☒ Yes
- ☐ No

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

We agree with the overall approach and, in particular with the conclusions set out at paragraph 50 of Appendix 8. Of the matters identified at paragraph 50, we consider the most important to be "the maintenance of a bespoke JR PAP development in conjunction with the Administrative Court".

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

No.

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

☐ Agree

☐ Disagree

☒ Very strongly agree. As recognised in the sub-cor

51. 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?

Only those matters included in the conclusions at paragraph 50 of Appendix 8.

Debt Protocol

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

☒ Yes

☐ No

53. 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

☒ I do not think a joint stocktake report is a good idea

54. 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?

Simple debt claims are the only claims where a 14 day time limit might be appropriate. As a rule I think it should be 28 days. Anything older than 1 year may require people to investigate, question staff etc. 14 days is not enough time.

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

Not more prescriptive – I think it's pretty clear at present. But it should be clear what needs to be included.

56. 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

57. 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

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

- ☐ Yes
- ☒ No

Professional Negligence Protocol

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

- ☒ Yes
- ☐ No

60. 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
- ☒ Absolutely not. The limitation period is 6 years. C

Proposed low value small claims track

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

- ☐ Yes
- ☒ No

Any other comments

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