

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 is 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 *

Stuart

3. Last Name *

Hoysted

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

[REDACTED]

5. Your role *

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

6. Your job title

[REDACTED]

7. If relevant, whose interests do you predominantly represent? *

- ☒ Claimants
- ☐ Defendants
- ☐ Not applicable

8. Your organisation

[REDACTED]

9. Are you responding on behalf of your organisation? *

- ☐ Yes
- ☒ No

10. Your email address *

[REDACTED]

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

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 - support the idea of a summary procedure

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.

There are clear concerns that this question (and others) are based on the presumption that the PAP process is there to "resolve and narrow disputes" in all situations. In respect of debt claims there is rarely a dispute. The Debt PAP process should be there to encourage engagement between the parties, signposting and provide the opportunity, should there be any unresolved issues, for these to be addressed. However, there is no reason why a mandatory good faith obligation should not apply in relation to the Debt or any other PAP.

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 circumstances where there is a genuine dispute, and so that it is not utilised as to request for non-specific blanket disclosure.

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) For Debt claims non-compliance by the Defendant is simply considered the norm.

Simply do not believe that the Court would in any circumstance consider it appropriate or fair administration of justice to strike out a Defendant's defence if that Defendant has failed to engage with the Debt PAP process.

The same cannot be said of the Court's approach towards Claimants, but most Creditors and their advisors are already aware of the unbalanced burdens in respect to pre-litigation obligations and requirements imposed on them.

In the Debt PAP process the threat of striking out is only ever going to be used as a stick against Claimant – who in any event tend to comply.

(b) Debt PAP Compliance should be relevant to Fast and Multi track DQ.

Extra requirements at DQ stage in Small Claims Track defeats the purpose of the track / invites bogus arguments.

Any party wish to seek sanction for non-compliance should be required to make a fee paid application – to prevent allegations of non-compliance tying up the Courts and stop insincere/unnecessary arguments.

(c) Yes.

(d) Purpose of Debt PAP is to encourage engagement. Debt PAP forms could be designed to make sanction obvious.

(e) Only able to comment on Debt PAP as above.

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.

Current Debt PAP documentation is simply not fit for purpose and needs a full redesign. The volume of paperwork is simply excessive and cumbersome. Currently seeing less than 1% engagement.

The focus of the Debt PAP should be to encourage engagement. It is not a dispute hunting exercise.

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?

N/A

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

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
- ☒ The requirements need to be considered with res

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, we would support the aligning of the time limits.

Since the introduction of the 30 day limit given in the current Debt PAP we have seen no discernible increase in response from debtors, but have heard anecdotal stories of debtors not responding when they may otherwise have done so, simply because they believe they have lots of time to respond, and the matter becomes secondary to other issues ongoing in their lives.

We would not propose any changes to the rules on when litigation can be commenced.

As has been stated, we find that Creditors will have already undertaken their own debt collection exercise, so the engagement of a legal representative is the natural next stage for a Creditor in the progression of a claim.

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?

No, we do not think that the pre-action letter of claim should be more prescriptive. The pre-action letter of claim already provides for a clear explanation of the debt. A further burden on the Claimant would be disproportionate when the vast majority of debtors do not dispute the debt.

There should be no requirement for the Claimant to submit further documentation to the Debtor unless there is a known dispute. At s.4.65 of the report produced for the current consultation it is suggested copies of the CCA should be supplied, and defences suggested to the debtor.

The topic of supplying further paperwork has been discussed numerous times before, and specifically during the consultation for the introduction of the Pre-Action Protocol for Debt back in September 2014. At that time, in addition to the paperwork suggested in s.4.65, it was question if the Creditor should supply the Debtor with copies of all invoices and all prior correspondence as a pre-action requirement.

Such blanket requirements place a significant and unfair burden on the Creditor.

The evidence supporting a simple household utility debt which has been unpaid for 2 years can easily consist of hundreds of pages of information, and would make a Pre-Action Conduct highly impractical.

It also only goes to serving to confuse the situation for a significant proportion of Debtors, who already having difficulty in understanding the purpose of the PAP and its forms. The provision of even more paperwork will be completely overwhelming for a debtor who may be trying address their finances but are likely to ignore the issue if they are faced with a mountain of paperwork.

The approach which needs to be taken is the sensible one which is currently stated at s.3 of the Debt Pre-Action Protocol. The Creditor should be required to explain the debt and where applicable provide background as to how the debt occurred.

If the debtor responds and asks for further information, then the Creditor should supply the same.
We consider the current protocol to be sufficiently prescriptive.

Finally the suggestion that the Creditor should be required to provide the Defendant with possible defences to the claim the Creditor is bringing, is bizarre and completely goes against overriding objective to treat all cases justly. It will do nothing but prompt disputes that were otherwise not there, have no merit and will only serve to increase the burden on the court service and creditors when dealing with spurious defence. The availability of free advice (such as CAB) is clearly signposted to assist defendants and this should be enough. Disputes should only be raised when there is reasonable cause. They should not be prompted in some form of tick box exercise as to 'what dispute do you want to raise today'.

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

☒ The language of the currently pre-action protocol

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

☐ Yes

☐ No

☒ Yes but only where appropriate as much be subject to

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

37. 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

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

It is not clear if full answer to the question on supporting good faith obligation / stocktake report on debt protocol was complete. Full answer was

The requirements need to be considered with respect to the value of the debt.

From our experience:

- The vast majority of debt claims which fall into the current debt PAP provisions relate debts which fall into the Small Claims Track.
- Current responses to Debt Pre-Action Protocol letters of claim are minimal.
- In circumstances where a party does engage with the Pre-Action Protocol letter, only a fraction will respond using legal assistance.

Good faith obligation

There is no reason why a good faith obligation should not be introduced more generally in PAP.

However, the various suggestions given as being actions which meeting the this "good faith obligation", largely being ADR, does not seem to factor in the significant additional costs that are likely to be incurred by both parties.

Whilst it is appreciated that there will be a supplementary Summary costs process, this will not negate all the costs the parties will incur.

For example, it is noted that one of the recommendations is that an Ombudsman might be engaged. We are aware of Creditor clients who are charged significant sums by their industry ombudsman for each referral considered by the Ombudsman. Each of the proposed actions adds a cost to creditors and debtors.

The requirement for pre-litigation ADR in Small Claims Track debt claims removes all benefits offered by the Small claims track.

Whilst we can fully understand and appreciate the benefit that the good faith obligation will have on disputed claims which are likely to fall into the Fast and Multi track categories, the same cannot be said for claims falling into the Small Claims Track.

We would suggest there need to be a difference as to what the "Good Faith" obligation means between tracks.

Stocktaking report

The number of cases where the prevailing conditions (legal assistance) apply for such that a stocktaking report becomes necessary would be expected to be minimal.

Again use of such a report would need to be proportional – and it is difficult to see how the use of such a report is proportional in Small Claims Tracks.

It is not just an expense for creditor, but on the assumption that the debtor's legal assistance is self-funded, is likely to represent a significant expense for the debtor.

The same is understandable for debt cases which are disputed pre-litigation and fall within the Fast and Multi tracks. The requirement in Small Claims Track cases negates the benefits of the small claims track.

