

View results

Respondent

[REDACTED]

Time to complete

[REDACTED]

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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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.

More options for Responses

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

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, but please see the specific concerns regarding

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, but please consider the specific concerns set out in detail below regarding the proposals in respect of debt claims.

Whilst many of the proposals seem entirely appropriate for claims which are disputed, this is not true of the vast majority of debt claims and this should be reflected in the debt pre-action protocol. Specific details and figures are provided later in this response but based on analysis that we have conducted regarding a considerable amount of debt cases, less than 2% of debt claims actually result in a defence. The vast majority of debt claims are not disputed but result in Court proceedings due to an unwillingness or inability to pay the debt, or a failure to engage with the creditor to try and reach a payment agreement.

It is therefore, important that proper consideration is given to the likelihood of a dispute when considering the contents of a specific pre-action protocol as to fail to do this is likely to result in the implementation of overly arduous and elongated protocols which do nothing but waste time and build costs.

When considering pre-action protocols and conduct it is important that both parties conduct is considered by the Court. Particularly in respect of debt claims where the defendant is often a litigant in person, the Courts will be all too quick to sanction claimants for minor indiscretions, including striking out proceedings, whilst simultaneously, giving defendants limitless chances in instances of non-compliance, without imposing any sanctions, including ordering wasted costs to be paid.

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
- ☒ Yes. This should only be applicable where both parties

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, where there is a dispute. There should not however, be an automatic assumption that there is a dispute.

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 where there is a dispute and where both parties have engaged in the pre-action protocol.

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) Yes. This should however, apply equally to all parties. As set out above, all too often, Judges are all too keen to sanction claimants whilst seemingly allowing defendants (particularly litigants in person) to repeatedly ignore directions and orders without consequences.

(b) Parties should have to apply. If not, Judges will be faced with dealing with conflicting accounts from parties, which is likely to simply result in disagreement and satellite litigation.

(c) Yes.

(d) Yes.

(e) The imposition of sanctions should be specific to the various claim types and should reflect the seriousness of any failure, rather than standard imposition of sanctions for non-serious breaches that have no effect on the conduct and outcome of the proceedings.

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. The various PAPs should reflect the claim type that they are a precursor to. In respect of debt claims, these relate to uncomplicated and generally undisputed claims, so the pre-action protocol should be uncomplicated and not overly arduous, as the main purpose is simply to advise the defendant of the potential next actions and try to encourage them to engage to arrange payment. The debt pre-action protocol should most certainly not be overly long and complicated and intended to deal with a dispute that does not exist.

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. Again however, this would apply to all, including litigants in person as Courts are currently all too happy to allow such litigants to change their position and pleaded cases without sanction and often without requiring formal applications. It is extremely rare that Courts are willing to sanction litigants in person and/or that Courts order costs to be paid under CPR 27.14(2)(g) even when conduct has been clearly and demonstrably unreasonable.

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'.

Any documents to be disclosed as part of a general PAP should be limited to those which the claimant intends to rely, as to provide for standard disclosure would be overly burdensome at that stage.

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
- ☒ This should only be applicable if a genuine dispute

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 time frames are overly long.

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 shorter and more clear than the current requirements. In the vast majority of cases, the debt is undisputed and the defendant is well aware of the subject matter of the claim. It is therefore, important that the letter gives sufficient details for the defendant to identify the debt, and also provide details of ways that the defendant can seek help, such as free debt advice. The initial stage should not go beyond this, and certainly should not require the production of documents as suggested in the consultation documents as in the vast majority of cases, these are not required as there is no dispute.

This firm undertakes bulk debt recovery and to aid in this process, conducted analysis on a tranche of 52,077 debt claims, where a letter of claim was issued. Those claims resulted in 880 defences been filed in proceedings. Only 1.68% of the claims were therefore, defended. 98.32% of the matters (51,197 cases) were not defended. Further details in respect of these claims is available upon request.

It is therefore, important that the pre-action protocol is not based upon the entirely incorrect assumption that all such claims relate to "disputes" - they do not. If an overly complicated and arduous protocol is brought in, in the above example, this would have resulted in unnecessary work been undertaken on 51,197 matters. It is also important that the environmental impact of this is properly considered as to bring in an overly arduous pre-action protocol will also result in vast amounts of unnecessary documents and correspondence being sent to defendants which will result in huge amounts of wasted paper.

It would also be beneficial for the defendants if the protocol is kept simple and simply identify the debt and receive details of debt advice, so they can engage with the claimant in respect of payment. Where the PAP letter is overly long and includes too much documentation, we believe that this will have the opposite effect and is likely to seem more intimidating to the defendant which is likely to have the opposite effect to that desired by the PAP and actually make them less likely to engage.

We do agree that where there is a genuine dispute, the defendant should be entitled to request and be provided with documents (as with the current debt pre-action protocol), but only in the cases where there is a genuine dispute - i.e. the 1.68% cases where there was a dispute in the above example. The debt PAP should therefore, be a two stage process, where there is only a requirement for documents relating to the debt to be provided to the defendant in the event that they request them in the very few cases which are disputed.

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
- ☒ Not where no dispute has been raised, which will apply

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 low value debt claims did not give the opportunity for comment. In respect of that question and the debt pre-action protocol however, we repeat what is said above in that in most cases, there is no dispute. We would urge the panel not to work on the entirely incorrect assumption that all debt claims are disputed as that will result in an entirely inappropriate outcome for all parties to those claims.

