View results

Respondent

[redacted]

[redacted]

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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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 *

[redacted]

3. Last Name *

[redacted]

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

Weightmans LLP

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)?

- [x] 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?

CJC report envisages that in cases where the PAP is not followed, the parties apply for a stay once proceedings are issued to comply with the PAP. This would seem the sensible course. Our view is that exceptions should be limited to only those cases which the court accepts meet the definitions of necessary urgent injunctive relief and cases where limitation is imminently due to expire though in such cases claimants' solicitors should be required to show good reason as to why compliance was not possible with costs sanctions to be applied in the court's discretion.

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
- [x] 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 are there are any cases and protocols in which it should not apply.

Yes, although such an obligation may be less effective without sanctions for non-compliance, and proving non-compliance of good faith would be difficult. There may need to be specific examples so parties understand what is expected of them, e.g. if one party makes an offer the other party must respond to that offer rather than ignoring it, and if they ignore it there could be a cost sanction.

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.

- [x] 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.

Agree in part. This idea would work better if it was a process that commenced at the start of the PAP, not just something to be completed at the end. Forcing the parties to list the issues in dispute at the beginning of the PAP, and then re-addressing each issue at the end of the PAP would be more productive forcing the parties to reflect on progress. Otherwise there is a risk that this stocktake would just be seen as a burden to be half-heartedly completed at the end of the PAP process prior to litigation.

Trying to have a table of issues that the parties 'agree' upon (as per current draft) is also likely to be problematic, particularly in complex cases with lots of issues, and particularly in cases involving Litigants in Person. The table at Section 3 'list of agreed issues' may become redundant in such cases.

It would be better to have a list of issues that the claimant completes at the start of the PAP process. At the end of the process and after considering the defendant's response to the claim, the claimant has to confirm if each issue still forms part of the claim or not. If it does, the defendant has to confirm if they agree that it is an issue to be resolved, and if they dispute the issue, and why.

We do not agree that any stocktake should include lists of documents disclosed and not disclosed as this could be too onerous for certain cases. It must be kept in mind that many pre-action cases never reach court and some have little merit, which is likely to increase with increased numbers of Litigants in Person and proportionality must be kept in mind otherwise costs will be incurred in completing these steps that will be wasted and not recoverable. Ultimately the parties provide pre-action disclosure and if they consider this to be insufficient, a PAD application can be made. We question what would be gained by having to complete these proposed tables of disclosure. A defendant would normally list the documents they are supplying in their letter of response anyway.

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) Agreed.
b) Parties should not be required to apply to the court (disproportionate additional expense) – a tick box on the DQ should be sufficient and this should then be dealt with at a CCMC (with additional time added to the ELH for the CCMC if the box has been ticked by either party)
c) Agreed
d) The court ultimately has a wide ambit of discretion to award costs if either party has acted unreasonably. We do not wish to fetter that discretion but would encourage compliance with pap by listing 2 examples where it may be appropriate to make costs orders. The first where a party is deemed to have issued proceedings prematurely. In such cases the protocol should make the default position that the case be denied any costs and disbursements incurred by issuing proceedings. The second example is where a defendant has unreasonably failed to respond to a letter of claim causing the issue of proceedings. In these cases the defendant should pay the claimant's costs of issuing proceedings regardless as to whether the claim is successful.
e) No

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.

Language is already quite basic and easy to understand. Hard to see how this could be improved upon.

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 would want to see parity with claimants who take a materially different stance in their Particulars of Claim from that in their letter of claim if this were to be considered. The principle of 'equality of sanctions' should be generally applied wherever possible, subject to appropriate exceptions.

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?

Trying to achieve 'perfection' at the pre-action phase in order to transfer across into the litigation phase could result in wasted costs in those cases that don't end up becoming litigated. If there was a cut and paste option from a PAP that would be fine as it remains optional.

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.

Difficult. Injury claims remain the largest by volume and with odd exceptions the report says the PI and Disease protocols are working well. Any general protocol would be subservient to the more specific one. As CJC says, there are currently 18 specific protocols and time would be better spent adjusting those rather than drafting a general one which would not have universal applicability.

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?

14 days is unworkable in practice in our submission. This too short a timeframe may well be used by some parties to justify early issue of proceedings which could inadvertently led to more not less litigation.

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'.

No. Current system works fine. Imposing a standard could be disproportionate for low value or low merit claims. PAD applications already allow redress if a defendant has supplied inadequate disclosure.

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
- In principle, we agree, but subject to the observa

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
- In principle, we agree, but query enforceability of

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?

Obligation to do so is fine provided stocktake report is not too onerous in requirements and is not binding. No harm in attaching it to the DQ as this might inform directions needed at a CMC/CCMC. Don't think ADR is or should be relevant as to whether and when a stocktake is completed. If ADR takes place, it would make sense for this to be before the stocktake, but ADR may never take place, or not until later on in a case.

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?

a) As the guide is intended to assist with the conduct of personal injury cases involving complex injury, specifically cases with a potential value on a full liab basis of £250,000 and above that are likely to involve an element of future continuing loss, a template wording for a Letter of Claim/Letter Before Action in multi-track claims at Annex B of the Personal Injury PAP (see attached template) should include a paragraph heading making reference to it after the heading "other financial losses" and before the heading "details of the insurer" along the following lines:

- Serious Injury Guide
We assess that our client's claim has a potential value on a full liability basis of £250,000 and above and will likely involve an element of future continuing loss. In the circumstances, we invite the defendant to agree to conducting this case in line with the guidance set out in the Serious Injury Guide ("the Guide"). If the defendant does not agree that the Guide applies or agrees that the Guide applies but that it is not appropriate to follow it in this case, the defendant is asked to set out his/her/its reasons."

The PAP should refer to the fact that the defendant's reply to the Letter of Claim should also include a specific reference to the Serious Injury Guide with reasons given if the guide is not to be followed. This can be dealt with by adding a heading in the template Letter of Response, also at Annex B. The assumption should be that the SIG applies to every case over £250,000 and there needs to be good reason, supported by evidence, to depart from it.

Perhaps it should be the case that the PAPs apply not just to fast-track but those on the proposed extended f -track i.e. having a value of 100k or less.

b) The start of a moderately severe case and a catastrophic claim are the same, i.e. consider liability and immediate needs arising from the injury. A catastrophic claim only starts to be different after 6 months to 12 months, usually where needs are more significant and probably longer term. The date of birth of the Claimant must be a requirement in the letter of claim as the age of the claimant is one of the main factors that dictates whether a claim could be classified as catastrophic.

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?

Only to protocols which apply to injury cases over £25k. We believe that reference to the Code in a Protocol, such as the need to make reference to it in the Letter Before Action/Letter of Claim, will make claimant solicitors consider rehab when otherwise they may not, particularly in lower value injury cases (where the serious injury guide does not apply). If so, should the protocol require a claimant to identify any rehabilitation they consider would be beneficial, with estimated costs if possible ? YES, but also to send supportive evidence e.g. medical records/a letter from a GP or treating clinician, if rehab is being requested and should it require a defendant to supply reasons if they refuse, or fail to provide assistance with rehabilitation ? YES, but a defendant cannot make a decision on paying for rehab upon receipt of a Letter of Claim without some sort of evidence to support its benefits (other than in very serious cases where the benefit of rehab will be obvious) so this goes back to our comment that if a claimant solicitor asks for rehab in the Letter of Claim, they need to provide some sort of evidence as to why it will be beneficial. A claimant solicitor can't just say "my client feels physio/CBT etc. would assist please agree to fund it". A defendant who provides proper reasons to refuse rehabilitation should not be criticised, but a failure to provide a proper reason should have a consequence to ensure that rehabilitation is properly considered in all cases by both parties.

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?

This is quite problematic. Parties ought to be aware of their general duties towards disclosure i.e. disclosing documents which are relevant and which may help/hinder their case. Such a process could risk trial by correspondence upon disclosure and an increase in 'kitchen sink' lists.

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?

- [x] 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?

- [x] Yes
- [ ] No
- [ ] Other

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

- [x] 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
- [x] We would welcome any initiatives with third part

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?

We would suggest there should be a specific costs sanction in these circumstances, with the claimant's costs of and incidental to the issuing of proceedings being disallowed.

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
- [x] 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?

N/A

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

- Yes
- No
- We would hope that those lawyers handling mult

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
- We would suggest that this is not required. Withi

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?

Agree.

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

We do not consider that there are further JR specific factors which need to be considered over and above those identified by the sub-committee in Appendix 8 of the Interim Report.

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?

Whilst it would clearly be possible to integrate many of the General Principles in Chapter into the JR PAP, we do not consider that the desirability of taking this step is necessarily as clear cut. We consider that the JR PAP currently works well and that changes, amendments and developments to that PAP should be driven primarily by the needs and requirements of parties and practitioners in the sector rather than an overarching set of principles relevant to all litigation. JR is very clearly a unique jurisdiction and this position should bee central to any development of the JR PAP, rather than a desire to homogenise the general litigation system. The General Principle of Accessibility and Guidance could be implemented into JR. Such a step would have benefits and would be relatively straightforward to achieve. Similarly, we consider that the general concept of Proportionality and Costs is something that is already well established in JR and amendments to the JR PAP in respect of this General Principle would be possible and desirable. We do not however consider that the implementation of the proposed Pre-action protocol steps and particularly the inclusion of the proposed stocktake report would be desirable. The specific factors that make JR unique mean that it is suitable for maintaining a degree of flexibility that the proposed steps would inhibit. JR cases are frequently urgent and pressurised and the adaption of a rigid time consuming process is unlikely to be universally adapted if the general principle remains that PAPs are not expected to apply to urgent cases.

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
- (●) Whilst the idea of introducing a good faith oblig

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?

Yes, we would support aligning the time limits across the PAPs but we would not support a change to 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?

No, we think the amount of information currently required in the Pre-Action Letter of Claim is sufficient and does not require alteration.

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
- (●) We believe that the Pre-Action Protocol for Debt

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

- ( ) Yes
- ( ) No
- (●) Provided this included claims in the CCBC then w

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
- (●) We have submitted elsewhere that the 14 day pr

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?

No, our preference would be to consider this on a case by case basis.

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
- (●) See our previous comments on this proposal.

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.

We are happy to discuss any of our answers if this will assist the CJC in the next stage of this process.