

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.

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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.

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
- ☐ 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?

We agree that compliance with PAPs should be mandatory. It may be that there are exceptional circumstances that would justify non-compliance, which would need to be justified on a case-specific basis, but urgency is generally the only factor that is likely to do so. Urgency is especially relevant in emergency homelessness cases, in which a local housing authority is refusing to provide accommodation under the 'interim duty' in s.188, Housing Act 1996, and we are obliged to seek judicial review of this failure to assist: although as a matter of practice we use the Judicial Review PAP template in any case, with a requirement to respond within a short period of time.

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
- ☒ In principle, we agree that it is helpful and convey

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, we support the creation of a new mandatory costs procedure. It is a significant failing of the present system that there is no provision for costs recovery or assessment where cases settle at the PAP stage, but only following considerable work on the part of the successful party's legal representative. There is provision in case law (*Birmingham City Council v Lee*) for costs recovery where a landlord carries out repairs in response to a Housing Conditions PAP. However, in our experience landlords refuse to acknowledge this liability, and in practice they succeed in avoiding it, since the tenant is usually not willing to start CPR Part 8 proceedings purely to recover these costs. A new procedure specifically tailored to cases of all kinds, including homelessness cases under the JR PAP, is long overdue.

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.

We agree with the proposal that there should be a mandatory good faith obligation. In terms of the protocols of which we have most experience – possession (social landlords and mortgages), housing conditions and judicial review – we are not aware of any circumstances in which this requirement would 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.

We see the advantages of a Joint Stocktake report in some, usually complex, cases, but in other cases it could become an unnecessary bureaucratic hurdle, since it may be clear what are the outstanding issues and there would be little point in enumerating them in tabular form. We are not convinced that this requirement would be of assistance in landlord or mortgagee possession proceedings. In housing conditions cases concerning the extent of works required, it is already the practice for the parties' experts to compile a Scott schedule identifying matters agreed and in dispute.

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) We agree that the court should have the full range of sanctions available, including the power to strike out a claim or defence in serious cases of non-compliance. b) We would suggest that the question of PAP compliance should be specifically dealt with in Directions Questionnaires, to ensure that compliance becomes embedded and is at the forefront of the parties' behaviour. c) We agree that it would be helpful for there to be such a steer in the PAP itself, in order to emphasise the importance that courts place on pre-action compliance. d) We have no changes to propose in this respect. e) Special consideration needs to be given to the kinds of sanction which the court can impose in possession cases, specifically claims brought against tenants on mandatory grounds or against borrowers, where the court's powers are limited by the substantive law. Because of the special nature of the jurisdiction, sanctions for failure to comply with the Judicial Review PAP, specifically as to the duty of candour on the proposed claimant and a failure to engage on the part of the proposed defendant authority also require particular attention, especially where urgent cases are concerned.

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.

In principle, we agree that the structure, language and content of the PAPs should be improved where possible. The challenge is to simplify the documents without losing essential content without which a litigant in person would equally be at a disadvantage. The language of the social landlords' PAP is already quite accessible, although the purpose of Part 3 (mandatory grounds for possession) needs to be explained, since only exceptional personal circumstances would create the possibility of a human rights defence. The mortgage arrears protocol is highly technical and considerable work is needed to make it accessible (although the proposed extension of the protocol to all mortgage claims which involve a property occupied as a home will greatly assist comprehension). The Housing Conditions protocol is also complex in parts, especially in its references to statutory material in section 3 (Scope of the Protocol). It may be worth considering whether the substantive legal provisions could be moved to separate guidance, so that the protocol itself only deals with procedural matters. Where the protocol succeeds in terms of accessibility is in its template letters of claim and of instruction to experts, and the schedules of disrepair and special damages. As with the Housing Conditions protocol, a 'vulnerable' person is the prospective claimant in a proposed application for judicial review against a local authority or other public body (as opposed to the possession protocols, in which the occupier needs to know that the landlord/lender has complied with the protocol. Because of the nature of judicial review, it is more likely that a prospective applicant will have legal representation, and on that basis the language of the JR protocol is relatively clear (although it could always be improved).

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

- ☐ Yes
- ☐ No
- ☒ We agree with the view of the Working Group that

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?

We consider that opportunities for using the PAP steps to replace or truncate subsequent litigation steps and to avoid duplication should be further examined. The Housing Conditions PAP, in particular, offers scope for detailed pre-action correspondence to act as the parties' statements of case in some circumstances. Documents such as the tenancy repairs history and reports disclosed by either party should automatically form part of the background materials, unless there is some exceptional reason for excluding it.

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.

We support the introduction of a General Pre-action Protocol. The draft text in Appendix 4 would meet that purpose. All the information in it is relevant, but it is lengthy and there is a risk that the potential litigant will become lost in it and lose the main points. Ideally, we would wish to see a shorter version summarising the main principles and steps for the benefit of LiPs, or to have the present text divided up into identified stages of the proceedings.

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?

We agree with these timeframes, and with the possibility of an extension of 28 days to enable expert evidence to be obtained. We would make the obvious comment, however, that many if not most experts such as surveyors or doctors will need more notice than 28 days to accept instructions in a particular case, carry out any interviews, consultations or site visits and prepare their reports.

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'.

We agree that the general PAP should incorporate a standard for disclosure, which should include disclosure of known adverse documents. We see some advantages in the scaled back Initial disclosure model in Practice Direction 51U, but we express no concluded view on this point.

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

30. 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
- ☐ Other

31. 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

32. 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

33. 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
- ☒ Pre-action protocols in their current form are flav

34. 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

35. Do you agree that the existing PAP should apply to claims for possession on grounds other than rent arrears grounds?

- ☐ Yes
- ☐ No
- ☒ A pre-action protocol would encourage open and honest communication

36. Mortgage Possession PAP - Do you agree that the PAP should be mandatory?

- ☒ Yes
- ☐ No
- ☐ Other

37. 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

38. 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

39. 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
- ☒ This is especially important, as the statutory regime is complex

40. 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

41. 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

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

- ☒ Yes
- ☐ No

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

We agree with the approach of the sub-committee.

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

We would wish to see some specific provision made for the conduct of pre-action correspondence in emergency cases such as homelessness, in which the object of the JR is often satisfied by securing interim relief requiring the local authority to provide accommodation. The provision of template letters in the Annexes is of prime importance, since a JR PAP letter is immediately recognisable. On the other hand, it is our experience that pre-action correspondence is often not taken seriously unless it takes the form of a PAP letter, whereupon it is referred to the authority's legal department for the first time. This practice is wasteful of time and resources, and often intensifies a homeless person's hardship and uncertainty. The protocol should stress the need for public bodies to respond to all communications, especially concerning cases which may be the subject of a JR, and not only to a letter which takes the form of the JR PAP letter in Annex A.

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

- ☒ Agree
- ☐ Disagree
- ☐ Other

46. 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?

There is insufficient time or space to consider the General Principles, as set out in Chapter 3 and Appendix 5, in any detail, but we believe that it is highly desirable to include in the JR PAP provision for the good faith requirement and for the proposed summary costs procedure.

Debt Protocol

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

- ☒ Yes
- ☐ No

48. 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
- ☐ Other

49. 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?

We would support aligning the time limits with the revised general PAP as proposed. We make no comment on changes to the rules on when litigation can be commenced.

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

We are unable to respond to this question in the time available.

51. 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

52. 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

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

- ☐ Yes
- ☒ No

Professional Negligence Protocol

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

☐ Yes

☒ No

Proposed low value small claims track

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

☒ Yes

☐ No

56. 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

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

