

## 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](mailto: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 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
- ☒ Citizens Advice Adviser

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?

Yes, for possession claims and debt. We do not regularly deal with other PAPs and so are not able to comment on these.

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, this would potentially save the Court time and save both parties money. However, we would not expect to see much operation of this procedure in the areas we deal with. Very few of the cases we deal with are dealt with at pre-action stage; they either do not reach this stage or proceed to a full hearing. Those that are settled at pre-action stage tend to bear minimal costs e.g. the costs of making a claim, which are generally not disputed.

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, we feel that this would benefit our clients significantly. Often, claimants will no longer seriously entertain a dispute during the pre-action stage and some will not seriously consider it at all. The first time a dispute is given a meaningful response is therefore often at a hearing. Many of our clients are not able to represent themselves effectively (or at all) at these hearings which often results in them disengaging from the process and the claimant obtaining judgment in default. In these cases, the claim is never seriously challenged. Where a dispute exists, parties should be able to demonstrate what they have done to resolve or narrow this. This action needs to be meaningful rather than merely a formality.

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. Whilst we appreciate that in many cases this will be useful, we would not support this becoming a requirement. Many defendants struggle with basic Court forms and the procedure generally. Adding an additional layer of complexity will make them more likely to disengage with the process. In some cases, our clients are unwilling or unable to communicate effectively with the claimant. The template contained in appendix 4 may be appropriate in some cases, and it does capture the necessary information without being unduly onerous. However, many of our clients will struggle to complete this or understand the implications. We are concerned that one party may be able to impose their particular view more forcefully, effectively getting the other to "sign away" a key element of the dispute by stating that they agree to it. Alternatively, they may be able to point to a failure to complete the report as demonstrating that the other party is not willing to assist the Court or seek early resolution. In our experience, many defendants are intimidated by the Court procedures as they are currently and imposing an additional paperwork requirement is likely to further this. We would support the introduction of the Stocktake as a voluntary and encouraged step, but would not make it a requirement.

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 power to strike out a claim or defence for non-compliance, although we would emphasise the need for this to be balanced against the interests of both parties. In particular, we think that the Court would need to consider whether the claim could return once the PAP had been met and whether, in this case, there was any realistic prospect of the case being resolved out of Court. b) We would suggest that compliance should be expressly dealt with via the Directions Questionnaire or some other procedure. Most of our clients will have little to no real understanding of what a PAP is or its purpose. Requiring them to apply to the Court to impose a sanction effectively removes the requirement for the opposing side to comply, as it is very unlikely that they will be able to recognise non-compliance on their own. The Directions Questionnaire could list the requirements of the relevant PAP and this would enable the defendant to better determine whether they think they have been met or not. c) We agree that PAP compliance should be one of, if not the first, issues to be considered by the Court. We cannot see any benefit in dealing with these matters at a later date, especially if sanctions could result in the claim being struck out. d) n/a e) We consider that sanctions should be more readily available in relation to possession and debt claims. As suggested in the interim report, there is likely to be a significant imbalance of power between the claimant and the defendant in these cases. The significance of what the defendant stands to lose in these cases cannot be understated. We regularly deal with cases where the PAP has been completed as a "box-ticking" exercise rather than being a meaningful process. In the majority of these cases, it is arguable as to whether the requirements have been met. However, it is very difficult to fully scrutinise the extent to which the PAP has been complied with as hearings are typically very short. Even if non-compliance can be demonstrated, the sanctions available are rarely of any real use. Not having to cover the landlord's Court fees is little consolation to the defendant who loses their home.

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.

Further emphasis on the need to access support is needed. Currently, this is often provided in the form of basic details within a larger form, many of our clients will not reach the end of the paperwork before giving up and so may never actually see these details. We feel that it would be worth the parties having to consider whether the other is likely to need further support. In particular, in areas where there is likely to be a large imbalance in understanding (e.g. possession claims) we feel that an onus should be placed on the claimant to demonstrate that efforts to assist the defendant have been made e.g. a referral to an advice agency, or an offer of assistance from an in-house team. We would welcome the suggestion that claimants could be provided with guidance on capacity, however, we would suggest that claimants should be prepared to demonstrate the ways in which they have complied with this guidance. The language of PAPs themselves is quite legalistic and generally not accessible for members of the public. It would be helpful to condense this down into a fact sheet, or a checklist of what should be done before a claim. Altering the PAP itself is unlikely to be of much benefit (defendants are unlikely to read it), however a basic outline of what is expected may be more accessible.

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?

N/A

## 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

27. 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

28. 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

29. 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

30. 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

31. 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

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

- ☒ Yes
- ☐ No
- ☐ Other

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

- ☒ Yes
- ☐ No
- ☐ Other

34. 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

35. 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

36. 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

37. 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

38. 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

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

- ☐ Yes
- ☒ No

## Debt Protocol

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

☒ Yes

☐ No

41. 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

42. 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?

Generally yes, it would be useful for action to be paused for 28 days whilst the defendant seeks legal advice. However, we would express concern about the assumption in para 4.64 that the PAP letter "should not come as a surprise." Whilst in many cases the creditor will have communicated with the debtor, in practice what this amounts to is a series of standard letters and/or phonecalls. These very rarely garner engagement from our clients and it is quite possible that the PAP letter will either be lost amongst the others, or the point at which the debtor actually realises what might happen. The application for an extension should be straightforward enough for a debtor to be able to do this themselves. It would also be useful if there was a sheet that could be retained or sent to an advice agency so that they have sufficient information about the claim to be able to advise. In practice, 28 days is not usually long enough to gather enough information to determine whether a defence can be made. We would welcome a change that specifically stated the date on which litigation could commence, not dissimilar to the notice requirements for possession claims.

43. 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 believe that it should include the requirement to produce certain documents e.g. credit agreement and statement of account. Having these available means that more effective advice can be given and at an earlier opportunity. Beyond this, we consider that the contents of the letter is sufficiently prescriptive.

44. 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

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

☐ Yes

☐ No

☒ If this can be accessed by 3rd parties who are prc

Construction and Engineering Protocol



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

☐ Yes

☒ No

### Professional Negligence Protocol

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

☐ Yes

☒ No

### Proposed low value small claims track

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

☒ Yes

☐ No

49. 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

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

