

## 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
- ☒ Consumer advocate

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 cannot comment on whether compliance with all individual PAPs should be mandatory for all parties. In the case of the debt, rent and mortgage protocols there is often a large imbalance of justice between the parties. For instance, with the debt PAP it will often be large consumer credit firms making a claim against an undefended litigant in person who are unable to access advice. In these cases, we support making compliance with PAPs mandatory for creditors, but only for defendants who have access to legal advice and representation.

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, we agree that there should be online pre-act

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 there are any cases and protocols in which it should 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.

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?

We would suggest that compliance with PAPs needs to be mandatory for creditors and the sanctions for creditor non-compliance should be strengthened. There is likely to be an imbalance in access to legal assistance for defendants using the PAP. We welcome the conditionalities placed on PAP requirements where the defendant is a litigant in person, as these individuals can be at a serious disadvantage when navigating the requirements that could make the experience of litigation more stressful. We believe that the PAP should prescribe sanctions for non compliance more clearly and exactly. This should include the court imposing a stay with directions to follow the protocol and the power to strike out a claim for non-compliance by claimants; particularly in the possession claims by social landlords, possession claims for mortgage arrears and, debt protocols where defendants may be financially or otherwise vulnerable and without legal assistance. It should be mandatory for claimants to apply for relief from those sanctions by demonstrating compliance with the relevant protocol. The PAP should make it clear a case cannot progress without the protocol having been followed except for urgent / exceptional reasons (maybe where a limitation period is set to expire). There could be a 'pause' rule whereby limitation times are paused during this time. It should be mandatory to discuss ADR as a possible route and evidence that discussion, and this should include all forms of ADR like complaints resolution and ombudsman schemes. There will commonly be an acute disparity of legal knowledge and access to legal assistance for people in debt who are defendants in a debt claim. In theory the same sanctions apply to the defendant under the debt PAP as the creditor. We welcome the conditionality mentioned in chapter 2 of the report for cases where a defendant is unable to access legal assistance, this condition will need to be monitored closely as legal assistance can take many forms as is also noted in the report. Given the rarity for defendants in housing or debt cases to have access to comprehensive legal assistance, if the court applies its discretion correctly then sanctions for non-compliance should apply almost solely to the creditor/claimant.

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.

We are supportive of updating the language used in the PAPs to ensure they are more user friendly and use plain language. Many defendants will be unaware of how the PAPs work or understand their requirements, as they are not written in plain and simple language. This should include consideration of the need for translations in the most spoken languages in the UK as well as versions for defendants who may be blind or visually impaired. We would also recommend that user research is carried out to inform any changes and make sure people will understand what is required of them. Some PAPs include requirements to help those who struggle to read or understand information. To ensure that these vulnerabilities do not lead to injustice there should be efforts to work with these groups and design PAP's according to their needs. As a general point, we do not think the use of the term "debtor" is helpful and we would fully support changing the word debtor to defendant. The term "debtor" tends to stigmatise people with debt problems who are already dealing with shame and stress of dealing with their debt problems – if possible, it would be better to use 'consumers' or 'people in debt' but in this context, defendant might be the best option as suggested.

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?

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?

### 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
- ☒ Yes, we agree the PAP should be amended to req

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
- ☒ Yes, we agree that the possession PAP should be

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
- ☒ If it has been established that the existing PAP w

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?

While we understand the case for aligning the time limits with a general PAP timeframe, we do not think it is appropriate place these restrictions on responding in the debt PAP. The power imbalance inherent in claims under this PAP between claimant and defendant mean that extra provision should be given for those subjects to a claim to seek advice. It is likely to be difficult for defendants to obtain a debt advice appointment within 14 days. There are limited resources in the debt advice sector and high levels of demand. Even the current time limit of 30 days before a claimant can begin court proceedings is limited given the potential difficulties defendants may face in seeking advice. Breathing Space also now offers 60 days protection for people in debt which should be promoted through the PAP and raise questions about placing the same response time limits on the debt PAP as those in a general PAP.

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?

Paragraph 5.1 of the debt protocol lists reasons as to why a debt might be disputed. The list doesn't explicitly mention that a debt might be statute-barred under the Limitation Act. This should be more clearly stated with the details of the legislation explained so that people in debt are aware that their debt may be unenforceable. While there is reference to the Financial Ombudsman in PAP we feel this could be made more prominent in the pre-action letter. FOS can't deal with complaints where court action is already ongoing so it's vital that defendants are aware that they can challenge the debt through FOS before court action is initiated. This option and the potential for it to be removed if court action starts needs to be clearly set out in the letter. The Protocol was drafted before statutory Breathing Space was introduced. While its current wording encourages people to seek debt advice and makes it clear that creditors should allow time for people to receive advice when they do, the Protocol doesn't set out the protections individuals can receive under the Breathing Space regulations. The Protocol should make it clear that individuals can receive 60-days protection from enforcement, interest and charges if they seek advice. We also think the Protocol needs to be more prescriptive in the form in which creditors are required to send a letter of claim. While section 3 outlines several requirements for creditors, we find that the letter is often missed by individuals as there is not enough to differentiate it from other creditor correspondence. The current rules state that creditors 'can also' send the letter by email, we think that creditors should be required to notify individuals of the letter of claim by their stated preferred method where this is known or there has been ongoing communication via a specific method. Creditors should also be required to test communications to understand the most effective ways to ensure people engage with the letter. A major problem with the current Protocol is the lack of sanctions for creditor non-compliance. This reduces the appetite of individuals to pursue breaches as the gains from challenging creditors are limited. This problem is exacerbated in the inequality of arms between claimants and defendants where creditors will often be deploying well-funded legal teams against litigants in person. We therefore support efforts to make the Protocol more prescriptive but will only be confident that changes will have a tangible effect if there are deterrent penalties for non-compliance.

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

☐ Other



## 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

Any other comments

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

In reference to the debt protocol: We support efforts to narrow disputes and uncover any unfounded claims where creditors may be attempting to initiate action despite not having the necessary documents. We welcome the condition that this stocktake only be required in cases where a defendant has access to legal assistance. Given the imbalance between claimants and defendants in consumer credit debt cases and the potential for harm to those in debt, we think the emphasis of the stocktake should be on creditor obligations. Firms must show they have tried to secure affordable repayments using the SFS and that they have clearly communicated information on consumer credit rights. Many claims for money in the County Court are between commercial consumer credit firms and individuals in debt who may be vulnerable due to their financial circumstances, and dealing with a multiple debt situation, mental or physical health problems and a range of other issues. Last year, 50% of StepChange clients has an additional vulnerability on top of their financial difficulties. This means that there is a substantial inequality between the status of claimants and defendants in debt claims and high risk of hardship if a successful claim is made. Recognising these risks, any stocktake should have focus on creditor obligations ahead of any defendant requirements. Currently, money claims are often not contested by defendants even if there may be a defence case relating to the balance owed, fees and charges, the debt being statute-barred etc. Liability under consumer credit rules is complex. Last year, 59% of consumer credit complaints to the Financial Ombudsman Service were upheld, such a high success rate demonstrates the range of grounds on which an individual can successfully dispute consumer credit claims. Even with legal assistance it's likely a defendant will not have the same resources or capacity as a consumer credit firm and therefore will not have a full understanding of their rights of potential grounds for dispute. Any stocktake process in the debt protocol, therefore, should prioritise ensuring claimants have clearly communicated individual rights under consumer credit legislation. The debt PAP currently requires creditors to pay reference to the SFS if a defendant proposes a repayment plan. The potential harm to a defendant who is refused a chance to repay a debt affordably is severe. As already outlined, those facing claims are likely to be vulnerable. There are strong rules in the CONC 7 section of the FCA handbook which require consumer credit firms to treat customers in arrears fairly. CONC 7.3.5 suggests firms should consider freezing interest or charges, accept token payments, accept reasonable repayment offers and refer individuals to debt advice. Even defendants with some legal assistance may not be full aware of the responsibility of consumer credit firms to apply this level of forbearance before pursuing more aggressive collection methods. To address this information asymmetry and safeguard against the potential harms to defendants, a stocktake should also prioritise checking that claimants have fulfilled these obligations and given due consideration to repayments plans using the SFS.