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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We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If yo
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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

Association of British Insurers

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)?

- (●) 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?

Please note that our responses to the questions below should not be interpreted as endorsing any changes to particular protocols, unless otherwise indicated. Each protocol has been developed by specialists with considerable knowledge and expertise and so before commenting further, we would need to consider more detailed proposals for changes to particular protocols.

In response to question 11, we agree that the requirement to deal with cases justly and at proportionate cost in CPR 1.1 should include enforcing compliance with any applicable pre-action protocol, and that the obligation to actively manage cases in CPR 1.4 should include encouraging the parties to co-operate with each other in complying with any applicable pre-action protocol.

In response to question 12, while we agree that compliance with pre-action protocols should be mandatory (except in urgent cases including where immediate court intervention is necessary), the greater imperative is to focus on improved judicial monitoring of adherence to protocols, in addition to greater consistency in enforcing compliance. We also note that several pre-action protocols have express carve outs for urgent cases and consideration should be given as to whether any new pre-action protocols should have similar carve outs.

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.

In response to question 13, we agree that there should be online pre-action portals for all cases where there is an online court process, as this would make the process easier for litigants and ensure that they are able to comply with pre-action protocols simply by following the on-screen instructions. We also agree that the systems should be linked so that non-confidential pre-action exchanges are accessible to the relevant court. This would also ensure that pre-action exchanges are not sent to the wrong court in error.

In response to question 14, we do not 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. We agree with the Forum of Insurance Lawyers (FOIL) that at present, many claims are brought forward and settled without the need for legal representation or legal proceedings and that the creation of a new summary costs procedure has the potential to create costs litigation and increase the burden on the court system, without discernible benefit. In addition, it is unclear that there would be a sufficient volume of cases meeting the criteria to justify the development of a new summary costs procedure.

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.

We agree in principle that pre-action protocols should include a mandatory good faith obligation to try to resolve or narrow the dispute. It is proposed that this would be a non-prescriptive obligation and that compliance could include engaging in formal dispute resolution processes, ombudsman schemes or informal negotiations. However, it will be important for each pre-action protocol to give indicative guidance as to how this obligation may be best discharged in the circumstances. There would also need to be a clear understanding of what sanctions can be expected in the event of non-compliance with this obligation.
There may be some cases to which a mandatory good faith obligation to resolve or narrow the dispute should not apply; for example, where there is a point of law that requires judicial determination, or where the issue in dispute is entirely binary and not capable of being compromised or narrowed. However, our overriding view is that, if there is to be a mandatory good faith obligation, any exceptions should be limited (in common with jurisdictions which have imposed a similar obligation), clearly signposted and tightly controlled.
In answering this question, we also note our response to the Ministry of Justice's recent call for evidence on dispute resolution in England and Wales, in which we supported a process of mandatory dispute resolution where appropriate but stated that it will require increasing the capacity of the dispute resolution market to respond to more and potentially new types of cases being resolved outside of the court process. Similarly, including a mandatory good faith obligation to try to resolve or narrow the dispute in pre-action protocols will be more effective if it is accompanied by efforts to increase the capacity of the dispute resolution market. In this regard, but also more generally, it will be important for the Civil Justice Council's review of pre-action protocols to align with the Ministry of Justice's work on dispute resolution to ensure a joined-up approach.

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 agree that there should be a requirement to complete a joint stocktake report as above. While stocktakes are already part of a number of pre-action protocols, in our experience they are rarely used and so we agree that a requirement to complete a joint stocktake report would be beneficial. Pre-action protocols should also make clear that the stocktake process is a good point for the parties to review any pre-issue dispute resolution which has taken place so far, and consider further attempts at dispute resolution where appropriate. In addition, we agree that the stocktake requirement should not apply in relation to the judicial review protocol or the proposed low value small claims track protocol.
The Template Joint Stocktake Report is useful, and our comments are as follows: (i) should it become a requirement to try to resolve or narrow the dispute, it may be helpful to be clearer about this in section 2 and (ii) Appendix 5 of the interim report states at paragraph 23 that 'it may become apparent that the parties are so close together that the stocktake might prompt renewed efforts to fully resolve all aspects of the dispute'. It may therefore be useful for the Template Joint Stocktake Report to explicitly include such a prompt.

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 courts should have this power to deal with grave cases of non-compliance; however, there is a risk that the exercise of this power could lead to unnecessary satellite litigation and so consideration will need to be given as to how to mitigate this risk. As above, our view is that in the first instance, there should be more focus on improved judicial monitoring of adherence to protocols, in addition to greater consistency in enforcing compliance.

b) In our view, parties should be required to apply to the court should they want the court to impose a sanction on an opposing party. We agree with FOIL that such an approach would encourage proper consideration of whether a breach had occurred which was serious enough to warrant a sanction, focusing judicial time on specific issues rather than general complaints.

c) We agree that pre-action protocols should include this.

d) Pre-action protocols should clarify upfront that a decision on whether to impose a sanction should be taken at the start of the proceeding, not the end, unless the court considers there to be good reason to postpone the issue.
More generally on non-compliance with pre-action protocols, the ABI has been clear that currently, whether a party to litigation is penalised for failure to comply with pre-action protocols largely depends on which judge in which court handles the litigation. There should be improved judicial monitoring of adherence to protocols in addition to greater consistency in enforcing compliance. This would help to ensure that all parties to a dispute, including where court proceedings are ultimately appropriate, take an open and fair approach to providing relevant information at an early stage in the process. Whilst the ABI is cognisant of current court backlogs and therefore judicial workloads, improved judicial monitoring would improve adherence to protocols which should improve dispute resolution outcomes. In turn, this should reduce the number of cases making it into the court process. Greater consistency in enforcement would also mean that all parties have a clear understanding of what sanctions can be expected in the event of non-compliance with pre-action protocols.

e) We do not have any comments on whether a different approach to sanctions should be adopted for any litigation specific pre-action protocols.

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 recognise that pre-action protocols need to include certain legal and technical terminology. However, we also agree with the majority of respondents to the Civil Justice Council's previous survey on pre-action protocols that there is room for improvement in terms of their length, consistency, language used and use of online portals where litigants in person could be walked through the process by following onscreen instructions. These measures would help vulnerable and indeed all parties to engage more effectively with pre-action protocols.

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?

In response to question 21, we agree that on balance, statements of truth should not be required at the pre-action stage on the grounds that it might lead to parties being overly cautious in pre-action stages, engaging in defensive litigation behaviour and/or incurring additional legal costs. However, requiring statements of truth can help to deter fraud and so it would be useful to consider further the impact that statements of truth, or other measures that ensure claimants act in good faith, can have and indeed whether other potential anti-fraud measures at the pre-action stage could provide benefit.

In response to question 22, we do not agree that this rule should be adopted in other pre-action protocols. As the interim report states, a court can already take into account a party's change in position when giving directions as part of its overriding obligation to deal with cases justly and at proportionate cost.

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 agree that where appropriate, it should be open for certain pre-action protocol steps to be used to replace or truncate the procedural steps parties must follow should litigation be necessary, provided that there are certain safeguards in place. In relation to pleadings, for example, we agree with the interim report's suggestion that parties should be allowed the option of relying on their pre-action protocol documents or filing a conventional pleading – hence parties will not feel pressured into thinking the pre-action protocol process will be their only chance to plead their case. In addition, the court should retain the power to order conventional pleadings where appropriate. Similarly, in relation to disclosure, we agree with the interim report's suggestion that parties who have complied with the relevant pre-action protocol should have the option not to provide any further disclosure. The exception would be where the courts believe there is a need to order specific disclosure. We are supportive of efforts to convert pre-action protocol compliance into more streamlined case management that avoids wasteful duplication, provided that there are appropriate safeguards in place.

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 a general pre-action protocol being introduced and a requirement that if there is no specific protocol which applies, or where the parties are unclear on which protocol should apply, then the parties must comply with the general pre-action protocol before starting proceedings. However, the introduction of a general pre-action protocol should not be seen as a substitute for maintaining/producing certain claim-specific pre-action protocols, where such claims would benefit from a different pre-action process.
We do not have any comments on the draft text for the revised general pre-action protocol set out in Appendix 4, except for those we make below.

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 would be concerned that these timeframes would not be achievable in many cases depending on:

- Whether the pre-action letter of claim is sufficiently detailed;
- Whether the claim is historic and/or complex and so might require more investigation than can be completed within the above timeframes;
- Whether records or other information required to corroborate the allegations can be acquired and reviewed in time;
- The availability of experts to provide any necessary evidence such as medical reports; and
- The level of resources available to insurers if a significant number of (potentially complex) claims are made within a short time period.

The Pre-action Protocol for Personal Injury Claims states that 'the defendant (insurer) will have a maximum of three months from the date of acknowledgment of the Letter of Claim…to investigate'. This timeframe is more realistic, and we would therefore suggest a timeframe of a maximum of three months to cater for more complex cases. A timeframe shorter than three months would risk any number of claims being subject to inappropriately short deadlines.

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'.

The ABI supports a "cards on the table" approach at the outset so that our members can properly and fully respond to all of the issues in play. For this reason, we agree that the general pre-action protocol should incorporate a standard for disclosure and are in favour of the clear and balanced wording in the proposed general pre-action protocol. We also agree on balance that, out of fairness to all parties, the standard for disclosure should include disclosure of 'known adverse documents'; however, it is important that this should not encourage speculative approaches or 'fishing expeditions' and so we would encourage further consideration of the potential impacts of this.

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
- Other

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
- Other

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?

In response to question 29, we agree that this would assist with navigation to the correct pre-action steps for each sub-speciality and avoid repetition. We are also supportive of a greater sub-division of protocols, so they can be applied to ensure that the controls which they impose are proportionate and adequate. The CJC has previously stated that both noise induced hearing loss claims and low value clinical negligence disputes need a more bespoke set of pre-action requirements, despite both already being covered by existing protocols – this is a point which we are in agreement with.

In response to question 31, we agree that all PI protocols should include an obligation to complete a joint stocktake report/list of issues. In our view, this should be required after attempts at dispute resolution have taken place as otherwise it is less likely that the issues in dispute will have been narrowed. There may be some arguments to consider this in advance of ADR where there is the agreement of both parties, for example, if it may help streamline the ADR process or assist the facilitator. The joint stocktake report/list of issues should also be filed with the Directions Questionnaire.

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?

We agree that there will need to be a careful separation of the workstreams for fast-track and multi-track cases.

a) We agree that the Serious Injury Guide methodology of planned route mapping meetings (which encourage discussion/resolution of outstanding issues in a progressive manner) should be considered for wider roll-out. However, before commenting further we would need to consider more detailed proposals for bringing the Serious Injury Guide into fuller alignment with and prominence within the protocol. Adoption of the Serious Injury Guide may not always be suitable.

b) We are supportive of a greater sub-division of protocols and so would suggest including different workflow sections within the protocol, while still avoiding repetition where possible.

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?

While we can appreciate the merits of this in principle, before commenting further we would need to consider more detailed proposals for bringing the Rehabilitation Code into fuller alignment with and prominence within the protocols. Consistent with the Rehabilitation Code, we would expect there to be a collaborative process with the emphasis on joint instruction of services to identify rehabilitation needs.

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?

In response to question 35, given the need to tackle the consistent problem of a lack of engagement from claimants following admissions of liability, it would also be useful for the protocols to be clear that claimants should not issue proceedings after a full admission without prior reference to defendants.

In response to question 36, we agree that the management of disclosure pre-issue needs to be strengthened. As above, there should be improved judicial monitoring of adherence to protocols in addition to greater consistency in enforcing compliance. This would help to ensure that all parties to a dispute, including where court proceedings are ultimately appropriate, take an open and fair approach to providing relevant information at an early stage in the process.
In addition, as above the ABI supports a "cards on the table" approach at the outset so that our members can properly and fully respond to all of the issues in play. For this reason, we agree that there should be equal obligations on claimants and defendants to give reasons why they consider a document is not relevant/why they will not disclose a document.

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?

- (●) 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?

- (●) Yes
- ( ) No
- ( ) Other

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

- ( ) 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
- ( ) Other

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?

In response to question 38, the ABI has consistently called for the implementation of a pre-action protocol which is specific to abuse claims, and so we agree that a working group should be established as a priority to consider this. We would ask that we are represented on the working group along with FOIL, the Insurance & Reinsurance Legacy Association (IRLA), the Association of Child Abuse Lawyers (ACAL) and the relevant local government body to ensure appropriate representation from those who handle or are involved in claims for abuse. This will also ensure that the working group has the requisite knowledge and expertise. In addition, while the ABI and FOIL previously prepared a draft pre-action protocol specific to abuse claims, given recent case law developments we are of the view that it will be necessary to review the draft in detail as it may require substantial alteration.

In response to question 39, we agree with FOIL that, following the UK's exit from the European Union, the volume of cross-border claims brought in England and Wales will likely reduce significantly and it may therefore be difficult to justify the work required to develop a new protocol.

In response to question 41, we agree that the personal injury pre-action protocols should deal with this question out of fairness to defendants. It is not appropriate for there to be no consequences if a claimant representative delays service until it is too late in the protocol period for the defendant to have any realistic prospect of responding.

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
- (●) 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?

In response to question 42, in our view, this would risk blurring the line between pre-issue and post-issue. In addition, it is for the claimant to disclose a medical report to support the issue of any claim, rather than the production of a medical report being initiated by the defendant.

In response to question 43, we do not agree with this proposal as this issue is already adequately dealt with in the Rehabilitation Code.

In response to question 44, we agree that if it is necessary to obtain expert evidence, the parties should consider using a single expert, whom they jointly instruct, with the costs shared equally between them. While using a single expert may not be appropriate in the most serious cases, it should be standard practice for the parties to consider using one given doing so can help minimise both costs and delays to the process. However, before commenting further we would need to consider more detailed proposals for changes to the process.

In response to question 45 (below), we agree with FOIL that this would risk blurring the line between pre-issue and post-issue and that the pre-action stage should not become quasi-litigation. In addition, at the pre-action stage it is more important that the focus is on the parties complying with mandatory pre-action protocols, with effective sanctions where they unreasonably fail to do so.

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

- ◯ Yes
- ◉ No
- ◯ Other

Housing Protocols

46. Do you wish to answer questions about housing protocols? *

- ◯ Yes
- ◉ No

Judicial Review Protocol

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

- ◯ Yes
- ◉ No

Debt Protocol

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

- ◯ Yes
- ◉ No

Construction and Engineering Protocol

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

- ◉ Yes
- ◯ No

50. 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
- ◯ Other

51. Do you support the retention of the referee procedure?

- ◉ Yes
- ◯ No
- ◯ Other

52. Would you support the formal incorporation of a standard of disclosure and, if so, which standard?

In response to question 50, we would be concerned that these timeframes would not be achievable, for the same reasons as set out in our response to question 26 above. We would also be concerned that this change to the construction and engineering protocol would be particularly prejudicial to the resolution of claims against construction professionals, as we understand that such claims are often made with little prior notice. In addition, construction professionals usually have insurers who need to be notified, and with whom coverage and the incurring of defence costs needs to be confirmed. We understand that this can take considerably more than 14 days in itself, which would mean that the proposed timeframes would be inappropriately short.

In response to question 51, we would support the retention of the referee procedure, although we understand that it is rarely used.

In response to question 52, as above, the ABI supports a "cards on the table" approach at the outset so that our members can properly and fully respond to all of the issues in play. For this reason, we would support the formal incorporation of a standard of disclosure (the same standard adopted in the professional negligence protocol).

Professional Negligence Protocol

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

- ◉ Yes
- ◯ No

54. 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
- ◉ We would not support this - we would be concer

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.

General:

It would be useful for the Civil Justice Council's review of pre-action protocols to also give consideration to (i) the disclosure processes for complex cases and whether they should be staged and (ii) the potential to obtain Judge issued pre-action 'directions' for complex cases.
In addition, it should be noted that the driver of a pre-action protocol is to encourage settlement pre-litigation wherever possible, but if the quantum claim is unclear then this is a significant barrier to settlement. It would therefore be helpful for the pre-action protocols to require each quantum claim to be particularised, which would encourage settlement prior to the issuing of proceedings. Clarity on the methodology that has been used to calculate quantum claims would help all parties to resolve claims more quickly, resulting in reduced costs and numbers of claims which go to court.

Pre-action Protocol for Personal Injury Claims:

The report of the PI Subcommittee (appendix 6 to the interim report, page 125) makes what might appear to be an inconsequential proposal about the "show cause" procedure: "The specialist High Court asbestos list 'show cause' procedure could be adopted to address primary liability in all personal injury cases outside fixed recoverable costs. The process has the benefit of narrowing issues and thereby reducing costs and achieving greater chance of settlement."
While we agree that the procedure can narrow disputes and reduce costs within the specific setting of mesothelioma claims, we do not accept that it could or should be replicated elsewhere in personal injuries litigation. On the basis of Fairchild v Glenhaven [2002] UKHL 22 and section 3 of the Compensation Act 2006, mesothelioma claims are subject to a unique regime of causation and joint and several liability. Those principles, and the need for expedition because of the limited life expectancy of living claimants, form the justification underpinning the procedure in those cases. Given that the combination of those factors simply does not exist in other types of personal injury claim, it must follow that the 'show cause' procedure should not be adopted more broadly.

Pre-action Protocol for Disease and Illness Claims:

We agree with the statements in the interim report that (i) the pre-action protocol for disease and illness claims has taken a long time to bed down and it would be inappropriate at this stage to seek significant changes, and that (ii) there should only be minor incremental amendments (if any are in fact needed) rather than wholescale revisions. From our perspective, the protocol continues to work well for all parties involved in disease and illness litigation.

Credit hire:

Finally, while we note that a bespoke credit hire protocol was outside the scope of the interim report, new rules for credit hire are being considered in Northern Ireland and so we would also advocate for consideration of a suitable credit hire protocol for England and Wales.