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
is 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 *

[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
- ◉ NHS Resolution indemnifies Defendant NHS bod

6. Your job title

[redacted]

7. If relevant, whose interests do you predominantly represent? *

- ◯ Claimants
- ◉ Defendants
- ◯ Not applicable

8. Your organisation

NHS Resolution

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
- ◉ We agree that express reference to Pre-Action Pr

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 the default position should be that compliance with all PAPs should be mandatory in order to attempt to resolve claims without court proceedings, the associated costs and distress to injured patients. However, we suggest that the PAPs include an expectation that defendants' requests for extensions of time for service of letters of response, supported by reasons, shall not be unreasonably refused by claimants.

• Claimants and defendants must take the same steps to investigate a claim at the pre-action stage. However, the timeframe for claimants to complete their investigations is only restricted by the expiry of the limitation period (where this applies) and defendants will not unreasonably object to extending limitation. However, Defendants often face real practical difficulties in securing expert evidence within the four-month response period of the Pre-Action Protocol for the Resolution of Clinical Disputes due to the availability of medical experts. Within this period, defendants must ensure they have all relevant medical records, source and instruct medical experts, obtain factual witness evidence and draft a letter of response.

• Practical difficulties arise particularly, although not exclusively, where expert evidence is required in complex and high value birth injury claims. Paediatric neurology and neonatology experts often have waiting lists of over a year due to clinical commitments. Experts' limited availability has also been exacerbated by the pandemic because of their need to focus on clinical commitments. These matters are beyond the control of defendants.

• There should be a requirement that claimants who are legally represented be obliged to serve a letter of notification on the named Defendant and a letter of claim on the named defendant and its indemnifier.

• It should be mandatory for litigants in person to comply with PAPs. Litigants in Person should be provided with a separate simple language guide and additional tools to assist them. Any non-compliance by Litigants in Person should be viewed by the Courts in the context of their lack of legal knowledge and training.

• We are of the opinion that collaborative working between the parties incentivises appropriate behaviours and motivates participation in dispute resolution. However, for some types of cases, mandatory dispute resolution may be a proportionate way to achieve settlement. In very low value claims and where the claimant is a litigant in person we would suggest that a joint stocktake report/list of issues is completed following service of the letter of response.

• The parties could also be required to consider whether some form of dispute resolution (such as Part 36 offers and/or telephone negotiations) is appropriate if the defendant is unable to serve a letter of response within four months of service of the letter of claim. This would provide an opportunity to resolve the claim without the need for a prior letter of response, if appropriate.

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
- ◉ We generally support the introduction of online p

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.

We would welcome the creation of a summary costs protocol to deal with costs disputes where the claim settles at the pre-action stage. There could be a system where a bill of costs is submitted but a determination is made on the papers, with an appropriate appeals process. Any summary procedure must not increase costs or reduce the efficiency of the current process.

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 that all PAPs ought to include a broad mandatory good faith obligation on the parties. However, genuine development of the parties' evidence which leads to amended pleadings should not be regarded as a breach of good faith, unless deployed for tactical reasons only.

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
- ◉ We agree with this proposal. Candid without prej

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 it should be a requirement for the parties to complete a joint stocktake report prior to commencement of proceedings. In our experience, a stocktake works best where the parties also engage in meaningful discussion of the claim, rather than completing a paper exercise. An environment should also be created in which the parties are able to have an ongoing dialogue about pre-action case management and to consider whether settlement can be agreed.

• We would suggest that the onus is placed on the parties to confirm in the stocktake the documents they have received and the documents they believe exist and wish to inspect.

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 agree with the above statement, but subject to the caveats described below.

a) Given the serious implications for the parties, if this proposal were to be adopted it would be essential for the PAPs to define what constitutes "grave cases of non-compliance" and provide examples.

b) We consider it is sufficient for PAP compliance to be dealt with in the Directions Questionnaire. Requiring the parties to make a separate application would lead to unnecessary costs. We recommend the PAP should be as clear as possible on what would constitute a breach of compliance and the sanctions for such breach to avoid potential satellite litigation on the subject.

c) In our view, any actual or purported non-compliance with the PAP should ideally be dealt with at the first Case Management Conference once the claim is litigated.

d) Costs/costs penalties inevitably motivate parties and their representatives and could be used to ensure compliance with the PAPs. However, as stated above, the criteria for imposition of sanctions for non-compliance must be must be carefully considered to safeguard access to justice and fairness.

e) • Defendants often face real practical difficulties in securing expert evidence within the PAP timeframes due to the availability of medical experts. This is particularly, although not exclusively, the case where expert evidence is required in complex and high value birth injury claims. Paediatric neurology and neonatology experts often have waiting lists of over a year due to clinical commitments. Experts' limited availability has also been exacerbated by the pandemic because of their need to focus on clinical commitments. These matters are beyond the control of Defendants.

• Where lack of available experts is the reason why the defendant cannot comply with PAP timeframes, claimants should agree reasonably requested extensions of time for service of the letter of response or no sanction should be imposed on defendants for non-compliance.

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
- ◉ Yes, we agree with the proposals set out in parag

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.

• It is our view that clarity of language is important, particularly for litigants in person, to ensure they are able to understand the relevant process and have access to justice.

• Great care would need to be taken to ensure that the significance of legal principles is not obscured by the use of simpler language. It may be worthwhile creating separate simple language guides or explanatory notes for litigants in person.

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

- ◯ Yes
- ◯ No
- ◉ Letters of claim and letters of response are not p

22. Do you believe that the rule in the Professional Negligence Protocol giving the court the discretion to impose sanctions on defendants who take a materially different position in their defence to that which they took in their pre-action letter of reply should be adopted in other protocols and, if so, which ones?

We oppose this suggestion on the basis that Defendants' pleaded cases change due to genuine developments in their experts' evidence. Claimants' pleaded cases may also change during the course of a claim as investigations develop. It would be inappropriate to consider imposing sanctions on only one party (the defendant) and imposing sanctions generally if the change in case circumstances is due to the maturing evidential position.

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?

Any steps taken under the PAPs in relation to disclosure may help to speed up the same steps in proceedings should litigation be necessary. However, a formal requirement to undertake procedural steps at the pre-action stage currently reserved for litigation would increase legal and administrative costs for the parties in claims that are resolved prior to litigation, and potentially lengthen the pre-action stage, which would be disadvantageous to both claimants and defendants.

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.

• Although we support the introduction of a general Pre-action Protocol (Practice Direction) to cover any claims that do not have a specific PAP, the general PAP will not apply to many cases handled by NHS Resolution. We have therefore not commented in any detail on the general PAP, save for providing the observations below.

• As to paragraph 7, we consider it would be helpful to include some text clarifying what should happen when the parties disagree on whether the general PAP is appropriate. There should also be provision for a claimant who uses the general PAP initially in error to have to transfer to the relevant specific PAP where one exists. This may be particularly important for litigants in person.

• The diagram at paragraph 9 should also reflect transfer of claims from the general PAP to the relevant specific PAP.

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?

• As stated above, the general PAP will not apply to many cases handled by NHS Resolution, and so we have not commented in any detail of the general PAP, save for providing the further observations below.

• Defendants often face real practical difficulties in securing expert evidence within the PAP timeframes due to the availability of experts. Medical experts' limited availability has also been exacerbated by the pandemic because of their need to focus on clinical commitments. These matters are beyond the control of defendants. The proposed timeframe for service of the letter of response under the general PAP, even with a further 28-day extension, may require significant extension in some cases.

• We also suggest including in the general PAP the provisions in paragraph 3.25 of the Pre-Action Protocol for Clinical Disputes, plus an expectation that defendants' requests for extensions of time for service of letters of response, supported by reasons, shall not be unreasonably refused by claimants.

• There should be a requirement that claimants who are legally represented be obliged to notify Defendants if they intend to serve a letter of notification on the named Defendant and a letter of claim on the named defendant and its indemnifier.

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'.

• If a party relies on a document relating to liability and/or quantum at the pre-action stage, then the document should be disclosed prior to proceedings being commenced.

• The parties should also provide an indication of other documents that may be available, so that each can consider whether further inspection is required. If so minded, the Rules Committee will need to perform a careful balancing act to ensure that opportunities for early resolution are weighed against cost, additional administration and delay.

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
- We have no objection to a general introductory t

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
- We agree that PAPs ought to include a mandator

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?

• We agree that it should be a requirement for the parties to complete a joint stocktake report prior to commencement of proceedings. In our experience, a stocktake works best where the parties also engage in meaningful discussion of the claim, rather than completing a paper exercise. An environment should also be created in which the parties are able to have an ongoing dialogue about pre-action case management and to consider whether settlement can be agreed. This may include further stocktakes and associated discussions at appropriate times, for example, after service of the letter of response, and/or after service of a challenge, and/or before ADR. We agree that a stocktake form should be filed with the DQ.

• In very low value claims and where the claimant is a litigant in person we would suggest that a joint stocktake report/list of issues is completed following service of the letter of response.

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?

In general, we agree it is appropriate to separate the work streams in the PI PAPs for fast-track and multi-track cases so the differences can be clearly described. The clinical disputes PAP does not currently make a clear distinction between fast-track and multi-track claims. However, due to their complexity, clinical negligence claims are generally allocated to the multi-track.

a) • In general, we agree the clinical disputes PAP and the Serious Injury Guide should be integrated, where appropriate, to encourage collaboration and potentially avoid the need for litigation. We recommend that a working group is established or a specific exercise undertaken to determine how that could be best achieved.

• However, the Serious Injury Guide includes a commitment to make early and continuing interim damages payments, where appropriate. Due to our governing legislation, it is not possible for NHS Resolution to agree to make interim damages payment before the liability position in claims has been resolved. Any incorporation of the Serious Injury Guide into the clinical disputes PAP should not include obligations on defendants to provide early and continuing interim damages payments unless liability has been admitted.

b) • We are not currently persuaded that the current protocols need to be updated to reflect moderately severe cases as well as catastrophic injury cases but are open to considering this issue further.

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?

• The Rehabilitation Code also includes a requirement for defendants to pay for rehabilitation, including without a prior admission of liability. However, as stated above, due to its governing legislation, it is not possible for NHS Resolution to agree to fund rehabilitation before the liability position in claims has been resolved.

• If the Rehabilitation Code is to be integrated with the PI PAP and/or clinical disputes PAP, a working group should be established or a specific exercise undertaken to determine how this could be best achieved.

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
- ◉ In our experience, many EL/PL claims are remove

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
- ◉ We consider the PI PAP, EL/PL PAP and clinical di:

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 our experience, defendants usually provide full disclosure and inspection at the pre-action stage. Where the defendant is unable to disclose a document, the defendant explains why this is the case, for example, that the document is legally privileged. Please also see our response to question 27.

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
- ◉ We agree with this proposal. There should also b

38. Do you agree that a working group should be established, as a priority, to consider a specific protocol for abuse claims?

- ◯ Yes
- ◯ No
- ◉ Abuse claims have very specific features and so w

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

- ◯ Yes
- ◯ No
- ◉ We do not respond substantively to this questior

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
- ◉ We agree that specific initiatives with experts, HM

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 our view, where either party obtains expert evidence on condition and prognosis at the pre-action stage, but chooses not to serve this prior to proceedings, the Court should, when deciding on costs, consider whether litigation would have been avoided or whether the number of litigated issues would have been reduced, had the expert evidence been disclosed pre-action.

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
- ◉ In our view, the defendant should be entitled to c

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
- ◉ As stated above, we consider that defendants sh

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?

We consider that it may also be of value for some quantum experts to be selected and instructed jointly in multi-track cases being dealt with under the PI PAP. We therefore suggest amending paragraph 7.2 of the PI PAP to delete the words "Save for cases likely to be allocated to the multi-track". We do not consider it would be appropriate to instruct joint liability experts in multi-track cases.

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

- ◯ Yes
- ◯ No
- ◉ We consider that it is unnecessary to have access

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

Professional Negligence Protocol

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

- ◯ Yes
- ◉ No

Proposed low value small claims track

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

- ◉ Yes
- ◯ No

52. 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

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

Response to question 52 (continued)

• We support inclusion of the good faith obligation in any new PAP for claims worth £500 or less.

• In very low value claims and where the claimant is a litigant in person we would suggest that a joint stocktake report/list of issues is completed following service of the letter of response.

Response to question 34 (continued)

• The only recourse open to defendants is to put claimants on notice in correspondence that they intend to take a point on costs. However, there should be a mechanism by which the parties agree that a matter is to be withdrawn from the portal. Claimants should be obliged under the EL/PL PAP to serve their evidence on the value of the claim on the defendant at the point when claimants wish to withdraw their claim from the portal. Further, if a claim is withdrawn from the portal on the grounds of value, but then the claim eventually settles for £25,000 or less, the EL/PL PAP should prohibit claimants from recovering any costs other than their portal costs.

Response to question 35 (continued)

• We would welcome more emphasis on pre-action quantification of claims where this is appropriate, the focus of the parties should remain on collaboration rather than one party undertaking significant quantification work without the other party's knowledge. It is important to ensure that quantum investigations are necessary and proportionate to the value of the claim and the issues.

Response to question 53

• The timeframe for the letter of response under the PI PAP and EL/PL PAP should be extended. There is currently no formal mechanism to obtain an extension to this period. If the defendant is unable to provide a timely letter of response in accordance with the EL/PL PAP then claim falls out of the Claims Portal process and fixed costs do not apply.

• We also recommend the 10 day period from settlement within which defendants are required to pay damages and fixed costs should be extended to 14 days reduce the administrative burden on defendants associated with making such rapid payments.

• At present, defendants receive no notification via the Claims Portal in EL/PL claims when claimants have applied for a stay. The EL/PL PAP should include a requirement that defendants be notified of applications for a stay.

• Claims for psychiatric injury, such as stress and anxiety, valued at between £1,000 and £25,000 and allegedly caused by a breach of the claimant's data protection rights by an NHS Trust are often brought under the Media and Communications Claims PAP. However, we consider it would be more appropriate for such claims to be brought under the PI PAP and to be dealt with via the Claims Portal. We would welcome clarification of the PAP under which it is most appropriate to manage claims for personal injury arising from data protection breaches.

About NHS Resolution

NHS Resolution (formerly known as the NHS Litigation Authority) is an Arm's-length Body (ALB) of the Department of Health and Social Care (DHSC). One of NHS Resolution's main functions is to administer clinical and non-clinical indemnity schemes for meeting losses and liabilities of NHS bodies in England. The main scheme of relevance to this call for evidence is the Clinical Negligence Scheme for Trusts ("CNST"), which covers clinical negligence claims in relation to incidents taking place on or after 1 April 1995. From 2019, GPs and their staff have also been covered by a new indemnity scheme for general practice which operates on a centrally funded (non-membership) basis.

NHS Resolution has significant expertise in handling pre-action and litigated claims. We have developed a mediation service and are also working collaboratively with claimant lawyers to test different methods of dispute resolution to avoid unnecessary court proceedings. In 2020/21, we resolved 74% of our cases pre-litigation and wish to go further, drawing on the increased collaboration during the pandemic.