

View results

Respondent



Time to complete



This is a public consultation by the Civil Justice Council.

The consultation is open until 24 December 2021 at 10am. **UPDATE - The CJC's consultation on pre-action protocols has been extended for 4 weeks. The consultation will close on Friday 21 January at 12 noon.**

Consultees do not need to answer all questions if only some are of interest or relevance. This form contains branching so you will be able to skip sections that you do not wish to respond to.

Answers should be submitted through the online form. Please note that responses are limited to 4,000 characters per question (around 650 words). Any individual question response longer than 4,000 characters will be cut off at 4,000 characters. If you want to supply any response not in text form please email cjc.pap@judiciary.uk for details on how to do so.

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
- ☐ Other

6. Your job title

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

- ☐ Claimants
- ☒ Defendants
- ☐ Not applicable

8. Your organisation

9. Are you responding on behalf of your organisation? *

- ☒ Yes
- ☐ No

10. Your email address *

Questions relevant to all protocols

11. Do you agree that the Overriding Objective should be amended to include express reference to the pre-action protocols (PAPs)?

- ☐ Yes
- ☐ No
- ☐ Other

12. Do you agree that compliance with PAPs should be mandatory except in urgent cases? Do you think there should be any other exceptions generally, or in relation to specific PAPs?

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.

No. This will only increase costs and create satellite litigation.

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.

No. In the absence of such a concept in English Law, disputes are bound to arise, which will again increase costs and create satellite litigation.

16. Do you agree that, unless the parties clearly state otherwise, all communications between the parties as part of their good faith efforts to try to resolve or narrow the dispute would be without prejudice? Invitations to engage in good faith steps could still be disclosed to the court demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36.

- ☐ Yes
- ☐ No
- ☐ Other

17. Do you agree that there should be a requirement to complete a joint stocktake report in which the parties set out the issues on which they agree, the issues on which they are still in dispute and the parties' respective positions on them? Do you agree that this stocktake report should also list the documents disclosed by the parties and the documents they are still seeking disclosure of? Are there any cases and protocols where you believe the stocktake requirement should not apply? In giving your answer please also include any comments you have on the Template Joint Stocktake Report in Appendix 4.

No. Only once the case has been properly pleaded will it be possible to identify the points truly in issue, so producing a list of issues before that point is unlikely to be of any assistance to the parties or the Court and will only serve to increase costs.

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?

No. The current regime for imposing costs penalties is sufficient and putting in place any other regime will only serve to increase disputes, the incurrence of costs and satellite litigation, which will waste court time.

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.

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?

No, particularly when the proposal is to limit the time that a defendant has in which to prepare the Letter of Response below the 3 months currently permitted by the Professional Negligence Protocol.

Very little may be known about the issues in the case. To put in place a mechanism which punishes only one party to a dispute when their case develops, as the issues emerge, during proceedings appears to us to be a clear breach of the principles of natural justice.

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?

For claims against professionals, RICS believes that requiring the claimant to disclose the expert evidence upon which they rely in bringing their claim will assist the parties in identifying the key issues between them at the pre-action stage. This is likely to bring about earlier settlement to prevent claims reaching litigation, which will save costs for all parties and avoid wasting the Court's time.

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.

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?

RICS strongly believes that requiring a response within 14 days is likely to undermine the purpose of the Pre-Action Protocols, as the defendant is unlikely to be able to consider the issues and provide a meaningful response in that period.

Where expert evidence is required, 42 days is unlikely to be adequate to allow reporting to insurers, and where necessary the instruction of defence counsel, the instruction of any expert, their investigations/inspection, reporting back to the defendant/the defendant's solicitors and preparing a response. The claimant will have had months or even years to prepare their claim. Forcing defendants to respond in very short timescales will put them at a significant disadvantage. Unless the parties agree a longer timeframe, it will inevitably lead to the defendant sending a Letter of Response that amounts to a mere denial of liability, with the parties either then agreeing to a more realistic timeframe for a further, properly-investigated response, or the claimant issuing proceedings when the issues have not been properly investigated or debated, which is exactly what the protocols are designed to prevent.

The proposals appear to be working on the basis that any delay at the pre-action stage is to be prevented. Our view is that there should be no urgency to push the parties into proceedings, which is what the proposals will do. Any delay on the part of the defendant can be reflected in the award of interest to the claimant.

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'.

Save for the disclosure of expert evidence, suggested above in question 26, extending the requirement to give disclosure will only cause the parties to incur more costs, which will put the parties further apart and therefore make the claim harder to settle.

The current PAPs already include requirements to disclose key documents, which are generally adequate to address the needs of the parties. If any further disclosure is required, then either party can make an application under Rule 31.16 of the Civil Procedure Rules. It is therefore unnecessary to increase the disclosure burden on the parties at this stage. If there was to be any extended requirement for disclosure, there should be a mechanism by which a defendant can recover the costs of that procedure, similar to that set out in Rule 46.1 of the Civil Procedure Rules.

Personal Injury Protocols

The sub-committee were very conscious, as a final point worth stressing, that there is a need for evidence to underpin any changes that might be suggested in response to the questions below.

28. Do you wish to answer questions about the personal injury (PI) protocols? *

- ☐ Yes
- ☒ No

Housing Protocols

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

- ☐ Yes
- ☒ No

Judicial Review Protocol

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

- ☐ Yes
- ☒ No

Debt Protocol

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

- ☐ Yes
- ☒ No

Construction and Engineering Protocol

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

- ☐ Yes
- ☒ No

Professional Negligence Protocol

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

- ☒ Yes
- ☐ No

34. 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
- ☐ Other

Proposed low value small claims track

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

- ☐ Yes
- ☒ No

Any other comments

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

Q.58 Would you support aligning the time limits for responding to the pre-action letter of claim to those suggested for revised general PAP (14 days with a right to extend for a further 28 days to obtain further information)?

RICS does not support the proposed amendments of the response times, we believe that this would further weaken the position of professional defendants facing negligence claims. The nature of professional negligence claims for RICS members are inherently complex and often require time to investigate. As outlined in our response to Q.26, we believe there is no urgency to rush parties into proceedings. The claims brought against RICS regulated professionals are often made many years after the work has been carried out, adding to the complexity and time needed to investigate.

