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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More options for Responses

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 your response is anonymous we will not include your name in the list unless you have given us permission to do so.

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

Keoghs LLP

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)?

- [x] 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 agree and consider that making all PAPs mandatory – with proper sanctions for failing to comply – is vital to ensuring their success. Parties should not have the ability to pick and choose when to comply with PAPs and what elements of PAPs they will comply with. Proper and full compliance with the PAPs will ensure that cases are resolved in a timely manner and as many cases as possible avoid progressing to court.

We are aware that several PAPs have an express carve out for urgent cases and consideration should be given as to whether any of the new PAPs, such as an abuse PAP, require a similar carve out.

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)?

- [x] 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.

The case for a new summary costs procedure to resolve costs disputes on pre-action settled cases appears to be based upon a desire to eliminate a "perverse incentive" not to settle cases at the pre-action stage because to do so would prejudice a party's costs position.

We consider the creation of a new summary costs process is likely to create frictional costs litigation. At present, many small claims are settled without the need for legal representation. They are handled by the litigants themselves and no legal costs are incurred. It is vital this status quo is preserved.

There is a real risk that a new jurisdiction for recovery of pre-issue costs will encourage lawyers to engage in small claims to argue they are costs bearing. It will increase the burden on the court system, without any discernible benefit.

Premature litigation occurs in low value protocol claims with claimant solicitors seeking to obtain post issue stage fixed recoverable costs (FRC). This perverse behaviour was sparked by the creation of the fixed costs regime in 2003. Jurisprudence shows that it sporadically recurs over time and the creation of a new jurisdiction will fuel this now rare behaviour.

Keoghs does not believe there are "perverse incentives" in the current system which discourage defendants from settling.

Small claims track cases - Some claimant solicitors refuse to settle claims unless costs are paid. They issue proceedings purely to put a defendant to the expense of having to pay small claims track fixed costs and issue fee as well as their own solicitor's costs. This is not a "perverse incentive" but a "perverse behaviour" designed to penalise a defendant into paying costs on future claims where there is no entitlement.

The creation of a new jurisdiction will legitimise this perverse behaviour and fuel solicitor engagement in small claims to obtain costs where there is no entitlement.

Fast Track and intermediate cases - Upon pre-action settlement the entitlement to FRC arises under a contract of compromise or by way of acceptance of a Part 36 offer.

Defendants have an incentive to settle as early as possible so as to avoid paying FRC of the post action stages. Conversely, claimant solicitors are incentivised to issue proceedings to obtain higher post action stage FRC rather than settle pre-issue. This perverse behaviour is well known and is controlled by a refusal to pay the post action fixed costs and a finding of premature litigation. It will be eradicated by the introduction of prescriptive PAPs as conduct by way of non-compliance restricts a claimant to pre-action stage costs.

Whilst there is no jurisdiction for an assessment, the court has readily resolved any dispute over quantification by way of the application process. [Nema v Kirkland [2019] EWHC B15 (Costs) applied]

This is a simple application procedure which works well and resolves the issues between the parties.

Multi track claims - There are no "perverse incentives" in the current system of non FRC cases which discourage defendants from settling. In practice, defendants recognise and agree to pay costs to be assessed on all cases where the court would order costs to be paid.

Usually costs can be agreed but the Part 8 costs only procedure is simple and works well. An order for assessment can be obtained without a hearing.

Settle without agreeing an entitlement to costs? - The agreement of an entitlement to costs is inextricably linked to settlement of the underlying claim. It is extremely rare for the parties not to agree upon entitlement and invariably this arises where one party considers it unjust for the usual Part 36 consequences of acceptance to apply. It follows that the volume of cases is so small that further consideration of a summary assessment process is not needed.

No right to appeal - The government is to extend FRC and implement the extension through a redrafted Part 45. This extension will cause a similar if not more appellate costs 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 are there are any cases and protocols in which it should not apply.

Keoghs agree to the inclusion of a good faith obligation in PAPs subject to two important considerations:

The good faith obligation canvassed in the CJC report on mandatory ADR published on 12 July 2021 is non-prescriptive. It does not mandate any particular dispute resolution process or require the parties to compromise their claims or even offer to do so.

Instead what it requires is for the parties to engage with each other, having exchanged the key information and evidence about their dispute, with the aim of exploring whether resolution is achievable.

Each work type protocol needs to require the parties to provide the key information and evidence so that each party understands the other's case prior to the issue of proceedings. It is only when they have this understanding that an opportunity for resolution is created and the parties can properly explore resolution.

Currently, a significant proportion of litigated claims settle post–issue, shortly after the claimant's claim on quantum is particularised. These cases often settle without an admission of liability or causation based on the parties' assessment of the merits of the case.

These cases do not settle pre-issue because the existing protocols do not create an opportunity for settlement as quantum is not required to be particularised. The issuing of proceedings can be avoided if a claimant is required to particularise the quantum claim within each PAP.

Many cases settle without any admission of the claim being made. For this reason there must be a mandatory offers process after the "stocktake" meeting where the parties must confirm the amount of any settlement offer or confirm they have no offer to make.

It should be recognised that the value of a claim may well make the cost of some methods of dispute resolution disproportionate and parties should not be sanctioned for failing to act in good faith in not using them in these circumstances.

In our recent response to the Ministry of Justice's recent call for evidence on dispute resolution we set out our views on the potential unintended consequences of mandatory dispute resolution, with the same risking a more 'have a go' attitude which could lead to more spurious claims being progressed, in the hope that defendants might feel forced to make offers in claims, as a result of the threat of sanctions for not engaging.

Parties should have the right to pursue/defend a case and have the evidence heard by a Judge. Incentivising dispute resolution by the way of cost sanctions may threaten this.

The Government has recently confirmed that it will act to extend Fixed Recoverable Costs in civil cases. We believe that this will act as a catalyst for a change in behaviour, and as such these new fixed costs reforms should be taken into account as changes to the PAPs are considered.

These fixed costs will introduce a commercial dynamic to cases, and the vast majority of civil justice claims should fall within those value brackets once the costs have been extended (anticipated by October 2022).

Some types of claim may have a particular dispute resolution scheme in place and some forms of dispute resolution may be better suited to particular types of claim, for this reason it would be helpful if each PAP provided guidance on how parties might best comply with this obligation.

There are some types of claim where mandatory dispute resolution would not be appropriate, for example where parties are not reliant on third party funding to meet a claim and where there are allegations of fraud and/or fundamental dishonesty. Rather than engaging with dispute resolution these types of cases are best resolved through proceedings with oral evidence given on oath.

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 during progress of a claim to establish what is needed to facilitate settlement of a case, and what can be done to encourage the provision of required evidence. We consider a joint stocktake report to be a vital tool in the facilitation of dispute resolution and while stocktakes are present in a number of PAPs they are rarely utilised. We consider they should be included in the majority of PAPs and the need to comply with them enforced.

We consider that for complex claims the joint stocktake report should be followed by the provision of judge issued pre-action directions if required, which would also ensure a greater likelihood of dispute resolution prior to proceedings being issued, and therefore ultimately save court time.

We agree that the joint stocktake proposal should not apply to the judicial review protocol or the proposed low value small claims track protocol.

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) Whether courts should have the power to strike out a claim or defence to deal with grave cases of non-compliance?

We agree that courts should have this power. We consider that without the proper sanctions for non-compliance the PAPs lack the necessary 'teeth' they require. We consider that the sanction of striking out a claim should be reserved for only the most grave of cases of non-compliance, with the usual sanction for non-compliance of elements of PAPs being cost sanctions.

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?

We do consider that the issue of PAP compliance should be expressly dealt with in all Directions Questionnaires. Putting the issue of compliance with the PAPs within the Direction Questionnaire incentivises parties to consider this a vital component of dealing with any claim.

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?

We agree that PAPs should include this. As above, including this within the PAPs provides a clear steer to parties of the importance of compliance, as well as paving the way for judicial understanding of the need to impose proper sanctions for non-compliance.

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?

There is currently no unified approach across the court service as to whether parties are sanctioned at all or properly for non-compliance with the PAPs, and if they are sanctioned – what sort of sanctions are imposed. There should be a unified approach for sanctions for non-compliance with the PAPs. With clarification contained within the PAPs that the decision on whether to impose a sanction will be taken at the start of proceedings, and therefore not impacted by the result of the particular claim, unless there is good reason to postpone the issue to the end of proceedings.

Greater consistency in application and enforcement of sanctions for non-compliance with the PAPs would ensure that parties have a clear understanding of what sanctions will be applied to particular circumstances in each claim.

e) Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why?

We have no particular comment on this point.

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.

Whilst it is necessary for PAPs to include particular legal and technical terminology we consider that a great deal can be done to simplify the language used within the PAPs so that plain English is used wherever possible to improve engagement and understanding by vulnerable parties.

In addition the development of additional online portals, such as the OIC portal for whiplash claims, provides a framework where litigants can be taken through the claim process step-by-step, with on and off screen support. Such measures can improve the claims process for vulnerable parties and litigants in person.

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?

We do not agree that this rule should be adopted in other pre-action protocols. As the interim report references - 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 proportionately. There can be many reasons why a defendant's position can change from the time a reply is sent to the pre-action letter of claim, to when a defence is filed, particularly following receipt of disclosure and after obtaining witness statement evidence, when the facts of a claim are fully realised.

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 possible for particular PAP steps to replace or truncate procedural steps within the litigation process and that permitting such may reduce court time and costs, which is particularly necessary at this time when there is a significant court backlog. We consider that necessary safeguards should be put in place to ensure that this process is only permitted in clams where the relevant PAP has been fully complied with, and that it does not permit parties to avoid complying with necessary procedural steps where the provision of additional evidence for example is required.

We agree with the interim report's suggestion that where parties have complied with the relevant PAP on disclosure, it should not be necessary for parties to provide any further disclosure, unless there is a need for additional specific disclosure, which the parties should be able to identify.

We also agree that in straightforward cases, it should be possible for a party to substitute a conventional pleading with their letter of claim or reply to the same, if they so wish.

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 PAP being introduced and a requirement that if there is no specific PAP which applies, or where the parties are unclear on which PAP should apply, then the parties must comply with the general PAP.

However, the introduction of such a general PAP should not be seen as a substitute for a specific PAP where one applies. Parties should not be able to pick and choose which PAP they comply with in claims as this could lead to confusion, and non-compliance with importance aspects of specific PAPs.

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?

Whilst a timeframe of 14 days for responding to a pre-action letter of claim may be possible in the most straightforward of claims, where investigations have already been carried out, we are concerned that for many cases this timeframe may be too tight depending on how detailed the pre-action letter of claim is, whether any early investigations have been carried out, the availability of any evidence or witnesses, the timeframe from incident to claim and the level of complexity of the claim.

We consider that it would be better for a timeframe of 28 days for response to the pre-action letter of claim to be provided for, with a specific note to the fact that a response should be provided sooner if at all possible. We consider such a timeframe to be more in-line with other timeframes, such as that for the RTA Small Claims Protocol which provides a timeframe of 30 days for accepting a claim within the OIC portal, after which the defendant has a further three months to investigate the claim.

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'.

Early comprehensive disclosure, including disclosure of any known adverse documents, is one of the most important tools for ensuring early resolution of claims. We consider it most important that the general pre-action protocol should incorporate a standard for disclosure and that this should include disclosure of 'known adverse documents'.

We agree to the wording as set out in the draft general pre-action protocol:

'The claimant's and defendant's letters must disclose and attach any key documents on which the parties rely in support of their claims or defences (e.g. a copy of the contract, receipts) and the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

All parties must provide sufficient information to enable each party to understand each other's position and to meaningfully engage in good faith efforts to resolve or narrow the dispute.'

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?

We agree that all PI protocols should include an obligation to complete a joint stocktake report/list of issues.

We consider it more beneficial that a joint stocktake report/list of issues is completed following attempts at resolution, when it is more likely that outstanding issues are narrowed. The joint stocktake report/list of issues should be filed with the Directions Questionnaire to hold parties accountable to the court.

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. Whilst there are similarities for the core principles to be included for both fast-track and multi-track cases, there are also key differences which arise for more complex and higher value claims which need to be addressed in the PAPs.

a) How could there be effective, referencing to and integration with the Serious Injury Guide where appropriate?

Without sight of more detailed proposals for amendments to the Serious Injury Guide we are unable to comment in any real detail on integration with the personal injury protocols. However we agree that there is benefit to considering the wider roll-out of The Serious Injury Guide methodology of planned route mapping meetings, which encourages discussion/resolution of outstanding issues in a progressive manner.

b) How can the current protocol be updated to reflect moderately severe cases as well as catastrophic injury cases despite workflows for each being significantly dissimilar?

Should an overarching personal injury protocol be adopted, we consider this could support greater sub-division of personal injury cases, including a separate section for lower value multi-track claims. We consider further consideration will be needed as to whether sub-division is based on claim value, or claim type.

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?

In general we consider that there is merit on more focus within the personal injury PAPs on rehabilitation and ensuring claimants identify what rehabilitation they consider would be beneficial, and the cost of the same where appropriate for the defendant to consider. We are not sure that integration of the rehabilitation code is necessary and might overcomplicate the personal injury PAPs. Referencing several external codes/guides can be confusing for vulnerable parties and litigants in person when we note an above question about how reform of the PAPs can better support vulnerable parties.

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?

The process for disclosure is a vital part of the pre-issue journey for all claims. We agree that there should be equal obligations on claimants and defendants to give reasons why they consider a document is not relevant or should not be disclosed and that having equal obligations in this regard will encourage a more "cards on the table" approach to litigation at the outset of a claim.

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?

There is currently no obligation on a claimant to disclose medical evidence they obtain prior to the issue of proceedings. We do consider that more could be done within the PAPs to deal with this issue and encourage more openness when it comes to the obtaining and disclosure of medical evidence. We consider that at a minimum claimants should disclose that they are being examined and by whom, with encouragement for increased disclosure of medical reports obtained pre issue.

Where claimants do not wish to disclose medical evidence obtained pre-issue there should be the provision for facilities for the defendant to have the claimant examined by an expert of the same or similar expertise.

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?

If it is necessary to obtain expert evidence the parties should consider a single joint expert wherever possible, with the costs shared equally. Whilst in the most serious and complex of cases this may not be appropriate, it should be the standard for the majority of personal injury cases.

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?

We would support the formal incorporation of a standard of disclosure. The Disclosure Pilot Scheme was run in the Business and Property Courts, including the Technology and Construction Court. We have found the provision of Initial Disclosure accompanying the parties' pleadings to be very useful in advancing the parties understanding of each other's cases. We consider that the early provision of comprehensive (proportionate) relevant disclosure at the pre-action stage would significantly assist in achieving the early resolution of claims. We support the inclusion of the proposed wording set out in the draft general pre-action protocol:

'The claimant's and defendant's letters must disclose and attach any key documents on which the parties rely in support of their claims or defences (e.g. a copy of the contract, receipts) and the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

All parties must provide sufficient information to enable each party to understand each other's position and to meaningfully engage in good faith efforts to resolve or narrow the dispute.'

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
- ◯ Other

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.

Comments on the need for a credit hire PAP

Although we acknowledge that the interim report has not identified a requirement for a credit hire PAP, we would take the opportunity to highlight what we regard as a clear need for the CJC to review this issue.

Having regard to Keoghs volumes of credit hire claims handled and our market share, we estimate the total number of claims issued in the County Court which include a claim for credit hire to be in the region of 35,000 – 40,000 per year. This, we assume, represents a considerably greater volume than many of the claim types for which there is already a specific PAP. Furthermore, we anticipate that the volume of credit hire claims is likely to increase in the short to medium term, due to a number of converging legislative and market factors.

The majority of litigated credit hire claims do not involve a dispute on liability, but require a determination on quantum only; most commonly as to the recoverable rate of hire. This is largely because a feature of the common law rules governing the assessment of credit hire damages is that, ordinarily, the measure of damages recoverable will depend on whether or not the claimant can demonstrate that they are 'impecunious'; that is, that they could not have afforded to hire a replacement vehicle from a normal hire company at non-credit rates. This necessarily requires consideration of a claimant's financial means at the relevant time.

Whilst there is now provision within the CPR PD 16 for "relevant facts" in relation to impecuniosity to be pleaded in the Particulars of Claim, this is in our experience routinely ignored without sanction. Moreover, it is clearly desirable and in accordance with the overriding objective for the position to be addressed at the pre-litigation stage. The existing general Practice Direction - Pre-Action Conduct and Protocols requires 'key documents' to be exchanged before proceedings are issued. Although we take the view this ought to apply to impecuniosity documents in credit hire cases, and although there has been judicial support for this interpretation, it is routinely ignored without sanction and the position remains that in the vast majority of credit hire cases insurers are blind to the material which determines the measure of damages until after proceedings are issued.

In our view, the introduction of a specific credit hire PAP, with a requirement for insurers to exchange simple documentary BHR evidence and claimants to disclose specified financial documents pertaining to their financial means in reply, with specific sanctions for failing to comply, would represent a positive step forward with the potential to substantially reduce the volume of contested litigation in this area. We would warmly welcome the opportunity to engage with the CJC further in relation to this issue.

Comments on fixed recoverable costs

PAPs provide a process for settlement of claims prior to the issue of proceedings. However, they do not address the process for resolution of any entitlement to costs.

For fixed recoverable costs claims, each protocol needs to include a process and a standard letter for a claim for FRC with the following criteria:
• It should not be marked "without prejudice";
• It should contain a certificate that the costs claimed do not exceed the party's liability to pay their own solicitor;
• It should set out the amount of fixed recoverable costs claimed;
• It should list the disbursements claimed;
• It should set out the amount of VAT claim (If the party cannot recover VAT as input tax from HMRC);
• It should be accompanied by vouchers for all disbursements.

For hourly rate costs claims, each protocol should require the service of an n260 Statement of Costs together with vouchers for all disbursements.

Every PAP should require service of the FRC costs letter or the n260 Statement of Costs within 21 days of settlement of the substantive claim.