

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.

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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 provide an anonymous response 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 *

Michael

3. Last Name *

Watson

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

N/A

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?

No - this would unduly constrain the parties freedom of manoeuvre and in practical terms protocols can include provisions which may be drafted with the best intentions but which contradict the law - for example in the Dilapidations Protocol how could the requirement to present a claim within 56 days of the end of a lease be mandated where the limitation period might be 12 years or if the landlord is going to bring a claim based on the actual cost of works incurred it might take a number of years to carry out the works and crystallise the claim.

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.

Yes - a clear mechanism for resolving costs issues where a pre-action part 36 offer is accepted would be helpful. This could be by way of application to a district judge / master depending upon the sums involved.

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.

Keep it simple - introducing such obligations then just opens up a whole new field of argument about whether those obligations have been complied with - and that of itself leads to potentially further disputes. Protocols should be no more than straightforward guidance as to actions that in many cases might be sensible.

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
- ☒ There should be no good faith obligation - see tr

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.

When I first started practising discovery was a simple process and preparation for a directions hearing was relatively simple and inexpensive. We now have the disclosure pilot scheme and the process of costs budgeting both of which have greatly (phenomenally) increased the cost and time in properly preparing for a Case Management Conference. Continually it seems more and more procedural requirements are being bolted on and written into the CPR. Now bringing in mandatory requirements for stocktake reports will just add another layer of work and expense.

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?

Pre action protocols should be just that - pre-action. Once court proceedings are issued the courts should focus on progressing those proceedings as quickly and efficiently as possible in order that the court can do that which it is mandated to do and decide issues between the parties based on evidence. The court should not be there to mediate or facilitate settlement but rather should focus on giving judgments. Once that process has been completed then as is the case now compliance with a protocol can be a relevant factor in relation to costs but why should a party who disregards a protocol and launches straight into proceedings seeking to have their rights at law upheld run the risk of justice being denied because of failing to do certain things prior to actually even bringing the court into play. The courts should not waste time raking back over pre-action conduct but should just get on with the job of deciding cases in the first instance. As the report says the aim should not be to punish defaulting parties but to encourage routine compliance accepting that there may be good reasons for non compliance - something perhaps better considered after a trial.

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.

No - the relevance of the vulnerability is something that can be considered in relation to issues of compliance. Protocols just need to be kept as simple and straightforward as possible for the benefit of all parties.

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 - cases evolve as more facts come to light and such a provision then opens up a whole new area for arguing about what was said and why / whether it was justifiable at the time. If the matter is not resolved at the protocol stage then the courts should just focus on progressing to judgment as quickly as possible by looking forward not backwards.

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?

No - the protocols should encourage the exchange of information etc but we should not become bogged down with them. There is a risk that they actually become a first phase of litigation with pleading and disclosure taking place prior to proceeding being issued - this feels like the courts trying to offload their duties. The focus should be on managing efficient litigation not trying to push everything into a pre-action process.

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.

A simple general pre-action protocol offering guidance as to conduct is sensible and indeed has been workable for many years however the drafting in the proposed protocol at appendix 4 seems lengthy and likely to just add more complexity to the process of litigation - see comments previously regarding Disclosure Pilot Scheme and Costs budgeting. In many cases much time and expense is incurred preparing costs budgets that simply do not come to be looked at again. Over complexity in pre-action conduct requirements may also increase the cost burden when really the parties should focus on setting out their position, providing relevant information to support it and then if that does not enable the matter to be resolved they should plead their case and move as swiftly towards trial - indeed the threat of trial is more of a driver to settlement in many cases than detailed pre-action exchanges etc.

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?

No - that is much too short. 28 days as a minimum. If any response is to be meaningful there must be ample time to respond.

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'.

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

Proposed low value small claims track

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

☐ Yes

☒ No

Any other comments

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

We must be very careful of making the process of litigation more complex than it needs to be because complexity (both before proceedings are issued and afterwards) leads to increased expense which limits access to justice for some parties. Keep it really simple would be my preference, focus on the dispute and avoid anything that gives potential for satellite litigation.

