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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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 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
- ◯ Other

6. Your job title

[redacted]

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

- ◯ Claimants
- ◯ Defendants
- ◯ Not applicable

8. Your organisation

DLA Piper UK 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)?

- (●) 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 consider that the existing cost consequences of non-compliance are sufficient and it is unnecessary to make compliance strictly mandatory. There may be a number of valid reasons why a PAP has not been complied with, for example where parties have already engaged in detailed correspondence and to send further formal pre-action letters would only serve to increase costs without significant benefit.

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.

On balance, we would not support the creation of a costs summary procedure. If courts were to be granted jurisdiction to consider pre-action costs, we expect this would in fact disincentivise defendants from settling at the pre-action stage; there would no longer be an incentive to settle in order to avoid the costs of an issued claim. We also foresee the procedure would encourage speculative pre-action steps being taken if opportunist claimants believe there is an opportunity to recover costs. We are of the view that the existing option for a claimant to issue costs-only proceedings to recover pre-action costs is sufficient and only requires a short application at limited cost. There is also a concern as to whether a judge would have sufficient detail to be able to make decisions on pre-action costs on a summary basis.

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 do not consider that the naming of this step as 'good faith' would actually add anything beneficial or tangible. There already exists the requirement for parties to comply with the overriding objective and to act reasonably – which is considered sufficient. We feel strongly that the framing of this obligation as 'good faith' is in fact highly likely to lead to increased tension between the parties; we anticipate that allegations of bad faith would be made if a party is not happy with the steps taken. This could lead to further applications being made to the court, with resultant satellite litigation and adding to the court's burden. The good faith steps themselves as outlined in the draft PAP seem sensible – there is already an obligation for parties to consider ADR at the pre-action stage.

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
- (●) it should remain for the parties to decide whethe

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 can foresee that completion of this report will be contentious (even if it is not intended to be) and an administrative burden which will incur significant upfront costs. In our experience, agreeing a List of Issues with your opponent can take significant time. In addition, we do not see the list is necessary at the pre-action stage, nor are we clear what it would achieve. The issues in dispute should be set out in the correspondence. We do not expect that setting out the issues in a report will in fact assist in narrowing any issues or be a step that will actually change the mind of a party from issuing a claim. If the report is to be introduced, then there should be an emphasis on the report being brief and the option for the parties to file their own completed reports rather than an agreed report. We do not see it necessary to list the documents that have been exchanged during PAP as these should be detailed in correspondence.

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) Such a power would be too severe; there are many reasons why a protocol may not have been complied with, and there are already costs sanctions which can deal with issues of non-compliance. We consider the introduction of this power would take up more court time with contested hearings about the level of compliance. Non-compliance can be addressed in an application for an extension of time for a defence. b)We consider compliance can be dealt with in the Directions Questionnaire/ Case Management Information Sheet. c) We accept that compliance issues can be lost if they are left until cost decisions after a trial. The CMC would seem to be an appropriate time to consider compliance issues and appropriate sanctions, however, the time available at a CMC is already very limited and we do not expect there will be time for a judge to consider detailed arguments over compliance and to make formal costs decisions. If the issues are to be raised at the CMC stage, one option could be for the court to record a note in the CMC order that there are compliance issues to consider when it comes to costs decisions.

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, there can be many reasons why a defendant adopts a different approach in their defence – there could be new information, documents etc which come to light after more through investigations are undertaken to plead a defence. There could also be a disagreement as to whether the defendant has in fact adopted a different position. A new requirement could be introduced for a defendant to explain why their position has changed.

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, we do not consider that lists of documents or of issues should be exchanged at the pre-issue stage.

## 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.

Yes

26. Do you agree parties should have 14 days to respond to a pre-action letter of claim under the general PAP, with the possibility of a further extension of 28 days where expert evidence is required? In cases of extension, the defendant would still be required to provide a reply within 14 days disclosing relevant information they had in their possession and confirming that a full reply would be provided within a further 28 days. Claimants would have 14 days to respond to any counterclaim. If you do not agree with these timeframes, what timeframes would you propose?

We do not agree with these timescales - they would not suit High Court disputes. Extensions to the timescales for the reply should not only take into account the need for expert input, but also the size of the parties involved, the complexity of the dispute and the time that has elapsed since the matters in dispute took place. An extension of only 28 days is rarely sufficient for complex, high value litigation. It can take several weeks for large organisations to retain lawyers, to locate and gather the information required for a response letter to be prepared. If the parties are outside of the jurisdiction this can impact the need for further time. The parties should have the flexibility to able to agree between themselves what is an appropriate length of time for a response given the individual circumstances. It would be helpful for the rules to set out the guidelines in which a longer time for a reply will be considered appropriate.

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'.

Pre-action disclosure should remain governed by the rules under CPR 31.16, with the PAP setting out that key documents should be exchanged with pre-action correspondence – being documents which will enable the parties to consider the points raised in the letter of claim/ response. It would be potentially onerous and disproportionate to include any wider disclosure obligations at the pre-action stage, with the risk that wider obligations would be mis-used. We consider that Paragraph 9.2 of the PDPAC (which was in force until 6 April 2015) should be re-introduced. This expressly provided as follows: "Documents provided by one party to another in the course of complying with this Practice Direction or any relevant pre-action protocol must not be used for any purpose other than resolving the matter, unless the disclosing party agrees in writing." This should be re-instated to give parties who are providing documents under the PAP comfort that the documents are only to be used for the purposes of the dispute. Currently, parties have to obtain an express undertaking that documents disclosed pre-action will be used for no purpose other than the proceedings then contemplated. This only causes delay in providing documents and progressing pre-action steps.

## 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

31. Do you agree or disagree with the approach set out by the subcommittee in chapter 4?

For the reasons outlined below, we agree in part with the approach set out by the sub-committee in chapter 4. As a firm, we frequently act for public authority defendants in complex and high-profile judicial review proceedings. In respect of such claims, public authorities face unique challenges in responding to judicial review pre-action correspondence. Invariably, the decisions under challenge involve a disparate range of officials across a number of different entities, all with competing operational and legal interests. In such circumstances, complying with the "good faith obligation" (as it is described in chapter 4 and appendix 8) is likely to be highly challenging given, relative to other forms of civil litigation, the short time-scales and expedited nature of judicial review litigation. The sub-committee does not appear to have properly appreciated these difficulties. Moreover, judicial review, for the reasons outlined in chapter 4 and appendix 8, is a unique jurisdiction subject to a permission stage. This permission stage acts as a filter blocking unmeritorious claims. From a public policy perspective, it is unclear why, at the pre-action stage, a prospective claimant should be entitled to extensive access to what, in high-profile claims, is likely to be highly sensitive disclosure in the form which would at present have only been made available once a claim has been issued and/or once a claim has been granted permission (and thus judged to be arguable). The general public has an interest in ensuring that public authorities are able to freely canvass ideas and develop policies internally. This is likely to be inhibited if such processes are exposed, through disclosure, to a prospective judicial review claimant, pursuant to the good faith obligation, at the pre-action stage before the Court has been able to determine whether the proposed claim is arguable. Finally, if this aspect of the approach is pursued, then we suggest that the CPRC be invited to amend CPR 31 and/or CPR 54 to extend the collateral undertaking obligation to documents disclosed pursuant to the good faith requirement. This is especially important in judicial review litigation because, as noted above, the disclosure is often highly sensitive.

32. Are there any any factors specific to JR that should be considered?

As we have noted above, the sub-committee does not appear to have fully appreciated the practical implications of imposing the good faith requirement on public authority defendants. We would encourage the CJC to consider the consultation responses of public authorities carefully.

33. Do you agree or disagree that there should continue to be a separate and bespoke PAP for judicial review?

- (●) Agree
- ( ) Disagree
- ( ) Other

34. What elements of the proposed General Principles in Chapter 3 do you consider it is possible and/or desirable to include in the JR PAP?

Subject to our concerns (outlined above) regarding the "good faith duty", we agree with the approach outlined at paragraph 50 of appendix 8. The principles as described in that paragraph strike us as sensible given the unique nature of judicial review litigation. We would reiterate the importance of avoiding a 'stocktake duty' and/or imposing too stringent an obligation to pursue ADR type measures. As noted throughout chapter 4 and appendix 8, judicial review claims frequently involve matters which are, by their very nature, immune to early settlement since they involve points of law which only the Court, pursuant to its supervisory jurisdiction, can resolve.

## Debt Protocol

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

- ( ) Yes
- (●) No

## Construction and Engineering Protocol

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

- ( ) Yes
- (●) No

## Professional Negligence Protocol

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

- (●) Yes
- ( ) No

38. 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

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

- ◯ Yes
- ◉ No

## Any other comments

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

Overall, we are supportive of the CJC's aim to ensure that pre-action protocols are used effectively, in order to avoid, if possible, claims reaching the courts. As explained in our responses, we are concerned that a number of the new steps proposed could in fact have the opposite effect to what is intended. They are likely to lead to parties incurring additional costs and result in challenges which may lead to applications being made to the court, resulting in satellite litigation taking up further court time and adding pressure to judicial resources. Notably, the recent reforms to PD51U have lead to increased time and costs being incurred before the disclosure phase. Further, we are concerned that introducing a summary costs procedure could lead to less defendants being willing to settle. With regards to portals holding PAP correspondence - we consider that such correspondence should remain as between the parties as steps prior to the court's involvement, and only be referred to the court as and when necessary. If portals were set up, we consider this would be a further step incurring costs before a case is issued, and we query whether the courts would have capacity to consider PAP information in any detail. Many claim letters are wide ranging – they lack the precision of pleadings. Making pre-action correspondence automatically available to the court will not improve its ability to dispose of cases quickly and fairly. The present system of pre- action correspondence appearing in application bundles where relevant is sufficient. We do not agree that a statement of truth should be introduced for pre-action correspondence, at the pre-action stage of a dispute, we do not expect clients to be in a position to sign a statement of truth. There will not have been the same in-depth review that will have been done to complete a pleading. Introducing a statement of truth at the pre action stage will lead to satellite disputes about the integrity of the statement especially in cases where a party's case has, for good reason, changed since the pre-action correspondence.