

## 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](mailto: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
- ☒ Ombudsman

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

☒ Yes: This is a natural extension of the CPRs in light

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?

Yes: There are existing mechanisms by which to do so. For example, Dispute Resolution Ombudsman Limited (DROL) operates the Rail Ombudsman, Furniture & Home Improvement Ombudsman and Dispute Resolution Ombudsman and, therefore, has experience in sectors which businesses voluntarily subscribe. In the furniture and home improvement industry where there is no regulator, membership of the Ombudsman is voluntary for retailers and many subscribe. In the rail industry, the regulator underpins the Ombudsman by mandating that train operating companies are members via a license condition which ensures that consumers have access. The Civil Justice Council Interim Report highlights risks associated with front-loading costs however, Ombudsman schemes offer a solution which is of low-cost to the business and free to consumers and it is also vital to note in this context, that Ombudsman schemes are designed to provide ease of access without the need for legal representation which provides real, alternative solutions to unrepresented parties and addresses any issues of inequalities of arms. The claimant reserves their position as the Ombudsman's decision is not binding on them, so they can pursue the matter via the courts or some other tribunal. For this reason, we welcome the inclusion of Ombudsman schemes on the non-exhaustive list of good faith steps that parties could take. Also, of note is the Reforming Competition and Consumer Policy consultation from the Department for Business, Energy and Industrial Strategy Consultation which closed on 1 October 2021 within which mandating the use of dispute resolution in certain high detriment consumer contracts (such as home improvements) is being considered.

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

☒ See response to "Any other Comments" below

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 response

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.

Yes: In the consumer dispute resolution landscape, where litigation has not already commenced, (A)DR is voluntary for consumers, although binding on the traders where they have signed up to an Ombudsman scheme or otherwise via trade association codes of practice etc. If Government takes a proactive role in promoting the extra-judicial routes that exist to facilitate settlement even before the parties consider legal routes, this will have a knock-on effect of driving complaints to the earliest possible point of resolution outside of the court system. Ombudsmen have feedback mechanisms in place to ensure that outcomes are learned from, preventing future detriment. For businesses, therefore, participation should be viewed through a broad lens; it can inspire consumer confidence, it can provide helpful management information and it can save businesses costs. If (A)DR is to help reduce the burden on the Courts, educating both businesses and consumers will be the key and both businesses and (A)DR providers will require the support of Government working in a joined-up way, to ensure the messages are received and understood. This therefore has relevance in terms of the current discussions regarding the use of Pre-action Protocols.

In terms of consumer access, the availability of (A)DR can be an important filter to enable the parties to negotiate an outcome or to assist them in narrowing the issues. FHIO and DRO processes include a final adjudication based on expert evidence which is compliant with Part 35 of the Civil Procedure Rules. This is an important mechanism as it ensures that the parties have a final, written decision, based on expert evidence which is binding on the trader and our (anecdotal) experience is that very few cases are then escalated via the court system.

Other motivations include factors such as ease of access, the opportunity to negotiate in a confidential forum and also the availability of non-legal remedies. For example, in the Rail Ombudsman scheme, the prevalence of non-legal remedies is a very important driver of resolution, for example gestures and gifts, apologies and explanations represent a significant proportion of outcomes. The importance of non-legal resolution is referenced in the report and we would be happy to engage further on our experience of this important factor in effective dispute resolution.

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.

A similar mechanism already exists in the Ombudsman's process, where reasons provided for decisions can serve the same purpose; highlighting what is agreed and providing reasons why the Ombudsman otherwise agrees or disagrees with one party, or believes a split decision is appropriate. This enables a consumer to make an informed choice on the risk of court action once the Ombudsman process is complete. This is particularly important in the context of unrepresented parties.

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 response

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
- ☒ See 20 below

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.

Our experience of setting up the Rail Ombudsman and engagement with passengers saw enhancements such as a website and portal that conform to WCAG 2.1AA standards, use of textphone, sign-language, braille and SMS and engaging with the Plain English campaign, which is assessed as part of our ongoing quality monitoring. Justice must be accessible for all and we encourage engagement with stakeholders and representative bodies and user-groups to ensure appropriate signposting and referrals.

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 response

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 response

## Practice Direction - Pre-Action Conduct

24. Do you wish to answer questions about Practice Direction - Pre-Action Conduct? \*

- ☐ Yes
- ☒ No

## 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.

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

☐ Yes

☒ No

## Housing Protocols

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

☐ Yes

☒ No

## Judicial Review Protocol

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

☐ Yes

☒ No

## Debt Protocol

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

☐ Yes

☒ No

## Construction and Engineering Protocol

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

☐ Yes

☒ No

## Professional Negligence Protocol

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

☐ Yes

☒ No

### Proposed low value small claims track

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

☒ Yes

☐ No

32. 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

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

The Ombudsman, together with a specialist software house, has developed an innovative case management tool that is bespoke to our service and adapted to provide both accessible dispute resolution mechanisms for the parties involved in and case handlers investigating a dispute, but which also captures data to provide feedback and insight for other stakeholders. The case management system interfaces with other users and, for example facilitates the single-front door for rail passenger complaints (out of scope cases being triaged elsewhere by the system). We are very happy to engage by way of a demonstration of this effective and accessible route into dispute resolution.

Also of relevance is that membership of the Ombudsman Association, whose preference is for one Ombudsman per sector, ensures that consumers and those in their jurisdiction alike, have access to schemes with consistent and validated processes. This could play a vital role in the integration of such schemes with the courts' systems, as single repositories with interfaced portals could transfer non-resolved claims to the relevant track and provide joined-up data.

Even given the emphasis currently on the climate of (A)DR, more onus should be placed on regulated legal service providers to proactively encourage consumers and SMEs to explore these alternative channels. We have seen examples of where consumers are using our service in conjunction with chargeable legal representation. Given that access to dispute resolution is free to consumers who use an Ombudsman, it would appear to be contrary to the intentions of the Pre-Action Protocol to be charged a fee by their legal representative to access an otherwise free service. This also meets the overarching objective of reducing costs to ensure they are proportionate to the dispute which is particularly relevant noting the threshold of FHIO's maximum award limit is in line with that of the Small Claims Court.

It therefore follows that the Ombudsman processes are designed to facilitate ease of access to justice and by their nature should not require legal representation. This is important as it enables both parties to narrow issues and test arguments outside of the court system facilitated by a suitably qualified Ombudsman whilst keeping the overall cost of the dispute to a minimum which is proportionate to the issue at hand.

In the Ombudsman's experience the value of the claim does not always bear a correlation as to the input from the parties in terms of managing their claims which can also have an impact on cost overheads for a business.

Ongoing contractual relationships are better suited to less adversarial forums and goodwill steps should include reference to these.

The timescales for completion of (A)DR should be carefully considered in the context of other factors and requirements of (A)DR providers. For example, the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, provide that processes should be completed within 90 days and it is important that any timescale would not operate a barrier to the consideration by the parties of which route to redress to take;

The impact of legal processes on unrepresented parties should also be carefully considered. The Ombudsman process guides the parties through evidence gathering, providing advice about the dispute which enables both parties to make informed choices about settlement. The consumer is not bound by the outcome, although the business is, which provides certainty for consumers that outcomes will be performed, also enabling them to take their claim via the courts if they choose having had the benefit of independent evaluation on the merits of their claim.

This serves to ease the burden on the courts and to ensure that cases are dealt with in the appropriate forums, encouraging settlement at the earliest possible time, thereby reducing costs and preserving relationships.

