

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:

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

More options for Responses

Please let us know if you wish your response to be anonymous or confidential.

1. My response is: *

- ☒ Public
- ☐ Anonymous
- ☐ Confidential

About you

2. First Name *

3. Last Name *

4. Your location (name of town/city) *

5. Your role *

- ☐ Judge
- ☒ Lawyer
- ☐ Insurer
- ☐ Paralegal/Legal Assistant
- ☐ Litigant
- ☐ Policy maker/civil servant
- ☐ Other

6. Your job title

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

- ☐ Claimants
- ☐ Defendants
- ☒ Not applicable

8. Your organisation

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

- ☒ Yes
- ☐ No

10. Your email address *

Questions relevant to all protocols

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

- ☒ Yes
- ☐ No
- ☐ Other

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

Yes, it was the unanimous view of the working group that PAPs should generally be considered mandatory, subject to an exception for "exceptional reasons". If a case is urgent, or limitation is in issue, a claim could be issued without compliance with the PAPs and the proceedings stayed to allow the parties to comply with the PAP. To ensure compliance with PAPs, we consider that Judges should be able to give directions at the first hearing of the proceedings to sanction any party who has failed to comply with the PAP. It would also assist litigants if Claim Forms had a box confirming compliance with the relevant PAP prior to commencing proceedings.

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
- ☒ While we agree there should be an online pre-ac

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. It was the general view of the working group that the creation of a summary costs procedure to resolve pre-action costs disputes in cases that settle at the PAP stage would not be a good idea.

- a. For the avoidance of doubt, we do not consider there should be any change to the position that where a claim or cause of action settles pre-action, the legal costs in respect of it are not recoverable in Court.
- b. As regards the 'costs element' of cases that settle pre-action, our experience is that this is generally an issue which the parties take into account and 'wrap up' in settlements pre-action, with the assistance of a mediator or otherwise. We consider that introducing a court-based procedure would be likely to cause fewer cases to settle in this way, and instead, it would provide the parties with another 'opportunity' to argue, and for substantial further costs to be incurred e.g. with the parties making use of costs draughtspersons. Further, given the costs at the PAP stage are usually modest, we consider that in many instances these further costs will be disproportionate to the amount actually in dispute.

15. Do you agree that PAPs should include mandatory good faith obligation to try to resolve or narrow the dispute? In answering this question, please include any views you have about the proper scope of any such obligation and whether there are any cases and protocols in which it should not apply.

No. It was the unanimous view of the working group that imposing a mandatory good faith obligation to try to narrow or resolve the dispute into the PAPs is a bad idea. The concept if good faith applies only in very narrow circumstances in law, is an evolving area and is likely to be poorly understood by many litigants (both professional and lay). We think sufficient rules exist within the current PAPs insofar as narrowing and resolving the dispute are concerned and the imposition of a good faith requirement will add little to those rules whilst also running the risk of muddying the water / making the PAP harder to understand.

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

☒ No. The answer above is repeated. Moreover the

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 a joint stocktake report is of value, however we caution against this being in an overly prescriptive form, as lest this increase costs and provide a further ground for dispute of only tangential benefit.

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?

Yes. It was the unanimous view of the working group that there are presently few if any effective sanctions with which to encourage and enforce compliance and deter non-compliance with PAPs.

a. Yes, but of course the power to strike out a claim or a defence should only be applied in the most extreme and flagrant cases of non-compliance, amounting to an abuse of the court's process. Otherwise it would amount to an interference, potentially unlawful, with the parties' Article 6 right of access to the courts.

b. Yes, we consider that the issue of PAP compliance should be addressed in directions questionnaires, and the court directed to consider it and the imposition of sanctions for non-compliance at the outset of the first hearing in the case. This is necessary both to allow directions to be modified in light of what has been achieved by the parties pre-action so as to minimise duplication of effort in the directions to trial (as considered by Question 23 below), and to ensure that sanctions are applied at the earliest practical opportunity (as envisaged by Question 18(c) below). We do not think that the compliant party should be under an obligation to make a specific application for a sanction to be imposed against a non-compliant party; this would put the compliant party under an unfair risk as to costs of the additional hearing, in cases where the court decides not to impose any sanction notwithstanding the non-compliance.

c. Yes. We feel strongly that in order for compliance with PAPs to be enforced and taken seriously, the matter should be considered at the earliest opportunity. At present, if such issues are raised at the first CCMC at all, they tend to be left to the end of the hearing, and cannot be dealt with due to lack of time. Although these questions may be raised on assessment of costs after trial, compliance with the PAP at the outset of mediation many months earlier feels too remote and disproportionate to be raised, particularly in respect of a summary assessment of costs. Reviewing PAP compliance immediately would also allow the court, if appropriate, to direct a stay for further exchange of information and ADR can be imposed before additional litigation costs are incurred.

d. Yes.

A clearer and wider range of sanctions are required. It is in our view important that the rules give judges the confidence to impose costs sanctions even when it cannot be positively demonstrated that the non-compliance with the PAP has led to unnecessary costs being incurred (which for obvious reasons it is usually impossible to tell).

There should be a presumption that non-compliance with a PAP has or will result in additional costs being incurred, and sanctions imposed accordingly. The court could disallow a some or all of the costs incurred or to be incurred by the non-compliant party in those stages of the litigation which could have been covered in whole or in part by compliance with the pre-action protocol, such as some of the costs of formulating statements of case, some witness statements and disclosure of documents which should have been supplied sooner. The Court could also make an award of costs in favour of the compliant party, of the costs the compliant party has spent attempting to comply and attempting to persuade the non-compliant party to comply, and of costs incurred up to the time of the first hearing.

The Working Group is respectfully referred to the approach of the learned Judge in *Charles Church Developments Ltd v Stent Foundations Ltd* [2007] EWHC 855, in which a costs order in favour of the compliant party of 50% of costs incurred to date was made at an early stage in litigation. It is regrettable that this decision has not been followed more often or more widely, in our view. If this approach were the norm, rather than the exception, non-compliance with PAPs would be rare indeed, we believe.

e. Not that we are aware.

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
- ☒ Yes, although we think the reference intended was

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.

We could not think of any particular requirement requiring improvement.

21. Do you believe pre-action letters of claim and replies should be supported by statements of truth?

- ☐ Yes
- ☐ No
- ☒ The broad view of the working group was "No". \

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?

Yes. We believe the discretion to impose sanctions on defendants (and claimants) that applies in the Professional Negligence Pre-Action Protocol is helpful and should be adopted in other protocols. Whilst the working group cannot speak for all fields in which there is a Pre-Action Protocol, we consider this could be included in the General Pre-Action Protocol: see below.

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?

In respect of disclosure, "Yes", but (save for narrow exceptions) in respect of pleadings and any other stages, "No":

- a. In respect of disclosure, we consider there is scope in 'business and property' type cases to harmonise the requirement to disclose "key documents": see the Practice Direction: Pre-Action Conduct and Protocols para 6(c), and the express requirements in the Professional Negligence Pre-Action Protocol, with the "Initial Disclosure" test under PD51U. Presently there are differing views among the profession as to whether the two are to be equated.
- b. We also consider that it may then be beneficial for parties to have the option, at the first CCMC, to agree that the documents disclosed pursuant to the relevant PAP suffice for the purposes of disclosure. However this would always be subject to the Court's decision.
- c. By contrast, save possibly for narrow exceptions, we do not consider that Letters of Claim, Response and Reply should be used to replace statements of case. Whilst conscious that as barristers we are to some extent 'singing for our supper':
- i. We consider there is much merit in requiring parties to set out concisely and with precision, in the manner required of a pleading, exactly what their case is. We consider this is much more likely to identify and crystallise the issues, and reduce the scope for disputes later down the line about what is, and is not, within the scope of the litigation.
- ii. We also consider that the process of drafting a new document is beneficial in requiring the parties to reappraise their case in light of the benefit of having complied with the PAP.
- iii. It also follows from our broad view that PAP letters should not be verified by statements of truth that we do not support retrospectively 'elevating' them to the status of pleadings.
- d. The narrow exception in respect of pleadings may be low value or possibly very simple cases, where both parties agree that the pre-action correspondence should stand as their statements of case, but subject to the power of the Court to order conventional statements of case to be produced.

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, we support the introduction of a General Pre-Action Protocol. This is the function of the existing Practice Direction on Pre-Action Conduct, that even when no area-specific PAP applies, parties are nonetheless expected to exchange information about their respective cases with a view to narrowing the issues and putting themselves in the best position to be able to resolve the dispute without resort to litigation. We do not see any substantial change in principle between the imposition of a general PAP and the currently prevailing duty under the PD.

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, we think these time limits are unreasonably short.

- Although it may in some simple cases be possible for parties (who may still be unrepresented at the state of a letter of claim) to obtain legal advice, investigate the claim and prepare a response within 14 days, this will very often be impractical. While the general PAP would encourage parties to sooner where they can, rather than waiting until the deadline to reply, we consider that 28 days ought to be the minimum.
- We do not think that the requirement for expert evidence is the only relevant trigger for an extension; there will often be cases where files need to be retrieved from storage or advisers, or bank statements or medical records to be obtained, all of which can take time. Parties often disagree about when an extension is needed. We would prefer simply to say that parties who fail to comply with the 28-day timeframe without an agreed extension should be prepared to explain on evidence at the first hearing why additional time was needed.
- Although we agree that in some urgent cases it will be helpful for defendants to supply such information as they have in their possession and to provide further information when it can be obtained, and they should be encouraged to do so if they can, in general we do not believe it would serve either party's interest to provide for a dripfeed approach. Defendants will wish to complete their investigations before committing to a particular response. Claimants will end up incurring additional costs if they have to consider multiple responses.

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'.

As to the three questions posed:

- a. Yes, we do think there should be a standard for disclosure in the general PAP, although where a specific Protocol provides for some other standard or specifies certain documents then that should take priority, having regard to the differing natures of various fields.
- b. As to what that standard should be, in 'business and property' type cases we consider that the 'Initial Disclosure' test could be adopted: see our paragraph 23.a above. What is appropriate in other fields will vary.
- c. The working group did not reach clear consensus on whether known adverse documents should be disclosed. We recognise that requiring disclosure of known adverse documents may in certain circumstances facilitate settlement, and that there are similarities between a party who knowingly 'keeps hidden' an obviously prejudicial document and a party who knowingly makes an incorrect statement. However, this requirement may serve to increase costs, and may in practice be difficult to enforce and cause disputes as to what documents a party did or did not know about.

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

32. Do you support the introduction of a good faith obligation to try to resolve or narrow the dispute and the requirement to file a joint stocktake report, on condition that debtors have access to legal assistance to complete both requirements?

☐ Yes

☐ No

☒ Other - As outlined in question 17 above, we con

33. 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 including legal advice)? What changes, if any, would you make to the rules on when litigation can be commenced?

The provision for 30 days in the current Debt Protocol provides a balance between the need to provide a debtor with sufficient time to respond, and the need to prevent debtors purposely delaying their response to avoid payment of the debt. The provision in the current Debt Protocol for a further period of 14 days where a response has been provided (para 8.2) save in exceptional circumstances brings the timeframe in line with the total timeframe in the revised general PAP. We do not consider that 42 days (14 days plus a further 28 days extension) in the general PAP would be necessary for all debt claims. We note that if the creditor sought to enforce a debt claim by statutory demand and then use an insolvency process (e.g. petition for bankruptcy or winding up), then if the debt is not paid within 21 days from service of the statutory demand, the creditor could issue a petition and pursue the debtor's insolvency. If the standard timeframe for a claim under the Debt Protocol was double the timeframe under the statutory demand route for all claims (even where no response is provided by the debtor), creditors may seek to use insolvency processes rather than pursue debt claims.

34. Do you think the contents of the pre-action letter of claim should be more prescriptive and, if so, what content should be prescribed?

It is sufficient for the Debt Protocol to set out what the contents of the pre-action letter of claim "should" contain (as it does at para 3) rather than being more prescriptive.

35. Do you think the language of the PAP should be made more user friendly and do you support changing the terms creditor and debtor to claimant and defendant?

☐ Yes

☐ No

☒ Other - It would be helpful if the language in par

36. Do you support integrating the PAP for debt claims into the Money Claims Online (MCOL) portal (or any successor platform)?

☐ Yes

☐ No

☒ Other – Yes, save that the MCOL portal should nc

Construction and Engineering Protocol

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

☐ Yes

☒ No

Professional Negligence Protocol

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

☒ Yes

☐ No

39. 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

☒ No, we think these time limits are unreasonably s

Proposed low value small claims track

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

☒ Yes

☐ No

41. 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

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

41. Yes, the stocktake requirement could be excluded for very low value small claims cases. As outlined in our answer to question 17 above, we do not consider a good faith obligation should be included for any PAPs.

