

## 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.

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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
- ☒ Yes, this would fit with allowing judicial oversight

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, compliance should in principle be mandatory but in PI the timescales should not be too rigid. It is important to allow freedom of action if parties are proactively investigating and progressing claims during the pre-action stage, i.e. the form and structure must not be too prescriptive for what are almost always represented parties in PI cases.

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
- ☒ PIBA agrees with the report of Lord Briggs, 'Civil Justice Review' (2016)

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. PIBA considers that the existing, and often recent, processes for resolving costs disputes in PI claims across different areas, such as in fixed recoverable costs and provisional assessment, should remain as at present.

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.

Not particularly for PI (as such a system already works in practice) but if there were any such requirement then this should not be such as to mandate ADR. In personal injury cases the pre-action stage is focussed on information exchange and narrowing the issues. The parties are already incentivised to seek resolution, and do so in the vast majority of cases.

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
- ☒ Yes, but with the important exception that consid

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.

No. This stocktake need not be formally required in PI, as the present PAPs already facilitate identification of the issues pre-action. In the particular context of PI, a requirement for a separate formal stocktake at the pre-action stage may increase delay and increase costs on both sides. For instance, where a claim is genuinely contested over an intractable liability dispute, the Appendix 4 Report Form would not alter the approach of either party. The pre-action positions of the parties will already be known in PI under the existing PAP, but we can see scope for the position to be set out in DQs if litigation is commenced.

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?

Yes, but only in exceptional cases.

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?

The matter could be subject to a simple 'yes' or 'no' question within the Directions Questionnaire, but this should not involve or encourage protracted or satellite litigation within the proceedings themselves.

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?

Judicial involvement in pre-action applications should be sufficient but otherwise yes, the earlier the better.

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?

Costs orders following the event in pre-action applications should be sufficient.

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

Yes, specific PAPs, such as PI and clinical negligence, which involves a greater degree of documentation and expert evidence, should allow more leniency as to time limits. Any judicial oversight should enable a subjective and case-specific approach.

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.

Straightforward language should be encouraged. No specific recommendations.

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

- ☐ Yes
- ☐ No
- ☒ No. The nature of solicitors' correspondence sho

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, not in PI. There are reasons why a parties' position might legitimately change upon identification of issues pre-action, for example with a change in expert opinion after scrutiny in conference or upon considering evidence not then available or disclosed by the opposing party. We already have clear case-law on admissions and on resiling from them, which does not need to be muddled by the language of PAPs.

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?

Perhaps only in the simplest and lowest value of PI cases. The present system once litigation is commenced works well for pleadings (the requirements of which are ell-established and understood) and disclosure. Particulars of Claim and Defences are proportionate means of identifying the outstanding issues. There is a benefit to the Court and parties in having these Statements of Case as stand-alone documents.

## 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

26. 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
- ☒ No. PIBA do not consider that there is any partic

27. 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
- ☒ Yes, but we observe that the parties in PI cases ar

28. 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?

At present, processes of information exchange and disclosure between parties are successfully addressed in the PAPs. Parties are routinely represented and mandatory stock take or mandatory ADR, pre-issue, would not assist. Claims already do settle at this stage when appropriate. Both sides are already incentivised to make and seek appropriate concessions and achieve early resolution where possible. A requirement for a formal stocktake at the PAP stage begs the question of when and to whom it would be reported and whether it would unnecessarily increase costs. If a stocktake report is introduced at all, PIBA suggests that it should be to assist the Court and should be part of the parties' DQs.

29. 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?

Yes. This question highlights the already different treatment of cases for personal injury. At present most cases of under £25k are dealt with under the lower value personal injury protocol. The principles are already applied by parties into higher value litigation, but cases over £25,000 become increasingly complex, fact-dependent and expert-dependent that no "one size fits all" workflow is apparent. PIBA suggest that the present system is not obvious failing, so there is no need for a more prescribed approach or identified workflows for higher value cases. Cross-reference to the Serious Injury Guide is supported, but it need not be integrated into a PAP.

30. 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 principle, yes. In our experience, this already takes place in practice. But, because PI cases evolve as an individual is treated and their needs change, there should not be a time limit for a claimant to identify all treatment needs. Ewe see no reason not to require a defendant to supply reasons if they decline to engage in rehabilitation – in practice this already happens.

31. 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

32. 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
- ☒ No, there is no requirement for a more prescripti

33. 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?

Yes, disclosure obligations are an essential part of pre-action investigations and there should be an equal requirement on both parties as identified.

34. 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
- ☒ Yes. If (as we suggest) there is not to be a requirement

35. Do you agree that a working group should be established, as a priority, to consider a specific protocol for abuse claims?

- ☒ Yes
- ☐ No
- ☐ Other

36. Do you agree that a working group should be established to consider a specific protocol for foreign accident cases?

- ☒ Yes
- ☐ No
- ☐ Other

37. 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
- ☒ PIBA adopts a neutral view in this respect pending

38. 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?

No. As set out above, our view is that a claimant should be entitled to obtain medical evidence prior to bringing proceedings and should not be under a requirement to disclose. As indicated above it is essential for parties to have the ability to scrutinise their own expert evidence as against issues raised, without a formal obligation to disclose expert evidence. This could inhibit experts and the scrutiny and investigation of issues in the pre-action stage, as well as damaging professional privilege.

39. 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
- ☒ No. This presents practical and theoretical difficulties

40. 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

☒ Yes, with the firm caveat of "reasonable". This sh

41. 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?

Not applicable.

42. Would an ability to have pre-litigation court case management help dispute resolution in multi-track PI cases?

☐ Yes

☐ No

☒ No. Our experience of court-imposed ADR/case

## Housing Protocols

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

☐ Yes

☒ No

## Judicial Review Protocol

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

☐ Yes

☒ No

## Debt Protocol

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

☐ Yes

☒ No



## Construction and Engineering Protocol

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

☐ Yes

☒ No

## Professional Negligence Protocol

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

☐ Yes

☒ No

## Proposed low value small claims track

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

☐ Yes

☒ No

Any other comments

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

PIBA Executive summary - please see additional document sent by email with full response

PIBA broadly support the proposed revisions to the PAP for PI but have reservations about:

- (i) there being too prescriptive a timescale for pre-action behaviour in our field, where litigants are invariably represented by experienced solicitors and counsel who already navigate the pre-action process well and where there are already costs pressures to deal with claims expeditiously;
- (ii) in particular any prescriptive timetabling for ADR on quantum, when (perhaps uniquely) PI cases may not be able to be quantified until many years after an accident, or even a considerable time after the issue of proceedings, due to the length of the rehabilitation and recovery process and the consequent inability to be confident of prognosis until they have plateaued;
- (iii) the involvement of the Court (other than by way of pre-action applications) in the supervision or enforcement of pre-action behaviour as being unnecessary and serving only to increase costs;
- (iv) any absolute requirement for a stocktake report to be filed at a pre-action stage (at most we see it as being a useful part of DQs if proceedings are commenced);
- (v) a requirement to serve expert medical evidence as part of the PAP for PI (as opposed to a requirement to disclose medical records, which we fully support);
- (vi) any extension of the "show cause" process from asbestos litigation to PI litigation generally, when it was introduced into historic asbestos litigation, which often requires speedy determination within an individual's limited life expectancy, to weed out "non admission" defences which would not withstand scrutiny at a subsequent trial.

Further we note that:

- (vii) in our field there are already many processes and pressures in place which focus parties towards early settlement, and the system of ADR by joint settlement meeting ("JSM") is already an embedded part of PI practice which is regularly used successfully to settle or limit issues in claims both before and after issue of proceedings.

We have no particular comment to make about the introduction of a general PAP, nor as to the PAP for clinical negligence claims (on which we would defer to the Professional Negligence Bar Association).

PIBA agrees that pre-action protocols should be straightforward and comprehensible. We agree, as set out in the Interim Report, that co-operation should be fostered at the pre-action stage. Modernisation and appropriate simplification of language and instructions are uncontroversial and are supported.

Please see further full response sent by email.

Steven Snowden QC, Chair of the Personal Injuries Bar Association  
Stuart Jamieson, Executive Committee member of PIBA