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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.

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 *

Mike

3. Last Name *

Wilkinson

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

[REDACTED]

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?

Yes, but there may also be other extenuating circumstances which should be capable of recognition, and there should be some tolerance of ignorance and unfamiliarity with any reforms, especially for self-represented litigants and even small practice practitioners who are often at a competitive disadvantage, having to litigate in a broad range of areas and keep up with so many rule changes. One example of a potentially extenuating circumstance might be where a party is out of pocket and already taken extensive steps to avoid litigation, for example where they have been kept out of payment, had to sue, already settled that entitlement at ADR upon a compromised /reduced entitlement, which has again been frustrated by prevarication with further new /incomprehensible/ mentally exhausting excuses, which ought to be forced on for determination.

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, and it will have to work along fixed costs regime. I think it is appropriate to require more pre-action works to be done on most if not all cases, and it is fairer to have fixed costs recovery than it is to have no costs, which is what otherwise happens if a case is settled pre-action (ie there is no costs only jurisdiction): Citation Plc v Ellis Whittam Ltd [2012] EWHC 764 (QB); see also Sowerby v Charlton [2005] EWCA Civ 1610; Ian McGlinn v Waltham Contractors Ltd plus 2 [2005] EWH 1419 (TCC); and Brown v Russell Young & Co [2007] EWCA Civ 43; [2008] 1 W.L.R. 525 (CA (Civ Div)).

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 (and I would say the duty to cooperate to further the overriding objective including pursuing ADR already contemplates some such obligation).

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
- ☒ I think a better principle might be that all such ne

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.

I think, in practice, this might be unworkable. Where a party will not cooperate, any rule requiring the other to cooperate risks asking too much of that other.

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?

Broadly yes, but I think the focus of sanctions for non-compliance should be focused on costs, with strike out being the nuclear option. If a party will not work with another to resolve matters without resort to court in a regime which provides for at least some fixed costs, it is right they should be limited in their scope for recovering costs otherwise, but the imposition of such costs sanctions should not be automatic or applicable where there has been a genuine attempt at engagement/ compliance. DQs can and should deal with PAP compliance and the issue ought to be resolved as soon as possible to lend certainty to litigants and eventual costs-recoverability.

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?

Yes, there should be a discretion to punish a party in costs for causing the other to undertake unnecessary works as a result of their non-compliance to articulate their case where the same is blameworthy, but caution needs to be exercised in cases of informational asymmetry where one is in the dark or relying on the other clarifying their case in some ways.

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?

Yes, I think the parties should be able to agree to take any procedural step, for example rely on their particulars as pleadings, or to give disclosure generally or on certain issues, but it should only by agreement pre-action.

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.

