

## 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 provide an anonymous response 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, although for litigants in person we think the courts will always need to be prepared to consider their particular circumstances

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.

Our focus is on the JR area and so no strong opinion about this.

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 our view that is a natural development of the present process

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
- ☒ We think there are risks that this is interpreted br

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 with the reference in chapter 4 to the requirements for a formal stocktake and agreement of issues being disproportionate in the judicial review context. Our concern is that they may be difficult to apply in cases where the litigant simply cannot engage constructively with the process. The proposals would therefore need to recognise the risk that the claimant did not cooperate. Furthermore the risk of increased costs from this proposed stage should be considered against the potential benefits.

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?

It is our view that any change should recognise that any increased power for the court should remain explicitly subject to the need to consider the implications should a defence be struck out.

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?

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?

## 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

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

Broadly we agree. However, we do not agree that the new JR PAP should align with the General PAP 'good faith' principle if that is considered to extending to require reference to the Ombudsman. We believe that is not the intention. We consider the position should remain flexible, as it is now and as is envisaged by the relevant subcommittee. We explain our reasoning in more detail in our responses to questions 32 and 34. We would therefore suggest that the conclusion in 4.56 be clarified to ensure that the requirement to go first to the Ombudsman is not inadvertently included. We do welcome the recognition of the important role played by Ombudsman schemes and welcome explicit reference to the Ombudsman in any revised documentation because we believe this will help signpost litigants and complainants to the correct fora to investigate their issues. In very many cases, the outcomes sought can only be achieved via the Ombudsman rather than a determination by the Administrative Court.

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

Our concern is in relation to the way the interaction with the Ombudsman jurisdiction is characterised. We agree that judicial review is the last resort option. We do not agree that this characterisation means that it should only be sought after approaching the Ombudsman, where relevant. The inclusion of the Ombudsman in the Good Faith steps included in paragraph 19(ii) of the introductory section appears to suggest that that should always be the sequence. There are two problems with such an approach. Firstly, in most cases any reference to the Parliamentary and Health Service Ombudsman that requires any sort of detailed consideration is unlikely to be resolved before the judicial time long stop time limit has expired. Requiring a reference to the Ombudsman would therefore restrict access to the courts in a way that seems undesirable to us. Secondly, the jurisdiction of the Ombudsman is not coterminous to that of the court. The Ombudsman must consider whether there was maladministration (and good care in the health context). This is different to the role of the court. To illustrate, a decision could be lawful but still be maladministrative. And the Ombudsman cannot consider matters of law in the way the court can, nor does he have powers of enforcement. It will often be appropriate for a litigant to bring a judicial review without considering a complaint to the Ombudsman, for example where the outcome sought is to reverse a decision (of course the reverse position will more often be true). The need for nuance in the sequencing is also supported by the provisions in our legislation which require us to consider whether a remedy was available in a court of law and whether it was reasonable for the complainant to resort or have resorted to it. For example, see section 5(2) of the Parliamentary Commissioner Act 1967. Placing the Ombudsman automatically before the court in sequence would render that provision difficult to apply in a case where judicial review was clearly the right course of action. Finally, we should mention the requirement in section 5(1) of the Parliamentary Commissioner Act 1967 that complaints to the Parliamentary Commissioner be referred via an MP (the provision known as the MP filter). This is an additional step complainants must take which we consider to be anachronistic and is one of a number of areas where reform of our legislation is needed. As it stands this adds time to the process of complaining to the Ombudsman and in the context where judicial review proceedings must be brought promptly, again supports our view that exploration with the Ombudsman should not be a prior condition for judicial review. We note that these challenges are recognised in the report of the judicial review subcommittee in appendix 8 and support the conclusion there that prescriptive good faith requirements are not appropriate in the context of judicial review.

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

- ☒ Agree
- ☐ Disagree
- ☐ Other

31. 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?

We believe that emphasis on engaging and complying with the pre action protocol process found in the general principles in Chapter 3 is helpful. The pre action process, when used as intended, leads to many potential judicial reviews being dealt with in a way that is proportionate, less stressful for the potential litigant, low cost, and without taking up scarce court time. The aim to allow digital portals may be useful although some litigants may feel excluded by such an approach and we would be cautious if the effect was to increase the costs of the pre action process. The key area where we think more consideration is needed is in relation to the reference to "Participation in any applicable Ombudsman schemes" in the fourth bullet under paragraph 3.21. On the one hand we welcome the recognition of the importance of Ombudsman schemes. On the other, in relation to JR in most cases we do not think reference to the Ombudsman should be considered a pre-condition to exercising the right to bring a judicial review, or at least this should not apply to the Parliamentary and Health Service Ombudsman or other schemes that have similar roles. As we said in our response to the question in relation to chapter 4, there are two problems with such an approach. Firstly, in most cases any reference to the Parliamentary and Health Service Ombudsman that requires any sort of detailed consideration is unlikely to be resolved before the judicial time long stop time limit has expired. Requiring a reference to the Ombudsman would therefore restrict access to the courts in a way that seems undesirable to us. Secondly, the jurisdiction of the Ombudsman is not coterminous to that of the court. The Ombudsman must consider whether there was maladministration (and good care in the health context). This is different to the role of the court. To illustrate a decision could be lawful but still be maladministrative. And the Ombudsman cannot consider matters of law in the way the court can. It will often be appropriate for a litigant to bring a judicial review without considering a complaint to the Ombudsman, for example where the outcome sought is to reverse a decision. The need for nuance in the sequencing is also supported by the provisions in our legislation which require us to consider whether a remedy was available in a court of law and whether it was reasonable for the complainant to resort or have resorted to it. For example, see section 5(2) of the Parliamentary Commissioner Act 1967. Placing the Ombudsman automatically before the court in sequence would render that provision difficult to apply in a case where judicial review was clearly the right course of action. We agree with the reference in chapter 4 to the requirements for a formal stocktake and agreement of issues being disproportionate in the judicial review context. Our concern is that they may be difficult to apply in cases where the litigant simply cannot engage constructively with the process. The proposals would therefore need to recognise the risk that the claimant did not cooperate. Furthermore the risk of increased costs from this proposed stage should be considered against the potential benefits.

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

- ☐ Yes
- ☒ No

### Construction and Engineering Protocol

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

- ☐ Yes
- ☒ No

### Professional Negligence Protocol

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

- ☐ Yes
- ☒ No

### Proposed low value small claims track

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

- ☐ Yes
- ☒ No

### Any other comments

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

No further comments other than to say that we would be happy to discuss our responses if that was thought helpful.