

## 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 is 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?

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.

We do not support the creation of a further summary costs procedure to resolve costs disputes about liability and quantum in cases that settle at the PAP stage. This is for the following 4 reasons:

- Lack of information
- The appropriateness of summary assessment
- The existence of Part 8 Costs only proceedings and Provisional Assessment
- Simplification of the rules

Lack of information

It is noted within Appendix 5 that there currently is no data in respect of the number of cases that such a proposal would apply to. Without such information it makes it extremely difficult to consider whether the introduction of a new summary costs procedure and the creation of new rules would in fact be proportionate and cost effective to the number of cases that would fall within the rules.

Appropriateness of summary assessment

This response is not a rebuttal of the principle of summary assessment itself, but instead, sets out why summary assessment works and why it would be unsuitable or unnecessary in the proposed circumstances.

Currently summary assessment of costs is predominantly used at the end of an application hearing or a 1 day trial. Each party is obligated to prepare a Statement of Costs and this is filed and served in advance of the hearing.

The hearing then takes place and, only after the hearing, will the Judge consider the issue of costs and potentially make a summary assessment of those costs. It is the same Judge who has heard the hearing who is able to hear submissions from both sides in respect of the liability and quantum of costs.

Therefore, the Judge will have a complete understanding of the issues that were addressed at the hearing and this knowledge will assist in the swift summary assessment of both the liability and quantum of costs. It is this intimate knowledge that enables the Judge to conduct a summary assessment.

It is therefore difficult to understand how this could be replicated when a case settles within the PAP and it is considered inappropriate to use the fact that a claim has settled within the PAP to be a dividing line for the method of assessment.

The existence of Part 8 Costs only proceedings and Provisional Assessment

The current system in place enables the party who considers that they are entitled to payment of costs from a case that has settled pre-issue to issue the claim for costs in a very pared down and low cost way. The deemed paying party then has the chance to set out their acknowledgment and confirm whether they dispute liability and quantum or quantum only. It is unclear how the proposed 'summary assessment procedure' would not simply duplicate this current step.

Part 8 allows the parties to set out their details of costs and for both sides to prepare their submissions through the preparation of Points of Dispute and Replies. The CPR already governs and encourages submissions to be concise and to the point. It is unclear quite how a summary assessment could be conducted without hearing from either party in respect of their submissions for or against the liability or quantum of costs.

Finally, these issues are dealt with on the paper by way of provisional assessment (if the costs are under £75,000) or by a detailed assessment hearing. It is anticipated that the majority of costs would be dealt with by way of provisional assessment, which is essentially a summary assessment once the judge has been provided with all required information and arguments. It is, therefore, unclear how a proposed 'summary assessment procedure' will be able to make any further short cuts or efficiencies.

Simplification of the rules

Finally, we consider that in light of already complex nature of the PAPs and the CPR as it currently stands is further justification that the rules should be reviewed and simplified, not added to. Furthermore, to proceed with this proposal without sight of the proposed implementation of the extension of the FRCS regime would be to proverbially put the cart before the horse.

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.

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.

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?

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

## 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

Any other comments

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