

## 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 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

The Property Bar Association comprises 495 members and is the professional body for barristers who practise in the field of property law. It is recognised as one of the Specialist Bar Associations by the Bar Council and its members have expertise in all areas of commercial, agricultural and residential property law acting both for owners and occupiers of land. It has a voice on the Bar Council, takes part in Law Reform Consultations and makes representations in respect of changes to property law and litigation practice, and provides a programme of educational lectures, seminars and social events.

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
- ☒ • Neither agree nor disagree. Some members

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?

- Some members of the organisation agree with the premise of the question. An alternative view is that it may be disproportionate in some cases.
- The PBA has not identified any other exceptions.

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
- ☒ • Yes (Insofar as it is practical to set up and ad

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. The PBA forms the view that CPR rule 44 and PD44 adequately deal with the procedure for assessing costs. A new summary costs procedure is likely to be duplicative.

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.

- The PBA forms the view that it is wrong to impose good faith obligations on parties who are by definition in dispute and with divergent personal interests in opposing outcomes. Also, such an obligation could be misused (usually by the party in the wrong) to threaten or coerce the other (often innocent) party by way of further applications or sanctions.

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 (subject to 15 above).

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.

- Neither agree nor disagree. One view is that such a requirement would be desirable. An alternative view is that there is a risk that this may become a pointless waste of costs in cases where parties can't agree on the issues (or, sometimes, especially in case of LIPs, understand the issues), or an opportunity for duplication of pleadings and posturing. A suggested solution is that a joint stocktake could be ordered as part of case management as appropriate.
- Yes
- No. The PBA has not identified any cases or protocols where the joint stocktake should not apply. The PBA affirms the view that the stocktake requirement could be improved by making it concrete, to avoid the risk identified at 2.18 of the review.
- An alternative view is that LIPs should be granted relief from partaking in any stocktake (with the other party preparing it as well as they can, if represented). This is because it is envisaged that a stocktake could be quite overwhelming for some LIPs as recognised at paragraph 3.27 of the review.

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:

- Whether courts should have the power to strike out a claim or defence to deal with grave cases of non-compliance?
- 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?
- 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?
- 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?
- Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why?

- The PBA forms the view that the power to strike out in grave cases of non-compliance would be draconian considering the response to Q15 above. Also, the court has other tools at its disposal to ensure procedural fairness and to deal with unnecessary legal expenditure.
- The PBA forms the view that the issue is best dealt with at the Directions Questionnaires stage (to save on costs). Further, that the issue of non-compliance should be dealt with at the conclusion of any trial – as with Part 36 offers – when costs are assessed (perhaps award costs on an indemnity basis against the offending party).
- The PBA is of the view (as expressed at Q18 2b) above) that the court should, as a matter of general discretion, wait until the conclusion of trial to deal with PAP compliance disputes subject to its discretion to deal with the issue earlier.
- None identified. At the PAPs stage, parties to remind each other of cost implications for non-compliance.
- No different approach identified save for the responses to 1a) and 2b) and to Q15 above.

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.

None identified.

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

- ☐ Yes
- ☐ No
- ☒ • Neither agree nor disagree. A strong view h

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 (The PBA suggests that a materially different position should be the subject of an application);
- PAP for Housing Disrepair Cases (Wales);
- PAP for Housing Conditions Claims (England);
- PAP for Possession Claims by Social Landlords;
- PAP for Possession Claims based on Mortgage or Home Purchase Plan Arrears in respect of Residential Property;
- PAP for Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy (the "dilapidations Protocol").

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?

- The PBA expresses no view on this question.

## 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.

- No. The PBA suggests that the variation in PAPs is necessary to address the specific needs of different types of litigation.
- No comments on the draft text at Appendix 4.

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?

- Neither agree nor disagree. The PBA forms the view that if PAP letters become in effect the pleading of the case before the case is started, then it should be 28 days just as it is when you are sued. 10 working days is seen as a ludicrously short time to plead a full response on pain of paying the opposing party's costs.
- Another view canvassed by some members is that replacing pleadings with letters could have a potential knock-on effect on "pleading points" due to the reduced precision.

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'.

- The PBA forms the view that a general PAP, if introduced, should incorporate a standard for disclosure which should meet the test for initial disclosure and Limited Disclosure under PD 51 U. Early disclosure, including disclosure of 'known adverse documents', is an important aspect of an attempt to achieve the fair resolution of civil proceedings.

## 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

30. Disrepair/Housing Conditions PAP - Do you agree that large corporate landlords should be required to publish an address to which PAP letters should be sent?

- ☐ Yes
- ☐ No
- ☒ • The PBA expresses no view on this question

31. Landlord Possession Claim PAP - Do you agree that the existing PAP should include information for landlords relating to the rules and procedure when a Defendant may lack capacity?

- ☐ Yes
- ☐ No
- ☒ • The PBA expresses no view on this question

32. Do you agree that the existing PAP should be amended to require landlords to file a checklist at court when issuing a claim, confirming compliance with the PAP and/or that the Claim Form or Particulars of Claim be amended to require the landlord to confirm compliance?

- ☐ Yes
- ☐ No
- ☒ • The PBA expresses no view on this question

33. Do you agree that the Landlord Possession PAP should be extended to apply to possession claims brought by a private landlord (with the exception of claims brought under the accelerated procedure)?

- ☐ Yes
- ☐ No
- ☒ • The PBA expresses no view on this question

34. If so, do you agree that such a PAP should include information for landlords about the rules as to which bodies are authorised to conduct litigation?

☐ Yes

☐ No

☒ • The PBA expresses no view on this question

35. Do you agree that the existing PAP should apply to claims for possession on grounds other than rent arrears grounds?

☐ Yes

☐ No

☒ • Yes – Would be particularly useful in cases where

36. Mortgage Possession PAP - Do you agree that the PAP should be mandatory?

☐ Yes

☐ No

☐ Other

37. Do you agree that the PAP should apply to all mortgage possession claims relating to residential property, including 'buy to let' mortgages?

☐ Yes

☐ No

☒ • The PBA expresses no view on this question

38. Do you agree that the PAP should be amended to require that occupiers are notified of steps taken under the Protocol that are likely to lead to a possession claim being made?

☐ Yes

☐ No

☒ • The PBA expresses no view on this question

39. Do you agree that the PAP should be amended so as to provide standard information to borrowers about the powers of the court?

☐ Yes

☐ No

☒ • Yes (Particularly in relation to LIPs who suffer from

40. Do you agree that the PAP should be amended to require lenders to write to the borrowers to inform them of the time and date of the hearing and the importance of attending?

☐ Yes

☐ No

☒ • The PBA expresses no view on this question

41. Do you agree that the PAP should be amended to make reference to other forms of ADR available, such as the Business Banking Resolution Service?

- ☒ Yes
- ☐ No
- ☐ Other

### Judicial Review Protocol

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

- ☐ Yes
- ☒ No

### Debt Protocol

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

- ☐ Yes
- ☒ No

### Construction and Engineering Protocol

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

- ☐ Yes
- ☒ No

### Professional Negligence Protocol

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

- ☐ Yes
- ☒ No



## Proposed low value small claims track

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

☐ Yes

☒ No

### Any other comments

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

No other comments.