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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.

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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 *

Nyree

3. Last Name *

Applegarth

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 to mandatory. No to 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
- ☒ In theory we agree that pre-action portals are a c

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 a new summary costs procedure, or indeed any cost jurisdiction where the parties settle in advance of issuing proceedings. We consider that if the Court had a new power to assess costs at the pre-action stage that might actually deter people from wanting to use the protocol all together. For example, in a case where a lease contractually set out one party's entitlement to costs, we do not consider that the Court should have the power, at the pre-action stage to effectively override the contractual provisions and assess costs on a summary basis.

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 are there are any cases and protocols in which it should not apply.

Yes

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 consider that making a distinction between o

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.

This is supported in principle, but we consider that this is going to exacerbate the front loading of costs and needs to be considered in light of the disclosure pilot and wider changes to disclosure more generally which already put, we think, sufficient pressure on parties to consider their positions carefully at the outset of any proceedings. We consider that the disclosure pilot already deals with the disclosure of relevant documents and that adding additional burdens on the parties at the pre-action stage in relation to disclosure is unnecessary. We also have concerns that even if it was a mandatory part of the protocol that the parties should engage in a joint stock take, without sanctions for non-compliance, this would be worthless. We envisage many situations where one party, who was keen to move forward, might participate in the joint stock take exercise, only to receive no response from the other party. Thought therefore needs to be given about the sanctions for non-compliance. We consider this proposal adds to the costs the parties will incur for no practical benefit.

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) We consider that striking out pleadings is a step too far for cases of non-compliance. Even with a definition of "grave" non-compliance we are fearful that all this will do is open up a new area of satellite litigation in relation to what constitutes a grave non-compliance. We consider that costs sanctions could possibly be appropriate in grave cases of non-compliance and that it would be beneficial for the Court to deal with any non-compliance at an early stage, perhaps at the first CCMC. b) We had mixed views on this question. If a new tick box appeared on the directions questionnaire asking you to confirm whether the other party had complied with the PAP, we considered that it would be all too easy for the opposing party to indicate to the Court that there had been non-compliance when the opposing party may take a different view. Careful thought would therefore need to be given to how this is dealt with and what information would need to be provided in order to enable the Court to consider whether there had been compliance. This could potentially be achieved by a simple application notice which would allow for a short statement or assessment of the non-compliance. However, if there are issues of non-compliance at the pre-action stage, we considered that an appropriate time for the Court to deal with those issues would be at the first case management conference. Therefore it would be helpful if the Court did have an indication with the directions questionnaire as to whether or not there were any issues regarding non-compliance. Again, we considered that if sanctions were to be imposed, then costs sanctions would be the most appropriate. As above these could be dealt with at the case management conference. We also considered whether the Court should have jurisdiction to summarily assess those costs and on balance felt that perhaps that might be better dealt with by way of a note on the cost budget rather than by way of summary assessment although we do see some merit in allowing a discretion for the Court to do so in the right circumstances. c) The parties should state whether there has been non-compliance prior to the CCMC but the court should assess non-compliance on a case by case basis and there might be good justification (such as limitation deadlines) for non-compliance. Overall though we consider that the opportunity to raise the issue of non-compliance with any PAP should be a one-time only option so that a party can either use or lose that right. d) Yes. See comments above. e) No.

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.

We wholly support the simplification of the obligations in the PAPs and the use of plain language. We also believe that diagrams and flow charts may be useful.

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

☐ Yes

☐ No

☒ Again, there is a mixed view on this. Forcing par

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?

Not relevant as the question is about the professional negligence 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?

We would not support changes that force parties to turn their initial letters before action and communications with the third party into mini pleadings. We consider that there is already enough front loading of costs to make parties contemplating litigation think very hard before instigating or participating in any such process. If parties were expected to produce pleadings in place of letters before action that that could actually prevent access to justice for some parties. As mentioned above we consider that the changes imposed by the disclosure pilot requiring key documents to be provided with pleadings is already sufficient to deal with disclosure and that it would be duplication for there to be additional burdens and possibly irrecoverable cost placed on the parties at the pre-action stage in undertaking a disclosure process (including reviewing potentially significant data and then storing that for an even longer period than may currently be required given extended court timetables). We take the view that if the PAPs are to be strengthened as envisaged by the consultation, that would be sufficient to deter vexatious litigants and the general view is that people do not rush into litigation lightly in most cases.

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.

Yes – no comments to add.

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?

We would not support changes to the protocol to provide for a response to a pre-action letter of claim within 14 days. This is an insufficient period of time to enable a full response to be complied. We also consider that it is placing an onerous burden on a party to have to reply to a pre-action letter within 14 days and then obtain expert evidence within a further period of 28 days. We do not see any issue with the current rules which ask for a response within 21 days. In addition, we consider that setting an arbitrary deadline of 14 days to respond to a pre-action letter is futile in the event that there is not going to be a sanction for non-compliance. In reality, what happens now is that a party will receive a pre-action letter of claim, take up to two weeks to go off and instruct a solicitor, upon receipt, the solicitor then contacts the other party to advise that they have been instructed and asking for more time and their response is then sent once full instructions have been obtained, and that there is no ill to be cured in this respect. Accordingly, we do not consider that any changes are necessary to the current position.

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’.

We do not consider that disclosure obligations should form part of the pre-action protocol stage. There are already sufficient rules in place regarding disclosure and we consider that litigants in person in particular would struggle with understanding what is meant by standard disclosure, initial disclosure or limited disclosure. We suspect that owing to that lack of understanding, if obligations were imposed at the pre-action stage in relation to disclosure of documents, litigants in person would likely disclose everything which would mean that the opposing party would then have to review all materials to decide what was relevant which defeats the intention of the disclosure pilot. There might also be issues of disclosing privileged information, and subsequent satellite litigation as a result.

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

Judicial Review Protocol

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

- ☐ Yes
- ☒ No

Debt Protocol

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

☐ Yes

☒ No

Construction and Engineering Protocol

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

☐ Yes

☒ No

Professional Negligence Protocol

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

☐ Yes

☒ No

Proposed low value small claims track

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

☐ Yes

☒ No

Any other comments

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

CONTINUATION 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)? In theory we agree that pre-action portals are a good idea, but we consider that they will add an additional burden and cost on both parties which is unjustified. Additionally, having to use a computer could deny access to justice for some individuals who may not have access to a computer, or have the requisite skills/knowledge, which we consider to be counterproductive. We also have significant concerns about how the Courts would be able to resource and provide the technology required for pre-action portals if they were to be available to all litigants. There is also a potential concern over disclosure of without prejudice material. 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. We consider that making a distinction between open and without prejudice correspondence as part of the protocol is fraught with difficulties. There are many solicitors practicing who do not appreciate the distinction between open and without prejudice correspondence, let alone litigants in person. Additionally, we consider that the CPR, in particular Part 36, already deals adequately with settlement procedures and that to introduce a new aspect of the protocol of without prejudice communications would simply open up another area for argument and/or potential error. 21. Do you believe pre-action letters of claim and replies should be supported by statements of truth? Again, there is a mixed view on this. Forcing parties to sign a statement of truth on their pre-action letter might be beneficial by forcing the parties to take the matter more seriously. However, even if statements of truth had to be included on letters of claim, we query the benefit of that if there were no sanctions for non-compliance. On balance, we consider that statements of truth should be maintained to pleadings and not letters of claim. We consider that this also provides a potential access to justice issue given that parties may have numerous reasons for engaging with a pre-action process and may choose to do so, and should we think be able to do so, without having to incur increased legal fees – particularly for litigants in person.

