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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 *

3. Last Name *

4. Your location (name of town/city) *

5. Your role *

- ☐ Judge
- ☐ Lawyer
- ☐ Insurer
- ☐ Paralegal/Legal Assistant
- ☐ Litigant
- ☐ Policy maker/civil servant
- ☒ Mediator

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, absolutely. Without mandatory compliance, their purpose, to better inform parties, narrow issues and assist resolution before litigation, is undermined. It is hoped that the greater emphasis on, for example, the good faith obligation to resolve or narrow the dispute will result in more cases settling before litigation thereby reducing the time and costs that litigation requires of both the individual, society and the state.

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 - however, in our experience, a settlement arrived at through mediation usually includes the issue of costs. It is rare that costs are left out of the settlement agreement. In the rare event that costs remain an issue following settlement we agree that a summary paper-based procedure such as that used in the Administrative Court would be a sensible idea.

We are aware of ADR options, particularly mediation, specific to costs disputes and suggest that any new summary costs procedure should, as with other Court procedures, support and encourage those options.

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.

This should be a minimum requirement, which, if implemented, should be promulgated by the PAPs and associated provisions of the CPR as a much stronger requirement than the current largely unenforced PAP formulation that "the parties should consider" using ADR before issue.

This requirement, particularly if combined with sanctions for failure to engage, would serve to focus parties' and their advisors' minds on their obligation.

We are minded that there may, of course, be circumstances where there is a dispute between the parties as to whether this obligation has been complied with and it will be difficult for courts to police the issue because the evidence of efforts to settle will be governed by privilege unless waived or an exception to privilege applies (such as unambiguous impropriety).

There will therefore be constraints on the extent to which a court will be able to satisfy itself, either of its own motion or on the application of one party, that the good faith obligation has been met, where one or all parties refuse to waive privilege. It is important that where mediation has taken place but it is later alleged that a party did not participate in good faith that the mediation privilege is not lifted. It is essential that mediators do not find themselves called to give evidence: even the remotest possibility that party confidentiality within a mediation could be affected will affect parties willingness to be open and candid in all mediations. It is the confidence in the process and of the duties of confidentiality that enable parties to find resolutions through mediation. If issues of good faith are to be raised and considered by a Court we believe that the parties will be able to adduce sufficient evidence of those issues to enable appropriate determinations to be made.

It is our position that there should be an automatic referral to mediation as set out in our response to the Ministry of Justice's Call for Evidence on Dispute Resolution – October 2021. In our experience even the most reluctant of parties can, often to their surprise, find common ground.

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.

We agree. Any encouragement for the parties to focus on the issues and, indeed, to work collaboratively to produce such a report should be beneficial. Where there has been a failure to settle at mediation it would be sensible for the mediator to be involved in facilitating the production of the joint stocktake report to avoid further delay and costs on agreeing it.

We suggest that a requirement to produce a joint timeline of events which refers, or even links, to the documents relied upon. There is technology available which can help with this: in our experience the process of producing such a document can focus minds, highlight issues and identify missing information at an early stage.

We also suggest that the questions within the Stocktake Report should be broadened from the merely procedural.

It is our experience that solutions to disputes are found beyond beyond the judicial outcomes that may be imposed by a Court. Within Clinical Negligence the apology and explanation offered is frequently a key to a resolution. Within commercial disputes between parties with an ongoing business relationship the options available for resolution are far wider and more important than a determination at Trial of issues that arose years before. We recommend that questions could be posed within the Stocktake Report which prompt parties to address any barriers to settlement or of desired outcomes. We recognise the adversarial culture of litigation may draw less than helpful responses but in asking the question it may encourage parties and their advisers to consider wider issues - particularly where they have not yet attempted mediation.

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 agree that the full range of sanctions for non-compliance will provide a Court with the flexibility it needs to cover the range of situations and circumstances that it will face.

b) Compliance with the PAP should be directly addressed in the Directions Questionnaires requiring parties to provide details of the mechanism used (joint settlement meeting, mediation, blind bidding, etc). This will help the parties to focus and to consider whether they have fully complied with the good faith obligation to resolve or narrow the dispute. The court should actively review this material and question counsel/ the parties where it is not provided to identify collusive failures as well. It is our view that parties and their legal representatives (where instructed) should be required to sign a statement of truth on any document explaining compliance with the PAP.

c) Yes.

d) It is our view that there is no reason why costs should not be ordered at the interim stage. The courts have power both to impose summary costs on a defaulting party and to order their immediate payment without waiting for the end of litigation. This is an important tool in case management and will serve to focus parties' minds on the downsides of litigation and the risks involved. Too often, where failure to comply with a PAP is considered as part of a decision on costs at the end of the case, the failure is subsumed / overtaken by subsequent events, memories of events are weaker and the defaulting party is not sanctioned. It is important both to ensure compliance with the PAP and with the ongoing obligation to consider settlement throughout the case to ensure a party is penalised for failure to comply at the time of non-compliance not several months or years down the line.

e) The court's approach to failures to observe the requirements of any relevant PAP should be as uniform and firm irrespective of the sector, with perhaps a willingness to make some allowances where LIPs are involved.

It should be remembered that the whole concept of the PAPs is to make settlement possible for the benefit of litigants and the court system. Litigation must truly be the last resort. If the relevant PAP is complied with, the great majority of claims will be capable of settlement, which is why compliance with the PAPs is so important and needs to be firmly policed by the courts. A few demonstrations by judges that they intend to adopt this firm attitude to the need for PAP compliance, the legal profession will rapidly adapt to make compliance a priority. The issuing of litigation is unlikely to widen either party's knowledge appreciably given PAP compliance, all it really becomes is a way to threaten opponents towards settlement or submission, all at very considerable cost of time and money and underlying uncertainty. In our experience, lay parties are very often relieved to find a way out of litigation at the earliest opportunity and regret the loss of control over their claim that engagement in litigation inevitably bring.

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.

It is really important that plain and easily understood language is used.

In addition, we think that the PAP itself should point parties to other resources. For example, where the PAP mentions mediation there should be a hyperlink to the more information on mediation and where a party could find a mediator such as the MoJ page here: <https://www.gov.uk/guidance/a-guide-to-civil-mediation>.

It is not enough to say "you can use a mediator" without helping parties know where to find one. We fully support the idea that portals could encompass the steps required by a PAP to assist with compliance.

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?

We consider this an issue for practitioners and the Judiciary

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 concur with the view of the Master of the Rolls that there should be frequent opportunities offered to parties in dispute to find resolution. To the extent that the PAP processes encourage this, perhaps via the Stocktake, such steps might also be adopted at other stages of litigation.

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.

This seems sensible, and support the draft which will doubtless be refined in the light of feedback generated by this consultation. We are delighted that the phrase "it is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR" has disappeared from the GPAP. As we say under Q.78, this needs to disappear from all PAPs.

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 consider this an issue for practitioners and the Judiciary

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 consider this an issue for practitioners and the Judiciary

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.

a) We have not commented on specific PAPs. Our Members practice across all areas of civil mediation and dispute resolution. Our response reflects and applies to mediation generally and our commentary broadly applies to all subject areas.

We do however wish to repeat our response to question 25 in so far as that relates to specific PAPs. We wholeheartedly welcome the exclusion of the misleading rubric that has haunted most PAPs which should now be removed from all of them. This reads (with some variations):

"it is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR".

This was always questionable in the light of court decisions over costs sanctions (which had the effect of strongly warning that ignoring ADR might well give rise to cost sanctions). However, the 2021 CJC Report Compulsory ADR now makes it clear that courts can indeed "force" (i.e. "order") parties to mediate or use other forms of ADR. See also on this point Lomax v Lomax [2019] EWCA Civ 1467. So this rubric must be removed from all PAPs and more accurate wording must replace it. We consider that issues raised on sector specific PAPs are for practitioners and / or Judiciary to comment.

b) We mention that in preparing our response we have had the benefit of seeing the response from CEDR and concur with it's comments.