

## 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.

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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
- ☒ Third Sector Agency

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?

I think there should be defined exceptions - eg when domestic abuse is known between parties; when one party is identified as too vulnerable to conduct proceedings on their own; when the imbalance of power can be sufficiently quantified to show that a PAP would be meaningless, or give the stronger party unfair advantage.

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.

Probably a good idea. Again, the system must mitigate against exploitation of a weaker party by a stronger party.

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 general, with attention to potential exploitation by stronger parties: parties identified as vulnerable will need some form of support to manage a PAP, just as they need help navigating court procedures. There's often a strong drive to agree to a solution simply to make the problem go away, and the system must protect weaker parties against agreeing to solutions for the wrong reasons. NB: the direction of travel here appears to reduce the scope for early resolution through co-operation and negotiation. It seems to be advancing the strictures of court procedure to the pre-action space, with a risk that the overall process is more intimidating and off-putting for LiPs. We strongly believe that if these proposals go ahead, there must be extra support put in place for LiPs to deal with the enhanced procedures.

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
- ☒ If implemented, this would need explaining to LiF

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.

Yes. NB: the term 'joint stocktake report' should be replaced with a more literal phrase - eg 'joint pre-action statement'/'joint position on issues'..... The Template appears straightforward and should be easy for LiPS to use.

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?

If I understand this point, it seems to reinforce the risk of a 'pre-court court process' which simply extends the pre-court dispute before full proceedings start, with associated use of Court resources - not to mention opportunities for parties to stall proceedings by complaining about compliance with PAPs. It would make sense to address minor/innocent breaches of the PAP process, but on the whole, if the principle of a PAP is to encourage collaboration and negotiation, significant non-compliance means it hasn't worked. Shouldn't the case move as quickly as possible into formal proceedings with all the powers of the Courts to address non-co-operation? (The court could then take account of non-compliance in subsequent judgments/orders, as happens now).

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
- ☒ Yes, but... See Q20 below

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.

See answers above: we remain concerned that the adversarial nature of court proceedings is simply being extended into pre-court activity. While part of the aim is to reduce court time, the difference between a PAP and court process is the focus on collaborative resolution. The system - and any change in language - should focus on how to encourage collaboration and co-operation rather than creating a 'pre-court court process'. How to make this work for vulnerable parties needs a much bigger conversation than a 650-word text box! Please consider a roundtable discussion with interested organisations.

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?

Yes. It seems an obvious matter of principle that arguments should be consistent, unless there's a material change in circumstances or legitimate shift in reasoning, which can be clearly demonstrated and justified.

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?

Yes. This seems a sensible principle and an incentive to use the PAPs honestly/appropriately. If efforts made to follow the steps in a PAP contribute to the court process, this is better for court-users and reduces time spent at court, fulfilling both main aims of this work (seems a 'no-brainer' in principle!). No suggestions for details at present - seems to be another opportunity for a wider discussion.

## 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 - we support a General PAP, but it should be focused on negotiated solutions, not just become 'pre-court court activity' (see above). The draft text seems to get more legal towards the end. I'm sure Support Through Court or Law for Life would have a look at the language if that would be helpful.

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?

Yes, probably, but there should be facilities to accommodate reasonable extra time for exceptional circumstances. Not sure exactly how this would be achieved, but the system mustn't set such strict limits that opportunities for negotiation are undermined (while also keeping things moving forward).

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'.

Probably - but whatever is decided, it needs to be proportionate and achievable, with LiPs in mind. It would need careful explanation for LiPs, and possibly some tailored assistance for this stage of the procedure.

## 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

29. Do you agree that there should be a generic PI protocol that incorporates relevant general principles from the general PAP but also identifies PI specific objectives not applicable to other litigation (Part A) with users being directed to a subject specific "Part B" rules for each specialist area?

☐ Yes

☐ No

☒ Yes – it seems logical to have a generic PI protocol

30. Do you agree that all PI protocols should include a good faith obligation more prominently in the introduction to try to resolve or narrow the dispute?

☐ Yes

☐ No

☒ Yes – we don't see any possible downside to this

31. Do you agree that all PI protocols should include an obligation to complete a joint stocktake report/list of issues and should this be:

a) before or after ADR, and/or

b) filed with the Directions Questionnaire?

Yes – although for LiPs there would need to be a clear explanation of what is meant by this (as above): "joint stocktake report" is not a readily understandable phrase. "List of issues" is another alternative, but might still need some explanation. As to stage, I would slightly favour it being filed with the Directions Questionnaire as presumably not all cases will be suitable for ADR and it would therefore reduce the number of occasions on which a party needs to take action.

32. Do you agree that any revisions to the PI protocols need to be approached with great care to ensure workstreams for multi-track cases are clearly separated out from fast-track work? If so:

a) How could there be effective, referencing to and integration with the Serious Injury Guide where appropriate?

b) How can the current protocols be updated to reflect moderately severe cases as well as catastrophic injury cases despite workflows for each being significantly dissimilar?

Not sure we can offer a view on this, as it falls into a more specialised area and is arguably less likely to affect LiPs.

33. Do you agree that there should be better integration of each protocol with the Rehabilitation Code? If so, should the protocols require a claimant to identify any rehabilitation they consider would be beneficial, with estimated costs if possible and should it require a defendant to supply reasons if they refuse, or fail to provide assistance with rehabilitation?

Yes – anything that prioritises early rehabilitation and treatment should be encouraged.

34. Do you agree the transitional integration clauses for injury claims exiting fixed recoverable processes and slotting into the main injury protocol require greater clarity?

☒ Yes

☐ No

☐ Other

35. Is there value in being more specific within protocols about the level of quantification work to be undertaken without a route map agreed with the other party and the timetable for commencing proceedings following an admission of liability?

- ☐ Yes
- ☐ No
- ☒ Yes, although there remains a need to be flexible

36. Do you agree the management of disclosure pre-issue needs to be strengthened to encourage greater compliance with the protocol? Paragraph 7.1 of the protocol expects the claimant to identify which documents are relevant and why. Should there be equal obligations on defendants to give reasons why they consider a document is not relevant/why they will not disclose a document?

Yes – there needs to be a level playing field between Claimant and Defendant, and early disclosure of relevant documents will usually promote early settlement, or at least the narrowing of issues. If the Defendant feels that a particular document or class of documents are not relevant or not disclosable, they should need to explain why, so the Claimant can understand their position and either accept it or challenge it.

37. Should the claimant's letter of claim state what medical records have been obtained and are available for disclosure and what medical records are still to be obtained?

- ☐ Yes
- ☐ No
- ☒ Yes, along as (i) the Claimant is aware of this and

38. Do you agree that a working group should be established, as a priority, to consider a specific protocol for abuse claims?

- ☒ Yes
- ☐ No
- ☐ Other

39. Do you agree that a working group should be established to consider a specific protocol for foreign accident cases?

- ☒ Yes
- ☐ No
- ☐ Other

40. Should initiatives with third party organisations such as the expert witness community and HMRC be considered to reduce delays in the resolution of injury disputes?

- ☒ Yes
- ☐ No
- ☐ Other

41. Should the PI PAPs deal with the question of what to do where a Claimant obtains medical evidence prior to issue but elects not to serve, and if so, what steps should be open to the Defendant?

Probably not – there may be many reasons why a Claimant chooses not to rely on a particular report which is likely to contain sensitive and personal medical information and should remain privileged.

42. Prior to commencement of proceedings by the Claimant should the Defendant be entitled to obtain a medical report on the Claimant if the Claimant does not disclose a medical report?

- ☐ Yes
- ☐ No
- ☒ No – it's hard to see how this could work in pract

43. Do you agree that the protocol should include provision that for the purposes of rehabilitation the claimant solicitors should give reasonable access for medical assessment when requested by the defendant insurer?

- ☐ Yes
- ☐ No
- ☒ Yes, but only in cases where the Claimant has req

44. If you consider any change to the PI PAP expert evidence process in multi-track cases would be beneficial what would the new process look like?

We have no view on this question.

45. Would an ability to have pre-litigation court case management help dispute resolution in multi-track PI cases?

- ☐ Yes
- ☐ No
- ☒ Yes – structured and focused judicial case manag

## Housing Protocols

46. Do you wish to answer questions about housing protocols? \*

- ☒ Yes
- ☐ No

47. 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
- ☐ Other

48. 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
- ☐ Other



49. 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
- ☐ Other

50. 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
- ☒ Yes, probably - but it's worth considering if there

51. 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
- ☒ Yes. Generally speaking, the more information the

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

- ☐ Yes
- ☐ No
- ☒ If negotiation has a chance of working, the PAP s

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

- ☐ Yes
- ☐ No
- ☒ Yes, with defined exceptions.

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

- ☐ Yes
- ☐ No
- ☒ Yes, probably

55. 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
- ☐ Other

56. 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
- ☐ Other

57. 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
- ☐ Other

58. 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

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

- ☐ Yes
- ☒ No

## Debt Protocol

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

- ☒ Yes
- ☐ No

61. Do you support the introduction of a good faith obligation to try to resolve or narrow the dispute and the requirement to file a joint stocktake report, on condition that debtors have access to legal assistance to complete both requirements?

- ☐ Yes
- ☐ No
- ☒ Yes (but see above - change the term "joint stock

62. Would you support aligning the time limits for responding to the pre-action letter of demand to those suggested for the revised general PAP (14 days with a right to extend for a further 28 days to obtain further information including legal advice)? What changes, if any, would you make to the rules on when litigation can be commenced?

Yes, probably, but with facility to accommodate exceptional circumstances. (No comment at present on rules about commencing litigation - further discussion might be enlightening).

63. Do you think the contents of the pre-action letter of claim should be more prescriptive and, if so, what content should be prescribed?

Possibly - templates are useful, but any prescriptive content must allow for a range of circumstances.

64. Do you think the language of the PAP should be made more user friendly and do you support changing the terms creditor and debtor to claimant and defendant?

- ☒ Yes
- ☐ No
- ☐ Other

65. Do you support integrating the PAP for debt claims into the Money Claims Online (MCOL) portal (or any successor platform)?

- ☐ Yes
- ☐ No
- ☒ Yes, probably

## Construction and Engineering Protocol

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

- ☐ Yes
- ☒ No

## Professional Negligence Protocol

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

- ☐ Yes
- ☒ No

## Proposed low value small claims track

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

☒ Yes

☐ No

69. Would you support the exclusion of the stocktake requirement and the inclusion of the good faith obligation to try to resolve or narrow the dispute in a new PAP for low value small claims case worth £500 or less?

☐ Yes

☐ No

☒ Other

Any other comments

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

Ref Qstn 69 above: just because sums under £500 are relatively small, it doesn't mean they're insignificant; they may be all the more critical to a claimant on a low income who would need to recover the money quickly. It could make the difference between rent arrears/bankruptcy etc and timing could be critical. There could therefore be an argument to except these cases from the PAP altogether, so they can be dealt with quickly in court - or at least try to define exceptions where the money is needed urgently to cover a short-term income gap that could save the claimant from longer-term problems (bankruptcy/rent arrears etc.....).

