

The Civil Justice Council's (CJC) proposed reforms to the Pre-Action Protocols (PAPs) and the possible mandatory ADR gateway. What could this mean for your case?

In November 2021, The Civil Justice Council's published its interim report on proposed changes to the current Pre-Action Protocols, which included a mandatory Alternative Dispute Resolution (ADR) gateway. In this article, we look at proposed reforms and consider what this could mean for your case.

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On 15 November 2021, the CJC published its [interim report](#) on proposed changes to the current PAPs, which are aimed at making the process more accessible and efficient. The PAPs set out steps that parties to a dispute should take to set out their position and narrow points of dispute before starting Court proceedings for civil claims. The CJC has described the proposed reforms as “evolutionary rather than revolutionary” — but they do mark a significant shift from current practice, which has sparked concern amongst commercial litigators. The proposed reforms have not yet been integrated into the Civil Procedure Rules (CPR) (a procedural code which deals with how Courts treat cases justly).

What are the key PAPs reform proposals?

A key objective of the proposed reforms to the PAPs is to increase pre-action exchanges between the parties to encourage early resolution and encourage the parties to narrow the issues in dispute.

Some of the key proposed reforms include:

- Creating PAPs online portals where open correspondence (i.e., correspondence that is not confidential, which we take to mean correspondence that is not without prejudice or privileged correspondence) would be exchanged and accessible to the Court at the point litigation commences, such as letters of claim and replies. The platform could also be used to explore settlement options, for example by facilitating formal offers to settle, mediation, or a meeting between the parties after the early exchange of information has taken place.
- A “good faith obligation” to try to resolve or narrow the issues in dispute before commencing Court proceedings. This might include: a meeting between the parties, or, in the absence of a formal offer to settle, intra-party discussions as a minimum. The report does not recommend making ADR, which refers to ways of resolving disputes outside of the courtroom, and is a mandatory step of the PAP. A decision which is perhaps inconsistent with the recommendations in the CJC's [Compulsory ADR report](#), published in June 2021, the key focus of which was removing the 'A' from Alternative Dispute Resolution and integrating it as a mandatory step in formal proceedings.
- Carrying out a 'joint stocktake' or creating a list of issues before proceedings commence to identify:
 - the issues in dispute/points of agreement;
 - the parties' respective positions; and
 - requests for disclosure.
- Making compliance with PAPs mandatory (except in urgent cases) and expanding the Court's powers to raise and sanction non-compliance with the PAPs.
- Introducing a summary costs procedure.
- Tighter time limits for pre-action correspondence.

- Pre-action letter of claim and replies to be supported by statements of truth. The consequences of falsely signing a statement of truth are significant: a party could face proceedings for contempt of Court if they knowingly make a false statement.

If introduced, what could the proposed PAP reforms mean for my case?

For complex commercial litigation the reforms are likely to mean additional levels of case preparation at an earlier stage, which could make the pre-action stages of litigation more expensive than is the case currently by front-loading this element of the work. If parties are required to sign statements of truth it is likely to put an additional duty on solicitors to scrutinise the evidence in the case before issuing letters of claim/replies. In the absence of agreement, legal costs are not recoverable if a case is settled or abandoned before proceedings are commenced. An increase in pre-action legal costs as a result of the proposed changes to the PAPs (if adopted) could mean that parties are less willing to settle having invested more heavily in the pre-action phase and become more entrenched in their positions. This would undermine a key objective of the reforms: to improve economy and proportionality in litigation.

On the other hand, we expect commercial clients may welcome the CJC's efforts to encourage compliance with the PAPs via an online portal and narrowing the issues in dispute. We hope that reforms in these areas might encourage parties to evaluate more critically the merits of their cases and avoid advancing weak arguments or claims, which in turn would reduce their legal costs.

If you have any queries about how the proposed reforms could affect your case if they are implemented, please get in touch with our [Commercial Dispute Resolution team](#) who would be happy to advise you.

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