Proposals for Consultation

Proposal 1

Provisions expressly setting out the overriding objectives of the civil justice system should be adopted with a view to establishing fundamental principles to be followed when construing procedural rules and determining procedural questions.

Report paras 225-233

CPR 1.1 to 1.3; Supreme Court Rules of South Australia Rule 2; NSW Supreme Court Rules (amendment No 337) 2000, 20 December 1999, r 1.3

Proposal 2

A rule placing a duty on the Court to manage cases as part of the overriding objective of the procedural system and identifying activities comprised within the concept of case management should be adopted.

Report paras 240-256

CPR 1.4, 3.1(2), 3.3; NSW Supreme Court Rules, r 26

Proposal 3

Rules listing the Court's case management powers, including a power to make case management orders of its own initiative should be adopted.

Report paras 240-256

CPR 3.1, 3.3

Proposal 4

Steps should be taken, in cooperation with interested business, professional, consumer and other groups, to develop pre-action protocols suitable to Hong Kong conditions with a view to establishing standards of reasonable pre-action conduct in relation to specific types of dispute.

Report paras 258-275

Practice Direction on Pre-action Protocols and 5 current Protocols

Proposal 5

Rules should be adopted allowing the court to take into account the parties' pre-action conduct when making case management and costs orders and to penalise unreasonable non-compliance with pre-action protocol standards.

Report paras 258-275

CPR 3.1(4), 3.1(5), 3.9(e), 44.3(5), 48.1 and 48.2; and Practice Direction on Pre-action Protocols

Proposal 6

The way to commence proceedings should be simplified to involve only two forms of commencement, abolishing distinctions between writs, originating summonses, originating motions and petitions.

Report paras 276-277

CPR 7 and 8

Proposal 7

Part 11 of the CPR should be adopted to govern applications to challenge the court's jurisdiction or to invite it to decline jurisdiction.

Report para 278

CPR 11

Proposal 8

Provisions along the lines of Part 14 of the CPR should be adopted to provide a procedure for making admissions and for the defendant to propose terms for satisfying money judgments.

Report paras 279-283

CPR Part 14

Proposal 9

Rules should be adopted aimed at returning pleadings to a simpler form, comprising a concise statement of the nature of the claim and of the facts relied on, together with any relevant point of law.

Report paras 284-288, 298

CPR 16.2, 16.4, 16.5, 16PD

Proposal 10

Rules be introduced requiring defences to be pleaded substantively, with reasons given for denials and positive cases advanced.

Report paras 289, 298

CPR 16.5

Proposal 11

A requirement for all pleadings to be verified by statements of truth should be introduced and the making of a false statement without an honest belief in its truth should be made punishable as a contempt.

Report paras 290-292, 298

NSW Supreme Court Rules, r 15 and r 15A; CPR 22.1, 22.2, 32.14 and 22PD

Proposal 12

Rules should be adopted to establish a power to require clarification of and information on pleadings, exercisable by the court of its own motion or on application by a party, in accordance with the principles contained in the overriding objective.

Report paras 293-295, 298

CPR 18, 18PD

Proposal 13

Rules making it more difficult to amend with a view to encouraging carefully prepared statements of case early in the proceedings should be adopted.

Report paras 296-298

CPR 17

Proposal 14

The test for summarily disposing of proceedings or issues in proceedings should be changed to the "real prospect of success" test, construed as establishing a lower threshold for obtaining summary judgment, and applied in all procedural contexts where summary disposal of the case may ensue. Cases or issues in cases, whether advanced by plaintiff or defendant, which have no real prospect of success should not be allowed to proceed to trial unless some overriding public interest requires that they do proceed.

Report paras 299-316

CPR 3.4, 13, 24

Proposal 15

Rules governing the making and costs consequences of offers of settlement and payments into court along the lines of Part 36 of the CPR should be adopted.

Report paras 317-323

CPR 36, 44.3; New South Wales, Supreme Court Rules 1970, rr 22.2, 52 and 52A

Proposal 16

The rules governing the grant of interim relief, the award of interim payments and security for costs should be rationalized and collected together, accompanied by a Practice Direction setting out appropriate court-approved forms for interim relief applications and orders, along the lines of CPR 25 and CPR 25PD.

Report paras 324-331

CPR 25, 25PD

Proposal 17

Interim relief by way of *Mareva* injunctions and/or *Anton Piller* orders should be available in relation to proceedings which are taking place, or will take place, outside the jurisdiction (and where no such substantive proceedings are contemplated in Hong Kong).

Report paras 324-331

CPR 25.4

Proposal 18

A rule should be adopted requiring the parties each to fill in and file a questionnaire shortly after the defendant serves its defence, providing the court with specified items of information to enable it to assess the procedural needs of the case with a view to fixing a timetable and giving appropriate directions for the conduct of the case including directions fixing milestones in the progress of the case which are, save in the most exceptional circumstances, immovable.

Report paras 332-358

CPR 26.3

Proposal 19

Rules should be adopted which give the court maximum flexibility when devising timetables and directions and which also encourage the parties to make reasonable procedural agreements without requiring reference to the court unless such agreements may impinge upon specified milestone events in the prescribed timetable.

Report paras 332-358

CPR 2.11, 26, 29

Proposal 20

As an alternative to Proposals 18 and 19, the possible adoption of case management by a docket system should be explored for use either generally or in connection with particular classes of proceedings.

Report paras 359-370

Proposal 21

Specialist lists should be preserved and Specialist Courts permitted to publish procedural guides modifying the application of the general body of rules to cases in such specialist lists.

Report paras 371-375

CPR 49 and associated Practice Directions

Proposal 22

Consideration should be given to establishing additional specialist lists in areas likely to benefit, including lists for complex cases, for cases involving unrepresented litigants and cases where group litigation orders (if introduced) have been made.

Report paras 371-376

Proposal 23

A procedural scheme to deal with multi-party litigation should be adopted in principle, subject to further investigation of schemes implemented in other jurisdictions which may be suitable for the HKSAR.

Report paras 377-402

CPR 19.10 – 19.15, 48.6A; 19BPD

Proposal 24

A provision regulating derivative actions should be adopted.

Report paras 403

CPR 19.9

Proposal 25

Automatic discovery should be retained, but the *Peruvian Guano* test of relevance should no longer be the primary measure of parties' discovery obligations. Subject to the parties' agreeing otherwise, a primary test restricted to directly relevant documents, namely, those relied on by the parties themselves, those adversely affecting each party's case and those supporting the opponents' case, should be adopted instead.

Report paras 404-425

CPR 31.6, 31.8

Proposal 26

In making disclosure, the parties should be free to reach agreement as to the scope and manner of making discovery. Where no agreement is reached, they should be obliged to disclose only those documents required under the primary test, ascertainable after a reasonable search, the reasonableness of such search being related to the number of documents involved, the nature and complexity of the proceedings, how easily documents may be retrieved and the significance of any document to be searched for.

Report paras 404-425

CPR 31.7, 31.10

Proposal 27

In the alternative to Proposals 25 and 26, discovery should not be automatic but should be subject to an inter partes request, with further discovery requiring the court's order, along the lines of the system adopted in New South Wales.

Report paras 404-425

Part 23 of the NSW Supreme Court Rules 1970

Proposal 28

Parties should be empowered to seek discovery before commencing proceedings and discovery from non-parties along the lines provided for by the CPR.

Report paras 404-425

CPR 31.16, 31.17

Proposal 29

The court should be expected to exercise its case management powers with a view to tailoring an appropriate discovery regime for the case at hand. It should have a residual discretion both to direct what discovery is required – to narrow or widen the scope of discovery required, to include, if necessary and proportionate, full *Peruvian Guano* style discovery – and in what way discovery is to be given.

Report paras 404-425

CPR 31.13

Proposal 30

The rules should pursue the objective of reducing the need for interlocutory applications by adopting one or more of the following strategies, namely :-

- Encouraging the parties to cooperate with each other and to agree procedural arrangements (subject to the court's residual jurisdiction to set aside or vary those arrangements).
- Authorising the court, in appropriate cases, to act on its own initiative in giving procedural directions, without hearing any party before so acting (subject to affected persons thereafter having a right to apply for orders so made to be set aside or varied).
- Making orders which specify the automatic consequences of non-compliance and placing the onus on the party guilty of non-compliance to seek relief from those consequences, such relief to be granted at the court's discretion.

Report paras 426-441

CPR 1.3, 1.4(2), 2.11, 3.1(3), 3.3, 3.8, 3.9

Proposal 31

Rules should be adopted with a view to streamlining interlocutory applications including rules which :-

- Permit applications to be dealt with on paper and without a hearing.
- Eliminate hearings before the master where the matter is contested and may be likely to proceed on appeal to the judge in any event.
- Make provision for dispensing with attendance and for use of modern means of communication for hearings where costs may be saved.

Report paras 426-429, 442-450

CPR 23.8, 23PD §6.1-7

Proposal 32

The court should be encouraged to make, whenever possible, summary assessments of costs at the conclusion of interlocutory applications.

Report paras 426-429, 451-462

CPR 43.3, 44.2, 44.7, 44PD §13.2, §13.5; 45PD §14.1

Proposal 33

In place of the powers currently conferred on the court by HCR Order 62 r 8(1), the court's power to make wasted costs orders against solicitors should be exercisable where the wasted costs are incurred as a result of any improper, unreasonable or negligent act or omission on the part of a solicitor or any employee of such solicitor; or which costs, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

Report paras 463-467

HCR Order 62 r 8(1); s 51 of the Supreme Court Act 1981 as amended by s 4 of the Courts and Legal Services Act 1996; CPR 48.7

Proposal 34

The court's power to make wasted costs orders against solicitors should be extended to cover barristers.

Report paras 463-468

HCR Order 62 r 8(1); Supreme Court Act 1981, s 51(6), as amended by s 4 of the Courts and Legal Services Act 1996; CPR 48.7

Proposal 35

A rule should be adopted giving the court express powers to exercise control over the evidence to be adduced by the parties by giving directions as to the issues on which it requires evidence; the nature of the evidence which it requires to decide those issues; and the way in which the evidence is to be placed before the court. Such powers extend to powers to exclude evidence that would otherwise be admissible and to the limiting of cross-examination.

Report paras 469-479

CPR 32.1

Proposal 36

For the avoidance of doubt, the High Court Ordinance should be amended to provide an express rule-making power permitting the court to restrict the use of relevant evidence in furtherance of the overriding objective.

Report paras 469-479

Cf Civil Procedure Act 1997, Schedule 1, para 4

Proposal 37

A rule should be adopted to promote flexibility in the court's treatment of witness statements, by expressly catering for reasonable applications for witnesses to be allowed to amplify or to add to their statements.

Report paras 480-483

CPR 32.5(3) and (4)

Proposal 38

Provisions aimed at countering the inappropriate and excessive use of expert witnesses should be adopted, giving the court control of the scope and use of expert evidence to be adduced.

Report paras 485-493, 518

CPR 35.1, 35.4, 35.6, 35.9

Proposal 39

Measures aimed at countering lack of independence and impartiality among expert witnesses should be adopted :-

- Declaring the supremacy of the expert's duty to assist the court over his duty to the client or the person paying his fees.
- Emphasising the impartiality and independence of expert witnesses and the inappropriateness of experts acting as advocates for a particular party.
- Annexing a code of conduct for expert witnesses and requiring experts to acknowledge their paramount duty to the court and a willingness to adhere to the code of conduct as a condition for allowing expert reports or evidence to be received.
- Requiring expert reports prepared for use by the court to state the substance of all material instructions conveyed in any form, on the basis of which the report was prepared, abrogating to the extent necessary, any legal professional privilege attaching to such instructions, but subject to reasonable restrictions on further disclosure of communications between the party and such expert.
- Permitting experts to approach the court in their own names and capacity for directions without notice to the parties, at the expense of one or all of the parties, as directed by the court.

Report paras 494-506, 518

CPR 35.3, 35.10, 35.14; NSW Supreme Court Rules, Schedule K and r 39

Proposal 40

That a procedure be adopted permitting the court to direct the parties to cause single joint experts to be engaged at the expense of the parties and that appropriate rules be adopted to govern the rights, duties and functions of such single joint experts.

Report paras 507-518

CPR 35.7, 35.8

Proposal 41

Rules conferring express powers on the court to case manage trials, including powers to exclude otherwise admissible evidence and to limit cross-examination and submissions by counsel should be adopted, with the proviso that the exercise of such powers is subject to the parties' entitlement to receive a fair trial and a reasonable opportunity to lead evidence, cross-examine and make submissions.

Report paras 519-528

Western Australia Supreme Court Rules O 34 r 5A; NSW Supreme Court Rules r 34.6AA; CPR 1.4(1), 2.11, 3.9(g), 29.9(2), 29.5, 32.1

Proposal 42

A requirement that interlocutory appeals to the Court of Appeal be brought only with leave of the Court of First Instance or the Court of Appeal should be introduced.

Report paras 529-532

Proposal 43

All appeals from the Court of First Instance to the Court of Appeal (and not merely interlocutory appeals as proposed in Proposal 42) should be subject to a requirement of leave.

Report paras 533-534

CPR 52.3

Proposal 44

Leave to appeal should only be granted where the court considers that the appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard.

Report paras 535-539

CPR 52.3(6)

Proposal 45

Leave to appeal from case management decisions should generally not be granted unless the case raises a point of principle of sufficient significance to justify the adverse procedural and costs consequences of permitting the appeal to proceed.

Report paras 535-539

CPR 52, 52PD §4.5

Proposal 46

Leave to appeal from a decision itself given on appeal should generally not be granted unless the case raises an important point of principle or practice or some other compelling reason exists for the grant of leave.

Report paras 535-539

CPR 52.13

Proposal 47

If a requirement of leave for appeals to the Court of Appeal is introduced, the Court of Appeal should have power, in relation to applications for leave which are wholly unmeritorious and tantamount to an abuse of its process, to dismiss such applications without an oral hearing, subject to the applicant being given one final opportunity to show cause in writing why the application should not be so dismissed.

Report paras 540-541

Cf Hong Kong Court of Final Appeal Rules, rule 7

Proposal 48

Rules designed to enable the substantive hearing of appeals to be dealt with efficiently, including rules enabling the Court of Appeal to give directions case managing the hearing, should be adopted.

Report paras 540, 542-543

CPR 52PD §§4.6, 4.11, 6.5, 6.6, 15.12 to 15.14

Proposal 49

Appeals should be limited to a review of the decision of the lower court, subject to the appellate court having a discretion to treat the appeal as a re-hearing if the circumstances merit such an approach.

Report paras 544-551

CPR 52.11

Proposal 50

The principles upon which appeals are determined should apply uniformly to the Court of First Instance and the Court of Appeal.

Report paras 544-551

CPR 52.11

Proposal 51

A general rule should be adopted requiring the court to take into account the reasonableness or otherwise of the parties' conduct in the light of the overriding objective in relation to the economic conduct or disposal of the claim before and during the proceedings when exercising its discretion in relation to costs.

Report paras 552-557

CPR 44.5(3)(a), 44.14

Proposal 52

Rules should be adopted requiring solicitors and barristers (i) to disclose to their clients full information as to the basis on which they will be charged fees; (ii) to provide them with the best available estimates as to the amount of fees they are likely to be charged for the litigation in question, by reference to stages of the proceedings and overall (in the case of barristers, assuming that they continue to be instructed by the solicitors in the case); and (iii) to update or revise such information and estimates as and when they may change, with reasons given for any such changes.

Report paras 558-573

New South Wales Legal Profession Act 1987, ss 174, 175, 178, 179, 182 and 183; in England and Wales: Solicitors' Practice Rules 1990, r 15; Solicitors' Costs Information and Client Care Code 1999; CPR 44.2, 44.14(3)

Proposal 53

Steps should be taken, including the promotion of legislation if necessary, to ensure that the public is given access to information regarding barristers and solicitors relevant to a choice of legal representation in connection with litigation or possible litigation, including information concerning fees, expertise and experience to be made available by the professional associations concerned or in some other appropriate manner.

Report paras 574-575

Proposal 54

Procedures should be adopted to make challenges by clients to their lawyers' charges subject to a test whereby the necessity for the work done, the manner in which it was done and the fairness and reasonableness of the amount of the costs in relation to that work, are all subject to assessment without any presumption that such costs are reasonable.

Report paras 576-583

New South Wales Legal Profession Act 1987, ss 184, 185, 208C and 208D

Proposal 55

Steps should be taken to compile benchmark costs for use in Hong Kong.

Report paras 584-598

Proposal 56

Provision should be made in Hong Kong to require the parties, periodically and as ordered, to disclose to the court and to each other best available estimates of costs already incurred and likely to be incurred in the case.

Report paras 599-604

43PD §6.1-6.6; 48PD Schedule of Costs Precedents, Precedent H

Proposal 57

The exceptional treatment given to counsel's fees on party and party taxations, as provided for by para 2(5) of Pt II of the 1st Schedule to Order 62 of the HCR should be deleted.

Report paras 605-607

1st Schedule to Order 62 of the HCR

Proposal 58

A rule should be introduced to enable offers similar to Part 36 offers under the CPR to be made in the context of the taxation of costs.

Report paras 610-612

NSW Supreme Court Rules, r 22.10

Proposal 59

Conditional upon benchmark costs being adopted, such benchmark costs should be taken to represent the presumptive amounts allowable in a taxation of costs and pursuit of a taxation process by a party who subsequently fails to secure an award for a higher amount in respect of an item covered by a costs benchmark should be taken into account in determining the incidence and quantum of the costs of the taxation process.

Report paras 613-615

Proposal 60

A procedure should be introduced to enable provisional taxations to be conducted on the papers, at the court's discretion, subject to a party dissatisfied with any such provisional taxation being entitled to require an oral hearing, but subject to possible costs sanctions if he fails to do better at the hearing.

Report paras 616-617

Proposal 61

Rules, backed by costs sanctions, be introduced requiring the parties to a taxation to file documents in prescribed form, with bills of costs supported by and cross-referenced to taxation bundles and objections to items in such bills taken on clearly stated grounds, using where applicable, prescribed court forms and precedents.

Report paras 618-619

CPR 47.18

Proposal 62

Rules similar to those listed in Schedule 1 to the CPR should be retained in the HCR with only such changes as may be necessitated by changes to other parts of the HCR.

Report paras 620-622

CPR Schedule 1

Proposal 63

Rules making mediation mandatory in defined classes of case, unless exempted by court order, should be adopted.

Report paras 623-643

Rule 24.1 of the Ontario Rules of Civil Procedure

Proposal 64

A rule should be adopted conferring a discretionary power on the judge to require parties to resort to a stated mode or modes of ADR, staying the proceedings in the meantime.

Report paras 644-645

Proposal 65

A statutory scheme should be promoted to enable one party to litigation to compel all the other parties to resort to mediation or some other form of ADR, staying the proceedings in the meantime.

Report paras 646-651

Notice To Mediate Regulation (BC Reg 127/98) under the Insurance (Motor Vehicle) Act; Notice to Mediate (Residential Construction) Regulation (BC Reg 152/99) under the Homeowner Protection Act; Notice to Mediate (General) Regulation (BC Reg 4/2001) under the Law and Equity Act

Proposal 66

Legislation should be introduced giving the Director of Legal Aid power to make resort to ADR a condition of granting legal aid in appropriate types of cases.

Report paras 652-654

Family Law Act 1996, s 29

Proposal 67

Rules should be adopted making it clear that where ADR is voluntary, an unreasonable refusal of ADR or uncooperativeness during the ADR process places the party guilty of the unreasonable conduct at risk of a costs sanction.

Report paras 655-661

CPR 1.4(e), 26.4, 44.3(4), 44.5(3)(a)

Proposal 68

A scheme should be introduced for the court to provide litigants with information about and facilities for mediation on a purely voluntary basis, enlisting the support of professional associations and other institutions.

Report paras 662-672

Proposal 69

Reforms should be adopted to simplify description of the scope of judicial review and to simplify the terminology for forms of judicial review relief.

Report paras 679-683, 692.1

CPR 54.1(2)(a), HCR O 53 r 1

Proposal 70

Provisions should be adopted to facilitate participation in judicial review proceedings by persons interested therein other than the applicant and respondent.

Report paras 679-680, 684, 692.2

CPR 54.1(2)(f), 54.6(1)(a), 54.7, 54.17

Proposal 71

Provisions should be adopted to require claims for judicial review to be served on respondents and on other persons known to be interested in the proceedings.

Report paras 679-680, 684, 692.3

CPR 54.8

Proposal 72

Provisions should be adopted to require respondents who wish to contest the proceedings to acknowledge service and to summarise the grounds relied on**.**

Report paras 679-680, 685, 692.4

CPR 54.8

Proposal 73

Provisions should be adopted spelling out the court's powers on quashing a decision, including a power, subject to statutory limitations, to take the impugned decision itself.

Report paras 679-680, 690-691, 692.5

CPR 54.19(2) and (3)

Proposal 74

Assuming that a series of Proposals in this Report are to be recommended by the Working Party, they should be implemented by adopting a new set of rules along the lines of the CPR and of relevant rules from other jurisdictions (with any necessary modifications).

Report paras 693-701

Proposal 75

In the alternative to Proposal 74, recommended Proposals should be implemented by amending, but otherwise retaining, the existing HCR.

Report paras 693-701

Proposal 76

Any reforms to be undertaken must be adequately resourced. In particular, provision must be made to ensure that adequate judicial and court resources are in place to implement comprehensive case management and other functions mandated by the reforms and to accommodate trials in accordance with prescribed timetables.

Report paras 702-707

Proposal 77

An analysis of the system's demands in the light of proposed reforms should be conducted before and after such reforms take effect in order to determine how judges, masters and administrative staff (including staff in any newly defined posts) should best be deployed so as to respond effectively to those demands.

Report paras 708-711

Proposal 78

Training programmes to familiarise judges and other court staff with any reforms adopted, tailored to the knowledge and skills required to implement such reforms, should be established and made compulsory for civil judges, masters and all other relevant court staff.

Report paras 712-715

Proposal 79

Steps should be taken to develop the Court's existing computerised system to enable it to facilitate any reforms by being able to accommodate not merely administrative support, but also to perform case-flow management, resource allocation and management statistics functions.

Report paras 716-721

Proposal 80

Research should be commissioned so as to monitor continuously the system's functioning, establishing baselines of performance, guiding the deployment of resources, helping tailor judicial and court staff training and assessing the benefits or disadvantages of particular reforms in practice.

Report paras 722