

## *Executive Summary*

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1. The Working Party was appointed by the Chief Justice in February 2000 with the following terms of reference :-  
  
“To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed.”
2. This Interim Report and Consultative Paper (“the Paper”) seeks :-
  - 2.1 to report on reforms in other jurisdictions relevant to Hong Kong;
  - 2.2 to review available evidence as to the state of civil justice in Hong Kong; and,
  - 2.3 to formulate proposals for possible reform for the purpose of consulting court users and all interested members of the public.

## **PART I – THE NATURE OF THE PROBLEM**

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### **The Civil Justice System**

3. The existence of a civil justice system enabling individuals and corporations effectively to enforce their legal rights underpins all investment, commercial and domestic transactions as well as the enjoyment of basic rights and freedoms. If the system becomes inaccessible to segments of society, whether because of expense, delay, incomprehensibility or otherwise, they are deprived of access to justice.

### **Pressures on many Civil Justice Systems and on Hong Kong’s System**

4. Social change and technological advances have resulted in a sharp increase in the number, rapidity and complexity of transactions, matched by increased complexity in legislation and case-law. These changes have put pressure on civil justice systems all over the world, generating large numbers of civil disputes and court proceedings. Civil justice systems have been criticised for being too slow, too expensive, too complex and too susceptible to abuse in responding to such pressures. This has led to proposals for reform in many countries.
5. Some of the defects in the system commonly identified by commentators include the following :-

- litigation is too expensive, with costs often exceeding the value of the claim;
- litigation is too slow in bringing a case to a conclusion;
- there is a lack of equality between litigants who are wealthy and those who are not;
- litigation is too uncertain in terms of time and cost;
- the system is incomprehensible to many litigants;
- the system is too fragmented with no one having clear overall responsibility for the administration of civil justice;
- litigation is too adversarial as cases are run by the parties and not by the courts, with the rules all too often ignored by the parties and not enforced by the courts.

6. There is general agreement that the desired characteristics of a system include the following :-

- The system should be just in the results it delivers.
- It should be fair and be seen to be so by :-
  - ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
  - providing every litigant with an adequate opportunity to state his own case and answer his opponent's;
  - treating like cases alike.
- Procedures and cost should be proportionate to the nature of the issues involved.
- It should deal with cases with reasonable speed.
- It should be understandable to those who use it.
- It should be responsive to the needs of those who use it.
- It should provide as much certainty as the nature of particular cases allows.
- It should be effective, adequately resourced and organised.

7. An influential study was conducted by Lord Woolf who published an Interim Report in June 1995 and a Final Report in July 1996, leading to enactment in England and Wales of the Civil Procedure Rules (“CPR”) which entered into force in April 1999. Lord Woolf, along with many other commentators, identifies as the main cause of the ills mentioned above, the unbridled and inappropriate application of adversarial principles in the civil justice system. This results in a distortion of important features of the civil justice system :-
  - 7.1 Pleadings which are supposed to identify the issues between the parties, promoting fairness and procedural efficiency, instead often raise superfluous questions, obscure the issues and complicate the case, delaying or preventing settlement and increasing costs.
  - 7.2 Discovery which is intended to ensure fairness and to promote equality of arms between the parties can be used as a tactic by the wealthier party to oppress the less wealthy, inflating the costs of the action.
  - 7.3 Experts who are supposed to assist the court, are often used excessively and as “hired guns”.
  - 7.4 Witness statements which are supposed to encourage early settlement, prevent surprise and save costs are often prepared by teams of lawyers as an adversarial weapon at great expense and producing a “massaged” case rather than reliable evidence to be placed before the court.
  - 7.5 Passivity on the bench often leads to trials significantly overrunning their time estimates.
8. It is a widely-held view that Hong Kong’s civil justice system suffers from similar problems.

### **Pressures on the Hong Kong System: Expense, Delay, Complexity and Unrepresented Litigants**

#### ***Expense***

9. Expense is perceived to be a major barrier to using the system in Hong Kong. Media and other published reports tend to be critical of what are seen to be excessively high litigation costs in Hong Kong.
10. High litigation costs have an adverse effect on Hong Kong’s competitive position as a commercial and financial centre. Evidence exists that the parties to some civil disputes have been opting to avoid Hong Kong as a venue for resolving such disputes because litigating here is too

expensive. This has made Hong Kong a less attractive place to do business in and has also led to a loss of work for the legal profession.

11. Hard evidence of professional fee levels in Hong Kong is difficult to find. However, it appears from figures provided by the Secretary for Justice that at the top end of practice at the Hong Kong Bar, counsel charge significantly more on average than comparable counsel from England and Wales.
12. An examination was made of all High Court bills of costs taxed during the 12 month period between 1 July 1999 and 30 June 2000. This found that legal costs in the smaller cases, especially those involving awards or settlements of up to \$600,000, were dramatically disproportionate to the sums claimed or recovered. Many claimants, even when successful, had to pay more by way of legal fees and expenses than the sums they recovered.
13. However, cases involving the greatest disproportion between costs and claim have now effectively been transferred to the District Court, following the recent monetary increase of its civil jurisdiction to \$600,000. It is to be hoped that this will have ameliorated some of the worst excesses in terms of disproportionate fees.
14. The finding of disproportionate litigation cost, while less dramatic, holds good for the other bands. For instance, cases involving claims of up to \$3 million, using median values, involved legal bills (for one side in the dispute) equal to about 16% of the amount recovered. This was so even though many of the bills related to cases which concluded short of trial.
15. The taxed bills also show that in many cases that there is a high level of interlocutory activity, inevitably adding to costs and delays. It also shows that the taxation of costs is disproportionately expensive.
16. The taxed bills also give an insight into the order of sums involved in litigation costs overall. The study involved only 1,113 bills submitted for taxation between 1 July 1999 and 30 June 2000, but they gave rise to a sum of costs claimed totalling \$249 million. This represents the costs claimed by the winning side. If one assumes that the losing side was also represented and involved only one party and therefore one set of costs, the overall lawyers' bill for both sides in these 1,113 cases would have been of the order of \$500 million. In recent years, some 30,000 to 35,000 cases have been commenced annually although, understandably, many of the parties were unrepresented.

### *Delay*

17. The court's records have also been examined with a view to assessing procedural delays and to identifying the overall pattern of litigation in Hong Kong. While delays are not of crisis proportions, the available statistics show that significant delays are encountered in various areas, particularly where contested interlocutory applications or interlocutory appeals occur.
18. The evidence also shows that a high percentage of cases settle at the courtroom door or after start of the trial.
19. Unrepresented litigants are making increasing demands on the system, particularly on its bilingual resources. Judicial resources have meanwhile not grown significantly and are sometimes below establishment strength.

### *Complexity*

20. Another aspect of Lord Woolf's reforms has aimed at reducing the complexity of the civil procedure rules. This involves replacing the Rules of the Supreme Court ("RSC"), upon which Hong Kong's High Court Rules ("HCR") are based, with the CPR. Archaic and technical terms are replaced using a more modern and accessible vocabulary.
21. More importantly, the CPR are designed so that the court approaches procedural questions broadly in accordance with an "overriding objective" (discussed below) which sets out the system's basic principles of procedural justice and economy. The court does not look to the CPR to provide detailed answers to the range of specific problems that may arise in practice. Instead, the rules require the court to exercise a wide discretion, guided by the overriding objective, when deciding procedural points. Whether such considerations are applicable in Hong Kong is discussed later.

### *Unrepresented litigants*

22. Unrepresented litigants pose difficult challenges in all legal systems. The assumption of such systems is that the parties can be relied on to take the procedural steps necessary to bring the case to trial. This does not hold good for litigants in person, resulting in difficulties operating the system.
23. The available evidence indicates that litigants in person are appearing in increasing numbers in Hong Kong. During 2000, in HCAs, where (unlike personal injury cases) legal aid was generally unavailable, 44% to

64% of hearings of the first interlocutory application involved at least one litigant in person. Some 40% to 50% of trials involved at least one such litigant. Various measures to assist unrepresented litigants navigate the civil justice system are raised for consideration.

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## **PART II – POSSIBLE REFORMS**

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### **Need for Reform**

24. The available evidence indicates that the civil justice system in Hong Kong shares the defects identified in many other systems. In varying degrees, litigation in our jurisdiction :-
- Is too expensive, with costs too uncertain and often disproportionately high relative to the claim and to the resources of potential litigants.
  - Is too slow in bringing a case to a conclusion.
  - Operates a system of rules imposing procedural obligations that are often disproportionate to the needs of the case.
  - Is too susceptible to tactical manipulation of the rules enabling obstructionist parties to delay proceedings.
  - Is too adversarial, with the running of cases left in the hands of the parties and their legal advisers rather than the courts, and with the rules often ignored and not enforced.
  - Is incomprehensible to many people with not enough done to facilitate use of the system by litigants in person.
  - Does not do enough to promote equality between litigants who are wealthy and those who are not.
25. The Working Party believes that broad-based, coordinated and properly resourced reforms are called for.

### *Reforms and expense*

26. One must however be cautious about making claims that reforming the rules will necessarily mean reduced litigation costs. Some changes may have that result while other reforms may tend to produce the opposite consequence. Costs may be saved in certain classes of cases but increased in others. It may often be difficult to tell whether overall, savings have resulted from changes. The rules function in an institutional, professional and social framework and in particular, in a system involving a market for legal services. The cost of litigation may therefore be determined by market and institutional factors which may be more potent than simply a change in the rules.
27. The debate on whether the pre-action protocols brought in by Lord Woolf add to or reduce the cost of litigation illustrates the difficulty of ascertaining the impact of particular reforms on costs.
- Pre-action protocols (and other reforms introduced by the CPR) require the parties to place a more fully developed and accurately pleaded case before the court at an early stage. This aims at encouraging early settlement and enabling effective case management by the court at an early stage.
  - This means however that costs have to be incurred at an earlier stage of the proceedings than previously. Costs are “front-end loaded”. Some argue that in many cases, the costs incurred by having to observe the pre-action protocols are thrown away since many cases rapidly settle after proceedings are commenced.
  - However, while pre-action protocols (and other reforms) cause costs to be “front-end loaded”, it does not follow that such costs are wasted. More cases may settle before or shortly after the start of proceedings because the pre-action protocols bring the parties and their advisers to a more advanced appreciation of the issues and relative merits sooner.
  - If the case does not settle quickly then the work funded by the front-end costs will have brought the issues into sharper focus from the outset, making it likely that the parties will avoid the cost of interlocutory activity generated by early inaccuracies and lack of precision.
28. Notwithstanding such caveats about the uncertain impact of reforms on costs, it can be said with some confidence that particular procedural reforms are naturally likely to reduce costs, particularly if operated in the

context of appropriate infrastructural changes. This applies, for example, to reforms seeking :-

- to give prominence to the countering of excessive cost, delay and complexity as part of overriding procedural justice;
- to replace rules which impose blanket interlocutory obligations which may often be disproportionate to the issues in a particular case with rules catering for flexibility and proportionality;
- to discourage wasteful practices such as the proliferation of interlocutory applications or the overworking of witness statements or expert reports;
- to facilitate early settlement by requiring greater openness between the parties and by increasing the parties' options in making effective offers for settlement;
- to make the parties' potential liability to costs, both vis-à-vis their own lawyers and the other side's costs, more transparent and easier to assess;
- to devise a system of incentives and self-executing sanctions aimed at enforcing procedural economy;
- to reduce the need for the taxation of costs.

### **The Woolf reforms as a useful framework**

29. The Working Party was able to draw upon much work on civil justice reform done in a number of jurisdictions. Commentaries and proposals from Australia and Canada have been valuable and are reflected in some of the specific proposals discussed below. However, the reforms having particular relevance to Hong Kong are those promoted by Lord Woolf and implemented by the CPR, which have now been in force in England and Wales for over 2 years.
30. After some teething problems, the CPR have been generally well-received. The Working Party has therefore used the Woolf reforms as a framework for considering the options for possible civil justice system reforms in Hong Kong.



### **The main concepts underlying the Woolf reforms**

- 31. Two key concepts underlying the Woolf reforms as implemented by the CPR are :-
  - 31.1 Adoption of an explicit overriding objective setting out principles of procedural justice and economy to be treated as the foundation of the system, complemented by a new set of procedural rules to be construed and operated in accordance with the overriding objective; and,
  - 31.2 Adoption of a comprehensive case management approach to civil procedure.

### ***The overriding objective***

- 32. The overriding objective is set out in the first rule of the CPR as follows :-
  - “1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
  - (2) Dealing with a case justly includes, so far as is practicable –
    - (a) ensuring that the parties are on an equal footing;
    - (b) saving expense;
    - (c) dealing with the case in ways which are proportionate –
      - (i) to the amount of money involved;
      - (ii) to the importance of the case;
      - (iii) to the complexity of the issues; and
      - (iv) to the financial position of each party;
    - (d) ensuring that it is dealt with expeditiously and fairly; and
    - (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.
  - 1.2 The court must seek to give effect to the overriding objective when it-
    - (a) exercises any power given to it by the Rules; or
    - (b) interprets any rule.
  - 1.3 The parties are required to help the court to further the overriding objective.”
- 33. The overriding objective is not merely abstract or aspirational. As recent case-law shows, it is treated by the courts as laying down a set of principles to be projected into all procedural rules, guiding their interpretation in a dynamic and purposive way. Readers are asked

whether Hong Kong should adopt an overriding objective and the accompanying methodology. **[Proposal 1]**

### *Case management*

34. Before enactment of the CPR, the need for more proactive case management by the court was recognized in case-law developed by judges in many jurisdictions, including Hong Kong. The CPR now put case management on an express statutory basis, spelling out the court's case management powers.
35. Active case management is part of the overriding objective of the CPR :-
- “1.4 (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes –
- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
  - (b) identifying the issues at an early stage;
  - (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
  - (d) deciding the order in which issues are to be resolved;
  - (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
  - (f) helping the parties to settle the whole or part of the case;
  - (g) fixing timetables or otherwise controlling the progress of the case;
  - (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
  - (i) dealing with as many aspects of the case as it can on the same occasion;
  - (j) dealing with the case without the parties needing to attend at court;
  - (k) making use of technology; and
  - (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.”
36. Specific and general case management powers are spelt out in Part 3 of the CPR, all being powers that the court can exercise of its own initiative.
37. Some commentators have objected on the grounds (i) that it gives excessive discretion to judges, resulting in inconsistency and unfairness and (ii) that it increases the expense of litigation.

38. These are legitimate concerns. However, judicial discretion is an inescapable part of all procedural systems. Inconsistency and unfairness can be minimised by experience and by training to familiarise judges with the substance of the reforms and the guidance afforded by the overriding objective.
39. The minimising of case management hearings to contain costs is a conscious objective of the rules themselves and would be a necessary aspect of judicial training. As a general approach, the parties are not to be put to the expense of a case management exercise unless it is reasonable to believe that such expense can be justified by the benefits it will produce. Many rules (discussed further below) are designed :-
- To keep case management conferences to a minimum and to have them only where they are truly necessary.
  - To provide for self-executing sanctions in orders made by the court so that hearings to enforce directions or compliance with the rules are made unnecessary.
  - To encourage the parties to reach agreements on procedural matters without the need for court approval.
  - To provide for effective sanctions where a court hearing has been made unavoidable because of unreasonableness or incompetence on the part of one party or his advisers.
40. Readers' views are sought as to whether provisions making case management part of the overriding objective and setting out the court's case management powers should be adopted. **[Proposals 2 and 3]**

### **Possible reforms in specific areas**

41. Readers are invited to consider specific possible reforms which may be adopted either as part of a new set of rules or as amendments to the existing HCR.

### ***Pre-action protocols***

42. One of the innovations of the Woolf reforms has been to establish pre-action protocols which are codes of practice on how disputes should reasonably be handled before instituting proceedings. The rules prescribe ex post facto costs penalties for non-compliance with an applicable pre-action protocol if proceedings are subsequently commenced. This innovation involves the court assuming a degree of

control over the parties' conduct before the court's jurisdiction was invoked.

43. The stated object of pre-action protocols is :-

- “(a) to focus the attention of litigants on the desirability of resolving disputes without litigation;
- (b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
- (c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and
- (d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.”

44. Under the CPR, a Practice Direction on pre-action protocols and five protocols in the respective fields of personal injury, clinical negligence, construction and engineering, defamation and professional negligence have been adopted after close consultation with bodies and groups interested in litigation in each of those areas. Further protocols are at the stage of consultation and development. Even where a dispute does not fall within a specific pre-action protocol, the parties are expected to act reasonably and in accordance with the spirit of such protocols, non-compliance being potentially subject to costs sanctions.

45. As indicated previously, pre-action protocols were opposed in some quarters on the ground that they cause the costs of an action to be “front-end loaded” and wasted if the case settles quickly. Nonetheless, the protocols have been credited with many early, often pre-action, settlements and to a reduction in the ethos of non-cooperation bred of an unbridled adversarial approach. Readers are asked whether Hong Kong should adopt pre-action protocols. **[Proposals 4 and 5]**

### *Mode of commencing proceedings and challenging jurisdiction*

46. The CPR have simplified procedures for starting proceedings by reducing the forms to two: one for cases with factual disputes and an alternative for those without. Should Hong Kong follow suit? **[Proposal 6]**

47. The CPR have also summarised the rules (mostly judge-made) relating to applications to dispute jurisdiction or to seek a discretionary stay. Should these be adopted? **[Proposal 7]**

### *Default judgments and admissions*

48. Rules giving flexibility in the making of admissions and proposals for the defendant making payment by instalments have been introduced to eliminate certain court hearings and to streamline the procedure for default judgments. Readers are asked whether such procedures should be emulated. **[Proposal 8]**

### *Pleadings and statements of truth*

49. Current practice often leads to unsatisfactory pleadings which :-
- Fail to set out the facts clearly so that the issues are not properly identified;
  - Raise numerous alternatives according to causes of action and defences, rather than focussing on the facts;
  - Set up “stone walling” defences which do not reveal the true issues;
  - Suffer from prolixity;
  - Suffer from an initial lack of instructions or imprecision leading to numerous amendments and requests for further and better particulars.
50. Readers are consulted on the possible adoption of measures aimed at curing some of these defects, discussed below.
51. Reforms have sought to bring the focus of pleadings back to the key facts of the dispute and to require substantive defences exposing the true issues between the parties. The CPR, for instance, require the defendant to state his reasons for denying an allegation and if he intends to put forward his own version, to state what it is. Points of law may be included. **[Proposals 9 and 10]**
52. A key change has been the introduction of a requirement that all pleadings (called “statements of case” in the CPR) be verified by “a statement of truth”. Making a false statement without an honest belief in its truth is a contempt. **[Proposal 11]**
53. Where clarification of a pleading is necessary, further and better particulars (called “further information”) can be requested. However, one ground for resisting such a request is that the request is disproportionate to the needs of the case. The court is also given

powers to require a pleading to be particularised of its own motion. **[Proposal 12]**

54. Amendments are less readily approved under the CPR. This is in support of the court's general insistence on greater accuracy and precision at the early stages, and therefore its desire to discourage parties from filing casual, imprecise pleadings on the footing that they can later be tidied up. **[Proposal 13]**

### *Summary disposal of cases or issues*

55. The CPR have made changes along two broad lines.
- They introduce the test of “no real prospect of success” as the test for the summary disposal of proceedings.
  - They apply the same test in all contexts in which proceedings may be summarily disposed of: whether in respect of a plaintiff's or a defendant's case; whether setting aside a default judgment, applying for summary judgment, determining a point of law or striking out pleadings.
56. On its face the new test should make it easier to dispose of proceedings. But a question has arisen by virtue of an English Court of Appeal decision as to whether the “no real prospect of success” test is in practice any different from the current “no triable issue” test. It is likely that the rule is intended to, and in fact does, import a lower threshold for summary orders. Should such changes be introduced? **[Proposal 14]**

### *Offers of settlement and payment into court*

57. “Part 36 offers” under the CPR have been generally well-received. They develop the present machinery for making payments into court and offers of settlement by :-
- Allowing a *plaintiff* to make an offer of settlement which puts a defendant who unreasonably rejects it at risk as to costs and further financial penalty.
  - Allowing such offers to be made even before commencement of proceedings, which, if rejected, can be taken into account by the court in relation to pre-action costs.
  - Limiting the requirement of an actual payment into court to cases where the defendant seeks to settle a money claim, and

allowing appropriate offers of settlement to play a Part 36 role in respect of non-money claims.

- 58. The court retains a discretion as to costs since the fairness of penalising rejection of a Part 36 offer may, for example, depend on the information available at the time when the offer or payment was made, and the conduct of either or both of the parties with regard to the giving or withholding of such information.
- 59. Readers are asked whether rules providing for such offers and their consequences should be introduced. **[Proposal 15]**

### *Interim remedies and security for costs*

- 60. Part 25 of the CPR conveniently draws together the threads of various interim remedies developed largely by judicial decision over the years (particularly in the *Mareva* and *Anton Piller* jurisdictions). It also deals with interim payments and security for costs. As part of the CPR, all such applications are dealt with in accordance with the overriding objective.
- 61. One aspect of CPR 25, ie, permitting *Mareva* relief to be granted where the remedy is “sought in relation to proceedings which are taking place, or will take place, outside the jurisdiction,” would, if adopted, involve extending the jurisdiction presently enjoyed by the Hong Kong court.
- 62. Readers are asked whether a similar provision should be adopted and also whether the abovementioned extension to the court’s jurisdiction should be made. **[Proposals 16 and 17]**

### *Case management – timetabling and milestones*

- 63. At present, the progress of actions is left in the hands of the parties and a date for trial is not fixed by the court until all interlocutory issues have been resolved and the parties are seen to have completed their preparations for trial. This enables parties to rely on their own lack of readiness, whether deliberate or otherwise, as the basis for putting off the trial, possibly causing serious delay to conclusion of the proceedings. This is one of the unsatisfactory features of the adversarial design of our civil justice system.
- 64. A central feature of efforts to counteract such misuse of the adversarial process involves the court, at an early stage of the proceedings, laying down a timetable, with appropriate case management directions marking out largely immovable milestones, including the trial date (as a fixed date

or fixed window period) in that timetable. In consequence, the court, rather than the parties, determines the pace of the litigation and lack of readiness does not lead to the trial date or other milestones being put back. Instead, the party in default has to endure the consequences of his own lack of readiness in some fitting manner (eg, by doing without certain evidence or having part of his case – or in extreme instances, the whole of his case – struck out), save in the most exceptional circumstances.

65. To lay down an effective timetable with appropriate directions, the court must have adequate information as to the nature, scope and particular needs of the case. Possible reforms therefore provide for such information to be given to the court at an early stage, generally by the parties filing written information about the case and setting out the directions (agreed if possible) that they consider required. This information, often in a questionnaire prescribed as a court form, enables the court to give the directions and to set the timetable without a hearing.
66. Where the case is simple, the immediate directions and timetable may extend all the way to trial. If it is more complex, they may extend to a case management conference where further directions are envisaged in the light of progress made at that stage.
67. Readers are consulted as to the desirability of introducing this form of comprehensive, timetable and milestone-based case management. **[Proposals 18 and 19]**

### *A docket system*

68. A docket system is discussed as a possible alternative approach to case management and timetabling. It is a system which involves (i) the same judge handling the case from beginning to end; (ii) the early fixing of a near-immutable trial date; (iii) case management by the judge himself fixing the timetable and giving relevant directions in the pre-trial period in the light of the fixed trial date; and (iv) the judge trying the case if it goes as far as trial.
69. Docket systems have met with success in some jurisdictions particularly in the United States and in the Australian Federal Court. Many advantages are claimed for such a system. However, it was not considered appropriate by Lord Woolf on the grounds that it would require more judges and sacrifice flexibility. Readers are asked for their views as to the adoption of such a system either generally or in relation to particular types of cases. **[Proposal 20]**



### *Specialist lists*

70. In Hong Kong, four specialist lists have been established: the Commercial, Construction and Arbitration, Administrative and Constitutional and Personal Injuries Lists. Admiralty proceedings are also subject to special regulation under Order 75. Contentious Probate Proceedings, which are rare, are dealt with in accordance with Order 76. Companies Winding-up, Bankruptcy and Matrimonial Causes cases proceed according to Rules made under relevant Ordinances.
71. Such specialist lists or specialist courts also exist in other jurisdictions. They often have practices and needs not shared by general High Court actions. The CPR's approach has been to preserve their autonomy, allowing the courts dealing with such specialist business to publish procedural guides which modify the application of the CPR in such courts. Should a similar approach be adopted in Hong Kong?  
**[Proposal 21]**
72. It has also been suggested that consideration be given to establishing further specialist lists, for instance, a list for complex and heavyweight cases (which could, for instance, be run on a docket system); a list for unrepresented litigants and a list for group litigation (discussed below). Readers are asked whether they see a need for further specialist lists.  
**[Proposal 22]**

### *Multi-party litigation*

73. Special case management is needed for cases with numerous parties or potential litigants. Two situations need consideration.
74. The first, involving cases which in the United States may be dealt with by "class actions", is not catered for by our system. Consumer and other groups advocate their introduction. Such actions would allow a large number of small claims to be grouped together and pursued in a single set of proceedings, assisted by special case management measures. If this can be done, small claimants would acquire legal access previously denied and large corporate wrongdoers would be faced with proceedings in say, the product liability or environmental pollution fields, to be taken seriously. This would not only be fairer, it would, so the argument runs, lead to long-term social benefits such as better consumer safety and higher environmental standards.
75. The other principal multi-party situation does not involve problems of legal access. It arises where, for some reason or other, a large number of similar or related claims are instituted at about the same time, placing

heavy pressures on the court's resources. Machinery presently exists for ordering parties to act as representative parties, however, there are clear limitations on using these procedures.

76. Multi-party litigation procedures applicable to both situations, while desirable in principle, raise complex issues. Such procedures require compromises and adjustments in relation to the rights of plaintiffs and defendants. Mechanisms for moulding members of a class of potential plaintiffs into a workable group are needed, with the court possibly having to take decisions on certain issues where agreement cannot be reached within the class. Many issues involving resolution of various conflicts within the group may need to be dealt with.
77. The CPR have made a start by providing for "Group Litigation Orders" and special case management powers where such orders are made. However, provisions have yet to be developed to deal with certain important questions. Readers are therefore asked whether a group litigation scheme should in principle be adopted, but subject to further investigation of appropriate models in other jurisdictions. **[Proposal 23]**
78. As a separate matter, the CPR have re-enacted a provision previously in the RSC concerning derivative actions launched by individual members on behalf of their company. The HCR do not contain such rules. Should they? **[Proposal 24]**

### ***Discovery***

79. While discovery is in principle a valuable procedure which promotes fairness between the parties, the practice of discovery, particularly in larger, more complex cases, has given rise to serious complaint. It is said to be a major source of litigation expense. It lengthens trials and can be used as an oppressive weapon to delay, harass and exhaust the financial resources of less wealthy opponents.
80. To counter these tendencies, possible reforms have focussed on cutting down the width of the obligation to disclose. In Hong Kong, parties are presently required to disclose all relevant documents to their opponents applying the long-established *Peruvian Guano* test of relevance. That test is extremely wide, encompassing four classes of document, namely :-
- The parties' own documents, relied on in support of his own case.
  - Adverse documents which a party is aware of and which adversely affect his own case or support another party's case.

- Documents relevant to the issues in the proceedings, but not within either of the above categories since they do not obviously support or undermine either side's case, being merely background documents not necessary for the fair disposal of the case.
  - Train of inquiry documents: these being documents which do not themselves damage a party's case or advance that of the other side but which "may fairly lead him to a train of inquiry which may have either of these two consequences".
81. In many jurisdictions, the *Peruvian Guano* test has been abandoned in favour of a narrower definition of relevance. The CPR have essentially limited the obligation to the first two of the four categories mentioned above, subject to the court widening the disclosure by order in a particular case.
82. The routine obligation is to give "standard disclosure", ie, to disclose only the documents which are or have been in his control being :-
- “(a) the documents on which he relies; and
  - (b) the documents which –
    - (i) adversely affect his own case;
    - (ii) adversely affect another party's case; or
    - (iii) support another party's case; and
  - (c) the documents which he is required to disclose by a relevant practice direction.”
83. A party is only required to make "a reasonable search" for such documents, the reasonableness of the search being judged by the number of documents involved, how complex the proceedings are, how expensive retrieving the documents is and how significant any document is. In other words, the obligation is intended to be proportionate to the issues.
84. Discovery is to be approached flexibly, with the parties or the court making appropriate arrangements to minimise costs, eg, by ordering discovery by issue or in stages in the hope that vital points can be disposed of first, leading to conclusion of the proceedings without the expense of full discovery.
85. The court also has wide powers to order pre-action disclosure in order to dispose fairly of the anticipated proceedings or to help settle the case without the institution of proceedings or to save costs. Disclosure by non-parties can also be ordered where it is likely to be of direct relevance

to the issues and where disclosure is necessary in order to dispose fairly of the claim or to save costs.

86. An alternative approach to that described above is that adopted in Part 23 of the Supreme Court Rules 1970 of New South Wales. This allows parties access to the documents mentioned in the pleadings, affidavits, etc and also to request up to a total of 50 non-privileged documents which are relevant to facts in issue. To get more documents requires a court order.
87. Readers are consulted as to the desirability of adopting the abovementioned discovery reforms. **[Proposals 25 to 29]**

### *Interlocutory applications*

88. Contested interlocutory hearings introduce substantial delays and additional costs. Possible reforms seek to reduce the number of times when interlocutory applications are required. Where they cannot be avoided, they seek to streamline the process for dealing with applications. More effective sanctions to discourage unnecessary applications and the misuse of such applications, deliberate or otherwise, are also envisaged.
89. The need for interlocutory applications may be sought to be reduced by :-
- Enabling certain matters to be dealt with by the parties by agreement without involvement of the court.
  - The court dealing with a matter on its own initiative and without the necessity of first hearing the parties, but allowing any party who objects subsequently to apply for the order to be set aside, varied or stayed.
  - Making orders self-executing so as to eliminate the need for the applications to enforce orders previously made. The burden is placed on the party in default to seek relief from the prescribed sanction, which relief is by no means automatically granted.

Readers are consulted as to the desirability of adopting similar rules. **[Proposal 30]**

90. Where the interlocutory application is heard, possible streamlining measures include :-
- Dealing with applications on the papers and without a hearing.

- Eliminating the hearing before the master where the matter is likely to be contested and may be likely to proceed on appeal to the judge in any event.
- Allowing applications to proceed by telephone conference calls and other means of communication subject to necessary safeguards where this may be cost effective.

Should such measures be adopted? **[Proposal 31]**

91. Unnecessary applications are deterred by the more frequent use of summary assessments of costs made payable forthwith and notified to the client. Possible reforms tend to shift the emphasis away from the traditional rule that costs follow the event, ie, that costs are paid by the loser of the case to the winner, but only paid at the end of the proceedings and on a final reckoning of outstanding costs. Increasingly, costs are assessed and paid forthwith as a procedural discipline. An unnecessary or wasteful interlocutory application is likely to attract such an order even if the person against whom it is made ultimately wins the case.
92. In England and Wales the reaction to summary assessments of costs was mixed, some believing that the judge is not in a proper position to conduct such an assessment and fearing inconsistent assessments. On the other hand, the efficacy of summary assessments in deterring wasteful applications has been generally acknowledged with the procedure receiving support in many quarters. Inconsistency can be minimised with experience and training. Readers are asked for their views on adopting summary assessments of costs as a deterrent to wasteful interlocutories. **[Proposal 32]**
93. Bad interlocutory applications are sometimes entirely the brainchild of the lawyers. At present, a misconceived step taken by a solicitor may have to be paid for by him personally if the costs were incurred “improperly or without reasonable cause or [were] wasted by undue delay or by any other misconduct or default” on his part. The test arguably requires the solicitor to be guilty of something akin to professional misconduct. This may be thought too high a threshold. Under the CPR, a wasted costs order may be made where the costs are incurred “as a result of any improper, unreasonable or negligent act or omission” of the solicitor or his employee. Should this test be adopted in place of the existing test? **[Proposal 33]**
94. Barristers are presently subject to very restricted liability for wasted costs orders, limited to criminal proceedings. Should they be made subject to

such orders on terms equivalent to those applicable to solicitors?  
**[Proposal 34]**

### ***Witness statements***

95. While in principle the exchange of witness statements is a valuable procedure, in practice, they have often become over-worked and excessively expensive documents reflecting the advocacy of lawyers more than the witness's evidence.
96. Possible reforms involve :-
- Giving the court greater powers to regulate and limit the evidence to be adduced by the parties, with supporting amendments to primary legislation if required. **[Proposals 35 and 36]**
  - Introducing greater flexibility in the treatment of witness statements, allowing them to be reasonably supplemented by the witness's oral evidence or in a supplemental statement, so reducing the temptation to cram every conceivable detail into a statement for fear of the witness not being allowed to elaborate at trial. **[Proposal 37]**
  - Deterring over-elaboration by appropriate costs orders.

Readers are consulted as to whether such an approach should be adopted .

### ***Expert evidence***

97. Expert evidence is an indispensable aid to the court determining many factual issues. However, adversarial pressures have again distorted the practice so that :-
- Experts are often inappropriately or excessively used. Experts are called where expert evidence is either not needed or should be limited to a few issues instead of wide ranging matters covered in the expert report.
  - Experts are often partisan and lacking in independence, giving the court no objective assistance but deployed as part of the adversarial armoury.

These are practices which increase costs as well as the duration and complexity of proceedings.

98. To counter these problems, possible reforms aim :-
- to give the court control over the introduction and scope of any expert evidence sought to be adduced;
  - to emphasise the expert's primary duty to the court which overrides his duty to his client by requiring the expert to acknowledge that duty and to agree to adhere to a specified code of conduct which promotes independence and impartiality;
  - to allow the expert to approach the court for guidance as to his function in his own capacity without giving notice to the parties; and
  - to allow the court to require the parties to appoint a single joint expert.
99. Such reforms have been well-received. An increasing use of single joint experts has been reported. Readers are asked whether reforms should be adopted to address the problems of inappropriate, excessive and partisan expert evidence discussed above, and as to whether single joint expert directions should be introduced in Hong Kong. **[Proposals 38 to 40]**

### ***Trials and case management***

100. Trials are unpredictable in their duration and sometimes suffer from the prolixity of those appearing. The response has again been to embrace more proactive case management, with the judge setting time limits on the adducing of evidence, cross-examination and submissions pursuant to express powers allowing him to do so. Should such express powers be adopted? **[Proposal 41]**

### ***Appeals***

101. Procedural reforms adopted by the CPR in the context of appeals have focussed on :-
- A requirement for a party to obtain the court's leave before being allowed to lodge an interlocutory appeal from the Court of First Instance to the Court of Appeal. **[Proposal 42]**
  - Requiring leave to bring a final appeal from the Court of First Instance to the Court of Appeal. **[Proposal 43]**
  - Adoption of the requirement that a proposed appeal should have a "real prospect of success" or that "some other

compelling reason why the appeal should be heard” exists before leave to appeal is granted. **[Proposal 44]**

- A principle that leave to appeal should not be granted against case management decisions unless the case raises a point of principle of sufficient significance to justify the procedural and costs consequences of permitting the appeal to proceed. **[Proposal 45]**
- Additionally, the principle has been adopted that 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. **[Proposal 46]**
- If leave to appeal to the Court of Appeal should be introduced as a requirement, enabling the Court of Appeal to refuse leave without an oral hearing where the application is tantamount to an abuse of the appeal process, subject to permitting the applicant a final opportunity to make representations in writing as to why the application should not be summarily rejected. **[Proposal 47]**
- Where a substantive appeal is to take place, case management by the Court of Appeal to improve efficiency in the hearing of the appeal. **[Proposal 48]**
- Limiting the role of the Court of Appeal to a review of the lower court’s decision, subject to a discretion to allow a re-hearing. **[Proposal 49]**
- Applying the rule limiting the appellate court’s role to a review to the Court of First Instance acting in an appellate jurisdiction. **[Proposal 50]**

Readers are consulted as to the desirability of the abovementioned reforms.

## ***Costs***

102. As indicated above, reforms have shifted the emphasis from the principle of costs “following the event” (ie, being paid by the loser to the winner of the case) and costs “in any event” (ie, being paid only at the end of the case) to costs awards being used flexibly throughout the proceedings as an incentive for reasonable litigant behaviour, whoever may ultimately win the case. The court now generally decides on costs



orders taking into account the reasonableness or otherwise of the parties' conduct before and during the proceedings judged in accordance with the overriding objective. Should a like approach be adopted? **[Proposal 51]**

103. Three factors – complexity, number of case events and level of fees – have been identified as important factors for determining how much litigation will cost. Reforms aiming to reduce complexity and the number of case events have already been discussed. In relation to the level of fees, initiatives differ in relation to the fees charged by a party's own lawyers and those which the other side may have to pay to the party in question.

104. In relation to solicitor and own client costs, reforms in other jurisdictions inter alia :-

- Seek to promote costs transparency and predictability by requiring lawyers to provide their clients with specified information as to costs, both as to the basis on which charges are levied and as to the estimated overall cost of the litigation. **[Proposal 52]**
- Seek to improve the availability of information as to how much lawyers may charge. **[Proposal 53]**
- Empower the client to challenge his own lawyer's fees on an assessment of the necessity for the work done, the manner in which it was done and the fairness and reasonableness of the amount of the costs charged in relation to that work. **[Proposal 54]**
- Seek to establish benchmark costs against which fees charged by one's own lawyers or payable to the other side can be measured. **[Proposal 55]**

105. Reforms in relation to party and party costs aim to :-

- Reduce uncertainty as to exposure to costs by requiring the parties to disclose to each other the level of costs incurred and estimated to be required. **[Proposal 56]**
- In Hong Kong, to eliminate an anomalous treatment of counsel's fees in party and party taxation whereby such fees are taxed under a rule adopting in effect a solicitor and own client approach. **[Proposal 57]**

- Encourage agreement as to the cost of taxation by permitting “Part 36” type offers to be made as to costs payable. **[Proposal 58]**

106. The often disproportionate cost of the taxation process is also addressed by proposed reforms which :-

- Encourage avoidance of taxation hearings by encouraging parties to adopt benchmark costs as the presumptive amounts allowable in taxation, insofar as benchmark costs have been established. **[Proposal 59]**
- At the court’s discretion, extend the scope of provisional taxations on the papers, subject to a dissatisfied party being entitled to require an oral hearing, but subject to possible costs sanctions if he fails to do better at the hearing. **[Proposal 60]**
- Providing costs sanctions for unreasonable insistence on full taxations or failing to provide sufficient information to allow taxations to take place on the papers and without a hearing. **[Proposal 61]**

### *The CPR schedules of provisions from the RSC*

107. Certain rules from the RSC have not been replaced by the CPR in England and Wales and remain applicable pursuant to Schedule 1. These include rules relating to the enforcement of judgments and orders, rules dealing with special procedural cases, special jurisdictional cases and particular proceedings under specific statutes. As no proposals have been formulated for their replacement, the reader is asked for agreement that the HCR equivalents should remain in force whatever reforms may be adopted. **[Proposal 62]**

### *Possible reforms and ADR*

108. Increasingly, ADR (“Alternative Dispute Resolution”) has been seen as potentially a useful process in appropriate cases as an alternative or adjunct to civil proceedings. It is often said that ADR can be simpler, cheaper and quicker and can be more flexible and custom-designed for the dispute in question. It can be less antagonistic and less stressful than a court case and so less damaging to a possible on-going relationship between the parties. It is however accepted generally that some cases will not be suitable for ADR.

109. While no one suggests that a court should permanently turn a litigant away by directing him to ADR, it is increasingly envisaged that a court may make an attempt at ADR a condition of allowing the case to proceed. Several degrees of compulsion or encouragement to use ADR can be discerned in schemes of court-annexed ADR (usually mediation) adopted in various jurisdictions. ADR may be :-

- made mandatory by a statutory or court rule for all cases in a defined class; **[Proposal 63]**
- made mandatory by an order issued at the court's discretion in cases thought likely to benefit; **[Proposal 64]**
- made mandatory by one party electing for ADR; **[Proposal 65]**
- made a condition of getting legal aid in relation to certain types of cases; **[Proposal 66]**
- voluntary but encouraged by the court, with unreasonable refusal or lack of cooperation running the risk of a costs sanction; **[Proposal 67]** or
- entirely voluntary, with the court limiting its role to encouragement and the provision of information and facilities. **[Proposal 68]**

Readers are consulted as to which, if any, of the above regimes for court-annexed ADR should be pursued in Hong Kong.

## Judicial review

110. The basic requirements of obtaining the court's leave to bring judicial review proceedings and of acting promptly remain in place. However, there have been efforts in the CPR at procedural reform of judicial review claims seeking :-

- To simplify the definition of the scope and the nomenclature of the remedies. **[Proposal 69]**
- To provide for and facilitate participation of persons, other than the parties, who may be interested in judicial review proceedings. **[Proposal 70]**
- To require claims to be served on defendants and other persons known to be interested. **[Proposal 71]**

- To require defendants who wish to contest the proceedings to acknowledge service and to summarise the grounds relied on. **[Proposal 72]**
- To spell out the court's powers on the quashing of a decision, including, more controversially, power, subject to statutory limitations, to take the decision itself. **[Proposal 73]**

## **Implementing the reforms**

111. Assuming that the Working Party recommends a series of reforms, how can they best be implemented and translated into rules of civil procedure? Two main approaches fall to be considered. First, it may be advantageous to borrow in large measure from the CPR (and from relevant rules in place in New South Wales and elsewhere). Alternatively, one may largely retain the HCR, but amend them to introduce each reform.
112. Both approaches would require substantial effort. New rules would have to be prepared and all persons involved in the civil justice system would have to learn about the new system.
113. Switching from the RSC to the CPR in England and Wales took a great deal of effort. It took some 3 years just to draw up the CPR. Accordingly, much effort might be saved if Hong Kong were to borrow from the CPR (and from rules in other jurisdictions). If, instead, we retain and amend the HCR, much fresh drafting would probably be required. It would also be necessary to ensure that the amendments are in harmony with the retained rules.
114. Effort in relation to training must also be considered. Much effort would be required whichever approach was adopted. While the amendment option may require fewer new rules to be learned, it would still be necessary to learn what the changes are and how the new provisions work.
115. Consideration should also be given to the efficiency with which either approach may be operated in practice.
- 115.1 One possible difficulty which arises if one retains and amends the HCR concerns interaction between the amendments and the retained rules (with their attached case-law). Costly satellite litigation is likely to ensue over whether the parties should continue to apply the pre-existing case-law or whether it should give way to the amendments (including any amendment to introduce the overriding objective).

- 115.2 In contrast, if a set of rules along the CPR lines is adopted as a fresh start, accretions of pre-existing case-law would generally not be applicable and such debates are likely to be much rarer.
- 115.3 That is not to say that adopting a CPR-based set of rules would involve *no* potential questions requiring judicial resolution. Development of *some* case-law is inevitable, particularly for questions closely related to issues of substantive law. Nevertheless, the experience in England and Wales so far suggests that such case-law developments would be relatively sparse and that many of the citations in the White Book would be dispensed with.
- 115.4 Adoption of rules materially similar to the CPR would also confer persuasive authority status on English decisions and allow such practical experience to be drawn upon.
116. Would unrepresented litigants benefit either way? One reason for switching to the CPR was to bring in simpler and more easily understandable language with a view to making litigation more accessible to unrepresented litigants. As previously noted, this is a consideration only indirectly applicable in Hong Kong because most litigants in person would only refer to the Chinese text. Nonetheless, simplification of the rules in English may well permit a simpler Chinese translation to be used, favouring adoption of a new and simpler set of rules.
117. In the light of these considerations, readers are asked whether, in order to implement recommended reforms, the civil justice system should, adopt a new set of rules largely along the lines of the CPR (and rules drawn from other jurisdictions) or whether, instead, it should continue to employ the HCR with amendments to effect the reforms. **[Proposals 74 and 75].**

## Resources

118. If it is decided in principle that reforms should be instituted, resources will be needed to draft and promulgate the necessary new rules (whether as amendments to the HCR or a new set of rules based largely on the CPR) and to work with all interested parties towards drafting any necessary practice directions and pre-action protocols.
119. Thereafter, adequately funded and organized resources, likely to include additional judicial and court resources, will be needed to implement such reforms, for instance, to enable provision of comprehensive case management by the court and to accommodate trials in accordance with prescribed case timetables. **[Proposal 76]**

120. It must be determined how existing resources can most efficiently be deployed to meet the needs of the reforms. Traditional roles and case-loads may alter, requiring re-deployment of judges, masters and administrative staff. **[Proposal 77]**
121. Training programmes must be set up for judges, masters and court administrative staff to acquire an understanding of the reforms and to hone the skills needed to administer them. Such training should be sensitive to and directed at the needs of any reforms adopted. **[Proposal 78]**
122. Available information technology resources should be harnessed and adapted to support proactive case management by the judges and to improve management statistics. In the longer term, the court should consider commissioning electronic filing and electronic document-sharing in technology courts. **[Proposal 79]**
123. Research should be started now with a view to establishing base-lines by which the success or failure of any reforms adopted may subsequently be judged. Research should refine the reforms and continuously assess the deployment of resources for their implementation. To the extent that reforms may prove unsuccessful or counter-productive, such reforms should be jettisoned. **[Proposal 80]**