

(R E V I S E D)

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**Consumer Council's Submission to the
LegCo Panel on Administration of Justice and Legal Services on the
Civil Justice Reform - Interim Report and Consultative Paper**

Introduction

1. The Consumer Council welcomes the Civil Justice Reform - Interim Report and Consultative Paper (the "Interim Report") prepared by the Chief Justice's Working Party on Civil Justice Reform (the "Working Party"). The Interim Report is a significant step towards improving consumer access to the civil justice system in Hong Kong.

2. In the Council's experience in handling consumer complaints, shortcomings of the present system as identified in the Interim Report are revealed. They include issues relating to the speed of the system in resolving dispute, the system's cost-effectiveness, the abuse of the system by some unscrupulous litigants and the complexity of the system.

3. The Council notes that the Interim Report puts forward various proposals to reform the present system, many of which are technical changes to the current civil procedural rules of the High Court. In this submission, the Council would like to offer its observations on issues more directly related to consumer concerns.

Overriding objective and Case Management

4. The Council supports in principle the proposal to adopt an explicit overriding objective of dealing with cases justly with a comprehensive case management approach for the civil justice system. We hope that the proposal will achieve its aim of expediting the legal process without

compromising justice. For successful implementation of the recommendations, adequate manpower resources, supported by familiarisation/training programmes, must be provided.

5. There may be some litigants who file claims without any serious intention to go to trial; they do so for preserving their rights or for pressuring settlement. The new proposal will force these litigants to proceed quickly to trial, thus incurring legal expenses which may otherwise be saved. The Council hopes that the Working Party will study the impact of the new proposal on this type of litigants.

Multi-party litigation

6. The Council welcomes and fully supports that a procedural scheme dealing with multi-party litigation should be adopted in principle subject to further investigation of schemes in other jurisdictions including the U.S. class action scheme and the U.K. group litigation order scheme.

7. Consumer cases support the pressing need for reform of the present system to adjudicate, more efficiently and justly, large number of similar cases with aggregate claims of substantial amount but of small claim value on an individual basis. In a video shop case, the Council recorded a total of 4,577 complaints received with value of each claim ranging from \$10 to \$15,100. A more recent kindergarten case recorded 112 complaints with value of each claim ranging from \$3,800 to \$12,200.

8. Concerns need to be addressed in the reform of the present system include those relating to the representation of a definite group, the most cost-effective mode of proceedings, the binding effect of judgment in one case on the other similar cases, the mechanism for any settlement attempt, and the binding effect of any settlement term on future member if any of the group.

Transparency as to costs

9. The Council recognizes that transparency as to costs is vital for consumers in making an informed choice, improving bargaining position and planning financial exposure in litigation.

10. To inform clients about costs is currently an ethical duty of solicitors enforceable by self-regulatory sanction. The introduction of a statutory duty to disclose the basis and estimate of costs, as exemplified by the Australian jurisdictions, with appropriate sanctions for breach would, in principle, further promote transparency of costs. The Council views that it is important to stipulate in practical terms the extent and regularity of such basis and estimate of costs in consultation with the legal profession.

11. The Council agrees that public access to information as to the pricing of legal service is conducive to market transparency. However, consumers should be made aware that charging rate is not the only factor in consideration of choice of lawyers. Experience, competence and expertise are equally, if not more, important factors.

12. The Council recognizes that disclosure of costs by the opposing party in the litigation will reduce uncertainty of potential financial exposure. It may, however, encourage engagement of more senior legal professionals who charge higher fees as a means to exert undue pressure.

13. The Council emphasizes that information on costs, be it given by solicitors to his own clients or prospective clients, by litigants to the opposing party or by the legal service industry to the general public, must be accurate, comprehensive, reliable, realistic and current.

Taxation

14. The Council agrees that the present taxation process is disproportionately expensive. It welcomes reforms that are directed at avoiding taxation in appropriate cases, streamlining the taxation

procedures and enforcing higher standards of practice with a view to saving taxation costs.

15. Facilitating reasonable challenge of bills of legal costs by consumers is an important key to enhance market transparency and improve consumers' understanding of how the legal profession charges their fees. This can be done by improving consumers' access to the currently available process of taxation. Consumers' awareness of the taxation process, availability of taxation at reasonable costs, user-friendliness of taxation to lay people are issues that should be addressed.

Costs orders

16. Council notes the shift of emphasis from "costs follow the event" and "costs in any event" to the flexible use of costs awards throughout the proceedings and the court's consideration of the reasonableness of the parties' conduct before and during the proceedings. This change is beneficial to consumer interest, and will encourage reasonable litigation behaviour and avoid unnecessary costs.

17. Moreover, the Council supports the proposed widening of the court's power to make wasted costs orders against solicitors and the proposed extension of such power to cover barristers.

18. Judges will play a key role in this more interventionist approach and the Council emphasizes that it is important to provide familiarisation/training programmes for them to become full aware of the new standards and concepts under the proposed reforms.

Benchmark costs

19. Despite the positive effects that may be brought about by the compilation of benchmark costs, the Council would like to express a concern over its impact on market competition.

20. Compilation of benchmark costs may become a form of price fixing. Where market competition is used for determining appropriate fee for service levels, proposal for setting price raises problem of market distortion.

21. In jurisdictions with competition law, price setting is not allowed unless exempted by law or the relevant competition authority. A process of weighing the potential detriments to consumer welfare against the potential public benefits is employed to determine whether exemption should be granted. Those who argue for price setting have to clearly indicate the probability of public benefits. Importantly, any price setting mechanism is subject to a clearly defined review process. This could be as simple as setting a timetable for review, or that any future material change of circumstances would mean a review of the exemption. Moreover, the price setting mechanism itself would be created in a way to avoid market distortion as little as possible.

22. Notwithstanding the absence of competition laws in Hong Kong, the fact that price fixing distorts the efficient functioning of markets means that the same basic principles as to public debate on appropriate price setting mechanism and appropriate review mechanism need to be observed.

23. Furthermore, it is also the concern of the Council that benchmark costs may eventually become the floor rather than the ceiling, thus defeating the purpose of restraining costs.

Alternative Dispute Resolution ("ADR")

24. The Council agrees that a court-annexed mediation scheme is an attractive proposal. Hopefully it would provide a simpler, cheaper, quicker, more flexible and custom-designed approach for resolving disputes. The Council suggests that a pilot scheme for a few well-defined classes of cases should be implemented before a full-scale reform on ADR is launched.

25. However, it is noted that the advantage of mediation in saving costs depends on the reaching of a settlement. Failing a settlement, the parties have to go back to litigation and the mediation costs will become added costs. This is of more concern if mediation is made a mandatory procedure before litigation; mediation costs will become inevitable in all cases including those where the parties are determined not to settle.

26. Parties to arbitration may be legally represented. It is therefore advisable to extend legal aid to arbitration so that the underprivileged will secure an equal footing in the course of the arbitration procedure.

27. Moreover *pro bono* legal advice and mediation services should be provided to unrepresented litigants and the underprivileged; this would encourage them to resort to mediation before going for litigation.

28. The Council recommends that any ADR reform to the present system should ensure that the ADR services (e.g. the services of the mediator or arbitrator, the ADR venue) are provided to consumers free of charge.

Further issues of consumer concern

29. The Consumer Council appreciates that the scope of the Interim Report is limited by the Working Party's terms of reference. Nevertheless, the Council would like to take the opportunity to highlight other issues of consumer concern.

District Court and Small Claims Tribunal

30. While the Interim Report proposes reform to procedures in the High Court, a large number of consumer cases fall within the jurisdictions of the District Court and the Small Claims Tribunal. Some problems identified in the Interim Report are equally applicable to the said two lower courts.

31. The Council urges the Government to also conduct studies and propose reform to procedures of the District Court and the Small Claims Tribunal to further enhance consumers' access to justice.

Unrepresented litigants

32. Regarding the pressure of unrepresented litigants under the current system, the Council sees it also as a problem of consumers' access to justice. The Council views that the most effective way to deal with those litigants is to get representation for them. In the long run, it is recommended that the Government should study the experience of other jurisdictions including the U.K.'s conditional fee agreement system and the U.S. contingency fee system for devising a system most suitable for Hong Kong. In the meantime, the Council urges the Law Society to explore the feasibility of solicitors' provision of free legal representation in deserving cases.

33. "Unbundled legal assistance" may have its own problems e.g. not all the unrepresented litigants may have the time or education level required to conduct litigation effectively on their own. It is, however, a possible short-term solution to the current problem if no other alternative is available.

34. The court from time to time may invite *amicas curiae* (a friend of the court) to assist the court. The Council was involved in such a case recently where there was a large number of unrepresented litigants and important public interest concern. The outcome of this case has since become a precedent under a consumer interest-related ordinance. The Council urges the court to extend, if appropriate, more invitations to *amicas curiae* in deserving cases.

Education

35. The public may expect the civil justice system to administer justice in such a way that the bad will be punished and the good awarded. They may not understand that the system is pragmatic in resolving disputes; however rightful a party's case is, if the party persists in litigating the case despite reasonable settlement offer, that party will be penalized for costs.

36. From a broader perspective, this highlights the need to improve public understanding of the civil justice system, in particular, its costs implications to litigants.

Conclusion

37. The Consumer Council fully supports the Working Party's proposed reform towards improving consumer access to the civil justice system. The Council appreciates that many of the proposals relate to technical procedural rules concerning the legal professionals. While the inputs of the legal profession are very important in shaping a practical and feasible reform to the present system, the Council hopes that the Working Party will also address consumer concerns such as user experiences/expectations as much as possible. The Council also urges the Government to address consumer issues highlighted in this submission which are outside the scope of the Interim Report.