

立法會
Legislative Council

LC Paper No. LS66/01-02

**Paper for the LegCo Panel on
Administration of Justice and Legal Services**

Civil Justice Reform - Interim Report and Consultative Paper ("IRCP")

Purpose

This paper seeks to assist Members to navigate through the background and various proposals made by the Chief Justice's Working Party on Civil Justice Reform published in November 2001.

Background

(IRCP Sections A & B)

2. The civil justice system in Hong Kong as governed by the High Court Rules (Cap. 4, sub. leg.) ("HCR") basically follows the system in England and Wales before 1998, which is also the system taken as a model in many common law jurisdictions. The HCR are substantially the same as the pre-1998 English Rules of Supreme Court ("RSC").

3. However, the civil justice system in England and Wales was completely revamped in 1998 as a result of the recommendations made by Lord Woolf after extensive studies into the former English system. The defects that Lord Woolf identified in the English system, which are also common to many other jurisdictions, are -

- (a) the litigation process is too expensive, with costs too uncertain and often disproportionately high relative to the claim and to the resources of potential litigants;
- (b) it takes too much time to bring a case to conclusion;
- (c) the rules are too complex and are susceptible to tactical manipulation and delays;

- (d) it is too adversarial;
- (e) it is incomprehensible to laymen with not enough done to facilitate the use of the system by litigants acting in person; and
- (f) there is inequality between litigants who are wealthy and who are not.

The RSC have since been replaced by the Civil Procedure Rules 1998 ("CPR").

The Working Party and the IRCP

4. The Chief Justice of Hong Kong appointed a Working Party on Civil Justice Reform in February 2000 to "[r]eview 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". The Working Party published an Interim Report and Consultative Paper in November 2001 for consultation.

5. The IRCP focuses on the problems in the existing civil justice system in Hong Kong and in its commentaries draws heavily on the experience in other comparable jurisdictions. To deal with those problems, 80 proposals for reform are formulated for public consultation. After the consultation process, the Working Party will make recommendations in a Final Report.

Problems Identified

(IRCP Sections C to G)

6. The Working Party has identified the following problems with the Hong Kong civil justice system :-

- (a) it is too expensive as legal costs sometimes outweigh the size of claims;
- (b) it takes too long to resolve claims;
- (c) the procedure is too complex; and
- (d) the number of unrepresented litigants has increased significantly.

Reforms - the Two Approaches

(IRCP Section M)

7. In implementing any reforms as proposed, the Working Party suggests a choice between the two following approaches:-

- (a) to borrow in large measure from the CPR and from the relevant rules in New South Wales and other Australian jurisdictions; or
- (b) to retain the HCR and to make appropriate amendments.

Civil Procedure Rules - Two Key Concepts
(IRCP Section J)

8. One of the 2 key concepts of the CPR is that there is a clear statement in the CPR which sets forth the "overriding objective" of civil procedure. The overriding objective is intended to "provide a compass to guide courts and litigants and legal advisers as to their general course".

9. Rule 1 of CPR sets out the overriding objective of the new procedural code as enabling the court to deal with cases justly. And what is dealing with a case justly is elaborated as including, 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.

Not only must the court seek to give effect to the overriding objective when it exercises any power given to it by, or interprets, any rule, the parties are also required to help the court to further the overriding objective.

10. A new methodology is established for approaching procedural questions. The CPR are broadly drafted and a purposive approach is adopted in the construction of rules in accordance with the overriding objective. The judge is to exercise a broad discretion which takes into account considerations of procedural economy as an aspect of procedural fairness. The aim is to minimise encrustation of the rules with case-law seeking closely to construe each individual provision.

11. In furtherance of the overriding objective, the second key concept of case management is introduced. Specific and general case management powers are expressly given to courts and courts can exercise these powers of their own initiative.

Possible Reforms in Specific Areas
(IRCP Sections K to N)

12. Apart from general proposals on the overriding objective and active case management by the court, proposals in specific areas are put forward in the IRCP . The Appendix summarises and highlights the proposals in various areas and refer Members to relevant parts in the IRCP for details.

Public Consultation

13. The consultation on the Interim Report is for a period of 5 months, which will end on 30 April 2002.

Prepared by

Legal Service Division
Legislative Council Secretariat
11 March 2002

Proposals in the IRCP

| IRCP Section No. | Concern / Objective | Proposed Reforms for Consultation | References to IRCP (a) Proposal No. (b) IRCP Para. No. (c) IRCP Page No. |
|---------------------------|--|---|---|
| Guiding Principles | | | |
| J1 | <p><i>Overriding Objective</i></p> <p>To adopt the overriding objective</p> | <p>To make express provisions setting out the overriding objective of the civil justice system with a view to establishing fundamental principles to be followed when construing procedural rules and determining procedural questions.</p> | <p>(a) 1 (b) 225-233 (c) 88-92</p> |
| J2 | <p><i>Case Management</i></p> <p>To introduce case management by the court</p> | <p>(a) To place a duty on the court to manage cases.</p> <p>(b) To give powers to the court to manage cases including a power to make case management orders of its own initiative.</p> | <p>(a) 2, 3 (b) 234-256 (c) 92-100</p> |

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| Specific Areas | | | |
| K1 | <p><i>Pre-action Protocols</i></p> <p>To encourage potential litigants to resolve disputes without litigation and if pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings</p> | <p>To prescribe ex post facto costs penalties for non-compliance with pre-action protocols if proceedings are subsequently commenced.</p> | <p>(a) 4, 5 (b) 258-275 (c) 101-107</p> |
| K2 | <p><i>Commencement of Proceedings</i></p> <p>To simplify the mode of commencement of proceedings</p> | <p>To reduce the 4 existing modes of commencement of proceedings to 2 forms - the issue of a "claim form" or alternative procedure.</p> | <p>(a) 6 (b) 276-277 (c) 107</p> |
| K3 | <p>To summarize the rules relating to applications to dispute the court's jurisdiction</p> | <p>To adopt the rules as summarized in Part 11 of CPR.</p> | <p>(a) 7 (b) 278 (c) 107</p> |
| K4 | <p>To eliminate certain court hearings and to streamline the procedure for default judgments</p> | <p>To make rules to give flexibility to parties in making admissions and for a defendant to propose terms for satisfying money judgements.</p> | <p>(a) 8 (b) 279-283 (c) 108-109</p> |

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| K5 | <p><i>Pleadings</i></p> <p>To bring focus of pleadings back to the key facts in dispute</p> | <p>(a) Pleadings (called "statements of case" in CPR) to be verified by a "statement of truth".</p> <p>(b) Defendants required to put in substantive defence.</p> <p>(c) Further information may be requested if clarification of a pleading is necessary but the request may be resisted on the ground that the request is disproportionate to the needs of the case.</p> <p>(d) Amendments to pleadings to be approved less readily by the court.</p> | <p>(a) 9-13 (b) 284-298 (c) 110-115</p> |
| K6 | <p><i>Summary Disposal of Cases</i></p> <p>To make it easier to dispose of cases</p> | <p>To introduce a single test of "no real prospect of success" for summary disposal of cases.</p> | <p>(a) 14 (b) 299-316 (c) 115-121</p> |

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| K7 | <p><i>Offers of Settlement and Payment into Court</i></p> <p>To encourage reasonable and early settlement of claims</p> | <p>(a) To allow a plaintiff to make an offer of settlement at any time, even before the commencement of proceedings (which may be different from what is claimed in the proceedings).</p> <p>(b) A defendant who unreasonably rejects the offer is at risk as to costs and further penalty.</p> | <p>(a) 15 (b) 317-323 (c) 121-127</p> |
| K8 | <p><i>Interim Remedies and Security for Costs</i></p> <p>To streamline the relevant procedures</p> | <p>(a) The rules governing the grant of interim relief, award of interim payments and security for costs to be rationalized and collected together along the lines of CPR 25 and CPR 25PD.</p> <p>(b) The interim relief by way of <i>Mareva</i> and/or <i>Anton Piller</i> orders to be made available for proceedings outside Hong Kong.</p> | <p>(a) 16, 17 (b) 324-331 (c) 127-129</p> |

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| K9 K10 | <p><i>Case Management - Timetabling/Docketing</i></p> <p>The adversarial nature of the existing system leaves the progress of actions in the hands of the parties</p> <p>To enable the judge to have more control over the progress of actions</p> | <p>To put in place a system of timetables with firm milestone dates at an early stage of proceedings, enabling the Court to exercise its proactive case management powers.</p> <p><i>Alternatively</i>, to adopt a docket system. It involves the same judge handling the case from beginning to end and case management by the judge himself. (This approach is rejected by the CPR but adopted in US and some of the Australian states.)</p> | <p>(a) 18, 19 (b) 332-358 (c) 129-141</p> <p>(a) 20 (b) 359-370 (c) 141-145</p> |
| K11 | <p><i>Specialist Lists</i></p> <p>To preserve procedural autonomy in specialist cases if the CPR approach is adopted</p> | <p>To give a degree of procedural autonomy for specialist lists of cases and/or to expand the specialist lists.</p> | <p>(a) 21, 22 (b) 371-376 (c) 145-146</p> |
| K12 | <p><i>Multi-party Litigation</i></p> <p>To provide for special case management for cases with numerous parties or potential litigants</p> | <p>To introduce a procedure where the court may make a Group Litigation Order to provide for the case management of claims involving common or related issues of fact or law.</p> | <p>(a) 23, 24 (b) 377-403 (c) 146-155</p> |

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| K13 | <p><i>Discovery</i></p> <p>To reform the scope of discovery of documents</p> | <p>(a) The usual disclosure obligation imposed on parties to be restricted to "standard disclosure" of documents, i.e. to disclose only those documents which are or have been in their control.</p> <p><i>Alternatively</i>, to adopt the approach of New South Wales of Australia, i.e.-</p> <p>(i) subject to the court's extension, parties are allowed to access to the documents mentioned in the pleadings, affidavits, etc; and</p> <p>(ii) parties may also request up to 50 non-privileged documents which are relevant to the facts in issue.</p> <p>(b) The court to exercise its case management powers as to an appropriate discovery regime for the case at hand.</p> | <p>(a) 25-29 (b) 404-425 (c) 155-163</p> |

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| K14 | <p><i>Interlocutory Applications</i></p> <p>To reform the system of interlocutory applications</p> | <p>To reduce and streamline interlocutory applications, e.g.-</p> <ul style="list-style-type: none"> (a) certain matters to be dealt with by the parties without court's involvement; (b) the court may deal with certain procedural matters on its own motion; (c) making orders self-executing to eliminate applications to enforce such orders; (d) the court may deal with applications on paper without a hearing; (e) applications to proceed by telephone conference calls and other means of communication subject to necessary safeguards; (f) summary assessments of costs as a deterrent to wasteful interlocutories; and (g) wasted costs orders against solicitors and/or barristers where appropriate. | <ul style="list-style-type: none"> (a) 30-34 (b) 426-468 (c) 163-177 |
| K15 | <p><i>Witness Statements</i></p> <p>To prevent the use of over-worked and excessively expensive witness statements</p> | <ul style="list-style-type: none"> (a) To give greater powers to court to regulate and limit the evidence to be adduced by parties. (b) To allow greater flexibility in the treatment of witness statements. | <ul style="list-style-type: none"> (a) 35-37 (b) 469-484 (c) 177-182 |

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| K16 | <p><i>Expert Evidence</i></p> <p>To prevent inappropriate or excessive use of experts</p> | <p>(a) To give the court control over the scope and use of expert evidence.</p> <p>(b) To emphasise the expert's primary and overriding duty to the court.</p> <p>(c) To allow the expert to approach the court for guidance without giving notice to the parties.</p> <p>(d) The court may require the use of a single joint expert.</p> | <p>(a) 38-40 (b) 485-518 (c) 182-192</p> |
| K17 | <p><i>Trials and Case Management</i></p> <p>To put in place more proactive case management with regard to trial with a view to preventing unpredictability and prolixity</p> | <p>Subject to necessary safeguards, the judge may set limits on the adducing of evidence, cross-examination and submissions.</p> | <p>(a) 41 (b) 519-528 (c) 193-197</p> |

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| K18 | <p><i>Appeals</i></p> <p>(a) To filter out unmeritorious appeals</p> <p>(b) To protect parties from abusive use of appeals and unnecessary costs</p> <p>(c) To achieve efficiency by case management</p> | <p>To introduce procedural reforms with regard to appeals, e.g.-</p> <p>(a) leave to be required for interlocutory appeals from the Court of First Instance to the Court of Appeal and final appeals from the Court of First Instance to the Court of Appeal;</p> <p>(b) leave to appeal to be granted where there is "a real prospect of success" or that "some other compelling reason why the appeal should be heard";</p> <p>(c) leave to appeal generally not to be granted against case management decisions unless justified;</p> <p>(d) case management to be exercised by the Court of Appeal;</p> <p>(e) the appellate function to be limited to a review of the decision of the lower court, subject to the appellate court's discretion to permit a re-hearing; and</p> <p>(f) the appellate courts to adopt a uniform approach to determining appeals.</p> | <p>(a) 42-50</p> <p>(b) 529-551</p> <p>(c) 197-205</p> |

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| K19 | <p><i>Costs</i></p> <p>To introduce various reforms aiming at reducing the costs of litigation</p> | <p>(a) To shift the existing general rule as to costs from "costs following event" (i.e. to be paid by the losing party) to costs awards being used flexibly throughout the proceedings as an incentive for reasonable litigant behaviour regardless of which party wins the case and to empower the court to make such determination in accordance with the overriding principle.</p> <p>(b) To require parties, periodically and as ordered, to disclose to the court and each other the best available estimate of costs already and likely to be incurred.</p> <p>(c) Suggestions as to reduction of legal costs are also set forth for discussion, in particular, whether "benchmark costs" (scales of fees for definable categories of work) should be compiled.</p> | <p>(a) 51-62 (b) 552-619 (c) 206-231</p> |
| K21 | <p><i>Alternative Dispute Resolution ("ADR")</i></p> <p>To put in place directed "ADR" in contrast to the present voluntary use of ADR in resolution of disputes.</p> | <p>To make ADR mandatory by a statutory or court rule in certain cases.</p> | <p>(a) 63-68 (b) 623-678 (c) 232-250</p> |

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| L | <p><i>Judicial Review</i></p> <p>To reform the scope and procedure for judicial review</p> | <p>(a) To simplify or crisply identify the scope of judicial review.</p> <p>(b) To provide for and facilitate participation of persons, other than parties, who may be interested in judicial review proceedings.</p> <p>(c) To spell out the powers of the court on quashing of a decision which include the power to take the decision itself.</p> | <p>(a) 69-73 (b) 679-692 (c) 251-254</p> |
| Implementation | | | |
| M | To implement the reforms | To adopt the approach of CPR or to make appropriate amendments to HCR. | <p>(a) 74, 75 (b) 693-701 (c) 255-258</p> |
| Resources | | | |
| N | Resource implications | Resource deployment, training of judges and staff, information technology and establishing base-lines and on-going research to be considered. | <p>(a) 76-80 (b) 702-722 (c) 259-265</p> |

