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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 26 June 2006**

Civil Justice Reform

Purpose

This paper provides background information on past discussions of the Legislative Council (LegCo) on the Civil Justice Reform (CJR).

Interim Report and Consultative Paper on Civil Justice Reform

2. In February 2000, the Chief Justice appointed a Working Party (Working Party) 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. The Working Party was chaired by The Hon Mr Justice Chan, Permanent Judge of the Court of Final Appeal.
3. On 29 November 2001, the Working Party published the Interim Report and Consultative Paper on Civil Justice Reform (IRCP) for consultation. Members of the legal profession, court users, interested parties and organisations, and the general public were invited to give views on the 80 reform proposals contained in the Consultation Paper. The consultation period ended on 30 June 2002.
4. According to the IRCP, the civil justice system in Hong Kong as governed by the Rules of the High Court 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 Rules of the High Court are substantially the same as the pre-1998 English Rules of Supreme Court. 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 The English Rules of Supreme Court have since been replaced by the Civil Procedure Rules 1998.

5. The Working Party had 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.

6. In implementing any reforms as proposed, the Working Party had suggested a choice between the following two approaches-

- (a) recommended proposals should be implemented by adopting a new set of rules largely along the lines of the Civil Procedure Rules 1998 of the English system and of relevant rules drawn from other jurisdictions (with any necessary modifications); or
- (b) recommended proposals should be implemented by amending the existing Rules of the High Court.

7. The Panel discussed the IRCP at its meeting on 28 January 2002. Some members expressed concern whether the wide range of reform proposals in the IRCP was necessary. They considered that some of the identified problems could in fact be addressed by improving and simplifying certain existing rules and procedures.

8. The Panel held a special meeting on 14 March 2002 to receive views from the Consumer Council, the Hong Kong Bar Association, the Hong Kong Mediation Council and individual legal practitioners on the IRCP. A summary of the views received is in **Appendix I**.

9. Hon Margaret NG, the Panel Chairman, moved a motion urging Members to take note of the Civil Justice Reform Interim Report at the Council meeting on 8 May 2002. The motion was carried.

Final Report on Civil Justice Reform and its implementation

10. The Final Report on Civil Justice Reform (the Final Report) was published on 3 March 2004, with a total of 150 recommendations. The Working Party recommended that the proposed reforms should be implemented by way of amendment to the Rules of the High Court rather than by adopting an entirely new procedural code along the lines of the Civil Procedure Rules 1998. On 19 March 2004, the Chief Justice announced that he had accepted the recommendations made in the Final Report.

11. The Judiciary Administration informed the Panel of the implementation plan for the recommendations in the Final Report in March 2004. The Chief Justice was of the view that in order to achieve the overall objectives of the CJR, the recommendations which were to be implemented by the Judiciary should be taken forward together as one integrated package since most of them were related. The Chief Justice had established a Steering Committee on the Civil Justice Reform (Steering Committee) to take overall charge of the implementation of the recommendations pertaining to the Judiciary. The Steering Committee was chaired by Mr Justice Ma, Chief Judge of the High Court.

12. The Judiciary Administration advised that as a considerable number of the recommendations involved amendments to the existing rules and practices in the High Court, the first and foremost task of the Steering Committee would be to work on the necessary amendments to the relevant primary and subsidiary legislation, and to introduce amendments to and draw up new Practice Directions. It was expected that it would take two to three years to implement the recommendations.

13. There were a number of recommendations in the Final Report which required further study by bodies outside the Judiciary. The Judiciary Administration advised the Panel that the Chief Justice would discuss with the Secretary for Justice how the further study and consultation regarding the proposed scheme for multi-party litigation should be taken forward. The Chief Justice would also be writing to the Chief Justice for Administration, inviting the Administration to consider the proposal of empowering the Director of Legal Aid to fund mediation with legal aid in suitable cases.

Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform

14. On 12 April 2006, the Steering Committee published a Consultation Paper to seek views from the legal profession and other interested parties on proposed legislative amendments for the implementation of the CJR. The consultation period will end on 12 July 2006.

15. In respect of the High Court, the Steering Committee has identified that –

- (a) 21 recommendations require amendments to the High Court Ordinance (Cap. 4), Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) and Arbitration Ordinance (Cap. 341). The 21 recommendations are listed in Annex C to the Consultation Paper. The draft Civil Justice (Miscellaneous Amendments) Bill which contains amendments for the implementation of the 21 recommendations in the High Court and those applicable to the District Court is in Annex A to the Consultation Paper; and

- (b) 84 recommendations require amendments to subsidiary legislation under the High Court Ordinance (Cap. 4), including the Rules of the High Court (Cap. 4A) and the High Court Fees Rules (Cap.4D). The 84 recommendations are listed in Annex H to the Consultation Paper. The two sets of draft Rules are in Annexes D and F to the Consultation Paper.

The Steering Committee has in the course of its deliberations proposed additional amendments which are summarised in paragraphs 2.4 and 3.3 of the Consultation Paper.

16. As the practice and procedure in civil proceedings in the District Court largely mirror those in the High Court, the Chief Justice directed in December 2005 that the legislative amendment exercise for the implementation of the CJR should apply to both the District Court and the High Court. As most of the 84 recommendations in the Final Report requiring amendments to subsidiary legislation under the High Court Ordinance are applicable to the District Court, similar amendments are proposed to the Rules of the District Council to implement the relevant CJR recommendations and achieve consistency with the Rules of the High Court.

Latest Position

17. The Judiciary Administration will brief the Panel on –
- (a) the Consultation Paper at the coming meeting on 26 June 2006; and
 - (b) the outcome of the public consultation and the way forward in July 2006.

Relevant papers

18. A list of other relevant papers is in **Appendix II**. These papers are available on the LegCo website (<http://www.legco.gov.hk>).

Panel on Administration of Justice and Legal Services
Meeting on 14 March 2002

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

Summary of Views of Deputations

<p>Organizations / Individual legal practitioners (reference of submission)</p>	<p>Major Views on IRCP</p>
<p>The Consumer Council (LC Paper No. CB(2)1307/01-02(02))</p>	<p><i>Overriding Objective</i></p> <ul style="list-style-type: none"> - The Council supported in principle the proposal to adopt a comprehensive case management approach for the civil justice system. The proposal should aim at expediting the legal process without compromising justice. Adequate supporting resources should be provided to implement the proposed reform; - However, some litigants might file claims without a serious intention to go to trial. The proposal might force these litigants to proceed quickly to trial, thus incurring unnecessary expenses. The Working Party should study the impact of the new proposal on this type of litigants. <p><i>Multi-party Litigation</i></p> <ul style="list-style-type: none"> - The Council supported in principle the adoption of a procedural scheme to deal with multi-party litigation, subject to further studies to be conducted on schemes in other jurisdictions such as the class action scheme in US and the group litigation order scheme in UK.

Costs

- The Council supported the proposals for flexible use of costs awards throughout the proceedings, the court's consideration of the reasonableness of the parties' conduct and the extension of the court's power to make wasted costs orders to cover barristers;
- The Council expressed concern that benchmark costs might become a form of price fixing and result in market distortion. Benchmark costs might eventually become the floor rather than the ceiling, thus defeating the purpose of restraining costs;
- It was desirable to introduce a statutory duty to disclose the basis and estimate of costs, with appropriate sanctions for breach, to further increase transparency. However, disclosure of costs by the litigation parties might encourage engagement of more senior legal professionals who charged higher fees. This could be used as a means to exert undue pressure on the opposing party;
- The present taxation process was disproportionately expensive. Reforms should be directed at avoiding taxation in appropriate cases and streamlining procedures to save taxation costs. Consumers' awareness of the taxation process should be enhanced.

Alternative Dispute Resolution (ADR)

- A court-annexed mediation scheme could provide a simpler, cheaper and more custom-designed approach for resolving disputes. The Council suggested that a pilot scheme for certain classes of cases should be implemented before a full-scale reform on ADR was launched;
- However, if mediation before litigation was made mandatory, and failing a settlement, the mediation costs would become an additional burden to the parties;

- It was advisable to extend legal aid to arbitration so that the underprivileged would be on an equal footing in the course of the arbitration procedure. Pro bono legal advice and mediation services should be provided to unrepresented litigants;
- The Council recommended that any ADR reform should ensure that the ADR services (e.g. services of the mediator or arbitrator, the ADR venue) were provided to consumers free of charge.

Unrepresented Litigants

- In the long run, the Government should study the experience in other jurisdictions (e.g. the UK's conditional fee agreement system and the US's contingency fee system) in assisting unrepresented litigants;
- "Unbundled legal assistance", being a possible short-term solution, might be limited in its effectiveness e.g. not all unrepresented litigants were able to conduct litigation effectively on their own;
- More invitations should be extended to *amicas curiae* (a friend of the court) to assist the courts in deserving cases.

Further Issues of Consumer Concern

- Some problems identified in the Interim Report were also applicable to the District Court and the Small Claims Tribunal. Reform to the procedures of the two lower courts should also be considered;
- The public should be better educated on the civil justice system, in particular, its costs implications to litigants.

<p>The Hong Kong Bar Association (provisional submission)</p> <p>(LC Paper No. CB(2)1356/01-02(01))</p>	<p><i>Overall</i></p> <ul style="list-style-type: none"> - The Bar supported a large number of proposals in the IRCP which were procedural fine-tuning of existing rules. The Bar believed that a sustained and gradual reform was more fruitful than an abrupt and complete overhaul. <p><i>Guiding Principles of Reform</i></p> <ul style="list-style-type: none"> - The Bar considered that reform should not lose sight of (a) justice and fair hearing should take precedence; (b) the need to up-grade the quality of judges; and (c) the need for a continuous dialogue between the Judiciary and the legal profession to work out specifics. <p><i>Pre-action Protocols</i></p> <ul style="list-style-type: none"> - Pre-action protocols would lead to front-end loading of costs, hence creating difficulties for the poorer or unrepresented litigants. The parties might also miss out on the chance of a cheap settlement early into the proceedings. The Bar considered that this proposal should be carefully considered. <p><i>Judicial Control</i></p> <ul style="list-style-type: none"> - The proposal to give substantial judicial management power to judges would pose problems for the Judiciary as over 50% of the judges were deputy or inexperienced judges, and impair the image of neutrality of judges; - The Bar proposed that more judges should be trained to deal with special list cases within a particular field of expertise. It would be more acceptable to let a specialist list judge to have greater control over the conduct of cases on his list.
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Appeals

- On the proposal to give finality to proceedings and discourage unmeritorious appeals, the Bar was not convinced that the Judiciary had reached a stage where one could safely rely on a first level judgment. Also, a right of appeal was a fundamental right of a litigant;
- The Bar proposed that there should be at least a one-tier unrestricted appeal with appeals thereafter restricted by leave. There should be "leapfrog" appeals to enable cases which were bound to go to higher courts to skip some intermediate hearings, thus resulting in saving of costs and judicial time.

Costs

- The Bar did not consider statutory-enforced disclosure of rates charged by lawyers was necessary in a free market such as Hong Kong where market forces dictated. No other profession was subject to such control;
- The setting up of benchmark costs was not likely to limit costs. The Bar did not see the need for a benchmark system on top of the present system which already had a process where unusually high fees were taxed off;
- Disclosure of costs incurred by a party to his opponent would reveal privileged information relating to the strength or weakness of his case. A party could also inflate his costs to try to scare off his opponent. The Bar had serious reservations about this proposal;
- The Bar supported the proposed system of immediate costs orders as it would discourage unnecessary interlocutory applications.

	<p><i>Alternative Dispute Resolution (ADR)</i></p> <ul style="list-style-type: none"> - The Bar opposed the proposal of compulsory mediation before litigation. Mediation should be encouraged, not forced upon the parties. Recourse to the court was a fundamental right of litigants which should not be compromised. Also, compulsory mediation could be used as a means of delay or an escape route from the full rigour of liability.
<p>Hong Kong Mediation Council</p> <p>(no written submission)</p>	<p><i>ADR</i></p> <ul style="list-style-type: none"> - The proposal to promote the use of ADR processes, in particular mediation, in resolving disputes was supported. Mediation, as opposed to litigation, would lead to greater client satisfaction and less costs and delay in reaching a settlement. Mediation should be integrated as a necessary part of the civil justice system; - ADR, however, might not work in all dispute cases. It was necessary to clarify the mechanism for making ADR mandatory in specific cases. Pilot projects on the use of mandatory mediation as a method of dispute resolution for certain categories of cases should be implemented. For example, personal injury and professional litigation cases might be suitable cases for mediation; - The public should be educated on how mediation worked in resolving disputes and the benefits that could be derived from participating in the process; - It was important to ensure that mediators were not only accredited but also achieved recognized international standard of training and continuing professional development in the field.
<p>Mr Nicholas PIRIE</p> <p>(LC Paper No. CB(2)1374/01-02(01))</p>	<p><i>Pre-action Protocols</i></p> <ul style="list-style-type: none"> - Pre-action protocols would lead to front-end loading of costs and deter litigants from using the courts.

	<p><i>Access to the Judicial System</i></p> <ul style="list-style-type: none"> - The legal aid system in Hong Kong worked well. The scope of the Supplementary Legal Aid Scheme should be expanded to cover consumer cases; - Government assistance should be provided to the pro bono scheme operated by the Bar Association. The Law Society should consider introducing a scheme similar to the "Green Form Scheme" operating in the UK where solicitors provided consultation service to would-be litigants at a fixed fee, with the Law Society funding the balance of the fees with government's assistance. <p><i>Other Issues</i></p> <ul style="list-style-type: none"> - In order to retain good lawyers in practice, they had to be remunerated appropriately. People would lose faith in the administration of justice if they perceived lawyers were being poorly paid; - In view of the large number of tourists visiting Hong Kong, special rules and procedures should be established to deal with cases of tourists injured in Hong Kong. At present, the requirement to provide security for costs effectively stopped tourists from taking proceedings.
<p>Mr Warren GANESH</p> <p>(LC Paper No. CB(2)1374/01-02(02))</p>	<p><i>Civil Justice Reform in UK</i></p> <ul style="list-style-type: none"> - Enactment of the Civil Procedure Rules in England and Wales only came into force in 1999. The most complex types of cases had yet to come to trial. Any evidence as to the effectiveness of the reforms was only anecdotal. There were comments that the reforms were done too quickly. The rules were no less complex than before, and procedural delays had not been reduced.

Pre-action Protocols

- Pre-action protocols would only lead to front loading of costs, not saving of costs, particularly for the complex cases.

Case Management

- Case management should be done by a single judge to achieve continuity and consistency. Inconsistency would be a concern for Hong Kong with the high proportion of deputy judges and junior judges in the Judiciary;
- More resources should be provided for training of judges to minimize the number of appeals.

Expert Evidence

- Care should be taken to avoid the situation of experts instructing experts, resulting in huge extra costs.

Appeals

- Procedural reforms to filter out unmeritorious appeals to the Court of Appeal should be proceeded with care in order not to damage Hong Kong's reputation as an international dispute resolution forum.

Insurance for Costs

- After-the-event insurance schemes should be introduced to protect a litigation party from having to bear the other party's costs.

	<p><i>ADR</i></p> <ul style="list-style-type: none"> - Increased use of ADR was a good move. ADR, however, should be consensual, not mandatory.
<p>Ms Sheena M Y CHAN</p> <p>(no written submission)</p>	<p><i>Case Management</i></p> <ul style="list-style-type: none"> - Enhanced duty of judges to manage cases necessitated more resources be devoted to training of judges to improve their competence; <p><i>Costs</i></p> <ul style="list-style-type: none"> - Increased transparency of costs would strengthen consumer protection and enable the general public to better appreciate the implications of litigation; <p><i>Unrepresented Litigants</i></p> <ul style="list-style-type: none"> - Litigation in person put a strain on court's time and resources. Schemes similar to the Duty Lawyer Service which was now only available for Magistrates' Court cases should be set up to help unrepresented litigants in the High Court.

Council Business Division 2
Legislative Council Secretariat
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Civil Justice Reform

Relevant papers

LC Paper No.	Papers/Documents
<u>Reports/Papers provided by the Judiciary Administration</u>	
CB(2)987/01-02	-- Interim Report and Consultative Paper on Civil Justice Reform
CB(2)1574/03-04	Civil Justice Reform: Final Report and Executive Summary
CB(2)1811/03-04(01)	-- Paper on “Implementation of the Civil Justice Reform”
CB(2)1728/05-06 (<i>English version only</i>)	-- Consultation Paper on “Proposed Legislative Amendments for the Implementation of the Civil Justice Reform”
<u>Paper prepared by the LegCo Secretariat</u>	
LS66/01-02	-- Paper on “Civil Justice Reform – Interim Report and Consultative Paper (“IRCP”)” prepared by the Legal Service Division
<u>Minutes of meetings of the Panel on Administration of Justice and Legal Services</u>	
CB(2)1155/01-02	-- Minutes of meeting on 28 January 2002
CB(2)1622/01-02	-- Minutes of special meeting on 14 March 2002