

REVIEW OF FAMILY PROCEDURE RULES

Interim Report and Consultative Paper

Executive Summary

Chief Justice's Working Party
on Family Procedure Rules

Hong Kong Special Administrative Region
The People's Republic of China

***Your Views are Crucial
Please Take the Time to Respond***

THE CONSULTATION PERIOD ENDS ON 16 June 2014

- *This Interim Report and Consultative Paper affects everyone who has a stake in there being an effective and efficient family justice system.*
- *Whether you are someone involved in family and matrimonial proceedings – or legal professionals or other stakeholders – your response is crucial.*
- *The review of family procedure rules can only succeed with input and feedback from parties concerned.*
- *Please read the Interim Report and Consultative Paper and let us have your comments on the Proposals put forward for consultation on or before 16 June 2014.*
- *If you do not wish to comment on all the Proposals, you may just address those aspects of particular interest to you.*
- *The whole Interim Report and Consultative Paper is available at the Judiciary's website at http://www.judiciary.gov.hk/en/other_info/family_review.htm (English version) and http://www.judiciary.gov.hk/tc/other_info/family_review.htm (Chinese version). You are also invited to browse the above website for information on the family procedure rules review exercise.*

PLEASE SEND YOUR RESPONSES TO

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Table of Abbreviations

2008 Direction	Practice Direction on Allocation and Transfer of Proceedings issued by the President of the Family Division of the High Court on 3 November 2008 (UK)
2008 Order	Allocation and Transfer of Proceedings Order 2008 (UK)
2009 Direction	Family Proceedings (Allocation to Judiciary) Directions 2009 (UK)
AIOR	Attachment of Income Order Rules Cap. 13A
AM(RP)O	Age of Majority (Related Provisions) Ordinance Cap. 410
AO	Adoption Ordinance Cap. 290
AR	Adoption Rules Cap. 290A
BOR	Hong Kong Bill of Rights
CA 2003	Courts Act 2003 (UK)
CACO	Child Abduction and Custody Ordinance Cap. 512
CAR	Convention Adoption Rules Cap. 290D
CCR	County Court Rules (UK)
CDR	Children Dispute Resolution
CFI	Court of First Instance of the High Court
Ch A 1989	Children Act 1989 (UK)
CJR	Civil Justice Reform

CJR Interim Report	Civil Justice Reform Interim Report and Consultative Paper by the Chief Justice's Working Party on Civil Justice Reform, November 2001
CJR Final Report	Civil Justice Reform Final Report by the Chief Justice's Working Party on Civil Justice Reform, March 2004
CPR	Civil Procedure Rules (UK)
DCO	District Court Ordinance Cap. 336
DCRVO	Domestic and Cohabitation Relationships Violence Ordinance Cap. 189
DCRVR	Domestic and Cohabitation Relationships Violence Rules Cap. 189A
DVO	Domestic Violence Ordinance Cap. 189 (now known as DCRVO)
Family Court	that division of the District Court which is for the time being assigned by the Chief Justice to deal with family and matrimonial matters
FDR	Financial Dispute Resolution
FLA 1996	Family Law Act 1996 (UK)
FMO	Foreign Marriage Ordinance Cap. 180 (not adopted as laws of HKSAR)
FPR 1991	Family Proceedings Rules 1991 (UK)
FPR 2010	Family Procedure Rules 2010 (UK)
FPR Committee	Family Procedure Rule Committee (UK)
GMO	Guardianship of Minors Ordinance Cap. 13

Hague Convention	Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980
HCO	High Court Ordinance Cap. 4
HFEA 2008	Human Fertilisation and Embryology Act 2008 (UK)
HKCP 2013	Hong Kong Civil Procedure 2013 Vol.1
HRTO	Human Reproductive Technology Ordinance Cap. 561
I(PFD)O	Inheritance (Provision for Family and Dependents) Ordinance Cap. 481
JOO	Juvenile Offenders Ordinance Cap. 226
JP(RR)O	Judicial Proceedings (Regulation of Reports) Ordinance Cap. 287
LO	Legitimacy Ordinance Cap. 184
MA 1949	Marriage Act 1949 (UK)
MCA 1973	Matrimonial Causes Act 1973 (UK)
MCO	Matrimonial Causes Ordinance Cap. 179
MCR	Matrimonial Causes Rules Cap. 179A
MCR 1977	Matrimonial Causes Rules 1977 (UK)
MFPA 1984	Matrimonial and Family Proceedings Act 1984 (UK)
MO	Marriage Ordinance Cap. 181
MO(RE)O	Maintenance Orders (Reciprocal Enforcement) Ordinance Cap. 188

MO(RE)R	Maintenance Orders (Reciprocal Enforcement) Rules Cap. 188A
MO(RE) Order	Maintenance Orders (Reciprocal Enforcement) (Designation of Reciprocating Countries) Order Cap. 188B
MPPO	Matrimonial Proceedings and Property Ordinance Cap. 192
MPSO	Married Persons Status Ordinance Cap. 182
MRO	Marriage Reform Ordinance Cap. 178
MRR	Marriage Reform Regulations Cap. 178A
MWPA 1882	Married Women's Property Act 1882 (UK)
PCJO	Protection of Children and Juvenile Ordinance Cap. 213
PCO	Parent and Child Ordinance Cap. 429
PD / PDs	Practice Directions
RDC	Rules of the District Court Cap. 336H
RHC	Rules of the High Court Cap. 4A
RSC	Rules of the Supreme Court (UK)
SMOO	Separation and Maintenance Orders Ordinance Cap. 16

EXECUTIVE SUMMARY

Executive Summary

1. The Working Party was appointed by the Chief Justice in March 2012 with the following terms of reference :-

- “(1) To examine the current procedures in the family jurisdiction and, with a view to securing that the family justice system is accessible, fair and effective, to make recommendations to the Chief Justice for changes thereto and in particular to consider formulating a single set of rules for the family jurisdiction applicable both to the Family Court and the High Court; and
- (2) To advise the Chief Justice initially on the desirability, impact and practicalities of any such changes as may be recommended.”

2. The Working Party is only tasked to review the practice and procedure of the family jurisdiction exercised by the Family Court and the High Court. We will not examine or make any proposal to change the substantive law on family and matrimonial matters, which is entirely a matter for the Administration. Further, its purview does not include the public law proceedings of the juvenile court, that is, a magistrate appointed by the Chief Justice pursuant to section 3A(2) of the JOO in exercising the jurisdiction under the PCJO.

3. This Interim Report and Consultative Paper seeks :-

- (i) to identify the defects which impede the effective operation of the family justice system;
- (ii) to formulate proposals for possible reforms to the family procedural rules; and
- (iii) to consult court users, the legal profession, other stakeholders and all interested members of the public on the proposals.

PART I – THE PROBLEMS IDENTIFIED

An Overview of the Family Justice System in Hong Kong

4. Hong Kong's family justice system embraces a wide range of subject matters, such as family and matrimonial matters, including dissolution of marriage, children related applications, ancillary and other financial relief and those arising from various Ordinances, with both the Family Court and the High Court exercising concurrent jurisdiction, other than those falling within the exclusive preserve, under some seriously fragmented and labyrinthine procedural rules and PDs.

Desired Characteristics of an Effective Family Justice System

5. An effective family justice system should share all the typical characteristics of a well-functioning civil justice system :-

- (i) it should be just in the results it delivers;
- (ii) it should be fair and be seen to be so;
- (iii) it should be able to deal with cases with reasonable speed;
- (iv) it should be understandable to those who use it;
- (v) procedures should be simple, user-friendly and proportionate to the issues;
- (vi) it should be reasonably affordable with costs being proportionate to the issues;
- (vii) it should be able to provide as much certainty as the nature of the cases allows; and
- (viii) it should be effective, adequately resourced and organised.

6. An effective family justice system must also be designed to meet the challenges presented by the special nature, breath and complexity of family and matrimonial disputes, possessing the following essential features :-

- (i) it should be responsive to the varied needs of the family jurisdiction to facilitate the best possible outcomes;
- (ii) it should ensure that children's welfare is adequately addressed and where necessary, children are represented and heard;

- (iii) it should promote a conciliatory litigation culture which encourages the parties to make decisions as equal partners without any perceived bias, prejudice or ill-feelings associated with the drama of divorce;
- (iv) it should provide a mechanism for alternative dispute resolution; and
- (v) it should have a sufficient number of specialist judges.

Perceived Problems

7. When measured against the above characteristics, Hong Kong's family justice system suffers from a number of defects :-

- (i) many of the adversarial excesses continue to haunt hotly contested family and matrimonial cases, which are as hostile and litigious as before;
- (ii) fragmented and labyrinthine procedures are not conducive to the efficient disposal of disputes;
- (iii) where the MCR is silent on a procedural point, identifying the applicable rules in the RHC and debating the extent of the necessary modifications cause inconvenience and waste time and costs;
- (iv) where there is no provision in the MCR or the RHC, the English practice is applicable. However, the English practice may no longer be entirely appropriate;
- (v) the majority of family proceedings have no rules of their own. There are likewise the problems of identifying the extent of the applicability of the RHC or the RDC and the lack of harmonisation. In some specific matters, one may even have to resort to the English practice;
- (vi) some of the language in the existing rules appears outdated and inconsistent;
- (vii) different principal Ordinances provide for different rule-making authorities, which is confusing and discourages any coherent approach in introducing rules and forms; and
- (viii) the Registrar's and the Masters' jurisdiction and powers are extremely limited. Consequently, judges are overwhelmed with matters which otherwise could have been handled by the Registrar and the Masters.

PART II – PROPOSED REFORMS

Main Objectives of Reforms

8. Rules and procedures underpin an effective operation of the family justice system. Because of the problems discussed above, our family justice system is not functioning effectively. The procedural rules are in urgent need of comprehensive and fundamental reform.

9. The following main objectives of reforms are identified :-

- (i) the family justice system is to be accessible, fair and efficient;
- (ii) the shift in litigation culture started with the initiative of PD15.11 on financial dispute resolution is to continue;
- (iii) undue and excessive procedural distortions are to be reduced;
- (iv) the procedural rules are to be both simple and simply expressed for the benefit and comprehension of both qualified and lay court users and the court administration;
- (v) the procedures in the Family Court and the High Court are to be aligned;
- (vi) the procedural rules are to be streamlined and harmonised with the post-CJR RHC/RDC;
- (vii) procedures are to be introduced for proceedings and matters where hitherto no rules have existed;
- (viii) all extant inconsistencies in the procedural rules are to be removed;
- (ix) the legal language is to be modernised to reduce complexity and outdated terminology is to be replaced;
- (x) the procedural rules are to be compatible with and/or have the ability to accommodate modern technological advancements;
- (xi) a simpler approach with modernised process is to be adopted for contested family and matrimonial cases; and
- (xii) dedicated PDs and user-friendly statutory forms are to be designed to supplement the rules and to give all necessary procedural guidance for court users.

A Unified Procedural Code

10. In their recent reforms, England, Australia and New Zealand have all adopted a stand-alone unified procedural code that comprehensively deals with the processes and procedures for all family and matrimonial matters.

11. There are a number of perceived benefits in adopting a single unified procedural code :-

- (i) it will help underline a fresh start to promote the necessary cultural change for the modernisation of family litigation;
- (ii) it will facilitate a more streamlined procedure and contribute to a common approach across the Family Court and the High Court, resulting in a more efficient and cost-effective system;
- (iii) it will be easier for both qualified lawyers and unrepresented litigants to refer to one procedural source for guidance;
- (iv) it is more preferable to put the new rules for proceedings where no rules hitherto have existed in one unified code, thus making them readily accessible;
- (v) possible clashes between old rules and new procedural concepts, and hence satellite arguments, may be avoided;
- (vi) the need for cross references to the RHC/RDC will be greatly reduced; and
- (vii) the new code will repeal the existing rule-making powers under the various Ordinances and replace them with a comprehensive rule-making power to cover them all.

12. Having considered all the relevant factors, the Working Party proposes to adopt a single set of self-contained procedural rules (“the New Code”). **[Proposal 1]**

13. It is undesirable to have different rule-making authorities for family and matrimonial matters. We consider that the rule-making powers should be collected under the umbrella of a single rule-making authority. This is of particular importance for the New Code which requires a coherent, cohesive and consistent approach. We therefore propose that a new Family Procedure Rules Committee be set up by way of primary legislation as the single rule-making authority for the New Code and any subsequent amendments, which should be modelled on the powers, composition and approach for the two rules committees established for the High Court and

the District Court respectively, namely, the High Court Rules Committee and the District Court Rules Committee. **[Proposal 2]**

14. All the proposed reforms concern rules and procedures only. However, in order to implement some of the proposals, it may be necessary to introduce consequential amendments to the relevant principal Ordinances and/or subsidiary legislation. A ready example is the proposed creation of the Family Procedure Rules Committee. The Working Party therefore proposes that where it is necessary to implement any proposed reforms, consequential amendments should be introduced to the relevant principal Ordinances and/or subsidiary legislation. **[Proposal 3]**

Adopting the FPR as the Basic Framework for the New Unified Procedural Code

15. The FPR 2010, which sets out the latest developments in family procedural reforms within the global common law community, may be adopted as the basic framework for the New Code. The FPR 2010 uses detailed PDs substantively. The legitimacy of such approach is rooted in the express provisions in the CA 2003. However, in Hong Kong, in the absence of any similar provisions in the primary legislation, the same approach cannot be adopted. Subject to the reservation about the use of PDs, the Working Party proposes to adopt the FPR 2010 as the New Code's broad, basic framework. **[Proposal 4]**

General Contents of the New Code

16. To align the general practice and procedure in both the family and civil jurisdictions in the post-CJR era, to harmonise as far as possible the general parts of the family rules with those for civil proceedings and to reap the benefits of the CJR reforms, the Working Party proposes to model the general provisions of the New Code on the equivalents in the RHC or incorporate the relevant provisions of the RHC with modifications as appropriate for family and matrimonial matters. **[Proposal 5]**

17. As a self-contained instrument, the New Code should not, in principle, fall back on other provisions of the RHC. However, as a prudent measure, the Working Party proposes to create a general fall-back provision on the applicable rules with the RHC to fill any unforeseen procedural gap in the New Code. **[Proposal 6]**

18. The Working Party has identified a number of provisions in the RHC which are of general applicability and proposes that those provisions be adopted into the New Code, with modifications appropriate for family and matrimonial matters. **[Proposal 7]**

19. The Working Party proposes to select from the FPR 2010 and those necessary PDs relevant applicable provisions for adoption as rules in the New Code. **[Proposal 8]**

Specific Topics of Reforms

Application of the New Code

20. The New Code should apply to all matrimonial and family proceedings as defined, whether they are in the High Court or the Family Court. **[Proposal 9]**

21. The Working Party proposes to largely follow the English approach that the statutory definition of “matrimonial cause” in the MCO should be retained and incorporated into the New Code, that to avoid redundancy, it is not necessary to give a definition of “matrimonial proceedings” and that the term “family proceedings” should be comprehensive and list out all family-related proceedings, whether in the High Court or in the Family Court. **[Proposal 10]**

22. Since the meaning of “court” or “judge” has not been consistently set out in the various Ordinances and rules of court relating to family law, the Working Party proposes that there should be a clear definition of “court” and of “judge” in the New Code. **[Proposal 11]**

23. The powers of judges to perform functions under the New Code should also be spelt out. **[Proposal 12]**

Jurisdiction of the Family Court

24. There is no statutory provision setting out the establishment, jurisdiction or constitution of the Family Court. Apart from the MCO, the MPPO and the MPSO, there are no clear provisions dealing with the monetary jurisdiction of the Family Court. It has very limited inherent jurisdiction over children matters but a majority of the cases concerning

custody or upbringing of a child, or any other matters concerning a child are disposed of in the Family Court.

25. There should be a definition of “Family Court” in the New Code, setting out its jurisdiction, including the jurisdiction in children matters, and stating that there are no monetary limits in any financial applications. A list of matters assigned to be dealt with by the Family Court should also be set out in the New Code. **[Proposals 13 and 14]**

Jurisdiction of the High Court

26. The New Code should set out clearly the matters over which the Court of First Instance of the High Court has exclusive jurisdiction. **[Proposal 15]**

27. The High Court enjoys inherent jurisdiction in children-related matters. Presently, one has to refer to case law for the relevant inherent jurisdiction. The FPR 2010 and PD 12D comprehensively define inherent jurisdiction in children-related matters of the High Court of England, hence greatly reducing the need to refer to case law. The provisions for transfer in PD 12D enable the High Court to transfer cases to the lower court for dealing with relatively minor or more mundane or non-contentious matters concerning a ward. Both the provisions for inherent jurisdiction and transfer should be adopted in the New Code with necessary modifications. **[Proposal 16]**

Underlying objectives

28. The extension of the underlying objectives as set out in Order 1A of the RHC, a fundamental source of guidance for the operation of the civil justice system, to family procedural rules is the first and essential response to tackle adversarial excesses and to instil a shift of litigation culture. A statement similar to “the underlying objectives” in Order 1A of the RHC encapsulating the fundamental purpose of the New Code and the key concepts of family case management should be adopted. **[Proposal 17]**

29. Welfare issues have special relevance for the family jurisdiction, and in Hong Kong, the welfare or the best interests of children are always paramount in family and matrimonial cases. In England, welfare issues are also something the courts need to take into account when applying the

overriding objectives in the FPR 2010. The New Code should follow the FPR 2010 in requiring the court to have regard to welfare issues when applying the underlying objectives for family procedure. **[Proposal 18]**

Case management powers

30. By drawing the case management powers together and placing them on a clear and transparent legal footing under Order 1B of the RHC, a scheme of fair and consistent judicial case management is created. The New Code should have provisions setting out the court's case management powers similar to those under Order 1B of the RHC to ensure that the procedural steps are effectively carried out in accordance with the underlying objectives. **[Proposal 19]**

Alternative dispute resolution

31. To enhance the court's powers in promoting alternative dispute resolution, express provisions modelled on Part 3 of the FPR 2010 which sets out the court's powers to encourage the use of alternative dispute resolution and to facilitate its use should be adopted and considerations should be given to see if the mediation procedures now stipulated in PD 15.10 need any further enhancement. **[Proposals 20 and 21]**

32. The Working Party recognises the rationale behind a pre-action protocol as that contained in PD 3A of the FPR 2010 but notes that front loading of costs and delayed access to courts are the major concerns of those who object to it. Readers are asked to express their views if a pre-action protocol for mediation is suitable in local circumstances. **[Proposal 22]**

Commencement and transfer of proceedings

33. At present, the procedural law relating to the commencement and transfer of proceedings is seriously fragmented. There is a confusing mixture of primary and secondary legislation determining where matrimonial and family cases are heard. Only some of the primary legislation has designated the relevant court for commencing particular proceedings or allowed transfer and/or retransfer of proceedings.

34. The New Code should provide a simple route for access to family justice system and therefore should set out clearly the relevant court(s) for

commencing each type of proceedings and should provide that proceedings should generally begin in the Family Court unless the High Court has exclusive jurisdiction or in exceptional circumstances; and the exceptional circumstances should be spelt out. **[Proposals 23 and 24]**

35. In England, the FPR 2010 contains clear provisions for the transfer of family proceedings. The 2008 Order, supplemented by the 2008 Direction, stipulates the exceptional circumstances under which proceedings may be commenced in the High Court and may be transferred from the county court to the High Court, hence ensuring that the criteria for transfer of proceedings are applied in such a way that proceedings are heard at the appropriate level of court, that the capacity of lower courts is properly utilised, and that proceedings are only dealt with in the High Court if the relevant criteria are met.

36. The New Code should contain provisions on transfer and retransfer for all types of transferable proceedings between the Family Court and the High Court (with empowering provisions added to the individual primary legislation if required), to be modelled on the relevant provisions in the FPR 2010 and augmented by PDs modelled on the 2008 Order and the 2008 Direction, with modifications to suit local circumstances. **[Proposal 25]**

Commencement of proceedings and forms

37. At present there is a plethora of originating processes such as petition, originating application and originating summons designated by different rules or PDs, coupled with an array of statutory forms, if available. And depending on the particular mode of commencement of proceedings, the parties are called differently when their capacity is in substance the same.

38. Following the English approach, a new unified mode of originating process for both matrimonial and family proceedings, namely, “originating application”, should be adopted and new statutory forms should be introduced to cater for different types of proceedings. The nomenclature for the parties should be unified to simply read “Applicant” and “Respondent”, save for joint application for divorce, where the parties should be called “1st Applicant” and “2nd Applicant”. **[Proposals 26 and 27]**

Service and acknowledgement

39. The mode of service and acknowledgement of service of documents in matrimonial proceedings is governed by provisions set out in the MCR. The Working Party proposes that generally the present provisions should be retained but refined and put in one place in the New Code. **[Proposal 28]**

40. Rule 14(1) of the MCR allows service of petition by post without specifying the requirement of registered post, but in order to facilitate the obtaining of a deemed service order, a petitioner may try to serve the petition by double registered post (i.e. by producing advice of delivery) in order to show the respondent's actual notice of the petition. There is a suggestion that the rules in this area should be simplified and aligned with those in the RHC/RDC which provide for service by registered post and a deemed service order is unnecessary.

41. In England, an application for a deemed service order is still necessary if a signed acknowledgment of service has not been returned. The position in Australia and New Zealand is even stricter, in that there is no provision for a deemed service order and the alternatives are an application for substituted service or dispensation of service.

42. Readers are invited to express their views on whether the provision for service of matrimonial cause by ordinary post should be replaced by registered post for the alignment of the MCR, RHC and RDC, and to do away with the need for a deemed service order in cases where a signed acknowledgment of service has not been returned. **[Proposal 29]**

43. The FPR 2010 allows service of documents other than an application for a matrimonial order to be effected by fax or other means of electronic communication. Views are invited as to whether documents other than the originating process and judgment summons should, as a matter of principle, be able to be served by fax or other electronic communication in line with the FPR 2010. **[Proposal 30]**

Service outside the jurisdiction

44. Rule 109(1) of the MCR allows service outside the jurisdiction without leave. Whilst this provision should be retained, the manner of

service of documents should be aligned with that of the general civil practice as contained in Order 11 of the RHC. **[Proposal 31]**

45. The Working Party also proposes to follow the FPR 2010 by expressly providing that all documents in matrimonial and family proceedings may be served outside the jurisdiction without leave. **[Proposal 32]**

Interlocutory applications

46. For any interlocutory application in extant proceedings for matrimonial causes and family proceedings in the New Code, such an application should be made by summons. **[Proposal 33]**

Procedures for matrimonial causes

47. The MCR is the principal rules governing the procedures for matrimonial causes and matrimonial proceedings. Many of the essential features in the MCR should be retained and incorporated into the New Code but they need to be updated so as to reflect the current and modern practice and modified with a view to simplifying the procedural steps and harmonising them with other provisions in the New Code. Reference can be made to Part 7 of the FPR 2010 (Procedure for Applications in Matrimonial and Civil Partnership Proceedings) in identifying areas of possible improvement.

Matters of general application

48. For those provisions which are matters for general application, it is not necessary to make separate provisions for them in the procedures governing matrimonial causes. These provisions will be covered by the relevant provisions in the New Code. **[Proposal 34]**

Specific matters

49. The Working Party considers that specific matters which feature in matrimonial causes only should be improved and, if desirable, be adapted in accordance with the relevant provisions in Part 7 of the FPR 2010.

Application to consider agreement

50. Such applications to enable the parties to seek the court's opinion on an agreement or proposed arrangements before or after the presentation of a petition are now seldom, if ever, made, and there are no rules dealing with their practice and procedure.

51. In the absence of a comprehensive statutory code, the law and practice relating to such agreements should continue to be developed by the courts and the New Code should not include any specific provision to enable the parties to make such application, except in the context of a joint application for the agreement or proposed arrangements to be incorporated in an order of the court or in the context of a FDR or CDR hearing. **[Proposal 35]**

Reconciliation

52. The requirement for a legally represented applicant to file a statement certifying whether the legal representative has discussed the possibility of reconciliation is contained in PD 15.3 but not in the MCR. The Working Party proposes that the application and the scope of PD 15.3 should be reviewed and, if it is to be retained, incorporated into the New Code. **[Proposal 36]**

Naming of co-respondents

53. The New Code should discourage the naming of co-respondents, in that the other person should not be named unless the applicant believes that the other party to the marriage is likely to object to the making of a matrimonial order. **[Proposal 37]**

Special procedure for undefended cases

54. Since the vast majority of cases are disposed of under the special procedure, the New Code should follow the FPR 2010 so that this procedure becomes the norm to which the rules primarily apply and defended cases are treated as exceptions. The procedure should also be extended to nullity proceedings. The New Code should also include those relevant procedural matters which are currently set out in PD 15.14. **[Proposals 38 and 39]**

Medical examination

55. The New Code should have provisions similar to Rule 7.26 of the FPR 2010 and PD 7B which provide for medical examination in proceedings for nullity, and which place the onus of determining whether medical examiners should be appointed on the court, without any application needing to be made. The court must only make an appointment where it is necessary for the proper disposal of the case. **[Proposal 40]**

Rescission

56. Provisions relating to rescission should be grouped together in the New Code and such applications should be made in accordance with a common procedure. **[Proposal 41]**

Making a decree absolute

57. While the procedures under the relevant rules in the FPR 2010 are broadly the same as those under Rule 65 of the MCR, the English provisions set out more clearly when an application must be made to a judge other than a district judge and prescribe the information to be included in the notice of application if there is a delay of more than 12 months after the decree nisi was made. The New Code should include provisions similar to those in the FPR 2010. **[Proposal 42]**

58. The Working Party also considers that the precise time when a decree nisi was made absolute could be relevant and therefore proposes that the New Code should include provisions to record the precise time at which the decree was made absolute. **[Proposal 43]**

Structure of the rules

59. Subject to the discussions above, considerations should be given to see (a) if and how the structure of the procedural rules of matrimonial causes in the New Code should be modelled on Part 7 (Procedure for Applications in Matrimonial and Civil Partnership Proceedings) of the FPR 2010; and (b) if and how the relevant provisions in that Part should be best adopted with necessary modifications. **[Proposal 44]**

Application for a financial order

A compendious code

60. Applications for a financial order may arise in different scenarios and are governed by different statutory provisions such as the SMOO, GMO, MCO, MCR, MPPO and I(PFD)O. There is no compendious set of rules that applies to matters of a financial order generally. This situation is unsatisfactory and the New Code should provide for the practice and procedure for a financial order that arises in matrimonial causes and family proceedings, applicable to both the High Court and the Family Court, to rationalise, reconcile and consolidate the procedural rules by way of a compendious code. **[Proposal 45]**

61. An application for a financial order after overseas proceedings should also be included in the Part of the New Code applying to applications for financial orders.

Limited application to the MPSO

62. The MPSO enables applications for financial orders to be made under various provisions. The Working Party considers that where any of these applications is brought in fresh proceedings, notwithstanding that the general civil procedure should apply, the New Code should still apply to such an application whether or not it is brought within the extant family or matrimonial proceedings. **[Proposal 46]**

A clear definition for financial order

63. While Rule 2 of the MCR uses the archaic term “ancillary relief” to define the financial order available in the MCO and the MPPO generally, the MPPO however defines the term more narrowly to mean “*relief under any of the provisions of sections 3, 4, 5, 6 and 6A*” of the legislation. The New Code should modernise the language used and promote consistency in the terminology. The use of the descriptive term “ancillary” which connotes that the remedy sought is not free-standing may not be correct. The Working Party considers that “*financial order*” is more preferable as a neutral and general all-encompassing term and that the New Code should define “*financial order*” to cover all categories of financial applications in matrimonial causes and all family proceedings, whether in the High Court or

the Family Court, together with definitions for related terminologies. **[Proposal 47]**

General approach

64. The procedure for all applications for financial order should be simplified and, so far as circumstances permit, unified. The New Code should adopt this as the general approach, which is also the approach adopted in the FPR 2010. The Working Party proposes to adopt the relevant part in the FPR 2010 with all necessary modifications to suit local circumstances. **[Proposal 48]**

Where to start the proceedings, etc.

65. Applications for financial order will generally be commenced in the Family Court, with power to transfer to the High Court and also power to re-transfer. Following Rule 9.5 of the FPR 2010, the New Code should clearly state the court in which the application should be commenced; and should provide for the practice and procedure to apply for transfer and re-transfer. **[Proposal 49]**

66. Where there are family proceedings extant between the parties, an application for financial order should be made within the extant family proceedings, otherwise such application should in general be commenced by way of separate family proceedings. **[Proposal 50]**

Mode of commencement

67. The New Code should provide for standardised originating applications, summonses, forms and affidavits, together with the evidence that is to be provided for each type or form of financial order sought. **[Proposal 51]**

Mode of hearing

68. The current default mode of hearing in Chambers and not being open to the public should continue. **[Proposal 52]**

Service and joinder of third-parties

69. The New Code should adopt the relevant provisions in the FPR 2010 which involve the interests of a third-party with necessary modifications.

Variation of settlement orders and avoidance of disposition orders

70. The New Code should follow Rules 9.13(1) and 9.13(2) of the FPR 2010 to provide for service upon third-parties in applications for variation of settlement and for avoidance of disposition respectively. **[Proposals 53 and 54]**

Applications relating to landed property and notice of ancillary relief (registration against landed property)

71. The New Code should provide for service upon the registered owner and mortgagees where there is an application relating to landed property or where a notice of ancillary relief has been lodged with the Land Registry. **[Proposal 55]**

Disputed beneficial ownership or legal rights and entitlements

72. It is conducive to efficient case management that matters on joinder of third-parties, pleadings or determination of preliminary issues should be raised and appropriate directions (if any) should be given as early as practicable and separate civil proceedings should be avoided. Therefore, the New Code should set out the duties of the parties and those of their legal advisors to constantly monitor the progress of the proceedings. In the event any party becomes aware of any issue or dispute involving third-parties, the party should as soon as practicable make an application for appropriate directions. Where third-parties have become aware of the dispute or the issues involved, the third-parties are permitted to make an application for appropriate directions and for the determination of the disputed issues. The New Code should also provide for the general directions that the court may give in such an application. **[Proposals 56 to 59]**

73. The rules in the RHC in relation to joinder of third-parties should also be included in the New Code. Jurisdiction as to making an application

for declaration of beneficial ownership against a third-party should also be provided for. **[Proposal 60]**

Financial Dispute Resolution (FDR)

Codification

74. The FDR procedure has worked successfully in procuring settlements and is now being codified into rules. The New Code should largely adopt and incorporate the FDR procedure and the abandonment of the practice of “affidavit of means” should be clarified and reference to the same be deleted from the rules and PDs. The FDR procedure should also be extended to cover applications for variation under section 11 of the MPPO. **[Proposals 61 and 62]**

First appointment

75. Paragraph 2 of PD 15.11 provides for the filing and exchange of Form Es. There should be provisions catering for the situation where parties have been unavoidably prevented from including documents with Form E, for the provision of documents at the earliest opportunity together with a written explanation for the failure to do so earlier. **[Proposal 63]**

Costs estimates and open proposals

76. Parties should be aware of their potential liability for costs so that they may consider whether litigation is justified. The New Code should provide for costs estimates in a comprehensive and consolidated manner, incorporating the extant provisions in PD 15.11, PD 15.12, PD 15.9 and Rule 9.27 of the FPR 2010. Costs estimates, together with open proposals, should be prepared and provided prior to the substantive hearing. **[Proposal 64]**

Sanctioned offers

77. PD 15.12 has not listed Order 22 to be of general applicability to matrimonial and family proceedings, hence clarification is needed. Considering that (1) the nature of financial order proceedings and their potential outcomes may lead to more scope and latitude for reasonable debate concerning whether the eventual judgment is “*more advantageous*

than” the sanctioned offer; (2) confusion may be caused from the interplay between the mandatory “open proposals” and the optional sanctioned offers; and (3) conditions in Order 22 were designed with general civil proceedings in mind, the Working Party, therefore, proposes that Order 22 of the RHC shall not apply. **[Proposal 65]**

Forum of FDR hearings

78. Although FDR hearings have also been conducted in the High Court, there are occasions when cases are re-transferred to the Family Court for the purpose of FDR. This has the advantage of “*not conflicting out*” the judge of the Court of First Instance where at present there is a limited number of judges handling financial order matters. The New Code should provide for the possible partial re-transfer from the High Court to the Family Court for FDR, either upon application or of the court’s own motion. **[Proposal 66]**

Application under the I(PFD)O

79. Proceedings under this Ordinance are commenced in the Family Court and may be transferred to the High Court pursuant to section 25(2) of the Ordinance. The New Code should have a new Part for the practice and procedure of proceedings under the Ordinance, applicable to both the Family Court and the High Court. **[Proposal 67]**

80. The Ordinance does not stipulate the parties that ought to be joined. The New Code should stipulate the parties to be named, including the personal representatives, all beneficiaries and other persons affected by the application. Where there is an application for an order under section 11 to sever a joint tenancy, the joint tenant shall be joined as a party. **[Proposals 68 and 69]**

81. Where an application is made after 6 months from the date on which representation to the estate is first taken out as stipulated in section 6 of the Ordinance, the New Code should provide that such application for leave for late application should be made in the originating application and supported by affidavit. **[Proposal 70]**

82. The New Code should also provide that applications for interim relief should be made in the originating application or thereafter by way of

summons; and in general interlocutory applications should be made by way of summons. **[Proposal 71]**

83. Provisions for the practice and procedure relating to applications for variation, discharge, suspension or revival under sections 8 and 9 should also be made. **[Proposal 72]**

84. Where an application is made for a “donee” to provide financial provision under sections 12 and 13, the New Code should provide that such application be made in the originating application or thereafter by way of summons and the alleged “donee” shall be joined as a party. **[Proposal 73]**

85. Although the executor or personal representative would normally adopt a neutral position in contested proceedings, he or she may sometimes need to bring an application for court directions. Such application would have to be made in the Probate Court by way of a separate action. Such proceedings lie outside “family proceedings” and the New Code should not apply to such proceedings.

86. The Working Party considers that proceedings under the I(PFD)O are suitable to be resolved by way of mediation or alternative dispute resolution and proposes that there should be provisions in the New Code for giving directions for mediation or for the FDR procedure to be made applicable. **[Proposal 74]**

Alteration of maintenance after the death of one party

87. The court has the power to alter an agreement under section 16 of the MPPO. The court also has jurisdiction to vary or revoke a maintenance agreement under section 19 of the I(PFD)O. Under section 20 of the I(PFD)O, the powers of the court can also be exercised in relation to an application under either section 11(6) or 16(1) of the MPPO. In view of the overlapping jurisdiction, the New Code should provide rules for both in the same Part as the I(PFD)O. **[Proposal 75]**

Application for provision from deceased’s estate

88. The New Code should include, in the same Part as the I(PFD)O, rules which apply to all proceedings by which a person applies for provision

from a deceased's estate, both under the I(PFD)O and the MPPO. **[Proposal 76]**

Procedures for miscellaneous applications

Types of applications

89. There are various miscellaneous applications which arise in family proceedings. Those relating to financial applications have been grouped under the section on applications for financial orders, and those relating to children will be grouped under the section on children proceedings. Other miscellaneous applications are :-

- (i) declarations;
- (ii) applications under the DCRVO;
- (iii) applications for non-cohabitation under the SMOO; and
- (iv) applications for consent to marry under the MO.

90. There is no coherent set of procedural rules covering all these miscellaneous applications. The New Code should, so far as circumstances permit, include uniform procedures for all miscellaneous family proceedings, which would assist all persons involved in the conduct of such proceedings in their timely, just and cost-effective disposal. Further, the procedures for miscellaneous applications should be grouped together in the New Code and a uniform format should be adopted. **[Proposals 77 and 78]**

Specific applications

Declarations

91. At present, there are no prescribed procedures for applications for marital status, parentage, legitimacy or legitimation and adoptions effected overseas. The New Code should follow Chapter 5 of Part 8 of the FPR 2010 to provide for procedures for such applications. **[Proposal 79]**

Application under the DCRVO

92. Specific rules are contained in the DCRVR, but subject to those rules, the RHC applies. Rules which apply to the DCRVO should be included in a separate part of the New Code. **[Proposal 80]**

Applications under the SMOO

93. Apart from Order 89, rule 1 of the RDC which provides for proceedings to be commenced by originating summons, there are no prescribed rules. Rules should be made in the New Code to provide for such applications to be made to the Family Court in accordance with the proposed uniform procedures. **[Proposal 81]**

Application for consent to marry under the MO

94. Chapter 9 of Part 8 of the FPR 2010 provides rules for similar applications. The New Code should include rules for such applications. **[Proposal 82]**

Children proceedings

Scope of the new rules

95. Hong Kong does not have a comprehensive ordinance which exclusively deals with children's matters. Inevitably, the existing rules and procedures are seriously fragmented and in some cases there are simply no rules at all. A unified set of procedural rules for children proceedings should be introduced.

96. The scope of the new rules should include all extant proceedings under :-

- Sections 10, 11 and 12, GMO
- Section 19, MPPO
- Section 48, MCO
- Sections 6, 12 and 13, PCO
- Section 5(1)(b), SMOO
- Applications under inherent jurisdiction of the High Court including wardship proceedings under Order 90 of the RHC
- The Hague Convention under the CACO and Order 121 of the RHC
- Adoption proceedings under the AO

[Proposal 83]

Broad framework

97. Part 12 of the FPR 2010 may be adopted as a broad framework for the new procedures relating to children in the New Code. Part 14 of the FPR 2010 which deals with adoption proceedings is also a good model to follow. The Working Party proposes that both Parts 12 and 14 of the FPR 2010 should be adopted with necessary modifications as the broad framework for the procedural rules on children proceedings in the New Code. **[Proposal 84]**

Unified definition for “child”

98. In the family and matrimonial context, different Ordinances use different expressions to describe the same person who is under 18. In order to promote consistency with respect to both terminology and approach, the Working Party proposes that a single unified term should be used for all procedures concerning children irrespective of how they are described under different Ordinances, subject to any contrary definition in any principal Ordinance. **[Proposal 85]**

Statements as to arrangements for children

99. The Working Party considers that the current Rules 9(3) and 15B of the MCR concerning the filing of a statement as to arrangements for children are adequate and should be incorporated into the New Code to cover all children under the age of 18. **[Proposal 86]**

Custody, care and supervision, removal, and related matters

100. Rules 92 to 96 of the MCR deal with the procedures for custody, care and supervision, removal and related matters concerning children. Subject to Proposals 88 to 89, the Working Party proposes that Rules 92 to 96 of the MCR, with all necessary modifications, should be incorporated into the New Code. **[Proposal 87]**

101. Rule 92(5) and (6) relate to the procedure to be adopted where it is alleged that one party has committed adultery or formed an improper association with another. They are effectively obsolete, and therefore should not be incorporated into the New Code. **[Proposal 88]**

102. Rule 95(2) of the MCR and section 17 of the GMO allow for a social welfare report to be called for. Apart from such a report, the Working Party proposes that a clinical psychologist's report and an international social welfare report which are routinely called for in practice should also be included in the New Code. **[Proposal 89]**

Child Dispute Resolution

103. The CDR pilot scheme was a mandatory scheme introduced by PD 15.13 to deal with all children disputes in the Family Court, except adoptions. The purpose of the scheme is to ensure that whilst the best interests of children remain the court's paramount concern, lasting agreements concerning children are obtained quickly and in a less adversarial manner.

104. As a matter of principle, the Working Party supports the incorporation of PD 15.13 into the New Code. The Working Party further observes that there are presently no rules governing a child being medically examined or assessed by a psychiatrist or psychologist. This is different from Rule 25.4(2)-(4) of the FPR 2010 where it is clearly stated that no person may cause a child to be medically or psychiatrically examined without the court's leave or that no evidence arising out of such examination may be adduced without the court's leave.

105. At present, the court may under paragraph 10 of PD 15.13 direct the parties to attend counselling, a parent education programme and/or any other form of third-party direct intervention that may assist the parties. Unlike section 11A of the English Ch A 1989, which provides the English court with the power to make a "contact activity direction", there is no local equivalent in the MCR. As PD 15.13 will be reviewed in three years' time, any future amendments arising from the review also need to be incorporated into the New Code.

106. The Working Party proposes to incorporate into the New Code PD 15.13, with all future amendments arising from the review, and Rule 25.4(2)-(4) of the FPR 2010 with necessary modifications. Readers are invited to express their views on whether or not the CDR procedure should also be extended to the High Court. **[Proposal 90]**

Guardianship

107. The procedures for applications under the GMO are contained in Order 90 of the RHC/RDC and Rule 69 of the MCR, to which PD 15.13 also applies. The Working Party considers the current practice under such rules adequate and proposes that the provisions under Order 90 of the RHC/RDC and Rule 69 of the MCR, which are relevant to guardianship proceedings, should be incorporated into the New Code. **[Proposal 91]**

Inherent jurisdiction and wardship

108. The procedure for wardship proceedings is governed by Order 90, rule 3 of the RHC, supplemented by PD 23.1 on Wards of Court. In formulating the desired reform, the Working Party repeats Proposal 16 of this report which deals with the inherent jurisdiction of the Court of First Instance of the High Court.

CACO

109. The procedures for applications brought under the CACO are set out in Order 121 of the RHC. The Working Party considers the extant practice satisfactory and proposes to incorporate Order 121 into the New Code. **[Proposal 92]**

Parentage, etc.

110. Under section 49 of the MCO, an applicant may seek a declaration of legitimacy. The LO also sets out the applications that can be made by a legitimated person. The procedure is set out in Rule 124 of the MCR. The Working Party proposes to incorporate Rule 124 of the MCR into the New Code. **[Proposal 93]**

111. The PCO also deals with the law relating to parentage, legitimacy and legitimation. Section 18 of the PCO empowers the Chief Justice to make rules providing for the practice and procedure to be adopted. To date, no such rules have been made.

112. The Working Party proposes that provisions be made in the New Code to cater for the practice and procedure to be applied in applications under the PCO, including applications under sections 6 and 12, and for the

transfer of applications to the High Court pursuant to section 16. Considerations should also be given as to the manner of giving effect to directions under section 13 such as by making rules or by means of PD or guidance notes if necessary. **[Proposal 94]**

Surrogacy

113. The law on surrogacy in Hong Kong is set out in the HRTO but without any specific rules. It is, however, possible to apply for a parental order under the PCO.

Adoption

114. The AR applies to local adoptions and the CAR intercountry adoptions. The Working Party considers the current practice under the AR and CAR satisfactory, except :-

- (i) there are currently no rules for certain types of applications; and
- (ii) for service out of jurisdiction, both the AR and CAR merely provide that the documents must be served in accordance with the law of that place.

115. The Working Party proposes that the AR and CAR should be incorporated into the New Code. There should be rules for all the applications referred to in the AO. The practice for service outside jurisdiction should be aligned with that for other family and matrimonial cases. **[Proposals 95 to 97]**

Separate representation of children

116. Under Rule 108 of the MCR, the court has a broad discretion to order that a child be separately represented in any matrimonial proceedings. However, there are no similar provisions under the GMO, SMOO or I(PFD)O.

117. The Guidance on Separate Representation for Children in Matrimonial and Family Proceedings, containing many provisions of PD 16A of the FPR 2010, was issued to assist judges and family practitioners in considering whether an order for separate representation of a child should be

made. The Working Party considers the Guidance useful but also notes the associated policy and resource implications. The Working Party proposes that considerations should be given to incorporate it into the New Code. **[Proposal 98]**

Other miscellaneous applications

118. For other miscellaneous applications relating to children in our existing Ordinances of which no rules exist, the Working Party proposes to adopt the relevant provisions in the FPR 2010, if applicable, with necessary modifications in the New Code. **[Proposal 99]**

Guidance for judicial meetings of children

119. There is no provision in the existing rules relating to the judicial meeting of children. This gap has been largely dealt with by the Guidance on Meeting Children that took effect on 2 May 2012. Although the Guidance is useful, it remains guidance to judges and no more. The Working Party does not consider it necessary to incorporate it into the New Code.

Interim remedies and security for costs

Interim remedies

120. Interim remedies, in terms of civil proceedings, refer to a series of measures including interlocutory injunctions, interim preservation of property, applications for interim relief in aid of foreign proceedings and interim payments provided under Order 29 of the RHC/RDC. For matrimonial proceedings, the granting of an injunction is governed by sections 17(1)(a) and 29AJ of the MPPO and Rules 81 and 84 of the MCR.

121. The Working Party proposes that sections 17(1)(a) and 29AJ of the MPPO and Order 29 of the RHC should be combined and incorporated into the New Code with all necessary modifications. **[Proposal 100]**

Security for costs

122. The Working Party notes that because of the special nature of family litigation, the granting of an order for security for costs is extremely

rare. Despite its rarity, an order for security for costs may still serve a useful purpose in the rare case where a foreign or impecunious third party may be involved. The Working Party proposes that the current Rule 37 of the MCR and Order 23 of the RHC should be incorporated into the New Code with all necessary modifications. **[Proposal 101]**

Evidence

123. There are only a few procedural rules in the existing subsidiary legislation to deal with evidence in family and matrimonial proceedings, including Rules 38 to 42 of the MCR. Thus, resort has to be made to Order 38 of the RHC/RDC to fill the gap.

124. In England, Parts 22 to 24 of the FPR 2010 seek to provide a self-contained set of procedural rules for all family and matrimonial proceedings, which is supplemented by various practice directions.

125. The Working Party proposes that the New Code should include procedural rules relating to evidence in matrimonial causes and family proceedings similar to those contained in Parts 22 to 24 of the FPR 2010. Similar PDs, like those contained in PDs 22A and 24A which supplement the FPR 2010, should also be issued to provide guidance on the practice of such procedural rules. **[Proposal 102]**

Discovery, etc.

126. There are very few rules on discovery, except Rules 28 and 29 of the MCR providing that the formal procedures for discovery, inspection and interrogatories in Orders 24 and 26 of the RHC shall apply with necessary modifications. In practice, the procedures relating to discovery in matrimonial causes and family proceedings are very different from those in civil proceedings.

127. In England, there are different procedural rules relating to discovery for defended divorce, ancillary relief or children proceedings.

128. The Working Party proposes that the New Code should follow the model in the FPR 2010 to provide for a self-contained set of procedural rules relating to discovery, inspection and interrogatories for defended

matrimonial causes, financial order proceedings and children proceedings. **[Proposal 103]**

129. The Working Party also proposes that there should be a provision in the New Code to empower the courts, in all matrimonial causes and family proceedings, to carry out investigations and to make orders for discovery of documents against parties involved in the proceedings and other third parties. **[Proposal 104]**

Experts and assessors

Experts

130. At present, there is no specific rule on expert evidence under the MCR. Therefore, resort has to be made to Part IV of Order 38 of the RHC.

131. In matrimonial causes and family proceedings, the parties may seek to rely on the following expert evidence to substantiate their cases :-

- (i) forensic accountants to examine the potential or hidden assets of the other party;
- (ii) experts to value the assets of the parties; and
- (iii) psychologists in children cases.

132. In England, Part 25 of the FPR 2010 provides a self-contained set of procedural rules for expert evidence which is supplemented by PDs 25A-25F.

133. The Working Party proposes that the New Code should follow the model in England and contain procedural rules similar to those in Part 25 of the FPR 2010. PDs similar to PDs 25A-25F should also be introduced to give guidance to practitioners about the procedural rules relating to expert evidence in family and matrimonial proceedings. **[Proposal 105]**

Assessors

134. In Hong Kong, section 53 of the HCO and section 58 of the DCO provide that the court can hear any civil proceedings with the assistance of assessors. The procedural rules relating to trials involving assessors can be found in Order 33, rule 6 of the RHC/RDC.

135. In England, very detailed procedural rules relating to hearings involving assessors in family proceedings can be found in Rule 25.14 of the FPR 2010. As hearings involving assessors are extremely rare in Hong Kong, the Working Party does not see the need to incorporate elaborate provisions into the New Code for such hearings. The present provisions in Order 33, rule 6 of the RHC/RDC, should suffice. The Working Party proposes to incorporate Order 33, rule 6 of the RHC/RDC, into the New Code with necessary modifications. **[Proposal 106]**

Use of expert evidence

136. There are concerns in England over the use of expert evidence in family proceedings, including :-

- (i) the inappropriate or excessive use of experts, which increases costs, the duration of the proceedings and their complexity;
- (ii) partisanship and a lack of independence among experts, devaluing their role in the judicial process; and
- (iii) poor quality of the advice of certain experts.

137. In the Final Report of the Family Justice Review published in England in November 2011, the Family Justice Review Panel has made a number of recommendations to combat the existing shortcomings.

138. In the context of Hong Kong, after the CJR, the courts now have more extensive case management powers to regulate and restrict the use of expert evidence. Similar case management powers will be made available to the family judges under the New Code, which would, to a great extent, address some of the concerns expressed in England about the use of expert evidence in family proceedings. The Working Party is of the view that with the similar procedural rules and PDs as in England to be adopted into the New Code, there is no need to make proposals similar to the recommendations of the Family Justice Review Panel in England.

Statement of truth

139. The Working Party proposes that provisions of Statements of Truth in Order 41A of the RHC be incorporated into the New Code with all necessary modifications. **[Proposal 107]**

Trial

140. At present, Rules 44 to 55 and 88 of the MCR deal with some general procedures of trial in a matrimonial cause or ancillary relief in matrimonial proceedings. However, the detailed procedures to be adopted at trial are lacking. In order to fill this gap, one has to apply Order 35 of the RHC/RDC.

141. The Working Party proposes that Order 35 of the RHC, relevant provisions in Chapter 3 of Part 7 and Part 27 of the FPR 2010 and the existing MCR should, with necessary modifications, be incorporated into one single set of rules in the New Code to govern the setting down and conduct of a trial in matrimonial causes and family proceedings. **[Proposal 108]**

Appeals

142. At present, there is only one rule under the MCR which deals with appeals against a Registrar's decisions. As to other appeals, reference has to be made to Orders 55 to 61 of the RHC and Order 58 of the RDC.

143. The Working Party considers the reference to the RHC/RDC for procedures on appeal both inconvenient and burdensome. It proposes that a single set of rules should be drafted to cater for appeals from both the Court of First Instance and the District Court, by incorporating the present provisions in the MCR and RHC/RDC on appeal. **[Proposal 109]**

144. If Proposals 127 to 130 relating to the Registrars and Masters are to be adopted, the Working Party proposes that further consideration needs to be given to the new rules governing the appeals from the Registrar/Masters to the judge or to the Court of Appeal. **[Proposal 110]**

Setting aside decree nisi/absolute

145. There are 3 ways to set aside the service and the subsequent decrees :-

- (i) an application for re-hearing under Rule 55 of the MCR;
- (ii) a fresh action to set aside the decree absolute for fraud; and
- (iii) an appeal to the Court of Appeal to set aside the decree absolute.

146. The Working Party respectfully agrees with the Court of Appeal's observations in *CFF v ZWJ*¹ that for setting aside a decree under such circumstances, it may be more appropriate for the court granting the decree to set it aside under Rule 55 of the MCR, instead of the Court of Appeal on appeal, especially when there is dispute on facts. The Working Party proposes that express rules should be provided in the New Code for the application for setting aside the decrees, judgments or orders obtained by irregular service to be dealt with by the court granting such decrees, judgments or orders. **[Proposal 111]**

Costs

147. Costs in matrimonial proceedings are governed by Rule 91A of the MCR, Order 62 of the RHC and PD 14.3(costs). As for family proceedings, depending on the venue, either Order 62 of the RHC or the RDC together with PD 14.3 (costs) apply.

148. Apart from children's cases, though the starting point on costs in matrimonial and family proceedings remains to be "*costs follow the event*", the court's discretion on costs may be broader than in civil matters generally.

149. For children's cases and wardship proceedings, subject to the court's discretion, the general principle is "*no order as to costs*". When the Official Solicitor is appointed as *guardian ad litem*, the court retains an unfettered discretion on costs.

150. The Working Party considers that the current law and practice is serving well and gives the courts a sufficiently wide discretion on costs in order to achieve justice and fairness. The Working Party proposes to incorporate into the New Code Orders 62 and 62A of the RHC with necessary modifications. **[Proposal 112]**

¹ CACV 171/2012, unreported, 27 May 2013.

Enforcement

General

151. The provisions on enforcement in the MCR, being Rules 86 to 91A, are by no means comprehensive or exhaustive. Hence, references have to be made to the RHC.

152. Court orders made in matrimonial and family proceedings may be enforced by Judgment Summons, Attachment of Income, Committal for Contempt, Writ of Sequestration, Injunction, Charging Order, Garnishee Order, Prohibition Order, Writ of Fieri Facias and Appointment of Receivers: Equitable Execution, the relevant provisions for which are contained in Orders 44A to 52 of the RHC or the RDC.

153. The rules on enforcement of orders are fragmented and scattered over a number of Ordinances, i.e. the MCR, RHC, RDC and AIOR. The distinction between matrimonial proceedings and family proceedings appears to be artificial but this leads to the duplication of rules.

154. In *CYM v YML* [2013] 1 HKLRD 701, the Court of Appeal referred to the English Court of Appeal case *Mubarak v Mubarak* [2001] 1 FLR 698 and cast doubt on the compatibility of the judgment summons proceedings with the rights enshrined in Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance, Cap. 383. In *Mubarak v Mubarak*, it was held that judgment summons was a criminal proceeding and hence caught by Article 6 of the European Convention on Human Rights and the proceedings were not in compliance with the said Article. In short, it is recognised that the right to remain silent is inherently inconsistent with the examination procedure in judgment summons proceedings. The FPR 2010 retains a “Convention compliant” judgment summons proceedings in Chapter 2 of Part 33.

155. The Working Party notes the close resemblance of Hong Kong’s judgment summons provisions with the previous English provisions and considers there is a real risk that the former might be held inconsistent with the Hong Kong Bill of Rights. The Working Party proposes that considerations should be given to whether any amendments to the existing provisions are required. **[Proposal 113]**

156. At present, the AIOR does not apply to maintenance pending suit for spouses, and only applies to interim maintenance orders for children. This anomaly partly was an inadvertent omission at the time when the AIOR was introduced. The Working Party proposes that the New Code should provide that the relevant AIOR provisions are to apply to maintenance pending suit for spouses. **[Proposal 114]**

157. In England, the provisions on enforcement are contained in Part 33 of the FPR 2010 but it is not a comprehensive code and refers to relevant provisions in the CPR, RSC and CCR with necessary modifications. Any amendment to the latter provisions will not apply automatically to family proceedings. But steps have been taken to bring all the necessary rules on enforcement into the FPR 2010.

158. The Working Party prefers the English approach and proposes that the New Code should include the enforcement provisions in the MCR and the AIOR and refer to all the relevant provisions in Orders 44A to 52 of the RHC, with necessary modifications. Any future amendments to the RHC/RDC will not automatically apply to the New Code. **[Proposal 115]**

159. The Working Party also proposes that Rule 33.3(2) of the FPR 2010 should be adopted so that apart from applying for an order specifying the method of enforcement, an applicant may ask the court to decide which method of enforcement is the most appropriate in the circumstances. **[Proposal 116]**

Enforcement of undertakings

160. PD 33A which supplements Part 33 of the FPR 2010 enables enforcement for breach of an undertaking as if it was an order. The PD also provides the form of penal notice to be endorsed on the undertaking and that the person giving the undertaking must make a signed statement to the effect that he understands the undertaking and the consequences of failure to comply with it.

161. The Working Party proposes that provisions similar to PD 33A are to be adopted with necessary modifications in order to provide a solid legislative underpinning for the enforcement of the undertaking and to ensure that the person giving the undertaking is fully aware of the undertaking and the serious consequences if in breach. **[Proposal 117]**

162. Subject to the foregoing proposal being accepted, the New Code should provide the express legislative underpinning whilst the form of penal notice and statement to be signed by the person giving the undertaking are to be dealt with by way of a PD. **[Proposal 118]**

Reciprocal enforcement of maintenance orders

163. The practice and procedure on registration and transmission of maintenance orders made by a reciprocating country are set out in the MO(RE)R. The MO(RE)R is already a single code. The Working Party proposes that the present provisions of the MO(RE)R be incorporated into the New Code. **[Proposal 119]**

Hearing and reporting of proceedings

Hearing

164. The principle of open justice, which is firmly enshrined in case law and the Hong Kong Bill of Rights, is essential to the impartial and efficient administration of justice. There are, however, recognised exceptions for family cases. For example, evidence on the question of sexual capacity in proceedings for nullity normally must be heard in camera, all proceedings under the AO are heard in private and matters relating to children and applications for financial provisions and ancillary relief are usually heard in private.

165. The Working Party proposes that the New Code should expressly provide that subject to any enactment or any rules, all proceedings to which the New Code applies, where they are pending in the first instance courts, should be held in private, but the court retains the discretion to order the hearing to be open to the public if none of the reasons in Article 10 of the Hong Kong Bill of Rights is satisfied in the circumstances of the case. **[Proposal 120]**

166. However, family cases in the Court of Appeal are invariably heard in open court. Very often, measures such as an anonymity order or an injunction restricting publication of sensitive information would be sufficient for protection of parties' interests.

Reporting of proceedings and judgments

167. The restrictions on publication of judgments in family cases may unnecessarily inhibit dissemination of judgments, which is essential to the development of the case law, and deprive practitioners of access to authorities. Thus, the Family Court has adopted the practice of publishing judgments delivered after a trial of 2 days or more or after any hearing touching on legal principles. Further, the Chief Justice has issued an internal instruction, requiring that all judgments in family and matrimonial cases should be suitably anonymised before release.

168. The Working Party considers that the present practice and the internal instruction of the Chief Justice should be incorporated into a new PD under the New Code. **[Proposal 121]**

Access to court documents

169. Apart from the general provision on access to court documents which is Order 63, rule 4 of the RHC/RDC, there are specific provisions for specific matrimonial and family proceedings. Hence, confidentiality is preserved by an express order prohibiting public search and inspection of documents relating to Hague Convention cases, with Rule 121(2) of the MCR restricting the public's access to documents in relation to matrimonial proceedings without leave of the court and Rule 21 of the AR restricting the provision of a duplicate of an adoption order.

170. The Working Party considers these provisions should be incorporated into the New Code, but confidentiality protection from public search and inspection should be extended to all documents filed in children proceedings save with leave of the court. **[Proposal 122]**

Anonymisation

171. Rule 6 of the AR provides for the anonymisation of identity of an applicant for an adoption order and Rule 14A(5) of the AR provides for the anonymisation of identity of a parent applying for revocation of consent.

172. The Working Party proposes that the New Code should incorporate these provisions and should include provisions for anonymisation in children

proceedings to preserve confidentiality as from the filing of the originating process. **[Proposal 123]**

A new Part

173. The provisions relating to hearing and reporting of proceedings, access to court documents, anonymisation of parties and judgments and orders discussed above are currently scattered in different places. They should be put in one place in the New Code. **[Proposal 124]**

Representation

Change of solicitors/Acting in person

174. Order 67 of the RHC/RDC applies to matrimonial and family proceedings.

175. Part 26 of the FPR 2010 deals with this subject matter and the provisions are similar to those in our Order 67 of the RHC/RDC.

176. The Working Party considers that the present provisions have all along been working well. However, in *Dianoor International Limited v Aiyer Vembu Subramaniam*, HCA 806/2008, unreported, 19 November 2010, it was held that a defendant in general civil proceedings must give an address within the jurisdiction for service in his Notice of Intention to Act in Person. As for matrimonial proceedings, no leave is required for service out of the jurisdiction and it has been the practice of the Family Court Registry to accept an address outside the jurisdiction for service by a respondent. Whilst the practice and procedure on this subject should align with those in general civil matters as much as practicable, the reality is that there is now a significant number of parties residing out of Hong Kong, and the imposition of the same requirement may cause hardship to them. Further, if a respondent is allowed to give an address outside Hong Kong, one may question, for parity, why a petitioner should not be allowed to do so.

177. Readers are therefore invited to express their views on whether or not an address within the jurisdiction should be given. Subject to the foregoing, it is proposed to incorporate the existing Order 67 of the RHC into the New Code. **[Proposal 125]**

Representation of protected parties

178. For matrimonial proceedings, Rules 105 to 107 of the MCR contain provisions similar to those in Order 80 of the RHC/RDC. As for family proceedings, depending on the venue, either Order 80 of the RHC or the RDC applies. The Working Party proposes to have one set of codes for both matrimonial and family proceedings on this subject matter, incorporating the extant provisions in Rules 105 to 107 of the MCR and Order 80 of the RHC with duplicated provisions removed. **[Proposal 126]**

Registrar and Masters

179. Apart from taxation pending in the District Court, the Registrar for all cases pending in the Family Court and the Court of First Instance is the Registrar of the High Court. The Registrar has various case management or administrative duties, judicial functions and the power to grant the Registrar's certificate in undefended petitions or joint applications for divorce pursuant to the MCR.

180. The Family Court should have its own Registrar, who should be the Registrar of the District Court. The Registrar of the High Court should only act as the Registrar for cases pending in the High Court. Like the general civil cases, the jurisdiction, powers and duties of the "Registrar" should also be exercised or performed by Masters. **[Proposal 127]**

181. The Working Party considers that duties of the Registrar should be expanded to cover simple applications such as amendments to the originating process, time extension and approval of consent summons on procedural matters. **[Proposal 128]**

182. The Working Party also considers that the Registrar's jurisdiction, powers and duties should be conveniently set out in one place in a coherent manner. If and when it is necessary to expand their scopes in the future, it can be conveniently done by revising the PD.

183. The New Code should provide that the Registrar may under the general or special directions of a judge hear and determine any application or matter which may be heard and determined in Chambers and that any matter or application before the Registrar may be adjourned to be heard

before a judge. A PD should be introduced to list out all the matters and applications that the Registrar may hear and determine. **[Proposal 129]**

184. All the jurisdiction, powers and duties conferred on the Registrar may be exercised and performed by a Master. **[Proposal 130]**

Modernisation of language

185. Modernisation of language used in legislation has the benefits of making legislation more readable, more easy to understand and more accessible to the public. An important element of modernisation is the use of plain language.

186. The FPR 2010 was introduced with the aim to ensure that the rules are both simple and simply expressed. The language has been modernised by replacing outdated or archaic terms with user-friendly style and plain English terminology which mirror that of the CPR. There is also a glossary which guides the meaning of certain legal expressions used in the rules.

187. While adopting an approach similar to that of the FPR 2010 is an attractive option, the following concerns merit attention :-

- (i) Hong Kong is a bilingual legal system. Modernising legislative language and simplifying drafting cannot be fully effective unless plain and simple legislative language can be achieved for both the English and Chinese counterparts;
- (ii) further, one should be careful that any modernisation of terminology in family procedural law would give rise to read-across implications on the general civil procedure/provisions in the RHC/RDC; and
- (iii) there is also a risk in migrating to a modernised code, with possible resource implications and the need for IT support.

188. Having balanced all the factors, the Working Party considers as a matter of principle, the New Code should be simple and simply expressed, and where appropriate, the language used may be modernised. But considerations should be given as to how to pursue this objective, bearing in mind the concerns discussed above. **[Proposal 131]**

Removal of inconsistent language

189. Extreme care must be exercised in order to ensure that all the provisions in the New Code are consistent in their approaches, meanings and contents.

Miscellaneous Topics

Information technology

190. The Judiciary has formulated a strategy plan called the Information Technology Strategy Plan (“ITSP”) for the implementation of an integrated court case management system. The ITSP will be implemented in two phases. Phase I is expected to last for 6 years from July 2013 and with the experience to be gained, the Judiciary will consider implementing Phase II for the remaining courts and tribunals.

191. In light of the present reform and other considerations including resources, the Judiciary considers it more desirable to have the ITSP implemented in the Family Court in Phase II. Therefore, the Working Party will not carry out detailed consultation on issues relating to the use of information technology (“IT”) at this stage.

Implications on resources

Manpower Resources

192. Proposals on having Registrar(s) and Masters to help ease the workload of family judges may require additional Registrar/Master posts and extra support staff. The Working Party proposes an assessment on the organisational and manpower implications on the Judiciary be carried out.
[Proposal 132]

System Changes

193. The implementation of a revised set of procedural rules and proposed changes in terminologies would require corresponding support from the IT system. The Judiciary should consider undertaking a further study on the scope of system changes required and the approach to be

adopted in the context of implementation of Phase II of the ITSP. [**Proposal 133**]

Training

194. The New Code would bring about changes to the existing processes and arrangements. To ensure a smooth transition, suitable training should be provided to judges and judicial officers dealing with family cases, the support staff and the legal professionals. [**Proposal 134**]

Publicity materials for litigants in person and the public

195. To enhance the understanding of the overall procedures by litigants in person, the Judiciary should consider producing suitable publications and materials to assist them in navigating through the process. [**Proposal 135**]

196. General publicity materials should be produced to enable interested bodies such as family and welfare organisations and members of the public to have a good general understanding of the New Code. [**Proposal 136**]

***PROPOSALS FOR
CONSULTATION***

Proposals for Consultation

Proposal 1

Hong Kong's family justice system should adopt a single set of self-contained procedural rules to implement the reforms ("the New Code").

Report para. 56

Proposal 2

A new Family Procedure Rules Committee should be set up by way of primary legislation as the single rule-making authority for making the New Code and any subsequent amendments. The proposed Rules Committee should model on the powers, composition and approach for the two rules committees established for the High Court and the District Court respectively (namely, the High Court Rules Committee and the District Court Rules Committee) .

Report para. 57

Proposal 3

Where it is necessary to implement any proposed reforms, consequential amendments should be introduced to the relevant principal Ordinances and/or subsidiary legislation.

Report para. 58

Proposal 4

Subject to the reservation about the use of PDs as discussed herein, the FPR 2010 should be adopted as the broad, basic framework for the New Code.

Report para. 65

Proposal 5

The general provisions in the New Code should be modelled on the equivalents in the RHC or incorporate the relevant provisions of the RHC, as the case may be, with modifications as appropriate for family and matrimonial matters.

Report para. 67

Proposal 6

A general fall-back provision on the applicable rules in the RHC should be created to fill any unforeseen procedural gap left in the New Code.

Report para. 69

Proposal 7

All the provisions in the RHC, as set out above, which are of general applicability, should be adopted into the New Code, with modifications appropriate for family and matrimonial matters.

Report para. 70

Proposal 8

The relevant applicable provisions in the FPR 2010 and those necessary PDs should be selected for adoption with necessary modifications as rules in the New Code.

Report para. 73

Proposal 9

The New Code should apply to all family and matrimonial proceedings as defined, whether they are in the High Court or the Family Court.

Report para. 75

Proposal 10

The statutory definition of “matrimonial cause” in the MCO should be retained and incorporated into the New Code.

It is not necessary to give a definition of “matrimonial proceedings” in the New Code.

The term “family proceedings” should be comprehensive and list out all family-related proceedings to which the New Code is to apply, whether such proceedings are in the High Court or in the Family Court.

Report para. 78.3

Proposal 11

There should be a clear definition of “court” and of “judge” in the New Code

Report para. 79

Proposal 12

The powers of judges to perform functions under the New Code should be spelt out.

Report para. 80

Proposal 13

There should be a definition of “Family Court” in the New Code, setting out its jurisdiction, including the jurisdiction in children matters, and stating there are no monetary limits in any financial applications to which the New Code is to apply.

Report para. 87

Proposal 14

A list of matters assigned to be dealt with by the Family Court should also be set out in the New Code.

Report para. 88

Proposal 15

The New Code should set out clearly the matters over which the Court of First Instance of the High Court has exclusive jurisdiction.

Report para. 89

Proposal 16

The “inherent jurisdiction” of the Court of First Instance of the High Court in children matters should be defined in the New Code, following the FPR 2010, and the provisions in PD 12D therein should be adopted with necessary modifications, in particular the transfer of certain matters to be dealt with by the Family Court.

Report para. 92

Proposal 17

Provisions expressly setting out the underlying objectives of the family justice system, similar to those in Order 1A of the RHC, should be adopted in the New Code.

Report para. 97

Proposal 18

The New Code should require the court to have regard to welfare issues when applying the underlying objectives for family procedure.

Report para. 102

Proposal 19

The New Code should have provisions setting out the court's case management powers similar to those under Order 1B of the RHC.

Report para. 105

Proposal 20

Express provisions modelled on Part 3 of the FPR 2010 should be adopted into the New Code with necessary modifications to enhance the court's powers in dealing with alternative dispute resolution.

Report para. 108

Proposal 21

Considerations should be given to see if the mediation procedure as now stipulated in PD 15.10 needs any further enhancement and if so, how.

Report para. 109

Proposal 22

Readers are asked to express their views on if a pre-action protocol for mediation for family and matrimonial disputes is suitable in local circumstances.

Report para. 110

Proposal 23

The New Code should set out clearly the relevant court(s) for commencing the matrimonial causes and each type of the family proceedings.

Report para. 147

Proposal 24

The New Code should provide that matrimonial causes and family proceedings should generally begin in the Family Court unless the High Court has exclusive jurisdiction or in exceptional circumstances; and the New Code should further expressly spell out the exceptional circumstances where proceedings may begin in the High Court.

Report para. 148

Proposal 25

The New Code should adopt a simple, focused and efficient practice and procedure for the transfer and/or retransfer of all types of transferable proceedings between the Family Court and the High Court (with empowering provisions added to the individual primary legislation if required), to be modelled on the relevant provisions in the FPR 2010 and augmented by PDs modelled on the 2008 Order and the 2008 Direction, with modifications to suit local circumstances.

Report para. 153

Proposal 26

Originating application should be adopted as the unified mode of originating process for matrimonial causes and all family proceedings, accompanied by different statutory forms created specifically for the proceedings concerned.

Report para. 160

Proposal 27

In the originating application, the nomenclature for the parties should be unified so that the applicant should be called “Applicant” and the respondent “Respondent”, save for joint application for divorce where the parties should be called “1st Applicant” and “2nd Applicant” .

Report para. 160

Proposal 28

Generally, the present mode of service and acknowledgement of service in the MCR should be retained but refined and put in one place in the New Code.

Report para. 164

Proposal 29

Readers are invited to express their views on whether the provision for service in matrimonial causes by ordinary post should be replaced by registered post for the alignment of the MCR, the RHC and the RDC, and to do away with the need for a deemed service order in cases where a signed acknowledgment of service by the respondent has not been returned to the Registry.

Report para. 166

Proposal 30

Views are invited on whether in the New Code, documents other than the originating process and judgment summons should, as a matter of principle, be permitted to be served by fax or other electronic communication in line with the FPR 2010.

Report para. 169

Proposal 31

The provision in Rule 109(1) of the MCR on service outside the jurisdiction without leave should be retained in the New Code. Order 11 of the RHC should also be incorporated into the New Code for the manner of service of documents outside the jurisdiction.

Report para. 171

Proposal 32

The New Code should follow the FPR 2010 by expressly providing that all documents in matrimonial causes and family proceedings may be served outside the jurisdiction without leave.

Report para. 172

Proposal 33

For any interlocutory application in extant proceedings for matrimonial causes and family proceedings, such an application should be made by summons.

Report para. 173

Proposal 34

It is not necessary to make separate provisions in the procedures governing matrimonial causes for matters that are of general application, which will be covered by the relevant provisions in the New Code.

Report para. 177

Proposal 35

The New Code should not include any specific provision to enable the parties to a marriage to seek the court's opinion on an agreement or proposed arrangements before or after the presentation of a petition, except in the context of a FDR or CDR hearing.

Report para. 181

Proposal 36

The application and scope of PD 15.3 should be reviewed and, if it is to be retained, incorporated into the New Code.

Report para. 183

Proposal 37

The New Code should discourage the naming of co-respondents similar to that of PD 7A in the FPR 2010.

Report para. 184

Proposal 38

The New Code should follow the FPR 2010 so that what hitherto has been regarded as a special procedure becomes the norm to which the rules primarily apply and defended cases are treated as the exception. The current special procedure should also be extended to nullity proceedings.

Report para. 187

Proposal 39

The New Code should include those procedural matters which are currently set out in PD 15.4, including the Registrar's directions for trial in the Special Procedure List, attendance of the parties, pronouncement of the decree in open court and subsequent procedures.

Report para. 187

Proposal 40

Similar to Rule 7.26 of the FPR 2010, the New Code should provide for medical examination in proceedings for nullity, which places the onus of determining whether medical examiners should be appointed on the court, without the need to make any application. The court must only appoint examiners where it is necessary for the proper disposal of the case. Provisions similar to PD 7B should also be supplemented.

Report para. 189

Proposal 41

The provisions of the New Code relating to rescission should be grouped together and parties seeking rescission of all matrimonial decrees should do so by application made in accordance with a common procedure.

Report para. 190

Proposal 42

The New Code should include provisions similar to Rules 7.32 and 7.33 of the FPR 2010 on making a decree absolute, save that the application must be made to a judge including a district judge.

Report para. 192

Proposal 43

The New Code should include provisions to record the precise time when the decree nisi is made absolute.

Report para. 193

Proposal 44

Considerations should be given to see (a) if and how the structure of the procedural rules of matrimonial causes in the New Code should be modelled on Part 7 of the FPR 2010; and (b) if and how the relevant provisions in Part 7 of the FPR 2010 should best be adopted with necessary modifications.

Report para. 194

Proposal 45

The New Code should have provisions to provide for the practice and procedure for an application for a financial order that is made in matrimonial causes and family proceedings.

Report para. 197

Proposal 46

The New Code should clearly state that it does apply to financial applications made under the MPSO whether or not such applications are made within extant matrimonial proceedings or family proceedings.

Report para. 202

Proposal 47

The New Code should define “financial order” to cover all categories of financial order for which application may be made in matrimonial causes and all family proceedings to which the New Code is to apply, whether in the High Court or the Family Court, together with definitions for related terminologies.

Report para. 207

Proposal 48

The New Code should adopt a similar general approach as that in the FPR 2010 for the procedures for applications for a financial order and follow as far as possible the procedural steps with all necessary modifications to suit local circumstances.

Report para. 209

Proposal 49

The New Code should clearly state the court in which the application should be commenced; and should provide for the practice and procedure to apply for transfer and re-transfer.

Report para. 212

Proposal 50

The New Code should provide that where there are family proceedings extant between the parties, a financial order should be applied for within the extant family proceedings; if there are no extant family proceedings, a financial order (if available) should in general be commenced by way of separate family proceedings.

Report para. 213

Proposal 51

The New Code should provide for standardised originating applications, summonses, forms and affidavits, together with the evidence that is to be provided for each type or form of financial order sought. The originating applications, summonses or forms should require that the orders applied for be stated with particularity unless the applicant provides reasonable grounds for being unable to do so. Particulars of orders applied for, including any changes thereto, ought to be stated by way of amendment as soon as practicable. Where an application is made before filing Form E, there should be written evidence in support explaining why the order is necessary and giving up-to-date information about the applicant's financial circumstances.

Report para. 214

Proposal 52

The New Code should clearly state the default mode of hearing is in Chambers (not open to the public) .

Report para. 216

Proposal 53

The New Code should provide for service upon third-parties where a variation of settlement order has been applied for.

Report para. 220

Proposal 54

The New Code should provide for service upon alleged recipients where an avoidance of disposition order has been applied for.

Report para. 223

Proposal 55

The New Code should provide for service upon the registered owner and mortgagee where an application for financial order includes an application relating to landed property, or where a notice of ancillary relief has been lodged with the Land Registry for registration against landed property.

Report para. 227

Proposal 56

The New Code should set out the duties of the parties and those of their legal advisors to constantly monitor the progress of matrimonial proceedings and family proceedings. In particular, a party should be under a duty to forthwith notify the other parties and the court as soon as that party becomes aware of other proceedings that arise from, may affect or are connected with the matrimonial proceedings and family proceedings.

Report para. 232

Proposal 57

The New Code should expressly provide that as far as possible separate civil proceedings should be avoided.

Report para. 232

Proposal 58

The New Code should provide that in the event any party becomes aware of any issue or dispute arising involving third-parties, including where ownership or beneficial ownership of properties and assets is disputed or where legal rights and entitlements are disputed, the party should as soon as practicable make an application for appropriate directions to be given.

The New Code should provide that third-parties are permitted to make an application for appropriate directions and for the determination of disputed issues.

Report para. 232

Proposal 59

The New Code should provide for the general directions that the court may consider giving – including for the joinder of third-parties, the pleading of issues by way of points of claim and points of defence, the filing of separate witness statements, the hearing of the disputed issues separately by way of preliminary issue, the stay of other extant proceedings pending the relevant matrimonial proceedings or family proceedings, and other directions as the court may consider appropriate in the circumstances.

Report para. 232

Proposal 60

The rules in the RHC in relation to joinder of third-parties should be included in the New Code. Jurisdiction as to making an application for declaration of beneficial ownership against a third-party should also be provided for.

Report para. 233

Proposal 61

The New Code should largely adopt and incorporate the FDR procedure and PD 15.11.

Abandonment of the former practice of ‘affidavit of means’ should be clarified and reference to the same deleted from the rules and PDs.

Report para. 236

Proposal 62

The New Code should provide that the FDR procedure and PD 15.11 shall also apply to applications for a variation order under section 11 of the MPPO.

Report para. 237

Proposal 63

The New Code should incorporate provisions catering for the situation where parties have been unavoidably prevented from including documents with the Form E, for the provision of documents at the earliest opportunity together with a written explanation for the failure to do so earlier.

Report para. 239

Proposal 64

The New Code should provide for and deal with costs estimates in a comprehensive and consolidated manner, incorporating paragraph 10 of PD 15.11, PD 15.9, paragraphs 26 and 27 of PD 15.12 and Rule 9.27 of the FPR 2010.

Costs estimates should be prepared and provided prior to the substantive hearings (in particular the FDR hearing and the financial order hearing) and should also be provided together with open proposals.

Report para. 242

Proposal 65

The New Code should specifically stipulate that Order 22 of the RHC shall not apply in family proceedings.

Report para. 251

Proposal 66

Where proceedings have been transferred to the High Court, the New Code should provide for the possible partial re-transfer from the High Court to the Family Court for the conduct of the FDR hearing, either upon application or of the court’s own motion.

Report para. 255

Proposal 67

The New Code should have a new Part to provide for the practice and procedure for proceedings brought under the I(PFD)O, which should also be included within the meaning of “Family Proceedings”.

This should include provisions providing for the practice and procedure relating to commencement of proceedings in the Family Court, the filing of evidence and documents in support, and other procedural matters, including interlocutory applications, transfer and re-transfer.

Report para. 258

Proposal 68

The New Code should stipulate the parties to be named in the originating application, including the personal representatives, executors (if any), all beneficiaries (whether testate, intestate or upon partial intestacy) and other persons affected by the application.

Report para. 259

Proposal 69

Where there is an application for an order to be made under section 11 of the I(PFD)O, the joint tenant should be joined as a party.

Report para. 260

Proposal 70

The New Code should provide that where an application is made after the 6-month period stipulated by section 6 of the I(PFD)O, the originating application shall include an application for leave to bring such late application, to be supported by affidavit setting out the grounds and evidence justifying the same.

Report para. 261

Proposal 71

The New Code should provide that applications for interim relief should be made in the originating application wherever appropriate or thereafter by way of summons.

The New Code should provide that in general interlocutory applications should be made by way of summons.

Report para. 262

Proposal 72

The New Code should provide for the practice and procedure relating to applications under section 8 of the I(PFD)O for variation, discharge, suspension or revival and section 9 of the I(PFD)O for variation.

Report para. 263

Proposal 73

The New Code should provide that applications under section 12 or 13 of the I(PFD)O should be made in the originating application wherever appropriate or thereafter by way of summons.

Where there is an application for an order to be made under section 12 or 13 of the I(PFD)O, the alleged “donee” should be joined as a party.

Report para. 264

Proposal 74

The New Code should make provisions for directions to be given for mediation or for the FDR procedure to be made applicable to proceedings under the I(PFD)O.

Report para. 268

Proposal 75

The New Code should provide rules for Part V of the I(PFD)O and sections 11(6) and 16 of the MPPO in the same Part as the I(PFD)O.

Report para. 272

Proposal 76

The New Code should include, in the same Part as the I(PFD)O, rules which apply to all proceedings by which a person applies for provision from a deceased’s estate, both under the I(PFD)O and the MPPO.

Report para. 273

Proposal 77

The New Code should, so far as circumstances permit, include uniform procedures which cover all miscellaneous family proceedings which would assist all persons involved in the conduct of such proceedings in their timely, just and cost-effective disposal.

Report para. 277.1

Proposal 78

The procedures for miscellaneous applications not falling into any of the categories in paragraph 277.1 should be grouped together in the New Code and a uniform format similar to that in Part 8 of the FPR 2010 should be adopted.

Report para. 277.2

Proposal 79

The New Code should provide for procedures for applications for declarations as to marital status, parentage, legitimacy or legitimation and adoptions effected overseas.

Report para. 282

Proposal 80

Rules applicable to the DCRVO should be included in a separate part of the New Code.

Report para. 283

Proposal 81

Rules should be made in the New Code to provide for applications for non-cohabitation under the SMOO to be made to the Family Court in accordance with the proposed uniform procedures.

Report para. 285

Proposal 82

The New Code should include rules for applications under section 18A of the MO to the Family Court.

Report para. 286

Proposal 83

The new rules on children proceedings should cover all the extant proceedings relating to children arising from the applications brought under sections 10, 11 and 12 of the GMO; section 19 of the MPPO; section 48 of the MCO; sections 6, 12 and 13 of the PCO; section 5(1)(b) of the SMOO; applications under the inherent jurisdiction of the High Court, including wardship proceedings under Order 90 of the RHC; the Hague Convention under the CACO and Order 121 of the RHC; and adoption proceedings under the AO.

Report para. 288.1

Proposal 84

Parts 12 and 14 of the FPR 2010 should be adopted as the broad framework for the new procedural rules on children proceedings in the New Code.

Report para. 290

Proposal 85

The New Code should contain a unified term for the procedures concerning children irrespective of how they are described under different Ordinances, subject to any contrary definition in any principal Ordinance.

Report para. 293

Proposal 86

Rules 9(3) and 15B of the MCR should be incorporated into the New Code and should cover all children under the age of 18 years.

Report para. 294

Proposal 87

Subject to Proposals 88 to 89 below, Rules 92 to 96 of the MCR, with all necessary modifications, should be incorporated into the New Code.

Report para. 296

Proposal 88

Rule 92(5) and (6) of the MCR should not be incorporated into the New Code.

Report para. 297

Proposal 89

It should be expressly stated in the New Code that when the court directs that a report be filed by the Director of Social Welfare, it may also order that a clinical psychologist's report or an international social welfare report be provided.

Report para. 298

Proposal 90

PD15.13 with all future amendments arising from the review and Rule 25.4(2)-(4) of the FPR 2010 with all necessary modifications should be incorporated into the New Code. Readers are also invited to express their views with respect to whether or not the CDR procedure should be extended to the High Court.

Report para. 301

Proposal 91

The provisions in Order 90 of the RHC, Order 90 of the RDC and Rule 69 of the MCR, which are relevant to guardianship proceedings, should be incorporated into the New Code.

Report para. 302

Proposal 92

Order 121 of the RHC should be incorporated into the New Code.

Report para. 304

Proposal 93

Rule 124 of the MCR should be incorporated into the New Code.

Report para. 305

Proposal 94

Provisions should be made in the New Code to cater for the practice and procedure to be applied in applications under the PCO, including applications under sections 6 and 12, and for the transfer of applications to the High Court pursuant to section 16. Considerations should also be given as to the manner of giving effect to directions under section 13 such as by the making of rules or by means of PDs or guidance notes if necessary.

Report para. 308

Proposal 95

The AR and the CAR should be incorporated into the New Code.

Report para. 311

Proposal 96

There should be rules in the New Code for all the applications referred to in the AO.

Report para. 311

Proposal 97

In the New Code, the practice for service outside jurisdiction for adoption cases should be aligned with that for other family and matrimonial cases.

Report para. 311

Proposal 98

Considerations should be given to see if the provisions in the Guidance on Separate Representation for Children in Matrimonial and Family Proceedings should be incorporated into the New Code.

Report para. 313

Proposal 99

For other various miscellaneous applications relating to children in our existing Ordinances of which no rules exist, the relevant provisions in the FPR 2010, if applicable, should be adopted in the New Code with necessary modifications.

Report para. 314

Proposal 100

Sections 17(1)(a) and 29AJ of the MPPO and Order 29 of the RHC/RDC should be combined and incorporated into the New Code with all necessary modifications.

Report para. 321

Proposal 101

The current Rule 37 of the MCR and Order 23 of the RHC/RDC should be incorporated into the New Code with all necessary modifications.

Report para. 326

Proposal 102

The New Code should include procedural rules relating to evidence in matrimonial causes and family proceedings similar to those contained in Parts 22 to 24 of the FPR 2010. Similar PDs, like those contained in PDs 22A and 24A which supplement the FPR 2010, should also be issued to provide guidance on the practice of such procedural rules.

Report para. 332

Proposal 103

The New Code should follow the model in the FPR 2010 to provide for a self-contained set of procedural rules relating to discovery, inspection and interrogatories for defended matrimonial causes, financial order proceedings and children proceedings.

Report para. 339

Proposal 104

There should be a provision in the New Code to empower the court, in all matrimonial causes and family proceedings, to carry out investigations and to make orders for the discovery of documents against parties involved in the proceedings and other third-parties.

Report para. 340

Proposal 105

The New Code should include procedural rules relating to expert evidence in family and matrimonial proceedings similar to those contained in Part 25 of the FPR 2010. Similar PDs, like those contained in PDs 25A-25F which supplement the FPR 2010, should also be issued to provide guidance on the practice of such procedural rules.

Report para. 347

Proposal 106

Order 33, rule 6 of the RHC/RDC, should be incorporated into the New Code with necessary modifications.

Report para. 349

Proposal 107

Provisions on Statements of Truth in Order 41A of the RHC/RDC should be incorporated into the New Code with all necessary modifications.

Report para. 358

Proposal 108

Order 35 of the RHC/RDC, relevant provisions in Chapter 3 of Part 7 and Part 27 of the FPR 2010 and the existing MCR should, with necessary modifications, be incorporated into one single set of rules in the New Code to govern the setting down and conduct of a trial in matrimonial causes and family proceedings.

Report para. 361

Proposal 109

A single set of rules should be drafted to cater for appeals in matrimonial causes and family proceedings from both the Court of First Instance and the District Court, by incorporating the present provisions in the MCR, the RHC and the RDC.

Report para. 365

Proposal 110

In the event that Proposals 127 to 130 in this report are to be adopted, the Working Party proposes that further consideration needs to be given to the new rules governing the future appeals from the Registrar/Masters to the judge or to the Court of Appeal.

Report para. 366

Proposal 111

Express rules should be provided in the New Code for the application for setting aside the decrees, judgments or orders obtained by irregular service to be dealt with by the court granting such decrees, judgments or orders.

Report para. 372

Proposal 112

Orders 62 and 62A of the RHC/RDC should be incorporated into the New Code with necessary modifications.

Report para. 383

Proposal 113

Considerations should be given to whether any amendments to the existing provisions on judgment summons are required in light of Articles 10 and 11 of the Hong Kong Bill of Rights.

Report para. 394

Proposal 114

The New Code should provide that the relevant AIOR provisions are to apply to maintenance pending suit for spouses.

Report para. 397

Proposal 115

It is proposed that our New Code should include the enforcement provisions in the MCR and the AIOR and all the relevant provisions in Orders 44A to 52 of the RHC, with necessary modifications. Any future amendments to the RHC/RDC will not automatically apply to the New Code.

Report para. 418

Proposal 116

It is proposed that Rule 33.3(2) of the FPR 2010 be adopted into the New Code.

Report para. 419

Proposal 117

Provisions similar to the English Practice Direction 33A (Enforcement of Undertakings) should be adopted with necessary modifications in order to provide a solid legislative underpinning for the enforcement of the undertaking and to ensure that the person giving the undertaking is fully aware of the undertaking being given and the serious consequences that it entails if in breach.

Report para. 423

Proposal 118

Subject to Proposal 117 being accepted, the New Code should provide the express legislative underpinning for the enforcement of undertakings whilst the form of the penal notice and statement to be signed by the person giving the undertaking are to be dealt with by way of a PD.

Report para. 424

Proposal 119

The present provisions in the MO(RE)R should be incorporated into the New Code.

Report para. 428

Proposal 120

The New Code should expressly provide that subject to any enactment or any rules in the New Code, all proceedings to which the New Code applies, where they are pending in the first instance courts, should be held in private to the exclusion of the public, but the court retains the discretion to order the hearing to be open to the public if it is of the view that none of the reasons in the BOR Article 10 is satisfied in the circumstances of the case concerned.

Report para. 431

Proposal 121

The New Code should have a new PD to include the extant practice of the Family Court for publishing judgments and the internal instruction of the Chief Justice for anonymising judgments before release for publication.

Report para. 437

Proposal 122

The New Code should incorporate the provisions of Order 63, rule 4 of the RHC, Rule 121(2) of the MCR and Rule 21 of the AR, but should expressly provide for prohibition against public search and inspection of all documents filed in the Court Registry in children proceedings, other than a decree or order made in open court, without leave of the court.

Report para. 440

Proposal 123

The New Code should incorporate the provisions in Rules 6 and 14A of the AR pertaining to anonymisation in adoption proceedings, and should include provisions for anonymisation in children proceedings to preserve confidentiality as from the filing of the originating process.

Report para. 443

Proposal 124

In the New Code, all the relevant provisions relating to hearing and reporting of proceedings, access to court documents, anonymisation of parties and judgments and orders should be put together in a new Part, to be augmented by PDs if necessary.

Report para. 444

Proposal 125

Readers are invited to express their views on whether or not an address within the jurisdiction should be given in the Notice of Intention to Act in Person. Subject to the foregoing, it is proposed to incorporate the existing Order 67 of the RHC/RDC into the New Code.

Report para. 453

Proposal 126

It is proposed to have one set of codes for both the matrimonial and family proceedings for rules governing representation of parties under disabilities in the New Code, incorporating the extant provisions in Rules 105 to 107 of the MCR and Order 80 of the RHC with duplicated provisions removed.

Report para. 458

Proposal 127

In the New Code, “Registrar” should be defined as the Registrar of the District Court if the case is pending in the Family Court, and the Registrar of the High Court if the case is pending in the High Court.

Report para. 462

Proposal 128

The scope of the duties of the Registrar, other than those extant matters, should be expanded to cover simple applications such as amendments to the originating process, time extension and approval of consent summonses on procedural matters.

Report para. 463

Proposal 129

The New Code should provide that the Registrar may under the general or special directions of a judge hear and determine any application or matter which under the principal Ordinances and provisions in the New Code may be heard and determined in Chambers; and that any matter or application before the Registrar may at any time be adjourned by him to be heard before a judge. A PD should be introduced to list out all the matters and applications that the Registrar may hear and determine.

Report para. 465

Proposal 130

All the jurisdiction, powers and duties conferred on the Registrar in the New Code may be exercised and performed by a Master.

Report para. 466

Proposal 131

As a matter of principle, the provisions in the New Code should be simple and simply expressed, and where appropriate, the language used may be modernised. Further consideration should be given as to how to pursue this objective as far as practicable, bearing in mind the various concerns.

Report para. 475

Proposal 132

An assessment on the organisational and manpower implications of the proposals on the Judiciary should be carried out.

Report para. 482

Proposal 133

In taking forward the proposals, the Judiciary should consider undertaking a further study on the scope of IT system changes required and the approach to be adopted in the context of Phase II of the Judiciary-wide Information Technology Strategy Plan for better synergy and cost-effectiveness etc.

Report para. 484

Proposal 134

Suitable training on the New Code should be provided to judges and judicial officers dealing with family cases, the support court staff and the legal professionals.

Report para. 485

Proposal 135

The Judiciary should consider producing suitable publications and materials to assist the litigants in person in navigating through the process.

Report para. 486

Proposal 136

Considerations should be given by the Judiciary for producing general publicity materials to enable the interested bodies and members of the public to have a good general understanding of the New Code.

Report para. 487