

# **REVIEW OF FAMILY PROCEDURE RULES**

## **Final Report**

Chief Justice's Working Party  
on Family Procedure Rules

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Hong Kong Special Administrative Region  
People's Republic of China



## *Table of Abbreviations*

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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
AO	Adoption Ordinance Cap. 290
AR	Adoption Rules Cap. 290A
BOR	Hong Kong Bill of Rights
CACO	Child Abduction and Custody Ordinance Cap. 512
CAR	Convention Adoption Rules Cap. 290D
CDR	Children Dispute Resolution
C&FA 2014	Children and Families Act 2014 (UK)
Ch A 1989	Children Act 1989 (UK)
CJR	Civil Justice Reform
DCRVO	Domestic and Cohabitation Relationships Violence Ordinance Cap. 189
DCRVR	Domestic and Cohabitation Relationships Violence Rules Cap. 189A
DOJ	Department of Justice

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
FC	Family Council
FDR	Financial Dispute Resolution
FPR 2010	Family Procedure Rules 2010 (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
HKBA	Hong Kong Bar Association
HKFLA	Hong Kong Family Law Association
HKLS	Law Society of Hong Kong
Interim Report	Review of Family Procedure Rules Interim Report and Consultative Paper issued in February 2014
I(PFD)O	Inheritance (Provision for Family and Dependants) Ordinance Cap. 481
LAD	Legal Aid Department
LWB	Labour and Welfare Bureau
MCO	Matrimonial Causes Ordinance Cap. 179
MCR	Matrimonial Causes Rules Cap. 179A
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

MPPO	Matrimonial Proceedings and Property Ordinance Cap. 192
MPSO	Married Persons Status Ordinance Cap. 182
PCO	Parent and Child Ordinance Cap. 429
PCPD	Office of the Privacy Commissioner for Personal Data
PD / PDs	Practice Directions
RDC	Rules of the District Court Cap. 336H
RHC	Rules of the High Court Cap. 4A
SMOO	Separation and Maintenance Orders Ordinance Cap. 16
SWD	Social Welfare Department



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# ***EXECUTIVE SUMMARY***

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## ***Executive Summary***

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### **Section 1: Introduction**

#### ***The Working Party***

1. In March 2012, this Working Party was appointed by the Chief Justice 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.”

#### ***The Interim Report and consultation***

2. On 17 February 2014, the Interim Report and Consultative Paper (“the Interim Report”) was published for consultation. Stakeholders and the public were invited to give their views on the 136 proposals set out in the Interim Report and the whole consultation process was completed in early August 2014.

3. The Working Party has received written submissions from 15 respondents :-

- (a) Hong Kong Bar Association (“HKBA”);
- (b) Law Society of Hong Kong (“HKLS”);
- (c) Hong Kong Family Law Association (“HKFLA”);
- (d) Labour and Welfare Bureau (“LWB”);
- (e) Department of Justice (“DOJ”);
- (f) Legal Aid Department (“LAD”);
- (g) Social Welfare Department (“SWD”);
- (h) Office of the Privacy Commissioner for Personal Data (“PCPD”);
- (i) Family Council (“FC”); and
- (j) 6 individuals.

4. Some of the views received during the consultation fall outside our terms of reference and are not entirely relevant to the proposals in the

Interim Report. They have been referred to the Judiciary and/or the relevant parties for consideration and/or follow-up actions.

### ***Object of this Final Report***

5. In this Final Report, the recommendations are formulated with a view to identifying the reforms considered necessary or desirable. It is not an exercise of drafting. The actual drafting of the rules and any consequential changes to existing legislation to implement the recommendations upon approval by the Chief Justice will be undertaken in due course.

## **Section 2: The Need for Reforms and General Aspects of Implementation**

### ***The need for reforms***

6. The need to introduce comprehensive and fundamental procedural reform to the family justice system is felt nearly by all the respondents, especially the profession and the government bureau/departments.

7. However, one LegCo member of the AJLS Panel did not subscribe to the view that procedural changes should be introduced ahead of amendments to substantive family law as recommended by the Law Reform Commission in its 2005 Report on Child Custody and Access (“the 2005 Report”). He considered such attempt as putting the cart before the horse. In the absence of the policy direction for introducing amendments to the substantive family law, the proposed new rules might have limitations upon implementation thus rendering them impracticable.

8. We do not think the concern raised by the LegCo member detracts in any way from the urgent need of introducing the reforms.

- (a) How soon it will take to implement the recommendations of the 2005 Report is unknown. One thing for sure is that it is a massive exercise and will take a long time to complete. But the problems that our family justice system is facing need to be tackled forthwith. The problems would most likely exacerbate if no procedural reforms were introduced pending the completion of the long process of changing the substantive law.

- (b) It remains to be seen if any proposed changes to the substantive law would impact on the new procedural rules. The Government has undertaken to continue to closely liaise with the Judiciary over the legislative exercise and implementation of the 2005 Report. If any change to the substantive law would indeed impact on procedures, then either corresponding provisions can be put into the new rules if they are still in the drafting stage or consequential amendments can be made to the new rules after enactment.

9. We remain firmly of the view that comprehensive and fundamental procedural reforms to the family justice system need to be introduced now.

#### *A new code*

10. Proposal 1 concerns with whether the Hong Kong family justice system should adopt a single set of self-contained procedural rules to implement the reforms (“the New Code”). We have received overwhelming support from the respondents on this Proposal. We make the recommendation accordingly. (Proposal 1) [**Recommendation 1**]

#### *A new ruling-making authority*

11. Proposal 2 concerns with the setting up of a new Family Procedure Rules Committee 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. (Proposal 2)

12. This Proposal also receives overwhelming support from the respondents. We make the recommendation accordingly. [**Recommendation 2**]

#### *Consequential amendments*

13. Proposal 3 states that where it is necessary to implement any proposed reforms, consequential amendments should be introduced to the relevant principal Ordinances and/or subsidiary legislation. This

Proposal is uncontroversial. We make the recommendation accordingly. (Proposal 3) [**Recommendation 3**]

### **Section 3: Adopting the FPR as the Basic Framework for the New Code and Contents Generally**

#### ***Adopting FPR as framework***

14. In response to Proposal 4, there is overwhelming support from the respondents for the adoption of the FPR 2010 as the broad, basic framework of the New Code. (Proposal 4)

15. Since the first introduction of the FPR 2010, there have been so far 12 amendment rules made thereto. Some of the amendments may be applicable to Hong Kong, and some may not.

16. We recommend that any amendments/updates to the FPR 2010 to be adopted only if applicable to Hong Kong, and with necessary modifications.

#### ***Contents generally***

17. We proposed that, in order to align the general practice and procedure in both the family and civil jurisdictions in the post-CJR era and to harmonize as far as possible the general parts of the family rules with those for civil proceedings, the general provisions in the New Code should be modelled on the equivalents in the RHC or should incorporate the relevant provisions in the RHC with modifications. (Proposal 5)

18. As a prudent measure, we also proposed to have a general fall-back provision over any procedural gap left in the New Code. (Proposal 6)

19. We further identified the following RHC provisions which are by nature of general applicability to be adopted into the New Code, subject to necessary modifications (Proposal 7) :-

- (a) Order 1A – Underlying objectives;
- (b) Order 1B – Case management powers;
- (c) Order 2 – Sanctions on non-compliance with the rules;
- (d) Order 3 – Time;
- (e) Order 24, rule 7A – Discovery before action or by non-party;



- (f) Order 24, rule 15A – Limits on discovery;
- (g) Order 25 – Case management summons and conference;
- (h) Order 32A – Vexatious litigants;
- (i) Order 35, rule 3A – Time, etc., limits at trial;
- (j) Order 38, rule 4A – Single joint expert;
- (k) Order 38, Part IV – Expert evidence;
- (l) Order 41A – Statements of truth;
- (m) Order 62 – Costs; and
- (n) Order 62A – Costs offer and payments into court.

20. We considered that there are considerable benefits in selecting from the relevant applicable provisions in the FPR 2010 for adoption into our New Code. This will allow Hong Kong’s family justice system to draw on the practical experience of the English operation. (Proposal 8)

21. Proposals 4 to 8 all receive overwhelming support from the respondents. Based on them, we make the corresponding recommendations. **[Recommendations 4 to 8]**

#### **Section 4: Application of the New Code**

22. The Working Party proposed that 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)

23. We also made proposals relating to the definitions of some terms to be adopted in the New Code, including :-

- (a) The statutory definition of “matrimonial cause” in the MCO should be retained and incorporated into the New Code.
- (b) It is not necessary to give a definition of “matrimonial proceedings” in the New Code.
- (c) 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.

(Proposal 10)

24. The above Proposals receive overwhelming support from the respondents. We make the recommendations accordingly. **[Recommendations 9 and 10]**

## **Section 5: Definition and Jurisdiction of the Courts**

### ***Definition of the courts and powers and functions of the judge***

25. 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 proposed that there should be a clear definition of these terms in the New Code. (Proposal 11)

26. Besides, the powers of judges to perform functions under the New Code should also be spelt out. (Proposal 12)

27. The above Proposals receive overwhelming support from the respondents. We make the recommendations accordingly. **[Recommendations 11 and 12]**

### ***Jurisdiction of the Family Court***

28. At present, 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. Further, it has very limited inherent jurisdiction over children matters. We proposed that the New Code should have provisions cover these issues. (Proposals 13 and 14)

29. Likewise, the above Proposals receive overwhelming support from the respondents. Based on them, we make the corresponding recommendations. **[Recommendations 13 and 14]**

### ***Jurisdiction of the High Court***

30. We also proposed to clearly spell out in the New Code the matters over which the Court of First Instance of the High Court has exclusive jurisdiction and the Court’s inherent jurisdiction in children matters etc. (Proposals 15 and 16)

31. Proposal 15 is welcomed by the respondents.

32. Proposal 16 is broadly welcomed by the respondents subject to some concerns being raised with respect to the practicalities surrounding the possible transfer of proceedings down from the High Court to the Family Court. There is particular concern that this might cause confusion

and be costly and time consuming. The Working Party however takes the view that these are issues that should more properly be dealt with as part of the court's case management function and we should not therefore preclude the inclusion of this recommendation in the report.

33. We make the corresponding recommendations.  
**[Recommendations 15 and 16]**

## **Section 6: Underlying Objectives**

34. We are firmly of the view that the extension of the underlying objectives as set out in Order 1A of the RHC to family procedural rules is the first and essential response to tackle adversarial excesses and to instil a shift of litigation culture. We therefore proposed that the underlying objectives encapsulating the fundamental purpose of the New Code should be set out clearly in the New Code. (Proposal 17)

35. There is overwhelming support from the respondents to Proposal 17.

36. Since welfare issues have special relevance for the family jurisdiction, we also considered that the court should have regard to welfare issues when applying the underlying objectives for family procedure. (Proposal 18)

37. Proposal 18 is welcomed by the respondents.

38. Based on Proposals 17 and 18, we make the corresponding recommendations. **[Recommendations 17 and 18]**

## **Section 7: Case Management Powers and Alternative Dispute Resolution**

### ***Case management powers***

39. The Working Party believed that 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. Thus, we proposed that 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)

40. This Proposal is uncontroversial. We make the recommendation accordingly. **[Recommendation 19]**

### *Alternative dispute resolution*

41. In the Interim Report, we have proposed that express provisions modelled on Part 3 of the FPR 2010 (“2010 Part 3”) should be adopted into the New Code with necessary modifications to enhance the court’s powers in dealing with alternative dispute resolution. (Proposal 20) 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. (Proposal 21) Readers were also asked to express their views on if a pre-action protocol for mediation for family and matrimonial disputes is suitable in local circumstances. (Proposal 22)

42. After the publication of the Interim Report, there has been further development in England which we consider not applicable to Hong Kong.

43. Having considered the wording of the 2010 Part 3, coupled with the meaning of “Alternative Dispute Resolution” in the Interpretation Section of the FPR 2010, we conclude that this should be wide enough to include all methods of alternative dispute resolution, namely a collaborative approach and the use of arbitration or other methods. The rules in the 2010 Part 3 did not give precedence to any particular method of alternative dispute resolution, whether mediation or others.

44. Generally, there is overwhelming support for enhancing the court’s powers in promoting alternative dispute resolution. We thus make the recommendation that express provisions modelled on the 2010 Part 3, and the meaning of “Alternative Dispute Resolution” in the Interpretation Section 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. **[Recommendation 20]**

45. There is overwhelming support for Proposal 21. It has been further suggested that other methods of alternative dispute resolution should be considered. At present, only the procedures for family mediation have been set out in a practice direction, that is, PD 15.10, after an effective pilot scheme was implemented. If pilot schemes for other

methods of alternative dispute resolution are to be introduced and proved effective, consideration may be given to include those procedures into a practice direction.

46. We make the recommendation accordingly. **[Recommendation 21]**

47. The general responses are that a pre-action protocol for mediation for family and matrimonial disputes may delay parties' access to justice as well as front loading the costs, and that a pre-action protocol is not necessary.

48. In light of the responses, we do not recommend any pre-action protocol. **[Recommendation 22]**

## **Section 8: Commencement and Transfer of Proceedings and Forms**

### ***Commencement and transfer of proceedings***

49. We identified that 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. We therefore proposed that 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)

50. There should be provisions to ensure 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 utilized, and that proceedings are only dealt with in the High Court if the relevant criteria are met. We proposed that the New Code should contain provisions on transfer and retransfer for all types of transferable proceedings between the Family Court and the High Court, 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)

51. Proposals 23 and 24 are welcomed by the respondents. Based on them, we make the corresponding recommendations. **[Recommendations 23 and 24]**

52. Since 1 July 2013, there have been further developments in England concerning transfer and allocation of cases by ways of new guidance from the President of the Family Division or new practice directions. There have also been further amendments to the FPR 2010 by The Family Procedure (Amendment No 3) Rules 2013 which were made to reflect the formal creation of the family court in England under the Crime and Courts Act 2013 (c 22).

53. As we do not have any primary legislation in relation to the setting up of a formal family court, nor is there any Family Division in our High Court, we are of the view that some of those amendments in the Family Procedure (Amendment No 3) Rules 2013 are not applicable to Hong Kong. Also, so far, there have not been too many cases transferred to the High Court from our Family Court, we do not see any need to “reduce” such transfers or to limit the decision to transfer only to High Court judges. In any event, under our present rules, there is power to transfer by the Family Court judges.

54. There is overwhelming support for Proposal 25. We thus make the recommendation as in Proposal 25, based on those pre-amendment rules in the FPR 2010, the 2008 Order and the 2008 Direction. **[Recommendation 25]**

### ***Commencement of proceedings and forms***

55. The Working Party is concerned about the fact that 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.

56. We proposed that 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. (Proposal 26)

57. We also proposed that the nomenclature for the parties should be unified. (Proposal 27)

58. There is overwhelming support for Proposal 26. One of the respondents has suggested that there should also be simplification of the statutory forms, to help unrepresented litigants and other users. There is also a suggestion that all statutory forms should be downloadable from the Judiciary website, as in England.

59. We agree that the statutory forms should be reviewed to see whether there is any need for simplification and should be downloadable from the Judiciary website. We thus include this in our recommendation. **[Recommendation 26]**

60. Likewise, Proposal 27 is also welcomed by the respondents. We make the recommendation accordingly. **[Recommendation 27]**

## **Section 9: Service and Acknowledgement**

### ***Retaining the current mode generally***

61. The Working Party considered that the mode of service and acknowledgement of service of documents in matrimonial proceedings, now being governed by the provisions in the MCR, should be retained. (Proposal 28)

62. Proposal 28 receives support from the respondents. We make the recommendation accordingly. **[Recommendation 28]**

### ***Service by registered post***

63. We noted that 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. We therefore invited views on whether any changes need to be made. (Proposal 29)

64. For Proposal 29, there are mixed responses received from

various stakeholders.

65. After considering those responses, we agree with the HKBA's view that the dissolution of a marital status is an important matter and should therefore not be granted unless and until the court is satisfied that notice of the proceedings has been properly brought to the attention of the other party. Therefore, it is reasonable for the standard of service to be higher than ordinary civil proceedings. We are of the view that the present mode of service of matrimonial causes should be retained. Apart from personal service, service by ordinary post should be allowed but in the event that no acknowledgment of service was received, a deemed service order would be necessary. **[Recommendation 29]**

66. As to the HKLS's proposal that registered post should be used instead of ordinary post, we are of the view that such mode of service would not be conducive to bringing notice of the proceedings to the respondent. The advantage of ordinary post is that the documents would still be delivered to the address for service irrespective of whether the respondent is there at the time. Provided that there are sufficient measures for the court to be properly satisfied of the receipt of the documents by the respondent, e.g. by way of a deemed service order, ordinary post is considered to be a more appropriate mode of delivery than registered post.

### ***Service by fax and electronic means***

67. The FPR 2010 allow service of documents other than an application for a matrimonial order to be effected by fax or other means of electronic communication. The Working Party sought consultation on whether, as a matter of principle, documents other than the originating process and judgment summons should be permitted to be served by such mode. (Proposal 30)

68. After considering various responses on this Proposal, the Working Party takes note of the fact that for service of ordinary documents in general civil proceedings (i.e. for documents other than originating process or judgment summons which would require a higher standard of personal service), service by fax or other electronic means is not yet allowed under the RHC. Furthermore, it is accepted that generally speaking, there is a greater need for privacy and confidentiality in matrimonial and family proceedings and therefore, it may not be appropriate for adopting a more liberal approach in service of documents than that of general civil proceedings. For this reason, the Working Party



does not recommend that service of ordinary documents by fax or other electronic means to be allowed at this stage. **[Recommendation 30]**

### ***Service outside the jurisdiction***

69. Whilst the present provision in Rule 109(1) of the MCR which allows service outside the jurisdiction without leave should be retained, we took the view that the manner of service should be aligned with that of the general civil practice as contained in Order 11 of the RHC. (Proposal 31)

70. We also took the view that the “no leave” provision should cover all documents in matrimonial and family proceedings. (Proposal 32)

71. These two Proposals are uncontroversial and positive response has been received from the HKLS in support of them. The Working Party makes the recommendations accordingly. **[Recommendations 31 and 32]**

## **Section 10: Interlocutory Applications**

72. Pursuant to Rule 114 of the MCR, the mode of making an interlocutory application in extant proceedings for matrimonial proceedings is by way of summons. The Working Party proposed that this should be the unified mode for making such applications. (Proposal 33)

73. This Proposal is welcomed by the respondents. We make the recommendation accordingly. **[Recommendation 33]**

## **Section 11: Procedures for Matrimonial Causes**

### ***Matters of general application***

74. The Working Party identified that some of the matters contained in the MCR, the principal rules governing the procedures for matrimonial causes, are of general application across the board, such as the use of the official languages, applications in the course of extant proceedings, transfer of proceedings, pleadings, discovery, interrogatories, evidence, preparation for trial and security for costs etc. The Working Party is of the view that separate rules governing these matters of general application

are not required. (Proposal 34)

75. This Proposal receives overwhelming support from the respondents. We make the recommendation accordingly.  
**[Recommendation 34]**

### *Specific matters*

76. On the other hand, there are specific matters which feature in the procedures for matrimonial causes only. These should be improved and if desirable, be adapted in accordance with the relevant provisions in Part 7 of the FPR 2010.

#### *(a) Application to consider agreement (Rule 6)*

77. 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. We took that view that 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 such specific provision, 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.

78. As stated in the Interim Report, applications under Rule 6 of the MCR are now seldom, if ever made, and the proposal is that the New Code should not include this rule. (Proposal 35)

79. Although Rule 6 has rarely been invoked, the HKBA sees little benefit in removing it until such time as a comprehensive statutory code governing marital agreements is in place. The HKBA in their responses has referred to the recent decision of the CFA in *SPH v SA* formerly known as *SA* (FACV 22/2013) endorsing the guidance of the Supreme Court of the United Kingdom ("UK") in *Radmacher v Granatino* [2010] 2 FLR 1900. As pointed out by the HKBA, there has been increased interest in this area of the law and that it is important that a procedure should exist whereby parties could seek the approval or otherwise by the court of proposed agreements – especially in situations where no proceedings are extant, for instance where no grounds under section 11A of the MCO exist.

80. While the rationale is understandable, the majority of the Working Party is not persuaded by the HKBA's views.

81. As pointed out in the Interim Report, Rule 6 of the MCR was introduced at a time when there was a stigma attached to divorce and parties would want to have an agreement reached before agreeing to a divorce. The rule has rarely been invoked and so it is not necessary to include a corresponding provision in the New Code.

82. As Rule 6 of the MCR was enacted at a time before all these new developments, we consider that the old rule may not be appropriate to be applied in the new circumstances. In any event, a new tailor-made procedural rule may be introduced in the future to cater for the specific need of any new statutory code on marital agreements. Further, question about the effect of such kind of agreements can always be determined in the substantive divorce proceedings, and we have reservation as to necessity of providing a separate procedure for the determination of the effect of such kind of agreements.

83. For the above reasons, we make the recommendation that 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. **[Recommendation 35]**

*(b) Reconciliation*

84. We considered that the current requirement for the filing of a statement certifying whether the legal representative has discussed the possibility of reconciliation with the applicant should apply to both represented and unrepresented parties, and that the list of "persons" regarded as qualified to help effect reconciliation should be expanded. Therefore, we proposed that the application and scope of PD 15.3 should be reviewed and, if it is to be retained, incorporated into the New Code. (Proposal 36)

85. The majority of the respondents agrees with such proposal and we make the recommendation accordingly. **[Recommendation 36]**

*(c) Naming of co-respondents (Rule 13)*

86. We proposed that 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)

87. The majority of the respondents welcomes such proposal except with one contrary view.

88. Despite such contrary view, we consider that we should follow the new practice in the United Kingdom in avoiding to name co-respondents in divorce proceedings. The naming of co-respondents may cause a lot of unnecessary embarrassment and hostility between the parties, which may encourage the co-respondents to defend the divorce proceedings. This would only result in additional and quite unnecessary costs and inconvenience. Further, like the practice in the United Kingdom after the implementation of the FPR 2010, new practice direction can be issued under the New Code to provide for the appropriate circumstances under which co-respondents should be named in the divorce proceedings.

89. For the above reasons, we make the recommendation accordingly. **[Recommendation 37]**

*(d) Other rules of the MCR (Rules 47A, 30, 31, 56A, 64, 65 and 67)*

90. As regards other rules specific to matrimonial proceedings in the MCR, we identified the following applications that we believed reforms are required, namely, special procedure for undefended cases, medical examination in proceedings for nullity, application for rescission of a decree and application for a decree absolute.

91. We made the following Proposals accordingly :-

- (a) 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. (Proposal 38)
- (b) 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. (Proposal 39)

- (c) 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. (Proposal 40)
- (d) 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. (Proposal 41)
- (e) 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. (Proposal 42)
- (f) The New Code should include provisions to record the precise time when the decree nisi is made absolute. (Proposal 43)

92. Proposals 38 to 43 are welcomed by the respondents. Based on them, we make the corresponding recommendations.  
**[Recommendations 38 to 43]**

### ***Structure of the rules***

93. With regard to the structure of the rules, we made the proposal that 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. (Proposal 44)

94. Likewise, the above Proposal is also welcomed by the respondents. We make the recommendation accordingly.  
**[Recommendation 44]**

## **Section 12: Application for a Financial Order**

### ***A compendious code***

95. We considered that there should be a compendious code providing 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. (Proposal 45)

96. This Proposal receives overwhelming support from the respondents. We make the recommendation accordingly. **[Recommendation 45]**

### ***Limited application to the MPSO***

97. The MPSO enables applications for financial orders to be made under various provisions. The Working Party considered 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)

98. Likewise, this Proposal also receives overwhelming support from the respondents. We make the recommendation accordingly. **[Recommendation 46]**

### ***Clear definition for financial order***

99. The Working Party considered that there is a need to 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 considered 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)

100. This Proposal is welcomed by the respondents. Based on it, we make the corresponding recommendation. **[Recommendation 47]**

### ***General approach***

101. We proposed that 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. (Proposal 48)

102. This Proposal also receives overwhelming support from the respondents. We make the recommendation accordingly. **[Recommendation 48]**

### ***Where to start proceedings, etc.***

103. We proposed that 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)

104. We also proposed that 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. (Proposal 50)

105. Proposals 49 and 50 are welcomed by the respondents. We make the recommendations accordingly. **[Recommendations 49 and 50]**

### ***Mode of commencement***

106. We proposed that 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. (Proposal 51)

107. This Proposal is agreeable to the respondents. We make the

recommendation accordingly. **[Recommendation 51]**

### ***Mode of hearing***

108. We proposed that the current default mode of hearing in Chambers (not open to public) should continue. (Proposal 52)

109. This Proposal receives overwhelming support from the respondents.

110. This Proposal, which is confined to one particular type of hearings, should be considered together with Proposal 120, which deals with the overall position regarding hearings in family and matrimonial proceedings. We think Recommendation 119 based on Proposal 120 is wide enough to cover Proposal 52. So we do not make a separate recommendation here.

### ***Service and joinder of third-parties***

111. It is not uncommon that interests of a third-party are involved in an application for financial orders. To address this issue, we had Proposals 53 and 54 :-

- (a) The New Code should provide for service upon third-parties where a variation of settlement order has been applied for. (Proposal 53)
- (b) The New Code should provide for service upon alleged recipients where an avoidance of disposition order has been applied for. (Proposal 54)

112. Proposals 53 and 54 receive overwhelming support from the respondents. As such, we make the recommendations accordingly. **[Recommendations 52 and 53]**

113. Where there are disputed beneficial ownership or legal rights and entitlements, we believed 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. On that basis, we made Proposals 55 to 60 :-

- (a) 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. (Proposal 55)

- (b) 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. (Proposal 56)
- (c) The New Code should expressly provide that as far as possible separate civil proceedings should be avoided. (Proposal 57)
- (d) 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. (Proposal 58)
- (e) 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. (Proposal 59)
- (f) 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. (Proposal 60)

114. We have received views on Proposal 55 that the registration may constitute a breach of the terms of mortgage whereby the mortgagee may then be able to exercise its rights under the mortgage including calling in the loan.

115. This is a fact specific concern (whether or not the registration might constitute an event of default), which does not affect the underlying rationale for the proposal – namely, that registered owners and mortgagees should be informed that there is an application or registration lodged which potentially affects the relevant landed property because they have an interest therein and may be affected.

116. Moreover, the procedural rules cannot dictate whether or not a litigant will attempt to lodge a registration (thereby triggering the event of default, if any). The purpose of the proposal is to ensure that interested persons are given due notice and are in a position to take any necessary steps or actions.

117. We have also received views on Proposal 57 suggesting that there should be costs consequences for the party who initiates separate civil proceedings. We agree and would revise Proposal 57 in making the recommendation.

118. Subject to the above discussions, we make the recommendations accordingly. **[Recommendations 54 to 59]**

### ***Financial dispute resolution (FDR)***

119. The FDR procedure has worked successfully. On that premises, we made Proposals 61 to 66.

#### ***(a) Codification***

120. The FDR procedure should be codified into the New Code, the abandonment of the practice of “affidavit of means” should be clarified and the FDR procedure should also be extended to cover applications for variation under section 11 of the MPPO. Thus, we had Proposals 61 and 62. (Proposals 61 and 62)

121. We also identified six specific points that may improve the FDR procedure. Hence, we made Proposals 63 to 66.

*(b) First Appointment*

122. We believed that the New Code should incorporate 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)

*(c) Costs estimates and open proposals*

123. 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. (Proposal 64)

124. We have received views on Proposal 64 suggesting that costs estimates should be made as simple as possible. We would note and point out that paragraph 10 of PD 15.11 already mandates the use of Form H. We have proposed inter alia incorporating paragraph 10 of PD 15.11.

*(d) Sanctioned offers*

125. Since PD 15.12 has not listed Order 22 to be of general applicability to matrimonial and family proceedings, hence clarification is needed. However, the Working Party is concerned that (a) 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; (b) confusion may be caused from the interplay between the mandatory “open proposals” and the optional sanctioned offers; and (c) conditions in Order 22 were designed with general civil proceedings in mind, we therefore recommended that Order 22 of the RHC shall not apply and made Proposal 65 accordingly. (Proposal 65)

126. The HKLS has agreed with the proposal that Order 22 of the RHC should not apply in family proceedings, and suggested that Calderbank offers continue to apply in lieu of Order 22 provisions and sanctions.

127. We have received views from an individual that whilst she agreed that Order 22 is unsuitable and inappropriate in divorce cases, the same was not necessarily true for applications under the I(PFD)O. The individual has suggested that Order 22 should apply to all applications made under the I(PFD)O.

128. We remain of the view that sanctioned offers and sanctioned payments under Order 22 of the RHC should not apply in family proceedings, including those under the I(PFD)O.

*(e) Forum of FDR hearings*

129. 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. The Working Party therefore made Proposal 66. (Proposal 66)

130. Subject to the discussion above, Proposals 61 to 66 are welcomed by the respondents. We make the recommendations accordingly. **[Recommendations 60 to 65]**

***Application under the I(PFD)O***

131. The Working Party identified the following matters that may require reform in relation to the New Code.

132. To start with, the Working Party proposed that 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. (Proposal 67)

133. At present, the Ordinance does not stipulate the parties that ought to be joined, hence, we had Proposals 68 and 69.

134. In Proposal 68, we proposed that 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. (Proposal 68)

135. We have received views from an individual who agreed that all persons affected should be named as parties, however, there might be beneficiaries who are not affected, such as pecuniary legatees given only a token sum. The individual suggested that such persons should be given notice of the proceedings only. We agree and would revise Proposal 68 to make the recommendation.

136. In Proposal 69, we proposed that 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. (Proposal 69)

137. As for late application, i.e. 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 I(PFD)O, there should be clear provision dealing with application for leave. We proposed that such application should be supported by affidavit setting out the grounds and evidence justifying the same. (Proposal 70)

138. 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. (Proposal 71)

139. As regards applications under section 8 or 9 of the I(PFD)O, we had Proposal 72 that the New Code should provide for the practice and procedure relating to applications under section 8 of the Ordinance for variation, discharge, suspension or revival and section 9 of the Ordinance for variation. (Proposal 72)

140. Where an application is made for a “*donee*” to provide financial provision under sections 12 and 13 of the I(PFD)O, we had Proposal 73 that the New Code should provide that those applications 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 Ordinance, the alleged “*donee*” should be joined as a party. (Proposal 73)

141. We believed the proceedings under the I(PFD)O are suitable to be resolved by way of mediation or alternative dispute resolution, hence, we made Proposal 74 that 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 Ordinance. (Proposal 74)

142. Upon consultation, we accept that there are other methods of alternative dispute resolution apart from mediation, and agree that the provisions in the New Code should be widened to include alternative dispute resolution generally, and not limited to mediation.

143. We recommend in Recommendation 20 that there be express provisions modelled on the 2010 Part 3 of the FPR 2010 be adopted into the New Code with necessary modifications. We also recommend that those provisions made under Recommendation 20 should be made applicable to proceedings under the I(PFD)O. As for the FDR procedure, such should be made available to proceedings under the I(PFD)O, subject to direction of the court, and there should be provisions in the New Code to reflect this.

144. The court has the power to alter an agreement under section 16 of the MPPO and 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, we had Proposal 75 that 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. (Proposal 75)

145. Rule 103 of the MCR applies to an application by a former spouse of a deceased person for provision out of the deceased's estate. It refers to an application under "section 38 of the Ordinance" i.e. the MCO, but that section was repealed when the I(PFD)O was enacted in 1995. Thus, we had Proposal 76 that 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)

146. Subject to the above discussions, we make Recommendations 66 to 75 accordingly. **[Recommendations 66 to 75]**

### **Section 13: Procedures for Miscellaneous Applications**

147. At present, there is no coherent set of procedural rules covering applications relating to declarations, those made under the DCRVO, those for non-cohabitation under the SMOO and those for consent to marry under the MO which arise in family proceedings. The Working party therefore made 6 proposals. (Proposals 77 to 82)

148. The Working Party believed that :-

- (a) there should be uniform procedures for all these miscellaneous proceedings; hence Proposals 77 and 78;
- (b) there should be rules for applications for declarations as to marital status, parentage, legitimacy or legitimation and adoption overseas; hence Proposal 79;
- (c) rules applicable to the DCRVO should be included in the New Code; hence Proposal 80;
- (d) rules should be made to provide for applications for non-cohabitation under the SMOO; hence Proposal 81; and
- (e) there should be rules for application for consent to marry; hence Proposal 82.

149. These Proposals are welcomed by the respondents. We make Recommendations 76 to 81 accordingly. **[Recommendations 76 to 81]**

### **Section 14: Children Proceedings**

150. Hong Kong does not have a comprehensive ordinance which exclusively deals with children matters. Inevitably, the procedures for proceedings relating to children are seriously fragmented and limited. In order to tackle these deficiencies, we put forward Proposals 83 to 99.

#### ***Scope and broad framework of the new rules***

151. We proposed the scope of the new rules should include all extant proceedings dealing with children and that the relevant part of the FPR 2010 may be adopted as a broad framework with necessary modifications. (Proposals 83 and 84).

152. These Proposals receive overwhelming support. We make Recommendations 82 and 83 accordingly. **[Recommendations 82 and**

***A unified definition for “child” and statement as to arrangements for children***

153. The Working Party noted that in the family and matrimonial context, different Ordinances use different expressions to describe the same person who is under 18. We also considered that the practice and procedure for filing of a statement as to arrangement for children should cover all children under the age of 18. Hence, we had Proposals 85 and 86. (Proposals 85 and 86)

154. The two Proposals receive overwhelming support. We make Recommendations 84 and 85 accordingly. **[Recommendations 84 and 85]**

***Custody, care and supervision, removal and related matters under Rules 92 to 96 of the MCR***

155. The Working Party recommended that, save for Rule 92(5) and (6) relating to procedure where it is alleged that one party has committed adultery or formed an improper association with another, the existing relevant rules dealing with the procedures for custody, care and supervision, removal and related matters concerning children should be incorporated into the New Code. Further, the powers of the court to call for various reports including a clinical psychologist’s report and an international social welfare report should be placed on firmer statutory footing. (Proposals 87 to 89)

156. Proposal 89 is broadly welcomed save for some suggestions that it should be widened. The Working Party considers that it is not necessary to widen the scope of this Proposal given that *Practice Direction 15.13 – Children’s Dispute Resolution Pilot Scheme*, allows for some flexibility in this respect.

157. We make Recommendations 86 to 88 accordingly. **[Recommendations 86 to 88]**

***Child dispute resolution***

158. 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 Working Party proposed the incorporation of PD 15.13



into the New Code. Since PD 15.13 will be reviewed in three years' time, the Working Party suggested that any future amendments arising from the review also need to be incorporated into the New Code. The Working Party also invited views to whether the CDR procedure should be extended to the High Court. Hence, the Working Party made Proposal 90. (Proposal 90)

159. This Proposal is largely welcomed, in particular the extension of the CDR procedure to the High Court. The Proposal is accepted subject to concerns about the practicalities of this and the need to retain an experienced wardship judge plus an acknowledgment that the CDR process is not appropriate for Hague related matters.

160. We make the recommendation accordingly. **[Recommendation 89]**

### ***Guardianship***

161. The Working Party's Proposal 91 to incorporate the relevant provisions in the RHC, the RDC and the MCR into the New Code is welcomed by the respondents; hence, we make Recommendation 90. (Proposal 91) **[Recommendation 90]**

### ***Inherent jurisdiction including wardship***

162. The Working Party repeats Proposal 16 and the corresponding recommendation set out in Section 5 above.

### ***CACO***

163. The Working Party's proposal that Order 121 of the RHC should be incorporated into the New Code is uncontroversial. (Proposal 92)

164. We make Recommendation 91 accordingly. **[Recommendation 91]**

### ***Parentage, etc.***

165. The Working Party proposed that Rule 124 of the MCR can be conveniently incorporated into the New Code. As for the PCO, although currently no rules have been made to deal with the practice and procedure to be adopted relating to parentage, legitimacy and legitimation, reference

has been made in case law in Hong Kong to Rules 3.13 and 3.16 of the Family Proceedings Rules 1991 in England and Wales. Thus, it is proposed that consideration be given to the inclusion of these rules in the New Code. (Proposals 93 and 94)

166. These Proposals are agreeable to the respondents. We make Recommendations 92 and 93 accordingly. **[Recommendations 92 and 93]**

### *Adoption*

167. The Working Party found that whilst the current practice is satisfactory, there are two matters that need attention. The first is there are currently no rules for certain types of applications; and the second is that for service out of jurisdiction, both the AR and the CAR merely provide that the documents must be served in accordance with the law of that place. The Working Party therefore put forward Proposals 95 to 97. (Proposals 95 to 97)

168. These Proposals are welcomed by the respondents. We make Recommendations 94 to 96 accordingly. **[Recommendations 94 to 96]**

### *Separate representation of children*

169. The Working Party proposed that consideration 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. (Proposal 98)

170. This Proposal receives overwhelming support from the respondents. We make Recommendation 97 accordingly. **[Recommendation 97]**

### *Other miscellaneous applications*

171. To cater for other various miscellaneous applications of which no rules exist, the Working Party proposed that the relevant provisions in the FPR 2010, if applicable, should be adopted in the New Code with necessary modifications. (Proposal 99)

172. Likewise, this Proposal also receives overwhelming support from the respondents. Based on it, we make Recommendation 98. **[Recommendation 98]**

### **Section 15: Interim Remedies and Security for Costs**

173. Interim remedies 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. It was the Working Party's proposal that these provisions should be put together. (Proposal 100)

174. Positive response has been received from the HKLS in support of this Proposal. The Working Party would make the recommendation as proposed. **[Recommendation 99]**

175. As regards security for costs, the Working Party proposed that the current rules be adopted. (Proposal 101)

176. The HKLS has had no objection to this Proposal, but cautioned that such order should only be allowed in exceptional circumstances. The Working Party makes Recommendation 100 accordingly. **[Recommendation 100]**

### **Section 16: Evidence, etc.**

#### ***General procedural rules relating to evidence***

177. As there are only a few procedural rules specifically relating to evidence in family and matrimonial proceedings, the Working Party proposed that the New Code should include the relevant procedural rules and the issuance of PDs to provide guidance. (Proposal 102)

178. This Proposal receives overwhelming support from the respondents. We make the recommendation accordingly. **[Recommendation 101]**

### *Discovery, etc.*

179. There are very few procedural rules which specifically deal with the issue of discovery in matrimonial causes and family proceedings. In practice, these procedures are very different from those in civil proceedings. The court may also be required to investigate into matters such as the welfare of the children but there is now no specific provision in this regard. Thus, the Working Party put forward Proposals 103 and 104. (Proposals 103 and 104)

180. Proposal 103 receives overwhelming support from the respondents. Based on it, we make the corresponding recommendation.

181. For Proposal 104, there are some concerns that the object of the proposal is to expand the power of the courts beyond the Norwich Pharmacal principles. It is not the intention of the Working Party. The New Code should therefore only incorporate these existing rules in the RHC to enable the courts to make such kind of orders or to issue subpoena if appropriate.

182. Based on the above reasons, we make Recommendations 102 and 103. **[Recommendations 102 and 103]**

### *Experts and assessors*

183. There is no specific rule on expert evidence under the MCR. The Working Party considered that, using Part 25 of the FPR 2010 as the guidelines, we should have a self-contained set of rules dealing with these matters. As for hearings involving assessors, the Working Party considered that the present provisions under the RHC/RDC should suffice. Thus, the Working Party put forward Proposals 105 and 106. (Proposals 105 and 106)

184. These Proposals receive overwhelming support.

185. Under the FPR 2010, parties to matrimonial proceedings can put questions about an expert's report to an expert. There are some concerns about the resource implications if the expert is a civil servant such as a social welfare officer. In striking a proper balance, practice direction can be issued to specify the circumstances under which the parties may ask experts for clarification.

186. There is also a suggestion that for those abused by their spouse

or family member, the court may consider appointing medical examiners in proceedings for nullity, without the need to make any application. This view suggests that the court should be given the necessary power.

187. As we indicate at Proposal and Recommendation 40 above, we have suggested and stakeholders have agreed that we follow the arrangements of Rule 7.26 of the FPR 2010 in that 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. Such an arrangement is more flexible than the present Rule 30 of the MCR and we suggest adopting the FPR 2010 arrangements.

188. For the above reasons, we make Recommendations 104 and 105 accordingly. **[Recommendations 104 and 105]**

### ***Statement of truth***

189. The Working Party's Proposal 107 to incorporate the provisions on Statements of Truth in Order 41A of the RHC/RDC into the New Code with all necessary modifications has received positive response from the HKLS. We make Recommendation 106 accordingly. (Proposal 107) **[Recommendation 106]**

## **Section 17: Trial and Appeals**

190. The Working Party proposed to consolidate the procedural rules in the MCR and the RHC/RDC relevant to trial and appeals relating to matrimonial causes and family proceedings into the New Code and put forward Proposals 108 to 110 for consultation. (Proposals 108 to 110)

191. Positive response has been received from the HKLS in support of Proposals. The Working Party makes the recommendations as proposed. **[Recommendations 107 to 109]**

## **Section 18: Setting aside Decree Nisi/Absolute**

192. In light of the Court of Appeal's recent observations in *CFF v ZWJ*, CACV 171/2012, (unreported, 27 May, 2013), for setting aside a decree, it may be more appropriate for the court granting the decree to set it aside, instead of the Court of Appeal on appeal. The Working Party

therefore proposed 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)

193. Positive response has been received from the HKLS in support of this Proposal. The Working Party would make the recommendation as proposed. **[Recommendation 110]**

### **Section 19: Costs**

194. The Working Party took the view that the “*costs follow the event*” as the starting point on costs in matrimonial and family proceedings should be retained. This has the benefit of giving the court a sufficiently wide discretion on costs in order to achieve justice and fairness between the parties. Consequently, we did not propose any change to “*no order as to costs*” as is the position in England and Wales; and we simply proposed to incorporate into the New Code Orders 62 and 62A of the RHC/RDC with necessary modifications. (Proposal 112)

195. The Working Party has given due regard to the views expressed by the respondents. The Working Party considers that the current law and practice has served us well and should be maintained. We make Recommendation 111 accordingly. **[Recommendation 111]**

### **Section 20: Enforcement and Reciprocal Enforcement**

196. The rules on enforcement of orders are fragmented and scattered over a number of Ordinances. The distinction between matrimonial proceedings and family proceedings appears to be artificial but this leads to duplication of rules.

197. The Working Party is concerned about the constitutionality of our provisions regarding judgment summons for the reason that previous similar English provisions were held in contravention of the European Convention on Human Rights. We considered that there is a real risk that our provisions might be held inconsistent with the Hong Kong Bill of Rights. (Proposal 113)

198. The Working Party noted that at present the AIOR does not apply to maintenance pending suit for spouses, and only applies to

interim maintenance orders for children. We proposed that this discrepancy should be remedied. (Proposal 114)

199. The Working Party proposed that all the enforcement provisions be contained in one single set of rules. (Proposal 115)

200. The Working Party saw the benefit of having a rule similar to Rule 33.3(2) of the FPR 2010 by which 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. (Proposal 116)

201. The Working Party also saw the benefit of adopting the English PD 33A in facilitating enforcement of undertakings. However, we considered that the legislation underpinning for the enforcement of undertaking should be found in the New Code rather than in the PD. (Proposals 117 and 118)

202. Finally, we proposed that the practice and procedure on registration and transmission of maintenance orders made by a reciprocating country as contained in the MO(RE)R be incorporated into the New Code. (Proposal 119)

203. All the above Proposals receive overwhelming support. Based on them, we make Recommendations 112 to 118 accordingly. **[Recommendations 112 to 118]**

## **Section 21: Hearing and Reporting of Proceedings**

### ***Hearing, reporting of proceedings and judgment and anonymisation***

204. The Working Party recognized the principle of open justice. There are, however, recognized exceptions for family cases where, they should be heard in private. The court should have the discretion to order, in appropriate cases, hearings be open to the public. (Proposal 120)

205. Proposal 120 receives overwhelming support from the respondents. We make the recommendation accordingly. **[Recommendation 119]**

206. Restrictions on publication of judgments in family cases may

unnecessarily inhibit dissemination of judgments. Thus, the Family Court has adopted the practice of publishing judgments delivered after a trial of two 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. We proposed that the present practice to be incorporated into the New Code. (Proposal 121)

207. The Working Party also proposed that the existing provisions in the AR should be incorporated into the New Code and be extended to all children proceedings. (Proposal 123)

208. Most respondents including the PCPD supports Proposal 121, although some have urged for more publication of judgments in family cases and expressed reservation over giving the parties a right to object to publication. The PCPD has suggested that dissemination of judgments can be achieved without disclosing the identities or personal particulars of the parties and recommended that measures be adopted to notify the public of the purpose of the publication of judgments and to restrict secondary use of the personal data.

209. Since the publication of the Interim Report, the twin issues of transparency and privacy have received judicial attention in both the UK and Hong Kong.

210. In the UK, following the practice guidance on “*Transparency in the Family Courts: Publication of Judgment*” issued by Sir James Munby, President of the Family Division, on 16 January 2014 (which took effect on 3 February 2014), an incremental approach has been adopted to increase publication of judgments by distinguishing between judgments that must ordinarily be allowed to be published and those that may be published, subject always to the judge’s discretion to regulate publication.

211. Further, the principle of open justice was re-emphasised in recent UK cases. Given the move towards greater transparency, it has been reiterated that an application to cause the appellate process to be heard in private should be rare or exceptional.

212. This is echoed by Ribeiro PJ recently in the final appeal concerning ancillary relief proceedings in *Kan Lai Kwan v Poon Lok To Ottoi*, FACV Nos 20 & 21 of 2013 (17 July, 2014), at para. 145.

213. On 15 August 2014, Sir James Munby issued a consultation



paper “*Transparency – The Next Steps*” which highlights the need for greater transparency and recognition of the public’s legitimate interest in being able to read what is being done by the judges in its name.

214. In light of the above recent developments in both the UK and Hong Kong, the Working Party notes at the time of preparing the Final Report that the Judiciary is, in consultation with the relevant stakeholders, preparing a PD on anonymisation, and publication of judgments in family and matrimonial proceedings.

215. In the circumstances, it is not necessary for the Working Party to make any recommendation based on Proposals 121 and 123 now. We recommend that the PD, once promulgated, should be retained in the PDs issued under the New Code. **[Recommendation 120]**

### ***Access to court documents***

216. The Working Party proposed that 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. (Proposal 122)

217. This Proposal receives support from the respondents. We make the recommendation accordingly. **[Recommendation 121]**

### ***A new Part***

218. The Working Party’s Proposal 124 that 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, is uncontroversial. (Proposal 124)

219. We make the recommendation accordingly. **[Recommendation 122]**

## **Section 22: Representation**

220. It has been the practice of the Family Court Registry to accept a

respondent's Notice of Intention to Act in Person giving an address outside the jurisdiction for service. The Working Party considered that given that there is now a significant number of parties residing out of the jurisdiction, notably in the Mainland, the requirement of providing an address within the jurisdiction may cause inconvenience and even hardship on them. Further, if a respondent is allowed to give an address out of the jurisdiction, one may question why a petitioner should not be allowed to do so. The Working Party therefore invited views on this issue. (Proposal 125)

221. Further, in line with our general theme, there should be one set of codes for both matrimonial and family proceedings. (Proposal 126)

222. The HKBA and the HKLS have endorsed the recommendation that the existing Order 67 of the RHC/RDC should be incorporated into the New Code.

223. On whether or not an address within the jurisdiction should be given, the general view appears to be that a Hong Kong address for service should be given.

224. Matrimonial proceedings are of great consequences. The Working Party therefore considers that parties should be motivated to engage and to respond. It should also be noted that as regards matrimonial proceedings, leave from the court is not required for service out of the jurisdiction of Hong Kong. This is different from other family proceedings and general civil matters.

225. On the other hand, the Working Party bears in mind that the practice in matrimonial proceedings should as far as possible align with that in family proceedings and in general civil matters where a respondent/defendant must give an address within the jurisdiction for service.

226. The Working Party has carefully considered the views expressed and has come to the view that as a matter of principle, the general position should remain to be that parties are required to give an address in Hong Kong for service. That said, the Working Party considers that a proper balance should be struck and that can be achieved by giving the court the discretion to dispense with the requirement in case of genuine difficulty and hardship. We make Recommendation 123 accordingly. **[Recommendation 123]**

227. We have not received any views contrary to Proposal 126. We make Recommendation 124 accordingly. **[Recommendation 124]**

### **Section 23: Registrar and Masters**

228. The Working Party considered that the Family Court should have its own Registrar and Masters. We also recommended that the duties of the Registrar should be expanded to cover simple applications, and that the Registrar may under the general or special directions of a judge hear and determine certain applications, and that the jurisdiction, powers and duties of the Registrar may be exercised and performed by a Master. We therefore put forward Proposals 127 to 130. (Proposals 127 to 130)

229. The general response, including that from the HKLS is positive. After considering all these responses, the Working Party recommends the adoption of all these four Proposals. **[Recommendations 125 to 128]**

### **Section 24: Modernization of Language**

230. Modernization of language used in legislation has the benefits of making legislation more readable, more easy to understand and more accessible to the public; Proposal 131 was therefore put forward. (Proposal 131)

231. There is overwhelming support for this Proposal.

232. There is a suggestion in the responses for simplification of statutory forms to help unrepresented litigants and other users to understand the procedures. We have already agreed to include simplification of statutory forms in Recommendation 26, and will similarly include this in Recommendation 129. **[Recommendation 129]**

### **Section 25: Miscellaneous Topics**

233. It is likely that additional resources and support are needed in the implementation of the above recommendations.

234. The Working Party proposed to provide greater support to

family judges, including creation of additional Registrar/Master posts etc. We proposed that an assessment on the organisation and manpower implications of the proposals be carried out. (Proposal 132)

235. This Proposal receives general support from the respondents.

236. The Working Party understands that the Judiciary will carry out a detailed assessment on the organizational and manpower implications of the recommendations. We make Recommendation 130 accordingly. **[Recommendation 130]**

237. The Working Party also considered that the Judiciary should assess the implications of the proposals on the IT systems of the courts. We therefore put forward Proposal 133. (Proposal 133)

238. The Judiciary will conduct a study on the scope of system changes and enhancements required for implementing the New Code. In the context of the Judiciary-wide Information Technology Strategy Plan (“ITSP”), the Judiciary plans to implement the integrated court management system to the Family Court during Phase II implementation of the ITSP tentatively scheduled for 2019 to 2022. If in the interim there is a need to introduce early changes, they would be favourably considered so long as they do not prejudice against the long-term objectives of the ITSP.

239. Proposal 133 is generally supported by the respondents. We make Recommendation 131 accordingly. **[Recommendation 131]**

240. The Working Party also considered that necessary training should be given to judges and judicial officers (“JJOs”) dealing with family cases and the support court staff. Besides, suitable training should be conducted for the practitioners by the relevant legal professional bodies with support from the Judiciary. (Proposal 134)

241. With the establishment of the Judicial Institute, the Judiciary will be able to enhance the judicial skills and knowledge of the JJOs through the development of continuing and more structured judicial education programmes.

242. The Judiciary has no difficulty with this Proposal which is not controversial either. Accordingly, we make Recommendation 132. **[Recommendation 132]**

243. To enhance the understanding of the overall procedures set out in the New Code by the litigants in person and other stakeholders (e.g. family and welfare organizations), the Working Party put forward Proposals 135 and 136 relating to publicity materials. (Proposals 135 and 136)

244. The Working Party understands from the Judiciary that they would consider a number of publicity initiatives, namely, producing information sheets to highlight the major changes, producing leaflets, issuing press releases; and producing and displaying notices at various court premises.

245. These Proposals receive positive responses. We make Recommendation 133 accordingly. [**Recommendation 133**]



# ***RECOMMENDATIONS***

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## ***Recommendations***

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### ***Recommendation 1 (Proposal 1)***

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

### ***Recommendation 2 (Proposal 2)***

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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).

### ***Recommendation 3 (Proposal 3)***

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

### ***Recommendation 4 (Proposal 4)***

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Subject to the reservation as set out in the Interim Report about the use of PDs, and subject to any amendments/updates to be adopted only if applicable to Hong Kong and with necessary modifications, the FPR 2010 should be adopted as the broad, basic framework for the New Code.

### ***Recommendation 5 (Proposal 5)***

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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.

### **Recommendation 6 (*Proposal 6*)**

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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.

### **Recommendation 7 (*Proposal 7*)**

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

### **Recommendation 8 (*Proposal 8*)**

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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.

### **Recommendation 9 (*Proposal 9*)**

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

### **Recommendation 10 (*Proposal 10*)**

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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.

### **Recommendation 11 (*Proposal 11*)**

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

### **Recommendation 12 (*Proposal 12*)**

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

### **Recommendation 13 (*Proposal 13*)**

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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.

### **Recommendation 14 (*Proposal 14*)**

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

### **Recommendation 15 (*Proposal 15*)**

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

### **Recommendation 16 (*Proposal 16*)**

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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.

### **Recommendation 17 (*Proposal 17*)**

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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.

### **Recommendation 18 (*Proposal 18*)**

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

### **Recommendation 19 (*Proposal 19*)**

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

### **Recommendation 20 (*Proposal 20*)**

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Express provisions modelled on the 2010 Part 3 of the FPR 2010 and the meaning of "Alternative Dispute Resolution" in the Interpretation Section 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.

### **Recommendation 21 (*Proposal 21*)**

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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. Considerations may be given in future to see whether there is need for a pilot scheme for any other method of alternative dispute resolution, and if so, if such a pilot scheme has been implemented and proved effective, whether the procedures should then be set out in a practice direction.

### **Recommendation 22 (*Proposal 22*)**

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It is not necessary to introduce any pre-action protocol for mediation for family and matrimonial disputes.

### **Recommendation 23 (*Proposal 23*)**

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

### **Recommendation 24 (*Proposal 24*)**

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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.

### **Recommendation 25 (*Proposal 25*)**

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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.

### **Recommendation 26 (*Proposal 26*)**

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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, and such statutory forms should be reviewed to see whether there is any need for simplification. All statutory forms should be downloadable from the Judiciary website.

### **Recommendation 27 (*Proposal 27*)**

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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”.

### **Recommendation 28 (*Proposal 28*)**

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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.

### **Recommendation 29 (*Proposal 29*)**

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The present mode of service by ordinary post should be retained but in the event that an acknowledgment of service has not been returned to the registry, and without prejudice to the other provisions under Rule 14 of the MCR, a deemed service order is still necessary.

### **Recommendation 30 (*Proposal 30*)**

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It is not recommended that in the New Code, service of ordinary documents (i.e. for documents other than originating process or judgment summons which would require a higher standard of personal service) should, as a matter of principle, be permitted to be by fax or other electronic communication in line with the FPR 2010. This is subject to future developments, in particular with regards to the procedural laws applicable to service of documents in general civil proceedings. There may be a need to re-visit or re-consider these issues in the context of such future developments relating to electronic filing and service of documents, and whether the rules applicable to general civil proceedings ought to apply to matrimonial and family proceedings as well.

### **Recommendation 31 (*Proposal 31*)**

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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.

### **Recommendation 32 (*Proposal 32*)**

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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.

### **Recommendation 33 (*Proposal 33*)**

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

### **Recommendation 34 (*Proposal 34*)**

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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.

### **Recommendation 35 (*Proposal 35*)**

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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.

### **Recommendation 36 (*Proposal 36*)**

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

### **Recommendation 37 (*Proposal 37*)**

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

### **Recommendation 38 (*Proposal 38*)**

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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.

### **Recommendation 39 (*Proposal 39*)**

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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.

### **Recommendation 40 (*Proposal 40*)**

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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.

### **Recommendation 41 (*Proposal 41*)**

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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.



**Recommendation 42 (*Proposal 42*)**

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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.

**Recommendation 43 (*Proposal 43*)**

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

**Recommendation 44 (*Proposal 44*)**

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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.

**Recommendation 45 (*Proposal 45*)**

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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.

**Recommendation 46 (*Proposal 46*)**

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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.

**Recommendation 47 (*Proposal 47*)**

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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.

**Recommendation 48 (*Proposal 48*)**

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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.

**Recommendation 49 (*Proposal 49*)**

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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.

**Recommendation 50 (*Proposal 50*)**

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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.

### **Recommendation 51 (*Proposal 51*)**

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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.

### **Recommendation 52 (*Proposal 53*)**

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

### **Recommendation 53 (*Proposal 54*)**

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

### **Recommendation 54 (*Proposal 55*)**

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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.

### **Recommendation 55 (*Proposal 56*)**

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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.

### **Recommendation 56 (*Proposal 57*)**

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The New Code should expressly provide that as far as possible separate civil proceedings should be avoided and warn that failure to comply may result in costs or other consequences.

### **Recommendation 57 (*Proposal 58*)**

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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.

### **Recommendation 58 (*Proposal 59*)**

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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.

### **Recommendation 59 (*Proposal 60*)**

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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.

### **Recommendation 60 (*Proposal 61*)**

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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.

### **Recommendation 61 (*Proposal 62*)**

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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.

### **Recommendation 62 (*Proposal 63*)**

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The New Code should incorporate 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.

### **Recommendation 63 (*Proposal 64*)**

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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.

#### **Recommendation 64 (*Proposal 65*)**

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

#### **Recommendation 65 (*Proposal 66*)**

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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.

#### **Recommendation 66 (*Proposal 67*)**

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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.

#### **Recommendation 67 (*Proposal 68*)**

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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) whom are affected or potentially affected by the proceedings and other persons affected by the application; due notice of the proceedings should be given to all beneficiaries who are not named as parties.

#### **Recommendation 68 (*Proposal 69*)**

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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.

### **Recommendation 69 (*Proposal 70*)**

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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.

### **Recommendation 70 (*Proposal 71*)**

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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.

### **Recommendation 71 (*Proposal 72*)**

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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.

### **Recommendation 72 (*Proposal 73*)**

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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.

### **Recommendation 73 (*Proposal 74*)**

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The provisions made under Recommendation 20 in relation to alternative dispute resolution should be made applicable to the proceedings under the I(PFD)O. The FDR procedure should be made available to proceedings under the I(PFD)O, subject to the direction of the court, and there should be provisions in the New Code to reflect this.

**Recommendation 74 (*Proposal 75*)**

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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.

**Recommendation 75 (*Proposal 76*)**

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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.

**Recommendation 76 (*Proposal 77*)**

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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.

**Recommendation 77 (*Proposal 78*)**

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The procedures for miscellaneous applications not falling into any of the categories in paragraph 277.1 of the Interim Report 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.

**Recommendation 78 (*Proposal 79*)**

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

**Recommendation 79 (*Proposal 80*)**

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



### **Recommendation 80 (*Proposal 81*)**

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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.

### **Recommendation 81 (*Proposal 82*)**

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

### **Recommendation 82 (*Proposal 83*)**

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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.

### **Recommendation 83 (*Proposal 84*)**

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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.

### **Recommendation 84 (*Proposal 85*)**

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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.

### **Recommendation 85 (*Proposal 86*)**

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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.

### **Recommendation 86 (*Proposal 87*)**

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Subject to Recommendations 87 and 88 below, Rules 92 to 96 of the MCR, with all necessary modifications, should be incorporated into the New Code.

### **Recommendation 87 (*Proposal 88*)**

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

### **Recommendation 88 (*Proposal 89*)**

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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.

### **Recommendation 89 (*Proposal 90*)**

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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. Changes may be needed to take practicalities into account.

### **Recommendation 90 (*Proposal 91*)**

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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.

**Recommendation 91 (*Proposal 92*)**

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

**Recommendation 92 (*Proposal 93*)**

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

**Recommendation 93 (*Proposal 94*)**

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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. Particular reference should be made to Rules 3.13 and 3.16 of the Family Proceedings Rules 1991 in England and Wales and the Blood Tests (Evidence of Paternity) Regulations 1971.

**Recommendation 94 (*Proposal 95*)**

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

**Recommendation 95 (*Proposal 96*)**

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

**Recommendation 96 (*Proposal 97*)**

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

### **Recommendation 97 (*Proposal 98*)**

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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.

### **Recommendation 98 (*Proposal 99*)**

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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.

### **Recommendation 99 (*Proposal 100*)**

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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.

### **Recommendation 100 (*Proposal 101*)**

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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.

### **Recommendation 101 (*Proposal 102*)**

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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.

**Recommendation 102 (*Proposal 103*)**

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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.

**Recommendation 103 (*Proposal 104*)**

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The New Code should incorporate the appropriate rules in the RHC, with necessary modifications, to enable the courts, in all matrimonial causes and family proceedings, to make orders on discovery of documents from a third party or non-party according to the existing legal principles.

**Recommendation 104 (*Proposal 105*)**

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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.

**Recommendation 105 (*Proposal 106*)**

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

**Recommendation 106 (*Proposal 107*)**

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

### **Recommendation 107 (*Proposal 108*)**

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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.

### **Recommendation 108 (*Proposal 109*)**

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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.

### **Recommendation 109 (*Proposal 110*)**

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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.

### **Recommendation 110 (*Proposal 111*)**

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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.

### **Recommendation 111 (*Proposal 112*)**

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

### **Recommendation 112 (*Proposal 113*)**

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Amendments to the existing provisions on judgment summons should be made in light of Articles 10 and 11 of the BOR.

### **Recommendation 113 (*Proposal 114*)**

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

### **Recommendation 114 (*Proposal 115*)**

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The 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.

### **Recommendation 115 (*Proposal 116*)**

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Rule 33.3(2) of the FPR 2010 should be adopted into the New Code.

### **Recommendation 116 (*Proposal 117*)**

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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.

### **Recommendation 117 (*Proposal 118*)**

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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.

### **Recommendation 118 (*Proposal 119*)**

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

### **Recommendation 119 (*Proposal 120*)**

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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.

### **Recommendation 120 (*Proposals 121 and 123*)**

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The proposed PD on anonymisation and publication of judgments in family and matrimonial proceedings, once promulgated, should be retained in the PDs issued under the New Code.

### **Recommendation 121 (*Proposal 122*)**

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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.

### **Recommendation 122 (*Proposal 124*)**

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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.

### **Recommendation 123 (*Proposal 125*)**

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Subject to leave being obtained from the court, an address within the jurisdiction should be given for service. Subject to the foregoing, it is proposed to incorporate the existing Order 67 of the RHC/RDC into the New Code.



#### **Recommendation 124 (*Proposal 126*)**

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There should be 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.

#### **Recommendation 125 (*Proposal 127*)**

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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.

#### **Recommendation 126 (*Proposal 128*)**

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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.

#### **Recommendation 127 (*Proposal 129*)**

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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.

#### **Recommendation 128 (*Proposal 130*)**

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

### **Recommendation 129 (*Proposal 131*)**

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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, and the statutory forms may be simplified. Further consideration should be given as to how to pursue this objective as far as practicable, bearing in mind the various concerns.

### **Recommendation 130 (*Proposal 132*)**

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The Judiciary should carry out an assessment on the organisational and manpower implications of the recommendations against the overall context of the prevailing and anticipated workload in the Family Court. Consideration should be given to in particular the need to create additional Registrar/Master posts.

### **Recommendation 131 (*Proposal 133*)**

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In taking forward the proposals, the Judiciary should undertake 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.

### **Recommendation 132 (*Proposal 134*)**

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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.

### **Recommendation 133 (*Proposals 135 and 136*)**

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The Judiciary should produce publicity materials to enable court users, interested bodies and members of the public to have a good general understanding of the New Code. In particular, suitable materials should be prepared to assist the litigants in person in navigating through the process.

# ***FINAL REPORT***





## ***Final Report***

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### **SECTION 1 : INTRODUCTION**

#### **1.1 The Working Party**

1. In March 2012, this Working Party was appointed by the Chief Justice 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 consists of the following members :-

The Hon Mr Justice Jeremy Poon, the Judge in charge of the  
Family Law List, High Court (Chairperson)  
The Hon Madam Justice Bebe Chu, (Deputy Chairperson)  
The Hon Mr Justice David Lok  
Deputy High Court Judge Marlene Ng  
HH Judge Bruno Chan, Acting Principal Family Court Judge  
HH Judge Sharon Melloy  
HH Judge CK Chan  
Mr Jeremy Chan, representative of the Hong Kong Bar  
Association  
Mr Dennis Ho, representative of the Law Society of Hong  
Kong  
Mr Ian Wingfield, representative of the Hong Kong Family  
Law Association  
Mrs Annie Williams, Deputy Director of Legal Aid (Litigation),  
representative of the Legal Aid Department (until 31  
August 2012)  
Ms Sherman Cheung, Assistant Director of Legal Aid  
(Litigation), representative of the Legal Aid Department  
(as from 1 September 2012)

Ms Mary Ho, Assistant Law Officer (Civil) (Advisory), representative of the Department of Justice (until 10 June 2014)

Ms Daphne Siu, Acting Assistant Law Officer (Civil) (Advisory), representative of the Department of Justice (as from 11 June 2014)

Deputy District Judge Ivan Wong (Secretary)

Mr Arthur Ng, Deputy Judiciary Administrator (Operations) (In Attendance)

Ms Wendy Cheung, Assistant Judiciary Administrator (Development) (In Attendance)

## **1.2 The Interim Report and consultation**

3. On 17 February 2014, the Interim Report and Consultative Paper (“the Interim Report”) was published for consultation.<sup>1</sup> Stakeholders and the public were invited to give their views on the 136 proposals set out in the Interim Report by 16 June 2014. However, at the request of the Hong Kong Bar Association and the Hong Kong Council of Social Service, the deadline was extended to early August 2014.
4. To facilitate the consultation process, the Working Party conducted a mass briefing for stakeholders from the legal profession and welfare sector on 22 March 2014. Members of the Working Party also attended briefing/discussion sessions to collect views from the following bodies :-
  - (a) Working Party on Mediation on 10 March 2014;
  - (b) Women’s Commission on 4 April 2014;
  - (c) Panel on Administration of Justice and Legal Services (“AJLS Panel”) of the Legislative Council (“LegCo”) on 22 April 2014;
  - (d) Hong Kong Family Law Association on 17 May 2014;
  - (e) Family Support Sub-Committee of the Family Council on 5 June 2014; and

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<sup>1</sup> The Interim Report was made available in print and on the internet at [http://www.judiciary.gov.hk/en/other\\_info/family\\_review.htm](http://www.judiciary.gov.hk/en/other_info/family_review.htm).

- (f) Hong Kong Federation of Trade Unions on 9 June 2014.
5. As at 31 July 2014, the Working Party has received written submissions from 15 respondents :-
- (a) Hong Kong Bar Association (“HKBA”);
  - (b) Law Society of Hong Kong (“HKLS”);
  - (c) Hong Kong Family Law Association (“HKFLA”);
  - (d) Labour and Welfare Bureau (“LWB”);
  - (e) Department of Justice (“DOJ”);
  - (f) Legal Aid Department (“LAD”);
  - (g) Social Welfare Department (“SWD”);
  - (h) Office of the Privacy Commissioner for Personal Data (“PCPD”);
  - (i) Family Council (“FC”); and
  - (j) 6 individuals.<sup>2</sup>
6. Some of the views received during the consultation fall outside our terms of reference and are not entirely relevant to the proposals in the Interim Report. They have been referred to the Judiciary and/or the relevant parties for consideration and/or follow-up actions.

### **1.3 Object of this Final Report**

7. Having considered the responses received in the consultation process and having regard to the further development of the law in some material aspects, the Working Party now seeks to identify the areas where reform is considered necessary or desirable and to make recommendation to the Chief Justice accordingly.

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<sup>2</sup> Their names and available details are listed at the *Appendix*.

8. The recommendations are formulated with a view to identifying the reforms considered necessary or desirable. It is not an exercise of drafting. The actual drafting of the rules and any consequential changes to existing legislation to implement the recommendations upon approval by the Chief Justice will be undertaken in due course.



## **SECTION 2 : THE NEED FOR REFORMS AND GENERAL ASPECTS OF IMPLEMENTATION**

### **2.1 The need for reforms**

9. In the Interim Report, we described our family justice system,<sup>3</sup> discussed the desired characteristic of an effective family justice system,<sup>4</sup> and identified the problems and challenges that our family justice system is now facing. We concluded that :-<sup>5</sup>

“Rules and procedures underpin an effective operation of the family justice system. They inform the users of how the system works and are fundamental in ensuring that it works well. If there are problems impeding its effective operation, then the system is not serving its users well. Because of the problems discussed above, our family procedural rules are in urgent need of comprehensive and fundamental reform. We need to provide an accessible and responsive procedural source for the courts and all court users, represented or otherwise, in achieving the fundamental objective of dealing with and disposing of family and matrimonial disputes justly and efficiently.”

10. The need to introduce comprehensive and fundamental procedural reform to the family justice system is felt nearly by all the respondents, especially the profession and the government bureau/departments.
11. However, one LegCo member of the AJLS Panel did not subscribe to the view that procedural changes should be introduced ahead of amendments to substantive family law as recommended by the Law Reform Commission in its 2005 Report on Child Custody and Access (“the 2005 Report”). He considered such attempt as putting the cart before the horse. In the absence of the policy direction for introducing amendments to the substantive family law, the proposed new rules might have limitations upon implementation thus rendering them impracticable.
12. We do not think the concern raised by the LegCo member detracts in any way from the urgent need of introducing the reforms.

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<sup>3</sup> See Part I, Section A.

<sup>4</sup> See Part I, Section B.

<sup>5</sup> See Part II, Section D.

- (a) How soon it will take to implement the recommendations of the 2005 Report is unknown. One thing for sure is that it is a massive exercise and will take a long time to complete. But the problems that our family justice system is facing need to be tackled forthwith. The problems would most likely exacerbate if no procedural reforms were introduced pending the completion of the long process of changing the substantive law.
  - (b) It remains to be seen if any proposed changes to the substantive law would impact on the new procedural rules. The Government has undertaken to continue to closely liaise with the Judiciary over the legislative exercise and implementation of the 2005 Report. If any change to the substantive law would indeed impact on procedures, then either corresponding provisions can be put into the new rules if they are still in the drafting stage or consequential amendments can be made to the new rules after enactment.
13. We remain firmly of the view that comprehensive and fundamental procedural reforms to the family justice system need to be introduced now.

## **2.2 A new code**

### ***Proposal 1***

#### *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").*

*Interim Report para. 56*

14. Proposal 1 receives overwhelming support from the respondents. We make the recommendation accordingly.

**Recommendation 1** (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").

**2.3 A new ruling-making authority**

***Proposal 2***

**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).*

*Interim Report para. 57*

15. Likewise, Proposal 2 also receives overwhelming support from the respondents. We make the recommendation accordingly.

**Recommendation 2** (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).

## 2.4 Consequential amendments

### *Proposal 3*

#### *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.*

*Interim Report para. 58*

16. This Proposal is uncontroversial. We make the recommendation accordingly.

#### **Recommendation 3** (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.

### **SECTION 3 : ADOPTING THE FPR AS THE BASIC FRAMEWORK FOR THE NEW CODE AND CONTENTS GENERALLY**

#### **3.1 Adopting FPR as framework**

##### ***Proposal 4***

##### *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.*

*Interim Report para. 65*

17. There is overwhelming support from the respondents for the adoption of the FPR 2010 as the broad, basic framework.
18. Since the first introduction of the FPR 2010, there have been so far 12 amendment rules made thereto. Some of the amendments may be applicable to Hong Kong, and some may not.
19. We recommend that any amendments/updates to the FPR 2010 to be adopted only if applicable to Hong Kong, and with necessary modifications.

#### **3.2 Contents generally**

20. We proposed that, in order to align the general practice and procedure in both the family and civil jurisdictions in the post-CJR era and to harmonize as far as possible the general parts of the family rules with those for civil proceedings, the general provisions in the New Code should be modelled on the equivalents in the RHC or should incorporate the relevant provisions in the RHC with modifications.

### ***Proposal 5***

#### *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.*

*Interim Report para. 67*

21. As a prudent measure, we also proposed to have a general fall-back provision over any procedural gap left in the New Code.

### ***Proposal 6***

#### *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.*

*Interim Report para. 69*

22. We further identified the following RHC provisions which are by nature of general applicability to be adopted into the New Code, subject to necessary modifications :-
- (a) Order 1A – Underlying objectives;
  - (b) Order 1B – Case management powers;
  - (c) Order 2 – Sanctions on non-compliance with the rules;
  - (d) Order 3 – Time;
  - (e) Order 24, rule 7A – Discovery before action or by non-party;
  - (f) Order 24, rule 15A – Limits on discovery;

- (g) Order 25 – Case management summons and conference;
- (h) Order 32A – Vexatious litigants;
- (i) Order 35, rule 3A – Time, etc., limits at trial;
- (j) Order 38, rule 4A – Single joint expert;
- (k) Order 38, Part IV – Expert evidence;
- (l) Order 41A – Statements of truth;
- (m) Order 62 – Costs; and
- (n) Order 62A – Costs offer and payments into court.

***Proposal 7***

*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.*

*Interim Report para. 70*

23. We considered that there are considerable benefits in selecting from the relevant applicable provisions in the FPR 2010 for adoption into our New Code. This will allow Hong Kong's family justice system to draw on the practical experience of the English operation.

## ***Proposal 8***

### **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.*

*Interim Report para. 73*

24. Proposals 4 to 8 all receive overwhelming support from the respondents. Based on them, we make the following recommendations.

### **Recommendation 4** (Proposal 4)

Subject to the reservation as set out in the Interim Report about the use of PDs, and subject to any amendments/updates to be adopted only if applicable to Hong Kong and with necessary modifications, the FPR 2010 should be adopted as the broad, basic framework for the New Code.

### **Recommendation 5** (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.



**Recommendation 6** (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.

**Recommendation 7** (Proposal 7)

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

**Recommendation 8** (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.

## SECTION 4 : APPLICATION OF THE NEW CODE

25. The Working Party proposed that the New Code should apply to all matrimonial and family proceedings as defined, whether they are in the High Court or the Family Court. We also made proposals relating to the definitions of some terms to be adopted in the New Code.

### *Proposals 9 and 10*

#### 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.*

*Interim 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.*

*Interim Report para. 78.3*

26. The above Proposals receive overwhelming support from the respondents. We make the recommendations accordingly.

**Recommendation 9** (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.

**Recommendation 10** (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.

## SECTION 5 : DEFINITION AND JURISDICTION OF THE COURTS

### 5.1 Definition of the courts and powers and functions of the judge

27. 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 proposed that there should be a clear definition of these terms in the New Code. Besides, the powers of judges to perform functions under the New Code should also be spelt out. We put forward the following two Proposals in the Interim Report for consultation.

#### *Proposals 11 and 12*

##### Proposal 11

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

*Interim Report para. 79*

##### Proposal 12

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

*Interim Report para. 80*

28. The above Proposals receive overwhelming support from the respondents. We make the recommendations accordingly.

##### **Recommendation 11** (Proposal 11)

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

**Recommendation 12** (Proposal 12)

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

**5.2 Jurisdiction of the Family Court**

29. At present, 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. Further, it has very limited inherent jurisdiction over children matters. We proposed that the New Code should have provisions cover these issues, and put forward the following Proposals for consultation.

***Proposals 13 and 14***

**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.*

*Interim 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.*

*Interim Report para. 88*

30. Likewise, the above Proposals receive overwhelming support from the respondents. Based on them, we make the following recommendations.

**Recommendation 13** (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.

**Recommendation 14** (Proposal 14)

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

**5.3 Jurisdiction of the High Court**

31. We also proposed to clearly spell out in the New Code the matters over which the Court of First Instance of the High Court has exclusive jurisdiction and the Court’s inherent jurisdiction in children matters etc.

***Proposals 15 and 16***

**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.*

*Interim 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.*

*Interim Report para. 92*

32. Proposal 15 is welcomed by the respondents.
33. Proposal 16 is broadly welcomed by the respondents subject to some concerns being raised with respect to the practicalities surrounding the possible transfer of proceedings down from the High Court to the Family Court. There is particular concern that this might cause confusion and be costly and time consuming. The Working Party however takes the view that these are issues that should more properly be dealt with as part of the court’s case management function and we should not therefore preclude the inclusion of this recommendation in the report.
34. We make the following recommendations.

**Recommendation 15** (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.

**Recommendation 16** (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.



## SECTION 6 : UNDERLYING OBJECTIVES

35. We are firmly of the view that the extension of the underlying objectives as set out in Order 1A of the RHC to family procedural rules is the first and essential response to tackle adversarial excesses and to instil a shift of litigation culture. We therefore proposed that the underlying objectives encapsulating the fundamental purpose of the New Code should be set out clearly in the New Code.

### *Proposal 17*

#### *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.*

*Interim Report para. 97*

36. Part 1 Rule 1.4 of the FPR 2010 sets out the court's duty to manage cases under "Underlying Objective". Rule 1.4(2) in relation to the duty of "active case management" has been further amended on 31 January 2013 under the Family Procedure (Amendment No 5) Rules 2012 by replacing (2) with a new paragraph (2) which added "controlling the use of expert evidence" to what was included in active case management and altered the order of matters which was included placing setting timetable or otherwise controlling the progress of the case first on the list.
37. We are of the view that the court's duty of "active case management" under Order 1A, rule 4 of the RHC, similar to those of the pre-amendment provisions in Rule 1.4(2) of the FPR 2010, should be sufficient to include the control of the use of expert evidence, and any further amendment is not necessary at this stage.
38. There is overwhelming support from the respondents to Proposal 17.
39. Since welfare issues have special relevance for the family jurisdiction, we also considered that the court should have regard to welfare issues when applying the underlying objectives for

family procedure.

***Proposal 18***

*Proposal 18*

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

*Interim Report para. 102*

40. Proposal 18 is welcomed by the respondents.
41. Based on Proposals 17 and 18, we make the following recommendations.

**Recommendation 17** (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.

**Recommendation 18** (Proposal 18)

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

## SECTION 7 : CASE MANAGEMENT POWERS AND ALTERNATIVE DISPUTE RESOLUTION

### 7.1 Case management powers

42. The Working Party believed that 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. Thus, we proposed that 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*

##### *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.*

*Interim Report para. 105*

43. This Proposal is uncontroversial.<sup>6</sup> We make the recommendation accordingly.

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<sup>6</sup> Recently, in *Chan Cheung Ming Jacky v Siu Sin Man*, CACV152/2014 (reported, 19 August 2014), which is an appeal against a refusal of leave to issue a subpoena at a late stage in GMO proceedings concerning the welfare of a child, the Court of Appeal has reminded that Orders 1A and 1B are equally applicable to family proceedings (see Practice Direction 15.12 paragraphs 8 and 16), and judges in the Family Court can resort to the powers and provisions in Order 25 and Practice Direction 5.2 to fulfil their case management function prescribed by Order 1A, rule 4 as buttressed by the powers set out in Order 1B even though there is as yet no formal rule for the holding of case management conference in family proceedings.

**Recommendation 19** (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.

**7.2 Alternative dispute resolution**

44. In the Interim Report, we have stated that Part 3 of the FPR 2010 sets out the court's powers to encourage the parties to use alternative dispute resolution and to facilitate its use ("2010 Part 3"). Further the meaning of "Alternative Dispute Resolution" as set out in Rule 2.3 of the Interpretation Section of the FPR 2010 means methods of resolving a dispute, including mediation, other than through the normal court process ("2010 Interpretation Section"). The term has been interpreted to include a collaborative approach and the use of arbitration. We then made the following proposals.

***Proposals 20 to 22***

**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.*

*Interim 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.*

*Interim 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.*

*Interim Report para. 110*

45. After the publication of the Interim Report, there has been further development in England.
- 45.1 A new Part 3 was introduced under the Family Procedure (Amendment No. 3) Rules 2014 (“2014 Part 3”), which came into force on 22 April 2014, and the heading of the 2014 Part 3 is now “Non-court Dispute Resolution”. Further, the previous Rule 2.3 of the Interpretation Section has also been amended, in that there is no longer the term “Alternative Dispute Resolution”.
- 45.2 There is an Explanatory Note to the 2014 Part 3 which explains that the amendments are made under or in consequence of and to support certain provisions of the Children and Families Act 2014 (c.6) (“C&FA 2014”), and that the amendments also adjust service rules applicable to certain private law children proceedings.
- 45.3 In particular, section 10(1) of the C&FA 2014 now stipulates that before making a relevant family application, a person must attend a family mediation information and assessment meeting. Sections 52 to 57 of the C&FA 2014 also provide for mediation and dispute resolution.
46. Despite the development in the England, in view of the fact that we do not have the equivalent of section 10(1) of the C&FA 2014 or the other provisions in our primary legislation in Hong Kong, we consider that the new rules in the 2014 Part 3 should not be followed or adopted.
47. Having considered the wording of the 2010 Part 3, coupled with the meaning of “Alternative Dispute Resolution” in the 2010 Interpretation Section, we conclude that this should be wide enough to include all methods of alternative dispute resolution, namely a collaborative approach and the use of arbitration or other methods. The rules in the 2010 Part 3 did not give precedence to

any particular method of alternative dispute resolution, whether mediation or others.

48. Generally, there is overwhelming support for enhancing the court's powers in promoting alternative dispute resolution. We thus make the recommendation that express provisions modelled on the 2010 Part 3, and the meaning of "Alternative Dispute Resolution" in the 2010 Interpretation Section should be adopted into the New Code with necessary modifications to enhance the court's powers in dealing with alternative dispute resolution.

**Recommendation 20** (Proposal 20)

Express provisions modelled on the 2010 Part 3 of the FPR 2010 and the meaning of "Alternative Dispute Resolution" in the Interpretation Section 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.

49. There is overwhelming support for Proposal 21. It has been further suggested that other methods of alternative dispute resolution should be considered. At present, only the procedures for family mediation have been set out in a practice direction, that is, PD 15.10, after an effective pilot scheme was implemented. If pilot schemes for other methods of alternative dispute resolution are to be introduced and proved effective, consideration may be given to include those procedures into a practice direction.
50. We make the recommendation accordingly.

**Recommendation 21** (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. Considerations may be given in future to see whether there is need for a pilot scheme for any other method of alternative dispute resolution, and if so, if such a pilot scheme has been implemented and proved effective, whether the procedures should then be set out in a practice direction.

51. The general responses are that a pre-action protocol for mediation for family and matrimonial disputes may delay parties' access to justice as well as front loading the costs, and that a pre-action protocol is not necessary.
52. In light of the responses, we do not recommend any pre-action protocol.

**Recommendation 22** (Proposal 22)

It is not necessary to introduce any pre-action protocol for mediation for family and matrimonial disputes.

## **SECTION 8 :      COMMENCEMENT AND TRANSFER OF PROCEEDINGS AND FORMS**

### **8.1 Commencement and transfer of proceedings**

53. We identified that 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. We therefore proposed that 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.
54. There should be provisions to ensure 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 utilized, and that proceedings are only dealt with in the High Court if the relevant criteria are met. We proposed that the New Code should contain provisions on transfer and retransfer for all types of transferable proceedings between the Family Court and the High Court.

### ***Proposals 23 to 25***

#### *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.*

*Interim 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.*

*Interim 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.*

*Interim Report para. 153*

55. Proposals 23 and 24 are welcomed by the respondents. Based on them, we make the following recommendations.

**Recommendation 23** (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.

**Recommendation 24** (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.

56. On 1 July 2013, the President of the Family Division in England issued a Guidance on Allocation and Gatekeeping for Care, Supervision and Part 4 proceedings under the Children Act 1989 (“Ch A 1989”), in which it is stated that allocation decisions must continue to be made in accordance with the Allocation and Transfer of Proceedings Order 2008 (“2008 Order”); the Practice Direction – Allocation and Transfer of Proceedings 3rd November 2008 (2008 Direction”) ; and the Family Proceedings (Allocation to Judiciary) Directions 2009 (“2009 Direction”). That Guidance identifies criteria which are intended to be consistent with the above Orders and Directions and the decisions of superior courts.
57. Thereafter, there have been further amendments to the FPR 2010. Rules 7.24, 9.25, 10.4, 11.5 in the FPR 2010 referred to in paragraph 143 of the Interim Report have now been largely omitted under The Family Procedure (Amendment No. 3) Rules 2013 which came into effect at about early 2014.
58. A new Rule 29.17 has now been inserted, which sets out the power of a court to transfer a case to another court, and further provides that a case may not be transferred from the family court to the High Court unless :-
- (a) The decision to transfer was made by a judge sitting in the family court who is a person to whom the following applies :-
    - (i) President of the Family Division;
    - (ii) an ordinary judge of the Court of Appeal (including the vice-president, if any, of either division of that court); and

(iii) a puisne judge of the High Court.

(b) One or more of the circumstances specified in Practice Direction 29C, namely, circumstances are that the proceedings are to be transferred solely for the purpose of making an order under the inherent jurisdiction of the High Court to require a government department or agency to disclose an address to the court.

59. The majority of the amendments in the Family Procedure (Amendment No. 3) Rules 2013 are made to reflect the formal creation of the family court in England under the Crime and Courts Act 2013 (c 22). Such amendments seem to “limit” transfer orders to be made only by the President of the Family Division, a puisne judge of the High Court and a judge of the Court of Appeal, and may “reduce” the number of cases to be transferred up, although it is too early to tell.
60. As we do not have any primary legislation in relation to the setting up of a formal family court, nor is there any Family Division in our High Court, we are of the view that some of those amendments in the Family Procedure (Amendment No. 3) Rules 2013 are not applicable to Hong Kong. Also, so far, as there have not been too many cases transferred to the High Court from our Family Court, we do not see any need to “reduce” such transfers or to limit the decision to transfer only to High Court judges. In any event, under our present rules, there is power to transfer by the Family Court judges.
61. There is overwhelming support for Proposal 25. We thus make the recommendation as in Proposal 25, based on those pre-amendment rules in the FPR 2010, the 2008 Order and the 2008 Direction.

**Recommendation 25** (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.

**8.2 Commencement of proceedings and forms**

62. The Working Party is concerned about the fact that 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.
63. We proposed that 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.
64. We also proposed that the nomenclature for the parties should be unified.

***Proposals 26 and 27***

**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.*

*Interim 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”.*

*Interim Report para. 160*

65. There is overwhelming support for Proposal 26. One of the respondents has suggested that there should also be simplification of the statutory forms, to help unrepresented litigants and other users. There is also a suggestion that all statutory forms should be downloadable from the Judiciary website, as in England.
66. We agree that the statutory forms should be reviewed to see whether there is any need for simplification and should be downloadable from the Judiciary website. We thus include this in our recommendation.
67. Likewise, Proposal 27 is also welcomed by the respondents. We make the following recommendation accordingly.

**Recommendation 26** (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, and such statutory forms should be reviewed to see whether there is any need for simplification. All statutory forms should be downloadable from the Judiciary website.

**Recommendation 27** (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”.

## SECTION 9 : SERVICE AND ACKNOWLEDGEMENT

### 9.1 Retaining the current mode generally

68. The Working Party considered that the mode of service and acknowledgement of service of documents in matrimonial proceedings, now being governed by the provisions in the MCR, should be retained.

#### *Proposal 28*

##### 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.*

*Interim Report para. 164*

69. Proposal 28 receives support from the respondents. We make the recommendation accordingly.

##### **Recommendation 28** (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.

### 9.2 Service by registered post

70. We noted that 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. We therefore invited views on whether any changes need to be made.

## ***Proposal 29***

### *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.*

*Interim Report para. 166*

71. For Proposal 29, we have received mixed responses from various stakeholders.
72. The HKBA is of the view that the dissolution of the marital status is a matter of considerable importance and therefore, the court should be properly satisfied that such originating proceedings have been brought to the attention of the respondent party. They have not considered that registered post is by any means fool-proof evidence of service and therefore, the court should maintain the duty to make appropriate orders, in such circumstances as prevail, to satisfy that proper service has been achieved. As such, they have not recommended that provision for service in matrimonial causes be brought into line with the provisions of the RHC and the RDC.
73. On the other hand, the HKLS has agreed that service of the matrimonial causes by ordinary post should be replaced by registered post, but with deemed service order still required, where the circumstances warrant, e.g. a signed acknowledgment of service was not returned.
74. There is also another view that the present mode of service by ordinary post should simply be maintained.
75. Apart from the above responses, the PCPD has also submitted very detailed response on the topic of service and acknowledgment. However, it seems that the main focus of the PCPD is on how to ensure that personal data was properly protected during service of



the matrimonial causes and it has invited the Working Party to consider inserting into the New Code some guidance to safeguard privacy when legal documents are served.

76. After considering the above responses, we agree with the HKBA's view that the dissolution of a marital status is an important matter and should therefore not to be granted unless and until the court is satisfied that notice of the proceedings has been properly brought to the attention of the other party. Therefore, it is reasonable for the standard of service to be higher than ordinary civil proceedings. We are of the view that the present mode of service of matrimonial causes should be retained. Apart from personal service, service by ordinary post should be allowed but in the event that no acknowledgment of service was received, a deemed service order would be necessary.
77. As to the HKLS's proposal that registered post should be used instead of ordinary post, we are of the view that such mode of service would not be conducive to bringing notice of the proceedings to the respondent. The advantage of ordinary post is that the documents would still be delivered to the address for service irrespective of whether the respondent is there at the time. Provided that there are sufficient measures for the court to be properly satisfied of the receipt of the documents by the respondent, e.g. by way of a deemed service order, ordinary post is considered to be a more appropriate mode of delivery than registered post.
78. As to the proposals from the PCPD, whilst we recognize the importance of safeguarding the parties' privacy when legal documents are to be served, the Working Party does not feel that such safeguards should be achieved by creating new provisions in the New Code. The main purpose of the New Code is to consolidate and streamline the litigation process of matrimonial and family proceedings and therefore, such safeguards for data privacy should be properly left to a separate exercise other than the New Code. We therefore do not recommend the incorporation of the proposals from the PCPD into the New Code. Instead, we would refer the PCPD's concerns to the Family Court Users' Committee for their further consideration.

**Recommendation 29** (Proposal 29)

The present mode of service by ordinary post should be retained but in the event that an acknowledgment of service has not been returned to the registry, and without prejudice to the other provisions under Rule 14 of the MCR, a deemed service order is still necessary.

**9.3 Service by fax and electronic means**

79. The FPR 2010 allow service of documents other than an application for a matrimonial order to be effected by fax or other means of electronic communication. The Working Party sought consultation on whether, as a matter of principle, documents other than the originating process and judgment summons should be permitted to be served by such mode.

***Proposal 30***

**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.*

*Interim Report para. 169*

80. The HKBA has considerable reservations as to the appropriateness of service of documents by fax, document exchange or e-mail in matrimonial and family proceedings. Their main concerns are the issues of privacy and confidentiality as fax is open to be seen by anyone in the vicinity and plunder of e-mail information is common-place.
81. The HKLS has adopted a different stance and expressed their agreement to this proposal.

82. There are mixed views from members of the HKFLA. Some members have been concerned that fax is not a confidential or reliable means of service while others believed that e-mail is an acceptable means of service as it would normally require a password to access one's e-mail account.
83. The PCPD has pointed out that the privacy risks in association with using fax or other electronic means of communication for service had to be properly recognized and addressed. Therefore, it is crucial for a party to be made fully aware of the privacy risks involved in such mode of service and necessary steps to be taken to address those risks.
84. There is another view that such modes of service should only be allowed if there is proof that the party to be served is familiar with fax or electronic communication and affirmation of service should be filed to prove such fact.
85. The Working Party takes note of the fact that for service of ordinary documents in general civil proceedings (i.e. for documents other than originating process or judgment summons which would require a higher standard of personal service), service by fax or other electronic means is not yet allowed under the RHC. Furthermore, it is accepted that generally speaking, there is a greater need for privacy and confidentiality in matrimonial and family proceedings and therefore, it may not be appropriate for adopting a more liberal approach in service of documents than that of general civil proceedings. For this reason, the Working Party does not recommend that service of ordinary documents by fax or other electronic means to be allowed at this stage.
86. Despite the making of the above recommendation, the Working Party is fully aware that there are developments in progress spearheaded by the Judiciary for introducing and exploring, as an additional option, electronic filing and service of documents. Therefore, the above recommendation is premised upon the present situation and state of procedural laws only. This will be subject to future developments with regards to civil proceedings in general and there will be a need to re-visit or re-consider these issues in the context of those future developments, and whether they ought to apply to matrimonial and family proceedings as well.

### **Recommendation 30** (Proposal 30)

It is not recommended that in the New Code, service of ordinary documents (i.e. for documents other than originating process or judgment summons which would require a higher standard of personal service) should, as a matter of principle, be permitted to be by fax or other electronic communication in line with the FPR 2010. This is subject to future developments, in particular with regards to the procedural laws applicable to service of documents in general civil proceedings. There may be a need to re-visit or re-consider these issues in the context of such future developments relating to electronic filing and service of documents, and whether the rules applicable to general civil proceedings ought to apply to matrimonial and family proceedings as well.

## **9.4 Service outside the jurisdiction**

87. Whilst the present provision in Rule 109(1) of the MCR which allows service outside the jurisdiction without leave should be retained, we took the view that the manner of service should be aligned with that of the general civil practice as contained in Order 11 of the RHC.
88. We also took the view that the “no leave” provision should cover all documents in matrimonial and family proceedings.

### ***Proposals 31 and 32***

#### **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.*

*Interim 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.*

*Interim Report para. 172*

89. These two Proposals are uncontroversial and positive response has been received from the HKLS in support of them. The Working Party makes the recommendations accordingly.

**Recommendation 31** (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.

**Recommendation 32** (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.

## SECTION 10 : INTERLOCUTORY APPLICATIONS

90. Pursuant to Rule 114 of the MCR, the mode of making an interlocutory application in extant proceedings for matrimonial proceedings is by way of summons. The Working Party proposed that this should be the unified mode for making such applications.

### ***Proposal 33***

#### *Proposal 33*

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

*Interim Report para. 173*

91. This Proposal is welcomed by the respondents. We make the recommendation accordingly.

#### **Recommendation 33** (Proposal 33)

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

## SECTION 11 : PROCEDURES FOR MATRIMONIAL CAUSES

92. The Working Party identified that some of the matters contained in the MCR, the principal rules governing the procedures for matrimonial causes, are of general application across the board, such as the use of the official languages, applications in the course of extant proceedings, transfer of proceedings, pleadings, discovery, interrogatories, evidence, preparation for trial and security for costs etc. The Working Party is of the view that separate rules governing these matters of general application are not required.
93. On the other hand, there are specific matters which feature in the procedures for matrimonial causes only. These should be improved and if desirable, be adapted in accordance with the relevant provisions in Part 7 of the FPR 2010.

### 11.1 Matters of general application

#### *Proposal 34*

##### *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.*

*Interim Report para. 177*

94. This Proposal receives overwhelming support from the respondents. We make the recommendation accordingly.

##### **Recommendation 34** (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.

## 11.2 Specific Matters

### (a) *Application to consider agreement (Rule 6)*

95. 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. We took the view that 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 such specific provision, 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***

#### *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.*

*Interim Report para. 181*

96. As stated in the Interim Report, applications under Rule 6 of the MCR are now seldom, if ever made, and the proposal is that the New Code should not include this rule.
97. Although there have been initially concerns over Proposal 35 by members of the HKFLA, after the briefing and the discussion with the Working Party, the general view of the HKFLA members is to abolish Rule 6 as none were aware of it ever been used.
98. Although Rule 6 has rarely been invoked, the HKBA sees little benefit in removing it until such time as a comprehensive statutory code governing marital agreements is in place. The HKBA in their responses has referred to the recent decision of the Court of Final Appeal in *SPH v SA* formerly known as *SA* (FACV 22/2013) endorsing the guidance of the United Kingdom Supreme Court in



*Radmacher v Granatino* [2010] 2 FLR 1900. As pointed out by the HKBA, there has been increased interest in this area of the law and that it is important that a procedure should exist whereby parties could seek the approval or otherwise by the court of proposed agreements – especially in situations where no proceedings are extant, for instance where no grounds under section 11A of the MCO exist.

99. While the rationale is understandable, the majority of the Working Party is not persuaded by the HKBA's views.
- 99.1 As pointed out in the Interim Report, Rule 6 of the MCR was introduced at a time when there was a stigma attached to divorce and parties would want to have an agreement reached before agreeing to a divorce. The rule has rarely been invoked and so it is not necessary to include a corresponding provision in the New Code.
- 99.2 As Rule 6 of the MCR was enacted at a time before all these new developments, we consider that the old rule may not be appropriate to be applied in the new circumstances. In any event, a new tailor-made procedural rule may be introduced in the future to cater for the specific need of any new statutory code on marital agreements. Further, question about the effect of such kind of agreements can always be determined in the substantive divorce proceedings, and we have reservation as to necessity of providing a separate procedure for the determination of the effect of such kind of agreements.
100. For the above reasons, we make the following recommendation.

**Recommendation 35** (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.

(b) *Reconciliation*

101. We considered that the current requirement for the filing of a statement certifying whether the legal representative has discussed the possibility of reconciliation with the applicant should apply to both represented and unrepresented parties, and that the list of “persons” regarded as qualified to help effect reconciliation should be expanded.

***Proposal 36***

*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.*

*Interim Report para. 183*

102. The majority of the respondents has agreed with such proposal. There is nevertheless one particular view that PD 15.3 should be abolished.
103. We take the view that reconciliation is quite different from mediation. Reconciliation provides an opportunity for parties to receive assistance and counselling service given by various organizations with a view to avoiding a divorce. PD 15.3 is therefore necessary and we make the following recommendation.

**Recommendation 36** (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.

(c) *Naming of co-respondents (Rule 13)*

104. We proposed that 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***

#### *Proposal 37*

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

*Interim Report para. 184*

105. The majority of the respondents has welcomed such proposal, but there is one contrary view about the suggested practice of not naming co-respondents in divorce proceedings. According to such contrary view, it is important that a party against whom an allegation of adultery or improper association is made should be given an opportunity to deny it. Such an allegation may have important repercussions even of a criminal nature, and further, failure to notify the person accused may result in costly procedural complications at a later stage. The existing practice should therefore continue.
106. Despite such contrary view, we consider that we should follow the new practice in the United Kingdom in avoiding to name co-respondents in divorce proceedings. The naming of co-respondents may cause a lot of unnecessary embarrassment and hostility between the parties, which may encourage the co-respondents to defend the divorce proceedings. This would only result in additional and quite unnecessary costs and inconvenience. Further, like the practice in the United Kingdom after the implementation of the FPR 2010, new practice direction can be issued under the New Code to provide for the appropriate circumstances under which co-respondents should be named in the divorce proceedings.
107. For the above reasons, we make the recommendation accordingly.

#### **Recommendation 37** (Proposal 37)

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

(d) *Other rules of the MCR (Rules 47A, 30, 31, 56A, 64, 65 and 67)*

108. As regards other rules specific to matrimonial proceedings in the MCR, we identified the following applications that we believed reforms are required, namely, special procedure for undefended cases, medical examination in proceedings for nullity, application for rescission of a decree and application for a decree absolute.

109. We made the following proposals accordingly.

***Proposals 38 to 43***

*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.*

*Interim 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.*

*Interim 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.*

*Interim 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.*

*Interim 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.*

*Interim Report para. 192*

Proposal 43

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

*Interim Report para. 193*

110. Proposals 38 to 43 are welcomed by the respondents. Based on them, we make the following recommendations.

**Recommendation 38** (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.

**Recommendation 39** (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.

**Recommendation 40** (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.

**Recommendation 41** (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.

**Recommendation 42** (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.

**Recommendation 43** (Proposal 43)

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

**11.3 Structure of the rules**

111. With regard to the structure of the rules, we made the following proposal.

***Proposal 44***

***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.*

*Interim Report para. 194*

112. Likewise, the above Proposal is also welcomed by the respondents. We make the recommendation accordingly.

**Recommendation 44** (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.



## SECTION 12 : APPLICATION FOR A FINANCIAL ORDER

113. Applications for a financial order may arise in different scenarios and are governed by different statutory provisions. There is no compendious set of rules that applies to matters of a financial order generally. To address this situation and other relevant issues, the Working Party put forward 32 proposals in the Interim Report for consultation.

### 12.1 A compendious code

114. We considered that there should be a compendious code providing 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.

#### *Proposal 45*

##### *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.*

*Interim Report para. 197*

115. This Proposal receives overwhelming support from the respondents. We make the following recommendation accordingly.

##### **Recommendation 45** (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.

## 12.2 Limited application to the MPSO

116. The MPSO enables applications for financial orders to be made under various provisions. The Working Party considered 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***

#### *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.*

*Interim Report para. 202*

117. Likewise, this Proposal also receives overwhelming support from the respondents. We make the following recommendation accordingly.

#### **Recommendation 46** (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.

## 12.3 Clear definition for financial order

118. The Working Party identified that 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. We considered that there is a need to 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 considered 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***

*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.*

*Interim Report para. 207*

119. This Proposal is welcomed by the respondents. Based on it, we make the following recommendation.

**Recommendation 47** (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.

**12.4 General approach**

120. As a matter of general approach, we believed the procedure for all applications for financial order should be simplified and, so far as circumstances permit, unified.

### ***Proposal 48***

#### **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.*

*Interim Report para. 209*

121. This Proposal also receives overwhelming support from the respondents. We make the following recommendation accordingly.

#### **Recommendation 48** (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.

### **12.5 Where to start proceedings, etc.**

122. Applications for financial order should generally be commenced in the Family Court, with power to transfer to the High Court and also power to re-transfer. There should be clear provisions on these matters. There should also be clear provisions on how an application for financial order is to be commenced if there is already an extant family proceedings between the parties and in the situation where there is not. We therefore made Proposals 49 and 50.

## ***Proposals 49 and 50***

### **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.*

*Interim 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.*

*Interim Report para. 213*

123. Proposals 49 and 50 are welcomed by the respondents. We make the following two recommendations accordingly.

### **Recommendation 49** (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.

**Recommendation 50** (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.

**12.6 Mode of commencement**

124. It is our firm view that 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. We therefore made the following proposal.

***Proposal 51***

**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.*

*Interim Report para. 214*

125. This Proposal is agreeable to the respondents. We make the following recommendation accordingly.

**Recommendation 51** (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.

**12.7 Mode of hearing**

126. We believed the current default mode of hearing in Chambers (not open to public) should continue.

***Proposal 52***

***Proposal 52***

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

*Interim Report para. 216*

127. This Proposal receives overwhelming support from the respondents.
128. This Proposal, which is confined to one particular type of hearings, should be considered together with Proposal 120, which deals with the overall position regarding hearings in family and matrimonial proceedings. We think Recommendation 119 based on Proposal 120 is wide enough to cover Proposal 52. So we do not make a separate recommendation here.

## 12.8 Service and joinder of third-parties

129. It is not uncommon that interests of a third-party are involved in an application for financial orders. To address this issue, we had Proposals 53 to 60.
130. In the case where third-parties are involved in applications for variation of settlement and for avoidance of disposition, we made Proposals 53 and 54 respectively.

### *Proposals 53 and 54*

#### Proposal 53

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

*Interim 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.*

*Interim Report para. 223*

131. Proposals 53 and 54 receive overwhelming support from the respondents. As such, we make the following recommendations accordingly.

#### **Recommendation 52** (Proposal 53)

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



**Recommendation 53** (Proposal 54)

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

132. Where there are disputed beneficial ownership or legal rights and entitlements, we believed 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. On that basis, we made Proposals 55 to 60.

***Proposals 55 to 60***

**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.*

*Interim 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.*

*Interim Report para. 232*

Proposal 57

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

*Interim 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.*

*Interim 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.*

*Interim 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.*

*Interim Report para. 233*

133. We have received views on Proposal 55 that the registration may constitute a breach of the terms of mortgage whereby the mortgagee may then be able to exercise its rights under the mortgage including calling in the loan.
134. This is a fact specific concern (whether or not the registration might constitute an event of default), which does not affect the underlying rationale for the proposal – namely, that registered owners and mortgagees should be informed that there is an application or registration lodged which potentially affects the relevant landed property because they have an interest therein and may be affected.
135. Moreover, the procedural rules cannot dictate whether or not a litigant will attempt to lodge a registration (thereby triggering the event of default, if any). The purpose of the proposal is to ensure that interested persons are given due notice and are in a position to take any necessary steps or actions.
136. We have also received views on Proposal 57 suggesting that there should be costs consequences for the party who initiates separate civil proceedings. We agree and would revise Proposal 57 in making the recommendation.
137. Subject to the above discussions, we make the following recommendations accordingly.

**Recommendation 54** (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.

**Recommendation 55** (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.

**Recommendation 56** (Proposal 57)

The New Code should expressly provide that as far as possible separate civil proceedings should be avoided and warn that failure to comply may result in costs or other consequences.

**Recommendation 57** (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.

**Recommendation 58** (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.

**Recommendation 59** (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.

## 12.9 Financial dispute resolution (FDR)

138. The FDR procedure has worked successfully. On that premises, we made Proposals 61 to 66.

### (a) *Codification*

139. The FDR procedure should be codified into the New Code, the abandonment of the practice of “affidavit of means” should be clarified and the FDR procedure should also be extended to cover applications for variation under section 11 of the MPPO. Thus, we had Proposals 61 and 62.

### ***Proposals 61 and 62***

#### *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.*

*Interim 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.*

*Interim Report para. 237*

140. We also identified six specific points that may improve the FDR procedure. Hence, we made Proposals 63 to 66.

### (b) *First Appointment*

141. We believed that the provisions for the filing and exchange of Form Es currently set out in Paragraph 2 of PD 15.11 could be enhanced, hence Proposal 63.

### ***Proposal 63***

#### *Proposal 63*

*The New Code should incorporate 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.*

*Interim Report para. 239*

#### *(c) Costs estimates and open proposals*

142. Parties should be aware of their potential liability for costs so that they may consider whether litigation is justified.

### ***Proposal 64***

#### *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.*

*Interim Report para. 242*

143. We have received views on Proposal 64 suggesting that costs estimates should be made as simple as possible. We would note and point out that paragraph 10 of PD 15.11 already mandates the use of Form H. We have proposed inter alia incorporating paragraph 10 of PD 15.11.

(d) *Sanctioned offers*

144. Since PD 15.12 has not listed Order 22 to be of general applicability to matrimonial and family proceedings, hence clarification is needed. However, the Working Party is concerned that (a) 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; (b) confusion may be caused from the interplay between the mandatory “open proposals” and the optional sanctioned offers; and (c) conditions in Order 22 were designed with general civil proceedings in mind, we therefore recommended that Order 22 of the RHC shall not apply and made Proposal 65 accordingly.

***Proposal 65***

*Proposal 65*

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

*Interim Report para. 251*

145. The HKLS has agreed with the proposal that Order 22 of the RHC should not apply in family proceedings, and suggested that Calderbank offers continue to apply in lieu of Order 22 provisions and sanctions. We agree in principle with the suggestion that extra-procedural measures should continue to be applicable to costs considerations (including for example Calderbank offers, other forms of without prejudice save as to costs communications and open proposals), but we take the view that these fall outside the scope and ambit of our terms of reference, and would not be expressly provided for in the procedural rules. The relevance, applicability and effect or result of such matters on the question of costs is something that will be developed by and in accordance with case law authorities.
146. We have received views from an individual that whilst she agreed Order 22 is unsuitable and inappropriate in divorce cases, the same was not necessarily true for applications under the I(PFD)O. The individual took the view that whilst Order 22 may not be entirely



useful in the case of claims made by persons falling under section 3(1)(i) of the I(PFD)O (the wife or husband of the deceased) to the extent that the award is akin to financial ancillary relief awards in divorce proceedings, the situation may be different where the judge makes a capitalised lump sum award, if the circumstances permit and warrant. Further, in respect of all other categories of claimants, where the size of the estate is substantial and would easily lend itself to the making of a capitalised lump sum award, Order 22 may serve as a useful tool to structure an early compromise. The individual suggested that Order 22 should apply to all applications made under the I(PFD)O.

147. Whilst we agree that where an application under the I(PFD)O is concerned only or predominantly with a capitalised lump sum,<sup>7</sup> it might be said that Order 22 lends itself no less applicable than in general civil cases – the lump sum proposed in the sanctioned offer will either be higher or lower than the ultimate lump sum that is awarded; but it remains the case that the court under the I(PFD)O can make many different kinds of awards – such as periodical payment,<sup>8</sup> lump sum,<sup>9</sup> transfer of property,<sup>10</sup> settlement of property on specified terms<sup>11</sup> including life licences for occupation, orders for acquisition of property.<sup>12</sup> Accordingly, the concerns we expressed in paragraphs 248 to 250 of the Interim Report are no less applicable to applications under the I(PFD)O. So, whilst it is true that some applications under the I(PFD)O lend themselves easily to Order 22, this is not true for all applications under the I(PFD)O. There is therefore a danger to setting a default position where Order 22 is said to be applicable.

148. We remain of the view that sanctioned offers and sanctioned payments under Order 22 of the RHC should not apply in family proceedings, including those under the I(PFD)O. As we say hereinabove, extra-procedural measures may become relevant to

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<sup>7</sup> Section 4(1)(b) of the I(PFD)O.

<sup>8</sup> Section 4(1)(a) of the I(PFD)O.

<sup>9</sup> Section 4(1)(b) of the I(PFD)O.

<sup>10</sup> Section 4(1)(c) of the I(PFD)O.

<sup>11</sup> Section 4(1)(d) of the I(PFD)O.

<sup>12</sup> Section 4(1)(e) of the I(PFD)O.

the question of costs, and this has been and will continue to be developed by and in accordance with case law authorities, where Order 22 of the RHC might be consulted and might be considered to be of referential or other value.

(e) *Forum of FDR hearings*

149. 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. The Working Party therefore made Proposal 66.

***Proposal 66***

*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.*

*Interim Report para. 255*

150. Subject to the discussion above, Proposals 61 to 66 are welcomed by the respondents. We make the following recommendations accordingly.

**Recommendation 60** (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.

**Recommendation 61** (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.

**Recommendation 62** (Proposal 63)

The New Code should incorporate 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.

**Recommendation 63** (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.

**Recommendation 64** (Proposal 65)

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

**Recommendation 65** (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.

**12.10 Application under the I(PFD)O**

151. The Working Party identified the following matters that may require reform in relation to the New Code.
152. To start with, since proceedings under the I(PFD)O are commenced in the Family Court and may be transferred to the High Court pursuant to section 25(2) of the Ordinance, there should have a new Part in the New Code for the practice and procedure of proceedings under the Ordinance.

### ***Proposal 67***

#### *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.*

*Interim Report para. 258*

153. At present, the Ordinance does not stipulate the parties that ought to be joined, hence, we had Proposals 68 and 69.

### ***Proposal 68***

#### *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.*

*Interim Report para. 259*

154. We have received views from an individual regarding the persons to be named as parties. The I(PFD)O does not specifically spell out who should be joined as party to the proceedings. The individual has agreed that all persons affected should be named as parties, however, there might be beneficiaries who are not affected, such as pecuniary legatees given only a token sum. The individual has suggested that such persons should be given notice of the proceedings only. We agree and would revise Proposal 68 to make the recommendation.

### ***Proposal 69***

#### *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.*

*Interim Report para. 260*

155. As for late application, i.e. 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, there should be clear provision dealing with application for leave.

### ***Proposal 70***

#### *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.*

*Interim Report para. 261*

156. Applications for interim relief should also be provided for in the New Code.

### ***Proposal 71***

#### *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.*

*Interim Report para. 262*

157. As regards applications under section 8 or 9 of the Ordinance, we had Proposal 72.

### ***Proposal 72***

#### *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.*

*Interim Report para. 263*

158. Where an application is made for a “donee” to provide financial provision under sections 12 and 13 of the Ordinance, we had Proposal 73.

### ***Proposal 73***

#### *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.*

*Interim Report para. 264*

159. We believed the proceedings under the Ordinance are suitable to be resolved by way of mediation or alternative dispute resolution, hence, we made Proposal 74.

### ***Proposal 74***

#### *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.*

*Interim Report para. 268*

160. Proposal 74 only refers to mediation or the FDR Procedure. The responses are all supportive of Proposal 74, save that there should be provisions in the New Code to provide for other methods of alternative dispute resolution to be made available in proceedings under the I(PFD)O.
161. We accept that there are other methods of alternative dispute resolution apart from mediation, and agree that the provisions in the New Code should be widened to include alternative dispute resolution generally, and not limited to mediation.



162. We have in Recommendation 20 recommended that there be express provisions modelled on the 2010 Part 3 of the FPR 2010 be adopted into the New Code with necessary modifications. We recommend that those provisions made under Recommendation 20 should be made applicable to proceedings under the I(PFD)O. As for the FDR procedure, such should be made available to proceedings under the I(PFD)O, subject to direction of the court, and there should be provisions in the New Code to reflect this.
163. The court has the power to alter an agreement under section 16 of the MPPO and 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, we had Proposal 75.

***Proposal 75***

*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.*

*Interim Report para. 272*

164. Rule 103 of the MCR applies to an application by a former spouse of a deceased person for provision out of the deceased's estate. It refers to an application under "section 38 of the Ordinance" i.e. the MCO, but that section was repealed when the I(PFD)O was enacted in 1995. Thus, we had Proposal 76.

## ***Proposal 76***

### **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.*

*Interim Report para. 273*

165. Subject to the above discussions, we make Recommendations 66 to 75 accordingly.

### **Recommendation 66** (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.

### **Recommendation 67** (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) whom are affected or potentially affected by the proceedings and other persons affected by the application; due notice of the proceedings should be given to all beneficiaries who are not named as parties.

**Recommendation 68** (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.

**Recommendation 69** (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.

**Recommendation 70** (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.

**Recommendation 71** (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.

**Recommendation 72** (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.

**Recommendation 73** (Proposal 74)

The provisions made under Recommendation 20 in relation to alternative dispute resolution should be made applicable to the proceedings under the I(PFD)O. The FDR procedure should be made available to proceedings under the I(PFD)O, subject to the direction of the court, and there should be provisions in the New Code to reflect this.

**Recommendation 74** (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.

**Recommendation 75** (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.

## SECTION 13 : PROCEDURES FOR MISCELLANEOUS APPLICATIONS

166. There are various miscellaneous applications which arise in family proceedings. This section covers applications relating to declarations, those made under the DCRVO, those for non-cohabitation under the SMOO and those for consent to marry under the MO. The Working Party proposed the following six proposals for consultation.
167. At present, there is no coherent set of procedural rules covering all these miscellaneous applications, the Working Party believed there should be uniform procedures for all these miscellaneous family proceedings. We therefore made Proposals 77 and 78.

### ***Proposals 77 and 78***

#### *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.*

*Interim Report para. 277.1*

#### *Proposal 78*

*The procedures for miscellaneous applications not falling into any of the categories in paragraph 277.1[ of the Interim Report] 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.*

*Interim Report para. 277.2*

168. At present, there are no prescribed procedures for applications for marital status, parentage, legitimacy or legitimation and adoptions effected overseas.

### ***Proposal 79***

#### *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.*

*Interim Report para. 282*

169. There are now specific rules in the DCRVR, but subject to those rules, the RHC apply. The New Code should include these rules, hence, Proposal 80 was made.

### ***Proposal 80***

#### *Proposal 80*

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

*Interim Report para. 283*

170. Apart from Order 89, rule 1 of the RDC which provides for proceedings to be commenced by originating summons, there are no prescribed rules. We therefore made our recommendation in Proposal 81.

### ***Proposal 81***

#### *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.*

*Interim Report para. 285*

171. We considered that rules may be made prescribing the method of application for consent to marry under the MO and other related matters. We made Proposal 82 accordingly.

***Proposal 82***

*Proposal 82*

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

*Interim Report para. 286*

172. These Proposals are welcomed by the respondents. We make the following recommendations accordingly.

**Recommendation 76** (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.

**Recommendation 77** (Proposal 78)

The procedures for miscellaneous applications not falling into any of the categories in paragraph 277.1 of the Interim Report 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.

**Recommendation 78** (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.

**Recommendation 79** (Proposal 80)

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

**Recommendation 80** (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.

**Recommendation 81** (Proposal 82)

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



## SECTION 14 : CHILDREN PROCEEDINGS

173. Hong Kong does not have a comprehensive ordinance which exclusively deals with children matters. The statutory provisions are scattered in different Ordinances including the MCO, the MPPO, the GMO, the SMOO, the AO and the CACO. Inevitably, the procedures for proceedings relating to children are seriously fragmented and limited. In order to tackle these deficiencies, we put forward Proposals 83 to 99.

### 14.1 Scope and broad framework of the new rules

174. We believed the scope of the new rules should include all extant proceedings dealing with children and that the relevant part of the FPR 2010 may be adopted as a broad framework for the new procedures with necessary modifications. We put forward Proposals 83 and 84.

#### *Proposals 83 and 84*

##### 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.*

*Interim 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.*

*Interim Report para. 290*

175. These Proposals receive overwhelming support from the respondents. Based on them, we make the following recommendations.

**Recommendation 82** (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.

**Recommendation 83** (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.

## **14.2 A unified definition for “child” and statement as to arrangements for children**

176. The Working Party noted that in the family and matrimonial context, different Ordinances use different expressions to describe the same person who is under 18, we were of the view that in principle a single unified term should be used for all procedures concerning children irrespective of how they are described under different Ordinances and that the practice and procedure for filing of a statement as to arrangement for children should cover all children under the age of 18. We therefore put forward Proposals 85 and 86.

### ***Proposals 85 and 86***

#### *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.*

*Interim 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.*

*Interim Report para. 294*

177. Likewise, the two Proposals above also receive overwhelming support from the respondents. We make the following recommendations accordingly.

**Recommendation 84** (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.

**Recommendation 85** (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.

**14.3 Custody, care and supervision, removal and related matters under Rules 92 to 96 of the MCR**

178. The Working Party recommended that existing relevant rules dealing with the procedures for custody, care and supervision, removal and related matters concerning children, i.e. Rules 92 to 96 of the MCR should be incorporated into the New Code. However, we considered that Rule 92(5) and (6) relating to the procedure to be adopted where it is alleged that one party has committed adultery or formed an improper association with another should not be adopted since they are now effectively obsolete.
179. Further, the powers of the court to call for various reports including a clinical psychologist's report and an international social welfare report should be placed on firmer statutory footing.
180. We therefore put forward Proposals 87 to 89.

## ***Proposals 87 to 89***

### *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.*

*Interim Report para. 296*

### *Proposal 88*

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

*Interim 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.*

*Interim Report para. 298*

181. Proposal 89 is broadly welcomed by the respondents save for some concerns expressed about the scope of the proposal and suggestions that it should be widened. After discussion by the Working Party however it is felt that it is not necessary to widen the scope of this proposal given that Practice Direction 15.13 – Children's Dispute Resolution Pilot Scheme, allows for some flexibility in this respect. Paragraph 10 of PD 15.13 states inter alia as follows :-

*"10. At the CA the Judge, with a view to defining the specific issues in dispute in relation to the children shall give directions, if necessary, for the filing of :*

- i) a Social Investigation Report (SIR) and/or an International SIR (with or without recommendations)*

ii) *other expert's reports (e.g. psychologist's reports)*"

Please see Recommendation 89 below.

**Recommendation 86** (Proposal 87)

Subject to Recommendations 87 and 88 below, Rules 92 to 96 of the MCR, with all necessary modifications, should be incorporated into the New Code.

**Recommendation 87** (Proposal 88)

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

**Recommendation 88** (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.

#### **14.4 Child dispute resolution**

182. 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 Working Party supported the incorporation of PD 15.13 into the New Code.
183. We further observed 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.

184. 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. However, there is currently no local equivalent in the MCR.
185. PD 15.13 will be reviewed in three years' time, we suggested any future amendments arising from the review also need to be incorporated into the New Code.
186. Finally, consideration should be given to whether the CDR procedure should be extended to the High Court.
187. In view of the above, the Working Party made Proposal 90.

***Proposal 90***

*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*

*Interim Report para. 301*

188. This Proposal is largely welcomed. We specifically asked whether or not the respondents were of the view that the CDR procedure should be extended to the High Court. Subject to concerns expressed about the practicalities of this and the need to retain an experienced wardship judge plus an acknowledgment that the CDR process is not appropriate for Hague related matters, which is accepted, this Proposal is accepted.

**Recommendation 89** (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. Changes may be needed to take practicalities into account.

**14.5 Guardianship**

189. The Working Party considered that the current practice under the existing rules is adequate and accordingly made Proposal 91.

***Proposal 91***

**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.*

*Interim Report para. 302*

190. This Proposal is welcomed by the respondents. We make the following recommendation accordingly.

**Recommendation 90** (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.



## 14.6 Inherent jurisdiction including wardship

191. 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 repeated Proposal 16 of the Interim Report which deals with the inherent jurisdiction of the Court of First Instance of the High Court. Please refer to the relevant proposal and the corresponding recommendation set out in Section 5 above.

## 14.7 CACO

192. The Working Party considered that the extant practice and procedure satisfactory and made suggestion as per Proposal 92 accordingly.

### *Proposal 92*

#### Proposal 92

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

*Interim Report para. 304*

193. This Proposal is uncontroversial. We make the following recommendation accordingly.

#### **Recommendation 91** (Proposal 92)

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

## 14.8 Parentage, etc.

194. The Working Party proposed that the current procedure as set out in Rule 124 of the MCR can be conveniently incorporated into the New Code. As for the PCO, although currently no rules have been made to deal with the practice and procedure to be adopted relating to parentage, legitimacy and legitimation under the PCO, it has

been noted that on occasion reference has been made in case law in Hong Kong to Rules 3.13 and 3.16 of the Family Proceedings Rules 1991 in England and Wales. Thus, it is proposed that consideration be given to the inclusion of these rules in the New Code. Reference can also be made to the forms found in the Blood Tests (Evidence of Paternity) Regulations 1971.

***Proposals 93 and 94***

**Proposal 93**

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

*Interim 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.*

*Interim Report para. 308*

195. These two Proposals are agreeable to the respondents. Based on them, we make the following recommendations.

**Recommendation 92** (Proposal 93)

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

**Recommendation 93** (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. Particular reference should be made to Rules 3.13 and 3.16 of the Family Proceedings Rules 1991 in England and Wales and the Blood Tests (Evidence of Paternity) Regulations 1971.

**14.9 Adoption**

196. The AR applies to local adoptions and the CAR intercountry adoptions. The Working Party found that the current practice under the AR and the CAR satisfactory. However, there are two matters that need attention. The first is that there are currently no rules for certain types of applications; and the second is that for service out of jurisdiction, both the AR and the CAR merely provide that the documents must be served in accordance with the law of that place. To address these issues, the Working Party put forward Proposals 95 to 97.

***Proposals 95 to 97***

**Proposal 95**

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

*Interim Report para. 311*

Proposal 96

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

*Interim 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.*

*Interim Report para. 311*

197. These Proposals are welcomed by the respondents. Based on them, we make the following recommendations.

**Recommendation 94** (Proposal 95)

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

**Recommendation 95** (Proposal 96)

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

**Recommendation 96** (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.

#### 14.10 Separate representation of children

198. At present, 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 considered the Guidance useful but also noted the associated policy and resource implications. After due consideration, the Working Party made Proposal 98.

#### ***Proposal 98***

##### *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.*

*Interim Report para. 313*

199. This Proposal receives overwhelming support from the respondents. We make the following recommendation accordingly.

##### **Recommendation 97** (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.

#### 14.11 Other miscellaneous applications

200. To cater for other various miscellaneous applications of which no rules exist, we put forward Proposal 99.

## ***Proposal 99***

### ***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.*

*Interim Report para. 314*

201. Likewise, Proposal 99 also receives overwhelming support from the respondents. Based on it, we make the following recommendation.

### **Recommendation 98** (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.

## **SECTION 15 : INTERIM REMEDIES AND SECURITY FOR COSTS**

202. The Working Party put forward the following two Proposals relating to interim remedies and security for costs in the Interim Report for consultation.
203. 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. It was our view that these provisions should be put together, hence, Proposal 100.

### ***Proposal 100***

#### *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.*

*Interim Report para. 321*

204. Due to the special nature of family litigation, the granting of an order for security for costs is extremely rare. Nevertheless, 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 therefore suggested that the current rules be adopted.

## ***Proposal 101***

### **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.*

*Interim Report para. 326*

205. Proposal 100 is not controversial and positive response has been received from the HKLS in support of this Proposal. The Working Party would make the recommendation as proposed.

### **Recommendation 99** (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.

206. The HKLS has had no objection to Proposal 101, but cautioned that such order should only be allowed in exceptional circumstances. The Working Party would make the recommendation as proposed.

### **Recommendation 100** (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.



## SECTION 16 : EVIDENCE, ETC.

### 16.1 General procedural rules relating to evidence

207. As there are only a few procedural rules specifically relating to evidence in family and matrimonial proceedings, the Working Party proposed that the New Code should include procedural rules relating to evidence in matrimonial causes and family proceedings and the issuance of PDs to provide guidance.

#### *Proposal 102*

##### *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.*

*Interim Report para. 332*

208. This Proposal receives overwhelming support from the respondents. We make the recommendation accordingly.

##### **Recommendation 101** (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.

## 16.2 Discovery, etc.

209. At present, there are very few procedural rules which specifically deal with the issue of discovery in matrimonial causes and family proceedings. In practice, the procedures relating to discovery in matrimonial causes and family proceedings are very different from those in civil proceedings.
210. Further, the court may be required to investigate into matters such as the welfare of the children but there is now no specific provision giving the court such general power.
211. To address such situation, the Working Party put forward the following two Proposals for consultation.

### ***Proposals 103 and 104***

#### *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.*

*Interim 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.*

*Interim Report para. 340*

212. Likewise, Proposal 103 also receives overwhelming support from the respondents. Based on it, we make the following recommendation.

213. For Proposal 104, there are some concerns that the object of the proposal is to expand the power of the courts to order discovery against a third-party or non-party beyond the Norwich Pharmacal principles.<sup>13</sup>
214. It is not the intention of the Working Party to expand such power of the courts. There are now provisions in the RHC to enable the courts to request the production of documents from a third party or non-party by way of subpoena duces tecum, and there are established legal principles relating to the exercise of such power. The New Code should therefore only incorporate these existing rules in the RHC to enable the courts to make such kind of orders or to issue the subpoena if appropriate.
215. Based on the above reasons, we make the following recommendation.

**Recommendation 102** (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.

**Recommendation 103** (Proposal 104)

The New Code should incorporate the appropriate rules in the RHC, with necessary modifications, to enable the courts, in all matrimonial causes and family proceedings, to make orders on discovery of documents from a third party or non-party according to the existing legal principles.

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<sup>13</sup> *Norwich Pharmacal Co v Customs and Excise Commissioner* [1974] AC 133.

### 16.3 Experts and assessors

216. 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. The Working Party considered that, using Part 25 of the FPR 2010 as the guidelines, we should have a self-contained set of rules dealing with these matters.
217. As for hearings involving assessors, they are extremely rare in Hong Kong. We considered that the present provisions under the RHC/RDC should suffice.
218. Thus, the Working Party put forward the following two Proposals relating to experts and assessors for consultation.

#### ***Proposals 105 and 106***

##### *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.*

*Interim Report para. 347*

##### *Proposal 106*

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

*Interim Report para. 349*

219. These Proposals receive overwhelming support.
220. Under the FPR 2010, parties to matrimonial proceedings can put questions about an expert's report to an expert. If Hong Kong is to follow the same practice, there are some concerns about the resource implications if the expert is a civil servant such as a social

welfare officer. In striking a proper balance between the use of public resources and the reduction of legal costs to the parties, practice direction can be issued under the New Code to specify the circumstances under which the parties can ask such kind of experts for clarification.

221. There is also a suggestion that for those abused by their spouse or family member, the court may consider appointing medical examiners in proceedings for nullity, without the need to make any application.
222. Apparently, this view suggests that the court should be given the power to appoint medical experts on its own motion without any application by the parties.
223. As we indicate at Proposal and Recommendation 40 above, we have suggested and stakeholders have agreed that we follow the arrangements of Rule 7.26 of the FPR 2010 in that 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. Such an arrangement is more flexible than the present Rule 30 of the MCR and we suggest adopting the FPR 2010 arrangements.
224. For the above reasons, we make the recommendations accordingly.

**Recommendation 104** (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.

**Recommendation 105** (Proposal 106)

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

**16.4 Statement of truth**

225. At present, there is no provision in the MCR for the signing of a statement of truth, as in the case for general civil proceedings under Order 41A of the RHC/RDC. To address this situation, the Working Party put forward the following Proposal for Consultation.

***Proposal 107***

**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.*

*Interim Report para. 358*

226. Positive response has been received from the HKLS in support of this Proposal. The Working Party would make the recommendation as proposed.

**Recommendation 106** (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.

## SECTION 17 : TRIAL AND APPEALS

227. The Working Party proposed to consolidate the procedural rules in the MCR and the RHC/RDC relevant to trial and appeals relating to matrimonial causes and family proceedings into the New Code and put forward the following three proposals for consultation.

### ***Proposals 108 to 110***

#### *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.*

*Interim 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.*

*Interim Report para. 365*

#### *Proposal 110*

*In the event that Proposals 127 to 130 in the Interim 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.*

*Interim Report para. 366*

228. Positive response has been received from the HKLS in support of Proposals 108 and 109. The Working Party make the recommendations as proposed.

**Recommendation 107** (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.

**Recommendation 108** (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.

229. Likewise, positive response has been received from the HKLS in support of Proposal 110 and in view of the positive recommendations to be made under Recommendations 125 to 128 (i.e. the establishment of a Master system to assist the judges), the Working Party would make the recommendation as proposed.

**Recommendation 109** (Proposal 110)

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.



## SECTION 18 : SETTING ASIDE DECREE NISI/ABSOLUTE

230. In light of the Court of Appeal's recent observations,<sup>14</sup> for setting aside a decree, 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, the Working Party put forward the following Proposal for consultation.

### *Proposal 111*

#### 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.*

*Interim Report para. 372*

231. Positive response has been received from the HKLS in support of this Proposal. The Working Party would make the recommendation as proposed.

#### **Recommendation 110** (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.

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<sup>14</sup> *CFF v ZWJ*, CACV 171/2012, unreported, 27 May, 2013.

## SECTION 19 : COSTS

232. In the Interim Report, we took the view that despite the change in the English position that the “*costs follow the event*” principle has been removed in matrimonial and family proceedings and replaced by “*no order as to costs*”, nevertheless the “*costs follow the event*” as the starting point on costs in matrimonial and family proceedings should be retained. This has the benefit of giving the court a sufficiently wide discretion on costs in order to achieve justice and fairness between the parties. Any changes following the English example by setting the “*no order as to costs*” in stone would certainly have significant ramifications on the landscape of our matrimonial and family litigations. Consequently, we recommended that it is not necessary to follow the English practice and we simply proposed to incorporate into the New Code Orders 62 and 62A of the RHC/RDC with necessary modifications.

### ***Proposal 112***

#### *Proposal 112*

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

*Interim Report para. 383*

233. It has been expressed by the HKBA that any recommendation to the contrary, i.e. a change from the “costs to follow the event” goes to a change of the substantive law, which falls outside the scope of the Interim Report, but they urged that further consideration be given to the statutory changes that have been instituted in England.
234. The HKLS endorsed our proposal that Orders 62 and 62A of the RHC/RDC be incorporated into the New Code.
235. The HKFLA is in support of maintaining the present practice of Calderbank letters and allowing family judges the discretion in respect of costs. We note this accords with our recommendation.

236. The Working Party has given due regard to the views expressed. The Working Party considers that the current law and practice has served us well and should be maintained and makes the recommendation as proposed.

**Recommendation 111** (Proposal 112)

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

## SECTION 20 : ENFORCEMENT AND RECIPROCAL ENFORCEMENT

237. The rules on enforcement of orders are fragmented and scattered over a number of Ordinances. The distinction between matrimonial proceedings and family proceedings appears to be artificial but this leads to duplication of rules. To address this situation, the Working Party put forward Proposals 113 to 118 for consultation. Besides, we also suggested Proposal 119 relating to reciprocal enforcement.
238. Proposal 113 is specifically directed from the Working Party's concern over the constitutionality of our provisions regarding judgment summons for the reason that previous similar English provisions were held in contravention of the European Convention on Human Rights. The Working Party considered there is a real risk that our Hong Kong provisions might be held inconsistent with the Hong Kong Bill of Rights ("BOR").

### ***Proposal 113***

#### *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.*

*Interim Report para. 394*

239. At present, the AIOR does not apply to maintenance pending suit for spouses, and only applies to interim maintenance orders for children. The Working Party regarded the difference as an inadvertent omission when the rules were introduced. We proposed this anomaly should be remedied.

### ***Proposal 114***

#### *Proposal 114*

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

*Interim Report para. 397*

240. The Working Party proposed that all the enforcement provisions be contained in one single set of rules.

### ***Proposal 115***

#### *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.*

*Interim Report para. 418*

241. The Working Party saw the benefit of having a rule similar to Rule 33.3(2) of the FPR 2010 by which 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***

#### *Proposal 116*

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

*Interim Report para. 419*

242. The Working Party also saw the benefit of adopting the English PD 33A in facilitating enforcement of undertakings. However, we considered that the legislation underpinning for the enforcement of undertaking should be found in the New Code rather than in the PD : see Proposals 117 and 118.

***Proposals 117 and 118***

*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.*

*Interim 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.*

*Interim Report para. 424*

243. The practice and procedure on registration and transmission of maintenance orders made by a reciprocating country are set out in the MO(RE)R, which is already a single code. We were of the view that it should be incorporated into the New Code.

### ***Proposal 119***

#### **Proposal 119**

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

*Interim Report para. 428*

244. These Proposals receive overwhelming support from the respondents. Based on them, we make the following recommendations.

#### **Recommendation 112** (Proposal 113)

Amendments to the existing provisions on judgment summons should be made in light of Articles 10 and 11 of the BOR.

#### **Recommendation 113** (Proposal 114)

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

#### **Recommendation 114** (Proposal 115)

The 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.

**Recommendation 115** (Proposal 116)

Rule 33.3(2) of the FPR 2010 should be adopted into the New Code.

**Recommendation 116** (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.

**Recommendation 117** (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.

**Recommendation 118** (Proposal 119)

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



## SECTION 21 : HEARING AND REPORTING OF PROCEEDINGS

### 21.1 Hearing, reporting of proceedings and judgment and anonymisation

245. The Working Party recognized that the principle of open justice, which is firmly enshrined in case law and the BOR, is essential to the impartial and efficient administration of justice. There are, however, recognized exceptions for family cases where because of their special nature and in the interests of justice, should be heard in private. The court should have the discretion to order, in appropriate cases, hearings be open to the public.

#### ***Proposal 120***

##### *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.*

*Interim Report para. 431*

246. Proposal 120 receives overwhelming support from the respondents. In particular, the PCPD has commented that interest of the private lives of the parties is one of the reasons in the BOR Article 10 for excluding the press and the public at hearings of particular family proceedings. We make the recommendation accordingly.
247. However, we would also wish to make it clear that any provision in the New Code or PD regarding the mode of hearing in first instance courts should in no way detract from the law and practice of the Court of Appeal and the Court of Final Appeal hearing appeals from the Family Court or the Court of First Instance in open court.

**Recommendation 119** (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.

248. The Working Party understood that 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 two 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. We proposed that the present practice to be incorporated into the New Code.

***Proposal 121***

***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.*

*Interim Report para. 437*

249. The Working Party recommended that the existing provisions should be incorporated into the New Code and be extended to all children proceedings.

## ***Proposal 123***

### *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.*

*Interim Report para. 443*

250. Most respondents support Proposal 121, although some have urged for more publication of judgments in family cases and expressed concern that giving the parties a right to object to publication may result in some significant judgments not being published with the result that those who were involved in the case will have advantage over those who were not. The PCPD has suggested that dissemination of judgments can be achieved without disclosing the identities or personal particulars of the parties, bearing in mind that once a judgment is published it is difficult to regulate or restrict use of the personal data contained therein. The PCPD has recommended that measures be adopted to notify the public of the purpose of the publication of judgments and to restrict secondary use of the personal data contained therein.
251. The PCPD supports Proposal 121.
252. Since the publication of the Interim Report, the twin issues of transparency and privacy have received judicial attention in both the UK and Hong Kong.
- 252.1 In the UK, following the practice guidance on “Transparency in the Family Courts : Publication of Judgment” issued by Sir James Munby, President of the Family Division, on 16 January 2014 (which took effect on 3 February 2014) that acknowledges a need for greater transparency and for increase in the number of judgments available for publication, and that recognises anonymity may not be appropriate in certain cases (e.g. where vindication of wronged persons is required), an incremental approach has been adopted to increase publication of judgments by distinguishing between judgments that must ordinarily be allowed to be published

and those that may be published, subject always to the judge's discretion to regulate publication.

252.2 The principle of open justice, namely, that the courts may only derogate from the principle of open justice where it is strictly necessary to have a private hearing in order to achieve justice between the parties and where the degree of privacy was kept to an absolute minimum, was re-emphasised in recent UK cases.<sup>15</sup> Given the move towards greater transparency, it has been reiterated that an application to cause the appellate process to be heard in private should be rare or exceptional.

252.3 This is echoed by Ribeiro PJ recently in the final appeal concerning ancillary relief proceedings in *Kan Lai Kwan v Poon Lok To Ottoi*: “In the proceedings below the parties were anonymised, being referred to by their initials. The parties informed the Court that there was no reason for anonymity in the present case and that they had no objection to being named. They are accordingly referred to by name in this judgment. It is consistent with open justice that anonymity should be maintained only if there is good reason to follow that course.”<sup>16</sup>

252.4 On 15 August 2014, Sir James Munby issued a consultation paper “Transparency – The Next Steps” which highlights the need for greater transparency and recognition of the public's legitimate interest in being able to read what is being done by the judges in its name. For the envisaged incremental reforms to be properly informed by views of all stakeholders, Sir James Munby invites

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<sup>15</sup> See *Hohn v Hohn* [2014] EWHC 2314 (Fam) (7/7/14) in which Roberts J permitted details of private divorce hearing except financial information relating to the couple's personal and business affairs to be published (but those financial matters that have already been published can be re-reported), and *DE v AB (No 2)* [2014] EWCA Civ 1064 (24/7/14) in which the hearing of the permission for appeal in respect of a refusal of financial orders for the benefit of the parties' child and a grant of an injunction restraining both parties from disclosing documents used in the proceedings to third parties was held in public (since no member of the public chose to attend the hearing) but subject to immediate and continuing publicity protections by way of temporary confidentiality orders to last until the end of the permission hearing, and upon the permission being refused, such temporary orders were extended to protect the information disclosed during the hearing with the injunction remaining intact.

<sup>16</sup> FACV Nos 20 & 21 of 2013 (17/7/14) para. 145.

comments on the impact and the working of the earlier practice guidance, and seeks views on (a) improving the information that is provided by the listing of cases in the family courts; (b) disclosing certain categories of documents to the media with appropriate restrictions and safeguards; and (c) piloting disclosure of documents prepared by the advocates and possibly expert reports or extracts thereof, as well as pre-consultation views about possible hearing in public of certain types of family cases by way of a pilot scheme.

253. The recent developments in the UK have yet to mature. Overseas developments may also inform local developments in respect of transparency in family proceedings.
254. In light of the above recent developments in both the UK and Hong Kong, the Working Party notes at the time of preparing the Final Report that the Judiciary is, in consultation with the relevant stakeholders, preparing a PD on anonymisation, and publication of judgments in family and matrimonial proceedings. The draft PD includes in substance Proposals 121 and 123.
255. In the circumstances, it is not necessary for us to make any recommendation based on Proposals 121 and 123 now. We recommend that the PD, once promulgated, should be retained in the PDs issued under the New Code.

**Recommendation 120** (Proposals 121 and 123)

The proposed PD on anonymisation and publication of judgments in family and matrimonial proceedings, once promulgated, should be retained in the PDs issued under the New Code.

## 21.2 Access to court documents

### *Proposal 122*

#### 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.*

*Interim Report para. 440*

256. Proposal 122 receives support from the respondents. We make the recommendation accordingly.

#### **Recommendation 121** (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.

## 21.3 A new Part

257. The provisions relating to hearing and reporting of proceedings, access to court documents, anonymisation of parties and judgments and orders are currently scattered in different places. To tackle this situation, we put forward Proposal 124.

### ***Proposal 124***

#### *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.*

*Interim Report para. 444*

258. The Proposal is uncontroversial. We make the recommendation accordingly.

#### **Recommendation 122** (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.

## SECTION 22 : REPRESENTATION

259. It has been the practice of the Family Court Registry to accept a respondent's Notice of Intention to Act in Person giving an address outside the jurisdiction for service. The Working Party considered that given the reality that there is now a significant number of parties residing out of the jurisdiction, notably in the Mainland, the requirement of providing an address within the jurisdiction may cause inconvenience and even hardship on them. Further, if a respondent is allowed to give an address out of the jurisdiction, one may question why a petitioner should not be allowed to do so. The Working Party therefore invited views on this issue.
260. Further, in line with our general theme, there should be one set of codes for both matrimonial and family proceedings.

### *Proposals 125 and 126*

#### *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.*

*Interim 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.*

*Interim Report para. 458*



261. The HKBA and the HKLS have endorsed the recommendation that the existing Order 67 of the RHC/RDC should be incorporated into the New Code.
262. On whether or not an address within the jurisdiction should be given, the general view appears to be that a Hong Kong address for service should be given, though it has been noted by some members of the HKFLA that Rule 29.1 of the FPR 2010 expressly provides that unless the court directs otherwise, a party is not required to reveal their home address or other contact details. The details must be given to the court but not to other parties unless the court so directs.
263. Those in support of a Hong Kong address for service took the view that if parties are engaging in Hong Kong proceedings, a local address should be provided to facilitate quick and efficient service. On the other hand, there is concern that if one or both parties is/are litigant(s) in person, and residing out of Hong Kong, an address in Hong Kong may not be available.
264. Matrimonial proceedings are of great consequences since they affect essentially all aspects of parties' family life : their marital status, the welfare of their children and their assets. The Working Party therefore considers that parties should be motivated to engage and to respond to the proceedings rather than leaving one side to proceed on de-facto ex-parte basis. Further, it should also be noted that as regards matrimonial proceedings, leave from the court is not required for service out of the jurisdiction of Hong Kong. This is different from other family proceedings and general civil matters where such proceedings are governed by the RHC or the RDC and accordingly leave from the court is required pursuant to Order 11 of the RHC/RDC.
265. On the other hand, the Working Party also bears in mind that the practice in matrimonial proceedings should as far as possible align with that in family proceedings and in general civil matters where pursuant to Order 12, rule 3(2)(a) and Order 67, rule 4 of the RHC/RDC, a respondent/defendant must give an address within the jurisdiction for service.
266. The Working Party has carefully considered the views expressed by the stakeholders and has come to the view that as a matter of principle, the general position should remain to be that parties are

required to give an address in Hong Kong for service. That said, bearing in mind that parties should be motivated to engage, the Working Party considers that a proper balance should be struck and that can be achieved by giving the court the discretion to dispense with the requirement and allow a party to give an address out of Hong Kong for service in case of genuine difficulty and hardship in the compliance of the requirement. We make the following recommendation accordingly.

**Recommendation 123** (Proposal 125)

Subject to leave being obtained from the court, an address within the jurisdiction should be given for service. Subject to the foregoing, it is proposed to incorporate the existing Order 67 of the RHC/RDC into the New Code.

267. We have not received any views contrary to Proposal 126. We make the following recommendation accordingly.

**Recommendation 124** (Proposal 126)

There should be 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.

## SECTION 23 : REGISTRAR AND MASTERS

268. The Working Party considered that the Family Court should have its own Registrar, who should be the Registrar of the District Court, as well as its own Masters. We also recommended that the duties of the Registrar should be expanded to cover simple applications, and that the Registrar may under the general or special directions of a judge hear and determine certain applications, and that the jurisdiction, powers and duties of the Registrar may be exercised and performed by a Master. We put forward Proposals 127 to 130 below relating to the jurisdiction, powers and duties of proposed Registrar and Masters for consultation.

### *Proposals 127 to 130*

#### 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.*

*Interim 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.*

*Interim 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.*

*Interim 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.*

*Interim Report para. 466*

269. Whilst there are minor concerns raised on matters like the Registrar's powers and jurisdiction; or whether there would be confusion due to another layer of judicial officers being employed, the general response, including that from the HKLS is positive. After considering all these responses, the Working Party would recommend the adoption of all these four Proposals concerning Registrar/Masters.

**Recommendation 125** (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.

**Recommendation 126** (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.

**Recommendation 127** (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.

**Recommendation 128** (Proposal 130)

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

## SECTION 24 : MODERNIZATION OF LANGUAGE

270. The Working Party considered that modernization 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 modernization is the use of plain language. We put forward the following Proposal relating to modernization of language for consultation.

### ***Proposal 131***

#### *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.*

*Interim Report para. 475*

271. There is overwhelming support for Proposal 131.
272. As mentioned earlier in relation to Proposal 26, there is a suggestion in the responses for simplification of statutory forms to help unrepresented litigants and other users to understand the procedures.
273. We have agreed to include simplification of statutory forms in Recommendation 26, and will similarly include this in Recommendation 129.

**Recommendation 129** (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, and the statutory forms may be simplified. Further consideration should be given as to how to pursue this objective as far as practicable, bearing in mind the various concerns.

## SECTION 25 : MICELLANEOUS TOPICS

274. Implementation of the above recommendations is likely to give rise to resource implications and require infrastructural support in various ways. The Working Party considered it likely that additional resources and support are needed in the areas of manpower resources, system support, training, assistance to litigants in person and public education. The Working Party put forward five proposals relating to the relevant issues for consultation.
275. The Working Party proposed to provide greater support to family judges, including creation of additional Registrar/Master posts etc. in order to help ease their workload. To assess the implications, we made Proposal 132.

### *Proposals 132*

#### *Proposal 132*

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

*Interim Report para. 482*

276. This Proposal receives general support from the respondents. One LegCo member of the AJLS Panel has considered that to tie in with the introduction of the New Code, it is necessary to increase the manpower and financial resources to strengthen other supporting services for the Family Court.
277. The Working Party understands that the Judiciary will carry out a detailed assessment on the organizational and manpower implications of the recommendations in the overall context of the prevailing and anticipated workload of the Family Court. The assessment would include an analysis of the workload of the judges and judicial officers (“JJOs”) dealing with matrimonial and family cases, related workflow and procedural changes arising from the implementation of the New Code and other proposals, the additional JJOs and extra supporting staff that would be so required.



278. We make the recommendation accordingly.

**Recommendation 130** (Proposal 132)

The Judiciary should carry out an assessment on the organisational and manpower implications of the recommendations against the overall context of the prevailing and anticipated workload in the Family Court. Consideration should be given to in particular the need to create additional Registrar/Master posts.

279. The Working Party considered that the Judiciary should assess the implications of our proposals on the IT systems of the courts. We therefore put forward Proposal 133 below.

***Proposals 133***

**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.*

*Interim Report para. 484*

280. The Working Party understands that the Judiciary aims to provide effective and efficient services of high quality to all stakeholders through adoption of Information Technology (“IT”). In the context of the Judiciary-wide Information Technology Strategy Plan (“ITSP”), the Judiciary plans to implement the integrated court management system to the Family Court during Phase II implementation of the ITSP tentatively scheduled for 2019 to 2022.

281. The Judiciary will conduct a study on the scope of system changes and enhancements required for implementing the New Code. In the context of the Phase II of the ITSP, the Judiciary would enhance the IT systems of the Family Court to introduce electronic

services, as appropriate, to enable court users to interact with the Judiciary in a more convenient fashion, which may include enabling electronic submission of documents, electronic / online payment, and use of electronic documents in the litigation processes. However, if in the interim there is a need to introduce early changes, they would be favourably considered so long as they do not prejudice against the long-term objectives of the ITSP.

282. We note that Proposal 133 is generally supported by the respondents. A few respondents have suggested that the court should provide more electronic services to facilitate the parties.
283. Having regard to the above responses, we make the following recommendation.

**Recommendation 131** (Proposal 133)

In taking forward the proposals, the Judiciary should undertake 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.

284. To ensure a smooth transition to the proposed New Code, the Working Party considered that necessary training should be given to JJOs dealing with family cases and the support court staff. Besides, suitable training should be conducted for the practitioners by the relevant legal professional bodies with support from the Judiciary. We therefore put forward the following proposal.

***Proposals 134***

**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.*

*Interim Report para. 485*

285. The Working Party appreciates that the Judiciary attaches great importance to the need for proper and timely training during the implementation of the New Code. With the establishment of the Judicial Institute, the Judiciary will be able to enhance the judicial skills and knowledge of the JJOs in the Family Court through the development of continuing and more structured judicial education programmes.
286. The Judiciary has no difficulty with this Proposal which is not controversial either. Accordingly, we make the recommendation below.

**Recommendation 132** (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.

287. To enhance the understanding of the overall procedures set out in the New Code by the litigants in person and other stakeholders (e.g. family and welfare organizations), the Working Party put forward Proposals 135 and 136 relating to publicity materials.

***Proposals 135 and 136***

**Proposal 135**

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

*Interim 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*

*Interim Report para. 487*

288. The Working Party understands from the Judiciary that they consider it important and beneficial to enhance the understanding of the overall procedures by the litigants in person. To enable the litigants in person, the members of the public and the family and welfare organizations which are providing assistance to litigants in family proceedings to have a good general understanding of the New Code, the Judiciary would consider the following publicity initiatives :-

- (a) to produce information sheets to highlight the major changes under the New Code;
- (b) to produce leaflets on family proceedings;
- (c) to issue press releases; and
- (d) to produce and display notices at various court premises to inform court users about the New Code.

289. These Proposals receive positive responses from the respondents. We make the following recommendation accordingly.

**Recommendation 133** (Proposals 135 and 136)

The Judiciary should produce publicity materials to enable court users, interested bodies and members of the public to have a good general understanding of the New Code. In particular, suitable materials should be prepared to assist the litigants in person in navigating through the process.

# *APPENDIX*

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**List of Individual Respondents**  
(in alphabetical order)

Ms Susan JOHNSON, solicitor

Somebody named “LUI”

Somebody named “Litigants in person”

Ms Jane MOIR, barrister

Ms Maureen MUELLER, solicitor without practicing certificate, family mediator and parenting co-ordinator

Miss Cynthia YEN, solicitor not in private practice and family mediator