第一章

香港民事司法改革

Chapter 1

REFORM OF THE CIVIL JUSTICE SYSTEM IN HONG KONG

改革的起動

為了完善我們的民事司法制度，確保民事訴訟可在合理的時間內、用合理的費用、通過更簡便的程序獲得公正審理，終審法院首席法官 2000 年 2 月委任民事司法制度改革工作小組，對高等法院的民事規則和程序進行檢討並提出修改建議。

小組的成員包括：

主席：終審法院常任法官陳兆愷（2000 年 8 月 31 日前為高等法院首席法官）

副主席：終審法院常任法官李義

委員：高等法院上訴法庭副庭長羅傑志

高等法院原訟法庭法官孫國治

高等法院原訟法庭法官夏正民

高等法院原訟法庭法官朱芬齡

律政司民事法律專員溫法德先生，經諮詢律政司司長後獲委任為小組成員

法律援助署署長陳樹鏘先生

資深大律師馬道立，經諮詢香港大律師公會主席後獲委任為小組成員

律師史沛加先生，經諮詢香港律師會主席後獲委任為小組成員

終審法院常任法官李義（工作小組副主席）解釋諮詢文件的建議
The Hon Mr Justice Ribeiro, Permanent Judge of the Court of Final Appeal and Deputy Chairman of the Working Party, details some of the recommendations

TOWARDS REFORM

In February 2000, the Honourable Chief Justice appointed a Working Party to review the civil rules and procedures of the High Court and to recommend changes with a view to ensuring and improving access to justice at reasonable cost and speed.

The Working Party comprises the following members –

The Hon Mr Justice Chan, Chief Judge of the High Court (until August 31, 2000), Permanent Judge of the Court of Final Appeal (Chairman)

The Hon Mr Justice Ribeiro, Permanent Judge of the Court of Final Appeal (Deputy Chairman)

The Hon Mr Justice Rogers, Vice-President of the Court of Appeal

The Hon Mr Justice Seagroatt, Judge of the Court of First Instance

The Hon Mr Justice Hartmann, Judge of the Court of First Instance

The Hon Madam Justice Chu, Judge of the Court of First Instance

Mr Ian Wingfield, Law Officer (Civil Law), Member of the Department of Justice appointed in consultation with the Secretary for Justice

Mr Chan Shu-ying, Director of Legal Aid

香港大學教授韋健信先生

消費者委員會總幹事陳黃穗女士

秘書：高等法院原訟法庭暫委法官潘兆初

工作小組就上述的民事司法改革草擬了中期報告和諮詢文件，並於2001年11月向法庭使用者、法律界和其他關注這項改革的公眾人士派發，諮詢各方意見。諮詢文件匯報了其他國家相關制度的改革經驗，檢討了香港現時的民事司法狀況，並提出了可行的改革方案。

民事司法制度改革工作小組主席陳兆愷法官
The Hon Mr Justice Patrick Chan, Chairman of the Working Party on Civil Justice Reform

出席的工作小組成員於記者會上合照
Group photo of members of the Working Party attending the press conference

Mr Geoffrey Ma S.C., Barrister appointed in consultation with the Chairman of the Bar Association

Mr Patrick Swain, Solicitor appointed in consultation with the President of the Law Society

Professor Michael Wilkinson, University of Hong Kong

Mrs Pamela Chan, Chief Executive of the Consumer Council

Deputy Judge Poon, Deputy Judge of the Court of First Instance (Secretary)

The Working Party drew up an Interim Report and Consultative Paper on the Civil Justice Reform and issued it in November 2001 to invite feedback and comments from court users, legal professionals, and interested members of the public. The Paper seeks to report on reforms in other jurisdictions relevant to Hong Kong, to review the available evidence as to the state of civil justice in Hong Kong, and to formulate proposals for possible reform for consultative purpose.

宣布諮詢工作展開
Announcement of the launching of the consultation exercise

改革的必要

民事司法制度

一個地方的民事司法制度除了保證人們能享受其基本權利和自由外，還確保個人和團體能有效地行使其法律上的權利，因此是所有投資、商業和非商業交易背後的重要支柱。社會的某些階層，如果因為費用高昂、訴訟遲延、程序難懂或其他原因而無法使用這項制度，就等於被剝奪了尋求公正的權利。

外國民事司法制度面對的壓力

社會不斷轉變，科技日新月異，因此各種各類的交易數量激增、流轉速度愈來愈快、過程愈見複雜，相應地發展起來的法律和案例也同樣錯綜複雜。隨之而來的是，世界各地民事糾紛和民事訴訟大量湧現，各國的民事司法制度都因而承擔著沉重的壓力。民事制度受到的種種評擊來自四方八面，例如認為程序太慢、太昂貴或太繁雜，雙方的訴訟地位因經濟能力懸殊而太不平等、太強調訴訟的對抗形式、程序太容易被濫用等。在批判的聲音中多個國家已紛紛提出改革方案。

NEED FOR REFORMS

The Civil Justice System

The existence of a civil justice system enabling individuals and corporations to effectively enforce their legal rights underpins all investment, commercial and domestic transactions, as well as the enjoyment of all basic rights and freedoms. If the system becomes inaccessible to segments of society, whether because of expense, delay, incomprehensibility or otherwise, it deprives them of access to justice.

Pressures on Many Civil Justice Systems

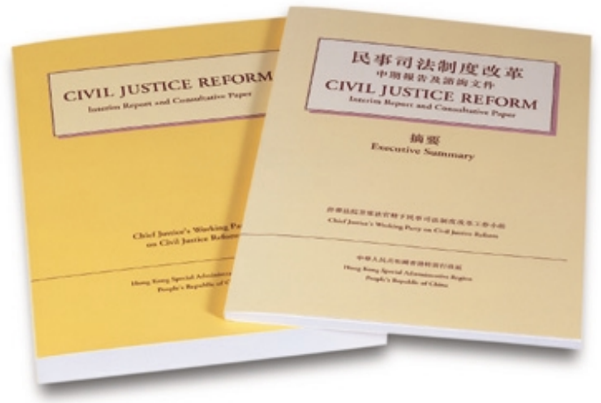
Social changes and technological advances have resulted in a sharp increase in the number, rapidity and complexity of transactions, matched by increased complexity in legislation and case-law. These changes have put pressure on civil justice systems all over the world, generating large numbers of civil disputes and court proceedings. Criticisms on these systems for being too slow, too expensive, too complex, too unequal between wealthy and less wealthy litigants, too adversarial and too susceptible to abuse in responding to such pressure have led to proposals for reform in many countries.

英格蘭和威爾斯高等法院院長伍爾夫勳爵（Lord Woolf）對民事司法改革進行了意義深遠的研究，並分別在1995年6月和1996年7月發表了中期和最後報告。英格蘭和威爾斯繼承了他的改革思路，終於制訂了《民事程序規則》，該規則已於1999年4月生效。伍爾夫勳爵的研究報告指出，對抗式訴訟的一些原則適用在民事司法制度中已產生了種種弊端。他更認為由於這些原則運用不當，制度的多項重要內容已經變得面目全非，這種情況在訴狀、證據披露、專家證供、證人供詞和案件管理等方面明顯可見。

伍爾夫勳爵觀察入微，見解獨到，其他普通法國家如澳大利亞、加拿大等無不表示贊同。這些國家都普遍意識到本身的民事司法制度危機重重。各方意見認為，香港的民事司法制度也出現了同樣的問題，無論是過高的訟費或程序上無法容忍的遲延，都對制度本身造成嚴重影響。

Lord Woolf, the Lord Chief Justice of England and Wales, conducted an influential study and published an Interim Report in June 1995 and a Final Report in July 1996, leading to enactment in England and Wales of the Civil Procedure Rules ("CPR") which entered into force in April 1999. Lord Woolf identifies the main cause of the ills and inappropriate application of adversarial principles in the civil justice system, resulting in a distortion of important features of the system. These relate to areas such as pleadings, discovery, expert evidence, witness statements and case management.

These observations struck a sympathetic chord with many common law jurisdictions such as Australia and Canada. A sense of crisis in the administration of civil justice is widespread among the countries. It is a widely-held view that Hong Kong's civil justice system suffers from similar problems. The problems, whether they take the form of exorbitant costs or of excessive delays, do have serious implications.



香港民事司法制度面對的壓力

費用昂貴

訴訟成本過高，即申索本身過度耗費，或訟費高昂得使經濟能力有限的法庭使用者無法負擔，都會導致訴訟權利無法行使及失去保障。此外，經濟能力不對等的訴訟人訴訟地位本來就不平等，訟費過高會造就機會容許經濟能力較強的一方用「以本欺人」的策略取盡優勢，激化這種不平等現象。

除此以外，香港作為商業及金融中心應有的競爭力，亦因訴訟費昂貴而正被磨損於無形之中。證據顯示，一些民事訴訟人因為香港的訴訟費太昂貴而寧願選擇其他地方作為紛爭解決地。與其他地方相比，香港的營商環境已經稍遜一籌，法律界部分業務亦已因此流失。

近期高等法院的訟費單記錄亦顯示，小額案件特別是和解協議金額或獲判金額不足港幣60萬的案件中，成功討回的訴訟費，往往不足以抵消律師費和其他訴訟開支。

（左起）高等法院暫委法官潘兆初、李義法官、陳兆愷法官、原訟法庭法官孫國冶和朱芬齡
(From left) Deputy Judge Poon, High Court; the Hon Mr Justice Ribeiro; the Hon Mr Justice Patrick Chan; the Hon Mr Justice Seagroatt and the Hon Madam Justice Chu, Judges of the Court of First Instance

PRESSURES ON THE HONG KONG SYSTEM

Expense

Where the cost of litigation becomes too high, whether when compared with the resources of potential court users or relative to the amount of the claim, it endangers one's rights, putting them out of reach if they become too expensive to enforce. It also increases inequality between the wealthier and the poorer litigant, the former being able to use his deeper pockets as a strategic or tactical advantage.

Moreover, high litigation costs undermine Hong Kong's competitive position as a commercial and financial centre. Evidence exists that the parties to some civil disputes have been opting to avoid Hong Kong as a venue for resolving such disputes because litigating here is too expensive. This has made Hong Kong a less attractive place to do business in and also led to a loss of work for the legal profession.

An examination of recent High Court taxed bills also reveals that the sums claimed or recovered in the smaller cases, especially those involving awards or settlements of up to HK$600,000, are often not sufficient to cover the legal fees and expenses.

高等法院原訟法庭法官朱芬齡闡釋改革建議的內容
The Hon Madam Justice Chu, Judge of the Court of First Instance, elaborates on the recommendations

程序遲延

遲延公正等於不公正。一項權利的行使如果耗時過久，以致濟助因為姍姍來遲而失掉價值，那麼這項權利的存在只屬空談，根本不具有任何實際意義。雖然現時遲延的情況還不至於造成危機，但數字顯示，程序的遲延在多方面表露無遺，涉及非正審申請的爭議或非正審上訴的程序尤其明顯。

另外，證據亦顯示，在相當多的案件中審訊即將開始或剛開始時雙方就能達成和解。

程序複雜

香港的《高等法院規則》是以英國的《最高法院規則》為藍本的，而伍爾夫改革的另外一項重要內容是以《民事程序規則》取代這套內容複雜的《最高法院規則》。英國的新《民事程序規則》結構比較簡單，又採用了現代語言，因此條文比以前更易讀易懂。新規則的另外一個特色就是，它要求法庭在處理程序問題時更廣、更多地行使酌情權。

無律師代表的訴訟人漸多

根據現有資料顯示，香港的民事訴訟人當中愈來愈多是沒有律師代表的。傳統的民事訴訟制度怎樣適應這種現象是一個難題。傳統的制度在設計時假設了訴訟各方都懂得按規定的步驟展開訴訟，但事實上現時沒有律師代表的訴訟人不一定懂得程序，這對訴訟的進度造成阻礙。

Delay

Justice delayed is tantamount to justice denied. The existence of a right becomes merely theoretical if its enforcement takes so long that the relief comes too late to be of value. While delays are not of crisis proportions, the available statistics show that there are significant procedural delays in various areas, particularly where contested interlocutory applications or interlocutory appeals occur.

The evidence also shows that a large proportion of cases settle at the courtroom door or after start of the trial.

Complexity

Another aspect of Lord Woolf's reforms involves replacing the complex Rules of the Supreme Court ("RSC"), upon which Hong Kong's High Court Rules ("HCR") are based, with the Civil Procedure Rules ("CPR"). With the simplified structure and the modernised language of the CPR, the rules are more readable and understandable. More importantly, the CPR require the court to exercise a wide discretion when deciding procedural points.

Unrepresented Litigants

The available evidence indicates that unrepresented litigants are appearing in increasing numbers in Hong Kong. They present particular challenges to the traditional civil justice system which is designed on the assumption that the parties can be relied on to take the necessary procedural steps to bring the case to trial. This does not hold good for litigants in person, resulting in difficulties in progressing the cases.

香港當前的問題

當前種種證據表明了香港的民事司法制度也存在著很多在其他民事司法制度已呈現的弊端。在香港進行民事訴訟在不同程度上都實在太昂貴、耗時太長，而且程序太強調對抗形式，對無律師代表的訴訟人來說也太難懂；我們的制度又容許故意拖延的訴訟人用各種策略操控訴訟程序的進度。再者，現有規則所規定應履行的程序，其複雜程度與案件之大小繁簡不相稱。

鑒于上述背景，工作小組認為極需要進行改革以消除種種弊端，改善我們的民事司法制度。

改革方針

多方位改革

改革要取得成效，僅僅修改具體的規則顯然是不足夠的，必須同時從更新訴訟理念，改變業界和社會的訴訟觀念著眼。任何新的規則都必須有新的訴訟文化作為基礎，才能發揮實際效用。

Present Problems in Hong Kong

The available evidence indicates that the civil justice system in Hong Kong shares the defects found in many other systems. In varying degrees, litigation in our jurisdiction is too expensive, too slow, too adversarial, too incomprehensible to litigants in person, and too susceptible to tactical manipulation by obstructionist parties to delay proceedings. Furthermore, the system of rules imposing procedural obligations are often disproportionate to the needs of the case.

Therefore, in the view of the Working Party, there is a strong need for reforms to overcome these deficiencies and to improve the performance of our civil justice system.

THE APPROACH

Coordinated Reforms on a Broad Front

While reforms to the procedural rules are a vital element of any attempt to cure the defects in our civil justice system, changing the rules alone cannot be a sufficient response. The rules function in an institutional, professional and social framework which must also undergo complementary and supporting changes if the reforms are to succeed.

小組成員之一律師史沛加先生（右二）回答記者提問
Mr Patrick Swain, Solicitor and member of the Working Group (second right), responds to press enquiry

從訴訟成本考慮

規則的改革不一定能減省訟費。某項改革可能使某些案件的訟費得以降低，但與此同時，亦可能提高了其他類別案件的費用。規則的修改究竟可否降低整體的訟費，實難斷言，原因是無論規則如何改變，律師費仍然受制於法律服務的市場要求。

英國和威爾斯的訴訟規則引進了伍爾夫勳爵提議的《訴前規程》作為爭訟雙方訴前行為的指引，目的是在早階段強化法庭的案件管理。但《訴前規程》的引入，使訴訟人必須在訴訟初期承擔一部分的訟費。

有些人可能會認為，如果雙方在訴訟開始不久就達成和解，這部分的訟費就白花掉了。不過，因為《訴前規程》迫使雙方和代表律師盡快理解爭議所在並在早期就盤算好自己的勝訴機會，所以或許會有更多案件可以在開審前或剛開審就能以和解結案。

縱使案件不能在早期和解，《訴前規程》的履行雖然會增加了訟費的前期負荷，但能使雙方在一開始就把爭議的範圍集中界定，這樣也能節省由不必要的非正審活動而引致的開支。

律政司民事法律專員溫法德先生翻閱諮詢文件。旁為夏正民法官（右）和韋健信教授
Mr Ian Wingfield, Law Officer (Civil Law) of the Department of Justice (centre), leafs through the Consultative Paper. At his sides are the Hon Mr Justice Hartmann (right) and Professor Wilkinson

Reforms and Expense

Reforming the rules may not necessarily mean reducing litigation costs. It may save costs in certain classes of cases but increase costs in others. It may be difficult to tell whether the changes will result in overall savings. This is because the rules function in a system involving a market for legal services.

Pre-action protocols brought in by Lord Woolf in England and Wales serve as guidelines as to reasonable conduct by parties to a dispute before proceedings commence. They aim at encouraging early settlement and enabling effective case management by the court at an early stage. However, they have resulted in "front-end loading" of costs, that is, the parties have to incur costs at an earlier stage of the proceedings.

Some may argue that for cases which settle shortly after the proceedings are commenced, such costs would have been incurred unnecessarily. However, more cases may settle before or shortly after the start of proceedings because the pre-action protocols bring the parties and their lawyers to a more advanced appreciation of the issues and relative merits sooner.

For cases which do not settle quickly, then the work funded by the front-end costs will have brought the issues into sharper focus from the outset, making it likely that the parties will avoid the cost of unnecessary interlocutory activities.

法律援助署署長陳樹鋭先生（左）和消費者委員會總幹事陳黃穗女士
Mr Chan Shu-ying, Director of Legal Aid (left) and Mrs Pamela Chan, Chief Executive of the Consumer Council

儘管訟費的改革會造成甚麼影響是無法確定的，但我們仍然可以肯定，某類的程序改革很可能會降低訴訟成本，舉例說：

- 進行減低訟費、消除遲延和簡化程序的各種改革，以體現程序公正這個首要原則
- 修改現行規則所規定的案無大小一概適用的一套程序，並按爭議的輕重繁簡適當地設定訴訟人應履行的程序義務
- 阻止任何一方在草擬證人證詞或專家報告的時候肆意堆砌內容
- 鼓勵訴訟各方盡早和解
- 使訴訟各方對案件發展的前景有較明確的認識，從而讓他們更容易預計訴訟成本，特別是律師費
- 為了貫徹節約成本的原則，設立賞懲制度，藉此一方面鼓勵節省訟費，另一方面令虛耗訟費的一方受到直接生效的當然制裁

借鑑其他國家的改革

工作小組可以從世界多國的民事司法改革吸取不少經驗。然而，對香港來說最值得借鑑的就莫過於伍爾夫勳爵所倡議的改革和在英國和威爾斯已經實施了兩年多的新《民事程序規則》。工作小組在考慮應怎樣改革香港的民事司法制度時，就以伍爾夫改革作為參照標準，並大量借鑑了澳大利亞的改革經驗。

Notwithstanding the uncertain impact of reforms on costs, it is certain that particular procedural reforms are likely to reduce costs. This applies, for example, to reforms seeking:

- To counter excessive cost, delay and complexity as part of the overriding procedural justice
- To change rules which impose blanket interlocutory obligations that are often disproportionate to the issues in a case
- To discourage the overworking of witness statements or expert reports
- To encourage early settlement between parties
- To make the parties' potential liability to costs, in particular, the legal costs, more transparent and easier to assess
- To devise a system of incentives and self-executing sanctions aimed at enforcing procedural economy

Reforms in Other Jurisdictions

The Working Party was able to draw upon much work on civil justice reform done in a number of jurisdictions. However, the reforms having particular relevance to Hong Kong are those promoted by Lord Woolf and implemented by the CPR, which have been in force in England and Wales for over two years. The Working Party has therefore used the Woolf reforms as a framework for considering the options for possible civil justice system reforms in Hong Kong. The Working Party also drew extensively from the Australian experiences in this area.

參考伍爾夫改革的主要概念

英國的新《民事訴訟規則》體現了伍爾夫改革的兩個主要概念：

- 為整個制度確立一個首要目標，同時重新制訂一套既要與首要目標配合又必須按首要目標來詮釋或運用的程序規則
- 對民事訴訟程序進行全面的案件管理

新《民事程序規則》是一套程序法則，其首要目標是確保法院公正地審理案件。首要目標一章勾畫出如程序公正和節約成本等整個民事司法制度的基本原則。法院無論按新規則行使權力或對該規則進行詮釋，都必須以首要目標為依歸；訴訟各方亦必須協助法院實現這項首要目標。

《民事程序規則》頒佈之前，在許多地方包括香港，法官在司法實踐中都已承認有加強案件管理的必要。《民事程序規則》具體列舉了怎樣進行積極案件管理，並明文規定法院在案件管理上的職權。

陳兆愷法官（中）公布將就民事司法制度改革展開為期五個月的諮詢
The Hon Mr Justice Partick Chan (centre) announces the launching of a 5-month long consultation exercise on civil justice reform

The Main Concepts Underlying the Woolf Reforms

Two key concepts underlying the Woolf reforms as implemented by the CPR are:

- Adoption of an explicit overriding objective for the system, complemented by a new set of procedural rules to be construed and operated in accordance with the overriding objective
- Adoption of a comprehensive case management approach to civil procedure

The CPR are a new procedural code with the overriding objective of enabling the court to deal with cases justly. The overriding objective sets out principles of procedural justice and economy to be treated as the foundation of the system. The court must seek to give effect to the overriding objective when it exercises any power given to it by the CPR or interprets any rule. The parties are required to help the court to further the overriding objective.

Before the enactment of the CPR, judges in many jurisdictions, including Hong Kong, have recognised the need for more proactive case management by the court. The CPR define the elements of active case management and expressly provide for the court's case management powers.

改革建議概要

工作小組提出了一共 80 條具體的改革建議，我們的改革如果涉及制訂一套全新的規則，這些建議將收納為新內容的一部分；如果我們只在現有《高等法院規則》的基礎上進行修改，建議條文則可作為修改部分。

這些建議包括：確立首要目標和《訴前規程》，制訂條文列舉法院對案件管理的職權及訂明如何消除狀書制度隱含的弊端。工作小組亦建議重新設定採用簡易程序的準則，制定關於和解要約和向法庭付款提出和解的各種新規範，並建議引入全面的、以進度指標為本的案件管理制度。

改革建議還涉及文件披露制度、非正審申請、證人供詞、專家證供、上訴制度、訟費、非訴訟方式的紛爭解決制度和司法覆核等。此外，小組亦就如何簡化訴訟開展的模式作了建議，又提出如何精簡程序，使一方在另一方不履行程序指定的步驟時，更容易取得勝訴判決。

諮詢程序

工作小組決定就改革方針和他們提出的具體建議進行廣泛諮詢，以收集法律界、關注這項改革的人士和社會大眾的意見。小組會全面考慮所得意見才向終審法院首席法官提交可行建議。

POSSIBLE REFORMS IN SPECIFIC AREAS

The Working Party identified a total of 80 specific reform proposals. They may be adopted either as part of a new set of rules or as amendments to the existing High Court Rules.

The proposals include the adoption of an overriding objective, pre-action protocols, provisions setting out the court's case management powers and measures to cure the defects in pleadings. The Working Party also put forward proposals to introduce a new test for summary disposal of proceedings, new offers of settlement and payment into court, comprehensive and milestone-based case management.

There are reform proposals on areas such as discovery, interlocutory applications, witness statements, expert evidence, appeals, costs, alternative dispute resolution and judicial review. Proposals to simplify the mode of commencing proceedings and to streamline the procedure for obtaining default judgments are also included.

THE CONSULTATION EXERCISE

The Working Party decided to conduct a comprehensive consultation exercise to gauge views and feedback from the legal professionals, other interested parties and the community at large on the approach of and specific proposals on the civil justice reform. The Working Party will take into consideration all the comments and representations received before coming up with practicable recommendations to the Chief Justice.

傳媒踴躍出席記者會
The launch of the consultation exercise draws good attention from the media

工作小組 2001 年 11 月發表了中期報告和諮詢文件，同月 29 日舉行了記者招待會介紹諮詢文件和諮詢計劃。獨立網站 http://www.civiljustice.gov.hk 亦於 11 月 29 日啟用，讓公眾人士在網上瀏覽諮詢文件全文或其摘要，查詢最新諮詢活動，或向工作小組提出意見。

司法機構已經向法律界、學術界、政府部門、公共機構、法庭使用者和其他關注此事的人士和團體提供了足夠數量的中期報告和諮詢文件以及文件摘要的印刷本。

積極的諮詢工作已經展開，並會持續至 2002 年 4 月底。

工作小組考慮諮詢得來的意見後會向終審法院首席法官提交具體的建議。

The Working Party published an Interim Report and Consultative Paper in November 2001. The Working Party hosted a media conference on November 29, 2001 to introduce the Consultative Paper and the consultation plan. At the same time, the web-site http://www.civiljustice.gov.hk was promulgated. Members of the public can gain access to the full Consultative Paper and its Executive Summary, obtain an update on forthcoming consultation events, and send their comments to the Working Party through the web-site.

Sufficient copies of the Interim Report and Consultative Paper and the Executive Summary have been made available to members of the legal profession, academic institutions, government departments and public bodies, court users, interested parties and organisations.

Active consultation has since been taking place and will progress until the end of April 2002.

The Working Party will then consider comments received and will proceed to come up with specific recommendations for the consideration of the Chief Justice.