Chapter 1

REFORM OF THE CIVIL JUSTICE SYSTEM IN HONG KONG
改革的起动

为了完善我们的民事司法制度，确保民事诉讼可在合理的时限内，用合理的费用，通过更简便的程序得到公正审理，终审法院首席法官于2000年2月委任民事司法制度改革工作小组，对高等法院的民事规则和程序进行检讨并提出改进建议。

小组的成员包括：
主席：终审法院首席法官陈兆恺（2000年8月31日前任高等法院首席法官）
副主席：终审法院首席法官李义
委员：高等法院上诉法庭庭长黄华志
高等法院上诉法庭法官张国治
高等法院上诉法庭法官方正民
高等法院上诉法庭法官朱凤龄
律师及民商界法律专家黄德洁先生，前常聘律师司司长兼政务司司长陈振德
法律援助署署长黎根 órg

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

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

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.
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.

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.
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 there 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.

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.

程序複雜
程序複雜等於不公正。一項權利的行使如非耗時過久，以致債主因為機構之臃腫而失掉價值，那麼這項權利的存在只屬空談，根本不具有任何實際意義。雖然現時遲鈍的情況尚不至于造成危機，但數字顯示，程序的複雜在多方面表現無遺，涉及非正當申請的爭議或非正當上訴程序尤其明顯。

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，因此較為簡單易懂，新規則的另一個特色就是，它要求法官在處理程序問題時更簡、更多地行使判斷權。

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。傳統的程序在設計時假設了訴訟各方都懂得按照規定的步驟展開訴訟，但事實上現在許多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。
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.

THE APPROACH

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.

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Reform of the Civil Justice System in Hong Kong

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.

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Mr Chan Shu-ying, Director of Legal Aid (left) and Mrs Pamela Chan, Chief Executive of the Consumer Council.

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 witnesses 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.

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.

Reform of the Civil Justice System in Hong Kong

The CPR define the elements of active case management and expressly provide for the court’s case management powers.
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, interrogatory 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 profession, 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.

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定一套全新的規則，這些建議將納入為新內容的一部分，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》、制定填文列舉法院對案件管理的職權及明訂如何消除法庭制度懸念的辦法。工作小組亦建議重新審查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規則，並建議引入全面的、以進度指標為本的案件管理制度。

改革建議還涉及電腦系統、非正規申請、証人供詞、專家證供、上訴制度，証費、訴訟費用的紛紛解決制度和司法覆核等。此外，小組亦就如何簡化訴訟開庭的模式作了建議，又提出如何簡化程序，使一方在另一方不履行程序規定的步驟時，更容易取得勝訴。

諮詢程序

工作小組決定就改革方向和他們提出的具體建議進行廣泛諮詢，以收集法律界、關注這項改革的各界和社會各界的意見。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。


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.