



THE HONG KONG INSTITUTE OF SURVEYORS

28th June, 2002

Secretary
Chief Justice's Working Party on
Civil Justice Reform
1 Battery Path
Central
Hong Kong

URGENT
BY FAX & POST
#2123 0028

Dear Sirs

Civil Justice Reform Interim Report and Consultative Paper (the "Report")

We refer to your invitation to comment on the Proposals contained in the Report.

As you will no doubt be aware, our members provide expert evidence in numerous cases that have come before the Courts. In recent years, we have seen a gradual increase in the involvement of our members in the provision of such service and we have maintained a list of those qualified to provide expert evidence.

We would therefore like to express our views on those suggestions pertaining to expert evidence. We set out below our comments in response to Proposals 38 to 40 inclusive contained in the Executive Summary and Section K16 (Expert Evidence) of the Report (pages 182 to 192).

Our comments are divided into two parts. The first part (Section A) sets out our understanding on Proposals 38 to 40. The second part (Section B) is our general recommendation on those Proposals.

(A) Proposals 38 to 40

1. Proposal 38

This Proposal seeks to introduce provisions which counter "the inappropriate and excessive use of expert witnesses, giving the court control of the scope and use of expert evidence to be adduced". This would ensure that the objectives referred to in Proposals 1 and 2 are met. Judges would decide the type of evidence which would be adduced, the manner of its presentation, and who is to be called as an expert. Several local judgments already favour court control of experts to better case manage the action.



2. Proposal 39

Proposal 38 is read in conjunction with Proposal 39 which suggests the manner in which court control should be exercised by reference to five measures. The ultimate result would be to remove autonomy over experts from the parties to the court, and that the expert would no longer be part of the litigious process but would be merely a part of the case management process owing a paramount duty to the court. It may be that the end result is that expert witnesses will not be permitted to analyse and critically assess the matter, but instead to merely act as part of the judicial process explaining background matters without committing themselves to any particular view. The expert would then be used to educate and inform the court about specific technical or non-legal matters of which the court does not have understanding.

Proposal 39 would require experts to acknowledge their adherence to a Code of Conduct before they may be called, and their evidence received. In other jurisdictions such a Code of Conduct is overseen by a professional body of experts, or those trained to be expert witnesses in various fields. The introduction of a Code of Conduct here would "professionalise" experts requiring that they conform to certain educational qualifications, and perhaps a licensing system.

Under CPR 35, the court is in strict control of when an expert may be called or evidence received. Court permission is required to call or rely on such evidence. The Code of Conduct is the Australian alternative to this shifting the focus from whether or not the expert may be called, or his evidence received, to a situation where the role of the expert depends on whether or not he is subject to , and has agreed to comply with, the Code of Conduct. Hence regulation and perhaps training of experts seem to be integral parts of any such Code.

Two of the five measures contained in Proposal 39 are not acceptable. For the fourth measure, the expert is to be required to disclosure "the substance of all material instructions" on which the report was based. This would appear to place a tremendous burden on the expert having no protection of privilege over instructions.

The fifth measure is one which would enable the expert to approach the court, at the expense of one or both parties, but without their knowledge or approval. This measure appears fraught with danger for the expert as a consequence of creating expense over which the parties will have no actual control.

3. Proposal 40

This Proposal seeks to introduce a single joint expert appointed by the court at the expense of both parties. This is not a "court-appointed" expert but one chosen by the parties for the benefit of advising the court and to avoid partisanship of opinion. Proposal 40 is open-ended on the details of the rights, duties and functions of a single joint expert. There is one factor which may militate against this expert: under the CPR, he is unable to be cross-examined. This changes the nature of his evidence from being analytical and representing idiosyncratic points in favour of the party calling the expert, to a situation where he gives conservative advice to inform the court.



(B) General Recommendation

1. Whilst Proposals 38 to 39 are generally to be encouraged and are supported, we have the following reservation on Proposal 39:

(a) *The 4th Measure of Proposal 39*

The loss of legal privilege may need some safeguards and the terms of Proposal 39 may be insufficient for this purpose.

(b) *The 5th Measure of Proposal 39*

The right of the expert to approach the court independently of the parties is not supported or may require further consideration to protect the expert should he create additional costs.

2. Regarding the suggested Code of Conduct referred to in Proposal 39, as we have prepared a number of guidelines and practice notes for our members, we would like to share our experience with you and would want to be involved in the drafting of the Code.

3. We object to Proposal 40. We believe the ambit of the duties of the expert under Proposal 40 may well turn the "expert" into a source of information but not one of critical analysis which is needed for the court to understand the issues in dispute. If the government does not accept our view, we suggest that a single joint expert should only be appointed if both parties to a particular case agree to such arrangement.

We hope the above comments are suitable for the present proposes. We note that the Proposals do not particularise in detail the wording of any proposed new Rules to be adopted and at that juncture we would appreciate further input.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Hak Chan', is written across the page.

Hak CHAN
President