

Consultation Paper on Proposed Legislative Amendments for the Implementation of Civil Justice Reform

SUBMISSION OF THE HONG KONG BAR ASSOCIATION

1. The Steering Committee on Civil Justice Reform proposed in a consultation paper released in April 2006 (“the Consultation Paper”) the legislative amendments for the implementation of Civil Justice Reform in Hong Kong, particularly the recommendations in the Final Report of the Chief Justice’s Working Party on Civil Justice Reform (“the Final Report”). The Hong Kong Bar Association (“the Bar”) now submits its response to the Consultation Paper.
2. The Bar last commented on Civil Justice Reform in Hong Kong in a Response submitted in June 2002 (“2002 Response”) on the proposals of the Chief Justice’s Working Party in its Interim Report and Consultation Paper (“Interim Report”). The Bar has reviewed the 2002 Response in the course of drafting this Submission and affirms the validity of the principles underlying the 2002 Response, namely:

Principle 1: Expediency should not be achieved at the expense of justice. Any reform must not compromise litigants' right to have a fair hearing and have the merits of their case rigourously and even-handedly determined. There can be no erosion of this paramount concern.

Principle 2: Any reform will depend on the quality of the barristers, solicitors and judges who operate the new systems and measures to be implemented. The judge, who will be given enhanced case management powers under the Civil Justice Reform, will play a pivotal role. Judges must follow consistent approaches across the board. Otherwise, "case management" will arbitrarily vary from judge to judge and leave litigants with the sense of taking part in a lottery. This would undermine respect for the Rule of Law. There will need to be a sufficient number of experienced judges, so as to ensure the continuing process of case management with the judge assigned to handle the case.

Principle 3: The Bar is not confined by the scope of the Consultation Paper. Rather the Bar is concerned with the "big picture" and will not hesitate to suggest a broader perspective.

3. This Submission has 3 substantive parts. The first part contains general observations on the Consultation Paper. The second part focuses on the detailed

legislative amendments proposed in respect of both primary legislation and rules of court in the Consultation Paper and the Bar's comments will be arranged largely by reference to the recommendations in the Final Report to which the draft amendments, ie the draft Civil Justice (Miscellaneous Amendments) Bill ("the Draft CJ Bill") and the draft Rules of the High Court (Amendment) Rules 2007 ("the Draft RHC Amendment"), correspond. The third part is concerned with the Consultation Paper's proposals to implement Civil Justice Reform in the District Court, the Lands Tribunal and employees' compensation proceedings.

4. If the Bar has not commented in this Submission in respect of a proposal in the Consultation Paper, it can be taken that the Bar has no comment on that proposal.

5. The Bar observes that the consultation period provided for in the Consultation Paper, being 3 months, was very short, given the substantial number and nature of the proposed amendments. In comparison, the Bar notes that the initial period of consultation in respect of the Interim Report was 5 months, subsequently extended by a further 2 months.

Part I: General Observations

6. While the Bar notes that the Final Report's Recommendations decline the wholesale adoption of the Civil Procedure Rules ("CPR") of England and Wales, some of them seek to adopt particular parts of the CPR. When implementing these Recommendations, it is necessary to achieve consistency between the language and terminology used in the amending rules of court and the pre-existing Rules of the High Court (Cap.4 sub. leg. A) ("RHC").

7. The Bar has not found it easy to evaluate the impact and workability of the proposed amendments in the absence of the non-legislative documentation, namely practice directions, pre-action protocols and other codes of practice, guidelines, or prescribed information or instructions that are expected to accompany the primary legislation and rules of court. Where appropriate, the Bar has suggested matters that ought to have been included in the legislative proposals as opposed to the additional layers of procedural documentation.

8. The Bar considers that the general observations in its 2002 Response remain applicable in spite of the Final Report's recommendations. The Bar reiterates that it remains an open question as to whether implementing the Recommendations by enacting the primary legislation and rules of court

proposed in the Consultation Paper will lead to a general lowering of the costs of litigation or not. The Bar also reiterates the strong need for consistency in judicial decision-making given the breadth of discretion sought to be vested in the judge in tailoring the suitable response to a procedural issue and ensuring orderly process of the case to settlement and, if not, trial. The lack of a sufficient assurance of predictability in case management is not conducive to the Rule of Law.

9. To assist in consistency of judicial decision-making, the Bar suggests that the Judiciary might consider deploying a limited number of designated judges and/or masters to perform case management duties at least during the initial period of operation of the legislative amendments, not only to ensure consistency in the approach towards decision-making, but also to allow the consistent development of caselaw on the proper interpretation and operation of the rules of court as amended, and also of practical guidance for practitioners in the new civil procedure regime.

10. The Bar has strong reservations over the proposed empowering of judges to make wasted costs orders against barristers. The Bar expressed support “in principle” only for this proposal in the 2002 Response, while noting that there was significant opposition to the proposal from some barristers. Recent

canvassing of views of members has indicated that the opposition to the idea of wasted costs orders has not abated and may even have grown stronger. Members have expressed concern that the proposed legislative amendments may inhibit them in the performance of their duties as advocates. They seem to have no confidence in the promise that the sanction would be applied sparingly and only in exceptional cases. Many are concerned that the potentially ruinous effect of a wasted costs order if it were made against them in a trial. They are also fearful that clients with deeper pockets will take advantage of the chance to make applications for wasted costs orders as a means of forensic browbeating the opposition with more modest means notwithstanding the proposed RHC O.62 r.8C. It seems that the only way to assuage these deep misgivings about this proposal is not to adopt the principle of wasted costs orders or to draft the relevant legislation and rules of court in such a way as to ensure that the power to make wasted costs cannot easily be abused and, if the power is used wrongly, there will be adequate recourse to a tribunal that can put things right.

11. The Bar also expresses concern over the proposed empowering of judges to act on their own motion to make wasted costs orders against legal representatives. Every legal practitioner faced with the requirement from the judge to show cause why a wasted costs order should not be made against him or her may

incur expenses which cannot be recompensed from any recognized source. This is a potentially oppressive power which should not be part of the rule book.

12. The Bar raises additional concerns. Enacting the primary legislation and rules of court proposed in the Consultation Paper does not necessarily lead to an improvement in the position of the litigant in person. Further, many of the requirements, non-compliance with which may lead to sanctions, are to be found in non-legislative documentations, to which a satisfactory way of access will have to be worked out. The inter-relationship among these different categories of requirements will have to be learnt. Since the Chinese version of the proposed legislative amendments has not yet been produced, one cannot evaluate how “user-friendly” they will be to the Chinese language court user.

Part II: The Draft CJ Bill and the Draft RHC Amendment

Underlying Objectives

Draft RHC Amendment O.1A r.1

13. The Bar considers, given the principle that justice and fairness should be the

overriding objectives, it is a matter of cardinal importance that the implementation of such underlying principles should not lead to inconsistent decisions being made by individual judges.

14. The Bar notes that the underlying objectives, as they now stand, are not stated in their order of importance. As it might assist parties' understanding if these objectives were to be stated in their order of importance and might also assist in leading to a consistent application of the objectives by individual judges, the Bar suggests that the underlying objectives are stated in their order of importance.

15. It is also suggested that the word "and" between objective (e) and (f) should be to "and/or" to make it clear that the underlying objectives are not necessarily cumulative objectives.

Draft RHC Amendment O.1A rr.2, 4

16. As case management is always a matter in the discretion of the Court, the Bar suggests it is made clear the Court's discretion is not confined to or fettered by the matters set out in O.1A rr.2 and 4.

17. As O.1A rr.2 and 4 now stand, in particular by the use of the word "shall", they

might be interpreted as fettering the Court’s discretion in the sense that it would not be permissible for the Court to take into account any other matters not listed in these rules.

18. The Bar also suggests the use of the word “and” between underlying objective (k) and (l) should be changed to “and/or” to make it clear that the underlying objectives are not necessarily cumulative.

Case Management Powers

Draft RHC Amendment O.1B

19. The Bar suggests that O.1B r.2(1) be amended to read: “Except where a rule or some other enactment provides otherwise, the Court may exercise any of its powers under rule 1(2) and (3) on an application or of its own motion.”

Application and General Provisions

Draft RHC Amendment O.2 r.4

20. With a view to promoting certainty and finality, the Bar suggests that O.2 r.4 be amended to read: "... any sanction for failure to comply imposed by the rule, practice direction, court order or pre-action protocol ~~has~~ shall take effect unless the party in default applies for and obtains relief from the sanction within 14 days."

Draft RHC Amendment O.2 r.5

21. In respect of O.2 r.5(1)(g), the Bar queries whether it is intended that the Court is to take an inquisitorial role in determining whether an unrepresented party was unaware of a relevant pre-action protocol. If an unrepresented party denies awareness, can the other party or the Court cross-examine him on such denial?

Pre-action Protocols

Draft RHC Amendment O.1 r.4(1); O.2 rr.3, 4, 5

22. Amendments to the RHC are proposed to give recognition to the status of pre-action protocols by allowing the Court to take them into account in the exercise of its procedural powers and to impose sanctions for non-compliance.

23. Whilst there can be no doubt that there is a need for a mechanism for giving effect to the use of pre-action protocols, the Bar has reservations as to whether the proposed amendment of O.2 is the proper way to deal with the matter.

24. As previously stated in the Bar's 2002 Response, whilst in principle the Bar is in support of the use of pre-action protocols, there are serious concerns that the pre-action protocols may operate to the prejudice of litigants, not least in the context of front-end loading of costs. These are matters which have to be addressed in the formulation of the relevant protocols. Thus, on a practical level, it is not possible to express a view on the proposed consequences of non-compliance with pre-action protocols when the protocols themselves have not yet been drawn up.

25. Moreover, on a conceptual level, there is a fundamental distinction between the existing provisions of O.2, which deal with the effect of non-compliance with the RHC, and the proposed amendments which deal with the effect of non-compliance with practice directions and pre-action protocols.

26. A provision which deals with non-compliance with certain rules or directions must pre-suppose the validity of those rules and directions. This is not a

problem in the context of the existing provisions of O.2 which deals with the effect of non-compliance with other provisions in the RHC, since the RHC are made pursuant to powers conferred under the HCO and as such, have unquestionable authority. Practice directions and pre-action protocols on the other hand, are merely administrative directions issued by the Court pursuant to its inherent jurisdiction and, as such, are liable to be challenged on the ground that the inherent jurisdiction cannot be exercised in a manner which is inconsistent with substantive legal rights (for an example of a successful challenge, see Birmingham Citizens Permanent Building Society v. Caunt [1961] Ch 883) or the express provisions of the RHC.

27. The Bar is therefore of the view that the rules dealing with the effect of non-compliance with practice directions or pre-action protocols should not be considered in isolation and ought to be reviewed alongside the practice directions or pre-action protocols after they have been drawn up.
28. In any event, provisions which deal with the effect of non-compliance with practice directions and pre-action protocols ought not to be added to O.2. As a matter of principle, an amendment ought not to go outside the scope of what is being amended. Although the scope of O.2, which deals with “effect of non-compliance” appears at first glance to be wide enough to cover the

proposed amendments, it is clear that the scope of O.2 is limited to dealing with non-compliance with other provisions in the RHC given that the existing RHC forms a self-contained code of civil procedure. Non-compliance with practice directions and pre-actions protocols are different matters altogether. In the circumstances, it would be more appropriate for any rules introduced into the RHC for regulation of non-compliance with pre-action protocols and practice directions to form a new Order on their own.

29. Moreover, the Bar notes that there may be some risk of arguments being raised as to the order of precedence as between practice directions and pre-action protocols and as to consistency between the two.

Commencement of Proceedings

Draft RHC Amendment O.2 r.1(3)

30. The phrase “the proceedings ought to have begun by an originating process other than the one employed” in the proposed new Order 2, rule 1(3) does not seem to distinguish between cases which are required by the RHC or where it would be more “appropriate” to use another form of originating process, and those cases where a particular type of originating process is “stipulated” by

specific provisions in legislative enactments. Insofar as it purports to cover the latter category of cases, the proposed amendment is *ultra vires*. The RHC, being subsidiary legislation, cannot override inconsistent provisions in legislative enactments and any attempt to do so will be void.

Draft RHC Amendment O.2 r.2(2); O.8 r.1

31. The proposed amendments to O.2 r.2(2) and O.8, r.1 appear to proceed on the erroneous assumption that “motion” is synonymous with “originating motion”. Under the existing rules, procedural applications arising in the course of a hearing in open court can be conveniently dealt with “by motion” without the need for issuing an interlocutory summons and there is no reason why this practice should not continue.

Draft RHC Amendment O.5 r.4(1)

32. The proposed O.5 r.4(1) should refer to “proceedings which under any written law are required or authorised” (cf. the wording of O.5 r.5). This is because the RHC cannot take away a right conferred by some other legislative enactment and any attempt to do so will be *ultra vires* and void (see also comments above). This comment applies with equal force to similar amendments in O.8 r.1 and O.9 r.1.

Draft RHC Amendment O.5 r.7

33. The wording of the proposed O.5 r.7 is unnecessarily convoluted and cumbersome. The reference to compliance with the old O.5 r.1 is both unnecessary and undesirable because any non-compliance should only attract sanctions in the ordinary way and should not deprive the defaulting party of the benefit of the transitional provision. The use of the sub-ordinate clause also makes difficult reading. It is therefore suggested that the provision be simplified to read: “Any civil proceedings begun by originating motion or petition immediately before the commencement of rule 14 of the Amendment Rules 2007 may be continued and disposed of as if the amending rule had not been made.” This comment applies with equal force to the transitional provisions inserted elsewhere by the proposed amendments.

Draft RHC Amendment O.7 r.2(1A) – (1C)

34. The Bar suggests that the proposed O.7 r.2(1A)-(1C) requires correction, as the phrase “Form No... *is appropriate to be used* ...” is unclear. The Bar proposes that the wording is amended by deleting either the words “appropriate” or “to be used” in each of these paragraphs.

Draft RHC Amendment O.17 r.3

35. It is not clear why the proposed amendment of O.17 r.3 should change the

words “must be made” the second time they appear in that sentence.

Draft RHC Amendment O.28 r.3A

36. The proposed O.28 r.3A requires all originating summonses to be heard in open court unless the court otherwise directs “in accordance with a written law”. Whilst the Bar supports the principle of “open justice”, the principle has no application to certain well-established categories of proceedings such as those brought before a judge in exercise of the jurisdiction of the *parens patriae* in wardship and lunacy proceedings. It is by no means clear that all those cases are now governed by statute; and without the benefit of full research, the worry is confining the jurisdiction to order hearing otherwise than in open court to those governed by “written law” might place undue fetters on the court.

Disputing Jurisdiction

Draft RHC Amendment O.12 r.8

37. One of the chief benefits of the CPR Part 11 is that it has brought together all aspects of dispute as to jurisdiction in a separate rule which is a readily identifiable rule as such rather than to have this important topic tucked away in a rule primarily dealing with a different matter altogether as is the case under

RHC O.12 r.8. It is therefore a matter of regret that in the Final Report the decision was made to recommend the amendment of O.12 r.8 “to the extent necessary to bring into its scheme for disputing the court’s jurisdiction, applications for the court to decline to exercise jurisdiction over the plaintiff’s claim and to grant a discretionary stay of the action” rather than to bring in a new, self-contained rule similar to CPR Part 11 as was originally proposed in the Interim Report which the Bar supported.

38. It is also a matter of concern that the wording of the proposed amendments falls short of the clarity achieved by CPR Part 11. For example, CPR 11(3) makes it clear beyond doubt that “a defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court’s jurisdiction” and r.(7) makes express provisions for what is to happen in the event of the court refusing to make the declaration sought, whereas the proposed amendments to O.12 r.8 are silent on these matters. It is therefore suggested that rather than having a piecemeal amendment of O.12 r.8, consideration should be given to the removal of the existing r.8 from Order 12 followed by the wholesale importation of CPR Part 11 as a new Order of the RHC.

Default Judgment and Admissions

Draft RHC Amendment O.13A

39. The amendments are proposed pursuant to Recommendation 18 in the Final Report. A new Order 13A is proposed to be added to the RHC, together with accompanying amendments to Form Nos.1, 14, 15 and 17 and the addition of new Form Nos.16, 16A, 16B, 16C, 16D and 16E.
40. The proposed O.13A rr.1(3), 4(1) and 5(1) use the language “where the only remedy which a plaintiff is seeking is the payment of money”. This may be contrasted with the language of O.13 r.1(1) which applies “where a writ is indorsed with a claim against a defendant for a liquidated demand only”. The language of the RHC as a whole should be kept consistent.
41. Similarly, O.13A rr.6(1) and 7(1) use the language “where (a) the only remedy which the plaintiff is seeking is the payment of money; (b) the amount of the claim is unliquidated ...”. This may be contrasted with the language of O.13 r.2 which applies “where a writ is indorsed with a claim against a defendant for unliquidated damages only”. O.13A is adopted from CPR Part 14. In England, the language of what used to be O.13 has also been changed – see CPR Part 12.4. When adopting provisions from the CPR, Hong Kong may

well need to modify the language so as to ensure that the terminology in the RHC as a whole is kept consistent. Thus, in Hong Kong, if we retain O.13 unchanged and introduce CPR Part 14 using the new language of the CPR, the result is incongruous language. These comments extend to the language of the relevant forms in Appendix A.

42. Under O.6 r.2(1)(b) (which will not be amended in the reform), where the claim made by the plaintiff is for a debt or liquidated demand only, the writ of summons must be endorsed “with a statement of the amount claimed in respect of the debt or demand and for costs and also with a statement that further proceedings will be stayed if, within the time limited for acknowledging service, the defendant pays the amount so claimed to the plaintiff, his solicitor or agent”.

43. It is not clear how this is going to work with the proposed O.13A rr.4 and 5. Thus, for instance, O.13A r.13(2) stipulates that the Statement of Claim or an originating summons must be accompanied by Form 16A or 16C as the case may be. Is it envisaged there is an endorsement on the writ under O.6 r.2(1)(b) and then a further form under O.13A? Further, how about the provisions for fixed costs in Second Schedule to O.62 where the defendant pays the amount claimed within the time and in the manner required by the indorsement of the

writ? More generally, what are the costs for which judgment is entered under O.13A rr.4(6), 5(8), 6(6) and 7(10)?

44. Some comments may also be made on the forms:

- Form 15, Appendix A – Paragraphs 2 and 3 under “Directions for Acknowledgment of Service” should be combined; otherwise with paragraph 3 standing on its own a defendant may misunderstand the position as *requiring* him to file a Form 16 or 16C in any event.
- Forms 16, 16C, Appendix A – The term “priority debts” in item 8 is not understood. If it is meant to refer to preferential debts upon insolvency, are “fuel debts” preferential debts?
- Forms 16A, 16B & 16E, Appendix A – In the left column, there are references to the court itself *sending* the defendant an order to pay. Is this really intended? Under the current practice, it is up to a party who has obtained a judgment or order in his favour to serve it on the party bound by the judgment or order.
- Forms 16A, 16B & 16D, Appendix A – References to “claimant” at the

bottom should be changed to “plaintiff”.

- Form 17, Appendix A – Paragraphs 2 and 3 should be combined; otherwise with paragraph 3 standing on its own a defendant may misunderstand the position as *requiring* him to file a Form 16 or 16C in any event.

Pleadings

Draft RHC Amendment O.18 r.12

45. It is proposed that O.18 r.12 be amended to provide that the Court may of its own motion make an order requiring particulars to be given. The Bar has no comments on the proposed O.18 rr.12(4A), (4B).
46. However, it is proposed to replace O.18 r.12(3) by a new provision which also provides for an order by the Court to require *amendment* to a pleading. The Bar considers that such a rule empowering the Court to make an order to require amendment to a pleading should be placed in O.20 or elsewhere in O.18 instead of in O.18 r.12 which deals with particulars. Although the power to require amendment and the power to order particulars are discussed together in

the Final Report, they belong to different parts of the RHC and it is incongruous to place a rule concerning amendment in O.18 r.12 rather than O.20. Even if the power to require amendment to be made to a pleading is to be put in O.18, it should not be put in r.12 – it may be combined, for instance, with O.18 r.19 which includes a power to order amendment.

Draft RHC Amendment O.18 rr.13, 14

47. It is also proposed that O.18 rr.13(1) and 14 be amended so that the implied joinder operates as a non-admission, as opposed to a denial, of the opposite party's pleading. The marginal notes in the marked-up version of the Draft RHC Amendment suggest that this is based on Recommendation 22 to 24 in the Final Report. However, the Bar does not agree that this proposed change is warranted by those recommendations. What is suggested in Recommendation 22 is that the proposal requiring defences to be pleaded substantively should be adopted. It is expressly stated in Recommendation 24 that this proposal should not be extended to pleadings subsequent to the defence. Since an implied joinder under O.18 r.14 arises only after a defence is filed, there is nothing in the Final Report to suggest that the implied joinder should cease to operate as a denial but merely as a non-admission. The proposal requiring defences to be pleaded substantively is not intended by the Final Report to apply to the denial arising from implied joinder. The Bar is conscious of the

fact that CPR 16.7(1) provides that: “A claimant who does not file a reply to the defence shall not be taken to admit the matters raised in the defence.” But there is no suggestion in the Final Report that O.18 r.14 should be amended to track CPR 16.7(1).

Draft RHC Amendment O.18 rr.23, 24

48. The proposed O.18 rr.23 and 24 set out the transitional provisions. It is not, however, apparent why there should be two different cut-off dates: by virtue of r.23 the provisions about pleading a defence substantively apply *if the statement of claim is served* after the commencement of the amending rule, but by virtue of r.24 the extension of the time limit for filing a defence from 14 to 28 days applies *if the action is brought* after the commencement of the amending rule. Having two different points of reference may lead to confusion in practice.

Draft RHC Amendment O.38 r.2A(4)

49. It is proposed that O.38 r.2A(4) be amended to include a new requirement that the witness statement be verified by a statement of truth in accordance with the new O.41A. This is said to be based on Recommendations 26 to 32 and 35 of the Final Report. The Bar observes it has not been able to find such a recommendation in the Final Report but does not oppose the proposed

amendment.

Draft RHC Amendment O.41A

50. The proposed O.41A r.6(1)(b) sits uncomfortably with O.41 r.5(2) which allows affidavits containing hearsay evidence to be used in interlocutory proceedings but requires the sources of information to be stated; see commentary in *Hong Kong Civil Procedure 2006*, Vol.1, page 656, para.41/5/3. On the basis of the proposed new rules, neither the pleading which is verified nor the statement of truth itself will specify the sources of information or the grounds of belief. In practice, therefore, if O.41A r.9 is enacted, it may allow O.41 r.5(2) to be circumvented.

Offers to Settle and Payments into Court

Draft RHC Amendment O.22

51. The amendments proposed under this heading relate to Recommendations 38 to 43 of the Final Report.
52. In the proposed O.22 rr.2 to 6, there are references to “money claim” and “non-money claim”. The Bar understands these terms are derived from CPR

Part 36 but they are not defined in the RHC and are couched in language inconsistent with the rest of the RHC, e.g. O.13 and the proposed new O.13A.

53. The proposed O.22 r.10 refers to a claim for “provisional damages”. The Bar suggests that cross-reference be made to O.37 regarding the meaning of “provisional damages”.
54. Consequential amendments are required to be made to O.80 r.15(2) as well as r.15(1) as proposed.

Interim Remedies and Mareva Injunction in aid of Foreign Proceedings

Draft CJ Bill: High Court Ordinance (Cap 4) (“HCO”) ss.21M, 21N; Arbitration Ordinance (Cap.241) (“AO”) ss.2GC, 49

55. The proposed new s.21M and s.21N of the HCO seek to give effect to Recommendations 45 to 51 of the Final Report in relation to the grant of Mareva injunctions and other interim remedies in aid of foreign proceedings. These recommendations seek to reverse the law as laid down by the Privy Council in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284.

56. In addition, it is proposed to amend s.2GC of the AO and to introduce a new s.49 of the same in order to give the Court power to grant interim injunctions and other remedies in aid of arbitration proceedings which have been commenced outside Hong Kong.
57. The Bar notes there is a potential source of dispute arising from the use of the word “capable” in the proposed new s.21M(1)(b). As this provision goes to the existence of jurisdiction, it is possible that respondents to applications for interim relief will seek to argue that the proceedings in the foreign jurisdiction are not “capable” of being enforced in Hong Kong and therefore there is no jurisdiction to grant the interim order.
58. The Bar is of the view that it would be preferable for the threshold which an applicant must reach in order to establish jurisdiction to be clearly stated. The Bar appreciates that the intention of the proposed new s.21M is to extend the new jurisdiction to grant interim relief only to those foreign proceedings and arbitrations which will potentially lead to a judgment or arbitral award which can, in the ordinary course, be enforced in Hong Kong (Final Report, page 171, para.341).
59. The difficulty the Bar foresees is that it will often be impossible at the stage

when the interim relief is sought for the Court to form anything other than a provisional view on the issue whether the foreign proceedings are, in the language of the proposed new s.21M(1)(b), “capable of giving rise to a judgment which is capable of being enforced in Hong Kong”. The Bar considers that it would be unfortunate if the Court were to be placed in a position of having to decide on limited evidence whether it had jurisdiction to grant the interim relief as opposed to whether it should exercise its discretion to grant relief.

60. The Bar considers that, in these circumstances, the preferable course would be to give the Court a wide jurisdiction to grant interim relief in aid of foreign proceedings and arbitrations but to impose stringent requirements on applicants for such interim relief. This approach would allow the Court to exercise its discretion in the circumstances of the particular case before it.

61. It is to be noted the proposed new HCO s.21M is intended to have the same broad effect as s.25 of the Civil Jurisdiction and Judgment Act 1982 [Eng] (“CJJA”). The form of s.25 of the CJJA is rather different to s.21M since the CJJA was intended to give effect to the Brussels Convention 1968. Consequently, s.25 of the CJJA provides that the High Court in England and Wales shall have power to grant interim relief where proceedings have been

commenced in a contracting state. However, as a result of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, the power of the Courts in England and Wales to grant interim relief has been extended to proceedings commenced anywhere in the world. The approach taken in England and Wales is therefore to give the Court a wide jurisdiction to grant interim relief in aid of foreign proceedings.

62. The Bar agrees with the proposal in HCO s.21M(2) that any order may be made unconditionally or on such terms and conditions as the Court of First Instance thinks fit. The Bar considers this to be an important provision since the grant of interim relief such as Mareva injunctions, particularly in aid of foreign proceedings, should ordinarily be subject to the giving of an appropriate undertaking as to damages and appropriate undertakings to protect the interests of third parties.

63. The proposed HCO s.21M(4) provides that the Court of First Instance may refuse an application for interim relief or appointment of a receiver if “in the opinion of the Court the fact that the Court has no jurisdiction apart from this section in or relation to the subject matter of the proceedings concerned makes it unjust or inconvenient for the Court to grant the application”. This reflects the wording of s.25(2) of the CJJA which provides that the Court may refuse to

grant that relief if, in the opinion of the Court, the fact that the Court has no jurisdiction apart from s.25 of the CJJA makes it inexpedient for the Court to grant the relief. The Bar agrees with the wording “unjust or inconvenient” and considers this to be an improvement on the word “inexpedient” in s.25 of the CJJA.

64. The proposed HCO s.21M(5) confirms that the power to make rules of court under section 54 of the HCO includes powers to make rules governing the making of an applications for interim relief and for appointment of a receiver under s.21M(5) and for the service of such applications and orders out of the jurisdiction. The Bar agrees with this proposed amendment so as to give clear authority for the amendment of the RHC for the proper exercise of the jurisdiction to grant interim remedies in aid of foreign proceedings. As noted below, the Bar considers that O.11 should be amended as soon as practicable.

Draft RHC Amendment O.29 r.8A

65. The Bar agrees with the proposed O.29 r.8A, which provides for applications for interim relief under HCO s.21M to be made by originating summons. In circumstances in which no substantive relief is being sought in the action other than the interim remedy, this is clearly an appropriate provision.

66. The Bar notes that no amendment is proposed to O.11 in relation to service out of the jurisdiction of applications for interim relief in aid of foreign proceedings. The Bar assumes that the intention is first to enact s.21M(5) of the HCO and subsequently to amend O.11 r.1(1)(b) to bring injunctions in aid of foreign proceedings within its compass.
67. The Bar considers that it is of importance that there should be an express provision in O.11 governing the procedure for applications for service out of the jurisdiction in cases where only interim relief is sought. The Bar further considers that it would be preferable to have the amendments to O.11 in place as soon as possible after the new HCO ss.21M, 21N and AO s.2GC come into force. In the event that amendments to O.11 are not in place soon after these provisions come into force, there is likely to be confusion as to the circumstances in which an originating summons seeking interim relief in favour of foreign proceedings or arbitration may be served out of the jurisdiction.
68. At present, O.11 r.1(1)(b) permits the service of proceedings out of the jurisdiction if an injunction is sought ordering the defendant to do or refrain from doing something within the jurisdiction. In England and Wales, the Courts have been prepared to exercise their powers under the Supreme Court

Act 1981 [Eng] s.25 to grant extraterritorial relief in support of foreign proceedings: see, for example, Republic of Haiti v Duvalier [1990] 1 QB 202: Credit Suisse Fides Trust v Cuoghi [1997] 2 All ER 724.

69. The Bar is of the view that if a decision is taken to create the new jurisdiction to grant interim remedies in aid of foreign proceedings, a decision should be taken at the same time whether, in principle, the jurisdiction might be exercised to give worldwide relief. The Bar is also of the view that it would be preferable to create such a jurisdiction at the present time even if subsequent cases were to decide that such jurisdiction should only be exercised in exceptional circumstances.
70. The Bar suggests that there would be merit in including a provision similar to O.11 r.8A of the Rules of the Supreme Court as in force in England immediately before their replacement by CPR. Such a provision might provide that the grant of leave to serve an originating summons out of the jurisdiction claiming interim relief under HCO s.21M must be supported by an affidavit or affirmation stating:
- (a) the grounds on which the application is made;
 - (b) that the proceedings have been or will be commenced in a place outside

Hong Kong;

- (c) that the proceedings are, in the deponent's belief, capable of giving rise to a judgment which is capable of being enforced in Hong Kong; and
- (d) in what place or country the defendant is or probably may be found.

71. Given the nature of the proposed relief under HCO s.21M – which almost inevitably will be of an urgent nature - the Bar considers that consideration should also be given to the question of service of the originating summons and any order made thereunder.

72. The Bar considers that as a general approach, it is appropriate for the legislative provisions governing jurisdiction to be expressed in wide terms, leaving the Court free to exercise its discretion as appropriate on the facts of the particular case before it. Whilst agreeing with the general form of the proposed HCO ss.21M and 21N, the Bar considers that there would be merit in seeking at the time of the introduction of the new amendments for there to be in existence guidelines in relation to the proper exercise of the Court's discretion.

73. The experience in England and Wales suggests that particular caution is required in granting a Mareva injunction (or freezing order) in aid of foreign proceedings: see Credit Suisse Fides Trust v Cuoghi [1998] QB 818; Ryan v

Friction Dynamics Ltd & Ors (2000) The Times 14 June.

74. It has also been stated in England and Wales that the fact that the primary forum for the litigation was abroad meant that the court was likely to be even less fully appraised of the facts than in a case where it was exercising primary jurisdiction: see Refco Inc v Eastern Trading Co [1991] 1 LI LR 159, 164. The principles which have emerged in relation to the grant of Mareva injunctions and Anton Piller orders and other interim remedies cannot be directly transferred to cases in which the relief is sought in aid of foreign proceedings. However, as noted in the Final Report, the decided cases on s.25 of the CJA may provide helpful precedents (Final Report, page 177, para.355).
75. The Bar considers it of particular importance that all reasonable protection should be given to third parties given notice of interim orders, since it would be invidious if a third party (such as a bank) were to find itself in a position of having to comply with an order of a Hong Kong Court whilst that at the same time being required to comply with a potentially conflicting, inconsistent or overlapping order from a court in the jurisdiction seized of the substantive proceedings.

Case Management Timetabling and Milestones

Draft RHC Amendment O.25, heading and r.1

76. The Bar believes that it should be made clear that the answers given in the questionnaire are the best estimate based on the issues identified in the pleadings. This is necessary in view of the sanctions provided under O.2 r.4.

77. In respect of O.25 r.1(1), the Bar suggests that the 14 days specified in this sub-rule is too short as any estimate, to be meaningful and accurate, necessarily involves input from counsel.

78. Moreover, as O.25 r.1(1A) envisages the parties are to try to agree on the directions or a timetable, sufficient time should be provided for this purpose. The Bar considers a realistic time frame for this is 35 days after the close of pleadings.

79. Further, when O. 25 r.1(1A) is read with O.25 r.1A, there is a concern that very often the parties, after commencing the action, may want to explore the possibility of negotiating an out-of-court settlement rather than spending money to progress with the case in accordance with a strict timetable. The Bar suggests that the parties should be allowed to apply for variations of the

directions given by the Court for such purpose, if both parties consent to the variation.

80. In respect of O.25 r.1(3), if the Bar's comments on the "14 days" is accepted, the reference to "14 days" in this sub-rule should be amended accordingly.

Draft RHC Amendment O.25 r.1A

81. In respect of O.25 r.1A(1)(c), the Bar queries whether the reference to "case management conference" is intended to mean a hearing whereby directions will be given by the Court on the further conduct of the case. If it is the intention, there is no obvious reason why a new term "case management conference" should be introduced under this rule.

82. If it is thought necessary to introduce this new term, corresponding changes should be made to O.25 rr.2 to 8 where references are made to the hearing of the summons for directions.

83. In respect of O.25 r.1A(2)(b), the Bar draws attention to the fact that it is very likely that the time necessary for the parties to complete the various steps in the proceedings and the estimate of the length of the trial will change over time as the case progresses. The timetable may also change depending on the state of

any negotiations that may be taking place between the parties. Thus, if the trial date or trial period is fixed at too early a stage, there is a risk that the Court's diary may become unnecessarily filled up by cases which are not in fact ready for trial or which may not proceed to trial.

Draft RHC Amendment O.25 r.1B

84. The Bar notes that under O.25 r.1B(6), an application to vary a non-milestone date cannot be granted if the variation would make it necessary to change a trial date or trial period. In light of the underlying objectives, the Bar questions whether it is appropriate to fetter the Court's discretion in this way. The limitation on the Court's discretion under O.25 r.1B(6) could have the result that a party applying to vary a non-milestone date will inevitably apply at the same time under O.25 r.1B(2) in case the variation sought might necessitate a change in the trial date or trial period.

85. Moreover, the Bar is of the view that if all parties agree to the variation, the Court should be empowered to vary a date whether or not it is a milestone date.

Draft RHC Amendment O.25 r.1C

86. It is proposed under O.25 r.1C(2) that the Court shall prior to the case management conference or pre-trial review inform the plaintiff of the

consequence set out in paragraph (1). The Bar queries whether this will create an unnecessary administrative burden on the Court. The reminder should be unnecessary as most plaintiffs will be keen to ensure that it would be present at the case management conference or pre-trial review. If the purpose is to ensure that the plaintiff attends at the hearing, the Bar wonders whether the purpose would be better achieved by the Court, upon the plaintiff's failure to attend the hearing, giving notice to the plaintiff, stating that if he does not proceed to fix a date for the case management conference or pre-trial review within a period of (say) the next 7 days, the action will be struck out without further order.

87. Due to the drastic consequences, the Bar considers that the meaning of "conditions" in O.25 r.1C(4) and "good reasons" in O.25 r.1C(5) should be clarified.

88. It is proposed under O.25 r.1C(6) that in the event a plaintiff does not apply to restore an action which has been provisionally struck out, the action shall stand dismissed upon expiry of 3 months from the date of the case-management conference or pre-trial review. If the intention is that once an action is dismissed, the plaintiff will be unable to commence a new action based on the same cause of action, the Bar considers that the sanction is too harsh and is out

of proportion to the default of the plaintiff. This is exacerbated by the fact that a period of 3 months is a relatively short period of time.

89. The Bar suggests that a more appropriate sanction would be to require the plaintiff, before commencing a fresh action based on the same cause of action, to indemnify the other parties in respect of all the costs occasioned by the action which has been struck out by the Court. If, however, it is thought appropriate that the action should be dismissed, the Bar suggests that the period of time should be extended to a much longer period, given the drastic consequences to the plaintiff.

90. The Bar notes that the sanction for failure to attend a case management conference or pre-trial review lies only against the plaintiff. The Bar questions why no sanction is included in respect of the failure by the defendant to appear.

Draft RHC Amendment O.25 r.10

91. The Bar notes that although “specialist judge” is referred to in this rule, that term, as well as the term “specialist list”, both mentioned in the definition under O.1 r.4, are not defined in the RHC.

92. Given the powers conferred on the Court under O.25 and the sanctions carried with them, the Bar queries whether the specialist judge has the necessary jurisdiction to determine the extent to which O.25 is to apply to an action in a specialist list.

Vexatious Litigants

Draft CJ Bill: HCO s.27

93. Subject to the views expressed below on the right to appeal or review by the applicant, the Bar agrees that it is necessary to have statutory backing in dealing with the problems associated with vexatious litigants and agrees with this proposed amendment in principal.
94. In respect of HCO s.27(1), the Bar notes that the Final Report's Recommendation 68 represents an extension of the class of person who may make an application for restriction against vexatious litigants in that under s.42 of the Supreme Court Act 1981 [Eng], an application can only be made by the Attorney General. The Bar agrees that any person who has been affected by the vexatious proceedings should also be allowed to make an application for such an order. This is particularly so when the leave application may be

determined by the judge without the attendance of the applicant (see O.32A r.3(1)).

95. In respect of HCO s.27(5), the Bar is concerned as regards the lack of a right to appeal or review by a person who is refused leave to institute proceedings. Although in the majority of cases a decision to refuse leave may be very clear-cut, it cannot be ruled out that there may be less clear cases whereby the party applying for leave may feel aggrieved by a decision of a single judge. Since a refusal of an application under this section would have the effect of taking away the applicant's right to bring any proceedings, and such a decision would have a bearing on a future application by the same applicant (see proposed Form 110), the Bar suggests that, if there is no right to appeal, there should at least be a right to seek leave to appeal against the decision made by a single judge.

Draft RHC Amendment O.32A

96. Other than the typographical error in O.32A, r.1(2) in that "a" should be inserted before "single judge", the Bar has no comments on the proposed amendment.

Discovery

Draft CJ Bill: HCO s.41A

Draft RHC Amendment O.24

97. Recommendations 75 to 78 of the Final Report are directed towards facilitating pre-action discovery to cover proceedings other than for personal injuries and fatal accident claims. The Bar welcomes this extension of pre-action discovery to all proceedings in general. With this extended provision, it would enable a party with an apparently meritorious claim to pursue it, which he otherwise may not.
98. It is noted that these Recommendations have been de-linked from the pre-action protocols that were originally proposed in the Interim Report.
99. The Bar initially had concerns that if the power to order pre-action discovery was couched in too wide terms, there was a risk that rich litigants could utilise this as a tool to put pressure on the other party. This concern has been met by the manner in which the power has been expressed in the proposed HCO s.41A. This introduces the limiting test of allowing discovery only in respect of documents that are “directly” relevant to an issue arising or likely to arise out of that claim. It is hoped that this will limit the potential and/or opportunity for

a party to embark on oppressive or fishing applications for pre-action discovery.

100. For the avoidance of any doubt, what is “directly” relevant is usefully defined by the proposed HCO s.41A(4).

Interlocutory Applications

Draft RHC Amendment O.32 r.11A

101. Although the Bar has no comments on the drafting of the proposed amendment, the Bar considers that the phrase “exceptional circumstances” may lead to arguments as to its meaning. Although the Final Report makes reference at page 272 in footnote 436 to the Ladd v Marshall test, the Bar observes that while this test provides for a degree of certainty, it sets a high threshold which may not be apposite in the context of interlocutory applications. This is particularly so given the proposal to restrict the ability to file further evidence on appeal from a master to a judge; see proposed amendment to O.58 r.1.

Draft RHC Amendment O. 32 r.11B

102. Although the Bar has no comments on the drafting of the proposed amendment,

the Bar considers that following enactment, the operation of O.32 r.11B (ie the making of self-executing orders) needs to be monitored to gauge whether the provision serves its intended purposes of better compliance with orders and fewer interlocutory applications.

Interlocutory Applications and Summary Assessment of Costs

103. As a general comment in respect of Recommendations 88, 89 and 92 of the Final Report, upon which the proposed amendments referred to below are based, the Bar maintains its view (vide the comments on Proposal 32 in the 2002 Response) that these Recommendations may lead to the arbitrary assessment of costs in similar cases depending on the viewpoint of a particular judge. Extensive training of judges may be required before consistency may be achieved. Without a general consensus as to what are the current acceptable and reasonable levels of professional fees and charges, consistency in such summary assessment can hardly be achieved.

104. The Bar is of the view that the Court's current power in making gross sum assessment, pursuant to O.62 r.9(4)(b), is sufficient.

Draft RHC Amendment O.62 r.9(4)(b), (5)

105. Subject to the general comments above, the Bar has no comments on the proposed amendments.

Draft RHC Amendment O.62 rr.9A, 9B, 9C, 9D

106. Subject to the general comments above, the Bar has no comments on the proposed amendments.

Draft RHC Amendment O.62 r.28A(6)

107. Subject to the general comments above, the Bar has no comments on the proposed amendments.

Witness Statements and Evidence

Draft RHC Amendment O.38 r.2A

108. The Bar supports the proposal to provide greater flexibility in allowing a witness to expand on his/her witness statement. This expansion has been achieved by the proposed amendment to O.38 r.2A(7)(b) by substitution of a new sub-paragraph (b). The new provision gives discretion to the Court to determine whether such expansion is to be permitted, instead of the previous

position where such amplification may be permitted with the consent of the opposite party.

109. By leaving the issue in the Court's discretion, this would enable better case and trial management. It would avoid the situation where both parties have been dilatory in the manner in which their respective witness statements have been prepared, and they can mutually agree to allow each other's witnesses to expand on their witness statements.

110. Under the proposed amendments, the Court will only exercise its discretion to permit such amplification only if it is satisfied there is "good reason" not to restrict the parties to the witness statements as filed.

Expert Evidence

111. The Bar supports the implementation of Recommendations 102 and 103 of the Final Report that require an expert to acknowledge that his overriding duty is to the Court and not to the party who instructs him. An Appendix D has been added to O.38 pursuant to a proposed r.37B. It is however noted that the proposed Appendix D set out in Annex D of the Consultation Paper appears to

mistakenly refer to Appendix D as being made pursuant to O.38 r.37AA. There does not appear to be any proposed r.37AA, and this may be a typographical error.

112. The proposed Code of Conduct for Expert Witnesses brings the Hong Kong position in line with that prevailing in England and Australia. The Bar supports the long overdue introduction of such a Code.

Draft RHC Amendment O.38 r.4A

113. Recommendation 107 of the Final Report provides for the Court to be provided with the power to order the parties to appoint a single joint expert upon the application of one of the parties. In supporting the idea in general, the Bar had expressed its concerns about the exercise of such a power particularly in personal injury cases, where there was a risk of escalating costs by the more resourceful party appointing “shadow” experts. Such “shadow” experts are used to provide advice and ammunition to help that party in directing how instructions to the single joint expert are to be drafted in order to influence the content of the single joint expert’s report.

114. The reality is that the claimant in personal injury cases is usually legally aided, and he is unlikely to receive approval from the Legal Aid Department to

instruct another expert to review and advise on the single joint expert's report. On the other hand, the defendant is usually funded by an insurance company who usually has deeper pockets. There is a danger that the balance may be tilted against claimants if a single joint expert is ordered to be used invariably.

115. Upon further consideration, the Bar considers that its concerns were expressed too narrowly in the 2002 Response. Experience shows that where a single joint expert is ordered to be used by the Court, his report is also ordered to be admitted without requiring his attendance in Court. Accordingly, if there are unfavourable or questionable opinions expressed by the single joint expert, the parties are usually not allowed to cross-examine the expert; see Peet v Mid-Kent Healthcare NHS Trust [2002] 3 All ER 688, CA(Eng). If there is nevertheless cross-examination, what happens if, after that cross-examination, the expert turns out to be a person upon whom the Court cannot rely? The temptation for a Court to rely on its "own" witness will be very great; and the chances of a superior court overruling a lower court's reliance on a witness is likely to be low.

116. It is felt that the better alternative, particularly in personal injury cases, would be for the parties to arrange for a joint or separate examination by their respective experts. The experts then can meet and provide a joint report

identifying their agreements and differences, if any, and thereby help to narrow down the issues for the Court's consideration.

117. The Bar therefore feels that it must be emphasised that the power to order the parties to use a single joint expert should be the *exception* rather than the rule.

118. It is noted that the Recommendation 107 proposes that the appointment of a single joint expert by the Court is to be ordered only upon the application of one of the parties and upon the Court being satisfied that the other party's refusal to the appointment is unreasonable in the circumstances.

119. To facilitate such an appointment, it is proposed that a new r.4A be added to O.38. It is however noted that O.38 r.4A(4) as presently drafted leaves the matters that the Court should take into account considering whether to make such an order to be embodied in a Practice Direction instead of being spelt out in the RHC itself.

120. Paragraph 632(b) of the Final Report identifies the various factors that the Court should take into account in deciding whether it would be appropriate to order the parties to appoint a single joint expert. Without necessarily being exhaustive, the five factors identified there would appear to provide a useful

checklist for the Court to bear in mind.

121. The Bar is of the view that these five factors should be embodied into the substantive law and not be the subject matter of a Practice Direction. It is suggested that these five factors be incorporated into O.38 r.4A itself, and the reference to the practice direction in O.38 r.4A(4) be deleted.

Case Managing Trial

Draft RHC Amendment O.35 r.3A

122. The proposed amendment is based on Recommendation 108 of the Final Report. Whilst such a recommendation may be safely adopted at the stage of a pre-trial review, the Bar maintains its views expressed in its 2002 Response under Proposals 35 and 41 in relation to the Court's power to manage trials during the trial itself.
123. The proposed amendment, in adopting O.34 r.5A of the Western Australian Supreme Court Rules, does not address the Bar's concern as to the danger of taking away the parties' rights to conduct their case in a way preferred by them. The danger of the judge descending into the arena still remains and the

appearance of bias will be most probable when a judge exercises his/her rights to limit the time of cross-examination and oral submissions etc. under the proposed O.35 r.3A(1).

124. The Bar is of the view that a more appropriate sanction is for the Court to penalise a party for wasting the Court's time rather than seeking to limit a party's right or liberty to present its case in the way it is felt necessary or desirable.

Leave to Appeal

125. Recommendations 109 to 115 of the Final Report relate to the procedure for appeals. Together, they deal with two aspects of the procedure, namely the requirement of leave to appeal and the determination of leave applications and interlocutory applications relating to a pending appeal.

Draft CJ Bill: HCO s.14AA

Draft RHC Amendment O.59 r.21

126. The Draft CJ Bill proposes amendments to the HCO to implement recommendations 110 to 113 and 115 of the Final Report. The main proposal is the introduction of a proposed s.14AA of the HCO prescribing the leave to

appeal requirement in respect of appeals against interlocutory judgments or orders of the Court of First Instance, with further provisions that leave to appeal may be granted in respect of a particular issue arising out of the interlocutory judgment or order or subject to conditions; and the finality provision in respect of the Court of Appeal's determination on the question of leave to appeal. The extent of the application of the leave to appeal requirement is prescribed by rules of court, namely through introducing the proposed O.59 r.21 (which lists the judgments and orders where an appeal lies as of right pursuant to HCO s.14AA) under the Draft RHC Amendment.

127. The Bar opposed in its 2002 Response the proposal in the Interim Report to require all appeals from the Court of First Instance to the Court of Appeal to be subject to a requirement of leave. Having considered the Draft RHC Amendment and the list in the proposed O.59 r.21 of judgments and orders where an appeal lies as of right, the Bar finds in principle that the delimitation between judgments or orders requiring leave to appeal and those where an appeal lies as of right is acceptable.
128. The proposed s.14AA(1) of the HCO specifies the requirement of leave to appeal to the Court of Appeal in respect of an interlocutory judgment or order of the Court of First Instance, except as provided by rules of court made under

s 54 of the Ordinance. The proposed s.14AA(2) empowers that rules of court made under s.54 may specify the judgments or orders by description to which there would be right to appeal. This provision, it is observed, provides sufficient authority for the relevant rules of court.

129. The proposed s.14AA(4) of the HCO specifies the criteria for granting leave to appeal to the Court of Appeal. Two alternative criteria are to be specified. The first, namely “reasonable prospect of success”, appears to be the criteria applied by the District Court and the Court of Appeal in determining whether leave to appeal against a judgment or order of the District Court to the Court of Appeal should be granted; see Ma Bik Yung v Ko Chuen (unreported, 8 September 1999, HCMP 4303/1999), CA. Leong JA in that case approved the guidance of Lord Woolf MR in Smith v Cosworth Casting Processes Ltd [1997] 1 WLR 1538, CA (Eng) at 1538F-H. Although Lord Woolf referred to “no realistic prospect of succeeding on the appeal”, that was stated to be no different from the test that “the applicant has no arguable case”. The second, namely “some other compelling reason”, seems to have also derived from the full effect of Lord Woolf’s guidance above but the editors of *Civil Procedure 2006*, Vol.1 considered it to be a reserve power to permit cases to go to the Court of Appeal even though there are doubts as to the prospects of success. The Bar has no objection to these criteria as understood above.

130. The Bar notes that the Chief Justice’s Working Party had considered in the Final Report, paras.648 to 650, the constitutional question of whether a finality provision of this nature is consistent with Art.82 of the Basic Law of the HKSAR, which provides for the power of final adjudication of the Court of Final Appeal, by reference to A Solicitor v Law Society of Hong Kong (SJ Intervening) (2003) 6 HKCFAR 570, CFA. The Bar notes that the Appeal Committee of the Court of Final Appeal left open the possibility of a constitutionality challenge on this type of finality provision in HLF v MTC & LHN (Intervener) (2004) 7 HKCFAR 167. It is considered that questions of great general or public importance may arise in the proper interpretation of the proposed O.59 r.21 (see, in this connection, Hip Hing Timber Co Ltd v Tang Man Kit & Anor (2004) 7 HKCFAR 212, CFA), making it necessary for the Court of Final Appeal to confront the constitutionality issue.

131. The proposed O.59 r.21(1) lists out the judgments or orders to which an appeal lies as of right. The list includes:

- (j) a restraint order under s.10 of the Drug Trafficking (Recovery of Proceeds) Ordinance (“DT(ROP)O”);
- (k) a charging order under s.11 of DT(ROP)O;

- (l) an order for the appointment of a receiver pursuant to a charging order under O.115 or under s.10 or 12 of DT(ROP)O;
- (m) an order under O.115 (pursuant to DT(ROP)O);
- (n) an order under O.116 (pursuant to the Organized and Serious Crimes Ordinance (“OSCO”));
- (o) an order under O.117 (pursuant to OSCO);
- (p) an order under O.118 (pursuant to Interpretation and General Clauses Ordinance (“IGCO”) ss.84, 85, 87); and
- (q) an order under O.119 (pursuant to Prevention of Bribery Ordinance).

The inclusion of those judgments or orders necessarily assumes that they were judgments or orders of the Court of First Instance in a civil cause or matter (per HCO s.13(2)(a)). On the other hand, O.1 r.2(3) categorizes proceedings to which O.115, 116, 117, 118 and 119 applies as “criminal proceedings”. The Court of Appeal held in So Wing Keung v Sing Tao Ltd & Anor [2005] 2 HKLRD 11 that an order made under IGCO s.85, following the procedural framework of O.118, was criminal in nature and not in a civil cause or matter. Accordingly, the Bar considers that the assumption behind the inclusion of items (j) to (q) of the proposed O.59 r.21(1) is erroneous and those items should be deleted. Appeals from orders made in the Court of First Instance under O.115, 116, 117, 118 and 119 presumably will have to be pursued before the

Court of Final Appeal in its criminal jurisdiction.

Draft RHC Amendment O.59 r.22

132. The Bar finds that the proposed O.59 r.22 does not specify the time limit for making an application for leave to appeal against an interlocutory judgment, order or decision of the Court. O.59 r.4 cannot be relied on to specify the relevant time limit, since it is concerned with service of the notice of appeal and where leave to appeal is required, one cannot validly serve a notice of appeal unless and until leave to appeal has been obtained; see *Hong Kong Civil Procedure 2006*, Vol.1, page 859, para.59/1/44. The Bar suggests that an amendment worded in terms similar to O.59 r.19(3) (relating to applications for leave to appeal from the District Court) be introduced.

Draft CJ Bill: HCO s.34B(4)

Draft RHC Amendment O.59 r.22(3)

133. The Draft CJ Bill seeks to amend HCO s.34B(4) to insert a new paragraph (aa) providing that two Justices of Appeal may properly hear or determine applications for leave to appeal (except applications for leave to appeal to the Court of Final Appeal) and to amend the phrase “hearing and determining” to “hearing or determining” where such phrase appears in the sub-section, in order to provide for the applications and appeals to which the sub-section

applies to be determined with or without a hearing. This amendment should be read with the proposed O.59 r.22(3), providing for the Court of Appeal to determine an application for leave to appeal without a hearing on the basis of written submissions only.

134. The Bar is of the view that provided that the leave to appeal requirement prescribed under the proposed HCO s.14AA(1) remains subject to the exceptions prescribed under the proposed O.59 r.21, the proposed insertion of HCO s.34B(4)(aa) is acceptable. However, the same cannot be said of the rest of the amendments. The remainder of the amendments to HCO s.34B(4) seek to erode the fundamental right to a public hearing by a side wind by making relatively subtle amendments to a provision whose purpose is to specify the situations in which a Court of Appeal consisting of two Justices of Appeal is duly constituted. (In any event, the drafting of that clause (clause 26(b)) is undesirable since an appeal by way of a public hearing involves the Court of Appeal “hearing and determining” the appeal and an appeal on the basis of written submissions involves the Court of Appeal “determining” the appeal. It is inadequate to draft the clause using only the phrase “hearing or determining”.) If it is intended that certain applications or appeals would be determined without a hearing on the basis of written submissions only, the Bar suggests that should be effected by the enactment of primary legislation

expressly abrogating the right to a public hearing, rather than by rules of court. This is because unless the rule-making powers specifically provide for the abrogation of this common law fundamental right, a rule of court purporting to achieve such a result is arguably ultra vires; see Joplin v Chief Constable of the City of Vancouver (1982) 2 CCC (3d) 396 (affd (1985) 20 DLR (4th) 314) (which was approved in New World Development Co Ltd & Ors v Stock Exchange of Hong Kong Ltd [2005] 2 HKLRD 612, CA).

Lands Tribunal Ordinance (Cap.17) (“LTO”) s.11

135. The Consultation Paper indicates at page C6 that amendments along similar lines as those to the HCO will be incorporated into the LTO s.11. The present LTO s.11 permits in general only appeals to the Court of Appeal on the ground that the determination or order of the Lands Tribunal is erroneous in point of law. The Bar is against introducing a leave requirement in addition to the existing provision, which already confines the scope of appeals. Where an appeal not seeking in substance to argue a point of law is filed, the respondent (which is usually the Government or the public authority) can be relied on to act diligently to seek the striking out of the notice of appeal.

Employees’ Compensation Ordinance (Cap.282) (“ECO”) s.23

136. The Consultation Paper also indicates at page C6 that amendments along

similar lines as those to the HCO will be incorporated into the ECO s.23. It is not known how the “incorporation” is to be formulated, particularly the extent of the present general right to appeal to the Court of Appeal from any order of the District Court under the ECO is to be restricted by the introduction of a leave requirement. Bearing in mind the beneficent object of the ECO and the fact that the present general right to appeal in employees’ compensation proceedings has been provided against the background of the leave requirement under the DCO for appeals against judgments or orders of the District Court in its civil jurisdiction, there is a good reason for orders made under the ECO to be excepted from a leave requirement. The Bar expressly reserves its views on this proposal and wishes to be consulted in relation to the detailed amendments (if any) that may be drafted.

Appeals

Draft CJ Bill: HCO s.34B(4)

Draft RHC Amendment O.59 r.14A

137. Recommendation 120 of the Final Report proposes that applications which are interlocutory to pending appeals should be dealt with on paper by a Court of Appeal consisting of two Justices of Appeal. This is implemented by the

proposed amendment to HCO s.34B(4) to make provision for such a jurisdiction of a Court of Appeal consisting of two Justices of Appeal; and the proposed amendment to add O.59 r.14A to provide that interlocutory applications relating to a pending appeal may be determined by the Court of Appeal (including a single judge thereof) without a hearing on the basis of written submissions and that a Court of Appeal consisting of two Justices of Appeal may direct a hearing of such interlocutory applications before themselves or a Court of Appeal consisting of three Justices of Appeal.

138. While the Bar considers to be acceptable the objective to be achieved by the proposed insertion of HCO s.34B(4)(ab), for the reasons stated above in relation to the proposed amendment to HCO s.34B(4)(a), (b), (c) and (e) and the Draft RHC Amendment O.59 r.22(3), the Bar also finds HCO s.34B(4)(ab) and O.59 r.14A, as presently drafted, to be unacceptable.

Costs-only Proceedings

Draft CJ Bill: HCO s.52B; DCO s.53A

139. The Bar notes there is no reference to the jurisdictional limits in either of these proposed sections and suggests that these are included to avoid confusion as to

the Court the parties should apply to for a determination of costs only.

Draft CJ Bill: Small Claims Tribunal Ordinance (Cap.338) (“SCTO”) Schedule

140. In respect of the proposed para.(1)(f) of the Schedule to SCTO, the Bar queries why the Small Claims Tribunal should not have jurisdiction to determine costs only proceedings where the costs in question are within the jurisdictional limit of the Tribunal. The costs involved in commencing costs only proceedings in the District Court is likely to be out of proportion to the amount at stake.

Costs Orders against Non-Parties

141. The Bar notes that Recommendation 9 of the Final Report (on which the proposed legislative and rule changes commented on below are based) has not hitherto been the subject matter of any discussion or consultation. However, the Bar recognises that the Recommendation is in line with the equivalent English provision under the Supreme Court Act 1981.

Draft RHC Amendment O.15 r.5A

142. The Bar supports the proposed amendments. To prevent abuse or improper joinder of party, the Bar considers that it would be desirable to specify –

- (a) the grounds upon which a non-party may be joined as a party under this rule,
- (b) the circumstances under which a party may be made liable for costs,
- (c) the time when the non-party may or should be joined for the purposes of costs only, and
- (d) whether and, if so, when any warning of the potential joinder should be given to the non-party in question.

143. The Bar finds it necessary to raise the following question: Is it intended that proceedings against a foreign non-party should be susceptible to the grant of leave to serve out of the jurisdiction? If the answer to the above question is in the affirmative, the Bar notes that there appears to be no proposal to include this type of claim within O.11 r.1. Whilst O.11 r.1(1)(ob) allows the Court to grant leave to serve out of the jurisdiction where the Court is exercising its power under HCO s.52B, it is by no means clear that this will include a claim against a non-party for costs. The Bar considers that clarification on this issue would be appropriate and notes that, in England, there is an express power to serve a claim for costs only against a foreign party in CPR 6.20(17) and 6.21.

Wasted Costs

Draft CJ Bill: HCO s.52A(4)-(6); DCO s.53(3), (4)

144. The Bar has strong reservations over the proposed amendments. The comments made earlier about present deep misgivings about this proposed power are elaborated below:

- (a) An award of costs against a barrister may potentially wreak ruin, both financially and professionally upon that barrister, particularly when the order were made in respect of a trial. It is the more junior at the Bar who are the most vulnerable, but the Courts will no doubt expect a higher degree of expertise to run concomitantly with a barrister's seniority.
- (b) Barristers are not in the same position as solicitors who may be able to accommodate an adverse costs order within their firms' general expenses. Wasted costs orders made against legal representatives who are legal officers as defined in the Legal Officers Ordinance (Cap.87) s.2 are likely to be borne by the relevant department instead of being personally threatening.
- (c) Generally speaking, a solicitor's costs, because of the lower level of

audience, are likely to be less than those that might be awarded against a barrister.

- (d) If a wasted costs order were made against a barrister and his instructing solicitor, there would be difficult questions of apportionment and it is possible that this would generate unseemly disputes (and necessarily, greater legal expense) in order to determine where the blame should lie for a particular course that was taken.

- (e) The proposed amendments relate to legal representatives who act on behalf of a “party”. HCO s.2 and DCO s.2 both define the word “party” as including “every person served with notice of, or attending, any proceedings, although not named on the record”. (Thus any one can be made a “party” to an action by the simple means of serving a set of court papers on him or her. In the field of judicial review, particularly, many persons are made “parties” although they do not intend to participate in the application because both the present O.53 r.5(3) and the proposed O.53 r.2B require service of papers on persons “directly affected” who then may or may not participate.) If it is intended that the new power is to be used only in connection with legal representatives who play an active part in proceedings and waste costs thereby, it seems that reliance on the

statutory definition of “party” may be problematic in opening the way to applications against absent legal representatives for sins of omission in not participating in an action. That might be onerous to the legal representatives whose client has chosen, on his or her advice, not to take part in proceedings when a case is adjourned so as to enable it to appear, as such advice might have to be evaluated to see if it was “an unreasonable act or omission”.

- (f) Parties to an action may, it is feared, take advantage of the proposed power to make applications for wasted costs orders against opposing parties with more modest means, notwithstanding the proposed O.62 r.8C.

- (g) It is inevitable that there will be a lack of uniformity from the Bench in imposing wasted costs orders on barristers. One merely has to note the increasing tendency of judges making public pronouncements about a lawyer’s competence before careful investigation of relevant circumstances and giving a reasonable opportunity for the lawyer to defend himself or herself. There may be certain Courts where barristers will be prone to restricting the fearlessness with which they represent their clients, for fear of losing their livelihoods.

(h) The Bar, in its 2002 Response, suggested that a wide latitude (and perhaps a narrower test) should be given to barristers and solicitor advocates in conducting cases, bearing in mind the duties and matters of public interest paragraphs 21, 110 and 111 of the Bar's Code of Conduct encapsulated for barristers. The proposed legislative amendments merely added barristers into the category of legal representatives to be subject to wasted costs orders.

145. Wasted costs orders are meant to compensate and not provide a windfall. This principle would be better recognized if the word "wholly" was inserted between the words "party" and "as" in the proposed HCO s.52A(5) and also in the corresponding provision in the DCO. A wasted costs order would only then be made if the relevant act in sub-paragraphs (a) and (b) and no other act caused the costs to be incurred.

146. A wasted costs order, being an order relating only to costs which are by law left to the discretion of the Court, may not be the subject of an appeal without the leave of the Court in question or of the Court of Appeal. To ensure that wasted costs orders are not easily abused or wrongly used, the extension of the wasted costs order jurisdiction to barristers together with the empowerment of judges to make such orders on their own motion should be accompanied by the

provision of an unqualified right of appeal against such orders as a safeguard.

Draft RHC Amendment O.62 rr.8, 8A, 8B, 8C, 8D

147. The Bar repeats the deep misgivings and concerns towards any legislative amendment that would empower a Court to make a wasted costs order against a barrister. However, insofar as such a costs order may be made against a solicitor, the Bar observes, in respect of O.62 r.8A(4), that it is difficult to see why, in an appropriate case, the Court should not entertain an application for wasted costs. There are at least the following advantages empowering the Court to make a wasted costs order at an early stage –

- (a) The Court seised of the application which is regarded as satellite litigation is in the best position to determine whether or not a wasted costs order should be made against the legal representative;
- (b) It serves as an early warning to the legal representative and would discourage him from repeating the same conduct; and
- (c) It enables the clients to know that the Court takes displeasure in the way his legal representative has been conducting the case. This, in turn, may lead the client to reconsider whether or not he should continue to retain his

legal representative.

Any of these advantages in a particular case should, in the Bar's view, be such as to cause a Court to be satisfied that there is reasonable cause for the application to be made or dealt with before the conclusion of the proceedings.

148. In respect of O.62 r.8A, the Bar notes that the Court's power to make a wasted costs order of its own motion against a legal representative carries a significant risk. If, upon the application of an opposing party, the legal representative is ordered to show cause why a wasted costs order should not be made and duly does show such cause, the opposing party will be at risk for the costs of the legal representative in showing cause. On the other hand, where the Court orders a legal representative to show cause on its own motion and the legal representative duly does so, there is no party from whom the legal representative can recover his costs of showing cause. A legal representative will therefore face a significant risk of non-compensable expenditure under this new rule. The Bar therefore opposes the introduction of O.62 r.8A(1). If, contrary to the Bar's view, this proposal is to remain, consideration should be given for making available public funds to meet the legal representative's costs in successfully showing cause. This is because where the Court asks for the order there is an exercise of government power just as much as if the Secretary

for Justice asked for such an order. There appears to be no rationale for having compensation in one case and not the other.

149. Also in respect of O.62 r.8A, the Bar notes that a legal representative may face difficulties in preparing to show cause why a wasted costs order should not be made against him if he needs to have resort to material subject to legal professional privilege in order to do so. If his client is unco-operative (and here there will be a clear conflict of interest between the client and his legal representative) the legal representative may find that he is prejudiced in the way in which he can show cause.

150. In respect of O.62 r.8B, the Bar considers that it is most undesirable to provide in sub-rule (2) that the Court may proceed with the second stage of the process without an adjournment. A “cooling-off” period is important to allow the parties and the Court to consider the situation, seek instructions, advice and guidance, and come back to the matter with greater objectivity and less passion. The default position should be that if the legal representative wishes to have time for the issue to be maturely considered, the Court should grant an adjournment subject to any party objecting that an adjournment would cause prejudice. In any event, if, contrary to the Bar’s views, the power proposed in sub-rule (2) should remain, it should be modified so that it would only be

exercised if the legal representative has had a reasonable opportunity to make representations and not if the judge is satisfied of that fact.

151. In respect of O.62 r.8C, the Bar recognises that the rule is a laudable one but suggests that there are a number of difficulties inherent in the rule as formulated. First, it is not clear whether it is an objective or subjective standard that is to be applied to determine whether this rule is breached. If subjective, there are obvious difficulties of establishing a breach. If objective, what are the matters against which the conduct is to be judged? For example, is a warning a threat? What if the party's letter impliedly makes the threat but expressly disclaims that a threat is intended? Second, it is not clear what consequences flow from a party's breach of the rule. The Bar considers that further consideration should be given as to the scope of the prohibition and any sanctions for breach before a revised rule is formulated.

152. Specifically in respect of O.62 r.8C(2)(a), the Bar notes there is a typographical error in (at page E200 of the Consultation Paper) where the reference to "waste costs" should be to "wasted costs".

153. In respect of O.62 r.8D, the Bar is of the view these provisions should be re-drawn to make it clear that in the matters covered by sub-rules (2) to (4) the

legal representative is a solicitor.

Costs: General Approach to Inter-party Costs

Draft RHC Amendment O.62 r.3A

154. The Bar considers that in addition to rule 7, the Court should also have regard to rule 5.

Draft RHC Amendment O.62 r.5(1), (2), (3)

155. The Bar notes that the amendments under O.62 r.5(1)(f) and (2) are consistent with the principles propounded in Re Elgindata Ltd (No.2) [1992] 1 WLR 1207 which, in turn, are founded upon O.62 r.7.

156. In respect of O.62 r.5(3), the Bar queries whether it is intended that the Court is to take an inquisitorial role in determining whether an unrepresented party was unaware of a relevant pre-action protocol. If an unrepresented party denies awareness, can the other party or the Court cross-examine him on such denial?

Costs: Taxing the other side's costs

Draft RHC Amendment O.62 First Schedule, Part II para.2(5)

Draft RHC Amendment O.62 First Schedule, Part II, paras.1(1), 2(3)

Draft RHC Amendment O.62 Second Schedule, Part II

Draft RHC Amendment O.62 r.13(1A)

Draft RHC Amendment O.62 rr.21, 21A, 21B, 21C, 21D

Draft RHC Amendment O.62 r.22

157. The Bar does not have any comments on the proposed amendments.

Draft RHC Amendment O.62 rr.32A, 32B, 32C

158. By reason of the matters stated above in relation to O.62 r.8A, the Bar opposes the introduction of O.62 r.32C. Otherwise, the Bar does not have any comments on the proposed amendments.

Costs Offer and Payments into Court

Draft RHC Amendment O.62A r.1(1)

159. The Bar notes a typographical error: “ettle” in the definition of “costs offer” should be “settle”.

Draft RHC Amendment O.62A r.2(3)

160. The Bar queries why an offer not made in accordance with the Order may also attract the consequences listed in O.62A rr.13, 14 and 15 (“if the Court so orders”). It should be noted that an offer to settle in England and Wales will not attract the consequences set out in CPR Part 36 unless it is made by way of a Part 36 payment. It is also contradictory to the proposed O.62A r.3(1).

Draft RHC Amendment O.62A r.6

161. The Bar queries whether there is any difference between the time when a notice is “served” on the offeree (sub-r.(2)), and when the notice is “received” by the offeree (sub-r.(1)). If so, it is difficult to see why there should be such a difference and therefore the Bar considers the different terminology may create confusion.

Draft RHC Amendment O.62A r.15

162. The Bar queries why the interest rate is not simply the judgment rate of interest.

Judicial Review

163. Recommendations 144 to 148 of the Final Report relate to the procedure of

application for judicial review. These recommendations are implemented in rules 147 to 157 of the Draft RHC Amendment.

164. It should be noted that rules 26 to 28 of the Draft RHC Amendment, implementing recommendations 12 to 14 of the Final Report, also provide for the express procedural change in the mode of commencement after the granting of leave to apply for judicial review.

165. Further, as the articles by David Elvin QC and James Maurici show in the case of England and Wales, changes in the other parts of the RHC (including the introduction of underlying objectives, and amendments to the rules of court governing interlocutory applications, interim relief, and costs) will carry implications for the procedure of application for judicial review. See Elvin and Maurici, *Judicial Review and the CPR* [1999] JR 72; Elvin and Maurici, *Judicial Review and the CPR: An Update* [1999] JR 207; and Elvin and Maurici, *Judicial Review and the CPR: Further Update* [2000] JR 164.

166. The full effect of Civil Justice Reform on applications for judicial review will not be appreciated unless and until the relevant Practice Direction and Pre-action Protocol have been drafted and released for public consultation. The Bar asks the Steering Committee to seriously consider making available those

two documents in draft for public consultation before the enactment of the Draft RHC Amendment into law.

Draft RHC Amendment O.53 rr.1, 1A

167. It is proposed to implement Recommendation 144 of the Final Report by substituting the current O.53 r.1 with the proposed O.53 rr.1, 1A, drafted along the lines of the CPR 54.1 to 54.3. The proposal is remarkable in that it introduces a definition of “application for judicial review”. Although the commentaries in respect of CPR 54.1(2)(a) (which sets out the identical definition) consider the description “broad enough to encompass the wide range of measures or omissions that the courts have held to be amenable to judicial review” (see *Civil Procedure 2006* Vol.1, pages 1624, 1626, paras. 54.1.1, 54.1.3; Lewis, *Judicial Remedies in Public Law* (3rd Ed) para.4-003), there is room to doubt whether applying the same description in the context of Hong Kong (vide the proposed O.53 r.1A) is comprehensive enough to cover the range of measures potentially amenable to judicial review, particularly under the constitutional jurisdiction of the HKSAR courts declared by the Court of Final Appeal in Ng Ka Ling & Ors v Director of Immigration (1999) 2 HKCFAR 4, given that the expression “enactment” is stated in IGCO s.3 to be synonymous with that of “Ordinance” (which is defined to refer to local primary and subsidiary legislation), unless the context otherwise requires. It is

pertinent in this context to note the following in *Civil Procedure 2006* Vol.1, page 1626, para.54.1.3: “It is unlikely that Part 54 was intended in any way to restrict the existing jurisdiction (and, if it had sought to do so, it may well have been *ultra vires*).”

Draft RHC O.53 rr.2A-2D

168. It is proposed to implement Recommendations 145, 146 and 147 of the Final Report by adding the proposed O.53 rr.2A to 2D in substitution of the existing O.53 r.3(1), (2). The new O.53 r 2A(1) seeks to make provision for two methods of making an application for judicial review: the usual procedure of applying for leave to apply for judicial review (which will engage the 28 days service and acknowledgement of service timetable under the proposed O.53 rr.2B, 2C) and an urgent procedure to be prescribed by a Practice Direction.
169. The Consultation Paper has not specified the urgent procedure to be prescribed. The Final Report, at paras.888 and 889, made reference to the Pre-action Protocol operating in England and Wales for applications for judicial review and the Practice Statement (Administrative Court: Listing and Urgent Cases) [2002] 1 WLR 810. A reading of the Practice Statement (which was made in response to a submission of the Administrative Law Bar Association; see Clayton, *Urgent Applications for Permission* [2001] JR 225) indicates that the

Judiciary and particularly the judges nominated to hear applications for judicial review should allocate the resources needed to handle urgent cases. This may require one of the nominated judges to act as the “urgent judge” on a rotation basis and a dedicated fax line for receiving applications and representations. The desirability of subsuming these requirements under the present “duty judge” system needs to be carefully examined, bearing in mind the volume of work and the nature of the issues capable of being canvassed in applications for judicial review. The Practice Statement also makes provision for a prescribed form for requesting urgent consideration. Rather than adopting the prescribed form without further ado, it is advisable to simply require a statement of items of information in the representation seeking urgent consideration.

170. Promptitude is always a matter of context: Lo Siu Lan & Anor v Hong Kong Housing Authority (unreported, 17 December 2004, CACV 378/2004), per Stock JA. A respondent or interested party does not appear to have the capacity to access the urgent procedure in a suitable case. The earliest point for such parties to engage the case management powers of the Court appears to be after they have been served with the application papers but the applicant has 7 days to do so. In an urgent case in which doubts cast upon a public policy initiative impinging on the rights and interests of many others (including financial implications) should be removed with expedition, the timetable prescribed

under the proposed O.53 rr.2B, 2C appears to be too rigid.

171. The proposed O.53 r.2C requires service of the notice of application to apply for judicial review and the verifying affidavit to the proposed respondent and other interested parties, and the acknowledgement of service by the served parties within a non-extendable time limit. The Bar did not support the relevant proposals when they were put to consultation in the Interim Report. The Final Report adopted Recommendations 146 and 147, disagreeing with the opposing views that giving a respondent and interested parties the option of acknowledging service would lead to increased costs; and that the requirements contributed to delay. Rather the Final Report considered the requirements had the benefits of allowing the pooling of claims and grounds and assistance to the Court in determining whether leave should be granted.

172. The Bar remains unpersuaded by the reasoning of the Final Report for adopting Recommendations 146 and 147. The costs implications the Bar envisaged in its submission in 2002 were made plain in the English Court of Appeal's judgment of R (Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346, [2004] 1 PLR 29, where, as Michael Fordham summarized, the Court of Appeal explained that a successful respondent or interested party at the leave stage should generally recover its costs of the acknowledgement of service but

should not generally recover its costs for attending an oral renewal hearing. The Court of Appeal also indicated that the basic purpose of the acknowledgement was to assist on arguability and to prompt the respondent authority to reconsider its position. See Fordham, *Procedural Pearls* [2005] JR 90.

173. While costs for attending an oral renewal hearing were said to be not generally recoverable, the English Court of Appeal in Mount Cook (above) listed a number of exceptional circumstances for recovery:

- (a) hopelessness of the application;
- (b) the persistence of the applicant after this hopelessness had been identified;
- (c) the extent to which the applicant had sought to abuse the process of judicial review for collateral ends; and
- (d) the extent to which the applicant had effectively had an early substantive hearing of his application.

Further, a relevant factor for the Court to consider in exercising its discretion was the extent to which the applicant had substantial resources, with which he had prosecuted his claim. The analysis by Palmer and Whale (in *Mount Cook 2: An Analysis* [2004] JR 55) argued that the Court of Appeal's decision ran

counter to the widely held opinion that applicants ought to be able to bring applications for judicial review without fear of costs sanctions at the leave stage. The danger, they contended, was that applications would be deterred. The other criticism was that an award of costs of a respondent's attendance at an oral hearing for leave may not be truly exceptional. Many applications refused leave to apply have been described as "hopeless" and oral hearings for the granting of leave where the respondent attends often develop into at least a dress rehearsal of the substantive hearing.

174. It may be argued that the costs involved in the preparation of an acknowledgement of service would be insubstantial, since the proposed O.53 r.2C(4)(a)(i) provides for the setting out of a summary of the grounds for contesting the application for judicial review. However, a respondent wishing to "knock-out" an application for judicial review touching upon a wide ranging and/or pressing matter of public policy would be minded at least to properly particularize its case at this stage.

175. As to the issue of delay, the Bar does not agree with the view expressed in the Final Report that the interposition of the 21-day period for acknowledgement of service "would not normally cause anyone difficulties". An administrative decision, such as the dismissal of a police officer, remains valid and effective

unless and until it is set aside in the substantive hearing of an application for judicial review. On many occasions, applicants endure irremediable difficulties while waiting for the case to come up for hearing.

176. As to the benefits stated in the Final Report, the Bar considers they may be more theoretical than real. The pooling of claims does not appear to be a consequence permitted under O.53 since the remedies (if any) granted at the substantive hearing will be in relation to the applicant's application and not individual claims each interested party may have. In any event, whether the relevant interested parties are attracted depends on the conscientiousness and knowledge of the applicant. Where a question of interpretation of the Basic Law of the HKSAR is raised in the context of administrative decisions affecting many persons, the requirement imposed upon the applicant to serve the application papers on interested parties is not only onerous but may also be ineffective.

177. On the other hand, given the definition of the expression "interested party" in the proposed O.53 r.1A, those who wish to complain against the application of a particular policy or interpretation of the law by the public authority in case-by-case decision-making affecting the rights and interests of each one of them are not arguably "directly affected by the application". See, as to the

under-developed state of jurisprudence on the meaning of “person directly affected”, Maurici, *What is a “Person Directly Affected”?* [1997] JR 7 and Fordham, *Judicial Review Handbook* (4th Ed) para.22.2.2.

178. The Final Report also noted the benefit of having the grounds put forward by the parties acknowledging service, whether in opposition or support. All such perceived benefit will have to be balanced against the inconvenience and drawbacks discussed above.
179. The Bar therefore asks the Steering Committee to reconsider the merits of enacting the proposed O.53 rr.2A to 2D, so that the merits of the leave filter protecting public bodies against weak and unarguable applications (see R v Secretary of State for Trade and Industry ex p Eastaway [2000] 1 WLR 2222, 2227H (per Lord Bingham)) may still be maintained.
180. The proposed O.53 r.2C(4)(a) should be drafted to ensure that any person served with the application papers of an application for leave to apply for judicial review will file an acknowledgement of service if he wishes to assist the Court’s determination of the leave application. The present drafting of the proposed O.53 r.2C(4)(a)(i), in using the expression “contest the application for leave”, may not be conducive to gathering the widest range of information

opposing the application especially from interested parties. It is suggested that the expression “oppose the application for leave” be considered instead.

181. The proposed O.53 r.2D(2) should be revised to amend “takes part in the hearing of the judicial hearing” to “takes part in the hearing of the judicial review”.

Draft RHC Amendment O.53 r.3A

182. It is proposed to add O.53 r.3A to prohibit respondents and interested parties served with the application papers to apply to set aside an order granting leave to apply for judicial review. This is a provision to be welcomed and should be retained even if the Steering Committee decides not to introduce the requirements of service and acknowledgement of service in O.53.

Draft RHC Amendment O.53 r.4A

183. It is proposed to implement Recommendation 148 of the Final Report by providing for the power of the Court to make directions for case management after granting leave to apply for judicial review and for service of the order granting leave and giving other directions. The proposed amendments appear to duplicate the existing practice of the Court sending notification of its determination of the leave application using a Form CALL-1. It is not known

whether the Practice Direction will be amended and in what manner. To simplify matters, it is advisable to adopt the CPR 54.11, which provides for the Court serving its order and directions on the applicant, the respondent and any other person who filed an acknowledgement of service.

184. Further, the proposed O.53 r.4A(2) should be revised to amend “order giving leave” to “order granting leave”.

Draft RHC Amendment O.53 rr.5A-5D

185. It is sought to incorporate CPR 54.14 to 54.16 by introducing the proposed O.53 rr.5A to 5D. The requirement sought to be imposed in O.53 r.5A that respondents and interested parties should file detailed grounds in opposition or support and associated affidavit evidence is, as Michael Fordham noted, confounding. A respondent or interested party would thus be required to formulate in written form his arguments 3 separate times, ie in the acknowledgement of service, the grounds of opposition or support, and finally the skeleton argument. See Fordham, *The New Procedure: Is it Working?* [2002] JR 14. Although Fordham advisedly identified distinct functions of each of the 3 documents to avoid making the tasks too onerous, the proposal remains a formalistic exercise particularly onerous to interested parties who may simply be interested in raising discrete issues in support of the application.

186. The requirement on the part of a respondent or interested party to formulate written arguments 3 separate times carries mounting costs implications for the losing applicant, as the normal consideration of costs following the event applies. This may be a disincentive on HKSAR residents vindicating their rights or seeking declarations on the constitutionality and/or legality of enactments and policies by way of applications for judicial review.
187. The proposed O.53 r.5D should be read together with O.53 r.9 as proposed to be amended. The relationship between these two provisions is not clear. The proposed O.53 r.5D specifies no qualification on the part of the person seeking to be heard. On the other hand, the Court grants leave under O.53 r.9 for a person to be heard at the substantive hearing upon being satisfied that that person is a proper person to be heard. Even though it appears that a person may be a proper person to be heard without being a person directly affected, the absence of any qualification in the proposed O.53 r.5D may suggest a more relaxed approach for the filing of evidence than for the making of representations at the substantive hearing. See, in this connection, Denman, *Who is "A Proper Person to be Heard"?* [1999] JR 98.

Draft RHC Amendment O.53 r.16

188. As to the transitional provision in the proposed O.53 r.16, the Bar refers to its views on the drafting of transitional provisions above.

189. The Bar concludes this Section of this Submission with additional comments on matters that may assist the Steering Committee in the formulation of the Practice Direction and Pre-action Protocol associated with the procedure for applications for judicial review; and generally, in the development of the procedure of application for judicial review:

- (a) The Bar has considered whether a Pre-action Protocol along the lines of the one in operation in England and Wales should be adopted. The Bar is not persuaded that Hong Kong should follow England and Wales in this respect. The Bar in particular is not persuaded that the “good practice” of correspondence before legal action will necessarily avoid litigation, given the nature of public law litigation, which involves matters of principle and entrenched positions, especially those arising out of “current events”. The position that the requirement of promptitude will continue in spite of the course of correspondence will generate the dilemma between waiting for the belated response of the proposed respondent and incurring costs to file an application for leave to apply for judicial review to obtain protection

against an accusation of lack of promptitude. Further, to state that non-compliance with the protocol will be taken into account with case management and/or costs consequences, when in the same document, judgment as to appropriateness of the protocol will be called for, is to create confusion and dissatisfaction that will not be outweighed by any perceived benefits.

- (b) The experience in England and Wales, as far as the Bar understands, is that the civil justice objectives and active case management approach of the CPR infuse into the procedure for applications for judicial review. It remains to be seen how the adoption of “underlying objectives” pursuant to the Draft RHC Amendment will, for example, “promote greater equality” between the individual applicant and the respondent public authority in applications for judicial review through managing the case to, for example, encourage co-operation of the parties, or decide whether the issues require full investigation, with the use of interlocutory applications for discovery and cross-examination.

Part III: District Court, Lands Tribunal and Employees’ Compensation Proceedings

District Court

190. The theme of the proposed amendments to the Rules of the District Court (Cap.336 sub. leg. H) (“RDC”) in Annex I of the Consultation Paper appears to be consistency with the RHC. They go much beyond the mere replication of the proposed amendments to the RHC. The Consultation Paper outlines the approach to be that the RDC should follow the RHC unless there are special considerations justifying differences between the two sets of rules. A makeover of the RDC in the image of the RHC is proposed, with the exception of the 3 matters in para.3.5 of the Consultation Paper.

191. The Bar has reservations on this approach. The reasons are:

- (a) The rationale for the expansion of the Steering Committee’s terms of reference may be at odds with the reasoning of the Kempster Report (1993) on the RDC providing for a streamlined procedural framework in which litigation involving both substantial and modest sums might be conducted and allowing, where appropriate, compliance with rules to be dispensed with. The terms of the RDC amendments proposed in Annex I of the Consultation Paper appear to be rolling back the recommendations of the Kempster Report.

- (b) The monetary jurisdiction of the District Court has expanded since 1993 to encompass claims between \$50,001 and \$1,000,000. Therefore there are a variety of cases with different demands on cost-effectiveness, procedural economy, and equality of arms. There are also more litigants acting in person.

- (c) The rapid expansion of the upper limit of the District Court’s monetary jurisdiction between 2000 and 2003 was to relieve the High Court of a substantial part of its civil proceedings caseload. It is therefore not an exaggeration to consider the District Court to be the venue for the majority of civil actions to be commenced and tried and thus, in a sense, the “main battleground” for the effect of Civil Justice Reform to be felt.

- (d) The present procedural framework under RDC has been in operation since 2000. The Consultation Paper has not put forward a case, backed with empirical data, on the defects, inefficiencies and inconveniences the RDC have and the advantages “cloning” the post-reform RHC for use in the District Court would have brought to the operation of the civil jurisdiction of the District Court.

- (e) The District Court Rules Committee was not consulted on the Steering Committee's inclinations and preferred approach.

To assume that the implementation of Civil Justice Reform in the District Court is relatively straightforward may turn out to be an over-simplification.

192. While the Bar agrees that the flexibility of the District Court in managing civil cases may be enhanced by the introduction in the RDC of the package of case management powers in the Draft RHC Amendment, the Bar is particularly concerned with 2 matters. The first involves the proposed repeal of RDC O.23A and O.34 merely for the purpose of maintaining consistency with the RHC. The second is a concern over the continuation of facilities in the RDC for hearing and determining modest claims by unrepresented parties (including corporations).

193. As to the first matter, the Bar has not been informed of any discussion of the demerits of the existing case progress mechanisms in the RDC by way of agreed or automatic directions/summons for directions and pre-trial reviews assisted by check lists. Replacing RDC O.23A with the provisions in the provisions in RHC O.25 after incorporating the proposals in the Draft RHC Amendment in fact amounts to the removal of the simple, clear and thus far

workable mechanism of automatic directions in civil proceedings before the District Court. At the moment, there is no sufficient information (particularly in relation to the contents of the applicable Practice Direction and the allocation of judicial resources) for one to appraise (a) how differently cases would be progressing pursuant to the post-reform RHC; and (b) how differently the balance would thus be struck between court-led management and party autonomy.

194. As to the second matter, the Bar is not convinced that the wholesale adoption of the proposals in the Draft RHC Amendment in the District Court will facilitate or enhance the conduct of modest claims by unrepresented parties (including corporations) in that Court. This view is illustrated by a number of examples. The reliance on non-legislative procedural requirements in the form of practice directions and pre-action protocols for the purpose of achieving case management objectives and the provision of sanctioning power for non-compliance therewith is inconvenient and sometimes oppressive to unrepresented parties who do not have ready access to those documents. This is not mitigated by the provision in the proposed RHC O.2 r.3(3) of requiring the Court to have regard to the amount in dispute and the costs incurred or may be incurred by the parties before exercising such sanctioning power. The fact that a litigant in person may have to resort to apply for relief against a sanction to

enable the Court to consider the significance of his lack of legal representation is indicative of the additional procedural hurdles unrepresented parties will face in the proposed regime. The addition of an extra layer of documentation of procedural requirements in the form of pre-action protocols simply exacerbates the problem.

195. Another example is the proposed repeal of RDC O.18 r.22 (power of Court to require framing of issues). This is a beneficent provision for unrepresented parties the RDC inherits from the former District Court Civil Procedure (General) Rules. The Consultation Paper fails to explain the reason for its repeal and further fails to indicate whether it will be replaced in substance by any of the proposed amendments. The Bar notes that none of the proposed amendments may arguably serve the function of RDC O.18 r.22. Neither the active case management powers proposed as RHC O.1A r.4(2) nor the general powers of management proposed as RHC O.1B r.1(2) unambiguously and unequivocally provide for the power to require the framing of issues.

196. Other proposed amendments to the RDC that the Bar queries are:

- The proposed addition in the RDC of the provisions of RHC O.8 and O.9 (as amended), given that the RDC was introduced in 2000 without

originating notices of motion and petitions. The same point applies to the proposed amendments to bring the RDC in line with the provisions of RHC O.10 r.5(2); O.11 r.9; O.38 r.2(3); O.80 r.6(3).

- The proposed addition in the RDC of the provisions of RHC O.24 rr.1, 2 (which are not part of the Draft RHC Amendment), given that those provisions were excluded from the RDC at the time of their introduction in light of the simplification that automatic directions would bring about.
- The proposed reformatting of RDC O.26 (interrogatories) fully along the lines of RHC O.26, given the intention at the time of the introduction of the RDC to strictly limit and control the use of interrogatories.
- The proposed reformatting of RDC O.32 (interlocutory applications and other proceedings in chambers) fully along the lines of RHC O.32 (as amended), given that the drafting of RDC O.32 involved a rationalization of the needs of interlocutory applications, resulting in innovations like RDC O.32 r.8 (the power of the Court to revoke or vary a direction or order subsequently upon sufficient cause being shown).
- The proposed repeal of RDC O.50 r.16, where that provision was

introduced specifically to reserve applications for charging orders of a partner's interests in partnership property to be dealt with under RDC O.81 r.10.

- The proposed amendment to RDC O.52 r.3 to adopt the use of a motion in committal proceedings in substitution for the present provision's use of an originating summons, given that it was considered in 2000 to have such proceedings commenced by way of originating summons to simplify the forms of commencement of proceedings. The amendment now proposed appears to be a retrograde step inconsistent with the underlying objective of the Final Report.

197. All of the above concerns have not been addressed in the Consultation Paper. The Bar would propose that the Steering Committee should consider carefully monitoring and evaluating the impact of implementing the Final Report's Recommendations in the High Court before taking the next step of introducing similar amendments to the RDC.

Lands Tribunal

198. Paragraph 3.7 of the Consultation Paper draws together, in the case of the Lands Tribunal, the impact of the implementation of Civil Justice Reform and the separate review of the procedures of the Lands Tribunal (particularly relating to LTO s.10(1)) and proposes that r.14(2) of the Lands Tribunal Rules (Cap. 17 sub. leg. A) be amended to “make it clear that the powers conferred by that rule are in addition and without prejudice to the general case management powers of the Tribunal”.
199. The Consultation Paper assumes that the Judiciary’s 2005 proposal to amend LTO s.10 will be implemented when stating the view that the Lands Tribunal will then utilize such of the changes under Civil Justice Reform as it thinks fit and thus will have general case management powers.
200. The Bar commented in April 2005 that the proposed amendment to LTO s.10 was unnecessary. Section 10 in its present form is already flexible enough. As to the empowering of the Lands Tribunal generally to adopt all practice and procedure of the Court of First Instance as it thinks fit, the Bar commented that the proposal was not clear enough and would do more harm than good, since the use of general language and the deletion of the list of matters in s.10(1) (which were proposed in 2005) would be to pursue neatness at the expense of ease of understanding of the law and ease of access to the law by ordinary

members of public and litigants in person. The Bar questioned such an approach of requiring, in effect, litigants in person to find out their procedural rights and obligations in a roundabout way.

201. The Bar cautions against the Consultation Paper's approach of opening the valve between the Lands Tribunal and the RHC (post-reform). This leaves the Lands Tribunal and the parties appearing before it to determine themselves how many of the Civil Justice Reform inspired rules and mechanisms will be applicable to the applications before that tribunal and to resolve disputes, incompatibilities and conflicts between the RHC provisions sought to be applied and the related provisions in the Lands Tribunal Rules. The Bar believes that the Lands Tribunal Rules were enacted in an attempt to provide procedures in a suitably simplified and self-contained form and the Court of First Instance's practice and procedure was intended to serve as a residual and remedial reservoir. The Consultation Paper's approach appears to seek an inversion of that set-up. That, in the Bar's opinion, is undesirable, not only because of the over-burdening of litigants in accessing the relevant procedural requirements, but also because of the strong potential for satellite litigation, with rounds of appeals, to resolve questions of procedure that could have been more suitably resolved by the legislative route.

Employees' Compensation Proceedings

202. Paragraph 3.8 of the Consultation Paper makes the point that there is no need to amend the Employees' Compensation (Rules of Court) Rules in light of the Civil Justice Reform since the RDC as amended pursuant to the proposals in the Consultation Paper will be applicable to employees' compensation proceedings by virtue of the ECO s.21(1).
203. The Bar considers that the Employees' Compensation (Rules of Court) Rules are in need of a review to minimize the scope of potential incompatibility or conflict so that the burdensome litigation trail involved in the cases of Li Kwok Shing v Law Ka Fu & Anor [2003] 4 HKC 543; Wong Mei Na v Genryoku Sushi Co Ltd [2003] 3 HKLRD 370; and Sun Jianqing v Trans-Island Limousine Services Ltd [2004] 1 HKC 533 need not be re-visited. Otherwise, the Civil Justice Reform inspired RHC O.22, O.22A and O.62 will, when applied to employees' compensation cases, produce uncertainty.

Dated 19 July 2006

Hong Kong Bar Association