Revised Proposals for Amendments to
Subsidiary Legislation under the Civil Justice Reform

SUBMISSIONS OF THE HONG KONG BAR ASSOCIATION

Introduction

1. The Steering Committee on Civil Justice Reform ('Steering Committee') has revised its proposals for amendments to subsidiary legislation under the Civil Justice Reform ('CJR') in the light of responses it received in respect of the Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform (April 2006) ('2006 Consultation Paper') and has invited comments on the revised proposals.

2. During a meeting with Members of the HKBA's Special Committee on CJR on 31 October 2007, the Steering Committee agreed to provide a specific response to issues of importance raised in the HKBA's response to the 2006 Consultation Paper (July 2006) and a subsequent supplementary response (October 2006) ('HKBA's 2006 Responses') but not apparently accepted or dealt with in the revised proposals. The HKBA submitted a list of issues by e-mail and the Steering Committee replied by a letter dated 7 November 2007, copies of which are annexed herewith as **Annex 1**.

3. Whilst we maintain the views expressed in the HKBA's 2006 Responses, the HKBA will not repeat them here save where the deliberation of a particular proposed amendment may benefit from additional discussion.

4. Subject to the comments set out below, the HKBA supports the revised proposed amendments to implement the CJR. The comments below are

only intended to highlight particular points which the HKBA suggests might benefit from further consideration or are made for the purpose of stimulating discussion as to how the proposed amendments will be interpreted in practice.

Underlying Objectives

5. The HKBA appreciates the Steering Committee's view that it is not possible to state the underlying objectives in any order of importance. However, since the intention behind the proposal of prescribing the underlying objectives is to make explicit what are implicit objectives which 'underlie' specific rules of the RHC and to support the internal logic of those rules (see *Final Report of the Chief Justice's Working Party on Civil Justice Reform*, paragraph 100), the framework for decision-making under the Civil Procedure Rules in England ('CPR') does not necessarily serve as a model that may be readily adapted for the purposes of CJR in Hong Kong.

6. On the other hand, the proposed RHC O 1A appears to be the 'engine of change' and would entail the elucidation for each and every order (if not each and every rule) of the RHC of its relevant underlying objectives, to be followed by the purposive interpretation of the relevant provisions and the objective-driven exercise of the court's discretionary powers. This is in addition to the provisions that specifically require that underlying objectives be furthered or taken into account; see the proposed RHC O 24 r 15A relating to limiting the extent of discovery; the proposed RHC O 62 r 5 relating to the exercising of the court's discretion as to costs; and the proposed RHC O 62 r 32A relating to making an order on the costs of taxation.

7. Further, the extent to which proportionality will determine or inform

decision-making under the proposed CJR scheme, including: –

(a) whether proportionate weight ought to be given to the different factors in the various checklists proposed to be inserted in the RHC to assist the exercise of discretionary powers, (for example, the proposed RHC O 2 r 5(1) relating to relief from sanctions for non-compliance); and

(b) the nature and steps involved in the requirement under the proposed RHC O 32 r 11B(3) that consequences specified for failure to comply with an order in an interlocutory application must be 'appropriate and proportionate',

remains to be seen, in spite of the less dominant position the Chief Justice's Working Party sought to accord to it in paragraph 106 of its Final Report.

8. Therefore, the concern as to the need for consistency and predictability in judicial decision-making under the proposed CJR scheme remains. English authorities on CPR cannot, given the different direction to be taken under the proposed CJR scheme, be conveniently taken as determining or paving the path for Hong Kong and it is incumbent on the courts in Hong Kong to place the principles in the right order for a particular rule of court and manage the case with the appropriate methodology.

9. The Court of Appeal is traditionally and rightly responsible for supervising the administration of civil procedure; see *Callery v Gray (Nos 1 and 2)* [2002] 1 WLR 2000, HL. Zuckerman has highlighted the English Court of Appeal's responsibility to oversee, develop and control principles for the exercise of discretion under the CPR, not only in respect of the individual case but also in continual review of the performance of the system and periodic adjustment of responses to emerging problems; see *Zuckerman on Civil Procedure: Principles of*

Practice (Sweet & Maxwell, 2006) 10.44-10.47. The HKBA considers that the Court of Appeal will have to assume a similarly leading role in not only ensuring the proper implementation of the proposed CJR scheme but also assessing and responding to emerging concerns of the legal profession and the public on the management of justice under the proposed CJR scheme.

Effect of Non-compliance

10. The proposed RHC O 2 r 4 refers to and twice lists 'rule, practice direction, court order or pre-action protocol' in that order. That word order is repeated, including in O 2 r 5. The word order does not reflect relative precedence to be accorded, status, or even their likely chronological relevance to proceedings. The HKBA's 2006 Responses noted the precedence issue as between practice directions and pre-action protocols.

11. The definitions in the proposed RHC O 1 r 4 define 'pre-action protocol' as a code of practice designated as such 'by a practice direction'. This would suggest that the pre-action protocol is subordinate to the enabling practice direction. In any event 'rules' and 'court orders' must override the others. There is no apparent reason for the RHC O 2 word order or sequence. If it is not a considered sequence, it could be amended, for example, to: 'rule, court order, practice direction or pre-action protocol'.

Default Judgment and Admission

Admission of Claim

12. The word 'claim' is not defined in the revised proposals but it is used in RHC O 13A and also in other Orders. Does 'claim' refer to the entirety of all causes of action brought and relief and remedies sought by a party

against another in a single set of proceedings or under one action, cause or matter? Alternatively, does 'claim' refer to any one of those causes of action brought, relief or remedies sought, which may be one of several in one proceeding, action, cause or matter? The context does not always make it clear which meaning is intended.

13. As a matter of construction where the word 'whole' has been inserted before 'claim' it may mean the sum of all causes of action etc in the proceedings brought by a party or it may mean the entirety of just one cause of action. And where in the same Order or rule the word 'whole' has not been inserted before 'claim' such references to 'claim' may be construed, in contra-distinction, to mean just one of the several causes of action etc or even just a part of one.

14. The proposed RHC O 13A r 1(1) authorises a party to admit the whole or part of another party's 'case'. Is 'case' the sum of 'claims'? There may be benefit in greater consistency in the language used.

15. The proposed RHC O 13A r 5 applies where the defendant admits part of the claim. 'Claim' is not defined. Rule 5(1) is silent as to whether the defendant's admission of part of the claim is made and intended by the defendant to be 'in satisfaction of the whole claim' or whether the admission is made as to part, irrespective of whether the plaintiff may proceed with other parts of the claim. If the r 5(1) and (2) admission of 'part of the claim' is for a defendant whose admission of part is intended and conditional upon the plaintiff accepting it in satisfaction of the whole and not merely the part expressly admitted, it may be prudent to clarify the Order by expressly stating 'in satisfaction of the whole', even though the risk to the defendant is limited by the acceptance rules. The 'acceptance' provision is more specific; r 5(3)(a)(i) has expressly inserted 'whole' before 'claim'. Regardless of the defendant's intent,

the plaintiff may only accept the admission of part in satisfaction of the whole.

16. The HKBA notes that if that be right, there may be situations that may fall outside the scheme. For example, the proposed RHC O 13A does not provide for the situation where the defendant admits and the plaintiff accepts the admission of part in satisfaction only of that part of the claim expressly admitted and also proceeds with other part(s).

Filing and Service

17. The proposed RHC O 13A r 9(3) raises the issue of filing and service. Under r 9(8), if a defendant fails duly to pay, the plaintiff may enforce. Rule 9(7) does state that the stay is 'subject to paragraph (8)'. The stay is subject to due payment. However, the rule does not expressly provide that no application is required to lift the stay once the payee defaults. If no application to lift the stay is required, that could be made clearer by expressly stating in r 9(8) that the stay of execution pursuant to paragraph (7) 'shall immediately cease' or 'cease forthwith'.

18. In the proposed RHC O 13A, r 11(2), 'notified' could refer to service. If that is intended, the proposed provision may be revised to 'served with notice'.

Sanctioned Offers and Payments

The Structure of RHC O 22

19. The HKBA continues to have some concern as to the complicated structure of the proposed RHC O 22, which is brought about by reason of the comprehensive scheme sought to be introduced, allowing both plaintiffs and defendants to settle the claims involved in the action, be they money claims or non-money claims, *but* providing distinct forms in

which a proposal to settle money claims and non-money claims may be made, i.e. a *sanctioned payment* and a *sanctioned offer* respectively.

20. The HKBA makes the following observations in respect of the drafting of the proposed RHC O 22: –

(a) Whether a proposal to settle should be by way of two distinct forms or simply by way of one form, called for example, a statutory offer to settle or simply an Order 22 offer, is a matter that might be considered further.

(b) Whether the forms in which a proposal to settle should be called a *sanctioned* offer or payment is a matter that might be considered further, given that under the proposed RHC O 22, a proposal to settle made pursuant to its provisions may be accepted with or *without* leave of the court. Such a proposal may, for example, be called a *statutory* offer to settle or simply an Order 22 offer or payment.

21. The HKBA adds the following comments on the terms of the proposed RHC O 22 in the revised proposals.

Removal of Fetter on Exercise of Discretion

22. The proposed RHC O 22 seeks to remove a present fetter on the exercise of discretion, namely the present RHC O 22 r 14(2) proviso, by proposing O 22 r 2(4). If that is intended, such that the proposed O 22 scheme is simply one alternative, this could be made clearer.

Offer to Settle the Claim

23. The proposed RHC O 22 r 2(1) refers to 'claim' without expressly referring to 'any part thereof' in the alternative. While O 22 r 1 expands 'claim' to include a counterclaim, the word itself is not defined for the purposes of the RHC or O 22. A 'claim' may mean or refer to the sum

of each or all the separate causes of action brought and remedies or relief sought against a party under a single set of proceedings, action, cause or matter. In that event if 'whole claim' also means the sum of those 'claims', 'whole' is superfluous. Alternatively, a 'claim' may mean or refer to any separate cause of action brought or remedy or relief sought against a party, in a single set of proceedings, action, cause or matter against a party or even a part thereof. Use of the plural 'claims' suggests 'claim' means each of those separate causes of action brought or remedies or relief sought or 'claimed' in that proceeding against a party.

24. The proposed RHC O 22 r 7(2) and (3) provides that a sanctioned offer may relate to 'the whole claim or to part of it or to any issue that arises in it'. Similarly, O 22 r 9(1) and (2) so provides for a sanctioned payment. Order 22 r 6(3)(b) uses the plural 'claims' in respect several liability of multiple defendants. Order 22 r 20, in dispensing with the need to commence fresh proceedings, uses 'a new claim'.

25. As presently drafted the fact that the proposed RHC O 22 rr 7 and 9 expressly qualify the word 'claim' and include 'or part thereof' in some instances could cause the word 'claim' appearing without those additional words to be construed in contra-distinction to mean only the sum of all causes of action etc in the proceeding. 'Claim' would bear that meaning where the alternative 'or part thereof' formula is not expressly provided. However, there are instances where 'whole' precedes 'claim', so as a matter of construction where 'whole' does not precede 'claim' it may be inferred that 'claim' may mean any one of the causes of action etc. but not necessarily the entirety of the 'claims' brought in the proceeding. Further, while 'whole claim' may be construed as the sum of all claims in one proceeding, alternatively, it could be construed as meaning merely the 'whole' or the entirety of just

one of several 'claims' in the set of proceedings.

26. If 'claim' in the proposed RHC O 22 is intended to refer to the sum of all causes of action etc or 'claims' brought by a party against another party in one set of proceedings that could be made clear by so defining 'claim' in O 22 r 1. For example, "'claim' means the whole claim" or "the whole money claim or whole non-money against a party [unless the context otherwise permits or requires.]". If 'claim' is intended to refer to any part thereof, 'claim' could be so defined in O 22 r 1.

27. The proposed RHC O 22 r 2(1) simply states 'claim'. That may refer to the proceedings, action, cause or matter. Subject to inserting a definition in the Order, each time 'claim' is used it would be preferable if its meaning were clarified.

28. The proposed RHC O 22 r 2(4) might be clarified by inserting the existing O 22 formula 'whole claim or part of it or any issue that arises in it' between 'offer to settle' and 'in whatever way he chooses'. Also 'or any part of it' could be added. Clarification as to whether any and all offers in respect of proceedings can be considered in the same manner as those that are strictly in accordance with O 22 is required. The only difference is that, where the offer does not strictly accord, the O 22 consequences do not automatically follow. Rather the consequences are a matter for the court's discretion.

29. The proposed RHC O 22 r 6 provides for an offer to settle the whole of a claim which includes both a money claim and non-money claim. Since r 6 expressly refers to 'whole' claim and 'both', 'claim' in O 22 may be construed as referring to the sum of all 'claims' and every part thereof.

Withdrawal or Reduction of Offers

30. The proposed RHC O 22 r 7(7), (9), (10), (11) and O 22, r 9(4), (5), (6) deal with withdrawing or reducing sanctioned offers or payments. While 'reduce' may be appropriate for 'payments', 'reduce' is less apt for an 'offer' which may be in respect of 'a part of a claim or any issue that arises in it'. Rule 11 refers to 'amendment to a' sanctioned offer or payment. In so far as an amendment that reduces the sum of a payment or diminishes the benefit of an offer to the offeree are intended by rr 7 and 9, the use of the word 'diminish' or a simile may be more appropriate. Another drafting option, which is also used in O 22, is 'advantageous', and accordingly, 'less advantageous'.

31. The proposed RHC O 22 r 7(11) might also be clarified to include the alternative situation where the court grants leave to reduce a sanctioned offer, by inserting the following underlined words:

'(11) If the Court dismisses an application to withdraw or reduce [diminish] a sanctioned offer or grants leave to reduce [diminish] the sanctioned offer, it may by order specify the period within which the sanctioned offer or reduced [diminished] sanctioned offer may be accepted.'

32. Similarly, the proposed RHC O 22 r 9(6) might be clarified as follows:

'(6) If the Court dismisses an application to withdraw or reduce a sanctioned payment or grants leave to reduce the sanctioned payment, it may by order specify the period within which the sanctioned payment or reduced sanctioned payment may be accepted.'

An alternative amendment would be to adopt the r 11 terminology of 'amendment' and accordingly, 'or amended offer' and 'amended

payment'. However, that does not limit the amendment to a reduction or diminution but would include an increase or improved offer, which does not fall under that leave provision.

33. The proposed RHC O 22 r 10(2) might be clarified by inserting 'also' so that it reads 'the defendant is also offering to agree to the making of an award of provisional damages.' Order 22 r 10(3)(b) may be clarified expressly to confine the 'claim for further damages' to the subsisting provisional damages claim, as follows: '(b) that the offer is subject to the condition that the plaintiff shall make any claim for further damages pursuant to the claim for provisional damages within a limited period;'

Making an Offer

34. The proposed RHC O 22 r 11 provides that a sanctioned or amended offer or payment is 'made' when 'served'. There is no express requirement in O 22 for the filing of the same by the offeror as distinct from the acceptance thereof by the offeree.

35. The proposed RHC O 22 r 12(2) refers to 'receiving' the request. As 'service' is adopted elsewhere, using 'receipt' may introduce an opportunity for a duly served party to deny actual receipt. This provision might therefore be revised to read, 'within 7 days of service of the request, ...'.

Consequences of an Offer

36. The proposed RHC O 22 r 20 disposes of the need to commence fresh proceedings to enforce the sanctioned offer terms. However, the words used are 'without the need for a new claim'. It might be clearer to provide 'without the need to commence new proceedings [another/new action]'. Similarly, O 22 r 20(6)(b) could be clarified to replace 'new claim' with 'new proceedings' or a 'new action'.

37. The proposed RHC O 22 r 21 applies where the plaintiff betters the payment or offer 'at trial'. If the O 22 scheme is to apply to proceedings that may be determined and concluded by judgment or order without a 'trial', clarification may be required. The proposed RHC O 1 r 4 does not include a definition of 'trial'. Still adopting the terms used, O 22 r 21(1) might be amended to:

'(1) This rule applies where the plaintiff –
(a) fails to obtain a judgment better than the sanctioned payment; or
(b) fails to obtain a judgment which is more advantageous than a defendant's sanctioned offer.'

38. Similarly, if the consequences provided in the proposed RHC O 22 r 22 are not intended to be confined to matters determined after 'trial', an amendment corresponding to those suggested in respect of O 22 r 21(1) might also be made to O 22 r 22(1).

39. The proposed RHC O 22 r 22 might be further clarified by expressly providing that the power of the Court under this rule is 'in addition to' or 'in no way limits' the power and discretion of the court in respect of costs before 'the latest date on which the defendant could have accepted the offer without requiring the leave of the Court'.

40. It is not entirely clear from reading the proposed RHC O 22 alone that it does not extend to taxation proceedings. However, the proposed RHC O 62A appears to be a comprehensive code for the costs scheme. If taxation proceedings are also to be included in O 22 that should be clarified. If taxation proceedings are intended to remain outside the O 22 scheme that may be clarified in the proposed RHC O 62 (and O 64) and/or O 22/O 22A. A question in a similar vein is whether arbitration

proceedings and/or taxation of arbitration proceedings (in the High Court pursuant to RHC O 73) are to remain outside the O 22 scheme. The proposed RHC O 22 Part V and/or O 22A could expressly state that they do not or, alternatively, could clarify to what extent they apply to taxation proceedings and arbitration taxation proceedings.

41. The HKBA understands that the Steering Committee has taken a deliberate policy decision to revise the maximum rate of interest that the court can impose as part of the consequences under the proposed RHC O 22 rr 21-22 (where the plaintiff fails to do better or does better at trial than the sanctioned offer or sanctioned payment) from 10% above prime rate to 10% above judgment rate. The HKBA however considers that a question of fairness is involved since the jurisdiction sought to be conferred is not intended to be punitive and 'may only be used in order to compensate the claimant for the costs that he has incurred and for any other real disadvantages, including anxiety and inconvenience, which he suffered as a result of needlessly being forced to pursue the case all the way to trial'; see *Zuckerman on Civil Procedure: Principles of Practice* 25.88-25.89. Revising the permissible range of interest enhancement to 10% above judgment rate might give a distorted impression as to what can be legitimately ordered in the interests of justice to compensate the plaintiff.

42. The proposed RHC O 22 might be further revised to substitute 'gives leave' with 'grants leave'.

43. The above comments apply to the proposed RHC O 62A.

Discovery

44. The HKBA's Special Committee on Personal Injuries have addressed the

issues concerning pre-action discovery. A copy of the letter dated 13 November 2007 setting out the views of the Special Committee on Personal Injuries is annexed herewith as **Annex 2**.

45. The proposed RHC O 24 r 7A(3A) provides that in the case of a r 7A(1) summons, paragraph (3)(b) shall be construed as if the word 'relevant' were substituted by the words 'directly relevant (within the meaning of section 41 of the Ordinance)'. As an alternative, those words (or simply the word 'directly' before the word 'relevant') could be inserted into paragraph (3)(b). Then paragraph (3A) could be deleted.

Applications and Proceedings in Chambers

46. The HKBA has obtained clarification from the Steering Committee that the proposed insertion of the words 'matters relating to the condition of admission to bail' in the proposed RHC O 32 r 11(1)(a) is intended to preserve the existing practice of the Registrar and the masters to deal with sureties for bail in criminal proceedings. This clarification has addressed the HKBA's concern over this provision.

Expert Evidence by Single Joint Expert

47. The HKBA notes the Steering Committee's views on the proposal of empowering the court to order the appointment of a single joint expert to give evidence on a question and appreciates the inclusion in the revised proposals of a list of circumstances for the court to take into account before making the order in spite of the disagreement of a party. The HKBA however sees the force in Zuckerman's observations that: –

> 'Experts are appointed ... where the court lacks particular knowledge necessary for deciding the issues. Yet, precisely because the court lacks the

> relevant knowledge or expertise there is a risk that the decision will effectively be left in the hands of the expert. ..... Where ... the issue is entrusted entirely to one expert, the court may not be left with room to exercise its own judgment with the result that the expert would effectively become the judge of that issue. It is suggested that where there is a serious risk that the appointment of a joint expert would effectively delegate adjudication to the expert, a single joint expert must not be appointed. The appropriateness of appointing a single joint expert will depend on the extent to which the risk of delegation of judgment is acceptably small and on the extent to which the court is able to counteract this risk. It is appropriate to appoint a joint expert where the question in dispute falls within a field of knowledge that can provide a straightforward and uncontroversial answer, as where the issue calls for expert measurement or for the interpretation of data in accordance with a universally accepted test' (*Zuckerman on Civil Procedure: Principles of Practice* 20.55-20.56).

48. The HKBA therefore suggests that consideration be given to emphasize in practice that a single joint expert should *only* be appointed where there is sufficient assurance that the particular issues that are proposed to be dealt with by a single joint expert must be readily identified and the expected opinion straightforward and uncontroversial.

49. The proposed RHC O 38 r 37B sets out the duty of a party who instructs an expert to provide a copy of the code of conduct. Where the court orders two or more parties to appoint a single expert pursuant to O 38 r 4A(1) and the court gives directions as to the instructions to be given to the expert pursuant to O 38 r 4A, the question arises as to whether the court must also give directions as to provision of the code of conduct. Or are both parties deemed to be 'a party who instructs an expert' and so under O 38 r 37A subject to the duty to provide the single expert with the code of conduct? Order 38 r 37A may be amended by adding 'including

(each of) the parties ordered to appoint a single expert pursuant to O 38 r 4A'.

Judicial Review

50. The HKBA suggests that the forms to be prescribed for applications for judicial review be grouped under one number (i.e. 86) so as not to be confused with forms prescribed for committal proceedings and habeas corpus applications.

Appeals

51. The revised proposals include the proposal in RHC O 59 r 2A(8) that the Court of Appeal should be empowered, where an application for leave to appeal to the Court of Appeal is determined on the basis of written submissions only, to make an order that no party may request the determination to be reconsidered at an *inter partes* hearing, on the ground that the determination 'cannot be seriously contested'.

52. This new proposal appears to be an adaptation of the recently introduced CPR 52.3(4A), which empowers the English Court of Appeal to make a similar order if it considers that the application for permission to appeal was 'totally without merit'.

53. The HKBA's views on the proposed RHC O 59 r 2A(8) are as follows. First, it would curtail or unduly restrict access to appeal. Second, this provision may be applied by a single judge of the Court of Appeal who determined the application for leave without a hearing, thus depriving the applicant's right under RHC O 59 r 2C to make a fresh application. Third, the formulation of 'cannot be seriously contested' may introduce a threshold that is comparatively less stringent than 'totally without merit'

and the HKBA would welcome clarification in this aspect. Fourth, this provision may have the unintended effect of disadvantaging the ability of litigants in person lacking the skill and resources to prepare and present an application to bring to the attention of the Court of Appeal a meritorious appeal. It is with these concerns in mind that the HKBA refers to the following observations of Neuberger LJ (as he then was) in *Malcolm v Mackenzie (Application for Permission to Appeal)* [2004] EWCA Civ 584:

> 'The mere fact that an applicant for permission to appeal feels very strongly about the injustice of the result he is seeking to challenge is plainly not, of itself, enough to justify the grant of permission to appeal. However, where the strong feelings are at least arguably objectively justified, that is, in my view, a fact which this court can, even should, take into account when deciding whether to give permission to appeal.'

Costs

54. The HKBA suggests that the revised proposal to the proposed RHC O 62 Second Schedule, paragraph 1 should read: "... issued after the commencement of the Amendment Rules 2007 and was indorsed with ...".

Costs Offers and Payments into Court

55. The HKBA considers that the following question should be clarified: Whether the present position, i.e. where there has been a costs order, the party liable to pay the costs to be taxed may make a 'without prejudice save as to costs offer' that may be taken into account by the taxing master when determining which party shall bear the costs of the taxation proceedings, is preserved under the proposed RHC O 62A. At present

the taxing master has a discretion to consider that offer notwithstanding the fact that the paying party has not made a payment into court of the costs offered or otherwise backed the offer with cash. That offer is not subject to the fetter in the present RHC O 22 r.14.

56. It might also be clarified whether the proposed RHC O 62A r 2(3) restores the present situation, so that the taxing master still has a discretion to consider 'without prejudice save as to costs' offers that have not been backed by cash. Or is it the case that under the revised proposals, where the paying party wishes to make an offer to pay a sum of money in satisfaction of costs to be taxed, the paying party must comply with O 62A to secure the benefit of the rules under that Order?

57. The proposed RHC O 62A r 6(2)(c) refers to an interim payment of costs. There is no express provision in the rules of court to provide for jurisdiction of the court to order an interim payment. Consideration may be given to expanding the ambit of RHC O 29 r 10 to include rules for the interim payment of costs, bearing in mind that the definition of 'interim payment' in O 29 r 9 excludes costs from interim payments. Alternatively, O 62A could include provisions for the making of, and regulating procedure for, interim payments of costs. At present the receiving party must rely upon the inherent jurisdiction of the court. However, as between solicitor and client, the Legal Practitioners Ordinance (Cap 159) s 67 provides jurisdiction.

58. The proposed RHC O 62A rr 5(8), 6(6) might be clarified to include the alternative of the court granting leave to reduce a sanctioned offer. Cf the proposed RHC O 22. This can be achieved by adding 'or grants leave to reduce the sanctioned offer' before 'it may'; and by adding 'or reduced sanctioned offer' before 'may be accepted'.

Typographical and minor drafting points

59. Originating and Other Motions: The heading to the proposed RHC O 8 r 5 contains a typographical error and should be revised to 'Adjournment of hearing'.

60. Disputing Jurisdiction: RHC O 12 r 8(5) contains a typographical error and should be revised to 'matter in dispute'.

61. Sanctioned Offers and Payments: In the proposed RHC Appendix A, Form No 23 *Notice of sanctioned payment*, the title reference to O 22 erroneously refers to rule 63. This should be amended to *"(O.22, rr.1, 6(3) & 9(2))"*.

62. Expert Evidence by Single Joint Expert: The proposed RHC Appendix D contains a typographical error in paragraph 1 and it is suggested that the word 'the' presently before 'Court' should be deleted.

63. Judicial Review: The proposed RHC O 53 r 9(1) appears to contain a typographical error in that the words 'in opposition to' need not be reinstated.

Hong Kong Bar Association
16 November 2007

(Annex 1)

By Email & Post

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7 November 2007

Mr Rimsky Yuen, SC
Chairman
Hong Kong Bar Association
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Dear Chairman,

Civil Justice Reform
Re: Proposed Legislative Amendments to Subsidiary Legislation

I refer to the recent meeting between the Bar's representatives and members of the Steering Committee. On behalf of the Chairman of the Steering Committee, I would like to thank you again for your attendance.

Thank you also for the email dated 31 October 2007 from Mr PY Lo, identifying a number of issues that require clarification. These matters were contained in the Bar Association's Submission on the April 2006 Consultation Paper. All these matters have been, as with responses received from other interested bodies, considered in detail by the Steering Committee ("SC") in the course of their further deliberations leading up to the recent "Revised Proposals for Amendments to Subsidiary Legislation under the CJR".

In relation to the specific points raised in Mr PY Lo's email, I am asked by the SC to respond as follows (the sequence follows the order of the points as in the email and there is also reference to the relevant paragraphs in the Bar's Submission referred to in that email) :-

1. O.1A

   (a) **Paragraph 14:** The SC is of the view it is not possible to state the underlying objectives in any order of importance. Their importance will depend on the circumstances of the particular case; some may assume a greater importance than others.

   (b) As for the point that it is not clear the court's discretion is not confined by the matters set out in rr.2-4, the SC takes the view that the guidelines offered by rr.1 and 2 are adequate in preserving the width of the court's discretion. In particular, see O.1A, r.2(2).

2. O.1B

   Paragraph 19: The wording of O.1B, r.2(1) is sufficiently clear.

3. O.2

   (a) **Paragraph 28:** O.2 is headed "EFFECTS OF NON-COMPLIANCE". It seems reasonably clear and logical that the consequences of non-compliance with practice directions or pre-action protocols etc. can be dealt with in this Order.

   (b) **Paragraph 30**: Even if there are enactments which mandate that proceedings must be instituted in a certain way and no other, of course O.2, r,1(3) will not have the effect of overriding the statutory requirement. However, this provision is not aimed at these types of situation: it is intended to refer to the vast majority of situations where a party has simply used the wrong originating process (e.g. originating summons instead of writ or vice versa). A statute may for example

require proceedings be commenced in a certain way but it would not necessarily follow that the court would treat proceedings commenced in a different way as being void. It would depend on the true construction of the statute.

(c) **Paragraph 31:** With respect, there is no erroneous assumption at all. All r.2(2) seeks to achieve is that any application to set aside for irregularity must be done by way of summons and not motion.

(d) **Paragraph 20:** The Bar's suggestion in paragraph 20 of its Submission was agreed to by the SC but this has been left out in error. This will be rectified.

4. O.8, r.1

Paragraph 32: The Bar's suggestion in this paragraph (not paragraph 31) of its Submission was also agreed to by the SC and will likewise be rectified.

5. O.11, r.1(1)

The new O.11, r.1(1)(oc) seems to deal with the Bar's point in **paragraph 64** of the Submission.

6. O.12

Paragraph 37: The point made by the Bar is a cogent one but in the end, the SC thought in view of the fact that much of the current format of the Rules will be maintained, it was better to retain O.12, r.8 (an order with which practitioners are familiar) as the principal provision dealing with challenges to jurisdiction.

7. O.13A

Paragraph 40: On reflection, the SC agrees that there should be consistency in the terminology used in this Order and O.13.

8. O.18

Paragraph 47: The Bar is quite right to refer to Recommendation 24 of the Final Report but the SC has deliberated further on this point and reached the view that as a matter of principle, the amendments to O.18, r.14 are justified. This, incidentally, is the same conclusion as that originally postulated by the Bar.

9. O.22

(a) **Paragraph 52:** The terms "money claim" and "non-money claim" are easy to comprehend. There is no need in O.22 to draw a distinction between liquidated and unliquidated claims.

(b) As stated in the recent meeting, O.22 seeks to be even more comprehensive than Part 36 of the CPR. The SC is of the view that although it is quite complicated, it is tolerably clear. However, any suggestions as to how it can be improved, will be appreciated.

10. O.25

(a) **Paragraph 84:** One of the key changes in the CJR exercise is the emphasis is on the fact that a milestone date, once arrived at (obviously after careful consideration), will not be easily moved. O.25, r.1B(6) is consistent with this.

(b) **Paragraph 85:** Another key component of the court' case management powers as envisaged by the CJR is that proceedings will become more court controlled. While obviously the consent of the parties will be a relevant factor, it should not be determinative.

(c) **Paragraph 87:** The terms "conditions" and "good reasons" on O.25, r.1C(3) & (4) are reasonably clear and ought not be further defined.

(d) **Paragraph 88:** The period of 3 months is regarded as sufficient, especially as the absent Plaintiff will be notified of

the fact that the action has been provisionally struck out.

(e) **Paragraph 90:** It was felt sufficient that where a Defendant was absent, directions would be given in its absence.

(f) **Paragraph 92:** A specialist judge would have the necessary jurisdiction.

11. O.32

(a) O.70 does not relate to bail. Perhaps the word "and" in O.32, r.11(1)(a) can be changed to "or".

(b) **Paragraph 101:** The term "exceptional circumstances" is clearly understood by practitioners. The threshold is put in these terms to minimise the delays (leading to adjournments) and unfairness which exist at present consequent on late attempts to put in evidence.

(c) **Paragraph 102:** This is a comment that the Judiciary will obviously bear in mind.

12. O.35

(a) **Paragraph 122:** The Bar's position was carefully considered by the Working Party: see paragraphs 576-583 and 635-642 of the Final Report. It needs scarcely to be stated that the court will, in the exercise of its powers, bear in mind the need to be fair and also the provisions of O.1A. The object of O.35, r.3A is to curb excesses as the Final Report makes clear.

(b) **Paragraph 123:** These points have been considered. The powers are required to prevent the excesses and delays that sometimes occur at present.

13. O.38: Single Joint Expert ("SJE")

Paragraphs 115-117: The pros and cons of the SJE provisions (including the Bar's views) were considered by the Working Party: see paragraphs 625-634 of the Final Report. As for the point made in paragraph 117, it is not stated in the Rule that orders for a SJE will be the norm. The court will have to consider in each case whether such an order is appropriate, taking into account the factors set out in O.38, r.4A(4) of the latest draft.

14. O.53

(a) **Paragraph 179:** The provisions of O.53, r.2D(3A) enable the court more effectively to filter out bad claims.

(b) **Paragraphs 185-186:** The Bar's views have been considered by the Working Party but it was felt nonetheless that the requirement on a respondent to set out his or her grounds of opposition, is justified: paragraphs 884-886 of the Final Report. The LTG does not believe that any additional costs would be disproportionate to the benefit that will be derived from a respondent having to set out the grounds of opposition earlier rather than later.

Please let me know if there remain any outstanding queries.

Yours sincerely,

(Miss Vega Wong)
Secretary, Steering Committee on
Civil Justice Reform

From: P. Y. Lo [mailto:pylo@pacific.net.hk]
Sent: Wednesday, October 31, 2007 8:33 PM
To: secretary@civiljustice.gov.hk
Cc: Rimsky Yuen; Joseph Fok SC; Eva Sit

Subject: CJR Revised legislative amendments

Dear Ms Wong,

I refer to the meeting this afternoon and am pleased to send to the Steering Committee the list of issues as set out below.

In relation to RHC O 1A, it appears that the underlying objectives have not been restated in their order of importance (as the Bar suggested). Further, it is not made clear in r 2 that the Court's discretion in case management is not confined to or fettered by the matters in rr 2 and 4. See the Bar's Submission dated 19 July 2006, paragraph 14.

In relation to RHC O 1B, the Bar's suggested amendment in respect of r 2(1) (exercise of powers on application or of own motion) is not accepted. See Bar's Submission, paragraph 16.

In relation to RHC O 2 –

- the Bar's suggestion of dealing with the effect of non-compliance with practice directions and pre-action protocols separately is not accepted. See Bar's Submission, paragraph 28.

- the Bar's questioning of the legality of the proposed r 1(3) on vires has not led to any revision. See Bar's Submission, paragraph 30.

- the Bar's questioning of an erroneous assumption in r 2(2) over the deletion of application "by motion" is not accepted. This appears to be the case in respect of other provisions where the words the "by motion" are to be deleted. See Bar's Submission, paragraph 31.

- the Bar's suggested amendment in respect of r 4 is not accepted. See Bar's Submission , paragraph 20.

In relation to RHC O 8, r 1 has not been amended as suggested by the Bar to add the words "or authorized". See Bar's Submission, paragraph 31.

In relation to RHC O 11, r 1(1) has not been amended to bring injunctions in aid of foreign proceedings to be one type of proceedings for which service out of the jurisdiction is possible. See Bar's Submission, paragraph 64 and cf the revision of r 1(1)(ob).

In relation to RHC O 12, the Bar's suggestion that r 8 be deleted and that the CPR Part 11 be incorporated as a separate order is not accepted. See Bar's Submission, paragraph 37.

In relation to RHC O 13A, the Bar's suggestion that the language used of "where the only remedy which a plaintiff is seeking is the payment of money" should be changed to allow consistency with RHC O 13 (such as referring at r 1(1) to a claim against a defendant "for a liquidated demand only") is not accepted. See Bar's Submission, paragraph 40. (NB: A similar observation was made in today's meeting with respect to RHC O 22. See also below.)

In relation to RHC O 18, the Bar's questioning of the proposed amendments in rr 13, 14 (denial of joinder changed to non-admission) is not accepted. See Bar's Submission, paragraph 47.

In relation to RHC O 22, the Bar's questioning of the use of CPR language inconsistent with the rest fo the RHC is not accepted. See the Bar's Submission, paragraph 52.

In relation to RHC O 25, some of the Bar's comments are not accepted. See Bar's Submission, paragraphs 76-92, especially paragraphs 84, 85, 87, 88, 90, 92.

In relation to RHC O 32, the revised amendment in r 11(1)(a) is not easily understood since RHC O 70 does not appear to contain any provision relating to conditions of bail. The Bar's comments in relation to rr 11A and 11B are not accepted. See Bar's Submission, paragraphs 101, 102.

In relation to RHC O 35, the Bar's comments in respect of r 3A are not accepted. See Bar's Submission, paragraphs 122, 123.

In relation to RHC O 38, the Bar's opposition to appointment of single joint expert is not accepted. See Bar's Submission, paragraphs 115-117.

In relation to RHC O 53, the Bar's opposition to the use of acknowledgement of service is not accepted. The Bar's criticism of the requirements on the respondent to file grounds of opposition thrice is not accepted. See Bar's Submission, paragraphs 179, 185-186.

Regards,

P Y LO

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13 November 2007

Mr. Rimsky Yuen S.C.,
Chairman,
Hong Kong Bar Association,
LG2 Floor, High Court,
38 Queensway,
Hong Kong.

Dear Rimsky,

Re: Civil Justice (Miscellaneous Amendments) Bill 2007
Part 6 – Discovery

I refer to your letter dated 29 October 2007 seeking the views of the Special Committee on Personal Injuries on the proposed amendments in Part 6 of the Civil Justice (Miscellaneous Amendments) Bill 2007 relating to the "direct relevance" test for pre-action disclosure in personal injuries cases. The Special Committee has deliberated on the subject and responds as follows.

There has been widespread acceptance of the extension of the power to order pre-action discovery to all proceedings and not only to proceedings for personal injuries and fatal accident claims. The Bar, however, expressed its concerns that if the power to order pre-action discovery was couched in too wide terms, there was a risk that litigants could utilise this as a tool to embark on oppressive or fishing applications (see para.63 of the Bar's Response dated 1 March 2002 and para.99 of the Bar's Submission dated 19 July 2006). The Bar's concerns have been met by the introduction of the "direct relevance" test to pre-action disclosure. As defined in section 14 of the Bill, a document is only to be regarded as directly relevant to an issue arising or likely to arise out of a claim in the anticipated proceedings if (a) the document would be likely to be relied on in evidence by any party in the proceedings; or (b) the document supports or adversely affects any party's case. This new test would restrict the right of an applicant to obtain discovery of "train of enquiry" documents.

The question raised at the Legislative Council Bills Committee Meeting on 12 November 2007 is whether the restriction to be imposed by the new "direct relevance" test would impact on the rights currently enjoyed by personal injury claimants to obtain pre-action discovery. The short answer to that question is yes, because

.... cont'd

potential personal injury claimants would no longer be able to obtain discovery of "train of enquiry" documents under the proposed new test for pre-action disclosure. In practical terms, however, the actual impact would be nil or negligible because "train of enquiry" documents are rarely, if ever, ordered to be disclosed to potential personal injury claimants under the current law and practice.

There is no good reason why personal injury claimants should enjoy greater rights of discovery than other claimants. The Special Committee supports the amendment because it ensures that a uniform test would be applied to all claimants seeking pre-action disclosure. On the other hand, all claimants continue to enjoy the right to apply for discovery of "train of enquiry" documents after proceedings have been commenced.

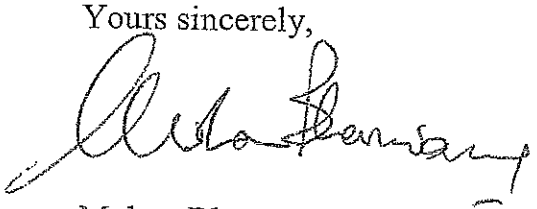
The loss of the right of a personal injury claimant to discover a "train of enquiry" document, on an application for pre-action disclosure, is not considered to be significant.

The reality is that it is extremely difficult, even under the present law and practice, to obtain discovery of such documents, whether the application for the same is made by a personal injury claimant before or after the commencement of proceedings (see the restricted approach as expounded in O.C. v M. Co. [1996] 2 Lloyd's Rep 347 and the discussion in Hong Kong Civil Procedure 2007 at marginal note 24/2/10 on p.436).

The other reality is that the documentary evidence relevant to personal injury claims usually takes the form of accident and other related reports. These would be discoverable under the "direct relevance" test. In fact, it is difficult to conceive of a class of document relating to a personal injury claim that would only qualify as a "train of enquiry" document but not as a "directly relevant" document.

In Hong Kong, applications for pre-action discovery are usually made in medical negligence cases, or other cases where the identity of a potential defendant is not known, and can only be ascertained from a hospital medical report, or a statement made to insurers or investigation authorities. In medical negligence cases, the climate has changed and hospitals normally disclose relevant documents without formal application being made.

Yours sincerely,



Mohan Bharwaney
Chairman
Special Committee on Personal Injuries