Draft Practice Directions Relating to Civil Justice Reform

Submission of the Hong Kong Bar Association

1. The Hong Kong Bar Association ("HKBA") offers the following comments on the Draft Practice Directions relating to Civil Justice Reform ("Draft PDs").

2. The HKBA observes that the Draft PDs include minor amendments consequential to amendments of primary and subsidiary legislation as well as newly introduced arrangements. The HKBA has considered each Draft PD individually, and in the case of some of them, in relation to other Draft PDs.

3. The HKBA's Special Committee on Personal Injuries has considered the Draft PD 18.1 on the Personal Injuries List and the Draft PD for the Employees' Compensation List ("the EC List PD"). The Special Committee's views on these two Draft PDs are annexed at the end of this Submission.

4. The HKBA's Special Committee on Family Law has also considered the Draft PD for Matrimonial Proceedings and Family Proceedings. The Special Committee's views on this Draft PD are stated herein below.

General Observations

5. The HKBA notes that the Draft PDs involve the revision of 12 existing PDs and the introduction of 9 new PDs. Each of the existing PDs was drafted at different times and by different persons. The new PDs would also appear to have been drafted by different persons. There are inevitably differences in format, terminology and style. The HKBA suggests that, given this opportunity to revise the PDs generally, the Steering Committee may find it timely to review matters of style and format in addition to matters of substance. Should that course find favour (and at the risk of being pedantic),

matters of style and form will be noted below, both generally and in relation to specific PDs.

6. There seems to be no consistent form of citation in the PDs. Practice has changed over time. Ordinances may or may not be prefaced with *"the"*, *"the High Court Ordinance"*. Ordinances are cited with and without Chapter numbers. Chapter number citation varies, for example, (Cap.4) or Cap.492, with and without a full stop. Sections and subsections may be cited in full or abbreviated, for example, sections 32 to 39; ss. 32-39. So too the Rules of the High Court: Orders and rules are variously cited, for example, Order 29, Rule 8A; Order 18 Rule 12(1c); Order 62 rule 9(4); O.59 r.4(1)(c). Practice directions are cited and are named with and without number. The number is cited with and without brackets and full stops. For example, Personal Injuries List (PD 18.1).

7. There is inconsistent use of Appendix, (*"App. A"*) and Annex (*"Annex A"*). The new practice properly refers to Annexures. The reference thereto is variously prefaced with *"at"* or *"per"*.

8. Abbreviations to be adopted are put in brackets with and without inverted commas. For example, (*"MPPO"*), (*HCO*).

9. The form of headings varies, even within the same practice direction. Variations include different use of typeface and size, upper and lower case, bold, italics and indents.

10. Phrases such as *"mutatis mutandis"* (the necessary changes being made), and *"inter alia"* (among others) could be replaced with modern ordinary language. While some PDs use the phrase "*mutatis mutandis*" (such as in PD 18.1 and the EC List PD")), others use the phrase *"with suitable adaptations"* (for example, PD 5.4, paragraph 28).

PD 4.1: Civil Appeals to the Court of Appeal

11. The second sentence of paragraph 1 may be deleted in its entirety since the existing PD 5.1, 5.2, 5.3 and 5.4 are not concerned specifically with civil appeals.

12. In paragraph 3, the description of Part IA should be "Applications for leave to appeal".

13. The heading of Part IA at page 2 should be in upper case for consistency with headings to other parts.

14. The first sentence of paragraph 8 may be clarified by separating the three accompanying documents by way of semi-colons (i.e. draft grounds of appeal; affidavit evidence; and written submissions). The reference to affidavit evidence in that sentence may also be clarified by the following phrasing: "affidavit evidence where appropriate (such as to demonstrate any justification for an extension of time)".

15. The HKBA suggests there should be inserted in the last full line of paragraph 9 the following underlined words: *"appeal should not be granted or granted only on terms can be..."*.

16. Paragraph 14 seeks to clarify that only the description of a party in the Court of First Instance may be used to stop the practice of using both descriptions. Accordingly, the HKBA suggests that there be inserted in the third line the underlined word *"First Instance only ..."*; and in fourth line before *";"* the underlined words *"whether instead or in addition;"*.

17. Paragraph 26 requires bundles be lodged 14 days before the appeal date. Paragraph 27 applies that time limit to any *"applications"*. Paragraph 19 applies to *"applications"* and *"appeals"*. The HKBA wishes to clarify whether paragraphs 20 to 25 apply only to *"appeals"* or also to *"applications"*.

18. The HKBA also wishes to clarify whether the reference to *"applications to be heard by the Court of Appeal"* in paragraph 27 includes applications for leave to appeal.

19. Paragraph 29 requires skeleton arguments and lists of authorities to be lodged 14 days before the hearing date. The HKBA anticipates that there may be difficulty in complying with this requirement, with paginated bundles only being available at the time that skeleton arguments are due. This is particularly difficult in the case of a cross appeal, when both parties may need to lodge skeleton arguments on the same day as the bundles. Inevitably the party who does not have carriage of the bundles will have later receipt which may cause difficulty in providing a timely skeleton with correct page references.

20. The HKBA wishes to clarify whether paragraph 30 applies also to *"applications"* or only to *"appeals"*. Suitable adaptations may be needed if the paragraph is to apply also to *"applications"*.

21. The HKBA wishes to clarify whether paragraph 31 applies also to *"applications"* or only to *"appeals"*. Suitable adaptations may be needed if the paragraph is to apply also to *"applications"*.

22. The HKBA suggests there should be inserted in line 6 of paragraph 39, line 6 after *"appeal"*, the words *"or application"*.

PD 5.4: Preparation of Interlocutory Summonses and Appeals to Judge in Chambers for Hearing

23. There appears to be some inconsistency in the use of the term *"appeal to judge in chambers"*; on occasion *"appeal to a judge in chambers"* is used instead.

24. There should be a line of space between paragraphs 4.1.5 and 4.1.6.

25. Paragraphs 4.3.1 and 4.3.2 should not be subsumed under paragraph 4.3. They appear to refer to requirements of general application to hearing bundles of all descriptions.

26. The HKBA suggests that in paragraph 9 the word *"summons"* should be substituted with *"application"*.

27. Paragraph 13.3 provides that for summonses for 30 minutes or less, the judge's clerk is to be informed of court documents *"other than"* the summons and affidavits filed. The HKBA wishes to clarify whether there is any additional requirement that a copy of the summons and affidavit for the application to be heard be provided in a bundle so that they may be marked. If this is not a requirement, the HKBA would suggest that solicitors be encouraged to exercise judgment and provide copies if appropriate in a particular case.

28. Paragraphs 16 to 24 may be appropriately grouped under the umbrella of "Part D".

29. The HKBA suggests there should be inserted in line 3 of paragraph 24 after *"apply for an oral hearing"* the words *"giving an estimate of time"*. There may be added by way of clarification at the end the words *"or fix a date for*

oral hearing or refuse the application for an oral hearing" to indicate that besides directing that an oral hearing be held on the order date, the master may also direct that no oral hearing is to be held; or that the oral hearing may take place at a date other than the order date (bearing in mind that appearance of the parties is not required on the order date).

30. At paragraph 25, the relevant date of coming into effect of the superseded practice direction should be 17 October 2005. Alternatively, the paragraph can be re-drafted along the lines of PD 11.1, paragraph 37.

PD 5.6: Documents for Use at Trial

31. The HKBA wishes to clarify whether PD 5.6 applies also to other contested proceedings with witnesses to be heard in court, given that paragraph 1 opens with the words *"In cases for trial"*. An example is assessment of damages.

32. The HKBA also suggests that PD 5.4, paragraph 4.3.2 be incorporated into PD 5.6.

33. Paragraph 2 may refer to the *"small bundle"* as a *"core bundle"* similar to PD 4.1.

34. Paragraph 6 may be amended to follow the formula in PD 5.4, paragraph 11 of *" at least 72 hours (excluding Saturday...)"*.

PD 11.1: Ex parte, Interim and Interlocutory Applications for Relief (including Injunctive Relief)

35. The HKBA wishes to clarify the application of Part II. Paragraph 29(3) requires details of any prior notice given. Even if the applicant has given notice and the notified party appears at the hearing, compliance with Part II is

still required. On the basis that Part II applies to all ex parte hearings, including ex parte on notice hearings, this should be made plain (subject to a contrary order such as an *"on notice hearing"* ordered to be treated as the inter partes hearing). Where the notified party does appear at the ex parte hearing, the judge can make orders or give suitable directions dispensing with particular provisions.

36. In paragraph 33, the HKBA suggests the words *"inter partes or"* should be deleted and the underlined word be inserted in the following manner: *"(including where the hearing is ex parte on notice)"*.

37. The HKBA suggests, in respect of paragraph 35(5), that lines 1 and 2 should be amended to: *"if a draft affidavit has not been sworn, or where other facts have been placed before the Court or disclosures made orally, to procure the..."* The HKBA further suggests the last line should read: *"the disclosures made or facts orally outlined to the court"*.

PD 11.3: High Court and District Court Restricted Applications and Restricted Proceedings Orders

38. The HKBA suggests, in respect of paragraph 2A, that the order of *"RPOs"* and *"RAOs"* should be reversed so as to be consistent with rest of the PD (although in the High Court Ordinance (Cap.4) the sequence is *"RPO"* then *"RAO"*). At line 3, it should read *"under the High Court Ordinance"*.

39. In paragraph 13, the reference to "Ng Yat Chi" should be italicized.

PD 14.2: Proceedings before Masters

40. The newly introduced provisions differ a little in form from the existing provisions. The new provisions use upper case for *"Master"*; see paragraphs

3, 5, 12. On the other hand, the existing provisions use lower case *"master"*; see paragraphs 1, 2, 4, 6, 8 and 9. In paragraph 7, the existing citation of legislation is long form *"section"* and includes Chapter number after short title, namely *"(Cap. 6)"*. In the new provisions, the short form is used, namely *"s.99(3)"* and no *"(Cap.)"*.

41. Paragraph 1 provides that *"all interlocutory applications should be made by summons to a master"* and applies PD 5.4 to such summons. Paragraph 6 on the other hand lists trials and assessments of damages, when providing for hearings before a master in open court. The HKBA wishes to clarify whether PD 5.4 applies to those open court proceedings and trials that may not be *"interlocutory applications by summons"*. For example, do the PD 5.4 provisions on bundles apply to an assessment of damages other than in personal injuries cases (where bundles should follow the PD 18.1)?

42. The HKBA suggests the following amendments should be made in paragraph 5: (d) "elections"; (e) *"declaratory relief"* (namely deleting *"s"*).

43. The HKBA suggests, in respect of paragraph 10, that the words *"consolidate and"* should also be deleted. Alternatively, the paragraph can be re-drafted along the lines of PD 11.1, paragraph 37.

PD 14.5: Application for Wasted Costs Order under Order 62 Rules 8, 8A, 8B, and 8C

44. Paragraph 1 should be amended in line 4 in the following manner: *"in the High Court Ordinance"*.

45. The words *"Ma So So"* in lines 1 and 5 of paragraph 3 should be italicized. The reference to *"s.52A"* in line 3 appears to be redundant.

46. Paragraph 24 provides for an opportunity to be heard at the first stage hearing but stipulates that *"submissions should be short"*. A legal representative would reasonably wish to fully dispose of the application at the first stage and should be allowed to fully develop a case for immediate dismissal to dispose of the application without going on to the second stage. However, the legal representative takes a grave risk if submissions are short, skeletal or without full citation of authority. On the other hand, paragraph 25 provides for the making of directions to ensure that a legal representative is afforded a reasonable opportunity to show cause.

47. By paragraph 26 the Court has a discretion to determine the legal representative has already had such opportunity and to proceed *"without adjournment"* from the first to the second stage. The HKBA is concerned that the reality is that the legal representative will in fact have to attend the first stage hearing fully prepared to put the full case.

48. If submissions were kept short as required by paragraph 24 and the Court then indicates it is proceeding immediately to the second stage, the HKBA wishes to clarify whether it is the case that the first stage submissions would be repeated. Or is it the case that the legal representative would then produce a more detailed submission?

49. Further, where a legal representative wishes to be represented for submissions to show cause in a case that is likely, but not bound, to be adjourned to a second stage hearing the legal representative could quite reasonably feel compelled to instruct his personal legal representative to attend the first stage hearing or risk no adjournment and a wasted costs order imposed summarily. The legal representative could justifiably wish to be represented in any proceedings. He or she may be well advised to do so in circumstances where he or she would wish to give evidence himself or herself.

50. Furthermore, the HKBA wishes to clarify the circumstances in which, in the event that no wasted costs order is made, the legal representative respondent would be able to recover costs of full representation at the first stage hearing. Would it depend on an assessment of whether there was likely to have been the second stage hearing? The difficulty in such an assessment is the power to proceed to the second stage without adjournment, even where the legal representative has sought an adjournment.

51. The HKBA suggests, in respect of paragraph 24, that instead of "Both parties", the words "The applicant and the legal representative" should be used at the beginning of the paragraph.

52. The HKBA suggests, in respect of paragraph 33, the following words should be inserted in the following manner in line 1: *"where a wasted costs order is made"*.

53. There seems to be inconsistent use of upper and lower case for *"Court"*, *"court"*.

PD 18.1: The Personal Injuries List

54. Paragraph 2.9 encourages the arranging of a joint medical examination before commencement of proceedings. The HKBA wishes to clarify whether the sanction specified in paragraph 9.15 may be applied to conduct at the pre-action stage.

55. Paragraphs 4.1 to 4.22 contain provisions to encourage the use of alternative dispute resolution. The HKBA's comments on the new Practice Direction on Alternative Dispute Resolution ("the ADR PD") apply.

56. Paragraph 19 could incorporate such further detail in terms of PD 4.1 and PD 5.6 as it is deemed appropriate. Further, it should be clarified whether in relation to paragraph 19.3(C), any joint report(s) should come chronologically, so usually after, or before reports obtained on behalf of only one party.

57. If amendment is made under the ADR PD, corresponding amendments should be made to the ADR provisions of the Questionnaire for PI Actions in Annex F. Further at section A, paragraph 2 of the questionnaire may be divided into 2 separate paragraphs by deleting at line 2 *"and"* and starting a new paragraph with *"I request..."*.

PD 24.1: Sealing of Writ of Summons, Newspaper Advertisements, Filing of Documents

58. Given the terms of paragraph 2, the HKBA wishes to clarify whether any part of this practice direction applies to the Lands Tribunal *"with necessary adaptation"*. This is because paragraph 5 refers to *"tribunal"* at line 2.

59. The HKBA suggests there should be inserted in line 2 of paragraph 6 word in the following manner: *"the statutory form"*.

60. In paragraph 9, line 3 may be amended by either *"forms ... have"* or *"form ... has"*.

61. The HKBA suggests paragraph 11 should make reference to the Rules of the District Court (Cap.336 sub. leg. H).

PD 27: Civil Proceedings in the District Court

62. The HKBA wishes to clarify which directions are referred to in paragraph 11 by the words *"(except paragraphs 5(ii), 5(iv) and 7)"* since there are no paragraphs 5(ii) and 5(iv) in the revised PD 14.2.

63. The HKBA suggests there should be deleted in paragraph 9.2(ii) the following: *"of the"*.

64. The HKBA suggests, in respect of paragraph 17.1, that line 1 should be amended as follows: *"orders"*.

PD SL3: Directions made by the Judge in charge of the Constitutional and Administrative Law List pursuant to O.72 r.2(3) of the Rules of the High Court

65. The HKBA had no comments on the revision of this practice direction.

LTPD: BM No.1/2009: Direction Issued by the President of the Lands Tribunal pursuant to Section 10(5)(a) of the Lands Tribunal Ordinance (Cap. 17)

66. The HKBA has no comments on the revision of this practice direction.

Admiralty List: Revised Practice Direction 1

67. The HKBA has no comments on the revision of this practice direction.

Construction and Arbitration List: Revised Practice Direction 6

68. Paragraphs 21 to 48 deal with voluntary mediation. The HKBA's comments on the ADR PD apply.

Practice Direction for Order 25: Case Management

69. The HKBA proposes that paragraph 4 should be clarified by reference to the primary aim in exercising judicial power in civil proceedings stated in the Rules of the High Court (Cap.4 sub. leg. A) Order 1A rule 2(2), namely "to secure the just resolution of disputes in accordance with the substantive rights of the parties".

70. The HKBA also proposes that paragraph 5 should be clarified by reference to the terms of the underlying objectives stated in RHC Order 1A rule 1, since it is not apparent which one or more of the underlying objectives supports the call in the paragraph to appreciate goal of "efficient" resolution of disputes.

71. Paragraph 14 provides for a time estimate certificate. The HKBA considers that requiring such a detailed certificate at the particular early stage may require a party to incur substantial fees of full trial preparation, say, of briefing or at least instructing on a time basis counsel for the purpose of familiarizing with the papers to the extent necessary to provide the estimates at the precision required. Once such substantial legal costs is spent, the hurdle to settlement is raised. This concern may be addressed by requiring a time estimate be given but without the breakdown detail and emphasizing the duty to inform the Court of any change in the time estimate. If a breakdown is required that should not be until say 14 days before trial, subject to directions otherwise in particular cases.

72. The HKBA notes that paragraphs 16 does not specify the time period within which the plaintiff is to take out a case management summons, a time period that RHC Order 25 rule 1(3)(b) envisages to be specified by the practice direction. Paragraph 16 in the present draft only specifies the relevant time period in the case where one of the parties is a litigant in person.

73. Paragraph 34 provides case management decisions are within the discretion of the master. On the other hand, paragraph 37 stipulates that: *"An application*

for extension will only be granted, if at all, on the basis of an immediate unless order". The HKBA considers that paragraph 37, by providing *"will only"* and not *"may only"*, removes the discretion and leaves no room for exercise of discretion upon consideration of exceptional circumstances.

74. The HKBA asks whether the warning in paragraph 43 that "the inadequacy of the person attending or of his instructions" would in substance make it likely for him or her to be the subject of a wasted costs order, bearing in mind the definition of "wasted costs", namely "costs incurred by a party as a result of (a) an improper or unreasonable act or omission; or (b) any undue delay or other misconduct or default, on the part of [the] legal representative".

75. Turning to the Timetabling Questionnaire at Annex A, Section K at page 5 provides for a declaration to be made by the party personally or the solicitor acting for the party that the answers are true and accurate. On the other hand, page 1 commences, *"This questionnaire is completed by, or on behalf of the party."* The Questionnaire is to be completed by ticking the appropriate box. The answers to be ticked are statements in the first person. This gives rise to the question of whether a solicitor of a party may properly complete the Questionnaire. If so, the Questionnaire should commence by identifying who is completing the Questionnaire. This can be done by stating whether it is completed by the party (personally if an individual, or representative if a company); or on behalf of the party if by a legal representative. Thus the first box may be amended to:

"This questionnaire is completed
*[by/on behalf of (name)]:**
*The [Plaintiff/Defendant/]*in this case."*

76. The second option in Section A, paragraph 1 of the Timetabling Questionnaire may admit of an ambiguity since the option can be understood as *"I have no*

intention to settle this case" at all or *"I have no intention to settle this case by ADR"*.

77. The Listing Questionnaire in Annex B could be reviewed on the same basis as proposed for Annex A, for example, *"I confirm that I do not..."*

Practice Direction Issued under Order 62: Costs

78. The HKBA proposes that the last sentence of paragraph 7 should be clarified as follows: *"This statement should be signed by the party (if acting in person) or his solicitor."*

79. The HKBA also suggests that paragraph 8 should be clarified that the time for lodgment and service of the statement of costs should be the time for the filing of the skeleton argument for the interlocutory application as provided for in PD 5.4.

80. The HKBA notes that Part A appears to be premised on the party taking the initiative to seek summary assessment and filing a statement of costs. However, the power to make summary assessment of costs given to the Court is a general one, and the Steering Committee in its Recommendation 88 clearly envisages that the Court should exercise this power where appropriate, including circumstances where there is an unwarranted application or unwarranted resistance to an application. As such, the HKBA observes that it may be desirable to make express provision in paragraph 11 to cater for the situation where the Court takes the view that summary assessment of costs should be made notwithstanding that the parties have failed to make the necessary application or lodged the necessary statement of costs.

81. The HKBA suggests that the last sentence of paragraph 17(f) should be re-worded as follows: *"If another firm of solicitors' costs are claimed in the*

same bill, there should be another certificate signed by such other firm of solicitors to the same effect."

82. The HKBA suggests that paragraph 20 should be clarified as follows: *"Notwithstanding paragraph 19 and Rule 21(2), it will not be necessary to re-serve the bill on the paying party if the same bill has been previously served on such party for the purpose of costs-only proceedings or negotiation of settlement ..."*.

83. The HKBA notes that the time for lodgment of documents in paragraph 28 is the same as the current PD 14.3 and has no further comment thereon.

84. The HKBA wishes to clarify whether there are specific rules relating to the filing of skeleton arguments (for example, applying the rules in PD 5.4) in costs-only proceedings, in view of the fact that (a) unlike the paradigm case of summary assessment after the hearing of the application or the action, in costs-only proceedings the master will not have dealt with the case previously, and (b) the originating summons may be disposed of at the return date.

85. The title to the draft in Annex A should be *"Statement of Costs for Summary Assessment"* to reflect the change in terminology in RHC Order 62 rule 9A.

Practice Direction Issued under Order 41A: Statements of Truth

86. The HKBA suggests, in respect of paragraph 2, that there should be inserted in line 1 the following words: *"amended or revised"*.

Practice Direction on Alternative Dispute Resolution

87. The HKBA considers that this practice direction introduces new procedural requirements on an aspect of legal practice with which legal practitioners in

Hong Kong are at this stage not entirely familiar. Therefore, while it is acknowledged that the purpose of this practice direction is not to inform or educate legal practitioners on the topic of alternative dispute resolution, it would be beneficial to indicate for the guidance of legal practitioners the following matters: (a) the nature of *"other ADR procedures"* the participation in which are being encouraged; (b) the criteria that parties to a dispute may refer to in negotiating the *"minimum level of participation"* that would qualify as *"a sufficient attempt at ADR"*.

88. Paragraph 8 requires an ADR Certificate in the Annex A form be filed with the RHC Order 25, rule 1 *"case management questionnaire"*. RHC Order 25, rule 7 (1) provides for filing *"a questionnaire"* prescribed in a practice direction, within 28 days after close of pleadings. The *Practice Direction for Order 25, Case Management*, paragraph 8 provides for a *"Timetabling Questionnaire"* in Annex A form. Paragraph 23, provides for a *"Listing Questionnaire"* in Annex B form to be filed subsequently. To avoid any issue as to the proper time for filing, the ADR PD could clarify that the *"case management questionnaire"* referred to therein is the *"Timetabling Questionnaire"* (not the *"Listing Questionnaire"*) by inserting those words into paragraph 8, as follows:

"... shall file into court an ADR Certificate at the same time [as and] with the case management Timetabling Questionnaire filed under O.25,r.1."

89. Paragraph 8 of the ADR PD provides that: *"The ADR Certificate shall be in the form as per Annex A, with modifications if necessary."* Part I of the Annex A Specimen ADR Certificate is a specimen that can never be adopted without amendment. Amendment to Part I will always be necessary. Part I could be amended for easier use by unrepresented parties.

90. Paragraph 9 sets out particulars to be provided by the certificate. Annex A Specimen ADR Certificate is divided into three parts. Paragraph 9(a) and (b) requirements appear in Annex A Part II. Paragraph 9(c) requirements appear in Annex A Part III. Paragraph 9(d) requirements appear in Annex A Part I. The Annex A Specimen Certificate may more logically start with the confirmation that solicitors have explained ADR etc., and so the paragraph 9(a) and (b) requirements. That would entail making the draft Part II, Part I. The draft Part III could be made Part II. So the draft Part I would become Part III.

91. The present draft Annex A, Part I is a list of questions indicating the type of information that is to be provided. Part I could be amended to follow the Part II and Part III approach. The Specimen ADR Certificate Part I could be re-drafted to approximate a statutory form, in the first person, that may be adopted or copied (at least in part) with modifications for easier use as follows:

"Part I

I certify/confirm that:

1. *The [Plaintiff/Defendant/parties have/has] attempted an ADR procedure to resolve the dispute in this action.*
2. *The parties attempted [mode of ADR attempted]. [when]..."*etc.

92. Alternatively, if the Specimen ADR Certificate, Part I is to remain a list of questions to define the required information that should be provided in the certificate, rather than a form, Part I should commence with a direction or statement to that effect. For example, stating that Part I should contain *"answers to the following questions"*, before then listing those questions. Alternatively *"provide the following information"*. Further, if this format is preferred, the present questions 1 to 7 may be amended for consistency. Paragraphs 6 and 7 include the phrase *"please state"*. Using that form each paragraph should commence *"Please state..."* or simply *"State"*. Alternatively, that repetition could be deleted and the Part I could commence:

"Please state the following:

1. *Whether the Plaintiff/Defendant/parties has/have attempted...*
2. *If yes, what mode[s] of ADR [have] has...*
3. *If the previous attempt was unsuccessful...*
4. *If not... the Plaintiff/Defendant intend[s] to explore...".*

93. The following minor grammatical amendments may be considered: (1) Annex A, Part I footnote 3: *"at the same time as [and when] the ADR Certificate is filed."* (2) Annex A, Part II, (d): *"[I have informed our client of the services of...]"* or *"...our client of the court's Mediation Co-ordinator's office service.]"* (3) Changing the "ADR" indefinite article from *"a"* to *"an"* so *"an Alternative Dispute Resolution"*.

94. Paragraph 9 also provides that the ADR Certificate shall be signed by both the party and the solicitors representing that party. Annex A requires solicitors to sign Part II which includes confirmation of Part I information. The party signs Part III confirming Part I information. Alternatively, in addition to signing Part II and III individually both could also be required to sign Part I. This appears to make sense particularly if Part I is moved to become Part III.

95. Following on from paragraph 9(d), an additional sub-paragraph (e) could be added requiring a statement of the position on a stay of proceedings. It might also be appropriate to require a statement on whether the parties' willingness to explore alternative dispute resolution is or is not conditional on a stay or no stay of proceedings being granted.

96. Paragraph 10 provides for service of an ADR Notice. Paragraph 11 provides for the ADR Notice form, Annex B. Paragraphs 12 and 13 particularise content requirements. Paragraph 14 provides for the ADR Response form, Annex C. Content requirements are then provided as sub-paragraphs of

paragraph 14. The paragraph 14 approach, using sub-paragraphs for particulars required, is more accessible. A more consistent approach would be for the ADR Notice provisions to follow the ADR Response form. In that event the present paragraph 11 could refer to the form and then the content requirements could be made sub-paragraphs of paragraph 11, instead of put in subsequent paragraphs 12 and 13.

97. Paragraph 14 could then be divided, so the first 1½ lines provides for an ADR Response within 14 days (or such other time as the parties may agree). And the subsequent paragraph state that *"the ADR Response shall be... Annex C"*. Then continue *"It should state:-*

(a) ... etc."

98. Given that a stay of proceedings can be so informative of the position on alternative dispute resolution, it is an issue that should be addressed as soon as possible. It appears desirable to add to both the ADR Notice and the ADR Response content requirements provisions requiring the party to state whether the party is or is not willing to agree a stay of proceedings; and whether any agreement to alternative dispute resolution is conditional on the grant or refusal of a stay. If such is added to the ADR Notice and ADR Response requirements set out in the PD, then the Annex B and Annex C forms should include a paragraph requiring the party to state its position on a stay of proceedings.

99. Paragraph 16, line 2 provides the parties *"should proceed... and make application to the court for an interim stay of proceedings."*. Litigation in relation to the dispute may be commenced and continued notwithstanding pursuit of alternative dispute resolution subject to agreement and orders of the Court. Given that a party may or may not apply for a stay and that a stay may

or may not be agreed, paragraph 16 could be amended to *"and may make any application..."*

100. Paragraph 17 applies where there is agreement to try alternative dispute resolution. The parties may apply for assistance with (the last line) *"the mechanics of the ADR"*. The word *"mechanics"* may not readily cover all timetabling or more fundamental disputes (such as appropriate identification or division of parts only of a dispute for alterantive dispute resolution.) Given that paragraph 17 is for cases where there is agreement the phrase *"the mechanics of"* could simply be deleted without suggesting the Court would be involved in the substance of the alternative dispute resolution process.

101. The HKBA considers it desirable to include in this practice direction a specimen ADR Minute (referred to in paragraph 17) so that parties will have a rough idea as to what is required by the Court. Needless to say, the specimen should only be intended as a guide and not a straitjacket.

102. Paragraph 19, line 3 should be amended to identify the Questionnaire by inserting *"Timetabling"* before *"Questionnaire"*.

103. Paragraph 22 applies where the Court stays proceedings and the alternative dispute resolution resulted in a settlement. It could be expanded to remind the parties that in addition to *"informing"* the Court of settlement they must formally conclude the proceedings or part thereof, in whatever manner the parties settlement has agreed that should be done. Further, in a case, where there has been no stay of proceedings or part thereof but settlement has been reached by alternative dispute resolution the parties should also promptly formally conclude proceedings.

104. Further, paragraph 22 does not state the manner in which the plaintiff should inform the Court of the settlement. It will be desirable to include in this

practice direction a specimen form for the parties to fill in. It will also be desirable for future studies if the parties are requested to provide particulars, *on a voluntary basis*, as to: (a) the total time spent on alternative dispute resolution before the case is settled; (b) the total costs spent on alternative dispute resolution before the case is settled; and (c) the contents of the settlement (unless the parties have agreed to keep the contents of settlement confidential).

105. The above comments apply also to the provisions on alternative dispute resolution in the revised PD 18.1, the revised PD 6 of the Construction and Arbitration List, and the new EC List PD.

106. Lastly, the ADR PD uses upper and lower case for *"Court"* inconsistently and the citation of *Wealthy Plus Ltd v Lai Man Ho* at footnote 1 should be: [2001] 4 HKC 691.

Practice Direction for Matrimonial Proceedings and Family Proceedings

107. The HKBA's Special Committee on Family Law has considered this practice direction and endorses it in general terms. The Special Committee is further of the view that as with all PDs its application may benefit with reflection and possible amendment in due course.

LTPD: CJR No.1/2009: Direction Issued by the President of the Lands Tribunal Pursuant to Section 10(5)(a) of the Lands Tribunal Ordinance (Cap. 17)

108. The HKBA has no comments on this practice direction.

Practice Direction: The Employees' Compensation List

109. Paragraphs 2.1 to 2.22 contain provisions to encourage the use of alternative dispute resolution. The HKBA's comments on the new ADR PD apply.

110. The HKBA also proposes that paragraph 8.2 should be clarified by reference to the terms of the underlying objectives stated in RHC Order 1A rule 1, since it is not apparent which one or more of the underlying objectives supports the call in the paragraph to appreciate goal of "efficient" resolution of disputes.

Practice Direction 3.4: Case Management for Bankruptcy Petitions, Winding-up Petitions and Petitions under Section 168A of the Companies Ordinance

111. The HKBA has no comments on this practice direction, which reflects current practice of the Companies Court.

Dated 17th October 2008.

Hong Kong Bar Association

Annex

SUBMISSIONS OF THE SPECIAL COMMITTEE ON PERSONAL INJURIES OF THE HONG KONG BAR ASSOCIATION RELATING TO THE DRAFT PRACTICE DIRECTIONS ON THE PERSONAL INJUIRES LIST (18.1) (REVISED) AND ON THE EMPLOYEES' COMPENSATION LIST (NEW)

Practice Direction (18.1) – The Personal Injuries List

Preamble

1. In general, the Special Committee on Personal Injuries (the "Committee") is of the view that the broad principles set out in the preamble are useful and they set the right tone for the modern approach towards case management in personal injuries cases.

2. The paragraph referring to the *"Guidance Note"* has been deleted. It is anticipated that no *"Guidance Note"* will be published to amplify on the provisions contained in the Practice Direction. Therefore, in making these submissions, the Committee has erred on the side of caution by setting out more detail in respect of certain provisions where it is deemed necessary.

Para. 1 - The Personal Injury List

3. Para. 1.4 – It may be advisable to change *"mutatis mutandis"* to *"with suitable adaptation"* if the Bar's suggestion regarding style of drafting is accepted so as to achieve consistency. However, the Committee has no strong view one way or the other.

Para. 2 – Pre-action Protocol

4. Para. 2.2 – Medical Report

   It is suggested that the reference to *"Government Hospitals"* be changed to *"any treating hospital"*. While most injured persons are initially treated in government hospitals after an accident, it is not uncommon for them to receive further or follow-up treatment in private hospitals or clinics thereafter.

5. Para. 2.8 – Consideration of Joint Examination before action.

   Reference is made therein to Para. 9.15 (sanction if there is a failure to arrange Joint Examination). For the sake of completeness and to avoid misunderstanding, reference should also be made to Para. 9.12 regarding arrangement for joint examination, which is automatically subject to the exception provided in Para. 9.19 applicable to Medical Negligence Cases and cases under $300,000.

Para.3 – Offer to settlement before commencement of proceedings

6. General Observation

(a) It is not clear whether this part only applies to litigants already acting through solicitors. Unlike cases involving money disputes, a lay person (whether plaintiff or defendant) may not know how much a claim is worth without legal advice.

(b) If this part is intended to apply to unrepresented litigants, it is suggested the following further provisions be added.

"3.5 Where the offer is to be made by a party who is legally represented, the solicitors acting for the offeror should take steps to ascertain whether the offeree is legally represented.

3.6 Where it has been ascertained that the offeree is not legally represented, the solicitors acting for the offeror shall include in the offer letter a notice informing the offeree:

(1) his right to seek independent legal advice;

(2) the requirement to make application to seek approval of the Court under RHC O.80, rr. 11 or 12, as the case may be, if the case involves the interest of a minor or a person under disability.

Paragraph 4 – Alternative Dispute Resolution

7. It is observed that for all intents and purposes the ADR Practice Direction has been incorporated in this part of the PI Practice Direction. The Committee will make the following general observations:

(a) The nature of PI Cases is such that about 90% or more of the cases will settle even without ADR being imposed on the parties. In the main, settlement in PI Cases is now achieved by 'without prejudice' negotiation, which itself is a recognized mode of ADR.

(b) Since an unrepresented party will not normally know how to assess the value of a claim, the input of lawyers is needed before any informed decision for settlement can be made.

(c) Given that lawyers are likely to be involved in most PI Cases in any event and that relevant information would have been gathered in the course of

investigation, the advantage of the introduction of the other more formal modes of ADR (e.g. mediation, evaluation by a neutral party, arbitration, etc) merits serious consideration.

(d) The additional costs to be incurred on other modes of ADR for PI Cases would only be justifiable if an infrastructure has been put in place which is conducive to successful resolution of disputes. Otherwise, not much may be achieved over and above what PI practitioners have already been doing (i.e. achieving settlements by 'without prejudice' negotiations).

(e) By reason of the nature of PI Cases, it is desirable for the mediators, neutral evaluators, arbitrators involved in ADR to have some expertise and experience in personal injury matters. Therefore, it is emphasized that there ought to be a proper system for accreditation of ADR service providers for PI cases.

(f) There should be a lead time for PI practitioners to learn the language, skills and procedure in the various modes of ADR and for non-PI ADR service providers (i.e. mediators, neutral evaluators, arbitrators in other fields) to acquire experience in resolving PI Cases. Otherwise, the effectiveness of the ADR in PI Cases would be doubtful.

(g) Therefore, the Committee has reservations as to whether sufficient infrastructure has been put in place for the implementation of the other modes of ADR which would enhance the chance of success and hence justify the additional costs.

(h) To this end, should it be decided that ADR be implemented for PI Cases, it is suggested that the practice direction concerning ADR be first implemented in District Court cases and a decision will be taken whether to extend the same to High Court Cases after a review has been conducted at a suitable time. The District Court is a suitable testing ground for the following reasons:

(1) With the increase in civil jurisdiction to $1m, the majority of PI Cases are now commenced and dealt with in the District Court.

(2) District Court cases tend to settle earlier because of the smaller amount involved.

(3) In a number of District Court PI Cases, there will be a related Employees' Compensation Case, which can conveniently be settled globally.

8. As regards the implementation of the ADR procedure, the following practical considerations have to be addressed:

(a) The PI Practice Direction presupposes that the parties are legally represented. The Committee has a doubt as to whether the ADR provisions are meant to apply to litigants in person or whether they are exempted from filing ADR Certificate (Para. 4.9) and ADR Notices (Para. 4.11 and 4.14). Clarification will be helpful.

(b) Provision should be made for legal representatives to follow the spirit of Para. 4 and to take steps to comply with the same if they are instructed by a litigant in person after commencement of proceedings. The following is suggested:

"4.23 Upon being retained by a party for the conduct of a case in the PI List, the solicitor acting for the party should ascertain whether the ADR procedure herein has been complied with and, where appropriate, take steps to comply with the same as soon as practicable."

(c) The source of funding for ADR should be secured. A large number of PI Cases are legally aided. As the Legal Aid Ordinance (Cap. 91) now stands, the cost incurred on negotiation (including mediation) is covered under Ordinary Legal Aid Scheme (see s.5 and Schedule II) but not under Supplementary Legal Aid Scheme (see s.5A and Schedule III).

(d) Para. 4.5 – *"minimum level of expected participation"*

The concept of *"minimum level of expected participation"* is new. Since there may be adverse cost consequences if a party fails to achieve the *"minimum level of expected participation"* (as agreed by the parties or determined by the Court), more guidance as to the factors that may be taken into account by the Court is desirable.

(e) Para. 4.6 – Court to take into account all circumstances for failure to proceed with mediation or other ADR procedures.

Except in very clear cases, the court may not be in a position to judge the reasonableness of the parties until after the evidence has unfolded at trial. It may be advisable to add at the end of Para. 4.6 that :

"Where appropriate, the Court may defer the determination of costs relating to the refusal of any party to proceed with mediation or other ADR procedures.

(f) Para. 4.17 – *"parties may apply to court for assistance"*.

It is observed that in the ADR Practice Direction (Para. 17) it reads *"parties may apply to [ADR master or judge]"*.

For cases in the PI List, this probably means that the PI Master or PI Judge will hear such application. There is a concern that this may compromise their potential role as the master assessing damages or as the trial judge in the same case if ADR is unsuccessful.

9. Miscellaneous Points and Typographical Errors

(a) In paragraph 4.4

(1) line 3 may be amended by inserting *"on the part of"*;

(2) line 5, the citation of Wealthy Plus Ltd. should be "[2001]" instead of "[2002]".

(b) In paragraph 4.14(d), *"preparation"* should be substituted with *"participation"*.

(c) In paragraph 4.18, there should be inserted in the following manner: *"the court on the question of costs"*.

(d) The Bar has made submissions on the ADR Practice Direction. Where changes are made to the ADR Practice Direction, corresponding changes should be made to this part of the PI Practice Direction.

Para. 5 – Commencement of Proceedings

10. Para. 5.6 – Certificate (Not funded by third party on the basis of contingency fee arrangement).

The Committee welcomes and would embrace this new provision. It will go a long way to stamp out the illegal activities of recovery agents and to protect the injured persons (who may otherwise be short-changed) and the insurers (who may otherwise have to pay more than what the plaintiffs would have accepted for a settlement).

11. By way of refinement, the following observation is made:

(a) The term *"contingency fee arrangement"* can mean anything from the division of proceeds derived from litigation (US style) to an uplift of the lawyer's fee as in CFA (UK style).

(b) It is known that recovery agents also purport to provide various services to injured persons, for instance, financial services by way of loans, escort

services to attend medical treatment, etc. It is envisaged that the recovery agents may charge an exorbitant fee for such purported ancillary services, which is tantamount to sharing of the proceeds of litigation. To this end, the Committee suggests that the scope of the declaration be widened in the revised Annex D (see attached).

(c) Recently, there has been some anecdotal evidence that a disproportionately large number of legally aided cases have been assigned to some particular firms of solicitors nominated by the aided persons. This phenomenon has given rise to a concern that the aided persons may be influenced by some third parties in their choice of legal representation.

(d) Therefore, the Committee suggests another safeguard by requiring the Legal Aid Officer assigning the case to a law firm to certify that he has confirmed with the aided person that the laws of champerty and maintenance have been explained to the aided person by the Legal Aid Officer concerned or the nominated or assigned solicitor, as the case may be, and he knows of no circumstances giving rise to any concern that the action is funded by a third party with a financial interest in the case or on the basis of a contingency arrangement of any form.

(e) In the event that the Legal Aid Officer has reason to be concerned that the action may be funded by a third party with a financial interest in the case or on the basis of a contingency arrangement of any form, it is incumbent upon the Legal Aid Officer to report the irregularity to the relevant authority. In those circumstances, the case should not be assigned to the firm of solicitors nominated by the legally aided person. Where the case has already been assigned to the firm of solicitor nominated by the legally aided person, steps should be taken to have the case re-assigned to a different firm of solicitors.

(f) There should be a mechanism for the certificate to be confirmed at Check List Review, Case Management Conference, Pre-trial Review, and/or upon setting down for trial. It is suggested that a box can be added in the Questionnaire for PI Action with the solicitor confirming that he has taken instructions from the plaintiff and the certificate filed with Court remains valid.

Para. 6- Pleadings

12. The Committee would suggest slight changes as follows:

(a) Paragraph 6.4 should be amended in the following manner: *"Further and Better Particulars" (c.f. paragraph 6.1).*

(b) Para. 6.5 – the words "(including any revision thereof or amendments thereto)" may be inserted after "Answer to Statement of Damages".

(This same comment applies to the Para. 1 of the Practice Direction issued under Order 41A – Statement of Truth, specifying that Statement of Damages and Answer thereto are regarded as pleadings.)

Para. 9 - Protocol for Commissioning of Expert Reports

13. It is observed that this section is new but is in line with current practice.

14. Para. 9.12 – The reference should be to Para. "2.8" instead of "2.5".

15. Para. 9.13 – There should be a mechanism for resorting to the court to prevent a party from "stalling" the other party's choice of expert. The party (or his doctor) objecting to the joint examination should state the reason therefor in the application made to the court before the other party can be forced to choose another expert. To this end, it is suggested that the practice direction be modified to read as follows:
"9.13 If a medical expert intended to be instructed by a party is unwilling to conduct a joint examination of the injured person or prepare a joint expert report with medical expert(s) of the other party or parties, the objecting party shall attempt to resolve the matter by nominating another medical expert for the purpose of conducting a joint examination and preparing a joint report. If there is still no agreement, directions should be sought from the court as soon as practicable and the reason for objection should be stated in the application.

16. Para. 9.18 – Common parameters

It is recognized and accepted that in PI actions under common law, the questions of *"loss of earning capacity"* and *"loss of earnings"* are purely matters to be decided by the court. The approach is slightly different from Employees' Compensation Cases where the *"Permanent Loss of Earning Capacity"* is to a large extent set out in the Schedule to the Employees' Compensation Ordinance (Cap. 282).

However, it does not detract from the fact that the court may be assisted (but not dictated) by the assessment of the medical experts as to the degree of permanent impairment with reference to objective criteria, for instance, the American Medical Association Guide. The Committee recommends the inclusion of a new paragraph as follows:

"9.19 The questions of "Loss of Earning Capacity" and "Loss of Earnings" for cases in the PI List are purely matters to be decided by the Court. In this regard, the Court may take into account the degree of permanent impairment suffered by the injured person as assessed by the medical experts with reference to

established objective criteria. If a party seeks to adduce such expert evidence, the parameters for the assessment should be clearly identified in the expert report."

17. If the above amendment is accepted the subsequent paragraphs are to be re-numbered.

Paras. 10 to 11 – Automatic Directions and Interlocutory Applications

18. Para.11.2(b) recognizes and reinforces the power of the court to determine an interlocutory application without an oral hearing under O.32, r.11A.

19. However, in truly contentious matters, the Court is likely to be assisted by submissions of the parties at an oral hearing.

20. It is therefore suggested that the following sentence be added at the end of Para. 11.2(b):

"A party to a contentious interlocutory application who wishes to be heard in an oral hearing should state the ground therefor in the application."

Para. 13 – Check List Review and Case Management Questionnaire

21. It is observed that there are now 3 possible interlocutory stages (i.e. Check List Review, Case Management Conference & Pre-trial Review). Case Management Conference and Pre-trial review are not mandatory save that a Pre-trial Review is mandatory for medical negligence cases (Para.13.20(i)). It is noted that Case Management Conference and Pre-trial Review are milestone dates but not Check List Review.

22. Para. 13.6

Now that all medical negligence cases are commenced in the PI List, it is no longer necessary to refer to medical negligence cases in this paragraph.

23. Para. 13.13

Instead of *"The Solicitors for the respective parties"*, it should read *"The respective parties or their solicitors"*.

24. Para. 13.16 – Securing admissions and agreements at Pre-trial Review

(a) The procedure of securing and recording admissions (of any aspect) and agreements as to the conduct of the proceedings is a bit of a novelty.

(b) PI Cases are fact-sensitive. The impression one gets from reading the papers may change over time as the evidence is unfolded in the course of the proceedings up to and including trial.

(c) Therefore, the costs sanction for unreasonable refusal should be exercised cautiously. Like in ADR, save in the clearest of cases, the Court may not be in a position to decide whether the refusal is reasonable without the benefit of hearing the evidence at trial. In an appropriate case, such decision should be deferred.

25. Para. 13.18 – Single Questionnaire (Annex F) of all parties.

It is very difficult to prepare a single joint Questionnaire (with all parts completed) covering the situation of each of the parties (see Annex F). Where the parties are in agreement as to the directions to be sought, perhaps a separate Part J of the Questionnaire can be submitted jointly by all parties in addition to the parties' individual Questionnaires. Further, with a view to saving costs, it should also be acceptable for the parties to make a joint application by letter. The Committee suggests that the paragraph to read as follows:

"13.18 *If the parties are able to reach agreement as to the conduct of proceedings before filing of the individual Questionnaires, each party should proceed to file its Questionnaires (with Part J marked "See Joint Questionnaire"). The plaintiff shall procure a joint application by letter or file a consent summons together with a Joint Questionnaire (consisting of Part J only) setting out the agreed directions or timetable for the court's approval and ask for vacation of the Check List Review."*

Para. 13.24 –13.28 – Case Management Conference

26. It is observed that the Case Management Conference is a milestone date with entailing consequences in the event of non-compliance.

27. It is recognised that the Court has the ultimate discretionary power for Case Management and fixing of date for Case Management Conference. However, the Committee is concerned that litigants in person may find the Check List Review and Case Management Conference slightly confusing. Therefore, a practice should be developed to ensure that a Case Management Conference would not be fixed until the case has reached the requisite state of readiness and litigants in person are warned of the significance of the Case Management Conference date.

28. Para. 13.25

(a) there should be deleted in line 2 *"of the"* ;

(b) the words *"after they have first filed their Questionnaires"* may be replaced by *"in their first Questionnaires or at the CLR"*.

29. It may be advisable to put Paras. 13.24 to 13.28 under a new heading starting with a new paragraph number. If this is accepted, the relevant part of Para. 13.21 regarding representation at Case Management Conference should be copied to become a new sub-paragraph under the new heading.

Para. 14 – Pre-trial Review

30. Para. 14.4

In keeping with the changes in the provision regarding CLR, it should read *"The Plaintiff or his solicitors must lodge. . ."* .

31. Para. 14.5

Likewise, it should read *"the Plaintiff or his solicitors"*.

Para. 14.11 to 14.15 – Variation of Court-Determined Directions or Timetable

32. It may be advisable to put this part under a new paragraph since it does not only apply to PTR (in Para. 14) but also to Check List Review and Case Management Conference directions.

Para. 14.16 – Case Managing Trial

33. Again it may be advisable to put this under a new separate paragraph. Perhaps, the heading should read *"Case Managing for Trial"*.

34. It may be advisable to specify that a trial date or a period fixed by the court in which a trial is to take place are milestone dates (*c.f.* EC Practice Direction, Paras. 8.53 to 8.55 and RHC O.25, r.1B(8))

35. Para. 14.16

(a) This paragraph requires a certificate prepared by trial counsel or solicitor. To prepare the certificate the counsel would have to be fully conversant with the papers. Counsel would have to be briefed or at least instructed on a time basis.

(b) Accordingly, the Committee notes that parties are required to incur substantial trial fees by that stage. Once that occurs the costs hurdle to settlement is raised. The prospects of settlement would inevitably decrease as the legal costs increase.

(c) This concern may be addressed by requiring a time estimate be given by *"trial counsel or solicitor"* or *"handling solicitor of the case"* where counsel will not be (or has not yet been) instructed, emphasizing the duty to inform the Court of any change in the time estimate (say) not later than 14 days before trial in order that the Court may give further directions as appropriate. To this end, if it is intended that counsel will be instructed to conduct the trial, instructions should be sent in good time.

Para. 16 – Assessment of Damage

36. Para. 16.4

Again, it should read *". . .the Plaintiff or his Solicitors. . ."*.

Para. 19 – Bundles of Document for trial

37. It remains to be the concern of the Committee that for medical negligence cases, a paginated medical record bundle should be prepared at the earliest possible opportunity, which should be used throughout the interlocutory stages and at trial.

38. Recently, there has been an increase in the number of medical negligence cases. In the long run, a separate practice direction for medical negligence case should be prepared. It is advisable to streamline the practice from the inception of a case so as to avoid unnecessary duplication of documents and/or additional effort in cross-referencing. Meanwhile, the following additional paragraphs are suggested:

"19.6 In medical negligence cases, the following additional requirement should be observed:

(a) A set of the medical records obtained from the defendant (or potential defendant) should be preserved in the same form and sequence as they are received. A set of working copies of the medical records should be produced therefrom. Suitable copying methods should be employed for medical records (or any part thereof) in obscure sizes or prints. Where appropriate, colour copying should be used.

(b) The set of working copies of the medical records are to be arranged in a logical sequence with due regard to the issues in dispute and effective presentation of the case at trial. Duplicate and irrelevant materials should be eliminated. The set of working copies should then be paginated to form a bundle of medical records.

(c) The bundle of medical records should be made available to the plaintiff's expert. Where it is necessary to refer to the medical records, the plaintiff's expert report should be cross-referenced to the paginations in the bundle of medical records.

(d) *The defendant (or potential defendant) should also be provided with a set of the same bundle of medical record when the plaintiff's medical report is served on the defendant. Where it is necessary to refer to the medical records, the defendant's expert report should be cross-referenced to the paginations in the same bundle of medical records.*

(e) *The bundle of medical records should be re-used and constitute a separate section or a separate volume, as the case may be, in the trial bundle.*

39. If the above is accepted, Para. 19.6 is to be re-numbered.

Paras. 21 & 22 – Part II of the Mental Health Ordinance (Cap.136) and Minor

40. It is observed that this section is new but in line with the current practice. However, Para. 21.2 seems a bit cumbersome.

(a) Sometimes, the defendant may take issue on the need for appointment of committee or next friend. Not issuing a protective writ within time may be imprudent.

(b) Provision should be made for issuing of a protective writ (with the committee acting as the next friend) in order to avoid unnecessary argument as to time bar. Approval of the court should then be sought under the Mental Health Ordinance to continue with the proceedings.

(c) To this end, the Committee suggests a new paragraph be added:

"2.3 Where it is anticipated that the defendant may take issue as to the mental state of the plaintiff and/or the need for a next friend but the time bar for the cause of action is imminent, a protective writ should be issued with member(s) of the committee standing as the next friend. Approval of the court should be sought for further conduct of the proceedings."

(d) If the foregoing is accepted, the subsequent paragraphs should be re-numbered accordingly.

41. Para. 21.7

The references therein should include Para 21.6(a) that the money is for the maintenance and benefit of the mentally incapacitated person.

Practice Direction – The Employees Compensation List

42. In so far as the provisions in the EC Practice Direction are the same as the PI Practice Direction, the foregoing submissions are repeated with the necessary adaptations.

43. For ease of reference, a Concordance Table has been prepared (see attached).

Dated the 30th day of September 2008.

Special Committee on Personal Injuries

Mohan Bharwaney SC (Chairman)
Nicholas Pirie
Corinne Remedios
Ashok Sakhrani
Christina Lee
Raymond Leung
Julia Lau
Mona Chhoa

CONCORDANCE TABLE

PRACTICE DIRECTION – THE EMPLOYEES' COMPENSATION LIST

(with cross –reference to the Personal Injuries Practice Direction)

Topic	Employees Compensation Practice Direction	Personal Injury Practice Direction	Reference to the Submission of the Committee on the Personal Injury PD and Further Comments
1.General Principles	Preamble	Preamble	Paras. 1 to 2 (with necessary adjustment to the comments on "Guidance Note")
2. ADR	Para. 4	Para. 2	Para. 7 to 9
3.Before Commencement of proceedings	Para. 3	Para. 3	Para. 6. The heading should also read *"Offer to settle before commencement of proceedings"*
4. Commencement of Proceedings	Para. 4.1(a) - RDC 13A	RHC 13A provided for in PD 24.1	
Certificate of declaring no contingency arrangement	Para. 4.1 (c) & Annex B	Para. 5.6 & Annex D	Para. 10, 11 & Revised Annex D
5. Pleadings	Para. 6	Para. 5	
Statement of Truth	Paras. 5.2 to 5.4	Paras. 6.4 to 6.6	Para. 12. It is however recognized that there will be no Statement of Damages in EC Applications.
6. Witness Statements	Para. 6.1	Not applicable.	In proceedings in the High Court Statement of Truth on Witness Statement generally governed by RHC O.41A & Practice Direction made thereunder.
7. Protocol for commissioning expert reports	Para. 7	Para. 9	
General	Para.s 7.1 to 7.12	Para. 9.1 to 9.11	The slight difference in the numbering is accounted for by the slight difference in the drafting of Para. 7.8 to 7.9 *(c.f. Para. 9.8 of PI PD)*
Joint Examination and Joint Report	Paras. 7.13 to 7.16	Para. 9.12 to 9.15	Para. 15 re: Regarding expert unwilling to perform joint examination.
Form of Expert Report	Paras. 7.17 to 7.19	Paras. 9.16 to 9.18.	Para.16 re: common parameters. Likewise, the court will be assisted by the expert assessment of the permanent *"Loss of Earning Capacity"* following Schedule I to Cap. 282 and assessment as to the degree of permanent impairment by reference to objective criteria such as the AMA Guide.
8. Case Management	Para. 8	Para.13 to 16	
Non-application of O.25	Para. 8.1	Para. 10	
General - Direction Hearing of	Para. 8.2 to 8.6	Paras. 13.1 to 13.23	This procedure is akin to Check

Joint Written Application			List Review. Para. 24 re: securing admissions and agreements. This procedure is new and should be used with caution.
Duty to give information	Para. 8.7 to 8.26	Paras. 13.2 to 13.23	This procedure is akin to Questionnaire in PI Action It is noted that it is unnecessary to lodge draft trial bundle for Direction Hearing (Para. 8.7 of EC PD). The power to be exercised by the court listed in Para. 8.23 is similar to that set out in Para. 13.20 of PI PD concerning CLR.
Interlocutory application	Paras. 8.27 to 8.33	Para. 11	The drafting in EC PD is different but the spirit is the same.
Case Management Conference	Paras. 8.34 to 8.42	Para. 13.24 to 13.28	The drafting in EC PD is different but the spirit is the same.
Pre-trial Review	Paras. 8.43 to 8.52	Paras. 14.1 to 14.9	The drafting in EC PD is different but the spirit is the same.
Milestone dates	Paras. 8.53 to 8.55	No equivalent.	Para. 35 re : specifying in the PI PD that a trial date is a milestone date
Case Management Trial	Paras. 8.56 to 8.59	Paras. 14.16 to 14.18	Para. 36 re : Certificate of time estimate in EC cases where counsel has not been or will not be instructed.
Variation of Court Determined Directions and Timetable	Paras. 8.60 to 8.63	Paras. 14.11 to 14.15	The drafting in EC PD is different but the spirit is the same.
Attendances	Paras. 8.65 to 8.68	Paras. 13.21	
Costs sanction	Paras. 8.69 to 8.71	Paras. 13.19 & 15	
9. Filing of Documents	Para. 9.1 to 9.2	Paras. 17.1 to 17.6	It is to be noted that Para. 10 of Practice Direction 24.1 regarding filing of documents does not apply. Hence, Lists of Documents, Witness Statements and Expert Reports are required to be filed in the District Court. No hearsay notice is needed to be filed in both the High Court and District Court.
10. Actions by persons under disability	Paras. 10.1 to 10.4	Paras. 20.1 to 20.8	
11. Part II of Mental Health Ordinance (Cap.136)	Para. 11	Para. 21	Para. 41
12. Sanctioned Offers and Sanctioned Payments	Para. 12.1 to 12.2	Para. 23.1 to 23.2	
13. Drawing up orders	Para. 13	Para. 25	

ANNEX D (Revised Draft)

CERTIFICATE

PART I - THE PLAINTIFF

I, [name], am the Plaintiff of the action herein. I hereby confirm that:

(a) the illegality of champertous and/or contingency arrangement or agreement for the purpose of funding litigation has been explained to me by [name of solicitor] on [date];

(b) the action herein is/is not* funded by financial resources provided under the Legal Aid Ordinance (Cap. 91);

(c) I have not at any time entered into any form of agreement or arrangement (whether orally or in writing) with any of my legal representative(s) which involves or has the effect of determining legal fees (or the level of legal fees) with reference to the outcome of the action herein;

(d) I have not at any time entered into any form of agreement or arrangement (whether orally or in writing) with any third party (other than the Director of Legal Aid) providing funding for this action which involves or has the effect of sharing the proceeds or damages recovered in the action herein with such third party (or any person(s) nominated by or associated with such third party) with reference to the outcome of the action herein.

Dated/etc.

_____

Plaintiff

* *delete as appropriate*

PART II - THE PLAINTIFF'S SOLICITOR

I, [name], of [name and address firm], am the solicitor acting for the Plaintiff in the action herein. I hereby confirm that:

(a) I have on [date] explained to the Plaintiff the illegality of champertous and/or contingency arrangement or agreement for the purpose of funding litigation;

(b) I have taken instructions from the Plaintiff and I am satisfied that:

(i) the action herein is/is not* funded by legal aid provided under the Legal Aid Ordinance (Cap. 91)*;

(ii) the action herein is not funded by any third party under a champertous and/or contingency arrangement or agreement;

(iii) the action herein is not maintained by any third party, who is not related to the Plaintiff and has no legitimate interest in its outcome;

(c) I have no reason to believe that the Plaintiff has at any time entered into any form agreement or arrangement (whether orally or in writing) with any of his legal representative(s), which involves or has the effect of determining legal fees (or the level of legal fees) with reference to the outcome of the action herein;

(e) I have no reason to believe the Plaintiff has at any time entered into any form of agreement or arrangement (whether orally or in writing) with any third party (other than the Director of Legal Aid) providing funding for this action which involves or has the effect of sharing the proceeds or damages recovered in the action herein with such third party (or any person(s) nominated by or associated with such third party) with reference to the outcome of the action herein.

Dated/etc.

_____

Solicitor for the Plaintiff

PART III - LEGAL AID COUNSEL
(where applicable)

I, [name and rank] confirm that I have advised the Plaintiff that it is unlawful for this action to be funded by a third party (other than the Director of Legal Aid) with a financial interest based on a contingency arrangement of any form or with reference to the outcome of the action.

I have made enquiries from the Plaintiff and know of no circumstances giving rise to any concern that this action is funded by a third party (other than the Director of Legal Aid) in any of the circumstances as aforesaid.

Dated/etc.

_____
Legal Aid Counsel

* *delete as appropriate.*