CJRB 9/2007

Bills Committee on
Civil Justice (Miscellaneous Amendments) Bill 2007

Response to the Issues Raised by the
Legal Service Division of the Legislative Council
Re: Part 6 of the Bill

Purpose

This paper sets out the response from the Administration/Judiciary Administration to the issues related to Part 6 of the Bill raised by the Assistant Legal Adviser ("ALA") to the Bills Committee in her letter dated 28 September 2007. It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

A. Does Part 6 of the Bill intend to restrict potential Personal Injuries ("PI") claimants' right of access to "train of enquiry" documents without which they do not know whether they have a valid claim?

2. The proposed amendments relating to the "directly relevant" test in Part 6 of the Bill are intended to narrow the scope of pre-action disclosure by excluding "background" or "train of inquiry" documents, and reflect Recommendations 75 and 77 of the Working Party on Civil Justice Reform ("the Working Party"). Under the proposed amendments, all applications for pre-action disclosure, whether PI or other civil claims, will have to satisfy the new "directly relevant" test as defined under the proposed section 41 of the High Court Ordinance ("HCO") (Cap. 4). Whilst potential claimants in PI claims will have to satisfy the new, somewhat stricter, test of "direct relevance", it is considered that potential PI claimants will be able to obtain the same documents as they are presently able to obtain under the existing provision as applied in practice by the Court.

3. It is relevant to note that for pre-action discovery in PI cases under the existing section 41 of HCO, satisfaction of the test of

"relevance" is a necessary, but not a sufficient, condition for an order to be made by the court for pre-action discovery. Under Order 24, rule 8 of the Rules of the High Court ("RHC") (Cap. 4A), on hearing such an application, the Court may refuse to make an order if it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs - see *Hong Kong Civil Procedure* 2007 at paras. 24/7A/6 and 24/8/1.

B. Has the Administration sought the views of the parties likely to be affected?

4. The amendments relating to the "directly relevant" test in Part 6 of the Bill are proposed taking into account the responses to the consultation exercises conducted by the Working Party and the Steering Committee.

5. The proposed amendments implement Recommendations 75 and 77 of the Final Report. These Recommendations are made by the Working Party having regard to the consultation response to the *CJR Interim Report and Consultative Paper*. Proposal 28 therein sought views on "*whether parties should be empowered to seek discovery before commencing proceedings and discovery from non-parties along the lines provided for by the Civil Procedure Rules ("CPR")"*. Under the CPR, "standard disclosure" applies to pre-action discovery for all actions (PI and other civil claims alike), and is limited to certain documents, which effectively are the same as what the Working Party describes as "directly relevant" documents. The respondents[1] were generally in favour of Proposal 28.

6. As set out in CJRB Paper No. 6/2007, following consultation on an earlier draft bill issued in April 2006[2], the Steering Committee considers that it would be preferable to have a single "directly relevant"

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[1] Those in favour included the Bar Association, the Special Committee on Personal Injuries of the Hong Kong Bar Association, the Law Society, and the Department of Justice.

[2] As set out in CJRB 1/2007, one respondent commented that the existing section 41 only required the documents to be "relevant", which seemed to suggest that the scope for pre-action discovery for PI claims was wider than the proposed section 41, under which the documents had to be "directly" relevant, and suggested that all types of cases should be dealt with under the "directly relevant" test. The Steering Committee agreed that a common test of "directly relevant" should be adopted for all applications for pre-action disclosure.

test for all applications (PI and other civil claims alike) for pre-action disclosure. It is difficult to see why there should be a laxer test for pre-action disclosure in PI claims, but a tighter one for other claims. In both situations, the purpose of ordering pre-action disclosure is the same – namely, to enable the intending plaintiff to ascertain whether or not he has a viable claim.

Administration Wing
Chief Secretary for Administration's Office

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October 2007