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on 13 June 2008**

**Report of the Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform**

PURPOSE

This paper reports on the deliberations of the Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform.

INTRODUCTION

Background

2. In February 2000, the Chief Justice appointed the Working Party on Civil Justice Reform (CJR) (the Working Party) to review the rules and procedure of the High Court (HC) in civil proceedings and to recommend changes thereto, with a view to ensuring and improving access to justice at reasonable cost and speed. The Working Party submitted its recommendations to the Chief Justice in its Final Report in March 2004, making a total of 150 recommendations.

3. The objective of the CJR is to –

- (a) preserve the best features of the adversarial system but curtailing its excesses. One of the primary ways to achieve this is by giving even greater case management powers to the courts. This would prevent tactical manipulation of the rules to delay proceedings and also ensure that court and judicial resources are fairly distributed;
- (b) streamline and improve the civil procedures; and
- (c) facilitate early settlement by parties, cut out unnecessary applications and, if necessary, penalize such applications.

In consequence, civil proceedings would become more efficient, expeditious and promote a sense of reasonable proportion and economy. The intention is to reduce

delay and eliminate unnecessary expenses in litigation. There would also be greater equality between parties to proceedings and settlements would be both encouraged and facilitated. As far as the administration of the court is concerned, its resources would be more fairly distributed and utilized.

4. In March 2004, the Chief Justice accepted the Working Party's Final Report and set up the Steering Committee on CJR (Steering Committee) to oversee the implementation of the recommendations therein relating to the Judiciary. The Chief Justice subsequently decided that the proposed changes should be implemented not just in the HC, but also in the District Court (DC) and the Lands Tribunal (LT) where such changes are appropriate. Thereafter, the Steering Committee decided on a package of proposed amendments to both primary and subsidiary legislation. Amendments are recommended for six Ordinances, namely, the High Court Ordinance (HCO) (Cap. 4), Lands Tribunal Ordinance (LTO) (Cap. 17), Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), District Court Ordinance (DCO) (Cap. 336), Small Claims Tribunal Ordinance (Cap. 338), and Arbitration Ordinance (Cap. 341). The Civil Justice (Miscellaneous Amendments) Bill 2007, which sought to implement some of the recommendations made in the Final Report published in 2004 and several recommendations proposed by the Steering Committee, was passed by the Legislative Council (LegCo) on 30 January 2008.

5. Of the 150 recommendations in the Final Report, the Steering Committee has identified 81¹ which require amendments to subsidiary legislation. Three main sets of subsidiary legislation are involved -

- (a) Rules of the High Court (RHC) (Cap. 4A);
- (b) Rules of the District Court (RDC) (Cap. 336H); and
- (c) Lands Tribunal Rules (LTR) (Cap. 17A).

6. Following the amendments to the RHC, consequential amendments to the following four sets of subsidiary legislation are required -

- (a) High Court Fees Rules (Cap. 4D);
- (b) District Court Civil Procedure (Fees) Rules (Cap. 336C);
- (c) High Court Suitors' Funds Rules (Cap. 4B); and
- (d) District Court Suitors' Funds Rules (Cap. 336E).

¹ As a result of the revised proposals in paragraphs 35 and 149, the number of recommendations implemented by the gazetted Rules of the High Court (Amendment) Rules 2008 has been reduced to 76.

THE SUBCOMMITTEE

7. Given the complexity and the volume of subsidiary legislation relating to the CJR, the Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007 recommended that in order to allow sufficient time for scrutiny, the subsidiary legislation should be studied in draft form before they are formally tabled before the Council. On 18 January 2008, the House Committee agreed to form a subcommittee for the purpose.

8. The Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform, under the chairmanship of Hon Margaret NG, held 14 meetings from February to May 2008 to scrutinize the English version of the seven sets of draft subsidiary legislation set out in paragraphs 5 and 6 above. The membership list of the Subcommittee is in **Appendix I**. The Subcommittee also received views on the draft subsidiary legislation from eight organizations and individuals, the names of which are in **Appendix II**.

9. The Subcommittee has expressed concern that there should be appropriate representatives from the Judiciary attending meetings of the Subcommittee to answer members' questions on the policy aspects of the draft subsidiary legislation. The Subcommittee has been informed that the Judiciary maintains the position, as previously expressed to the Bills Committee, that as a matter of constitutional principle, judges should not appear before LegCo committees and that the Judiciary Administration (JA) should continue, on behalf of the Judiciary and as authorized by the Chief Justice, to facilitate the Subcommittee in its work by providing the necessary explanation and assistance. Where views on the law are expressed in papers presented to the Subcommittee, such views are not to be taken as statements of law by the courts. Judicial determinations or statements or interpretation of law may only be made in actual cases that come before the courts after hearing argument.

DELIBERATIONS OF THE SUBCOMMITTEE

10. In its deliberations, the Subcommittee has taken note of the depositions' views/comments on the draft subsidiary legislation and JA's composite response to these views/comments. The deliberations of the Subcommittee are set out in this report under the following subjects -

Subject

Paragraph

Proposed amendments to the Rules of the High Court (Cap. 4A)

Purpose	11 - 12
Part 1 - Preliminary	13 - 18
Part 2 - Objectives and Case Management Powers	19 - 27

<u>Subject</u>	<u>Paragraph</u>
Part 3 - Pre-action Protocols and Costs-only Proceedings	28 - 37
Part 4 - Commencement of Proceedings	38 - 41
Part 5 - Dispute as to Jurisdiction	42
Part 6 - Default Judgments and Admissions	43 - 53
Part 7 - Pleadings	54 - 59
Part 8 - Sanctioned Offers and Payments	60 - 76
Part 9 - Interim Remedies and Mareva Injunctions in aid of Proceedings outside Hong Kong	77 - 78
Part 10 - Case Management Timetabling and Milestones	79 - 84
Part 11 - Vexatious Litigants	85 - 90
Part 12 - Discovery	91 - 92
Part 13 - Interlocutory Applications	93 - 95
Part 14 - Interlocutory Applications and Summary Assessment of Costs	96 - 103
Part 15 - Wasted Costs	104 - 109
Part 16 - Witness Statements and Evidence	110 - 111
Part 17 - Expert Evidence	112 - 119
Part 18 - Case Managing Trials	120
Part 19 - Leave to Appeal	121 - 135
Part 20 - Appeals	
Part 21 - General Approach to Inter-party Costs	136
Part 22 - Taxing the Other Side's Costs	137 - 140
Part 23 - Judicial Review	141 - 156
Part 24 - Costs against Non-party	157 - 158

<u>Subject</u>	<u>Paragraph</u>
Part 25 - Miscellaneous	159
Impact of the CJR on unrepresented litigants	160 - 163
Proposed amendments to the Rules of the District Court (Cap. 336H)	164 - 167
Proposed amendments to the Lands Tribunal Rules (Cap. 17A)	168 - 173
Proposed amendments to the High Court (Fees) Rules (Cap. 4D), District Court Civil Procedure (Fees) Rules (Cap. 336C), High Court Suitors' Funds Rules (Cap. 4B), and District Court Suitors' Funds Rules (Cap. 336E)	174 - 181

Proposed amendments to the Rules of the High Court (Cap. 4A)

Purpose

11. The Draft RHC introduce amendments proposed by the Steering Committee on CJR for the implementation of the recommendations in the Final Report of the CJR, and other related recommendations proposed by the Steering Committee. Whilst the proposed amendments relate primarily to the recommendations in the Final Report, they have also taken into account developments and various other matters deliberated on by the Steering Committee since the publication of the Final Report, and having regard to the comments received in the two rounds of consultation conducted by the Steering Committee in April 2006 and October 2007.

12. The Draft RHC is divided into 25 Parts². The relevant recommendations in the Final Report implemented by each Part, the RHC Orders affected (including those affected by consequential and related amendments), and the relevant Amendment Rules in the Draft RHC are set out in **Appendix III**.

Part 1 - Preliminary

Commencement notice

13. Under r.1 of the Draft RHC, the Rules shall come into operation on the day appointed for the commencement of the Civil Justice (Miscellaneous Amendments) Ordinance 2008 (CJO). For ease of reference, members have requested JA to consider specifying a separate commencement notice in Part 1 of the Draft RHC which may appoint the same date on which the CJO comes into operation.

² As a result of the revised proposals in paragraph 35 to delete the provisions relating to pre-action protocols, Part 3 has been divided into two separate Parts and the subsequent parts renumbered. The Rules of the High Court (Amendment) Rules 2008 gazetted on 6 June 2008 are divided into 26 Parts.

14. JA has advised that there would not be a separate commencement notice to be made under r.1 of the draft RHC. For ease of reference, the usual practice is to specify the commencement date by way of a footnote to the relevant section.

Commencement date

15. Regarding the commencement date of the Draft RHC, JA has advised that the Judiciary's target is to have the proposed subsidiary legislation relating to the CJR enacted before the end of the current term of the LegCo in the summer of 2008. The Judiciary intends to bring the relevant legislation, both primary and subsidiary legislation, into force on 2 April 2009 in one go.

16. Members have expressed concern whether there would be sufficient time for the Judiciary and the legal profession to undertake the necessary preparation and training for the implementation of CJR. Members have requested the Judiciary to consider the feasibility of implementing the legislative amendments by phases.

17. JA has advised the Subcommittee that the Judiciary has comprehensive plans for training programmes for Judges and Judicial Officers and support staff starting from late 2008 to early 2009. Both the Bar Association and the Law Society have confirmed they have training programmes in the pipeline, and have indicated their readiness for the implementation of CJR in April 2009. As many of the proposed changes in CJR are inter-related, and in order to achieve the overall objectives of CJR, the Judiciary is of the view that the legislative amendments should be implemented as an integrated package at the same time. It would be highly undesirable to implement them by phases. To do so may well create uncertainty and confusion, and affect the training plans already in place.

18. The Subcommittee has requested JA to ascertain the progress on preparation and training of the two legal professional bodies for the implementation of CJR in late 2008 and report the matter to the Panel on Administration of Justice and Legal Services by early January 2009, before gazettal of the commencement notice for the subsidiary legislation which is subject to the negative vetting procedure of LegCo.

Part 2 – Objectives and Case Management Powers (Recommendations 2 - 4, 81 and 82)

Proposed amendments

19. The new O.1A sets out the underlying objectives of the RHC and requires the Court to give effect to the underlying objectives when it exercises any of its powers or interprets any of the provisions of the RHC or a practice direction.

20. It is proposed under the new O.1B that courts have such case management powers as identifying the issues at an early stage, fixing timetables and controlling the progress of the case, and giving instructions to ensure that the trial of a case proceeds quickly and efficiently.

21. The proposed amendments in Part 2 seek to give effect to the underlying objectives and case-management powers of courts. These changes are intended to foster a new culture for the conduct of cases, so that at an earlier stage than it is at present, parties will have to be better prepared and be in a better position to know the other side's case. Case management may be applied with the aim to restrain excessive discovery, deter undue prolixity of witness statements and evidence, cut down the number of unmeritorious and unnecessary interlocutory applications, which are some of the major causes of costs and delays in the present system. Under the new system, there should be no scope for tactical games (which are often designed to cause delay or increase costs) by any party. Every step permitted by the court will go towards the just and efficient resolution of the dispute before the court bearing in mind the said objectives.

New Order 1A - Objectives

22. Some members and some deputations have doubts about the wording of one of the underlying objectives, i.e. to "promote greater equality between the parties" and consider that it should be replaced by "promote greater equality of arms between the parties" or "promote as much as is reasonably practicable equality of arms between the parties".

23. The Steering Committee has reviewed the wording and is of the view that some form of wording is necessary so as to allow the Court to ensure that there is, for example, a level playing field between parties. The alternative suggestions may cause difficulty. The Steering Committee proposes revising "to promote greater equality between the parties" to read "to ensure fairness between the parties". Whilst the term "fairness" is a broad term, it is considered that the concept of fairness is better understood in terms of civil procedure (revised O.1A, r.1(d)).

New Order 1B - Case management powers

24. Members have requested JA to explain the operation of O.1B, r.1(2)(g) (i.e. the Court's power to try two or more claims on the same occasion) and whether it is a new power granted to the court.

25. JA has explained that the power under O.1B, r.1(2)(g) would be no different from that under existing O.4, r.9. Many of the powers set out in O.1B, r.1(2) can be found within the existing procedural mechanism. Nevertheless, it would be more convenient and clearer if they are enumerated in the new O.1B.

26. The new O.1B, r. 2(2) provides that where the Court proposes to make an order of its own motion, it may give any person likely to be affected by the order an opportunity to make representations. Members have requested information on whether this is a new power to be conferred on the court, examples to illustrate the scope of "any person likely to be affected", and who would bear the costs of the hearings.

27. JA has advised that O.1B, r.2(2) provides for wider powers to be given to the Court to complement its case management powers under the CJR. Under the existing Rules, the Court can make orders on its own motion (e.g. O.42, r.5B(6)) but these are limited. An example of a "person who may be affected" (other than the parties to an action who would usually be affected parties) would be third parties affected by a Mareva injunction or a person affected by an order for pre-trial discovery. To facilitate the consideration of the matter, the Court may, on its own motion, order the person(s) to join as a party, and in making such an order, may give that person an opportunity to make representations. The question as to who would bear the costs of the hearings is a matter of the Court's discretion having regard to all the relevant circumstances of the case concerned.

Part 3 – Pre-action Protocols and Costs-only Proceedings (Recommendations 7 - 9 and 84)

Proposed amendments

28. Under the proposed new O.2, rr.3 to 5, it is proposed that the Court be empowered to -

- (a) take into account a party's non-compliance with any applicable pre-action protocol in exercising its powers under the RHC;
- (b) order a party to pay a sum of money into court if a party fails to comply with a rule, court order, practice direction or pre-action protocol; and
- (c) make "self-executing" orders, i.e. prescribing an appropriate sanction which automatically applies for non-compliance without the need to apply to the Court for enforcement.

29. The proposed amendments to O.62, r.5 empower the Court to take into account the conduct (including the extent to which the parties followed any relevant pre-action protocol) of all the parties in exercising its discretion as to costs.

30. The proposed amendment to O.11, r.1(1) and O.62, rr.11A and 12(1) are related to the procedure for commencing costs-only proceedings under the new section 52B(2) of the HCO in the CJO, and empower a master to tax the costs that are the subject matter of costs-only proceedings.

Effect of non-compliance with practice direction or pre-action protocol

31. Under O.1, "practice direction" is defined to mean a direction issued by the Chief Justice as to the practice and procedure of the Court, or a direction issued by a specialist judge for his specialist list. "Pre-action protocol" is defined to mean any code of practice designated as such and approved by a practice direction.

32. JA has advised that taking into account the consultation response to the Interim Report and the experience in England and Wales that pre-action protocols would result in the "front-loading" of costs, the Working Party had recommended in its Final Report that pre-action protocols should not be prescribed for cases across the board and would only apply to certain specialist lists after due consultation with all relevant parties, including the two legal professional bodies. However, practice directions or pre-action protocols relating to the CJR have not yet been promulgated.

33. The Subcommittee has expressed serious concern about the proposal to impose costs and other financial sanctions for non-compliance of practice directions and pre-action protocols which are yet to be promulgated. The Subcommittee has noted the view of the Bar Association that it is necessary to consider the yet to be promulgated pre-action protocols together with the proposed legislative amendments as a package.

34. Members have also raised other concerns/queries -

- (a) the sanction of payment into court is unfair to the defendant as the nature of the payment is such that it would in most cases apply to the defendant but not the plaintiff;
- (b) unlike the UK's Civil Procedure Rules (CPR), there is no provision for sanction in respect of interest under the Draft RHC;
- (c) the impact of the introduction of pre-action protocols and the proposed sanctions for non-compliance of practice directions and pre-action protocols on unrepresented litigants; and
- (d) as unrepresented litigants are given special consideration in application for relief from sanctions for non-compliance of practice directions or pre-action protocols as provided under O.2. r.5(1)(g), it may be unfair to litigants who are legally represented.

Revised proposal

35. In the light of the concerns expressed by members and deputations, the Steering Committee considers that it may be better to leave out references to "practice direction" and "pre-action protocol" in O.2, r. 3-5 for the time being. If the automatic sanction provisions regarding practice directions and pre-action protocols are considered to be necessary in due course, this can be revisited at the appropriate time after due consultation with all relevant parties, including the two legal professional bodies. The Steering Committee will revise the proposed amendments to O.2 to exclude the application of the proposed sanctions from practice directions and pre-action protocols. (relevant provisions deleted in revised O.2, rr. 3-5) Consequential amendments will also be proposed to O.1, O.22 and O.62 (relevant provisions deleted in revised O.1, O.22 and O.62).

36. Under the revised proposal, the Judiciary's response to the issues raised in paragraph 33 above is as follows -

- (a) Payment into court - the Court should be given the power to order payment in by parties for non-compliance with a rule or court order, whether by a plaintiff or a defendant. At present, the Court has power to order payment in limited situations (e.g. security for costs, giving conditional leave to defend, setting aside default judgment on condition). Non-compliance with rules and court orders in the course of proceedings can normally be penalized by costs sanctions at the conclusion of the proceedings. This may not have sufficient impact on, for example, a delaying party or some other party who has seriously committed a breach. Giving the Court a general power to order payment in at any stage of the proceedings as an appropriate sanction is a necessary measure to ensure that its orders are adhered to. The amount to be paid in may vary according to the circumstances and would conceivably include the payment in of an amount to reflect costs or in some cases, even the amount of the claim.
- (b) Interest sanction - Taking into account the consultation response to the Interim Report and the experience in England and Wales, the Working Party did not recommend a wholesale adoption of the approach under CPR for pre-action protocol. The existing section 48 of the HCO should be wide enough to empower the court to impose interest sanctions. At present, when making an order for payment into court, the Court already has power to order the payment be made to an interest bearing account.
- (c) Impact on unrepresented litigants - it is inevitable that at times unrepresented litigants may be given more leeway than represented litigants. It will continue to be the case that lawyers will (and can be expected to) know about the applicable procedures more than litigants acting in person. In any given case, it will be up to the judge to case-manage so as to ensure fairness to the parties.

Effect of sanctions

37. In response to the suggestion of the Bar Association, the Steering Committee agrees to make amendments to O.2, r.4 to provide that where a party has failed to comply with a rule or court order, any sanction for failure to comply imposed by the rule or court order shall take effect unless the party in default applies for and obtains relief from the sanction within 14 days (revised O.2, r.4).

Part 4 – Commencement of Proceedings (Recommendations 11 - 16)

Proposed amendments

38. The present system, with four different modes of commencement of proceedings - writs, originating summonses, originating motions and petitions - is often criticized for being too technical and cumbersome. Part 4 seeks to amend the various Orders to simplify the present system so that, save for certain exceptions (for example, winding up and bankruptcy proceedings) where petitions will continue to be used, the modes of commencement will be confined to -

- (a) writs where substantial factual disputes are likely to arise; and
- (b) originating summonses where questions of law involving no or little factual investigation are to be placed before the court.

Impact of abolition of originating motions

39. Members have pointed out that under the existing procedures, originating motions could be used for starting proceedings requiring fast-track procedures and have sought clarification on the impact of the proposed abolition of originating motions as a mode of commencement of proceedings.

40. JA has advised that the Final Report has made clear that the object in making Recommendations 12-14 is to simplify the existing modes of commencing proceedings. By prescribing that only writs and originating summonses are to be used, this will be achieved. The use of the originating summons procedure will not result in any less expedition than at present. In fact, the usual procedure at present to deal with issues of pure construction would be by way of originating summonses rather than originating motions. This will remain. It should be noted that, where an originating summons is issued to determine a question of law or construction of law in an uncontroversial factual context, the procedural steps such as pleadings, discovery, witness statements, etc. are avoided as unnecessary. It should also be noted that the originating motion procedure will remain for those types of proceedings where this procedure is expressly required.

Orders 118 and 119

41. In response to the query raised by the Subcommittee, JA has advised that revised amendments will be proposed to make it clear that the proceedings dealt with by O.118 and O.119 are ex parte in nature and the form to be used is Form No. 11 in Appendix A of the RHC (revised O.118, r.4 and O.119, r.4).

Part 5 – Dispute as to Jurisdiction (Recommendation 17)

Proposed amendments

42. The Subcommittee has noted that amendments are proposed to O.12, r.8 under this Part to -

- (a) provide that a defendant who wishes to dispute the jurisdiction of the Court may also apply for an order staying the proceedings;
- (b) prescribe the procedure for arguing that the Court should not exercise its jurisdiction; and
- (c) provide that an application for relief by a defendant who wishes to dispute the jurisdiction of the Court or to argue that the Court should not exercise its jurisdiction must be made by interlocutory summons.

Amendments are also proposed to O.18 and Appendix A to provide for transitional and consequential matters.

Part 6 – Default Judgments and Admissions (Recommendation 18)

Proposed amendments

43. At present, the default judgment process (which requires no court appearance) is limited, applying only where the defendant unconditionally surrenders to the claim. Accordingly, in many money claims, e.g. debt-collection claims, although the defendant has no defence (and accepts this), he may make desperate attempts to stave off default judgment being made against him just to avoid an immediate liability to pay. The plaintiff may then have to apply to the court for summary judgment or even take the matter to trial, incurring much expense and suffering delay. The defendant may also incur expense in trying to avoid an immediate liability to pay.

44. It is proposed that a new procedure for making admissions to money claims (both liquidated and unliquidated) is to be introduced by adding a new O.13A. This is intended to facilitate settlements and save court time and costs by enabling payment terms (whether as to the time to pay or as to instalment payments) to be proposed by a defendant who admits a claim. Part 6 seeks to give effect to this proposal.

45. Under the proposed new O.13A -

- (a) if the only remedy that a plaintiff is seeking is the payment of money, the defendant may admit the whole or part of a liquidated claim or in the case of an unliquidated claim, put forward a sum in respect of which he is willing to submit to judgment;

- (b) in making the above admission, the defendant may also seek time to pay, either by a certain date or by instalments at a specified rate of payment;
- (c) if the whole claim is admitted, or if the plaintiff decides to accept the sum admitted in satisfaction of the whole claim, the plaintiff may enter judgment against the defendant and consider whether to accept the defendant's payment proposal; and
- (d) if the plaintiff is not satisfied with the defendant's payment proposals, he can refer those proposals for determination by the Court.

Procedure for making an admission

46. Members have questioned the need for the types of information a defendant is requested to provide regarding his financial means (such as information on income, expenses and liabilities) in Form No. 16 - Admission (liquidated amount) and Form No. 16C - Admission (liquidated amount), and consider that this might deter defendants from making use of the new procedure introduced by O.13A. JA has responded that the content of the forms is modelled upon their counterpart under the CPR and is predicated on the premise that a defendant might seek time to pay solely on account of lack of means.

47. Members have requested JA to consider modifying the proposed procedure for making an admission to a money claim and requesting time to pay into a two-stage process, as follows -

- (a) at the first stage, the defendant may admit liability and make a proposal on payment terms (as to time and instalments) without the need to supply information on his financial means. If the plaintiff accepts the defendant's proposal for payment, the Court would, at the request of the plaintiff, enter judgment for the amount to be paid by the defendant at the times and rate specified in the defendant's proposal for payment; and
- (b) the second stage should only apply if the plaintiff does not accept the defendant's proposal for payment, in which case, the defendant would be required to provide information on his financial means, on the basis of which the Court would decide how the payment should be made.

48. JA has explained that currently, the basic rule is that a plaintiff is entitled to enforce a judgment on a money claim once it is given, and a stay of enforcement is the exception rather than the norm. Where a defendant applies for a stay of execution, he has to furnish sufficient information to assist the plaintiff and the Court to assess his financial means so that the court may decide whether to grant a stay of execution. The types of information required are similar to those required in the relevant admission forms if payment terms are proposed.

49. The new O.13A introduces a new procedure for a defendant in a money claim to make admission and propose payment terms as to time and instalments to satisfy the claim. One of the options to the plaintiff under O.13A is to accept a lesser sum in settlement of his claim (e.g. when the defendant admits part of the claim). The defendant is thus encouraged to be frank with his means to enable the plaintiff to make an informed decision. Splitting the procedure into two stages will cause delays to the proceedings.

Withdrawing an admission

50. O.13A, r.2(3) provides that the Court may allow a party to amend or withdraw an admission if the Court considers it just to do so having regard to all the circumstances of the case. In response to members' enquiry, JA has responded that it is not envisaged under the regime of O.13A that a defendant who is not satisfied with the Court's decision on the time of payment could apply to withdraw his admission on this ground alone. Nevertheless, the Court could exercise discretion under O.13A, r.2(3) having regard to the circumstances of individual cases.

51. In response to the suggestion of the Subcommittee, the Steering Committee agrees to add a notice to the Explanatory Notes in Forms No. 16 and 16C to alert a defendant making an admission and proposals for payment terms that an admission, once made, may not be withdrawn unless the Court considers it just to do so (revised Forms No. 16 and 16C).

Determination of rate of payment by Court

52. Under O.13A, r.10, if the plaintiff does not accept the defendant's proposal for payment, he shall file a notice with the Court which shall enter judgment for the amount to be admitted to be paid by the date or at the times and rate of payment determined by the Court. Members have suggested that it should be made clear in this rule and the relevant forms that the Court will determine payment terms taking into account the defendant's means.

53. JA has explained that apart from the means of the defendant, the Court would also take into account other relevant factors, e.g. the number of instalments involved and the plaintiff's objections to the defendant's proposal. In an extreme case where the payment terms are unrealistic and the plaintiff opposes (e.g. on the ground that the defendant may abscond), the Court may exercise its discretion not to order instalment payments. In view of the comment of members, the Steering Committee proposes to amend O.13A, r.10 and the Explanatory Notes in Forms No.16 and 16C to set out that, if the plaintiff does not accept the defendant's proposal for payment, the Court will decide how the payment should be made, taking into account the information set out in the defendant's admission filed in the Registry, the reasons why the plaintiff does not accept the defendant's proposal for payment, and any other relevant factors (revised O.13A, r.10(4), and revised Forms No. 16 and 16C).

**Part 7 - Pleadings
(Recommendations 22 - 24 and 26 - 35)**

Proposed amendments

54. JA has advised that pleadings, which should contain a concise and clear statement of the true nature of the case and the facts relied on, are at present often obscure, thereby hiding the true nature and strength of a party's case. For example, a defence pleading contains merely bare denials or non admissions or even drafted in an over-elaborate way. Extravagant claims or defences may be made (for tactical reasons) which are later shown to be unsustainable or which are abandoned. To confirm the proper function of pleadings, it is proposed that pleadings should be verified by a "statement of truth". Substantive defences must be revealed. These changes will enable each party's case to be defined with sufficient precision and accuracy at an early stage. In this way, early settlements should be achieved or if not, this will enable the parties to be better prepared and focused for trial. Part 7 seeks to give effect to this proposal.

New Order 41A - Effect of statement of truth

55. A new O.41A (modeled on Part 22 of the CPR and the associated practice directions) is proposed to introduce a requirement that certain documents be verified by a statement of truth. It also identifies the persons by whom a statement of truth is to be signed, sets out the effect of a statement of truth and the consequences of a failure to verify a document for which verification by a statement of truth is required.

56. Under the new O.41A, documents which must be verified by a statement of truth include a pleading, a witness statement, and an expert report (r.2(1)). A statement of truth is a statement that the party putting forward the document believes that the facts stated in the document are true (r.4(1)).

57. Members have expressed concern about the implications of the proposal on a legal representative. JA has advised that if a legal representative who has signed a statement of truth on behalf of a party and it is subsequently found out that the party has made a false statement without an honest belief in its truth, there would not be any legal consequence, such as risk of contempt proceedings, for the legal representative so long as he has met the requirements stipulated in O.41A, r.4(3)(a) to (c), as follows -

- (a) the party on whose behalf he has signed had authorized him to do so;
- (b) before signing he had explained to the party that in signing the statement of truth he would be confirming the party's belief that the facts stated in the document were true; and
- (c) before signing he had informed the party of the possible consequences to

the party if it should subsequently appear that the party did not have an honest belief in the truth of those facts.

58. Members have enquired about the possible consequences for a legal representative if he has failed to fulfill the requirements specified in r.4(3)(a)-(c). JA has explained that the possible consequences include -

- (a) the relevant pleading may be struck out under O.41A, r.6;
- (b) cost consequences for the legal representative's client;
- (c) the legal representative may face claims from his client if his client suffers any loss as a result;
- (d) disciplinary action against the legal representative if his client makes a complaint to the relevant legal professional body; and
- (e) proceedings for contempt of court may be brought against the legal representative if he puts forward a false statement of truth without his client's authority (O.41A, r.9).

59. In response to the suggestion of the Subcommittee, the Steering Committee agrees to set out in the relevant forms (Forms No. 1 and 14) for issuing a writ or an originating summons the requirement that pleadings should be verified by a statement of truth (revised Forms No. 1 and 14).

Part 8 - Sanctioned Offers and Payments (Recommendations 38 - 43 and 132)

Proposed amendments

60. A new O.22 is proposed to introduce a system of sanctioned offers and payments so that, effectively, offers to settle any type of dispute (not just money ones as under the present O.22) may be made, thereby bringing the whole action or a part of it, to an end. Moreover, the settlement offers by parties can relate to the whole claim, a part of the claim(s), and even an issue arising from a claim(s). The new O.22 substantially alters the existing system of payments into court and would considerably widen the ambit of offers to settle cases. As distinct from the existing O.22, which provides only the mechanism for payment into court by the defendant, the new O.22 allows also the plaintiff to make settlement offers. If an offer is not better when judgment is obtained, the offeree has to bear the consequences of enhanced interest and costs.

61. A new O.22A is also proposed to set out miscellaneous provisions about payment into court. A majority of these provisions are at present contained in the existing O.22.

62. A new O.62A is proposed to enable offers and payments similar to those contained in the new O.22 to be made in the context of the taxation of costs.

Sanctioned offers and sanctioned payments

63. The Subcommittee has noted the following -

- (a) "sanctioned payment" means an offer made by way of a payment into court in accordance with O.22. "Sanctioned offer" means an offer made (otherwise than by way of a payment into court) in accordance with O.22. The terms "plaintiff" and "defendant" apply interchangeably depending on whether the context is a claim or counterclaim;
- (b) the plaintiff can only make a settlement offer by way of a sanctioned offer. The plaintiff needs not do so by making a sanctioned payment. The defendant can, depending on the circumstances, make it by both ways; and
- (c) where an offer by a defendant involves a payment of money to the plaintiff, the offer must be made by way of a sanctioned payment. Where the offer does not consist of a payment of money, it will have to be made by way of sanctioned offer.

64. The Steering Committee considers it unnecessary to require the offeror of a sanctioned offer to file with the Court a certificate of service of the offer and will propose an amendment accordingly (deletion of such requirement in revised O.22, r.6).

Acceptance

65. The rules governing acceptance of sanctioned offer and sanctioned payment are similar except that there is a prescribed form (Form No. 22) to be used for acceptance of sanctioned payment. After acceptance of a sanctioned payment, the plaintiff may obtain payment out of the sum in court by making a request for payment in Form No. 25. There are situations where one or more, but not all, defendants make a sanctioned payment or offer. The procedures governing the acceptance of which are set out under O.22, r.14.

66. Members have requested JA to clarify whether a plaintiff can make a sanctioned offer to one or more, but not all, defendants where the defendants are sued jointly.

67. JA has advised that the proposed O.22, rr.1(2) and 2(1) provide the basis for a plaintiff to make a sanctioned offer to some, but not all, defendants. Upon acceptance by that defendant, the usual consequences under O.22 will apply. The plaintiff can, in principle, pursue his claim against other defendants on claims with several liability. If the plaintiff discontinues the action against the other defendants, O.21, r.2 or 3 will apply. To cater for the issue of costs (if any) between the defendants, in the event that

only one or more, but not all, defendants accepted the plaintiff's sanctioned offer, the Steering Committee proposes to add a provision to require that the notice of acceptance of plaintiff's sanctioned offer should be given to other defendants, who may then apply to the court as regards costs or other directions (revised O.22, r.13).

Costs and other consequences of non-acceptance

68. If a plaintiff has made a sanctioned offer which is not accepted, and he obtains a judgment which is better/more advantageous than the offer, the defendant may have to face the consequences. On the other hand, if the defendant has made a sanctioned offer or sanctioned payment which is not accepted, and the plaintiff fails to obtain a judgment which is better/more advantageous than the offer or payment, the plaintiff may have to face the consequences.

69. In response to members, JA has advised that the consequences of non-acceptance may include the liability to pay -

- (a) by the plaintiff -
 - (i) costs incurred by defendant after the latest date on which the offer or payment could have been accepted without requiring leave of the court;
 - (ii) costs on indemnity basis from the latest date on which the offer or payment could have been accepted without requiring leave of the court; and
 - (iii) enhanced interest (up to 10% above judgment rate) on those costs;
- (b) by the defendant -
 - (i) costs on indemnity basis from the latest date on which the offer could have been accepted without requiring leave of the court;
 - (ii) enhanced interest (up to 10% above judgment rate) on those costs; and
 - (iii) enhanced interest (up to 10% above judgment rate) on any sum awarded (excluding interest) to the plaintiff from the latest date on which the offer could have been accepted without requiring the leave of the court.

70. Members have requested JA to explain the criteria for the Court's determination as to whether a judgment is "better"/"more advantageous" than the sanctioned offer or payment. JA has advised that the criteria and/or principles for these phrases will be developed by case law.

71. In response to members' comments, the Steering Committee proposes to introduce amendments so that a plaintiff would, as in the case of a defendant, be subject to interest sanction on damages awarded for failing to do better than a sanctioned offer/payment (revised O.22, r.23).

72. In response to members, JA has confirmed that if a party has made an offer to settle which does not fall under the regime of O.22, he could still draw such offer to the Court's attention during its determination on costs under O.62 r.5, as is the case at present. Members have suggested that such information should be drawn to the attention of unrepresented litigants as they are not conversant with civil litigation rules and procedures. The Judiciary has agreed to consider including such information in updating the relevant information pamphlet for unrepresented litigants.

Restriction on disclosure of a sanctioned offer or payment

73. There are restrictions on disclosure of sanctioned offer or payment. A sanctioned offer is treated as "without prejudice save as to costs". The fact that a sanctioned payment has been made must not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided. The Subcommittee has asked whether, and if so what, penalty would be imposed against a party for breaching the rule.

74. JA has explained that similar to the present position for payment into court, where a party has made such disclosure to the trial judge, the other party to the proceedings may apply for the trial judge to recuse himself, and the party who has made the disclosure may be liable to bear the costs thrown away. In practice, however, parties on many occasions do invite the judge to disregard such disclosure and continue with the trial.

Money paid into court

75. O.22, r.23(2) provides that a defendant who has paid money into court in pursuance of an order made under O.14 may by notice to the plaintiff, appropriate the whole or any part of the money and any additional payment, if necessary, in satisfaction of any particular claim made by the plaintiff and specified in the notice, or if he pleads a tender, by his pleading appropriate the whole or any part of the money as payment into court of the money alleged to have been tendered. Members have suggested JA to consider replacing the word "appropriate" in the rule as it may give the impression that a defendant is actually paying money into court, and specifying when the money appropriated in accordance with r.23(2) would deem to be a sanctioned payment.

76. JA has advised that the word "appropriate" has been in use in the existing O.22, r.8. Experience shows that it does not give any such mistaken impression that a defendant has to actually pay money into court. The Steering Committee will propose amendments to clarify when a sanctioned payment notice is deemed to be served in the

case of appropriation of money already paid into Court under a Court order (revised O.22, r.27).

**Part 9 – Interim Remedies and Mareva Injunctions in aid of Proceedings outside Hong Kong
(Recommendation 49)**

77. The Subcommittee has noted that O.11 is amended to allow service out of the jurisdiction of an application for interim relief or appointment of a receiver. Amendments are made to O.29 and O.30 to respectively set out the procedure for applying for interim relief in aid of proceedings outside Hong Kong, and provide that the procedure for applying for appointment of a receiver in an action or proceeding in the High Court applies, with certain modifications, to an application for appointment of a receiver in aid of proceedings outside Hong Kong.

78. O.73 is amended to set out the procedure for applying for interim injunction or any other interim measure in aid of arbitration proceedings outside Hong Kong, and to allow for service out of the jurisdiction of such applications.

**Part 10 - Case Management Timetabling and Milestones
(Recommendations 52 - 60 and 62)**

Proposed amendments

79. Currently, O.25 lays down the procedures for parties to seek directions from the court after close of pleadings. A plaintiff is required to take out a "summons for directions" within one month after the pleadings in the action are deemed to be closed in order to obtain the Court's directions on all matters which have to be dealt with before the trial of the action. In practice, if at the hearing of the summons for directions, the parties are not ready to proceed on any outstanding interlocutory steps, as is often the case, the hearing will be adjourned to such date as may be ordered or at such time as when the parties are available. This leads to inevitable delays.

80. O.25 is amended so that court-determined timetables can be set at an early stage of proceedings, taking into account the needs of the particular case and the reasonable requests of the parties, who are required to fill in a questionnaire and to propose directions and a timetable. There will be "milestone dates" for the major steps in any proceedings and also "non-milestone dates" for the less critical steps. Only in the most exceptional circumstances would a milestone date be changed.

81. As it would be confusing to have in existence both a summons for directions and a case management summons, it is therefore proposed that there be only one procedural summons - the case management summons. The term "summons for directions" in O.25 and other orders are substituted by "case management summons".

Variation of case management timetable

82. New O.25, r.1B provides for the variation of a case management timetable. The Subcommittee notes that -

- (a) "milestone date" means a date which the Court has fixed for a case management conferences , a pre-trial review, the trial or trial period; and
- (b) "non-milestone date" means a date or period fixed by the Court, other than a date or period specified in the definition of "milestone date".

A party must apply to vary a milestone date and cannot vary the date by consent. A party may vary non-milestone dates by consent. If there is no consent, a party may apply to vary a non-milestone date but the Court will only vary the date where "sufficient grounds" have been shown. Even where such grounds may be shown, the court will not grant the application if this would result in the trial date or trial period being changed.

83. Members have questioned why the rule is silent on the threshold for granting an application for variation of a milestone date. JA has responded that milestone dates could only be varied in exceptional circumstances, which might be made clear in a practice direction. In response to the suggestion of the Subcommittee, the Steering Committee agrees to amend r.1B to specify that the Court shall not grant an application for variation of a milestone date unless there are exceptional circumstances (revised O.25, r. 1B(3)).

Failure to appear at case management conference or pre-trial review

84. The Steering Committee has also proposed to amend O.25, r.1C to clarify that, if the plaintiff and/or counterclaiming defendant has not appeared at the case management conference or pre-trial review, the claim and/or counterclaim shall be provisionally struck out, subject to a period of 3 months for restoration (revised O.25, r. 1C).

Part 11 – Vexatious Litigants (Recommendation 69)

Proposed amendments

85. By way of the CJO, the HCO has been amended to allow a vexatious litigant order to be made not only by the Secretary for Justice, but also on application of an "affected person".

86. Amendments are proposed to O.32, r.11(1) so that an application under section 27A of the principal Ordinance for leave to institute or continue legal proceedings may not be heard by the Registrar of the High Court or any master. A new O.32A is added to set out the procedure relating to the making of a vexatious litigant order. A new form is added to Appendix A for making a relevant application.

Mode of commencing proceedings

87. Members have requested JA to clarify the mode of commencement of proceedings for applications for a vexatious litigant orders under the existing and proposed procedures, and consider whether a fast-track procedure should be provided for applications involving little or no factual disputes.

88. JA has explained that currently, the mode of commencing proceedings for applications for vexatious litigant orders under section 27 of the HCO is by originating summons. Under the new O.32A, r.1, proceedings under the new section 27 of the HCO will be the same as at present, i.e. by originating summons.

89. For an application under section 27, the Judiciary does not see the need to provide an urgent procedure to curb vexatious litigation. A section 27 order involves the deprivation of a person's right to institute/continue with legal proceedings (unless leave of the Court is obtained). The person against whom the order is sought should at least be given a chance to properly respond.

90. In any event, a section 27 order is usually a last resort, and one would have thought that a restricted application order or a restricted proceedings order would have been in place or applied for by way of summons, which would be a quicker way, before the case has developed to such a stage that a section 27 is warranted. If any case were made out for an expedited or even an urgent hearing, the Court would of course accommodate this as in any other case. Apart from the restricted application order or a restricted proceedings order procedures, the Court will also in appropriate cases grant interim injunctive relief.

Part 12 – Discovery (Recommendations 76, 79 and 80)

Proposed amendments

91. The Subcommittee has noted that to facilitate settlement, the CJO amends the HCO to extend pre-action discovery to all civil claims, instead of death and personal injuries claims as at present. The proposed amendments in Part 12 are mainly intended to set out the detailed procedures to be adopted following the amendments in the CJO.

92. O.24 is amended to -

- (a) widen its scope of application for pre-action discovery under section 41 of the HCO to cases other than personal injuries or death claims. The affidavit in support of the application must show that the documents sought to be disclosed are directly relevant to the claim;

- (b) provide that no order for disclosure of documents is to be made under section 41 or 42 of the HCO, unless the Court is of the opinion that the order is necessary for disposing fairly of the cause or matter or for saving costs; and
- (c) empower the Court to limit the discovery of documents or to direct that the discovery of documents should be made in the manner specified by the Court.

**Part 13 – Interlocutory Applications
(Recommendations 83, 85 and 86)**

Proposed amendments

93. The Subcommittee has noted that O.32 is amended to -

- (a) allow interlocutory applications (other than applications specified in the rule) to be dealt with by a master without a hearing;
- (b) provide for the Court's power to specify the consequences of failing to comply with a court order on an interlocutory application; and
- (c) provide that the Registrar and any master of the High Court may deal with matters relating to the conditions of admission to bail.

Interlocutory applications

94. New O.32, r.11A allows interlocutory applications (other than applications specified in the rule) to be dealt with by a master without an oral hearing and empowers him to give directions for the purpose of determining the applications. O.32, r.11A(4) provides that -

"Where the determination of the applications is adjourned for the hearing of the summons, no further evidence may be adduced unless it appears to the Court that there are exceptional circumstances making it desirable that further evidence should be adduced."

95. Taking into account the comment of Professor Eric CHEUNG that the meaning of this rule is unclear and will encourage unnecessary arguments and hence costs, the Steering Committee agrees to propose amendments to clarify that, before determination of an application is adjourned for hearing, the Court has given directions as to filing of evidence and other matters (revised O.32, r.11A).

Part 14 - Interlocutory Applications and Summary Assessment of Costs (Recommendations 88, 89 and 92)

Proposed amendments

96. O.62 is amended to introduce summary assessment of costs. It is aimed at discouraging unwarranted interlocutory applications. The proposed changes are also intended to dispense with the present elaborate and lengthy taxation procedures, thereby saving time and costs.

Summary assessment of costs of interlocutory applications

97. The proposed O.62, r.9A empowers the Court, when disposing of an interlocutory application, to -

- (a) make a summary assessment of costs in lieu of taxation (r.9A(1)(a));
- (b) make a provisional summary assessment of costs subject to the right of either party to have the costs taxed (r.9A(1)(b)); or
- (c) order a taxation at the end of the action (r.9A(1)(c)).

98. Where the Court has made a provisional summary assessment of the costs, either party is entitled to insist on a taxation of the costs (r.9A(2)). Upon taxation, if the taxed costs equals the amount summarily assessed, no further amount is payable in respect of the taxed costs (r.9A(3)(a)). If the party seeking the taxation succeeds in having the sum assessed adjusted in his favour (either by having to pay less if he is the paying party, or being awarded a higher amount if he is the receiving party), he should be entitled to have the payment consequential to the summary assessment adjusted accordingly (r.9A(3)(b)-(c)). However, if he fails to achieve a favourable adjustment or if the adjustment is not significant so that the costs of the full taxation are disproportionate to the benefits gained, he may be ordered to bear the costs of the taxation (r.9A(4)).

O.62, r.9A(2)

99. Members have noted that r.9A(2) provides that where the Court has made a provisional summary assessment of the costs, either party to the interlocutory application who is aggrieved by the order is entitled to insist on a taxation of the costs.

100. In response to members' request for clarification, JA has advised that the phrase "aggrieved by the order" in r.9A(2) is not intended to introduce an additional condition for seeking a taxation of costs. For clarity, the Steering Committee agrees to delete this phrase from the rule (revised O.62, r.9A(2)).

O.62, r.9A(4)

101. Members have expressed concern about the lack of objective benchmarks for determining whether the party applying for taxation has done materially better than the provisionally assessed sum under r.9A(4).

102. JA has explained that the Court would have regard to the factors stated in r.9A(5) and the circumstances of individual cases. In addition, an order for costs of taxation made under r.9A(4) is subject to appeal.

O.62, r.9A(4) and (5)

103. Members have sought clarification whether the references to "the Court" in r.9A(4) and (5) refer to the "taxing master" which is the term used in r.9A(3), and if so, whether consideration would be given to replacing "the Court" with "taxing master" for the sake of consistency. The Steering Committee agrees to propose amendments to replace references to "the Court" in the rule by "taxing master" (revised O.62, r.9A(4) and (5)).

**Part 15 – Wasted Costs
(Recommendations 94 – 97)**

Proposed amendments

104. O.62 is amended by adding new rules 8, 8A, 8B, 8C and 8D, to -

- (a) set out the circumstances under which the Court may make a wasted costs order;
- (b) specify that the Court may make a wasted costs order on its own motion;
- (c) require the Court to consider the question of whether to make a wasted costs order by a two-stage procedure specified in the rule; and
- (d) provide that a party shall not threaten another party or any of that party's legal representatives with an application for a wasted costs order, and a party shall not indicate to the other party or any of that party's legal representatives that he intends to apply for such an order, unless he is able to particularize the misconduct concerned and to identify the evidence.

Scope of "legal representative"

105. "Legal representative" is defined in O.62, r.1(1) to mean, in relation to a party to proceedings, a counsel or solicitor conducting litigation on behalf of the party. In response to the Subcommittee's request, JA has confirmed that the term "legal representative" covers the legal representative(s) conducting the litigation at the relevant time, including ex-legal representatives where a litigant has changed legal representatives in the course of the litigation.

Application for wasted costs order not to be used as a means of intimidation

106. The new rule 8C provides that a party shall not threaten another party or any of that party's legal representatives with an application for a wasted costs order. It also provides that a party may not indicate to the other party or any of the party's legal representatives that he intends to apply for such an order unless he is able to particularize the misconduct concerned and to identify the evidence. Members have requested JA to clarify whether there is any sanction for breach of O.62, r.8C and how to address the practical difficulties in monitoring compliance with the rule.

107. JA has advised that a party in breach of O.62, r.8C (e.g. indicating an application for a wasted costs order without giving particulars) may face an adverse costs order (or even a wasted costs order) against him (or the legal representative). This sanction may be suitably provided under a Practice Direction.

Personal liability of legal representative for costs - supplementary provisions

108. In putting forward his views to the Subcommittee, Professor Eric CHEUNG has expressed reservation about the absence of procedural safeguards in O.62, r.8D which provides that a legal representative may be personally liable for costs.

109. JA has advised that r.8D re-enacts what is now in O.62, r.8(6)-(8). The Steering Committee agrees to introduce amendments to make it clear that the procedural safeguards in making wasted costs order are similarly applicable to wasted costs orders made by a taxing master (revised rr.8D and 8E).

Part 16 – Witness Statements and Evidence (Recommendation 100)

110. At present, O.38, r.2A(7)(b) permits a witness statement to be supplemented by testimony in very limited circumstances. The amendments allow a witness greater flexibility to amplify or supplement his witness statement.

111. In response to members' request for clarification, JA has advised that the intention of the proposed O.38, r.2A(7)(b) is to allow a witness to amplify his witness statement, or supplement it with evidence in relation to matters which have arisen since serving the witness statement, or to do both.

Part 17 – Expert Evidence (Recommendations 102 - 103 and 107)

Proposed amendments

112. Part 17 amends O.38 to -

- (a) empower the Court to order the parties to appoint a single joint expert (SJE);
- (b) declare that an expert witness's duty to assist the Court overrides his duty to his client or the person paying his fees;
- (c) provide that a party who instructs an expert witness shall provide the expert witness with a copy of the code of conduct set out in the new Appendix D; and
- (d) require an expert witness to make a specified declaration before his expert report or evidence will be admitted in evidence.

Evidence by a single joint expert

113. The Subcommittee notes that under O.38, the Court may, at or before the trial of the action, order two or more parties to the action to appoint a SJE to give evidence on a certain question (r.4A(1)). Where the parties cannot agree on who should be the SJE, the Court may select the expert witness from a list prepared or identified by the parties, or direct that the expert witness be selected in such manner as the Court may direct (r.4A(2)). Notwithstanding that a party to the action disagrees with the appointment of a SJE, the Court may make an order if it is satisfied that the disagreement is unreasonable (r. 4A(4)).

114. Members have expressed reservation about the proposed rules. They question whether the Court should be involved in matters concerning the appointment of expert witnesses which should best be left to the parties for decision having regard to the need of their cases. They have asked JA to clarify the circumstances under which the court may make an order for appointment of a SJE under r.4A(1), in particular whether such an order could be made if none or only one of the parties intends to appoint an expert witness.

115. JA has advised that the Working Party on CJR is aware of the concern that the appointment of SJE in unsuitable cases might give rise to counter-productive effects. At the same time, it also recognizes that the parties and the court may benefit significantly from SJE orders made in appropriate cases, particularly those which are of low value and/or low complexity. The Working Party is therefore of the view that the court should be given the power to make SJE orders subject to clear guidelines designed to ensure that the orders are not made in unsuitable cases.

116. JA has further advised that O.38, r.4A(1) is not intended to apply where no party considers it appropriate to appoint an expert. If the parties want to adduce expert evidence, the Court may make an order on its own motion under r.4A(1) after taking into account the factors in r.4A(5). This provision for the Court to make an SJE order on its own motion is added taking into account the Law Society's submissions in July 2006, which make reference to the relevant provisions in the CPR.

117. The Steering Committee proposes to amend O.38, r.4A to make it clear that -

- (a) before the Court considers appointing an SJE on its own motion, it should hear the parties first; and
- (b) the Court will only appoint an SJE where the circumstances allow (r.4A(5)), but where one party objects, or both or all parties object, the Court may nevertheless appoint an SJE in the interests of justice (revised O.38, r.4A).

Setting aside an order on the appointment of an SJE

118. Under O.38, r.4A(6), if the Court is satisfied that the SJE order made under r.4A(1) is inappropriate, it may set aside the order and allow the parties concerned to appoint their own expert witnesses to give evidence. The Subcommittee has requested JA to explain the operation of the rule and consider setting out clearly in the rule the procedures involved.

119. JA has explained that an application for setting aside an order for the appointment of an SJE under r.4A(6), like any other interlocutory applications, can be made by summons. The Court may on its own motion or upon a party's application set aside the order under r.4A(6). O.1B, r.2(1) already provides that the Court may exercise its powers on an application or of its own motion.

Part 18 - Case Managing Trials (Recommendation 108)

120. The Subcommittee has noted that Part 18 seeks to amend O.35 to set out the Court's powers of case management in relation to trials.

Part 19 – Leave to Appeal (Recommendations 109, 110 and 112)

Part 20 - Appeals (Recommendation 120 and Steering Committee's recommendations)

Appeals from masters - Order 58

121. O.58 is amended to make it clear that the entitlement to appeal to a judge from a master's decision applies irrespective of whether the decision is made on paper or after a hearing, and provides that the introduction of fresh evidence on the appeal is not allowed except on special grounds.

Leave to appeal and interlocutory applications of pending appeals under Order 59

122. Currently, appeals from the Court of First Instance (CFI) to the Court of Appeal (CA) are as of right, i.e. leave is not required. Interlocutory applications of pending appeals may be heard and determined by two Justices of Appeal (JAs).

123. The CJO introduces amendments to the HCO to provide that -

- (a) an interlocutory appeal from the CFI to the CA can only be brought with leave of the CFI or the CA. One or two JAs can deal with such applications for leave to appeal. Refusal of leave by the CA is final; and
- (b) the CA, comprising two JAs, has jurisdiction to hear or determine interlocutory applications of pending appeals on paper without a hearing.

124. Following amendments to the HCO, O.59 is amended to provide for -

- (a) a procedure for an application for leave to appeal for interlocutory matters from the CFI to the CA; and
- (b) the detailed procedures for the determination of interlocutory applications of pending appeals before the CA.

Revised procedure for applications for leave to appeal

125. In formulating the application procedure for leave to appeal to the CA for CFI interlocutory matters, opportunity is taken to standardize the procedure irrespective of the type of proceedings or the level of court. It is proposed that –

- (a) applications for leave to appeal should involve all parties (inter partes), and not just the party applying for leave (ex parte) initially, save in exceptional cases; and
- (b) the calculation of time for making applications (whether for leave to appeal or appeal) should start to run from the date of the relevant judgment, order or decision appealed against, instead of from the date of perfection of the order (as it is now).

126. Accordingly, amendments are proposed to standardize the provisions for leave to appeal to the CA, irrespective of the type of proceedings or the level of court. O.59, rr.2A and 2B deal, respectively, with applications for leave to appeal to the CA, and applications for leave to appeal against interlocutory and other orders (such as costs) of the CFI.

Applications to Court of Appeal for leave to appeal

127. The Subcommittee has discussed the revised procedure for applications to the CA for leave to appeal, and has expressed reservation about the proposed O.59, r.2A(8), viz -

"Where the Court of Appeal determines the application on the basis of written submissions only, it may, if it considers that the application is totally without merit, make an order that no party may under paragraph (7) request the determination to be reconsidered at an oral hearing *inter partes*."

The Subcommittee is concerned whether the above provision would deprive the aggrieved party of the right to an oral hearing, and in some cases, might result in injustice. It has requested JA to provide information on the statistics on applications to the CA for leave to appeal, renewal applications, and the outcome of these applications in the past few years.

128. JA has explained the Steering Committee's relevant considerations for the proposed O.59, r.2A(8). The problems of and associated with "totally" unmeritorious appeals (often from litigants in person but not restricted to this class) have been experienced in Hong Kong for some time and need to be addressed. In each of the three years from 2005 to 2007, on average, about 20% of leave applications were followed by renewal applications. Of the renewal applications, about 80% were refused leave. The proportion of such applications highlights the need to address the problem of unmeritorious appeals.

129. It is well-established in the international jurisprudence that the access and hearing rights are not absolute but may be subject to appropriate restriction. In many jurisdictions, leave to appeal is often dealt with on paper, without a hearing and without reasons for dismissal of the application. The proposed O.59, r.2A(8) is modeled on the English CPR 52.3, which provides that an application for permission to appeal may be considered by the appeal court without a hearing. If an application is refused without a hearing, such decision would then be subject to the appellant's right to have it reconsidered at an oral hearing, possibly before the same judge. If the CA considers that the application is without merit, it has the power to order that no request for reconsideration can be made by the applicant.

130. The proposed O.59, r.2A(8) was included in the Steering Committee's "Revised Proposal for Amendments to Subsidiary Legislation" published in October 2007. The Law Society has no comment on the proposed provision. Having considered the Bar Association's comments, the Steering Committee has suitably revised the wording of the proposed r.2A(8) to make it clear that it only applies to "totally unmeritorious appeals". The Bar Association has raised no further comments on the wording of the latest O.59, r.2A(8).

131. The proposed O.59, r.2A(8) seeks to deal with the problem of "totally"

unmeritorious appeals. Under the proposed O.59, r.2A, when at least two JAs have come to the view that an application for leave to appeal is "totally" unmeritorious and no rational basis has been shown as to why there should be an oral hearing, it seems difficult to justify an insistence that there be an automatic right to be heard orally. The Judiciary does not believe that O.59, r.2A(8) is disproportionate to the problem of applications which are "totally without merit".

Timeframe for the perfection of an order

132. Members have requested JA to clarify whether the proposed amendments on the calculation of time for making an application for leave to appeal or appeal, i.e. from the date of an order (instead of the date of the perfection of an order as at present), would affect the operation of the proposed O.59, r.5(1)(a), which requires the appellant to lodge with the Registrar a copy of the sealed judgment or order within 7 days after the service of the notice of appeal. They point out that there is often a significant time lag between the date of the order and that of perfection of the order.

133. JA has advised that in the majority of cases, the absence of a perfected order will not hold up the appeal process, since the losing party will have obtained the result and the reasons for it (obviously if the reasons are unavailable, this will often be a good reason for an extension of time to appeal to be given). O.59, r.5(1)(a) requires the appealing party to lodge with the Registrar a sealed judgment within 7 days after the date of service of the notice of appeal. A notice of appeal is filed either 28 days from the date of judgment if no leave to appeal is required, or 7 days from the grant of leave if leave to appeal is required. There will be ample time in between to seal the order if a party acts promptly.

134. Members have suggested that the Judiciary should consider drawing up a performance pledge on the timeframe for the perfection of an order. JA has advised that the Judiciary will try its best to ensure that draft orders of the CFI will normally be approved within 7 working days after receipt of the draft from the party concerned. However, as a member remains concerned about the lead time required for the perfection of an order, the Subcommittee has agreed that the issue be referred to the Panel on Administration of Justice and Legal Services for follow up.

Other issues

135. JA has advised the Subcommittee that taking into account the comments from Professor Eric CHEUNG in his submission to the Subcommittee, the Steering Committee agrees to delete -

- (a) the words "by a summons" from O.59, r.2B(1); and
- (b) the words "in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits" from O.59, r.10(2) (revised O.59, rr. 2B(1) and 10(2)).

Part 21 – General Approach to Inter-party Costs (Recommendation 122)

136. The Subcommittee has noted that the following changes regarding inter-party costs are proposed to be introduced -

- (a) in relation to interlocutory applications, the principle that the costs should normally follow the event is no longer the prescribed usual order but just an option; and
- (b) the Court shall take into account the underlying objectives of the RHC in exercising its discretion as to costs.

Part 22 – Taxing the Other Side's Costs (Recommendations 131, 134 to 136)

Proposed amendments

137. In response to members' request, JA has explained in detail the proposed amendments to O.62 in relation to –

- (a) entitlement to costs;
- (b) counsel's fees;
- (c) procedure and documents for taxation;
- (d) provisional taxation;
- (e) costs of taxation;
- (f) measures to facilitate settlement and reduce delays in taxation proceedings; and
- (g) bases and scales of taxation.

Bases and scales for taxation

138. In response to members' questions, JA has advised that the scales of costs for taxation are contained in the First and Second Schedules of O.62. Some rates (e.g. mechanical preparation of documents) are outdated and certain fixed costs are obsolete. Revisions are proposed to update these rates and fixed costs. Members have requested JA to explain the bases for the proposed revisions.

139. JA has advised that the revisions to the scale costs and fixed costs are proposed taking into account the Law Society's proposal, the experience of taxing masters, and the use of gross sum assessment of costs to better reflect the solicitors' work involved.

Final certificate

140. The Steering Committee proposes to amend O.62, r17A to make it clear that the taxing master would only issue a final certificate after the expiry of the review period in O.62, r33 (revised O.62, r. 17A).

Part 23 – Judicial Review (Recommendations 144 - 148)

141. The major provisions in this Part include the following -

- (a) O.53, rr. 1A and 1, defining more clearly the scope of judicial review proceedings;
- (b) New rr.2A to 2D, setting out the procedure for applying for leave to apply for judicial review;
- (c) O.53, r.3, making further provisions for dealing with an application for leave;
- (d) New r.3A, providing that neither a respondent nor a person served with an application for leave may apply to set aside an order granting leave to make the application for judicial review;
- (e) New r.4A, providing for service of an order granting leave to apply for judicial review and of any associated directions given by the Court;
- (f) New rr.5A to 5D, providing for the filing and service of grounds for contesting or supporting an application for judicial review; prohibiting an applicant for judicial review to rely on additional grounds unless leave of the Court has been granted; providing that at the hearing of the application for judicial review, no affidavit evidence may be relied on unless it has been properly served or the Court grants leave; and allowing any person to apply for leave to file evidence or make representations at a judicial review hearing; and
- (g) O.53, r.9(1), providing that a person who desires to be heard in support of an application for judicial review shall also be heard if the person appears to the Court to be a proper person to be heard.

Existing procedural framework

142. In response to the request of the Subcommittee, JA has explained the statutory framework of the procedures for judicial review proceedings. The scope of judicial review is currently defined by reference to the types of remedies sought under O.53, r.1(1), which provides that -

"(1) An application for-

- (a) an order of mandamus, prohibition or certiorari, or
- (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act,

shall be made by way of an application for judicial review in accordance with the provisions of this Order."

143. An application for judicial review is a two-stage process -

- (a) the applicant must first apply for leave to move for judicial review; and
- (b) if leave is granted, the applicant can proceed with a substantive application for judicial review where, if grounds for review are made out, the court may decide to intervene by granting the applicant appropriate relief.

144. Presently, the leave application is made ex parte and usually decided without an oral hearing. Neither the proposed respondent nor any interested party is served with the application or the supporting evidence. They are not brought into the picture unless and until the applicant succeeds in obtaining leave.

145. If the applicant secures leave and proceeds with the substantive application, the application has to be made by originating motion to a judge sitting in open court, unless ordered otherwise by the judge granting leave. The notice has to be served on all persons directly affected. Any respondent who intends to use an affidavit at the substantive hearing has to file it in the Registry within 56 days after the service upon him of the notice of motion or summons.

146. The Working Party on CJR noted in its Final Report that the present remedy-based approach in deciding the scope of judicial review proceedings is unsatisfactory, and there is merit in adopting some aspects of the changes to the procedural framework for judicial review proceedings in the CPR of England and Wales. Taking into account the consultation response to the Interim Report, the Working Party on CJR made Recommendations 144-148 in the Final Report.

Service of notice of application for leave

147. The Subcommittee has noted the proposed procedure for service of notice of application for leave and acknowledgment of service of notice of application of leave (proposed O.53, rr.2B and 2C) as follows -

- (a) an application for leave must be made ex parte by filing in the Registry a notice in Form No. 86 containing a statement of, inter alia, the name and

description of the respondent and all interested parties (if any). "Interested party" is defined to mean any person (other than the applicant and respondent) who is directly affected by the application for judicial review (O.53, r.1A);

- (b) the notice of application for leave together with the affidavit verifying the facts relied on must be served on the proposed respondent and any person the applicant considers to be an interested party within 7 days after the date of the filing of the notice of application;
- (c) any person served with the notice of application for leave who wishes to take part in the judicial review must file an acknowledgment of service in Form No. 86C;
- (d) an acknowledgment of service must be filed not more than 21 days after service of the notice of application for leave and served on the applicant and any interested party named in the notice of application not later than 7 days after it is filed. The time limit may be extended by agreement between the parties; and
- (e) the acknowledgment of service must, where the person filing it intends to contest or support the application for leave, set out a summary of his grounds for doing so and state the name and address of any interested party, and must be accompanied by an affidavit verifying the facts stated in the acknowledgment of service.

148. Members have expressed serious concern whether the proposed procedure would adversely affect the public's right to judicial review as a channel for seeking redress against decisions made by public bodies. They have requested the Judiciary to reconsider the proposal in the light of its implications on applicants applying for judicial review, especially unrepresented litigants.

149. In view of the concerns expressed by members and some depositions (e.g. the proposal may result in unnecessary costs and delay in some cases), the Steering Committee has looked at the matter again and accepts that in some cases, the procedural changes proposed may not be altogether desirable. The Steering Committee has therefore decided to remove the proposed amendments regarding the service requirement at the leave application stage. Nevertheless, the Court would (as is the position under the existing Rules) exercise its discretion, in appropriate cases, to order that notice be given to the proposed respondent or interested parties at the leave application stage. This discretion, together with the Court's case management powers under the existing and the proposed Rules, will, in appropriate cases, bring about the benefits expected of the original changes proposed for the leave application stage.

Requirements relating to "interested party"

150. Members have expressed concern whether the proposal to bring in interested parties before leave is granted is necessary and whether it would add to an applicant's obligations, especially one who is not legally represented.

151. JA has emphasized that the proposal does not add to the obligations of the applicant, and would be conducive to improving the present procedural framework for judicial review proceedings. It merely brings forward the time when an applicant has to decide who to be named as the respondent and who may be an interested party, so as to enable the Court to give directions timely and avoid unnecessary costs and delays. Litigants in person will be informed of the statutory definition of "interested party", and in any event, they are likely to be accorded some leeway by the Court in case of genuine difficulty.

152. Members have requested clarification about the costs consequences, if any, on the applicant if an interested party named in the application form turns out to be not truly an "interested party".

153. JA has explained that the Court will, at the leave stage, give suitable directions regarding service on the interested parties, and where the applicant has cast the net too widely, the Court can sift out those persons who need not be served or need not participate in the proceedings. At the leave stage, there is no question of costs consequences as it is essentially ex parte, and all respondents and interested parties at this stage are "putative" only.

154. Members have sought further clarification on the consequences faced by an applicant if he fails to identify all the interested parties in an application for leave for judicial review.

155. According to JA, in principle, an applicant in judicial review has a duty to inform/serve party (other than the respondent) whom he believes will be directly affected by his application. However, in practice, applicants do not do so in many cases. Sometimes, the interested party will apply for permission to take part in the proceedings. In some cases, the Court will give the necessary directions on filing of evidence and the like. In other cases, it may be at a late stage (e.g. at the substantive hearing) that it comes to the Court's attention that there is an interested party who should be served. The hearing may have to be adjourned and costs will have to be paid to the respondent.

156. In view of the Subcommittee's concerns about the requirements relating to "interested party" in O.53, the Steering Committee has agreed to make further amendments to clarify the procedural requirements where "interested parties" may be involved (revised O.53, rr. 3, 4A and 6 and Form No. 86)

**Part 24 – Costs against Non-party
(Steering Committee's recommendation)**

157. Part 24 deals with costs against a person who is not a party to the relevant proceedings, which is a recommendation of the Steering Committee.

158. The Subcommittee notes the following proposed amendments -

- (a) Order 11 - rule 1(1) is amended to enable service outside Hong Kong of an originating process by which a cost order against a person who is not a party to the relevant proceedings is sought; and
- (b) Order 62 - a new rule 6A is added to provide that if the Court is considering whether to make a costs order in favour of or against a person who is not a party to the relevant proceedings, that person must be joined as a party and must be given a reasonable opportunity to attend a hearing.

Part 25 – Miscellaneous

159. Part 25 contains technical and minor amendments to several Orders of the RHC.

Impact of the CJR on unrepresented litigants

160. Members have expressed concern about the impact of the various proposed changes in CJR on unrepresented litigants and requested the Judiciary to provide information on the assistance available to them.

161. JA has advised that the Judiciary is aware of the potential problems encountered by unrepresented litigants and is committed to providing assistance and facilities to enable them to deal with the applicable procedures in the conduct of their cases. The Judiciary is mindful of the fundamental principle that it must be and must be seen to be fair and impartial in adjudicating disputes when rendering assistance to unrepresented litigants.

162. The Judiciary has explained that the existing procedural arrangements for unrepresented litigants which would largely remain unchanged under the CJR. Administratively, the Resource Centre for Unrepresented Litigants (Resource Centre) has been in place since 2003 to provide assistance to unrepresented litigants. The Judiciary does not believe that the CJR changes will make civil litigation more complex nor will they make it less advantageous for unrepresented litigants in the conduct of proceedings. The Judiciary will continue to provide suitable assistance to unrepresented litigants through procedural and administrative arrangements, whilst upholding the fundamental principle that it must be and must be seen to be fair and impartial in adjudicating disputes.

163. Members are of the view that the services of the Resource Centre should be

reviewed and enhanced to better meet the needs of unrepresented litigants. As the matter is outside the ambit of the Subcommittee, members agree to refer the matter to the Panel on Administration of Justice and Legal Services for follow up in due course.

Proposed amendments to the Rules of the District Court (Cap. 336H)

Background

164. As the existing practice and procedure in civil proceedings in the DC largely mirror those in the HC, the Steering Committee considers it appropriate for the HC and DC to have the same set of procedures consequent on the CJR. The proposed amendments to RDC therefore largely follow those to the RHC, unless there are special considerations justifying differences between the two sets of Rules. Amendments are proposed to the RDC to implement the relevant CJR recommendations, and achieve consistency with the RHC. The objective is to extend CJR to the DC, so as to make improvements in the DC, while at the same time allowing it to retain certain existing features to give the DC flexibility to deal with cases even more effectively and efficiently.

Major differences between the Draft RDC and the Draft RHC

165. JA has briefed the Subcommittee on the major differences between the two sets of Rules as highlighted below –

- (a) the right of a director to represent a limited company is preserved (RDC O.5A);
- (b) the present position is that leave is generally required to appeal against any decision made in the civil proceedings in the DC. This is to be preserved. It will be different from the HC, where leave to appeal is only required for interlocutory decisions;
- (c) for taxation proceedings, the DC will continue to follow its existing requirement of obtaining a certificate for counsel. The DC scale of costs and the "two-thirds rule" under RDC O.62, r.32(1A) will also be preserved;
- (d) the judge shall retain the power to frame the issues in lieu of pleadings under RDC O.18, r.22;
- (e) interrogatories will continue to be administered only with leave under RDC O.26; and
- (f) the provision relating to revocation of interlocutory orders upon cause shown under RDC O.32 and the provision regarding the charging of partnership property in RDC O.50, r.16 are also retained.

166. Members have enquired about the reason for not abolishing the leave requirement for interrogatories under RDC O.26, as this may encourage more exchange of information between the parties before trial, thereby facilitating settlement. JA has explained that the intention of the leave requirement is to limit and control the use of interrogatories having regard to the fact that there are relatively more low-end claims in the DC. The retention of the leave requirement has also taken into account the Bar Association's submissions in response to the Steering Committee's previous consultation.

Major differences between the Draft RDC and the existing RDC

167. The Subcommittee has noted the major differences between the Draft RDC and the existing RDC as follows -

- (a) automatic directions and filing of memorandum of agreed directions under the existing RDC O.23A will be repealed. The new RDC O.25 will enable the court to have greater case management. However, parties will still be able to agree directions through the questionnaire to be filed prior to the case management conference. (cp. RHC O.25);
- (b) the court will have the power to strike out an action where the plaintiff fails to appear at the pre-trial review : RDC O.25, r.4(1). (cp. RHC O.25, r.1C(1));
- (c) the master will be given a general power to conduct an assessment of damages : RDC O.37. (cp. RHC O.37);
- (d) pre-action discovery will apply to all actions rather than just those involving personal injuries or death : RDC O.24, r.7A. (cp. RHC O.24, r.7A);
- (e) the new RDC O.62 will follow the amendment to RHC O.62 with the addition of costs-only proceedings covering amount of or under \$1 million;
- (f) the procedure for appeals to the Court of Appeal (in particular the seeking of leave to appeal) will be aligned with those in the HC and the application for leave will be inter partes (unless the relevant hearing below was ex parte) : RDC O.58. (cp. RHC O.59); and
- (g) further evidence can only be adduced on special grounds in appeals from master to judge in chambers, as in the HC: RDC O.58, r.1(4). (cp. RHC O.58, r.1(5)).

Proposed amendments to the Lands Tribunal Rules (Cap. 17A)

Background

168. Currently, pursuant to section 10(1)1 of the LTO, the LT has a general power to adopt the practice and procedure of the CFI in the exercise of its civil jurisdiction in respect of the matters listed under that section. Following a separate review of the procedures of the LT in 2005, the Judiciary proposed that section 10(1) be amended to make it clear that the LT has a general power to adopt all practice and procedure of the CFI as it thinks fit (and not restricted to the matters currently listed in section 10).

169. In December 2005, the Chief Justice decided that the legislative amendment exercise for the implementation of CJR should apply to the DC and the LT where appropriate, and expanded the terms of reference of the Steering Committee to oversee the application of the recommendations in the Final Report to the DC and LT.

Present Position

170. With the enactment of the CJO, amendments, among others, have been made to the LTO, to -

- (a) make it clear that the LT has the same jurisdiction, powers and duties of the CFI in respect of its practice and procedure;
- (b) introduce a leave requirement for interlocutory and final appeals from the LT to the CA, so that it can be ascertained that the appeal involves a question of law. Leave would only be granted where the appeal has a reasonable prospect of success, or there is some other reason in the interests of justice why the appeal should be heard; and
- (c) specify that the Registrar or a Master of the HC, or the registrar or a deputy registrar or assistant registrar of the LT may tax the costs ordered to be taxed by the LT.

Proposed amendments to the LTR

171. Pursuant to the new section 10(1) of the LTO, the LT has a general power to adopt the practice and procedure of the CFI in the exercise of its civil jurisdiction. With such flexibility therefore to adopt the practice and procedure of the CFI, any changes under CJR can likewise be utilized as the LT thinks fit. Following this amendment, amendments are proposed to the LTR to make it clear that the case management powers of the LT under the existing rule 14(2) are in addition to and do not derogate from any power of the LT conferred by any enactment or rule of law.

172. With the introduction of a leave requirement for appeals from the LT to the CA under the new section 11AA of the LTO, amendments are proposed to the LTR to prescribe the procedures for -

- (a) an appeal against a judgment, order or decision of the registrar of the LT or of a deputy registrar or assistant registrar of the LT; and
- (b) an application for leave to appeal against a judgment, order or decision of the LT, and for any subsequent appeal to the CA.

173. Opportunity is also taken in this exercise to replace 50 references to "Registrar" with "registrar" in the relevant provisions in the LTR for consistency with the term "registrar" in the LTO.

Proposed amendments to the High Court (Fees) Rules (Cap. 4D), District Court Civil Procedure (Fees) Rules (Cap. 336C), High Court Suitors' Funds Rules (Cap. 4B), and District Court Suitors' Funds Rules (Cap. 336E)

Purpose

174. JA has briefed the Subcommittee on the amendments proposed by the Steering Committee to the following four sets of draft amendment rules -

- (a) Draft High Court (Fees) (Amendment) Rules 2008 (Draft HCFR);
- (b) Draft District Court Civil Procedure (Fees) (Amendment) Rules (Draft DCFR);
- (c) Draft High Court Suitors' Funds (Amendment) Rules (Draft HCSFR); and
- (d) Draft District Court Suitors' Funds Rules (Draft DCSFR).

Amendments in the Draft HCFR and DCFR

Amendments consequential to the CJO

175. The Subcommittee notes that following the enactment of the CJO, amendments have been introduced to the HCO to empower the CFI to grant interim relief in aid of proceedings outside Hong Kong which are capable of giving rise to a judgment that is capable of being enforced in Hong Kong. Consequential amendments are proposed to the HCFR to provide for a prescribed fee payable on the sealing of an order made under section 21M of the HCO.

176. The CJO also amends section 27 of the HCO to allow a vexatious litigant order to be made not only on the application of the Secretary for Justice, but also on the application of any person who is or has been a party to vexatious proceedings instituted by a vexatious party, or who has directly suffered adverse consequences resulting from such proceedings. As has been the case under the existing section 27, a person subject to a vexatious litigant order has to file a notice for application to CFI for leave to

institute or continue proceedings. In line with the objective to screen out vexatious litigation, thereby enabling fairer distribution of the court's resources for genuine disputes, amendments are proposed to the HCFR to -

- (a) introduce a new fee at \$1,045 (i.e. the same amount charged for other similar applications such as the commencement of a cause or matter at the High Court) for the filing of a notice of application for leave to institute or continue proceedings by a vexatious litigant; but
- (b) provide that vexatious litigants who have been charged \$1,045 for leave application need not be charged again for commencing proceedings upon grant of leave.

Amendments consequential to the latest Draft RHC and Draft RDC

177. The Steering Committee has proposed certain amendments to the provisions governing taxation procedures in O.62 of the latest draft RHC and RDC, including -

- (a) empowering the Court to make a summary assessment of costs when disposing of an interlocutory application; and
- (b) requiring a party to pay to the Court a prescribed taxing fee when filing a notice of commencement of taxation.

178. Following the above proposed amendments to the RHC and RDC, and in line with the objective to facilitate settlement and to deter the inflation of the bill of costs, amendments are proposed to the HCFR and the DCFR to prescribe that -

- (a) taxing fees will be levied on the amount claimed in the bill of costs, instead of the amount allowed as at present. However, the prescribed taxing fees are not payable on summary assessment of costs; and
- (b) 10% of the taxing fee is payable if a bill of costs is withdrawn within 7 days after the application for setting down the taxation.

Amendments in the Draft HCSFR and Draft DCSFR

179. The proposed amendments in the Draft HCSFR and Draft DCSFR are mainly consequential to the new O.22 in the latest draft RHC and RDC. Under the new O.22, a party to the proceedings has 28 days to consider whether to accept a sanctioned payment.

180. Under the existing r.16(3A) of the HCSFR, if money is paid in court as security for costs, or by way of satisfaction or amends, or in compliance with an order giving leave to defend upon the payment, interest is to be credited in respect of the payment as from the day beginning 14 days after the money is paid in. To cater for the system of

sanctioned payment under the new O.22, amendments are proposed to r.16 of the HCSFR to provide that where the money so paid in court is an offer made by way of a payment into court in accordance with the new O.22 of the RHC, interest is to be credited in respect of the payment as from the day beginning 28 days after the money is paid in.

181. Amendments are proposed to the DCSFR to align with the existing r.16(3A) of the HCSFR, and cater for the system of sanctioned payment under the new O.22 in the latest Draft RDC.

FOLLOW UP ACTION

182. The Subcommittee has agreed that the Panel on Administration of Justice and Legal Services be requested to follow up the following issues -

- (a) the progress on preparation and training of the two legal professional bodies for the implementation of CJR (paragraph 18 above refers);
- (b) the lead time required for the perfection of an order (paragraph 134 above refers); and
- (c) the review of the services provided by the Resource Centre for Unrepresented Litigants in due course (paragraph 163 above refers).

RECOMMENDATION

183. In the light of the discussion with members, the Steering Committee has agreed to introduce revised amendments to the Draft RHC. JA has produced the English version of the revised amendments to the Draft RHC for consideration of the Subcommittee. JA has advised that the revised amendments, together with the necessary consequential and textual amendments, would be incorporated in the Draft RHC. Similar amendments, where applicable, would be made to the Draft RDC. Subject to the view of the Subcommittee on the revised amendments, the Judiciary would arrange for the gazettal of all the subsidiary legislation relating to the CJR on 6 June 2008 for negative vetting by the LegCo.

184. The Subcommittee supports the seven sets of draft subsidiary legislation with the proposed amendments to be made by the Judiciary. The Subcommittee has entrusted the LegCo Legal Service Division to follow up with JA on the Chinese version of the subsidiary legislation.

ADVICE SOUGHT

185. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
12 June 2008

**Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform**

Membership list

Chairman Hon Margaret NG

Members Hon James TO Kun-sun
Hon Miriam LAU Kin-yee, GBS, JP
Hon LI Kwok-ying, MH, JP
Hon Ronny TONG Ka-wah, SC

Total : 5 Members

Clerk Mrs Percy MA

Legal Adviser Miss Kitty CHENG

Date 4 February 2008

與民事司法制度改革有關的附屬法例擬稿小組委員會
Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform

曾向小組委員會表達意見的團體/個別人士名單
List of organizations/individuals who have
given views to the Subcommittee

<u>團體/個別人士名稱</u>	<u>Name of organizations and individuals</u>
1. Gary Meggitt 先生 香港大學法律學院教學顧問	Mr Gary Meggitt Teaching Consultant, Faculty of Law, The University of Hong Kong
2. Swati Jhaveri 教授 香港中文大學法律學院助理教授	Prof Swati Jhaveri Assistant Professor, School of Law, The Chinese University of Hong Kong
3. 李丁秀教授 香港中文大學法律學院助理教授	Prof LEE Jung-soo Assistant Professor, School of Law, The Chinese University of Hong Kong
4. 香港大律師公會	Hong Kong Bar Association
5. 香港律師會	The Law Society of Hong Kong
6. 香港訟費員協會	The Hong Kong Law Costs Draftsmen Association
7. 香港調解會	Hong Kong Mediation Council
8. 張達明先生 香港大學法律學院助理教授	Mr Eric CHEUNG Assistant Professor, Faculty of Law, The University of Hong Kong

**Civil Justice Reform (“CJR”)
Recommendations Requiring Amendments to the
Rules of the High Court (“RHC”) (Cap. 4A)**

The Steering Committee on CJR has identified that, in respect of the High Court, 81 recommendations in the Final Report on CJR require amendments to the RHC. These amendments are contained in the Draft Rules of the High Court (Amendment) Rules 2008 (“Draft RHC”) at **Annex B**.

2. The Draft RHC at Annex B is divided into 25 Parts. The relevant recommendations implemented by each Part, the RHC Orders affected (including those affected by consequential and related amendments), and the relevant Amendment Rules in the Draft RHC are tabulated below.

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
Part 1: Preliminary			
-	Not applicable.	-	Rule 1
Part 2: Objectives and Case Management Powers Recommendations 2 – 4, 81 and 82			
1.	Recommendation 2 A rule should be introduced identifying underlying (rather than overriding) objectives of the system of civil justice to assist in the interpretation and application of rules of court, practice directions and procedural jurisprudence and to serve as a statement of the legitimate aims of judicial case management.	New Order 1A New Order 1B	Rule 2
2.	Recommendation 3 The underlying objectives referred to in Recommendation 2 should be stated as (i) increasing cost-effectiveness in the court’s procedures; (ii) the expeditious disposal of cases; (iii) promoting a sense of reasonable proportion and procedural economy in respect of how cases are litigated; (iv) promoting greater equality between parties; (v) facilitating settlement; and (vi) distributing the court’s resources fairly, always recognizing that the primary aim of judicial case management should be to secure the just resolution of the parties’ dispute in accordance with their substantive rights.		

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
3.	<p>Recommendation 4</p> <p>Rules should be introduced (along the lines of CPR 1.4) listing available case management measures and conferring (along the lines of CPR 3.1) specific case management powers on the court, including power to act of its own motion, exercisable generally and (unless excluded) in addition to powers provided by specific rules, in the light of the underlying objectives referred to in Recommendation 2.</p>		
4.	<p>Recommendation 81</p> <p>The parties should be encouraged by rule and practice direction, backed by costs sanctions, to adopt a reasonable and cooperative attitude in relation to all procedural issues.</p>		
5.	<p>Recommendation 82</p> <p>Where the court considers one or more procedural directions to be necessary or desirable and unlikely to be controversial between the parties, it ought to have power, of its own motion and without hearing the parties, to give the relevant directions by way of an order <i>nisi</i>, with liberty to the parties to apply within a stated period for that order not to be made absolute.</p>		
<p>Part 3: Pre-action Protocols and Costs-only Proceedings Recommendations 7 – 9 and 84</p>			
6.	<p>Recommendation 7</p> <p>Rules should be introduced enabling the court when exercising any relevant power, in its discretion, to take into account a party’s non-compliance with any applicable pre-action protocol in accordance with the terms of the protocol in question.</p>	<p>Orders 1, 2, 10, 11, 12 and 62</p> <p>Appendix A – Forms No. 10, 11, 15</p> <p>New Form No. 15A</p>	<p>Rules 3-12</p>
7.	<p>Recommendation 8</p> <p>In exercising its discretion, the court should bear it in mind that special allowances may have to be made in relation to unrepresented litigants, if it is the case that, not having access to legal advice, they were unaware of any applicable protocol obligations or, if aware of them, that they were unable fully to comply with them without legal assistance.</p>		

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
8.	<p>Recommendation 9 A procedure should be introduced to enable parties who have settled their substantive dispute to bring costs-only proceedings by way of originating summons and subject to practice directions, for a party-and-party taxation of the relevant pre-settlement costs.</p>		
9.	<p>Recommendation 84 While it would be open to a party who has failed to comply with a self-executing order to seek relief from the prescribed consequences of his non-compliance, such relief should not be automatic and, if granted, should generally be granted on suitable terms as to costs and otherwise.</p>		
<p>Part 4: Commencement of Proceedings Recommendations 11 – 16</p>			
10.	<p>Recommendation 11 In so far as appropriate, other specialised types of proceedings governed by their own procedural rules and requirements should be added to the excluded proceedings and special provision should be made in respect of election petitions.</p>	<p>Orders 1, 2, 5, 7, 8, 9, 14A, 16, 17, 19, 20, 21, 27, 28, 29, 30, 35, 46, 50, 52, 53, 54, 67, 73, 75, 76, 77, 80, 83A, 88, 89, 90, 100, 102, 103, 115, 115A, 117, 118, 119 and 121</p> <p>Appendix A – Forms No. 81, 85, 86, 87, 107 and 109 New Forms No. 86 and 87</p>	<p>Rules 13-85</p>
11.	<p>Recommendation 12 The rules of the RHC making it mandatory to commence certain proceedings by writ or, as the case may be, by originating summons, should be abolished.</p>		
12.	<p>Recommendation 13 In all cases other than the excluded proceedings, the parties should be permitted to commence proceedings either by writ or by originating summons, with the RHC indicating that a writ is appropriate where a substantial dispute of fact is likely and that an originating summons is appropriate where the main issue is one of law or construction, without involving any substantial dispute of fact.</p>		

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
13.	<p>Recommendation 14 Originating motions and petitions should be abolished (save where they are prescribed for commencing any of the excluded proceedings).</p>		
14.	<p>Recommendation 15 Unless the court otherwise directs (in accordance with applicable laws), all hearings of originating summonses should take place in open court.</p>		
15.	<p>Recommendation 16 It should continue to be the case that an inappropriate mode of commencement does not invalidate steps taken in the proceedings so commenced and that in such cases, the court should give suitable directions for continuation of the proceedings in an appropriate manner.</p>		
<p>Part 5: Dispute as to Jurisdiction Recommendation 17</p>			
16.	<p>Recommendation 17 Order 12 r 8 should be amended to the extent necessary to bring into its scheme for disputing the court's jurisdiction, applications for the court to decline to exercise jurisdiction over the plaintiff's claim and to grant a discretionary stay of the action.</p>	<p>Orders 12 and 18 Appendix A – Forms No. 14 and 15</p>	<p>Rules 86-89</p>
<p>Part 6: Default Judgments and Admissions Recommendation 18</p>			
17.	<p>Recommendation 18 Provisions along the lines of Part 14 of the CPR should be adopted in relation to claims for liquidated and unliquidated sums of money with a view to enabling defendants to propose payment terms (as to time and instalments) in submitting to entry of judgment by default.</p>	<p>Order 6 and New Order 13A Appendix A – Forms No. 1, 14, 15 and 17 New Forms No. 16, 16A, 16B, 16C, 16D and 16E</p>	<p>Rules 90-92</p>

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
Part 7: Pleadings Division 1 - Recommendations 22 - 24			
18.	Recommendation 22 Proposal 10 (requiring defences to be pleaded substantively) should be adopted.	Order 18	Rules 93-95
19.	Recommendation 23 An exception to the general rule deeming the defendant to have admitted any untraversed allegation of fact in the statement of claim should be created along the lines of CPR 16.5(3) so that a defendant who has adequately set out the nature of his case in relation to which the untraversed allegation is relevant, is deemed not to admit and to put the plaintiff to proof of such allegation.		
20.	Recommendation 24 Proposal 10 should not be extended to pleadings subsequent to the defence.		
Part 7: Pleadings Division 2 - Recommendations 26 – 32 and 35			
21.	Recommendation 26 Proposal 11 (requiring pleadings to be verified by a statement of truth) should be adopted as modified and supplemented by Recommendations 27 to 32.	Orders 18, 20, 38, and New Order 41A	Rules 96-105
22.	Recommendation 27 The rules should indicate the level or class of officer or employee who may sign a statement of truth verifying pleadings on behalf of a party that is a corporation, a partnership or an analogous organization or association.		
23.	Recommendation 28 The rules should set out (along the lines of 22PD3.7 and 22PD3.8) the effect in law of a legal representative signing a statement of truth to verify a pleading on behalf of the party concerned.		

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
24.	<p>Recommendation 29 Insurers (or lead insurers) and the Hong Kong Motor Insurers Bureau should be authorized to sign a statement of truth to verify a pleading on behalf of the party or parties concerned (along the lines of 22PD3.6A and 22PD3.6B).</p>		
25.	<p>Recommendation 30 The period allowed for defendants to file their defence should be increased to allow adequate time to plead substantively to a plaintiff's claim and to verify the defence.</p>		
26.	<p>Recommendation 31 The possibility of proceedings for contempt being brought against a person who verifies a pleading by a statement of truth without believing that the factual allegations contained in the pleading are true should be maintained, but the rule should make it clear that such proceedings (to be brought either by the Secretary for Justice with the leave of the court) are subject to the general law of contempt and to be contemplated only in cases where sanctions for contempt may be proportionate and appropriate.</p>		
27.	<p>Recommendation 32 A rule should be adopted making it clear that a party who has reasonable grounds for so doing, may advance alternative and mutually inconsistent allegations in his pleading and verify the same with a statement of truth.</p>		
28.	<p>Recommendation 35 Voluntary particulars should be expressly required to be verified by a statement of truth.</p>		
<p>Part 7: Pleadings Division 3 - Recommendations 33 and 34</p>			
29.	<p>Recommendation 33 The court should have power to require, of its own motion and in such manner as it sees fit, any party or parties to particularise or amend their pleadings where clarification is necessary for disposing fairly of the cause or matter or for saving costs.</p>	Orders 18 and 20	Rules 106-108

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
30.	<p>Recommendation 34 The existing rule should be amended to make it clear that a court will only order delivery of further and better particulars where such order is necessary for disposing fairly of the matter or for saving costs.</p>		
<p>Part 8: Sanctioned Offers and Payments Division 1 - Recommendations 38 – 43</p>			
31.	<p>Recommendation 38 Proposal 15 (for introducing sanctioned offers and payments along the lines of CPR 36) should be adopted as modified and supplemented by Recommendations 39 to 43.</p>	<p>Orders 1, 22, 29, 34, 59, 62, 75, 80, 82 and 92</p> <p>New Orders 22 and 22A</p>	Rules 109-122
32.	<p>Recommendation 39 The defendant’s position under Order 22 should in substance be preserved, but with the addition of the relevant ancillary provisions found in CPR 36.</p>	<p>Appendix A – Forms No. 23, 24 and 51</p> <p>New Forms No. 23, 24, 25 and 25A</p>	
33.	<p>Recommendation 40 While parties should be encouraged to settle their disputes by negotiation, offers made before commencement of the proceedings should not qualify as sanctioned offers, save to the extent that a pre-action protocol which has been adopted in relation to particular specialist list proceedings provides otherwise in respect of such specialist list proceeding.</p>		
34.	<p>Recommendation 41 A sanctioned offer or payment should be required to remain open for acceptance for 28 days after it is made (such 28 day period falling before commencement of the trial), unless leave is granted by the court for its earlier withdrawal. Thereafter, the offer could be withdrawn and if not, would continue to be capable of acceptance.</p>		
35.	<p>Recommendation 42 The rules should make it clear that the court will continue to exercise its discretion as to costs in relation to any offers of settlement which do not meet the requirements to qualify as sanctioned offers.</p>		

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
36.	<p>Recommendation 43 The rules should make it clear that a plaintiff may qualify for an award of additional interest along the lines of Part 36 where he makes a sanctioned offer which satisfies the prescribed requirements, but not otherwise.</p>		
<p>Part 8: Sanctioned Offers and Payments Division 2 – Recommendation 132</p>			
37.	<p>Recommendation 132 The procedure for making sanctioned offers and payments should be extended to pending costs taxations, save in relation to legally-aided parties.</p>	<p>New Order 62A Appendix A – New Forms No. 93, 93A and 93B</p>	Rules 123-124
<p>Part 9: Interim Remedies and Mareva Injunctions in Aid of Proceedings outside Hong Kong Recommendation 49</p>			
38.	<p>Recommendation 49 The mode of commencing an application for a Mareva injunction in aid of foreign proceedings or arbitrations, including possible initial <i>ex parte</i> applications, should be prescribed and provision made for the procedure thereafter to be followed.</p>	Orders 11, 29, 30 and 73	Rules 125-129
<p>Part 10: Case management, Timetabling and Milestones Division 1 - Recommendations 52 – 60 and 62</p>			
39.	<p>Recommendation 52 Procedures should be introduced for establishing a court-determined timetable taking into account the reasonable wishes of the parties and the needs of the particular case.</p>	<p>Orders 14, 18, 24, 25, 28, 29, 33, 34, 37, 38, 72, 75, 78, 86, 102, 103, 115, 115A and 117</p>	Rules 130-172

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
40.	<p>Recommendation 53</p> <p>As the first part of the summons for directions procedure, the parties should be required (i) to complete a questionnaire giving specified information and estimates concerning the case with a view to facilitating case management by the court; and (ii) to propose directions and a timetable to be ordered by the court, preferably put forward by agreement amongst the parties, but with the court affording unrepresented litigants leeway in their observance of these requirements.</p>		
41.	<p>Recommendation 54</p> <p>Unless it appears to the court that a hearing of the summons for directions is in any event desirable, the court ought to make orders <i>nisi</i> giving such directions and fixing such timetable for the proceedings as it thinks fit in the light of the questionnaire and without a hearing. However, any party who objects to one or more of the directions given, should be entitled to have the summons for directions called on for a hearing.</p>		
42.	<p>Recommendation 55</p> <p>Where, at the summons for directions stage, the court's view is that a case management conference is desirable, the court should fix a timetable up to the date of the case management conference, that date constituting the first milestone, with further milestones to be fixed when the case management conference is held.</p>		
43.	<p>Recommendation 56</p> <p>A date for a pre-trial review and the trial date or the trial period should be fixed as milestone dates either at the summons for directions or at any case management conference held.</p>		
44.	<p>Recommendation 57</p> <p>Where all the parties agree to a variation of time-limits for non-milestone events in the timetable, they may effect such variations by recording the agreement in counter-signed correspondence to be filed as a matter of record with the court, provided that the agreed variations do not involve or necessitate changes to any milestone date.</p>		

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
45.	<p>Recommendation 58</p> <p>Where a party cannot secure the agreement of all the other parties for a time extension relating to a non-milestone event, a court should have power to grant such extension only if sufficient grounds are shown and provided that any extension granted does not involve or necessitate changing the trial date or trial period. It should be made clear in a practice direction that where an extension is granted, it is likely to involve an immediate “unless order” specifying a suitable sanction.</p>		
46.	<p>Recommendation 59</p> <p>A court should have power, on the application of the parties or of its own motion, to give further directions and to vary any aspect of the timetable, including its milestone dates, but it should be made clear in a practice direction that a court would only contemplate changing a milestone date in the most exceptional circumstances.</p>		
47.	<p>Recommendation 60</p> <p>Where the parties fail to obtain a timetable, the court should not compel them to continue with the proceedings. However, where a pre-trial milestone date has been set, the court should, after giving prior warning, strike out the action provisionally if no one appears at that milestone hearing. A plaintiff should have 3 months to apply to reinstate the action for good reason, failing which the action should stand dismissed and the defendant should automatically be entitled to his costs. Thereafter, the defendant should have a further three months to reinstate any counterclaim, which would also stand dismissed with no order as to costs in default of such application.</p>		
48.	<p>Recommendation 62</p> <p>The recommendations made in this Final Report regarding timetables and milestones should not apply to cases in the specialist lists save to the extent that the courts in charge of such lists should choose to adopt them in a particular case or by issuing appropriate practice directions and subject to what has previously been recommended regarding the retention of a Running List.</p>		

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
Part 10: Case management, Timetabling and Milestones Division 2 - Miscellaneous			
-	Not applicable	Order 25	Rules 173-175
Part 11: Vexatious Litigants Recommendation 69			
49.	Recommendation 69 All applications to have a person declared a vexatious litigant should be made directly to the single judge.	Orders 18, 32, New Order 32A Appendix A – New Form No. 27A	Rules 176-179
Part 12: Discovery Division 1 - Recommendations 76 and 79			
50.	Recommendation 76 Such jurisdiction should be exercisable where it is shown by the applicant that he and the respondent are both likely to be parties to the anticipated proceedings and that disclosure before the proceedings have been started is necessary to dispose fairly of the anticipated proceedings or to save costs.	Order 24	Rules 180-181
51.	Recommendation 79 The requirements to be met and procedure to be followed when seeking orders referred to in the Recommendation 78 should be as laid down by O 24 r 7A in respect of section 42(1) orders and by O 24 r 13, with any necessary or desirable modifications.		
Part 12: Discovery Division 2 - Recommendation 80			
52.	Recommendation 80 Proposal 29 (for the case management of discovery by the courts) should be adopted, but with <i>Peruvian Guano</i> principles as the primary measure of discovery, taken as the starting-point for such case management.	Order 24	Rule 182

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
Part 13: Interlocutory Applications Division 1 - Recommendations 83, 85 and 86			
53.	<p>Recommendation 83</p> <p>When disposing of interlocutory applications after the summons for directions, the court should normally make orders which specify the automatic consequences of non-compliance appropriate and proportionate to the non-compliance in question. Orders specifying such consequences may, if appropriate, also be made where the interlocutory application is heard before the summons for directions. However, the directions given on the summons for directions itself should generally not specify any such consequences.</p>	Order 32	Rule 183
54.	<p>Recommendation 85</p> <p>All interlocutory applications (other than time summonses and applications for relief against the implementation of sanctions imposed by self-executing orders previously made) should be placed before the master who may either to determine the application on the papers and without a hearing or to fix the summons for hearing either directly before a judge in chambers or before a master.</p>		
55.	<p>Recommendation 86</p> <p>Rules and practice directions should be issued, in respect of the setting of the timetable and the filing of evidence, skeleton arguments and costs statements to enable the master to exercise his discretion as aforesaid.</p>		
Part 13: Interlocutory Applications Division 2 – Jurisdiction of Registrar and Master			
-	Not applicable	Order 32	Rule 184

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
Part 14: Interlocutory Applications and Summary Assessment of Costs (Recommendations 88, 89 and 92)			
56.	Recommendation 88 The court should, whenever appropriate (whether as a response to an unwarranted application or unwarranted resistance to an application, with a view to saving costs; or otherwise), make a summary assessment of costs when disposing of interlocutory applications.	Order 62	Rules 185-187
57.	Recommendation 89 Rules and practice directions along the lines indicated in this section of the Final Report should be adopted to regulate the making and implementation of orders for the summary assessments of costs.		
58.	Recommendation 92 Judges and masters should be empowered to make provisional summary assessments of costs, whereby the assessed sum must promptly be paid but allowing either party, at the end of the main proceedings, to insist on a taxation of the relevant costs with a view to adjusting the quantum of the payment made, but with the party who insists on such a taxation being at risk as to a special order for the costs of the taxation and other possible sanctions in the event that the taxation does not result in a proportionate benefit to him.		
Part 15: Wasted Costs Recommendations 94 - 97			
59.	Recommendation 94 Rules along the lines of paragraphs 53.4 to 53.6 of the CPR Practice Direction on Costs, modified to exclude reference to liability based on negligence, should be issued providing guidance for the exercise of the court's discretion and discouraging disproportionate satellite litigation in relation to wasted costs orders.	Order 62	Rules 188-190

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
60.	<p>Recommendation 95 Applications for wasted costs orders should generally not be made or entertained until the conclusion of the relevant proceedings.</p>		
61.	<p>Recommendation 96 Rules should be issued making it clear (i) that it is improper to threaten wasted costs proceedings with a view to pressurising or intimidating the other party or his lawyers; and (ii) that any party who wishes to put the other side’s lawyers on notice of a potential claim for wasted costs against them should not do so unless he is able, when doing so, to particularise the misconduct of such lawyers which is alleged to be causing him to incur wasted costs and to identify evidence or other materials relied on in support.</p>		
62.	<p>Recommendation 97 Barristers should be made subject to liability for wasted costs under O 62 r 8.</p>		
<p>Part 16: Witness Statements and Evidence Recommendation 100</p>			
63.	<p>Recommendation 100 Proposal 37 (for introducing greater flexibility in permitting a witness to amplify or supplement his witness statement) should be adopted, replacing O 38 r 2A(7)(b) by a rule along the lines of CPR 32.5(3) and (4).</p>	Order 38	Rule 191
<p>Part 17: Expert Evidence Recommendations 102, 103 and 107</p>			
64.	<p>Recommendation 102 A rule along the lines of CPR 35.3 declaring that expert witnesses owe a duty to the court which overrides any obligation to those instructing or paying the expert should be adopted.</p>	Order 38 New Appendix D	Rules 192-198

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
65.	<p>Recommendation 103</p> <p>A rule along the lines of CPR 35.10(2) combined with Part 36 of the NSW rules should be adopted, making it a requirement for the reception of an expert report or an expert's oral testimony that (a) the expert declares in writing (i) that he has read the court-approved Code of Conduct for Experts and agrees to be bound by it, (ii) that he understands his duty to the court, and (iii) that he has complied and will continue to comply with that duty; and (b) that his expert report be verified by a statement of truth.</p>		
66.	<p>Recommendation 107</p> <p>The court should be given power to order the parties to appoint a single joint expert upon application by at least one of the parties, subject to the court being satisfied, having taken into account certain specified matters, that the other party's refusal to agree to a SJE is unreasonable in the circumstances.</p>		
<p>Part 18: Case Management Trials Recommendation 108</p>			
67.	<p>Recommendation 108</p> <p>A rule along the lines of O 34 r 5A of the Western Australian Rules of the Supreme Court should be adopted, setting out the court's powers of case management in relation to trials, together with a practice direction providing that such powers should primarily be exercised at the pre-trial review.</p>	Order 35	Rule 199
<p>Part 19: Leave to Appeal Division 1 - Recommendation 109</p>			
68.	<p>Recommendation 109</p> <p>An appeal should lie as of right from the master to the judge (whether from a decision on the papers or after a contested hearing) but with the introduction of fresh evidence for the purposes of the appeal precluded save in exceptional circumstances.</p>	Order 58	Rule 200

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
Part 19: Leave to Appeal Division 2 - Recommendations 110 and 112			
69.	<p>Recommendation 110 Interlocutory appeals from the CFI judge to the Court of Appeal should be subject to a condition of leave to appeal save in relation to (i) defined classes of interlocutory decisions which are decisive of substantive rights; and (ii) certain other defined categories of decisions, including those concerning committal, habeas corpus and judicial review.</p>	Order 59	Rules 201-203
70.	<p>Recommendation 112 A procedure designed to avoid separate oral hearings of applications for leave to appeal should be adopted, generally requiring any application before the CFI judge to be made at the original hearing and, if refused, for any further application for leave to be made in writing and usually dealt with by the Court of Appeal comprising two Justices of Appeal, on the papers and without an oral hearing. Where considered necessary, the Court of Appeal should be able to direct that there be an oral hearing before the original two judges or before a panel of three judges.</p>		
Part 20: Appeals Division 1 - Recommendation 120			
71.	<p>Recommendation 120 Applications which are interlocutory to pending appeals should be dealt with on paper by two Justices of Appeal, who should have power to make any orders necessary without a hearing, giving brief reasons for their decision; or, alternatively, to direct that there be a hearing before themselves or before a panel of three judges.</p>	Order 59	Rule 204
Part 20: Appeals Division 2 - Miscellaneous			
-	Not applicable.	Orders 58, 59, 60A and 61	Rules 205-217

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
Part 21: General Approach to Inter-party Costs Recommendation 122			
72.	<p>Recommendation 122 The principle that the costs should normally “follow the event” should continue to apply to the costs of the action as a whole. However, in relation to interlocutory applications, that principle should be an option (which would often in practice be adopted) but should not be the prescribed “usual order”. Costs orders aimed at deterring unreasonable interlocutory conduct after commencement of the proceedings should be given at least equal prominence in practice, with the court being directed to have regard to the underlying objectives mentioned in relation to Proposal 1. These powers should not apply to pre-action conduct.</p>	Order 62	Rules 218-220
Part 22: Taxing the Other Side’s Costs Division 1 - Recommendation 131			
73.	<p>Recommendation 131 Proposal 57 (for the abolition of a special rule governing taxation of counsel’s fees) should be adopted.</p>	First Schedule to Order 62	Rule 221
Part 22: Taxing the Other Side’s Costs Division 2 - Recommendation 134			
74.	<p>Recommendation 134 The court should have a general discretion to conduct provisional taxations on the papers, with any party dissatisfied with the award being entitled to require an oral taxation hearing, but subject to possible costs sanctions if he fails to do materially better at the hearing.</p>	Order 62	Rules 222-226

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
Part 22: Taxing the Other Side's Costs Division 3 - Recommendations 135 and 136			
75.	Recommendation 135 Rules or practice directions, backed by flexible costs sanctions, should be introduced requiring the parties to a taxation to file documents in prescribed form, with bills of costs supported by and cross-referenced to taxation bundles and objections to items in such bills taken on clearly stated grounds.	Order 62	Rules 227-232
76.	Recommendation 136 Rules conferring a broad discretion on the court in respect of the costs of a taxation and giving guidance as to the exercise of such discretion should be introduced along the lines of CPR 44.14 and CPR 47.18, suitably modified to fit local circumstances.		
Part 22: Taxing the Other Side's Costs Division 4 - Miscellaneous			
-	Not applicable.	Order 62	Rules 233-247
Part 23: Judicial Review Recommendations 144 - 148			
77.	Recommendation 144 Rules along the lines of CPR 54.1 to 54.3, suitably adapted, retaining the present terminology, should be adopted for defining the scope of judicial review proceedings in Hong Kong.	Order 53 Appendix A – Form No. 86A New Forms No. 85B and 85C	Rules 248-259
78.	Recommendation 145 Provision should be made to enable persons wishing to be heard at the substantive hearing, subject to the court's discretion, to be heard in support of, as well as in opposition to, an application for judicial review.		

Serial No.	Recommendations in Final Report	RHC Orders Affected	Amendment Rules
79.	<p>Recommendation 146 Applications for leave to bring a claim for judicial review should be required to be served with all supporting evidence on the proposed respondent and on any other persons known by the applicant to be directly affected by the claim, unless the court otherwise direct.</p>		
80.	<p>Recommendation 147 Persons served should be given the choice of either acknowledging service and putting forward written grounds for resisting the application or grounds in support additional to those relied on by the applicant; or declining to participate unless and until the applicant secures leave to bring the claim for judicial review.</p>		
81.	<p>Recommendation 148 If leave is granted, the order granting leave and any case management directions should be required to be served by the applicant on the respondent (whether or not he has acknowledged service) and on all interested parties who have acknowledged service, such persons then becoming entitled, if they so wish, to file grounds and evidence to contest or to support on additional grounds, the claim for judicial review.</p>		
Part 24: Costs against Non-party			
-	Not applicable.	Orders 11 and 62	Rules 260-261
Part 25: Miscellaneous			
-	Not applicable.	Orders 1, 25, 37, 38, 42, 71, 75, 78	Rules 262-280
