



HONG KONG BAR ASSOCIATION

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Mrs Percy Ma,
Clerk to the Legislative Council Subcommittee on
Draft Subsidiary Legislation Relating to Civil Justice Reform,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.

28 March 2008

Dear Madam,

Follow up to meeting on 29 February 2008

Thank you for your letter of 7 March 2008. The following are the views of the Special Committee on Civil Justice Reform of the Hong Kong Bar Association (“HKBA”), which will be formally endorsed at the next Bar Council Meeting, on the three matters raised in your letter.

(a) The impact of the proposed legislative amendments, in particular those relating to pre-action protocols, judicial review and case management powers of the court, on unrepresented litigants

1. In its responses to consultations on Civil Justice Reform (“CJR”), the HKBA reaffirmed the following principles:-

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- (1) Expediency should not be achieved at the expense of justice. Any reform must not compromise litigants' right to have a fair hearing and have the merits of their case rigorously and even-handedly determined. There can be no erosion of this paramount concern.
- (2) Any reform will depend on the quality of the barristers, solicitors and judges who operate the new systems and measures to be implemented. The judge, who will be given enhanced case management powers under the CJR, will play a pivotal role. Judges must follow consistent approaches across the board and it is important that case management does not arbitrarily vary from judge to judge.

(See 2006 Response, para.2, and 2007 Response, para.3)

2. The HKBA does not have any empirical data on litigants in person in Hong Kong and how comprehensible the rules of court are to them. However, a quantitative research project on litigants in person has been conducted and published: see Cameron and Kelly, *Litigants in Person in Civil Proceedings: Part I* (2002) 32 HKLJ 313; Kelly and Cameron, *Litigants in Person in Civil Proceedings: Part II Solicitors' Perspectives* (2003) 33 HKLJ 585; and Kelly, Cameron and Chui, *Litigants in Person in Civil Proceedings: Part IV Barristers' Perspectives* (2006) 36 HKLJ 519.
3. It is self-evident that litigants in person in Hong Kong vary largely in their levels of education and sophistication. Experience of members of the HKBA has shown that many litigants in person are not well-educated and have difficulty understanding litigation procedures. On the other hand, the same experience has also shown that there are litigants in person who are more sophisticated and have a good understanding of litigation procedures or are sufficiently intelligent to understand these procedures when they are explained to them.
4. The HKBA notes and agrees with the observations of the Steering Committee on Civil Justice Reform in paras. 7(c)&(d) of Paper CJRS 5/2008, and in paras. 9 to 11 of Paper CJRS 7/2008. Leeway to litigants in person has already been built into the existing rules of court and such leeway is in practice extended to litigants in person in the administration of those rules. The HKBA does not believe that the implementation of the CJR will diminish that leeway.
5. Specifically as to pre-action protocols, the Final Report of the Chief

Justice's Working Party on Civil Justice Reform recommended that these be introduced only in respect of specialist lists (Final Report, recommendations 5 and 6). The HKBA supports in principle the introduction of pre-action protocols. The HKBA welcomes the present proposal of the Steering Committee in Paper CJRS 5/2008, para. 6 to further revise the draft amendments to the subsidiary legislation to implement the CJR so as not to apply the mechanism of self-executing sanctions for non-compliance with practice directions and pre-action protocols. However, the HKBA is unable to express any further views on pre-action protocols until drafts of these are available.

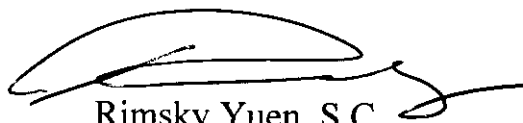
6. Specifically as to the proposed amendments to RHC O.53 (applications for judicial review), the HKBA welcomes the indication of the Steering Committee to further revise the draft amendments to remove the amendments requiring service of case papers on the proposed respondent(s) at the leave stage: see Paper CJRS 4/2008. The HKBA observes that removal of the amendments regarding the service requirement at the leave application will have implications to other draft amendments including those relating to acknowledgement of service, setting aside of order granting leave, service of order granting leave, and filing of grounds for contesting or supporting application for judicial review. The HKBA will comment further when the re-revised draft amendments to O.53 is available.
7. Beyond these comments, the HKBA is unable to predict the likely impact of the proposed legislative amendments on unrepresented litigants in the three areas referred to, namely pre-action protocols, judicial review and case management powers of the court.
 - (b) *The impact of the proposed rules in terms of justice between represented and unrepresented litigants, e.g. in the case of application for relief from sanctions for non-compliance of pre-action protocols (Order 2, rule 5), whether the former (who are expected to be capable of full compliance) would be put in a disadvantageous position vis-à-vis the latter (who are expected to be not familiar with the law and court procedures)*
8. The specific query referred to in the question has become redundant in light of the Steering Committee's proposed further revision of the amendments to the subsidiary legislation to implement CJR so as not to apply the mechanism of self-executing sanctions for non-compliance with practice directions and pre-action protocols: see Paper CJRS 5/2008, para. 6.

9. As to the general question of justice between represented litigants and unrepresented litigants, the HKBA would refer to paragraphs 2 to 4 above. The HKBA would add that the Steering Committee's proposal to amend O.1A, r.1(d) to read "to ensure fairness between the parties" (see Paper CJRS 5/2008, para. 3) highlights a fundamental principle and if applied consistently should enhance justice as between represented and unrepresented litigants.
 - (c) *Whether it would be meaningful for Hong Kong courts to make reference to the relevant case law in UK if only certain provisions of the Civil Procedure Rules were adopted in Hong Kong*
10. The HKBA indicated in its 2007 Response at para. 5 that since the intention behind the proposal of prescribing the underlying objectives is to make explicit what are implicit objectives which 'underlie' specific rules of the RHC supporting the internal logic of those rules (see *Final Report of the Chief Justice's Working Party on Civil Justice Reform*, paragraph 100), the framework for decision-making under the Civil Procedure Rules ("CPR") in England cannot serve as a model that may be readily adapted for the purposes of the CJR in Hong Kong.
11. In response, the Steering Committee expressed the view that while the English authorities on the CPR overriding objectives may not always provide the complete answer in the application and interpretation of the Hong Kong rules of court, it believed that they will offer some guidance: see Letter to HKBA, 6 Feb 2008, paras. 5 & 6.
12. The HKBA has stressed the importance of consistency and predictability of judicial decision-making under the proposed CJR scheme. English authorities cannot, given the different direction to be taken under the proposed CJR scheme, be conveniently taken as determining or paving the path for Hong Kong and it will be incumbent on the courts in Hong Kong to place the principles in the right order for a particular rule of court and to manage the case with the appropriate methodology: see 2007 Response, para. 8. The Court of Appeal accordingly will have to assume a leading role in not only ensuring the proper implementation of the proposed CJR scheme but also in assessing and responding to emerging concerns of the legal profession and the public on the administration of justice under the proposed CJR scheme: see 2007 Response, para. 9.
13. In responding to this, it is also pertinent to refer to the very recent decision in *A Solicitor v. Law Society of Hong Kong*, FACV 24/2007, unrep., 13 March 2008. In that case, the Court of Final Appeal has

unanimously held that, as the final court at the apex of Hong Kong's judicial hierarchy, it may depart from previous Privy Council decisions on appeal from Hong Kong and its own previous decisions. It would approach the exercise of its power to depart from any previous decision of the Privy Council on appeal from Hong Kong or any of its previous decision with great circumspection. The Chief Justice elaborated: 'Bearing in mind that historically, Hong Kong's legal system originated from the British legal system, decisions of the Privy Council and the House of Lords should of course be treated with great respect. Their persuasive effect would depend on all relevant circumstances, including, in particular, the nature of the issue and the similarity of any relevant statutory or constitutional provisions. At the end of the day, the courts in Hong Kong must decide for themselves what is appropriate for our own jurisdiction.'

14. Thus, the HKBA believes it will depend on a range of circumstances whether it will be meaningful for the Hong Kong courts to make reference to UK case law on certain aspects of the CPR, to the extent that those rules are adopted in the proposed legislative amendments in Hong Kong.

Yours sincerely



Rimsky Yuen, S.C.
Chairman