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Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform

Summary of Responses to the Draft Rules of the High Court (Amendment) Rules

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which sets out the summary of responses to the Draft Rules of the High Court (Amendment) Rules ("Draft RHC") published by the Steering Committee on Civil Justice Reform ("the Steering Committee") in April 2006 and October 2007, and the Steering Committee's consideration of the comments received.

Serial No.	Summary of Comments Received on Draft RHC	Steering Committee's Consideration
Part 2 – Objectives and Case Management Powers		
Order 1A – Objectives		
1.	Bar Association The Bar suggests that the underlying objectives are stated in their order of importance, as it might assist parties' understanding and might also assist in leading to a consistent application of the objectives by individual judges.	The Steering Committee is of the view it is not possible to state the underlying objectives in any order of importance. Their importance will depend on the circumstances of the particular case; some may assume a greater importance than others. The Steering Committee agrees that in the implementation and application of the new Rules, there is a need for consistency and predictability. However, to place the underlying objectives set out in O.1A in the "right order" would not achieve this. In fact, the inflexibility of this approach might well have the opposite effect.
	As case management is always a matter in the discretion of the Court, the Bar suggests it is made clear the Court's discretion is not confined to or fettered by the matters set out in O.1A rr.2 and 4.	The Steering Committee takes the view that the guidelines offered by rr.1 and 2 are adequate in preserving the width of the court's discretion. In particular, see O.1A, r.2(2).

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2.	Law Society The phrase used is "*underlying objectives*". This contrasts to the CPR phrase of "*overriding objectives*". In our view it is preferable to use the English terminology. The word "*overriding*" conveys a better understanding of the nature and status of these objectives, intended to apply as background principles throughout all the remainder of the RHC.	The Final Report has fully explained why the term "overriding" objectives is recommended. The Steering Committee does not think it is appropriate to depart from that Recommendation.
3.	Deacons The suggested O.1A is fine.	Noted. No change required.
4.	N. Millar of Littlewoods Solicitors Agreement in principle with the underlying objectives.	Noted. No change required.
Order 1B – Case Management Powers		
5.	Law Society The time limits in the proposed new O.1B, r.2 should be 14 days in line with the time limit in new r.3.	The time limit in O.1B, r.2(6) is now extended to 14 days.
Part 3 – Pre-action protocols and costs-only proceedings		
Order 2 – Effect of Non-Compliance		
6.	Bar Association It would be more appropriate for any rules introduced into the RHC for regulation of non-compliance with pre-action protocols and practice directions to form a new Order on their own, instead of adding them to O.2.	O.2 is headed "EFFECTS OF NON-COMPLIANCE". It seems reasonably clear and logical that the consequences of non-compliance with practice directions or pre-action protocols etc. can be dealt with in this Order.
7.	The phrase "*the proceedings ought to have begun by an originating process other than the one employed*" in the proposed new O.2, r.1(3) does not seem to distinguish between cases which are required by the RHC or where it would be more "*appropriate*" to use another form of originating process, and those cases where a particular type of originating process is "*stipulated*" by specific provisions in legislative	Even if there are enactments which mandate that proceedings must be instituted in a certain way and no other, of course O.2, r,1(3) will not have the effect of overriding the statutory requirement. However, this provision is not aimed at these types of situation: it is intended to refer to the vast majority of situations where a party has simply used the wrong originating process (e.g. originating summons instead of writ or

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	enactments. Insofar as it purports to cover the latter category of cases, the proposed amendment is *ultra vires*. The RHC, being subsidiary legislation, cannot override inconsistent provisions in legislative enactments and any attempt to do so will be void.	vice versa). A statute may for example require proceedings be commenced in a certain way but it would not necessarily follow that the court would treat proceedings commenced in a different way as being void. It would depend on the true construction of the statute.
8.	The proposed amendments to O.2 r.2(2) and O.8, r.1 appear to proceed on the erroneous assumption that "*motion*" is synonymous with "*originating motion*".	There is no erroneous assumption. All r.2(2) seeks to achieve is that any application to set aside for irregularity must be done by way of summons and not motion.
9.	With a view to promoting certainty and finality, the Bar suggests that O.2 r.4 be amended to read: "… *any sanction for failure to comply imposed by the rule, practice direction, court order or pre-action protocol ~~has~~ shall take effect unless the party in default applies for and obtains relief from the sanction within 14 days.*"	The Bar's suggestion was agreed to by the Steering Committee but this has been left out in error. This will be rectified.
10.	The proposed RHC O 2 r 4 refers to and twice lists '*rule, practice direction, court order or pre-action protocol*' in that order. There is no apparent reason for the RHC O 2 word order or sequence. If it is not a considered sequence, it could be amended, for example, to: '*rule, court order, practice direction or pre-action protoco*l'.	The Bar's views are accepted and amendments made to the relevant provisions accordingly.
Part 4 – Commencement of Proceedings		
Order 5 – Mode of Beginning Civil Proceedings in the Court of First Instance		
11.	Bar Association The proposed O.5 r.4(1) should refer to "*proceedings which under any written law are required or authorised*" (cf. the wording of O.5 r.5). This is because the RHC cannot take away a right conferred by some other legislative enactment and any attempt to do so will be *ultra vires* and void. This comment applies with equal force to similar amendments in O.8 r.1 and O.9 r.1.	The Steering Committee agrees with the Bar's views. Amendments have been made to the relevant rules accordingly.

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Part 5 – Dispute as to Jurisdiction		
Order 12 – Acknowledgement of Service of Writ or Originating Summons		
12.	Bar Association It is suggested that rather than having a piecemeal amendment of O.12, r.8, consideration should be given to the removal of the existing r.8 from Order 12 followed by the wholesale importation of CPR Part 11 as a new Order of the RHC.	The point made by the Bar is a cogent one but the Steering Committee thought in view of the fact that much of the current format of the Rules will be maintained, it was better to retain O.12, r.8 (an order with which practitioners are familiar) as the principal provision dealing with challenges to jurisdiction.
13.	Law Society No particular comment on the draft amendments to O.12, r.8, but we submit that consideration be given to spelling out the following applications for: an extension of time to challenge jurisdiction, or asking for security for costs for the challenge application, or asking for a stay pending the outcome of foreign proceedings, are not a submission to the jurisdiction. O.12, r.8(6) contains the curious procedure that if the challenge application is dismissed, a further acknowledgment of service should be lodged. This is an unnecessary additional step which might be deleted. The court in dismissing such a jurisdiction application should simply give directions for the service of the defence and further conduct of the action as appropriate.	The Steering Committee agrees with the Law Society's comments. Amendments made to O.18, r. 2(3) to include reference to O.12, r.8(2). The Steering Committee agrees with the Law Society that it is not necessary to file a further acknowledgment of service after the application is disposed. Amendments made to O.12, r.8(6) accordingly.
Part 6 – Default Judgments and Admissions		
Order 13A – Admissions in Claims for Payment of Money		
14.	Bar Association The proposed O.13A rr.1(3), 4(1) and 5(1) use the language "*where the only remedy which a plaintiff is seeking is the payment of money*". This may be contrasted with the language of O.13 r.1(1) which applies "*where a writ is indorsed with a claim*	The Steering Committee agrees that there should be consistency in the terminology used in this Order and O.13.

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	against a defendant for a liquidated demand only". The language of the RHC as a whole should be kept consistent.	
15.	The word '*claim*' is not defined in the revised proposals but it is used in RHC O.13A and also in other Orders. The context does not always make its meaning clear.	The policy of O.13A is to enable Defendants to admit the whole or part of the total aggregated claims made in an action, whether or not there are more than one causes of action. Unlike in the case of O.22 (see below), this Order is not intended to deal with claims in individual causes of action to be admitted (whether in whole or in part). The Steering Committee agrees that this being the intention, the position should be made clearer in this Order. In any event, O.13A should also make provision for an action where the Plaintiff makes both a claim for a liquidated amount as well for an unliquidated one. The Order has now been amended to reflect this.
16.	The proposed O 13A r 9(3) raises the issue of filing and service. Under r 9(8), if a defendant fails duly to pay, the plaintiff may enforce. Rule 9(7) does state that the stay is '*subject to paragraph (8*)'. The stay is subject to due payment. However, the rule does not expressly provide that no application is required to lift the stay once the payee defaults. If no application to lift the stay is required, that could be made clearer by expressly stating in r 9(8) that the stay of execution pursuant to paragraph (7) '*shall immediately cease'* or '*cease forthwith'*.	The Steering Committee considers that it is not necessary to refer to service in O.13A, r.9(3) since the earlier Rules make it clear that when filling out the appropriate Form, a Defendant must file and serve it (see O.13A, rr.4(2), 5(2), 6(2) and 7(2)). Agree with the suggested amendment to Rule 9(8).
17.	In the proposed O 13A, r 11(2), *'notified'* could refer to service. If that is intended, the proposed provision may be revised to '*served with notice'*.	The Steering Committee agrees with the suggestion.
18.	<u>Deacons</u> We suggest the new r.1(5) should indicate the ground or circumstances under which the Court may allow a party to amend or withdraw an admission; for example, *"if having regard to all circumstances of the case the Court considers it just to do so."*	The Steering Committee agrees with the suggestion. See O.13A, r. 2(3) in the latest draft RHC.

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Part 7 – Pleadings		
Order 18 – Pleadings		
19.	Bar Association It is proposed that O.18 rr.13(1) and 14 be amended so that the implied joinder operates as a non-admission, as opposed to a denial, of the opposite party's pleading. It is expressly stated in Recommendation 24 that this proposal should not be extended to pleadings subsequent to the defence. Since an implied joinder under O.18 r.14 arises only after a defence is filed, there is nothing in the Final Report to suggest that the implied joinder should cease to operate as a denial but merely as a non-admission. The proposal requiring defences to be pleaded substantively is not intended by the Final Report to apply to the denial arising from implied joinder.	The Bar is quite right to refer to Recommendation 24 of the Final Report but the Steering Committee has deliberated further on this point and reached the view that as a matter of principle, the amendments to O.18, r.14 are justified. This, incidentally, is the same conclusion as that originally postulated by the Bar.
20.	Deacons Suggest 28 days for plaintiff to file and serve reply and defence to counterclaim. The new O. 18, r .20A requires a statement of truth be made also in respect of the reply and defence to counterclaim. The plaintiff should therefore be given adequate time to plead substantively to the defendant's claim and to verify the reply and defence to counterclaim.	The Steering Committee agrees to the suggestion. Amendments made to O.18, r.3(4) to allow 28 days (instead of 14 days) for reply and defence to counterclaim.
Order 41A – Statements of Truth		
21.	Bar Association The proposed O.41A, r.6(1)(b) sits uncomfortably with O.41 r.5(2) which allows affidavits containing hearsay evidence to be used in interlocutory proceedings but requires the sources of information to be stated. On the basis of the proposed new rules, neither the pleading which is verified nor the statement of truth itself will specify the sources of information or the grounds of belief. In practice, therefore, if O.41A r.9 is enacted, it may	Agree with the Bar. The originally proposed O.41A, r.9 has been removed from the latest draft RHC, as it is considered that the provision would undermine the requirements of O.41, r.5(2) regarding the content of affidavit evidence.

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	allow O.41 r.5(2) to be circumvented.	
22.	Law Society It appears that the intention is that parties will still be permitted to plead (and verify) facts which they do not know for sure are true, but which they honestly believe "*with reasonable grounds*" are an appropriate way of putting their case. There is a strong case for recognising a distinction between the guarantee of veracity given on a witness statement and on a pleading. Alternative formula suggested for statements of truth – "***I put forward the facts in this pleading in good faith, and to the best of my knowledge and information they are a proper and appropriate statement of the facts relevant to my [claim/defence]".*** In order to take account the increase in the time taken to prepare pleadings which have to be verified, we recommend the following: (a) time for service of a Defence is to be increased from 14 to 28 days. (b) time for service of a Reply remains 14 days.	The wording in the latest draft RHC is considered appropriate having regard to the objective intended for statements of truth. The time for service for both has been increased to 28 days. See O.18, rr.2&3 in the latest Draft RHC.
23.	Deacons Textual amendments suggested for the wording of the Statements of Truth.	The Steering Committee has adopted most of the suggestions.
Part 8 – Sanctioned Offers and Payments		
Order 22 – Offers to Settle and Payments in the Court		
24.	Bar Association In the proposed O.22 rr.2 to 6, there are references to "*money claim*" and "*non-money claim*". The Bar understands these terms are derived from CPR Part 36 but they are not defined in the RHC and are couched in language inconsistent with the rest of the RHC, e.g. O.13 and the proposed new O.13A.	The terms "*money claim*" and "*non-money claim*" are easy to comprehend. There is no need in O.22 to draw a distinction between liquidated and unliquidated claims.

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25.	The Bar has some concern as to the complicated structure of the proposed RHC O 22, which is brought about by reason of the comprehensive scheme sought to be introduced, allowing both plaintiffs and defendants to settle the claims involved in the action, be they money claims or non-money claims, *but* providing distinct forms in which a proposal to settle money claims and non-money claims may be made, i.e. a *sanctioned payment* and a *sanctioned offer* respectively.	O.22 is admittedly quite complicated but, as the Submissions acknowledge, it has to be so in order to be comprehensive.
26.	The proposed RHC O 22 r 2(1) refers to '*claim*' without expressly referring to '*any part thereof*' in the alternative. While O 22 r 1 expands '*claim*' to include a counterclaim, the word itself is not defined for the purposes of the RHC or O 22. A '*claim*' may mean or refer to the sum of each or all the separate causes of action brought and remedies or relief sought against a party under a single set of proceedings, action, cause or matter.	The Bar has a point. Where a number of claims are made, it seems clear that an offer can be made to settle all of the claims (meaning the claims made under different causes of action) or only a few or one of them. For example O.22, rr.7(2), 9(1) referring to "the whole claim or part of it or to an issue that arises in it". That the word "claim" can mean a claim in a cause of action or that "claims" can mean the claims made in more than one cause of action should therefore be made clear in this Order. O.22, r.1(2) has accordingly been added in the latest draft.
27.	It is not entirely clear from reading the proposed O 22 alone that it does not extend to taxation proceedings. A question in a similar vein is whether arbitration proceedings and/or taxation of arbitration proceedings (in the High Court pursuant to O 73) are to remain outside the O 22 scheme.	It is already clear that O.62A deals with taxation proceedings. Arbitration proceedings are also clearly covered by O.22 (although it will be rare for sanctioned offers or payments to be made in O.73 proceedings).
28.	The proposed O 22 r 11 provides that a sanctioned or amended offer or payment is 'made' when 'served'. There is no express requirement in O 22 for the filing of the same by the offeror as distinct from the acceptance thereof by the offeree.	It is not anticipated that the offer will be filed in court.
29.	The proposed O 22 r 7(7), (9), (10), (11) and O 22, r 9(4), (5), (6) deal with withdrawing or reducing sanctioned offers	Agree that the use of the word "*reduced*" is not appropriate in the case of a sanctioned offer from the Plaintiff. This is now

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	or payments. While '*reduce*' may be appropriate for '*payments*', 'reduce' is less apt for an '*offer*' which may be in respect of '*a part of a claim or any issue that arises in it*'. The use of the word '*diminish*' or a simile may be more appropriate.	changed to "*diminished*" in the relevant provisions.
30.	The proposed RHC O 22 r 21 applies where the plaintiff betters the payment or offer '*at trial*'. If the O 22 scheme is to apply to proceedings that may be determined and concluded by judgment or order without a '*trial*', clarification may be required.	Agree with the Bar. It may be possible for there to be costs consequences where a Plaintiff fails to better a sanctioned offer or sanctioned payment after obtaining judgment other than after trial.
31.	The HKBA understands that the Steering Committee has taken a deliberate policy decision to revise the maximum rate of interest that the court can impose as part of the consequences under the proposed RHC O 22 rr 21-22 from 10% above prime rate to 10% above judgment rate. The HKBA however considers that a question of fairness is involved since the jurisdiction sought to be conferred is not intended to be punitive and 'may only be used in order to compensate the claimant for the costs that he has incurred and for any other real disadvantages, including anxiety and inconvenience, which he suffered as a result of needlessly being forced to pursue the case all the way to trial'; see *Zuckerman on Civil Procedure: Principles of Practice* 25.88-25.89.	The change from *prime rate* to *judgment rate* is intended to provide certainty as per comments by the Law Society (see item 36 below). It should be noted that the court has discretion in the fixing of the rate ("… not exceeding 10% ..." above *judgment rate*).
32.	<u>Law Society</u> O.22, r. 7(7)-(11) refers to the withdrawal or "*reduction*" of a sanctioned offer. However, the expression "*reduction*" is not appropriate in the case of a sanctioned offer from the Plaintiff.	Agree. Same as item 29 raised by the Bar.
33.	The definition of "*provisional damages*" O.22, r. 10(7) only mentions the first half of S. 56A(2) of the HCO, omitting the second half, namely "*further damages at a future date if the injured person develops the disease or suffers the deterioration*".	O.22, r.10 is not intended to deal with the further damages an injured person might be awarded.

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34.	O.22 r.20(3) refers to acceptance of a sanctioned offer or a sanctioned payment which only relates to **a part or issue of the claim**. But this rule does not provide that either party may enforce the terms. Such an omission may lead to arguments that those terms cannot be enforced until resolution of the rest of the claim.	Agree with the Law Society. Amendments have been made to make it clear that either party may apply to enforce the terms of a sanctioned offer without the need to commence new proceedings.
35.	O.22, r.20(6) provides that where a sanctioned offer has been accepted and a party has not honoured the terms of the offer, the other party may apply to the Court to claim the remedy of breach of contract. This means that the non-defaulting party cannot simply have judgment entered on the terms of the offer and enforce it, but still needs to apply to the Court to claim the remedy of breach of contract. The proposal appears to be at odds with the procedure in Order 20 rules (2) and (3) which provides a mechanism for enforcement.	The intention of O.22, r.20(6) is to allow parties to enforce the terms of the offer without starting a new action. An application to court ought to be required as opposed simply to enforcing the accepted offer without more. The position as drafted is similar to the position under the CPR (see CPR 36.11(8))
36.	We suggest the reference to the *prime rate* should be changed to the *judgment rate*. Whilst the *judgment rate* is ordinarily higher than the *prime rate*, given the court's discretion in the fixing of the rate ("… not exceeding 10% ..." above *prime rate*), the resulting interest rate does not necessarily have to be any higher than what has been intended in the proposed amendment.	The Steering Committee agrees with the suggestion. Amendments made to the relevant provisions to refer to "*judgment rate*" instead.
37.	<u>Deacons</u> The suggested Orders 22 and 22A are fine and we do not see any reason why the scheme cannot apply equally to both claims and counterclaims.	Noted. No need for change.
Order 22A – Miscellaneous Provisions about Payments into Court		
38.	<u>Law Society</u> The wording of the proposed O.22A, r. 1 is intended to cover the existing rule 5 (where the payment made is by way of a settlement offer) and rule 8 (where the payment is made into court under an order). However, as the wording of the proposed O.22A is	Agree with the Law Society. Amendments made to O.22A, r.1 to address this.

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	based on the existing rule 5, it does not seem adequately to cater for the existing rule 8 scenario.	
39.	Deacons The new provision looks fine.	Noted. No change required.
Order 62A – Costs Offer and Payments into Court		
40.	Bar Association It should be clarified whether the proposed RHC O 62A r 2(3) restores the present situation, so that the taxing master still has a discretion to consider 'without prejudice save as to costs' offers that have not been backed by cash. Or is it the case that under the revised proposals, where the paying party wishes to make an offer to pay a sum of money in satisfaction of costs to be taxed, the paying party must comply with O 62A to secure the benefit of the rules under that Order?	The proposed O.62A, r 2(3) is wide enough to enable the Court to consider a "without prejudice offer save as to costs". However, the party making that offer will have to justify why it is not made in accordance with this Order.
41.	The proposed RHC O 62A r 6(2)(c) refers to an interim payment of costs. There is no express provision in the rules of court to provide for jurisdiction of the court to order an interim payment. Consideration may be given to expanding the ambit of RHC O 29 r 10 to include rules for the interim payment of costs, bearing in mind that the definition of 'interim payment' in O 29 r 9 excludes costs from interim payments.	Interim payment of costs can be made pursuant to an order of provisional summary assessment (O.62, r.9A(1)(b)) or a taxing master's interim certificate (O.62, r.17). O.62A, r.6(2)(c) makes it clear that a party making an O.62A offer can take that interim payment into account.
42.	The proposed RHC O 62A rr 5(8), 6(6) might be clarified to include the alternative of the court granting leave to reduce a sanctioned offer. Cf the proposed RHC O 22. This can be achieved by adding 'or grants leave to reduce the sanctioned offer' before 'it may'; and by adding 'or reduced sanctioned offer' before 'may be accepted'.	Agree with the Bar's views. See O.62A, rr.5(6) & 6(6) in the latest Draft RHC.
43.	Law Society In general, the amendments to Order 62A are procedural and unobjectionable.	Noted. No change required.

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44.	Hong Kong Law Costs Draftsmen Association The Costs Draftsmen submit that the suggested indemnity costs sanctions for O.62A rr.14 and 15 to impose is inappropriate and should be substituted by ordinary costs consequences on a party-and-party basis.	The proposed amendments seek to give effect to Recommendations 132 of the Final Report. The power to award indemnity costs if a party fails to better a sanctioned payment or sanctioned offer is one of the measures to curb unnecessary taxations. This is a discretionary power.
Part 9 – Interim Remedies and Mareva Injunctions in aid of Proceedings outside Hong Kong		
Order 11 – Service of Process, etc., out of the Jurisdiction		
45.	Bar Association Law Society O.11, r 1(1) should be amended to bring injunctions in aid of proceedings outside Hong Kong under the new s.21M of the High Court Ordinance ("HCO") to be one type of proceedings for which service out of the jurisdiction is possible.	The new O.11, r.1(1)(oc) deals with this point.
Part 10 – Case management, Timetabling and Milestones		
Order 25 – Case Management Summons and Conference		
46.	Bar Association The Bar notes that under O.25 r.1B(6), an application to vary a non-milestone date cannot be granted if the variation would make it necessary to change a trial date or trial period. In light of the underlying objectives, the Bar questions whether it is appropriate to fetter the Court's discretion in this way. The limitation on the Court's discretion under O.25 r.1B(6) could have the result that a party applying to vary a non-milestone date will inevitably apply at the same time under O.25 r.1B(2) in case the variation sought might necessitate a change in the trial date or trial period.	One of the key changes in the CJR exercise is the emphasis is on the fact that a milestone date, once arrived at (obviously after careful consideration), will not be easily moved. O.25, r.1B(6) is consistent with this.
47.	The Bar is of the view that if all parties agree to the variation, the Court should be empowered to vary a date whether or not it	Another key component of the court's case management powers as envisaged by the CJR is that proceedings will become more

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	is a milestone date.	court controlled. While obviously the consent of the parties will be a relevant factor, it should not be determinative.
48.	Due to the drastic consequences, the Bar considers that the meaning of "conditions" in O.25 r.1C(4) and "good reasons" in O.25 r.1C(5) should be clarified.	The terms "conditions" and "good reasons" on O.25, r.1C(3) & (4) are reasonably clear and ought not be further defined.
49.	It is proposed under O.25 r.1C(6) that in the event a plaintiff does not apply to restore an action which has been provisionally struck out, the action shall stand dismissed upon expiry of 3 months from the date of the case-management conference or pre-trial review. If the intention is that once an action is dismissed, the plaintiff will be unable to commence a new action based on the same cause of action, the Bar considers that the sanction is too harsh and is out of proportion to the default of the plaintiff. This is exacerbated by the fact that a period of 3 months is a relatively short period of time.	The period of 3 months is regarded as sufficient, especially as the absent Plaintiff will be notified of the fact that the action has been provisionally struck out.
50.	The Bar notes that the sanction for failure to attend a case management conference or pre-trial review lies only against the plaintiff. The Bar questions why no sanction is included in respect of the failure by the defendant to appear.	It was felt sufficient that where a Defendant was absent, directions would be given in its absence.
51.	Given the powers conferred on the Court under O.25 and the sanctions carried with them, the Bar queries whether the specialist judge has the necessary jurisdiction to determine the extent to which O.25 is to apply to an action in a specialist list."	A specialist judge would have the necessary jurisdiction.
52.	<u>Law Society</u> We note neither O.25 r.2(j) nor O.25 r.8 have been amended and question the compatibility of the proposed amendments with the provisions in the existing paragraph 7 of Practice Direction 18.1 for the Personal Injuries List as r.8 appears to be ignored in practice.	The Steering Committee agrees with the Law Society. Accordingly, O.25, r.8(1)(b)&(c) relating to expert directions in PI cases have been deleted in the latest draft RHC.

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53.	N. Millar of Littlewoods Solicitors The provision within O.25, r.1C that failure to appear at a case conference or pre-trial review the action be struck out, even provisionally, is draconian and unwarranted. This is particularly so given sub-rule [5] that the action should not be restored unless good reasons have been shown to the satisfaction of the court. In effect that allows no room for human error e.g. wrong diarisation, being late, simply forgetting.	One of the key changes in the CJR exercise is the emphasis is on the fact that a milestone date, once arrived at (obviously after careful consideration), will not be easily moved. O.25, r.1C is consistent with this.
Part 11 – Vexatious Litigants		
Order 32 – Applications and Proceedings in Chambers		
54.	Deacons We agree that application for leave to continue legal proceedings under Section 27 of HCO should be dealt with by judges and fall outside the jurisdiction of Registrars and Masters.	Noted. No change required.
Order 32A – Vexatious Litigants		
55.	Bar Association Other than the typographical error in O.32A, r.1(2) in that "a" should be inserted before "single judge", the Bar has no comments on the proposed amendment.	Typo corrected in latest draft RHC.
56.	Deacons Amendments are welcomed.	Noted. No change required.
Part 12 – Discovery		
Order 24 – Discovery and Inspection of Documents		
57.	Deacons The criterion for PI and non-PI cases for the Court to give pre-action and 3rd party discovery are set out in different sub-paragraphs in O.24, r.8. We do not see any justification in such difference.	Following the changes in the Civil Justice (Miscellaneous Amendments) Ordinance 2008 (hereafter referred to as the "CJO"), these are now subject to the same criterion.

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58.	Bar Association The proposed O 24 r 7A(3A) provides that in the case of a r 7A(1) summons, paragraph (3)(b) shall be construed as if the word '*relevant*' were substituted by the words '*directly relevant* (*within the meaning of section 41 of the Ordinance)*'. As an alternative, those words (or simply the word '*directly*' before the word '*relevant*') could be inserted into paragraph (3)(b). Then paragraph (3A) could be deleted.	O.24, r.7A(3)(b) relates to ss.41&42(1) of the HCO. But an order under s.42(1) of the HCO may only be made in relation to a document that is relevant (and not directly relevant). Rule 7A(3A) is therefore necessary.
Part 13 – Interlocutory Applications		
Order 32 – Applications and Proceedings in chambers		
59.	Bar Association Although the Bar has no comments on the drafting of the proposed amendment, the Bar considers that the phrase "exceptional circumstances" may lead to arguments as to its meaning.	The term "exceptional circumstances" is clearly understood by practitioners. The threshold is put in these terms to minimise the delays (leading to adjournments) and unfairness which exist at present consequent on late attempts to put in evidence.
Part 14 – Interlocutory Applications and Summary Assessment of Costs		
Order 62 – Costs		
60.	Bar Association No comments on the proposed amendments to rr.9A(4) and (5). .	Noted. No change required.
61.	The Law Society of Hong Kong The drafting of the proposed O.62, rr. 9A(4) and (5) is unclear as how to address the position in relation to the situation the receiving party (rather than the paying party) is dissatisfied with the amount of costs awarded in the summary assessment and wishes to apply for taxation. In this event, if the taxed costs are materially less than the amount summarily assessed and paid, the receiving party should be subjected to the possibility that the court will impose sanctions.	Under rule 9A(1)(b), either party dissatisfied with the summary assessment can apply for a taxation. If it is the receiving party who applies but cannot do materially better, he will bear the costs of the taxation.

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62.	Hong Kong Law Costs Draftsmen Association It is noted with much concern that for interlocutory proceedings a party would no longer be entitled to taxed costs as of right as it currently does, if these amendments were enacted.	The proposed amendments seek to give effect to Recommendations 88-89 of the Final Report. It should be noted that under the existing provisions, the Court already has power to make an order for costs on a gross sum basis (O.62, r.9(4)(b)). It is a power, not exercised behind closed doors, but after giving parties an opportunity to make representation. Its exercise is gaining popularity in the professions.
Part 15 – Wasted Costs		
Order 62 – Costs		
63.	Bar Association The Bar considers that there should be unqualified right of appeal against wasted costs orders	The Steering Committee has deliberated on the proposed safeguards and has accepted the Bar's suggestion that there should be an unqualified right of appeal against wasted costs orders. The necessary amendments to this effect have been incorporated in RHC O.59, r.21(1)
64.	The Bar considers that provision should be made to except a Judge or Master proposing to make a wasted costs order on his own motion from the option of proceeding to the 2nd stage without an adjournment. A legal representative, who shows that he is barred by legal professional privilege from defending himself properly on a wasted cost order [,should have the benefit of the doubt]: *Medcalf v. Mardell*	The Steering Committee considers it unnecessary to provide these matters in the rules. The Court in exercising its power to grant wasted costs orders will inevitably take into account all relevant considerations and circumstances. It is well understood that a wasted costs order will not lightly be made.
65.	Hong Kong Law Costs Draftsmen Association This rule may need modification to take into consideration that in most cases, it is the client litigant's bill of costs, and not that of the legal representative, which is to be filed for taxation. If the aim is to extend the coverage to include counsel's default as well one only	Amendments made in the latest draft RHC to clarify this. The proposed amendments seek to give effect to Recommendations 94-97 of the

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	needs replace the word "solicitor" with "legal representative" and with a reference to the new s.52A (Cap.4). The Costs Draftsmen fail to see any justification for deleting the entire current 4.8 and replacing it with such a cumbersome and problematic new rr.8 and 8A to D.	Final Report, and to reflect the current procedures for making a wasted costs order as set out in Practice Direction 14.5. It should be noted that, under the existing provisions, the Court already has power to make wasted costs orders on its own motion. The extension of the power to make wasted costs orders against barristers have already taken into account the views of the professions.
Part 16 – Witness Statements and Evidence		
Order 38 - Evidence		
66.	Bar Association The Bar supports the proposal to provide greater flexibility in allowing a witness to expand on his/her witness statement.	Noted. No change required.
67.	Deacons We agree with the amendments which are basically made along the lines of CPR 32.5(3) and (4).	Noted. No change required.
Part 17 – Expert Evidence		
Order 38 – Evidence		
68.	Bar Association Experience shows that where a single joint expert is ordered to be used by the Court, his report is also ordered to be admitted without requiring his attendance in Court. It is felt that the better alternative, particularly in personal injury cases, would be for the parties to arrange for a joint or separate examination by their respective experts. The Bar therefore feels that it must be emphasized that the power to order the parties to use a single joint expert should be the *exception* rather than the rule.	The pros and cons of the single joint expert provisions (including the Bar's views) were considered by the Working Party: see paragraphs 625-634 of the Final Report. It is not stated in the Rule that orders for a single joint expert will be the norm. The court will have to consider in each case whether such an order is appropriate, taking into account the factors set out in O.38, r.4A(5) of the latest draft.
69.	The HKBA suggests that consideration be given to emphasize in practice that a single joint expert should *only* be appointed where	The Steering Committee is of the view that the present draft adequately deals with the concerns raised (see in particular O.38,

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	there is sufficient assurance that the particular issues that are proposed to be dealt with by a single joint expert must be readily identified and the expected opinion straightforward and uncontroversial.	r.4A(5)(a) & (b)).
70.	The proposed O 38 r 37B sets out the duty of a party who instructs an expert to provide a copy of the code of conduct. Where the court orders two or more parties to appoint a single expert pursuant to O 38 r 4A(1) and the court gives directions as to the instructions to be given to the expert pursuant to O 38 r 4A, the question arises as to whether the court must also give directions as to provision of the code of conduct. Order 38 r 37A may be amended by adding '*including (each of) the parties ordered to appoint a single expert pursuant to O 38 r 4A'*.	The Steering Committee agrees with the Bar's views. See O.38, r.37B(2) in the latest Draft RHC.A will be amended accordingly.
71.	Law Society As currently drafted, Order 38 r.4A(4) does not fully address our recommendation that certain specified matters be taken into account in the court's decision to appoint a single joint expert.	The factors to be taken into account by the Court in deciding whether or not to appoint a single joint expert have been set out in O.38, r.4A(5) in the latest draft RHC..
72.	O.38 r.4A(4)(c) of the Revised Proposals provides "**the value and importance to the parties of the claim**, as compared with the cost of employing separate expert witness to give evidence" (emphasis added) as one of the circumstances to be taken into account by the Court in deciding whether or not to appoint a single joint expert. It is more appropriate to consider objectively the importance of the issue in determining the claim. We therefore suggest amending O.38 r.4A(4)(c) to read as, "the **value of the claim and importance of the issue on which expert evidence is sought**, as compared with the cost of employing separate expert witness to give evidence".	Agree with the Law Society. See O.38, r.4A(5)(c) in the latest Draft RHC.
73.	As currently drafted, the court has the power to make an order that a single expert be appointed. However, there is no default	Agree with the Law Society. Amendments in O.38, r. 4A(2) in the latest draft RHC address this.

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	position should the parties be unable to agree on the identity of the expert.	
74.	As drafted, the court has a wide discretion but little guidance is given as to the terms and conditions of appointment of the designated single joint expert.	Agree with the Law Society. Amendments in O.38, r. 4A(3) in the latest draft RHC address this.
75.	O.38, r.37C(3) disapplies the requirement that the expert read and comply with the Code of Conduct in respect of an expert witness who has been instructed before the commencement of these Rules. Apart from not applying the rule retroactively, it is difficult to understand the rationale for this exemption. If the exemption applies only to written reports, then it would be appropriate to disapply the rule in respect of a report which has already been exchanged or disclosed prior to the commencement of the rule, so as to avoid the need to re-serve the report.	Agree with the Law Society. Amendments in O.38, r.37C(3) in the latest draft RHC address this.
76.	<u>Food and Hygiene Bureau</u> While the Hospital Authority ("HA") has no objection that the Court should have a discretionary power to order joint expert witness in appropriate circumstances, when it comes to liability and causation, HA considered that medical negligence cases do have a special feature which may not be found in other cases at which expert evidence is required. HA maintains the view that a joint expert on liability and causation in medical negligence cases should be the exception rather than the rule.	The matter does not require legislation and should more appropriately be dealt with by the court on a case-by-case basis.
77.	<u>Deacons</u> A rule requiring the appointment of a single joint expert is likely to lead to practical difficulties. If r.4A is to be implemented, it needs to provide mechanisms for dealing with practical difficulties, and list out the matters to which the Court should have regard when deciding whether to order the parties to appoint a single joint expert. The amendments in rr.35A, 37A, 37B and 37C are welcomed.	The factors to be taken into account by the Court in deciding whether or not to appoint a single joint expert have been set out in O.38, r.4A(5) in the latest draft RHC. Noted. No change required.

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Part 18 – Case Managing Trials		
Order 35 – Procedure at Trial		
78.	Bar Association The proposed amendment is based on Recommendation 108 of the Final Report. Whilst such a recommendation may be safely adopted at the stage of a pre-trial review, the Bar maintains its views expressed in its 2002 Response under Proposals 35 and 41 in relation to the Court's power to manage trials during the trial itself.	The Bar's position was carefully considered by the Working Party: see paragraphs 576-583 and 635-642 of the Final Report. It needs scarcely to be stated that the court will, in the exercise of its powers, bear in mind the need to be fair and also the provisions of O.1A. The object of O.35, r.3A is to curb excesses as the Final Report makes clear.
79.	The proposed amendment, in adopting O.34 r.5A of the Western Australian Supreme Court Rules, does not address the Bar's concern as to the danger of taking away the parties' rights to conduct their case in a way preferred by them.	These points have been considered. The powers are required to prevent the excesses and delays that sometimes occur at present.
80.	Mr Cheung Kam-chuen, Barrister To further improve case management, the court can also "*limit the issues on which it requires evidence*" under r.3A.	The Steering Committee is not of the view this wording is necessary or desirable.
Part 19 – Leave to Appeal		
Order 58 – Appeals from Masters		
81.	Deacons The amendment to O.58, r.1 does not change the existing rule. Currently, it is provided that the appeal shall lie from any judgment, order or decision of Master. The present provision therefore already covers those decisions made on the basis of written submissions or after a hearing. Amendment (1) only serves to clarify the present position. We agree that the amendment should be adopted for clarity purpose.	Noted. No change required.

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Order 59 – Appeals to the Court of Appeal		
82.	Bar Association Having considered the Draft RHC Amendment and the list in the proposed O.59 r.21 of judgments and orders where an appeal lies as of right, the Bar finds in principle that the delimitation between judgments or orders requiring leave to appeal and those where an appeal lies as of right is acceptable.	Noted. No change required.
83.	The revised proposal appears to be an adaptation of the recently introduced CPR 52.3(4A), which empowers the English Court of Appeal to make a similar order if it considers that the application for permission to appeal was 'totally without merit'. The HKBA's views on the proposed RHC O 59 r 2A(8) are that (i) it would curtail or unduly restrict access to appeal; (ii) it may be applied by a single judge of the Court of Appeal who determined the application for leave without a hearing, thus depriving the applicant's right under RHC O 59 r 2C to make a fresh application; (iii) the formulation of 'cannot be seriously contested' may introduce a threshold that is comparatively less stringent than 'totally without merit'; (iv) it may have the unintended effect of disadvantaging litigants in person.	Where a single judge has refused to grant leave to appeal (whether or not an oral hearing has taken place), the aggrieved party may apply to a court of two (O.59, r.2C). The Steering Committee agrees that the words "totally without merit" are preferable.
84.	Law Society The Law Society notes the proposed amendments codify the procedures for leave to appeal as outlined in Part 8 of the Civil Justice (Miscellaneous Amendments) Bill 2007. We have no further comments.	Noted. No change required.
Part 22 – Taxing the Other Side's Costs		
Order 62 - Costs		
85.	Bar Association The Bar does not have any comments on the proposed amendments in rr.13(1A), 21, 21A	Noted. No change required.

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	to 21D, 22, 1st & 2nd Schedules.	
86.	Law Society In general, the amendments to Order 62 are procedural and unobjectionable.	Noted. No change required.
87.	Hong Kong Law Costs Draftsmen Association The proposed rr.13A, 21, 21A to 21C together do not provide a clear indication as to what the procedures may become of.	The proposed amendments seek to give effect to Recommendations 134 of the Final Report. Any party dissatisfied with such provisional taxation may seek an oral hearing under O.62, r.21B(3) & (4).
Part 23 – Judicial Review		
Order 53 – Applications for Judicial Review		
88.	Bar Association The Bar asks the Steering Committee to reconsider the merits of enacting the proposed O.53 rr.2A to 2D, so that the merits of the leave filter protecting public bodies against weak and unarguable applications may still be maintained.	The provisions of O.53, r.2D(3A) enable the court more effectively to filter out bad claims.
89.	The requirement sought to be imposed in O.53 r.5A that respondents and interested parties should file detailed grounds in opposition or support and associated affidavit evidence is confounding. A respondent or interested party would thus be required to formulate in written form his arguments 3 separate times. The proposal remains a formalistic exercise particularly onerous to interested parties who may simply be interested in raising discrete issues in support of the application. The requirement on the part of a respondent or interested party to formulate written arguments 3 separate times carries mounting costs implications for the losing applicant, as the normal consideration of costs following the event applies.	The Bar's views have been considered by the Working Party but it was felt nonetheless that the requirement on a respondent to set out his or her grounds of opposition, is justified: paragraphs 884-886 of the Final Report. The LTG does not believe that any additional costs would be disproportionate to the benefit that will be derived from a respondent having to set out the grounds of opposition earlier rather than later.
90.	It is proposed to add O.53 r.3A to prohibit respondents and interested parties served	Noted. No change required.

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	with the application papers to apply to set aside an order granting leave to apply for judicial review. This is a provision to be welcomed	
91.	The HKBA suggests that the forms to be prescribed for applications for judicial review be grouped under one number (i.e. 86) so as not to be confused with forms prescribed for committal proceedings and habeas corpus applications.	Agree with the Bar.
92.	Law Society The proposed new rules 2A to 2D represent a shift from that present position and essentially require the application for leave to be *ex parte on notice* not only to the intended respondent but to all persons or bodies whom the applicant considers have a legitimate interest in the matter. It should be clear that service on such respondents or interested parties does not ***oblige*** them to attend and oppose leave, nor do they lose their right to challenge leave that is given merely by having been served.	The rules indeed do not oblige respondents or interested parties to attend or oppose leave.
93.	We consider the proposed new rule 5B to be unclear.	Amendments made to r.5B for clarity in latest draft RHC.
94.	Deacons It is proposed that the original Rule 1 be completely deleted and replaced by the newly proposed rule which basically identifies which cases are appropriate for application for Judicial Review. We believe that these distinctions are important and they should be adopted for the Hong Kong Judicial Review proceedings.	Noted. No change required.

Judiciary Administration
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