CJRS 6/2008

Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform

Response to Submissions on the Proposed Amendments to the Rules of the High Court (Cap. 4A)

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which sets out the Judiciary's response to the submissions made by various organizations/individuals (listed at **Annex**) to the Subcommittee on the proposed amendments to the Rules of the High Court ("RHC") (Cap. 4A). It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

Annex

Serial No.	Views/suggestions	Judiciary's Response
Overall comments		
1.	Hong Kong Bar Association ("HKBA") The Law Society of Hong Kong ("Law Society") Prof. Eric CHEUNG, Assistant Professor, Faculty of Law, University of Hong Kong ("Prof. Eric CHEUNG, HKU") Prof. LEE Jung-soo, Assistant Professor, School of Law, The Chinese University of Hong Kong ("Prof. LEE Jung-soo, CUHK") Generally support the draft subsidiary legislation proposed for implementing the Civil Justice Reform ("CJR").	Noted.

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2.	Law Society The implementation of the CJR will bring about significant changes in two respects, namely, front-end loading of costs and enhanced case management powers by the court. According to the UK experience, CPR had not been successful in bringing litigation costs down.	According to the UK experience, pre-action protocol is one of the major areas resulting in front-end loading of costs. Our reformed procedures would avoid the increase in front-loaded costs arising from pre-action protocols, as they will not be adopted across the board, but will only be confined to some specialist lists of the High Court after due consultation.
Part 2 - Objectives and case management powers		
Order 1A - Objectives		
3.	Mr Gary Meggitt, Teaching Consultant, Faculty of Law, University of Hong Kong ("Mr Gary Meggitt, HKU") The phrase "*to promote greater equality between the parties*" in O.1A, r.1(d) is pregnant with meaning and clarification is required. The language used in O.1A, r.1(d) is subtly different from its Civil Procedure Rules (CPR) equivalent of "*ensuring that the parties are on an equal footing*". The latter reflects the right to "equality of arms" under Article 6 of the European Convention on Human Rights to which UK is a signatory.	The Steering Committee has reviewed the wording of O.1A, r.1(d), and accepts that the present formulation may require some changes. **It has proposed revising it to read, *"to ensure fairness between the parties"*.** See paper **CJRS 5/2008.**
4.	Hong Kong Mediation Council ("HKMC") While one of the underlying objectives set out in O.1A, r.1(e) is to facilitate the settlement of disputes, apart from the general provision under O.62, r.5(1)(aa) that the Court in exercising its discretion as to costs shall take into account the underlying objectives set out in O.1A, r.1, it is unclear how the rules will be used to achieve that objective.	The Court will seek to achieve the underlying objective to facilitate the settlement of disputes with the use of alternative dispute resolution ("ADR"), such as mediation, through the development of case law on the application of the various rules, in particular the rules on costs, and the formulation of appropriate and relevant practice directions. Apart from O.62 r.5(1)(aa), the new rules on case management and offers to settle are also conducive to facilitating settlement.

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5.	Mr Gary Meggitt, HKU "Facilitating settlement" in O.1A, r.1(e) is commonly understood to include encouraging the parties to try some form of ADR, usually mediation. ADR is actively promoted elsewhere in the CPR. The Subcommittee may wish to give further consideration to this provision in light of the ongoing discussion on the future role of mediation within Hong Kong.	Noted. See item 4 above. Apart from the proposed amendments in the latest draft RHC, in 2007, the Chief Justice has established a Working Party on Mediation to consider how consensual mediation of civil disputes in the Court of First Instance, the District Court and the Lands Tribunal might be developed. The Judiciary has been working with the Administration, the legal profession and the mediation bodies to facilitate the greater use of mediation. Over the past few years, the Judiciary has taken steps to promote voluntary mediation by running the Mediation Coordinator's Office for family mediation in the Family Court and Pilot Schemes for cases on the Construction and Arbitration List and building management cases.
6.	Consumer Council Supports in principle the objectives and the Court's case management powers set out in the proposed new O.1A and O.1B, hoping that a fair, cost-effective and expeditious legal process will be achieved without compromising justice.	Noted.
Order 1B – Case management Powers		
7.	Consumer Council It is envisaged that judges will play a more proactive role in case management with a view to securing a quick and efficient legal process while upholding the principle of natural justice. As such, judges' proficiency in implementing the proposed rules is of utmost importance and relevant training programmes should not be overlooked.	Planning for the training programmes for judges is well in hand. The Judiciary plans to conduct training for judges at all levels of court and support staff in late 2008 and early 2009.

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Part 3 - Pre-action protocols and costs-only proceedings		
Order 2 - Effect of non-compliance		
8.	HKBA To evaluate the effect of implementing pre-action protocols and the proposed sanctions for non-compliance thereof, it is necessary to consider the yet to be promulgated pre-action protocols together with the proposed legislative amendments, as an integrated package.	In the light of observations of the Subcommittee and also taking into account the views expressed through deputations at the meeting on 29.2.2008, **the Steering Committee considers that it may be better to leave out references to "*pre-action protocol*" and "*practice direction*" in O.2, rr.3-5 for the time being.** If the automatic sanction provisions regarding pre-action protocols and practice directions 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. See paper **CJRS 5/2008**.
9.	Prof. Eric CHEUNG, HKU Expresses reservation about the proposal that any sanction for non-compliance of practice directions or pre-action protocols shall have automatic effect unless the defaulting party applies for and obtains relief from the court.	See item 8 above.
Part 7 – Pleadings		
Order 41A - Statements of truth		
10.	Law Society The proposed requirement that pleadings should be verified by statements of truth has a worthy aim. However, a practical problem with the proposal is that the parties to proceedings are not always in a position to verify the facts relevant to their claim/defence at the time when pleadings are made. In view of this, the Law Society has previously suggested	Noted. The Steering Committee considers that the wording in the latest draft RHC appropriate having regard to the objective intended for statements of truth.

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	an alternative formula for statements of truth in its submissions to the Steering Committee, but the suggestion was not taken up.	
11.	Mr Gary Meggitt, HKU Statements of truth for pleadings are introduced for pleadings by the English CPR for two reasons. The first is to make sure that the parties (and their legal advisers) do not knowingly advance false cases. The second is to enable statements of case to be used in evidence in interim hearings and therefore remove the need for additional witness statements and affidavits – thereby reducing costs. At least insofar as the second objective is concerned, CPR has not been successfully in achieving it.	The intention of introducing statements of truth for pleadings in the RHC is for the first reason but not the second. In relation to interlocutory applications, there will continue to be a need for affidavit evidence to be used (see the requirements of O.41).
Part 8 - Sanctioned offers and payments		
Order 22 - Offers to settle and payments into the court		
12.	HKBA Considers it unfair to revise upward the maximum rate of interest that the court can impose as part of the consequences where plaintiff does better than he proposed in his sanctioned offer, from 10% above prime rate to 10% above judgment rate [O.22, r.20(2)], as award of interest is not intended to be punitive.	The Steering Committee has adopted the term "10% above judgment rate" as suggested by the Law Society, instead of "10% above prime rate", as the former is more precise. The discretion to impose interest is to provide a measure of some significance, to encourage *reasonable* settlement. Hence, a power for the court to impose *up to* 10% above judgment rate for the entire period. Using judgment rate as a benchmark is reasonable, in that the plaintiff would have in any event been entitled to interest at judgment rate for the judgment sum.
13.	Mr Gary Meggitt, HKU Refers to the new CPR Part 36 promulgated in April 2007, which was prompted by a consultation conducted	The Steering Committee considers that there is no need to adopt the changes in the new Part 36 of CPR in Hong Kong. The

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	by the UK Government arising from the decisions in *Crouch v King's Healthcare NHS Trust* [2005] 1 All E.R. 207 and *The Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc* [2005] 1 WLR 3595 where the Court of Appeal held that certain categories of defendant – government departments and insurers – need only make CPR Part 36 offers without the supporting CPR Part 36 payments as they were, to put it bluntly, "good for the money". The Court of Appeal had used the "if the court so orders" words within CPR Part 36.1(2) to justify these decisions. This provision is mirrored in the proposed O.22, r.2(4). Urges the removal of O.22, r.20(2) which sits uneasily with the objective of encouraging mutually beneficially settlements and is little more than a form of punitive damages.	present draft O.22 has undergone two rounds of consultation and, save for some technical and textual comments, there was no objection in principle. The requirement for "payment in" is a well-established practice. It allays the worry of plaintiffs of an empty judgment and avoids the need for applying for enforcement separately if the sanctioned offer/payment is accepted. We believe this is more conducive to facilitating settlement. The Steering Committee does not see why government departments and insurers should be exempted. See item 12 above. The removal of this rule would defeat the very purpose of the scheme.
Part 12 –Discovery		
Order 24 - Discovery and inspection of documents		
14.	<u>Prof. Eric CHEUNG, HKU</u> The 14-day period for automatic mutual discovery upon close of pleadings is not complied with by both parties in most cases in practice. Such delay in mutual discovery will impact on the parties' ability to faithfully complete the case management questionnaire within 28 days upon close of pleadings under O.25 and the case management hearing. To resolve the problem, a two-stage discovery process is proposed as follows - (1) Requiring the parties to make mutual discovery only of the "directly relevant" documents within 14 days (or perhaps 21 days)	This suggested approach is interesting but would potentially lead to the same problems identified here by Prof. Cheung. The scheme of discovery should be as stated in the Rules, but obviously the court will take greater charge of the proceedings at the case management conference stage. The purpose of the new discovery rules is to facilitate and encourage the completion of discovery at the early stage of the proceedings, both for the reasons to avoid unnecessary delay (which is highlighted by Prof. Cheung's observation on practice) and to ensure that the parties would focus on the merits of their

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	upon close of pleadings. (2) Requiring the parties to state in the case management questionnaire whether there are any "train of inquiry" documents, and if so the standard order to be given will be further mutual discovery of all relevant documents within, say, another 21 days.	respective case at an early stage (to hopefully facilitate early settlement before too much costs have been incurred). As such, it is undesirable to make it as a rule to include the suggested 2nd stage of discovery, which may encourage the parties to "leave things later". If needed by the parties, they could on their own initiative include and apply (with justifications) for such in the case management conference.
15.	<u>Mr Gary Meggitt, HKU</u> Welcomes the presence of O.24, r.15A (empowering the court to make orders limiting discovery) which can be used by the courts to cut down unnecessarily costly discovery exercises. The court may benefit from considering the approach adopted by the Commercial Court in UK in this area as set out in Section E (Discovery) of the Admiralty and Commercial Court Guide, in particular the provisions concerning the various types of orders which can be made by the courts on discovery.	Noted. This is the kind of approach that it is envisaged to be considered by the court at the case management conference stage.
Part 13 - Interlocutory applications		
Order 32 - Applications and proceedings in chambers		
16.	<u>Prof. Eric CHEUNG, HKU</u> Suggests deleting O.32, r.11A(4) which 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.*" for the following reasons – (a) the meaning of the rule is unclear; (b) the rule will encourage unnecessary arguments and hence costs on whether "exceptional circumstances" exist; and	The Steering Committee accepts the point in item (a). O.32, r.11A(4) must be subject to any directions that may have been given regarding the filing of evidence. **The Steering Committee therefore proposes to make it clear in r.11A(4) that it is subject to any directions given under r.11A(3).** As for the other points, r.11A(4) is meant to apply to the situation when the Master initially decides to adjourn the application for determination without an oral hearing, but later decides on the "order date" to adjourn the application for argument.

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	(c) even without such a general rule, the court already has ample power to impose restrictions on the filing of further evidence according to the circumstances of a particular case.	This is envisaged in para. 523(b) of the Final Report. It serves a useful purpose in reducing the scope for interlocutory applications being adjourned as a result of new evidence, which is very much a problem at the moment. It will encourage parties to prepare properly.
Part 15 - Wasted costs		
Order 62 - Costs		
17.	Prof. Eric CHEUNG, HKU Expresses reservation about the proposed introduction of O.62, r.8D which provides sanction against the legal representative on taxation in view of the following – (a) this provision does not contain the procedural safeguard as in the wasted costs order procedure; (b) the legal representative may be pursuing or not pursuing a particular issue / approach based on instructions and it would be unfair that he shall bear personal liability; and (c) the provision may encourage a party to threaten the other party's lawyers with personal liability and result in unnecessary satellite litigation.	O.62, r.8D re-enacts what is now in O.62, r.8(6)-(8). In relation to the concern about procedural safeguards, **the Steering Committee proposes that it may be better to state that the procedural safeguards contained in Rule 8 will also apply here.** As for the other points, the court will only make an order where this is justified.
18.	HKBA Public funds should be made available to meet the legal representatives' costs in successfully defending wasted costs order.	The suggestion has been deliberated by the Bills Committee on the Civil Justice (Miscellaneous Amendments) Bill 2007. See papers **CJRB 8/2007 and CJRB 10/2007**. In short, having regard to the useful body of case law that would assist the courts to deal with wasted costs order, the inclusion of the "fearless advocacy" consideration, and the practice in England and Wales, the Administration does not

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		find it justified making available public funds to meet the costs of a legal representative who has successfully shown cause in defending a wasted costs order made on the court's own motion. As the Bar Association's suggestion involves the use of public funds, it cannot be effected by amendments to subsidiary legislation only.
19.	Consumer Council The Council supports the expansion of the province of O.62, r.8 to the effect that any costs incurred by a party to civil proceedings (e.g. consumer for legal service) as a result of unjustifiable conduct on the part of his or her legal representative will be borne by that representative. It may serve as a safeguard for consumer who may otherwise have to bear the costs unreasonably or improperly incurred by his or her legal representative. On the other hand, the Council is concerned that the wordings such as "unreasonable act or omission", "misconduct" and "default" in defining conduct which may give rise to wasted costs in s.52A(6) of the Civil Justice (Miscellaneous Amendments) Ordinance 2008 might be too wide and uncertain, and might have an inhibitive effect on the legal representative. As such, the Council suggests that "misconduct" and "unreasonable act or omission" should be properly defined.	The Steering Committee considers that the definition of "wasted costs" in the new section 52A of the HCO as contained in the Civil Justice (Miscellaneous Amendments) Ordinance 2008 appropriate. It had undergone consultation with the two legal professional bodies, and was accepted by the Bills Committee. The Ordinance was enacted on 30.1.2008.
Part 17 - Expert evidence		
Order 38 – Evidence		
20.	Mr Gary Meggitt, HKU Suggests making the following additions to the provisions on expert witnesses –	The Working Party has decided not to adopt CPR 35.6 for HK because of the comments of the Academy of Experts that the English experience has shown that

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	(a) introducing a rule similar to CPR Part 35.6 allowing a party to put to an expert witness instructed by another party or a single joint expert written questions about his report within 28 days of service of the report; (b) introducing a rule along the lines of CPR Part 35.14 granting an expert witness the right to file a written request to the court for directions to assist him in carrying out his function as an expert witness; (c) make provisions to address the situation where a party, who has no objection to the appointment of a single joint expert, is subsequently unhappy with that single joint expert's report; and (d) drawing up more substantial protocol on the instruction of expert witnesses to provide guidance to parties instructing experts.	such rule is often misused and abused (see Final Report, paras. 605-6).
Part 18 - Case management trials		
Order 35 - Procedure at trial		
21.	<u>Prof. Eric CHEUNG, HKU</u> Expressed reservation about the proposed O.35, r.3A empowering the court to give directions for trial to limit the number of witnesses, the time for examination and cross-examination of witnesses, for submissions and for trials, as this will jeopardise a fair trial. At present, the court has ample power to stop or curtail any evidence, questioning or submissions which are not relevant to the case. It is better to discourage verbosity by way of costs sanctions, rather than by a direction to	This is necessary in the case management of proceedings. Obviously, orders of this nature will not be made if it is inappropriate to do so. Prof. Cheung's concerns have been addressed in the Final Report – (1) O.35, r.3A is not aimed at empowering the court to exclude otherwise relevant and admissible evidence (see Final Report, paras. 636 & 641). Rather, it will enable

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	limit number and time.	the court and the parties to better plan and allocate resource for the trial (see Final Report, para. 639). (2) Whilst it is likely that the court already has power to give case management directions to curb prolixity, the Working Party considers it desirable to have a rule specifically setting out these powers (see Final Report, para. 640). (3) It is envisaged that the court will usually give such directions when it is in a good position to make an assessment of the needs of the trial (e.g. at pre-trial review) and with the parties' cooperation (see Final Report, para. 639). (4) The power "to limit the number of witnesses" will not lead to excluding relevant and admissible evidence given the considerations enumerated under r.3A(2) (see Final Report, para. 642). In practice, the court relies on the parties to give estimates of the length of hearings. Parties are encouraged to seek counsel's advice on the estimates (if necessary) at an early stage.
Part 19 - Leave to appeal		
Order 59 - Appeals to the Court of Appeal		
22.	HKBA There have been concerns that an exercise of the proposed power under O.59, r.2A(8) by the Court of Appeal may bring about unintended adverse effect on litigants in person, as they are unlikely to have the skills and resources to demonstrate the merits of their intended appeals. The HKBA considers that any suggestion that cases involving litigants in person should be made an	The provision of legal aid is a matter of policy for the Administration and is outside the purview of the Steering Committee. As to the promotion of pro bono services, the Judiciary looks to the legal professions to provide more pro bono services.

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	exception and they should be allowed to request for an *inter partes* hearing would frustrate the very aim of the CJR. The better way to address the concern that the rule may have the unintended effect of disadvantaging unrepresented litigants is to improve the legal aid system and/or to promote *pro bono* services.	
Part 22 - Taxing the other side's costs		
Part I of the First Schedule to Order 62		
23.	Hong Kong Law Costs Draftsmen Association ("HKLCDA") Expresses grave concern about the proposed reduction in the scale of costs in relation to the preparation of copies of documents (i.e. item 1 of Part I). Apart from being a real reduction to the profit costs to legal practitioners, such a reduction is also detrimental to the interest of the receiving party, cutting into the already imperfect indemnity the winning party can recover. Legal practitioners aside, the public should also be consulted on the proposed reduction as taxed costs are recovered for the benefit of the litigants instead of the solicitors, except in legal aid cases.	Secretarial cost is part of the overhead of solicitors and has always been accounted for in the hourly rate charged by solicitors. Historically, additional costs for "mechanical preparation of documents" are allowed because parties needed to type up documents. Nowadays, parties generally use computer and word processing software even to draft documents. This means less time and effort is required (e.g. use of proforma and multiple copies can be printed in one go). To continue to allow "mechanical preparation" is in fact an affront to the indemnity principle, because such work is no longer done. This is all the more so as the Law Society has only indicated recently that they do not wish to revise the guideline hourly rates of solicitors and have not opposed to the intended replacements.
Part II of Second Schedule to Order 62		
24.	Prof. Eric CHEUNG, HKU Expresses reservation about the proposed increase of the fixed scale of costs for obtaining default judgment to $10,000 for legally represented plaintiffs, and suggests the following –	The Steering Committee has adopted the Law Society's suggestion of setting the amount of fixed costs for obtaining default judgment at $10,000. It is a well-established principle that solicitors should not ask for costs beyond what they charge

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	(a) a more realistic fixed fee of $5,000 be set so that the indemnity principle will not be infringed; and (b) providing that the party may obtain a higher fixed fee of $10,000 by filing a certificate confirming that the amount of actual legal costs is not less than $10,000, or may apply to the court for taxed fee.	their clients. If the costs for obtaining a default judgment is less than $10,000 in any particular case, the solicitor should bring to the court's attention for a lesser amount. The court is already empowered under O.62, r.32(4) to make an order alternative to the provisions of 2nd Schedule.
Part 23 - Judicial review		
Order 53 - Applications for judicial review		
25.	HKBA Generally satisfied with the proposed changes having regard to the assurance of the Steering Committee that the relevant rules would be applied consistently.	Noted.
26.	Prof. Swati Jhaveri, Assistant Professor, School of Law, The Chinese University of Hong Kong The definition of the scope of judicial review proceedings under O.53, r.1A may not necessarily achieve the objective of reducing the scope for argument as to whether the conduct challenged is related to "public function" and amenable to judicial review.	The proposed amendments to O.53, r.1A are intended to define the scope of judicial review and the remedies available in simpler and more accessible terms.
27.	Prof. Eric CHEUNG, HKU Expresses reservation about the requirement under the proposed new O.53, r.2B that an applicant for judicial review has to serve the notice of application for leave on the proposed respondent and other interested parties, as it will result in unnecessary costs and delay in ordinary cases. Suggests that either the new O.53, r.3A (providing that neither the respondent nor any other person served with an	The Steering Committee accepts that in some cases, the procedural changes proposed for the service of the application for leave 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.** See paper **CJRS 4/2008**.

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	application for leave to apply for judicial review may apply to set aside an order granting leave to make the application) be deleted, or provisions should be made to allow applications for setting aside the order under exceptional circumstances, such as material non-disclosure in the leave application.	

Judiciary Administration
March 2008

Annex

Written Submissions from Organizations/Individuals

	Organization/Individual	LC Paper No.
1.	Hong Kong Bar Association	CB(2)1195/07-08(01)
2.	The Law Society of Hong Kong	CB(2)1225/07-08(01)
3.	Prof. Eric CHEUNG, Assistant Professor, Faculty of Law, University of Hong Kong	CB(2)1255/07-08(01)
4.	Mr Gary Meggitt, Teaching Consultant, Faculty of Law, University of Hong Kong	CB(2)1265/07-08(01)
5.	Hong Kong Law Costs Draftsmen Association	CB(2)1225/07-08(02)
6.	Consumer Council	CB(2)1327/07-08(01)