

**Comments of the Bar on the Interim Report and
Consultation Paper on Family Procedure Rules**

1. Initially, the Bar (“we”) welcomes the concept of streamlining procedures in all areas of family law under a unified set of Rules with the object of removing, where practical and sensible, inconsistencies, which arise between the various Rules/Statutes presently governing such procedures. Indeed, removal of inconsistencies between English and Chinese terms is important together with modernization of language as considered by Proposal 131 of the Report. We urge the Administration to pursue the proposals put forward with all due expediency.

2. We note that the Working Party have been required to refrain from examining or making any proposal to change the substantive law on family and matrimonial matters. Save for comments regarding discovery mentioned below, we follow suit.

3. We note that the Working Party has recommended in many of its proposals that the provisions of the English FPR 2010 be followed. We agree with this approach and commend the benefits of researching the experience achieved by England and other Common Law jurisdictions in this regard, particularly in those areas where the Working Party’s proposals recommend further research.

4. In the main, we agree with the many proposals of the Working Party and will thus limit our comments to those proposals where review is sought or we do not condone the relevant proposal as follows:
 - (i) Proposal 22 – Pre-action Protocol

It is our understanding that Common Law jurisdictions such as Australia and New

Zealand, have experienced problems with pre-action protocol as has been introduced. As a whole, we echo the objections mentioned in para. 110 of the Report as to loading of costs and delays caused thereby and would recommend further research in this regard. A party in urgent need of relief should not be barred from the Court by pre-action protocol ... in the discretion of the Court, mediation may be required or urged on the parties when proceedings are extant.

(ii) Proposal 29 – Service of Documents

We recommend the somewhat conservative views of Australia and New Zealand expressed in paras. 165.4 and 165.5 in this regard. Dissolution of the marital status is a matter of considerable import and we strongly recommend that the Court should be properly satisfied that such originating proceedings have been brought to the attention of the Respondent party. With respect, registered post is not by any means full-proof evidence of service and the Court should maintain the duty to make appropriate orders, in such circumstances as prevail, to satisfy itself that proper service has been achieved. As such we do not recommend that the provision for service in matrimonial causes be brought into line with the provisions of RHC and the RDC.

(iii) Proposal 30 – Service by Facsimile or Electronic Mail

We have considerable reservations as to the appropriateness of service of documents by fax, document exchange or e-mail in matrimonial causes. Preservation of privacy and confidentiality is vital in family proceedings, which involve not only intimate details of parties themselves and children but also full and frank information as to parties' financial standing. Fax is open to be seen by anyone in the vicinity of the receiving machine ... plunder of e-mail information is common-place. We certainly agree that any document

of originating process or judgment summons should be excluded but also have serious doubts as to the appropriateness of such service for other documents.

(iv) Proposal 35 – MCR Rule 6

Although it is apparent that the procedure empowered by Rule 6 MCR has rarely been invoked, we see little benefit in removing it until such time as the Legislature has formulated a comprehensive Statutory Code governing marital agreements. Hong Kong, following England, is far behind other jurisdictions in recognizing the rights of parties, subject to appropriate conditions, to regulate their own financial or other relationships. The recent decision of the CFA in SPH v SA formerly known as SA (FACV 22/2013) endorsing the guidance of the Supreme Court in Radmacher v Granatino [2010] 2 FLR/900, shows the increased interest in this area of the law and we consider that it is important that means should exist whereby parties may seek the approval or otherwise by the Court of proposed agreements – especially in situations where no proceedings are extant – for instance where no grounds under section 11A MCO exist.

(v) Proposal 37 – Citing Co-respondents

Initially we would comment that we assume this proposal is not intended to be limited only to “Co-respondents” but should apply to “2nd Respondents” as well.

With respect, we are somewhat skeptical of the FPR 2010 provision that “the other party should not be named unless the applicant believes that the other party to the marriage is likely to object to the making of a matrimonial order”. Perhaps further enquiry of the profession’s experience in England in this regard would be beneficial. We maintain that it is important that a party against whom an allegation of adultery or improper association

is made should be given an opportunity to deny it. Such an allegation may have important repercussions even of a criminal nature, and, further, failure to notify the person accused may result in costly procedural complications at a later date. Albeit, it is appreciated that the joining of the other party to the adultery or improper association causes inconvenience and cost, we believe the present rules in Hong Kong should be maintained. A possible solution may be to remove the requirement of naming the person with whom adultery is alleged and thus limiting the requirement of service to a later direction when such an offence is denied.

(vi) Proposal 104 – Discovery

We are concerned by the proposal that the Court be empowered “to order discovery against a third-party, who is not directly involved in the proceedings” (para. 340 of the Report). Such a proposal is totally contrary to the guidance given in Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133, which prevails in other areas of the law. At present, a party is entitled to seek the issue of a subpoena against a non-party who may apply to set aside the same. We are not entirely clear what provisions the Working Party recommends should be contained in the self-contained set of procedural rules proposed by Proposal 103 in this regard, but consider that the general power apparently proposed in Proposal 104 exceeds appropriate limitations on the rights to discovery.

(vii) Proposal 112 – Costs

We note the recommendations of the Working Party that the current law and practice in regard to costs should be maintained. Any recommendation to the contrary goes to a change of the substantive law, which falls outside the scope of the Report, but we would

urge that further consideration be given to the statutory changes that have been instituted in England.

(viii) Proposal 113 – Judgment Summons

We are of the view that the concerns expressed by Lam JA (as he then was) in CYM v YML [2013] 1 HKLRD 701 are correct and that, if challenged, a Court in Hong Kong would clearly agree with the findings of the English Court of Appeal in Mubarak v Mubarak [2001] 1 FLR 698 – the present provisions relating to judgment summonses in MCR are inconsistent with Articles 10 and 11 of the Hong Kong Bill of Rights. In anticipation of such a finding, we recommend that steps should be taken swiftly to amend our Rules in line with those now contained in FPR 2010.

(ix) Proposal 125 – Address Within the Jurisdiction

We endorse the Working Committee’s recommendation that the existing O. 67 of the RHC/RDC should be incorporated into the New Code.

Dated the 26th day of July 2014



David Pilbrow S.C.

For and on behalf of the

Special Committee on Family Law