

Statute Law (Miscellaneous Provisions) Bill 2005

Views of the Hong Kong Bar Association

1. The Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 2005 has invited the Hong Kong Bar Association (“the Bar”) to express its views on five aspects of the said Bill.

(a) Division 4, Part 2 (Clauses 8-10)

2. Clauses 8 to 10 of the Bill are proposed amendments to transfer the chairmanship of a number of rules committee from the Chief Justice to the Chief Judge of the High Court.
3. The Bar observes that these amendments appear to be based upon undisclosed policy considerations. The Bar understands that part of the policy considerations are associated with the up-coming implementation of the civil justice reform programme of the Judiciary, which the Chief Justice has entrusted the Chief Judge of the High Court with carriage thereof. Since the Rules of the High Court Rules and the Rules of the District Court Rules are largely identical, it is understandable for the Chief Judge to head the 2 civil

rules committees of the High Court and the District Court.

4. The above considerations, however, are not capable of serving as justification for the chairmanship of the Chief Judge of the criminal procedure rules committee.

(b) Division 5, Part 2 (clauses 11-15)

5. Clauses 11 to 15 of the Bill are proposed amendments to transfer rule-making and related powers in the Matrimonial Causes Ordinance (Cap 179) from the Chief Justice to the Chief Judge of the High Court.
6. The Bar considers that since the rules made under the Matrimonial Causes Ordinance for the Court of First Instance and the Family Court (ie the District Court) are largely identical, it is reasonable to transfer rule-making and related powers in the Matrimonial Causes Ordinance from the Chief Justice to the Chief Judge.

(c) Division 8, Part 3 (clauses 37-38)

7. Clauses 37 to 38 of the Bill propose to amend sections 9 and 13 of the Costs in

Criminal Cases Ordinance (Cap 492) so that where a prosecutor or a defendant unsuccessfully applies to the Court of Appeal or Court of First Instance (“the Lower Court”) for a certificate under section 32 of the Court of Final Appeal Ordinance (“CFAO”), the relevant Lower Court to whom such application is made may order that costs be awarded to the prosecutor or the defendant.

8. The Bar opposes *any* legislative provision for an award of costs by the Lower Court upon an unsuccessful application for certification under section 32(2) of the CFAO, for the following reasons:

(a) The decision of the Lower Court in relation to the granting of a certificate is not a “final” decision. Under section 32(3) of the CFAO, where the Lower Court refuses to certify, the Court of Final Appeal “may so certify and grant leave to appeal”. Even if the Lower Court does grant a certificate, the Court of Final Appeal still has a residual discretion to refuse to grant leave to appeal (*Lau Suk Han & Anor v HKSAR* FAMC 5/1998). It is therefore unsatisfactory for the Lower Court to consider the question of costs when the substantive issue has yet to be finally determined;

(b) Whilst it is correct to say that there is at the moment no power for the Lower Court to determine the issue of costs on an unsuccessful section

32(2) application, one must also consider that there is a corresponding absence of such power upon a *successful* (and possibly unreasonably opposed) application. The absence of the power to consider costs at this stage regardless of the success of the application appears to be justified in light of (a) above;

- (c) The Court of Final Appeal has a wide and unfettered discretion to make awards of costs, “including costs in the courts below” under section 43 of the CFAO. This provision would be sufficient to cover costs unnecessarily incurred by any party as a result of unmeritorious applications in the Court of Final Appeal and in the Lower Court;
- (d) Since the section 32(2) application is merely the first step in the process of a criminal appeal to the Court of Final Appeal, the Bar is of the view that it would be more appropriate to for the question of costs to be determined by the Court of Final Appeal at the end of the this process when the substantive issue is finally determined; and
- (e) The application to the Lower Court for a section 32(2) certificate is necessary only if the applicant relies upon the “point of law of great and general importance” limb. Where counsel is of the view that there may be

a point of great and general importance that justifies consideration by the Court of Final Appeal, it would be unsatisfactory to burden the applicant (especially a criminal defendant) with the risk of having costs awarded against him by the Lower Court even before the issue is considered by the Court of Final Appeal.

(d) Part 4 (clause 122)

9. Clause 122 of the Bill proposes to amend the Judicial Officers Recommendation Commission Ordinance (Cap 92) in relation to the declaration of interest requirement.

10. The Bar supports this proposed amendment.

(e) Part 4 (clauses 124-175)

11. Clauses 124 to 175 of the Bill propose to amend a number of Ordinances in relation to professional qualifications of judges and judicial officers.

12. The Bar observes that the proposed amendments appear to be putting into legislative form appointment policy or practices of the Judiciary.

13. The Bar considers that Clause 134, which seeks to amend the Magistrates Ordinance (Cap 227) to add section 5AB(2)(b), should be re-drafted so that the wording of the phrase "...served in the grade of Court Prosecutor, Court Interpreter or Judicial Clerk in the Government" is re-considered. This is because the grades of Court Interpreter and Judicial Clerk are grades in the Judiciary but "Government" is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 to mean the HKSAR Government, ie the executive authorities of the HKSAR under the Basic Law of the HKSAR.

Dated 18th May 2005.

Hong Kong Bar Association