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Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

Background brief

Purpose

This paper gives an account of the past discussion of the Panel on Administration of Justice and Legal Services on the proposed legislative amendments for the implementation of the Civil Justice Reform (CJR).

Reform of the civil justice system

2. The civil justice system in Hong Kong as governed by the Rules of the High Court (RHC) (Cap. 4A) basically followed the English system in England and Wales before 1998. The RHC are substantially the same as the pre-1998 English Rules of Supreme Court. However, the civil justice system in England and Wales was completely revamped in 1998 as a result of the recommendations made by Lord Woolf after extensive studies into the former English system. The English Rules of Supreme Court has since been replaced by the Civil Procedure Rules 1998 (CPR).

3. In February 2000, the Chief Justice appointed a Working Party to review the rules and procedures of the High Court in civil proceedings and to recommend changes thereto, with a view to ensuring and improving access to justice at reasonable cost and speed.

4. In November 2001, the Working Party published an Interim Report and Consultative Paper containing recommendations on changes to the civil justice system for consultation. The Working Party had identified the following problems with the Hong Kong civil justice system –

- (a) it was too expensive as legal costs sometimes outweighed the size of claims;
- (b) it took too long to resolve claims;
- (c) the procedure was too complex; and

- (d) the number of unrepresented litigants had increased significantly.

5. The Working Party submitted its Final Report, with a total of 150 recommendations, to the Chief Justice in March 2004. The Chief Justice in the same month accepted the Working Party's Final Report and set up a Steering Committee on CJR (Steering Committee) to oversee the implementation of the recommendations therein. The Chief Justice subsequently decided that the proposed changes should be implemented not just in the High Court (which comprises the Court of Appeal and Court of First Instance), but also in the District Court and the Lands Tribunal, where such changes were appropriate.

6. After the Steering Committee had decided on a package of proposed legislative amendments, it published a "Consultation Paper on Proposed Legislative Amendments for the implementation of the CJR" in April 2006 for a three-month consultation ending in July 2006. The Steering Committee had identified that, of the 150 recommendations in the Final Report, 21 required amendments to primary legislation, and 84 required amendments to subsidiary legislation. The Steering Committee had also identified the legislative amendments required for the extension of the CJR recommendations to the District Court, the Lands Tribunal and in employees' compensation proceedings.

Consultation with the Panel

7. The Judiciary Administration briefed the Panel on the proposed legislative amendments in the Consultation Paper at the meeting on 26 June 2006, and the outcome of the consultation exercise at the meeting on 12 December 2006. According to the Judiciary Administration, there was general support for most of the proposals in the Consultation Paper. The major issues discussed at the two Panel meetings are summarised below.

Major concerns raised by the legal professional bodies

8. At the Panel meeting on 12 December 2006, members were informed that the Steering Committee had held separate meetings with the Bar Association and the Law Society on the major concerns raised by the two legal professional bodies, which had largely been addressed after exchanges of views at those meetings. The major comments of the two legal professional bodies and the Steering Committee's responses in respect of the following issues are set out in paragraphs 5 to 17 of **Appendix I** -

- (a) wasted costs;
- (b) application of CJR to the District Court;
- (c) employees' compensation proceedings;
- (d) single joint expert; and

- (e) case management powers and docket system.

Objectives of CJR

9. Some members expressed concern as to whether the proposed reforms would achieve the objectives of improving cost-effectiveness of the civil justice system and reducing litigation costs, and requested the Judiciary Administration to make an assessment.

10. The Panel noted that the issue of reduction in litigation costs was mentioned in the Final Report. In deciding which reforms to recommend, the Working Party had taken into account the assessments on the impact of the CPR during the first 4½ years or so of their operation in England and Wales. The Working Party stated in the Final Report that *“from available assessments of the performance of the CPR, it appears that the CPR have been successful in some areas but disappointing in others..... However, there have been notable disappointments in relation to costs and complexity. There is also doubt as to whether greater equality between wealthy and less wealthy litigants has been achieved..... Of special concern has been the acknowledged failure, so far, to bring litigation costs down. Worse still, the problem of front-end loading of costs arising from introducing measures such as the pre-action protocols has actually led to an increase in costs in some cases.”* The Working Party also stated that *“one cannot be assured that a reduction of litigation costs will necessarily follow from such reforms alone. Other factors are equally important. However, by improving cost effectiveness, cutting delays and reducing complexity, such reforms should help to achieve overall cost reductions and to make the system more responsive to the needs of individual cases.”*

11. The Judiciary Administration advised the Panel that all the 150 recommendations in the Final Report were made with a view to achieving the objectives of the CJR, and the recommendations had been generally supported by those who responded in the consultation exercise, including the two legal professional bodies. The reforms had progressed to the implementation stage whereby the recommendations in the Final Report would be implemented through the legislative amendments proposed in the Consultation Paper.

12. Some members expressed concern that the measures introduced in the CPR such as pre-action protocols had actually led to an increase in litigation costs in some cases. They pointed out that pre-action protocols, if implemented in Hong Kong, would mean that judges could give direction after summons was served. In the circumstances, court proceedings would begin at a much earlier stage than otherwise and this would incur additional litigation costs. At present, summonses served could be set aside and sometimes resolved out of court.

13. The Judiciary Administration responded that unlike the United Kingdom (UK), pre-action protocols would not be prescribed for cases across the board in Hong Kong. The recommendations in the Final Report were inter-related and when implemented in its entirety, would enhance the cost effectiveness of the system of civil procedure.

Approach for implementing reforms to the civil justice system

14. The question of whether the CJR should be implemented by (a) adopting a new set of rules along the lines of the CPR or (b) amending the existing RHC was one of the issues put forward for consultation by the Working Party in 2001. The Working Party recommended in its Final Report that the RHC should be suitably amended, with some existing rules being retained and some rules of the CPR proven to be successful in the UK operation to be introduced in the RHC.

15. Some members expressed concern about such selective adoption of provisions of the CPR in Hong Kong. They pointed out that it would not be meaningful to make reference to the related case law if only certain provisions of the CPR were adopted in Hong Kong. Concern was also raised that if new rules were created or rules were modified from those of the CPR for use in the High Court, there would be no precedent case law in UK for Hong Kong to make reference to.

16. The Judiciary Administrator undertook to give a written response after the meeting. A relevant extract from the Judiciary Administrator's reply dated 22 March 2007 is in **Appendix II**.

Application of CJR to the District Court

17. Some members raised concern about the proposal to introduce similar amendments to the Rules of the District Court (RDC) (Cap. 336H) in the current legislative amendment exercise, as the consultation exercises conducted on the CJR in the past mainly focused on the review of civil rules and procedures of the High Court.

18. Representatives of the Bar Association attending the Panel meeting on 26 June 2006 expressed the view that a review of the RDC could be conducted after the new RHC had been introduced and operated for a period of time. Any amendments to the RDC should be considered separately and could be introduced in a separate legislative exercise.

19. The Judiciary Administration explained that when the District Court Ordinance was amended in 2000 to raise the financial limits of the civil jurisdiction of the District Court, it was decided that the provisions of the RDC should generally follow those in the RHC, unless special considerations justified differences. As the practice and procedure in civil proceedings in the District Court largely mirrored those in the High Court, the Chief Justice had directed in December 2005 that the legislative amendment exercise for the implementation of the CJR should apply to both the District Court and

the High Court. Since most of the 84 recommendations in the Final Report requiring amendments to subsidiary legislation under the High Court Ordinance were applicable to the District Court, similar amendments were proposed to the RDC to implement the relevant CJR recommendations and achieve consistency with the RHC. Moreover, the objectives of improving cost-effectiveness, cutting delays and reducing complexity applied equally to the District Court.

Legislative amendment exercise

20. The Judiciary Administration advised the Panel that the Civil Justice (Miscellaneous Amendments) Bill 2007, to be introduced into the Legislative Council, covered proposed amendments to six Ordinances, namely, the High Court Ordinance (Cap. 4), the Lands Tribunal Ordinance (Cap. 17), the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), the District Court Ordinance (Cap. 336), the Small Claims Tribunal Ordinance (Cap. 338), and the Arbitration Ordinance (Cap. 341).

21. Apart from the proposed amendments to primary legislation as contained in the Bill, the implementation of the CJR would also require amendments to three sets of subsidiary legislation, *viz.* the RHC, the RDC, and the Lands Tribunal Rules (Cap. 17A) (key features of which are described in Annex B to the Legislative Council Brief on the Bill issued to Members on 28 March 2007). The proposed amendments to subsidiary legislation would be made after the passage of the Bill, and would be submitted to the Legislative Council for approval by negative vetting.

22. Representatives of the Bar Association attending the Panel meetings on 26 June and 12 December 2006 expressed concern that the Consultation Paper on proposed legislative amendments only set out the proposed legislative amendments to the relevant primary and subsidiary legislation. To evaluate the effect of implementing the recommendations in the Final Report, it was necessary to consider the yet to be promulgated Practice Directions and pre-action protocols, in addition to the proposed legislative amendments, as an integrated package. In response, the Judiciary Administration agreed to consult the two legal professional bodies on the drafts of the Practice Directions before their promulgation.

Relevant papers

23. A list of relevant papers available on the LegCo website is in **Appendix III**.

**Legislative Council Panel on
Administration of Justice and Legal Services (“AJLS”)**

**Consultation Paper on Proposed Legislative Amendments
for the Implementation of the Civil Justice Reform**

Purpose

This paper informs Members of –

- (a) the outcome of the consultation exercise on the proposed legislative amendments for the implementation of the Civil Justice Reform (“CJR”); and
- (b) the way forward for the legislative amendment exercise to implement the recommendations in the CJR Final Report.

Background

2. On 12 April 2006, the Steering Committee on CJR (“the Steering Committee”) released the “Consultation Paper on Proposed Legislative Amendments for the Implementation of the CJR” (“the Consultation Paper”) for a 3-month consultation. At the AJLS Panel meeting on 26 June 2006, the Judiciary Administration briefed Members on the proposed legislative amendments therein. Members were informed, amongst other things, that -

- (a) Of the 150 recommendations in the CJR Final Report, 21 required amendments to primary legislation, and 84 required amendments to subsidiary legislation;
- (b) As the practice and procedure in civil proceedings in the District Court (“DC”) largely mirrored those in the High Court (“HC”), similar amendments were proposed to be introduced to the Rules of the District Court (“RDC”); and
- (c) The Steering Committee had proposed certain legislative amendments for the application of CJR to Lands Tribunal and Employees’ Compensation (“EC”) proceedings.

Present Position

3. The Steering Committee received 30 responses to the Consultation Paper, commenting mostly on technical and drafting details. There is general support to most of the proposals.

4. It is noted that the Bar Association and the Law Society, apart from giving support to most proposals and making comments on drafting matters, have raised some concerns about certain proposed amendments in their responses. The Steering Committee held separate meetings with representatives of the two legal professional bodies. After the useful exchanges at these meetings, the concerns of the two legal professional bodies have largely been addressed. In summary, the major comments of the two legal professional bodies and the Steering Committee's responses are set out below:

Comments from the Bar Association

Wasted Costs

5. The Bar Association accepts that it is right in principle for barristers to be made subject to liability for wasted costs. The comments relate to how this would work in practice and the possibility of abuse.

6. The Steering Committee has responded that there is already a useful body of case law that will assist the courts in this context. This, together with the provisions in the draft legislation, will provide adequate safeguards against possible abuse. At the invitation of the Steering Committee, the Bar Association submitted in mid-November proposed additional safeguards for incorporation in the draft legislation. The Steering Committee is considering the matter, and will revert to the Bar Association in due course.

Application of CJR to the DC

7. The Bar Association initially expressed concern that the wholesale application of CJR to the DC may not cater for the variety of cases and the predominance of unrepresented cases with low-end claims at the DC, and suggested that certain existing features in the RDC be retained.

8. The Steering Committee examined the Bar Association's comments and re-affirmed the importance of the application of the CJR to the DC –

- (a) The objectives of CJR are to improve the cost-effectiveness of our system, make it less complex and reduce delays, while keeping in mind the fundamental requirement of doing justice between the parties. These objectives and the case management powers under CJR are equally applicable to the DC;
- (b) It is also in line with the established policy for the practice and procedure in civil proceedings in the DC to follow those in the HC, save for special considerations justifying differences; and
- (c) It would therefore be highly undesirable if CJR were not to be extended to the DC, as this would result in having three separate systems of civil procedure, i.e. the CJR system in the HC, the non-CJR system in the DC, and the system appropriate for the Small Claims Tribunal. This would create confusion and practical difficulties for judges, court staff, legal practitioners and litigants alike.

9. The Judiciary is therefore strongly of the view that CJR should be applied to the DC, save for special considerations justifying differences. In line with this approach, the Steering Committee accepted a number of the Bar's comments and decided not to pursue certain proposed legislative changes for the DC. The Bar Association was informed of the revised proposals and made no further comments.

10. With the revised proposals, it is expected that the CJR reforms will make improvements in the DC, while at the same time allowing it to retain certain existing features to give the DC flexibility to deal with cases even more effectively and efficiently. The Steering Committee is pleased that the Bar Association appreciates this approach, and has made no further comments on the proposed application of CJR to the DC.

EC Proceedings

11. On the application of CJR to EC proceedings, the Bar Association commented that the Employees' Compensation (Rules of

Court) Rules are in need of a review to minimize the scope of potential incompatibility or conflict, and to avoid burdensome litigation trail as happened in a number of cases. Otherwise, the application of certain CJR recommendations to EC cases may produce uncertainty.

12. In view of the Bar Association's comments, the Steering Committee has decided not to pursue the introduction of the leave to appeal for EC proceedings at present.

Comments from the Law Society

Single Joint Expert ("SJE")

13. On this issue, whilst the Law Society has accepted that the appointment of an SJE in suitable cases would save costs, it is concerned that in the present draft of the proposed amendments to Order 38, (i) the Court does not have the power to appoint an SJE on its own motion; and (ii) the factors which the Court has to take into account in deciding whether or not to appoint an SJE are not spelt out.

14. Taking into consideration the Law Society's views, the Steering Committee will make further amendments to Order 38, so that (i) the Court will have the power to appoint an SJE on its own motion where appropriate; and (ii) the factors to be taken into account in deciding whether or not to appoint an SJE will be set out in the Rules.

Case Management Powers and Docket System

15. Whilst the Law Society supports the proposals on active case management, it has concerns about the application of such powers, the possibility of front-loaded costs, and the limited benefits without adopting a docket system.

16. The Steering Committee has explained that the proposals on case management powers aim to foster a new culture for the conduct of cases, so that at an earlier stage than is the case now, parties will have to be better prepared and be in a better position to know the other side's case; there will also be greater judicial control over proceedings. This may well mean more work at the early stages of a case than at present, but the whole process is expected to be more cost-efficient in the long run. While a docket system will not be adopted for managing cases across the

board, in appropriate cases, suitable listing arrangements will be made. As noted in the CJR Final Report, the existing specialist lists already operate very much along the objectives of a docket system, and applications may be made under Practice Direction 5.7 on “Long Cases” for cases to be given treatment similar to that under a docket system. These practices will continue.

Scale of Costs

17. In response to the Consultation Paper’s invitation for views on the scale of costs laid down in Order 62, the Law Society has made proposals, which suggest important changes with significant impact on solicitors and their clients. Given the wide implications of these proposals, the Steering Committee considers it desirable first for the Law Society to conduct wider consultation with all the relevant stakeholders concerned, for example, relevant Government Departments in the Administration, the Consumer Council, and the Legislative Council AJLS Panel. The Law Society undertook to further consider the issue.

Way Forward

18. The Steering Committee is refining the draft legislation in the light of the comments received. The High Court Rules Committee and the District Court Rules Committee will be consulted in due course. The Judiciary Administration will liaise with the Administration, with a view to introducing the necessary amendments into LegCo in the second half of the 2006-07 legislative session.

Judiciary Administration
December 2006

**Extract from the Judiciary Administrator's reply
dated 22 March 2007**

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Civil Justice Reform (paragraph 33 of minutes)

2. At the meeting on 12 December 2006, the Hon Martin Lee pointed out that if new rules were created or rules were modified from those of the Civil Procedural Rules (“CPR”) in England and Wales for use in the High Court to implement the Civil Justice Reform (“CJR”), there would be no precedent case law in the United Kingdom to which Hong Kong can make reference. The Judiciary Administrator indicated that she did not envisage the problem raised by the Hon Martin Lee, and undertook to give a written response.

3. The question of whether the CJR should be implemented by (i) adopting a new set of rules along the lines of the CPR or (ii) amending the existing Rules of the High Court (“RHC”) (Cap. 4A) was one of the matters put forward for consultation by the Working Party on CJR (“Working Party”) in its *Interim Report and Consultative Paper* published in November 2001. Having considered the responses received and the experience of the CPR, the Working Party had concluded in its *Final Report* that the proposed reforms should be implemented by way of amendment to the RHC rather than by adopting a new set of rules along the lines of the CPR, as this approach would be less disruptive and less demanding to the legal community as a whole.

4. In coming to the above conclusion, the Working Party had noted that this was the approach adopted by New South Wales, and taken into account the views of the two legal professional bodies. Specifically, the Bar Association had stressed the relative ease of mastering amendments over having to learn a whole new code. The Law Society considered that a new code was unnecessary, and that the reforms could and should be implemented by amending and supplementing the existing rules and where necessary re-interpreting existing rules.

5. The Working Party also noted that it was originally thought that with the CPR, it might be possible in most cases to do away with references to decided cases and rely instead on broadly formulated rules construed with the guidance of the overriding objective. Nevertheless, the experience in England and Wales had revealed that case law on the CPR has been developing.

6. In drawing up the proposed legislative amendments to implement the CJR, the Steering Committee on CJR has made reference to the relevant rules in the CPR, where appropriate, with necessary modifications to suit the local circumstances, having regard to the recommendations in the Working Party Final Report. With this approach, we believe that, upon the coming into effect of the new legislation for the implementation of CJR, appropriate reference may be made to the case law (whether pre-CJR or post-CJR) in England and Wales or the pre-existing RHC case law in Hong Kong, depending on their relevance, having regard to the provision in question in and the circumstances of the individual case. New case law on the new legislation will also be built up in Hong Kong.

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Civil Justice Reform

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Papers/Motion</u>
Panel on Administration of Justice and Legal Services	28 January 2002	<p>Interim Report and Consultative Paper on Civil Justice Reform published on 29 November 2001</p> <p>Minutes of meeting [LC Paper No. CB(2)1155/01-02]</p>
	14 March 2002	<p>Paper on "Civil Justice Reform – Interim Report and Consultative Paper ('IRCP')" prepared by the Legal Service Division [LS66/01-02]</p> <p>Speaking notes and submissions of deputations [LC Paper No. CB(2)1307/01-02(01)] <i>(English version only)</i></p> <p>[LC Paper No. CB(2)1307/01-02(02)] [LC Paper No. CB(2)1356/01-02(01)]</p> <p>[LC Paper Nos. 1374/01-02(01) and (02)] <i>(English version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)1622/01-02]</p>
Legislative Council	8 May 2002	<p>Official Record of Proceedings of the Council on the motion moved by Hon Margaret NG on "Civil Justice Reform"</p>
Panel on Administration of Justice and Legal Services	22 March 2004	<p>Final Report and Executive Summary on Civil Justice Reform published on 3 March 2004</p> <p>Paper provided by the Judiciary Administration on the implementation of the Civil Justice Reform [LC Paper No. CB(2)1811/03-04(01)]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Papers/Motion</u>
	26 June 2006	<p>Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform published in April 2006 <i>(English version only)</i></p> <p>Background Brief on Civil Justice Reform [LC Paper No. CB(2)2517/05-06(04)]</p> <p>Power point presentation materials provided by the Judiciary Administration on the Consultation Paper [LC Paper No. CB(2)2578/05-06(02)]</p> <p>Minutes of meeting [LC Paper No. CB(2)3001/05-06]</p>
	12 December 2006	<p>Background Brief on Civil Justice Reform [LC Paper No. CB(2)568/06-07(05)]</p> <p>Paper provided by the Judiciary Administration on "Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform" [LC Paper No. CB(2)568/06-07(06)]</p> <p>Minutes of meeting [LC Paper No. CB(2)889/06-07]</p>
	Issued on 23 March 2007	<p>Judiciary Administration's response dated 22 March 2007 to issues raised at the meeting on 12 December 2006 [LC Paper No. CB(2)1414/06-07(01)]</p>