

**Bills Committee on
Civil Justice (Miscellaneous Amendments) Bill 2007**

Response to Submissions to Bills Committee

Serial No.	Issues Raised	Response
1.	<p>The Bar Association generally supported the Bill except in relation to the “wasted cost” provisions and asked that public funds be made available by the Administration to recompense a barrister costs in successfully defending a wasted costs order which is initiated on the Court’s own motion.</p> <p>(Submission on 6.6.2007)</p>	<ul style="list-style-type: none"> – A useful body of case law exists that will assist the courts in dealing with wasted costs orders. As stated in the Final Report of the CJR, the cases have stressed that the wasted costs jurisdiction should only be invoked and orders made in <i>clear cases</i> (cf. paras. 560 and 561). – Further, in line with the amendments to the Costs in Criminal Cases Ordinance (“CCCO”) (Cap. 492) in the Administration’s Statute Law (Miscellaneous Provisions) Bill 2007, the proposed wasted costs provisions in the Bill have specifically provided that, “<i>the interest that there be fearless advocacy under the adversarial system of justice</i>” should be one of the circumstances which the court should consider when it determines whether or not to make a wasted costs order.

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		<ul style="list-style-type: none"> <li data-bbox="1184 260 2042 475">– Our wasted costs provisions are modelled on those in England and Wales, which do not contain provisions for public funds to recompense a legal representative’s costs for successfully defending a wasted costs order. <li data-bbox="1184 523 2042 738">– In view of the above, the Administration does not 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.
2.	<p data-bbox="295 786 1162 906">The Bills Committee should examine Part 7 of the Bill in relation to wasted costs jurisdiction together with the relevant draft subsidiary legislation.</p> <p data-bbox="295 954 707 994">(Submission on 26.6.2007)</p>	<p data-bbox="1184 786 2042 1034">The relevant provisions in the Rules of the High Court (“RHC”) (Cap. 4A) are being revised in the light of comments on the Consultation Paper issued in April 2006. The revised draft RHC will be made available to the legal profession and parties concerned in due course.</p>
<p data-bbox="188 1129 696 1169"><u>The Law Society of Hong Kong</u></p>		
3.	<p data-bbox="295 1217 1162 1337">The proposed section 52A(5) of the High Court Ordinance (“HCO”) concerning “fearless advocacy” should be removed.</p> <p data-bbox="295 1385 707 1425">(Submission on 31.5.2007)</p>	<p data-bbox="1184 1217 2042 1425">The proposed section was included having regard to similar amendments proposed by the Administration to the CCCO (Cap. 492) in the Statute Law (Miscellaneous Provisions) Bill 2007. It is considered that there should be consistency in this regard for both</p>

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		<p>civil and criminal cases. The proposed section will help address the profession's concerns about the likely impact of the wasted costs provisions on their advocacy during proceedings.</p>
<p>4.</p>	<p>The Law Society supports the general principle of wasted costs orders against lawyers but the following should be addressed in the draft rule –</p> <ul style="list-style-type: none"> - Orders should only be made in exceptional circumstances - Orders should not be routine - O.62, r. 8 must clearly provide for a method of review or appeal of such orders - Wasted costs orders should not be regarded as one of the tools to enhance case management - The issue of the successful appellant's legal costs. <p>(Submission on 22.6.2007)</p>	<ul style="list-style-type: none"> – As provided for in the draft provisions in the Bill, wasted costs orders will only be made in circumstances where costs are incurred by a party as a result of – <ul style="list-style-type: none"> (a) an improper or unreasonable act or omission; or, (b) any undue delay or other misconduct or default, <p>on the part of any legal representative, whether personally or through an employee or agent of the legal representative.</p> – Wasted costs orders have not been, and are not intended to be, a tool to enhance case-management. – It would be made clear in the RHC that wasted costs orders should be subject to an unqualified right of appeal to the Court of Appeal.

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		– As regards the issue of a successful appellant’s costs in defending a wasted costs order made on the court’s own motion, the Administration’s position is the same as item 1 above.
5.	Rules on costs against non-parties must clearly provide standing and the procedures for a review or appeal by the non-party against such an order. (Submission on 22.6.2007)	The draft Rules are still being finalized. Amendments along the lines of the CPR 48.2 (as proposed to Order 15 in the Consultation Paper issued in April 2006) would be made to provide that, where the court is considering whether to make such an order, the person who is not a party to the proceedings must be joined as a party to the proceedings for the purposes of costs, and that person must be given an opportunity to attend a hearing at which the Court should consider the matter further.
<u>The Hong Kong Law Costs Draftsmen Association</u>		
6.	The proposed summary costs assessments and provisional taxations on paper without a hearing may operate adversely and oppressively to discourage even warranted applications, ensue extra time and costs of the parties and the Court, and ultimately defeat their supposed purposes. (Submissions on 11.6.2007 and 5.7.2007)	– The Association’s comments are mainly related to the proposed amendments to Orders 62 and 62A of RHC. As these comments were not raised in the Association’s response to the Consultation paper issued in April 2006, the Judiciary Administration has forwarded them to the Steering Committee for consideration.

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		<ul style="list-style-type: none">- The relevant provisions in the RHC are being revised. The revised draft RHC will be made available to the legal profession and parties concerned in due course. - It is noted that the Association's concern is mainly the changes related to the procedures for taxation. These are primarily targeted at the legal practitioners (mainly solicitors). There has not been opposition from them. In fact, experience has shown that increasingly more legal practitioners have invited the Court to do summary costs assessment.
7.	Relevant non-legislative documentation, practice directions, guidelines etc. are indispensable and must be scrutinized by the Legislature. (Submission on 5.7.2007)	All non-legislative documentation (e.g. practice directions and guidelines) for the implementation of CJR has to be subject to the final version of the Bill and the subsidiary legislation. The Steering Committee would work on them and consult the legal profession and relevant parties after the passage of the Bill and the Rules.

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<u>ADR Chambers (HK) Limited</u>		
8.	<p>The Government, the Judiciary, the DoJ and LegCo should take an active role in promoting mediation.</p> <p>(Submission on 5.6.2007)</p>	<ul style="list-style-type: none">- In 2007, the Chief Justice 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 facilitated. The Working Group will focus on measures that could be adopted <i>by the Judiciary</i> to facilitate the use of mediation for resolution of civil disputes. Seminars and training courses are organized for our judges to increase their awareness as to the benefits of using mediation as ADR. - The Judiciary has been working with the Administration, the legal profession and the mediation profession to facilitate the greater use of mediation. Over the past few years, the Judiciary has taken steps to promote voluntary mediation by (i) running the Mediation Coordinator's Office for family mediation in the Family Court; (ii) introducing a 2-year "<i>Pilot Scheme for Voluntary Mediation in relation to cases in the Construction and Arbitration List</i>" in 2006; and (iii) introducing a "<i>Pilot Scheme for Voluntary Mediation in Building Management Cases in the Lands</i>

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		<p><i>Tribunal</i>” which will take effect on 1.1.2008.</p> <ul style="list-style-type: none"><li data-bbox="1189 347 2040 767">- The DoJ is taking an active role in promoting mediation. It has been liaising with various stakeholders since 2006 as to how mediation may be further promoted in Hong Kong. With a view to raising awareness and promoting more extensive use of mediation, DoJ, jointly with other stakeholders, is organizing a mediation conference in November 2007 in which both overseas and Hong Kong experience in mediation will be shared and discussed.<li data-bbox="1189 823 2040 1374">- Mediation has been used by DoJ to resolve disputes arising from public works contracts and DoJ will consider the wider use of mediation in other types of civil dispute in which Government is a party. While mediation is not a panacea for all civil disputes, DoJ will consider and facilitate the use of mediation in appropriate cases concerning land compensation, personal injuries, property damages and commercial disputes. DoJ is organising training on mediation for its counsel. The training will include lectures and mock mediation sessions guided by experienced practitioners.

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		<ul style="list-style-type: none">- The Legal Aid Department completed a one-year Pilot Scheme on Legal Aid for Mediation in Matrimonial Cases in March 2006. Following evaluation of the Pilot Scheme, the Administration intends to establish mediation in legally-aided matrimonial cases as a permanent feature of the legal aid service and is working on the detailed features of the proposed permanent scheme.
9.	<p>Recommendation 143 must be implemented (either by Court Directions, changes of Rules or by legislation) and should form part of the package of Amendments of the Consultation paper.</p> <p>(Submission on 5.6.2007)</p>	<ul style="list-style-type: none">- As explained at the meeting on 11.6.2007, the Bill and the proposed amendments to subsidiary legislation cover only those recommendations in the Final Report which require amendments to primary and/or subsidiary legislation.- Relevant case law in England has since been considered. The courts in England have held that provisions in the Civil Procedure Rules (“CPR”) do provide the basis for costs sanction upon unreasonable refusal to attempt voluntary mediation as regulated by a pre-action protocol. The draft Rules in the Consultation Paper issued in April 2006 contain similar provisions modeled on the relevant CPR. Our view is that there will be sufficient jurisdictional basis for imposing costs sanction under the draft Rules as and when

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		voluntary mediation is regulated by Practice Directions or Directions issued by the Court.
<u>Mr W S Clarke</u>		
10.	Suggested that draft O.1A and 1B, O.35, r.3A, O.62, rr.8-8D would be appropriate to be examined together with the Bill. The draft Bill and the proposed subsidiary legislation are worthy of support. The extent to which [they] will change the existing system of civil procedure can best be seen by referring to the draft subsidiary legislation together with the Bill. (Submission on 3.7.2007)	The relevant provisions in the RHC are being revised in the light of all comments received. The revised draft RHC will be made available to the legal profession and parties concerned in due course.

**Administration Wing
Chief Secretary for Administration's Office**

Judiciary Administration

September 2007