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Criminal
 LP 3/00/10C Pt.27

BY FAX (21809928) AND BY HAND

17 March 2008

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PROPOSED AMENDMENTS TO "WASTED COSTS" PROVISIONS OF COSTS IN CRIMINAL CASES ORDINANCE

Thank you for your letter dated 28 February 2008 and the Administration's Information Paper prepared in response to views expressed by the Hong Kong Bar Association on the above subject dated 20 September 2007.

The Law Society's Criminal Law & Procedure Committee has reviewed the Administration's response but remains unconvinced of the need for introducing legislative amendments to the existing "wasted costs" provisions. The Committee reiterates that it does not support the legislative proposals put forward under Part 7 of the Bill for reasons stated in its previous two submissions dated 20 October 2006 and 30 May 2007 (copies of the 2 submissions enclosed).

Yours sincerely

Christine W. S. Chu
 Assistant Director of Practitioners Affairs

c.c.: Miss Betty Ma, clerk to Bills Committee
 Mr. Stephen Hung, Chairman of the Criminal Law & Procedure Committee

Encl.

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Secretary General
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Statute Law (Miscellaneous Provisions) Bill 2007 – Submissions on Part 4, 5, 6 & 7

The Society's Criminal Law & Procedure Committee has considered the legislative proposals put forward in Parts 4, 5, 6 and 7 of the Statute Law (Miscellaneous Provisions) Bill 2007, which relate to criminal law practice. Whilst the legislative proposals in Parts 4 and 6 are considered acceptable, there are concerns on the other 2 Parts of the Bill:-

Part 5 – Proposed Amendments to Criminal Procedure Ordinance (Cap.221) (“CPO”)

The Committee noted that Part 5 proposes to amend Section 101I of the CPO to remove the limit for the maximum period of imprisonment of seven years for the offence of perverting the course of public justice, and to provide for such an offence to be “*punishable by fine and imprisonment at the discretion of the court*”.

The Committee cannot comprehend the rationale for giving an unfettered discretion to the court to impose a discretionary sentence for this offence as the Explanatory Notes fail to provide any clarification on the matter. The Administration should clarify this and confirm the position in other jurisdictions.

Part 7 – Proposed Amendments to Costs in Criminal Cases Ordinance (Cap.492) (“CCCO”)

Ss.2 and 18 of the CCCO currently limit the court's jurisdiction to award wasted costs in criminal cases to occasions when legal or other representatives “*fail to appear or are late*”. The proposal in Part 7 will substantially expand the circumstances to impose wasted costs orders. Under the legislative proposal in Part 7, the court will be able to make a wasted costs order against a legal or other representative for costs incurred by a party to the criminal proceedings as a result of “*the improper act or omission, or undue delay or any other misconduct or default*” on the part of the legal or other representative.

Both the Bar and the Law Society raised strong objections when the Administration first attempted to introduce wide wasted costs provisions for criminal proceedings under the Costs in Criminal Cases Bill in 1996 and reiterated their objections in response to a Consultation Paper issued by the Administration on the subject in 2006. We attach the submission made by the Law Society in 2006 for reference.

The Committee is concerned that instead of addressing the issues raised, the Administration now proposes only one amendment, namely, to include a new Section 18(3) to require the court to take into account the public interest in "*fearless advocacy*" as a factor when determining whether or not to make a wasted costs order.

The Committee does not think highlighting this as one of the many factors for the court to consider will resolve the many problems the two professional bodies have raised with the Administration's proposals. We agree with the Bar that civil proceedings and criminal proceedings are very different in nature and to expand the scope of the existing wasted costs provisions for criminal proceedings and make it similar to those applicable to civil proceedings will only bring with it undesirable consequences.

The Committee remains of the view that the proposed wasted costs provisions will result in more problems and difficulties rather than improve the administration of justice. As such, the Law Society cannot support the legislative proposal in Part 7.

**The Criminal Law & Procedure Committee
The Law Society of Hong Kong**

30 May 2007



Submissions on “Consultation Paper on Wasted Costs in Criminal Cases”

1. The Law Society’s Criminal Law & Procedure Committee has reviewed the proposal made by the Department of Justice in the Consultation Paper on Wasted Costs in Criminal cases. A proposal was made to amend Section 2 of the Costs in Criminal Cases Ordinance (Cap. 492) to provide that “wasted costs” means –

“any costs incurred by a party-

- (a) as a result of any improper or unreasonable act or omission; or*
- (b) any undue delay or any other misconduct or default,*
on the part of any representative or any employee of a representative; or
- (c) which in the light of any such act, omission, delay, misconduct or default occurring after they were incurred, the court considers it is unreasonable to expect that party to pay”*

2. The Committee noted that a similar proposal to introduce “wasted costs” provisions was made in 1996 and believes the grounds for objection to the 1996 proposal as outlined in paragraph 17 of the Consultation Paper are still valid. An additional concern is that under S. 18 of the CCC Ordinance, it is the very court or a judge in the criminal proceedings before whom the defence solicitors appear that will have the power to make the wasted costs order. Judges and defence solicitors have different roles to play and each judge will have his own idea of how a criminal case should be run. A defence solicitor, acting in the interests of the defendant, may have to conduct a case in a particular way which is objectionable to the judge concerned.
3. The power of a judge in the proceedings to impose wasted costs orders can have serious consequences on defence solicitors. Such order could put the reputation of a defence lawyer in jeopardy and much costs and time could be involved if the defence lawyer needs to defend himself in an appeal against the order. The risk of a wasted costs order will inevitably have an inhibitive effect on the mind of a defence lawyer and influence the way he runs his client’s case. If the

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**The Criminal Law & Procedure Committee
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30 May 2007