立法會
Legislative Council

立法會CB(2)1759/06-07(02)號文件

檔　號： CB2/BC/8/06

《2007年成文法(雜項規定)條例草案》

背景資料摘要

目的

本文件旨在提供有關《2007年成文法(雜項規定)條例草案》所納入下列建議的背景資料，並述明司法及法律事務委員會以往就該等建議所作的討論 ——

(a) 妨礙司法公正的刑罰 —— 有關《刑事訴訟程序條例》(第221章)第101I條的修訂建議；及

(b) 刑事法律程序中的虛耗訟費 —— 有關《刑事案件訟費條例》(第492章)第2條的修訂建議。

妨礙司法公正的刑罰

2. 在普通法中，妨礙司法公正是可公訴罪行。該罪行的刑罰受《刑事訴訟程序條例》(第221章)第101I條限制，即"任何人被裁定犯了一項可公訴罪行，而除此處外，並無任何條例訂定該罪的刑罰，則可處7年監禁及罰款"。

3. 在*律政司司長 訴 王國球*一案中，上訴法庭促請政府當局關注一個問題，就是妨礙司法公正罪行最高監禁7年的刑期上限訂得太低。為處理上訴法庭所表達的關注，政府當局於2006年5月就其提出的建議諮詢事務委員會。政府當局建議修訂《刑事訴訟程序條例》(第221章)第101I條，就妨礙司法公正罪行廢除最高監禁7年的刑期限制，並規定此類罪行可處罰款及監禁，罰款金額和監禁刑期由法庭酌情決定。政府當局就事務委員會該次會議提供的文件載於**附錄I**。

4. 事務委員會委員就下列事項表示關注 ——

(a) 只就妨礙司法公正罪行撤銷最高刑期限制，卻未有對嚴重程度可能相若的其他可公訴罪行作出同樣安排；

(b) 如沒有最高刑期限制，法庭所判處的刑期未必能保持一致；及

(c) 當局並無就該建議諮詢兩個法律專業團體。

5. 政府當局告知事務委員會 ——

(a) 法庭在判處監禁時，會參考案例及判刑指引。目前的問題，是法庭不能因應罪行的嚴重程度，判處較重刑罰；及

(b) 政府當局在提出修訂建議時，已研究過其他普通法司法管轄區的情況。在英格蘭，有關罪行可判處罰款及監禁，由法庭酌情決定，監禁刑期並無限制。

6. 事務委員會要求政府當局提供以下資料，供議員參閱：在其他普通法司法管轄區，妨礙司法公正罪行的最高刑期限制、法院所判的刑期及有關案例。政府當局其後在供2006年11月27日事務委員會會議討論《2007年成文法(雜項規定)條例草案》的資料文件中第25至31段提供有關資料。

虛耗訟費

民事法律程序中的虛耗訟費

7. 現時，如訟費是不當地或在無合理因由的情況下招致，或因不當延誤或任何其他不當行為或過失被浪費掉，則法庭有司法管轄權可針對律師作出虛耗訟費命令。《高等法院規則》第62號命令第8條規則的文本載於**附錄II**。

8. 《民事司法制度改革最後報告書》建議擴大法庭處分律師虛耗訟費的權力，使法庭也可頒令由大律師承擔虛耗的訟費。《2007年民事司法制度(雜項規定)條例草案》旨在實施《最後報告書》的建議，並已於2007年4月25日提交立法會。

刑事法律程序中的虛耗訟費

於1995年提交的條例草案

9. 《刑事案件訟費條例草案》於1995年11月2日提交立法會。條例草案第18條賦權法庭命令法律或其他代表支付刑事訴訟中的一方所招致的虛耗訟費。條例草案第2條把虛耗訟費界定為因刑事法律程序中的一方的法律或其他代表的不當、不合理或疏忽的作為或不作為而招致的，或鑒於該等訟費招致後發生的該等作為或不作為，期望由法律程序中該方支付該等訟費是不合理的。

10. 香港大律師公會及香港律師會反對虛耗訟費條文。最後，為研究條例草案而成立的法案委員會，以大多數決定由法案委員會動議委員會審議階段修正案，把虛耗訟費條文刪除。委員可參閱**附錄III**所載法案委員會於1996年4月19日向內務委員會提交的報告摘錄，以瞭解法案委員會有關虛耗訟費條文的商議詳情。

11. 其後，政府當局建議在條例草案納入英格蘭上訴法院 *Ridehalgh v Horsefield and Others* [1994]3 All ER 848一案所訂規管虛耗訟費的原則。這會限制虛耗訟費條文的適用範圍，因為除在缺席、遲到或疏忽導致本可避免的延期的簡單案件中，不應展開任何有關虛耗訟費的研訊。經進一步商議後，政府當局最後同意從Ridehalgh原則中刪除"疏忽"元素。經修訂後，條例草案於1996年6月26日獲得通過。

現行法例

12. 《刑事案件訟費條例》(第492章)第18條規定，法官可命令有關法律代表或其他代表負擔任何虛耗訟費的支付。該條例第2條就"虛耗訟費"作出界定。法院只可在法律代表或其他代表缺席或遲到的情況下，才可行使判給虛耗訟費的司法管轄權。

《2007年成文法(雜項規定)條例草案》中的擬議虛耗訟費條文

13. 當局於2006年11月27日的會議上，向事務委員會簡介旨在對多條條例及附屬法例作出改善的《2007年成文法(雜項規定)條例草案》。條例草案的建議之一，是修訂《刑事案件訟費條例》(第492章)第2條，讓法院可就適當的案件，要求涉訟一方的法律或其他代表，向因其不合情理的行為而遭受損害的一方作出訟費方面的補償。

14. 政府當局告知事務委員會，香港大律師公會及香港律師會反對該建議，並重申他們就立法會於1996年考慮虛耗訟費條文時所表達的關注。

15. 出席會議的香港大律師公會代表提出下列意見 ——

(a) 大律師公會認為，《民事司法制度改革最後報告書》就民事訴訟程序中的虛耗訟費提出的建議，不應擴及刑事訴訟程序(請參閱上文第7至8段)。該兩制度並不類同，而民事與刑事的司法管轄權亦有顯著分別；

(b) 上訴法庭在批准刑事上訴許可方面相當嚴格。部分大律師關注到，在面對虛耗訟費命令的威脅下，法律代表可能會有所掣肘，無法用他們認為最符合當事人利益的方式，無顧忌地提出上訴理由；及

(c) 在虛耗訟費命令下，私人執業律師須承擔支付訟費的個人法律責任，而政府律師的訟費則由公帑支付。兩者的待遇不同，因而造成不公平的情況。

大律師公會就刑事案件中的虛耗訟費向律政司提交的意見書已送交事務委員會(**附錄IV**)。

16. 政府當局解釋，該建議是按照上訴法庭的建議而提出的。該建議旨在防止出現上訴法庭在有關判詞中所認定的極差劣訟辯工作這個目的，與維持對辯式刑事司法制度的優點，即律師能暢所欲言，無畏無懼地進行訟辯，這兩者之間須確保能取得平衡。為解決法律專業的關注事項，政府當局建議加入條文，要求法院在裁定是否針對某法律代表發出虛耗訟費命令時，須考慮律師能無顧忌地進行訟辯工作這公眾利益因素。大律師公會表示會在看到新訂條文的實際措辭後才表達意見。

17. 委員的主要意見現綜述如下 ——

(a) 作為法律代表，不論是律師、大律師或政府僱用律師，均應就虛耗訟費承擔相同法律責任；及

(b) 法庭認為法律代表"訟辯工作極差劣"而作出虛耗訟費命令的決定可以是主觀判斷。在缺乏任何客觀準則下，虛耗訟費命令可被誤用，對法律代表造成不公。

18. 政府當局的回應現綜述如下 ——

(a) 政府律師受所屬專業團體的實務守則所規限，亦受到對私人執業律師同樣適用甚至更嚴厲的制裁所約束。政府亦可因其不合情理的行為向其提出紀律聆訊。此外，《公共財政條例》(第2章)第32條規定，公職人員如不當地承付開支或須對公帑的損失負責，財政司司長可向其徵收附加費；

(b) 虛耗訟費命令是針對在刑事訴訟中"訟辯工作極差劣"的律師而發出。預期此類命令的數量不多；及

(c) 法官曾是執業律師，他們會審慎行使作出虛耗訟費命令的權力。法官亦可參考上訴法庭有關判詞所認定屬"極差劣訟辯工作"的個案。

有關文件

19. **附錄V**載有相關文件一覽表，該等文件可於立法會網站閱覽。

立法會秘書處
議會事務部2
2007年5月22日

2006年5月22日會議

討論文件

立法會司法及法律事務委員會

檢討妨礙司法公正罪的刑罰

問題

在*律政司司長 訴 王國球*[2004] 3 HKLRD 208案中，上訴法庭促請政府關注以下問題(見判詞第44段)－

> "[妨礙司法公正的]最高判刑上限[即監禁7年]訂得太低。值得注意的是，在英格蘭及威爾斯，判刑者在判刑時，有權酌情就案情判處恰當的刑罰，不受任何約束。"

2. 在*王國球*案中，原訟法庭判處被告人監禁7年。這判刑是販運危險藥物罪的原本量刑起點(即21年)的三分之一。由於被告人認罪，他獲法庭給予標準的三分一刑期減免。

3. 不過，由於被告人作出減刑的申辯，他獲法庭另外給予三分一刑期減免。其後，他的減刑申辯卻被發現是虛假的。被告人與一名警長及其他人串謀妨礙司法公正，假裝進行一宗危險藥物交易，並導致警方獲得有關該宗交易的資料，讓被告人藉此向法庭求情，結果在審訊後獲給予減刑。

4. 被告人被原訟法庭裁定串謀妨礙司法公正罪名成立，被判入獄4年8個月。另外，上訴法庭撤銷被告人因干犯危險藥物罪名而被判入獄7年的刑罰，改判他入獄14年。上訴法庭認爲，"若非答辯人自己蓄意欺騙法官，他應已被判入獄14年"(判詞第42段)。法庭下令兩項刑罰分期執行，總體刑期爲18年8個月。

5. 上訴法庭又認爲(判詞第44段)－

"現實情況卻顯示，一些有影響力的罪犯是能夠深謀遠慮，藉以從身處的困境中脫身，情況令人驚訝。例如，他們能夠在警方同流合污的份子的協助下，捏造虛假證據，令他們在爭訟案件中獲釋，出現這樣的情況，不難預見。根據現行法例，被告人若被裁定無罪釋放，便不可能令他重新受審。被告人如被裁定破壞司法公正或串謀破壞司法公正，最高可被判監禁 7 年。不過，這須視乎所指稱罪行的嚴重性而定。我們認爲，對於一名面臨如經定罪會被判處監禁 14 年或以上的被告人來說，這項判刑便不足以起阻嚇作用，這正是本覆核案件中的答辯人的情況。"

定義

6. 妨礙司法公正是普通法的可公訴罪行。該罪行指具有妨礙司法公正傾向及意圖的作爲、一連串作爲或行爲(Halsbury's Laws of England，第 11(1)冊(第四版再版)第 315 段)。

7. 妨礙司法公正的例子，包括中止刑事檢控，以換取報酬；向某人提出虛假指控；向調查刑事罪行的警務人員提供虛假陳述；作出某項作爲，刻意協助另一人逃避追捕；不當地干擾證人；證人故意不出席聆訊，以換取報酬；提供捏造的證據；發布文章，刻意妨礙司法公正；不當地中止檢控；使原本可能得以提出檢控的法定程序受挫。

英格蘭的刑罰

8. 在英格蘭，有關罪行可判處罰款及監禁，由法庭酌情決定。由於普通法的可公訴罪行是沒有訂明任何特別的罰則，可判處的監禁刑期是沒有限制的(Halsbury's Laws of England，第 315 及 1200 段)。

9. 法庭量刑的準則，視乎罪行的嚴重性而定。舉例說，法庭曾裁定一名前警務人員串謀妨礙司法公正罪名成立，並以監禁 9 年爲適當的量刑起點(Halsbury's Laws of England，第 315、1200 及 1201 段)。

10. 就僞證罪及其他與妨礙司法公正相關的罪行而言，在作出適當的量刑等級時須考慮的因素包括，(1)遭破壞的訴訟是民事，還是刑事性質；(2)所犯罪行的數目；(3)所犯罪行持續的時間；(4)有關罪行是有計劃，還是在偶然情況下干犯；(5)有關罪行是否持續干犯；(6)所作出的謊言(或

其他作爲)對訴訟是否造成影響；(7)被告人有否把其他人牽涉入其活動中；及(8)被告人與牽涉入該行爲的其他人的關係性質(Halsbury's Laws of England，第 299 及 315 段)。

香港的刑罰

11. 妨礙司法公正的刑罰受到《刑事訴訟程序條例》(第 221 章)第 101I(1)條所限制，即"任何人被裁定犯了一項可公訴罪行，而除此處外，並無任何條例訂定該罪的刑罰，則可處監禁 7 年及罰款"。

12. 根據《刑事訴訟程序條例》第 101I(1)條的現行規定，如果有人就*王國球這樣嚴重*的案件提出爭議，並提供虛假證據令被告人被裁定販賣危險藥物罪名不成立，則上訴法庭最多只可判處被告人監禁 7 年，而不是在所有情況下，法庭可按被告人所犯的欺詐罪行(以獲法庭裁定罪名不成立)的嚴重程度，判處被告人妨礙司法公正罪名別的刑期，例如監禁 18 年 8 個月。

建議

13. 鑑於上訴法庭對這類最嚴重罪行的量刑問題表示關注，我們建議修訂《刑事訴訟程序條例》第 101I 條，規定凡作出有妨礙司法公正傾向或意圖的行爲，即屬犯罪，違反普通法而可被判處罰款及監禁，罰款金額和監禁刑期則由法庭酌情決定。

14. 雖然最終會成爲條例草案的文本定稿仍有待法律草擬專員審批，但按上述建議修訂後的第 101I(1)條暫定如下(修訂部分以粗斜體顯示)：

"	(1)	在不抵觸第(2)***及(3)款***的條文下，任何人被裁定犯了一項可公訴罪行，而除此處外，並無任何條例訂定該罪的刑罰，則可處監禁 7 年及罰款。
	(2)	[關於煽惑他人犯某罪項的條文]；

	(3)	*任何人被裁定犯了普通法的妨礙司法公正罪，可被判處監禁及罰款，監禁刑期及罰款金額由法庭酌情決定。”*

律政司

法律政策科

2006 年 5 月 8 日

#325701

附錄 II

8. 律師就訟費而須負的個人法律責任
(第62號命令第8條規則)

(1) 除本條規則以下條文另有規定外，凡在任何法律程序中，訟費是不當地或在無合理因由的情況下招致，或因不當延遲或任何其他不當行爲或過失而被浪費掉，則法庭可針對任何其認爲須個人負責或透過一名僱用人或代理人而須負責的律師，作出命令—

(a) 不准予該律師與其當事人之間的訟費；並
(b) 指示該律師須向其當事人償還其當事人被命令付給該等法律程序的其他各方的訟費；或
(c) 指示該律師須個人就該等其他各方所須支付的訟費向有關各方作出彌償。

(2) 除非一名律師曾獲給予合理機會，在法庭席前出庭提出不應根據本條規則作出任何命令的因由，否則不得根據本條規則針對該名律師作出任何命令，但如有任何在法庭或內庭的法律程序，基於下列原因而未能方便進行，以及進行不果或在沒有取得有用進展的情況下押後，則屬例外—

(a) 由於該名律師沒有親自或由恰當的代表代表他出庭；或
(b) 由於該名律師沒有交付任何原應交付供法庭使用的文件，或並無備有任何恰當的證據或帳目，或在其他情況下沒有進行法律程序。

(3) 法庭如認爲適合，可在根據本條規則作出任何命令前，將有關事宜轉交一名訟費評定官作查訊及報告，並指示該名律師須首先在該名訟費評定官席前提出反對的因由(但如有關事宜爲命令或判決的草擬或任何根據命令或判決進行的法律程序有不當延遲，並已由司法常務官報告法庭，則屬例外)。
(4) 法庭如認爲適合，可指示或授權法定代表律師出席及參與任何根據本條規則進行的法律程序或查訊，並可就法定代表律師訟費的支付作出其認爲適合的命令。(1991年第375號法律公告)
(5) 法庭可指示關於根據本條規則針對一名律師所進行的任何法律程序或所作出的任何命令的通知書，須以指示所指明的方式發給該名律師的當事人。
(6) 凡在任何在訟費評定官席前的法律程序中，代表任何一方的律師有疏忽或延遲之咎，或令任何另一方須就該等法律程序承擔任何不必要的開支，訟費評定官可指示該名律師須個人向該等法律程序的任何一方支付訟費；又凡任何律師沒有在本命令或根據本命令所定的時限內，將其訟費單[連同本命令所規定的文件]留交作訟費評定之用，或以其他方式延遲或妨礙訟費評定，除非訟費評定官另有指示，否則不得准予該名律師收取他本有權因草擬其訟費單及出席訟費評定程序而收取的費用。
(7) 凡任何訟費須從非屬由立法局依據《法律援助條例》(第91章)第27條提供的款項的任何款項撥付，而在進行訟費評定時，某律師的訟費單上的款額有六分之一或多於六分之一經評定而被減去，則不得准予該律師收取他本有權因草擬該訟費單及出庭訟費評定程序而收取的費用。
(8) 在任何法律程序中，如須支付由任何關於法院費用的成文法則訂明的費用的一方是由一名律師代表，則如根據該成文法則須予支付的費用或其任何部分未有按該成文法則所訂明的方式支付，法庭可應法定代表律師藉傳票提出的申請，命令該名律師個人按如此訂明的方式支付該筆款項，並支付法定代表律師提出該申請的訟費。(1991年第375號法律公告)

摘錄

檔號：CB2/BC/6/95

一九九六年四月十九日
內務委員會會議文件

刑事案件訟費條例草案
審議委員會報告

目的

本文件旨在匯報刑事案件訟費條例草案審議委員會的商議過程，並請求議員支持在一九九六年五月一日恢復條例草案的二讀辯論。

條例草案

2. 律政司在一九九一年曾成立刑事訴訟案件訟費工作小組(以下簡稱「工作小組」)，本條例草案是根據工作小組的建議而訂定的。工作小組由一名副刑事檢控專員出任主席，成員包括法律專業人士、法律改革委員會、法律援助署及庫務司的代表。

3. 本條草案大致上以(英國的)《1995年罪行檢控法令》(以下稱爲「英國的法令」)爲藍本，旨在除去現行規管在刑事案件中判給訟費的法例和做法中互相矛盾及不一致的地方，並訂出一套適用於各級刑事法院的明確準則，藉以改革該等法例和做法。此外，本條例草案訂定一項法例，以涵蓋法院在判定刑事法律程序中的被告人、檢控人、訴訟各方，以及其法律代表或其他代表繳付訟費方面所享權力的有關事宜。本條例草案提出的各項主要建議，載於法律事務部在一九九五年十一月三日內務委員會會議上提交議員審議的報告(立法局95-96年度第LS20號文件)內。

條例草案審議委員會

4. 在一九九五年十一月三日內務委員會會議上，議員同意成立條例草案審議委員會，研究本條例草案。審議委員會的成員名單載於**附錄I**。

5. 審議委員會在主席何俊仁議員領導下，先後舉行七次會議，其中三次與當局進行蹉商。審議委員會並接見了香港大律師公會(以下簡稱「大律師公會」)及香港律師會(以下簡稱「律師會」)的代表。

審議委員會的商議過程

6. 審議委員會曾經討論的主要問題及關注事項現撮錄於下文各段。

<u>虛耗訟費</u>

7. 本條例草案中最備受爭議的是虛耗訟費條文。條例草案第18條授權法院命令法律代表或其他代表負擔刑事法律程序的某一方所招致的虛耗訟費。在草案第2條，虛耗訟費的定義是法律程序中一方因其法律代表或其他代表的不正當、不合理或疏忽的作爲或不作爲所招致的訟費，或法律程序中一方所招致的訟費，而有鑑於該等作爲或不作爲在該等訟費招致後發生，期望由該方支付該等訟費是不合理的。

8. 審議委員會察悉，對於大律師公會及律師會反對的虛耗訟費條文，工作小組並未提出任何建議。審議委員會並質疑，既然沒有任何證據顯示有眞正問題存在，需予解決，當局基於何等理據制訂該等條文。

9. 當局解釋，有關條文旨在保障獲判勝訴被告人的利益。當局認爲在原則上，即使條例草案第2條提及引致虛耗訟費的情況甚少發生，亦應賦權法庭作出虛耗訟費命令，此方爲正確和公平的做法。法庭如沒有此項權力，則在上述甚少發生的情況眞的出現時，便不能解決因此引起的不公正問題。目前，如刑事法律程序中的一方招致虛耗訟費，並無任何補救辦法。因此，在大多數情況下，虛耗訟費會由本身並無過錯的被告一方委託人承擔。如法律代表有不正當的行爲，則無論情況如何罕見，亦須尋求補救辦法。當局強調，草案第18(2)條規定，除非有關法律代表或其他代表已獲給予合理的機會在法院席前提出不應作出虛耗訟費命令的因由，否則不得作出該項命令；因此議員大可無需憂慮在法庭有意命令法律代表或其他代表繳付訟費時，他們的利益可能未獲足夠保障。此外，本條例草案亦就反對法庭所作虛耗訟費命令而提出上訴的途徑，作出規定。據當局表示，司法機構支持本條例草案，包括虛耗訟費條文。

10. 大律師公會對建議的虛耗訟費條文極有保留。該會特別關注大律師會顧慮在虛耗訟費方面負上個人法律責任，因而不盡全力爲委託人謀求利益，或履行其專業職責。現時，高級的紀錄法庭具固有的司法管轄權命令律師個人承擔訟費，但不能對大律師行使此項權力。如草案第18條獲得通過，則大律師在刑事法律程序中享有的豁免權應予撤消。審議委員會及律師會亦同樣關注此問題。

11. 當局提出的論點，是正如英國判例法所顯示，法律專業人士如能適當地進行工作，即毋須顧憂此方面的問題。此外，即使律師屬法院人員，而法院可行使固有的司法管轄權命令其繳付虛耗訟費，但現時並無跡象顯示專責訟務的律師由於顧慮在虛耗訟費方面須負上個人法律責任，而不盡全力爲委託人謀求利益，或履行專業職務。

12. 草案第18(3)條規定，如被命令繳付虛耗訟費的法律代表是政府聘用的律政人員(如檢察官或法律援助主任)，則該等訟費須由政府一般收入撥款支付。審議委員會及大律師公會關注此條文是否公平，因爲代表政府或法律援助受助被告人的私人執業律師須就虛耗訟費命令負上個人法律責任，而政府聘用的律師則毋須負此責任。

13. 當局解釋其政策如下，如公務員在執行職務期間引致無辜的當事人蒙受任何損失或損害，則政府會負責賠償。此項政策涵蓋政府律師在執行職務期間引致的虛耗訟費。如政府律師有不具充分理由的行爲，當局可對其進行紀律處分程序。如法院命令由律政署或法律援助署委託的私人執業訟務律師(不論是大律師或律師)個人繳付虛耗訟費，則該等命令須由有關的訟務律師而非政府負責，因爲該名律師只是提供服務者，而非根據僱用合約行事。英國方面亦有制訂相類的條文。

14. 大律師公會指出，英國方面的經驗顯示，虛耗訟費引發大量案件，而被命令繳付虛耗訟費的人必會就該項命令提出上訴。審議委員會察悉，由於當局未能提供英國自《1995年罪行檢控法令》第19A條生效以來作出虛耗訟費命令的統計數字，不能確定虛耗訟費命令有否在英國引發大量訴訟。判例法案例不多，未必表示該等案件甚少發生。

15. 經詳細及審慎研究制訂虛耗訟費條文的優點後，大部分議員對支持該等條文有所保留，理由如下：

(a) 雖然當局表示司法機構支持本條例草案，但並無明確證據顯示必須制訂此項規定；或有眞正問題存在，需予解決；或制訂該等條文後有關「問題」會迎刃而解。議員不能接受當局引用傳媒有關司法人員批評法律代表有不具充分理由的行爲的報道，以顯示問題的嚴重性，藉此作爲有需要立法的論據。他們認爲當局引述的該等報章報道未經查究，故有欠公道；

(b) 該等條文或會令法律代表在進行抗辯時受到掣肘，對被告人不利；

(c) 私人執業律師與政府律師所獲待遇不同，因而出現不公平的情況；

(d) 據議員所知，以往並無接獲就虛耗訟費而對律師或大律師作出的投訴。案件延期審訊通常是由法庭提出，而非應辯方或控方的要求；

(e) 當局察覺的問題，即被告人須繳付由其法律代表招致的虛耗訟費，可藉其他方法，例如進行紀律處分程序來處理。大律師公會執行委員會會處理任何關於大律師行爲不當的指控；如有關投訴由大法官提出，則須進行紀律研訊；

(f) 虛耗訟費條文可能被濫用。只因法例中訂有虛耗訟費條文，敗訴一方或會藉此要求其法律代表賠償可能蒙受的損失；及

(g) 如因法律程序中某一方或其法律代表的不必要或不恰當的作爲或不作爲而招致訟費，則法庭可根據草案第17條賦予的權力作出命令，將訟費判給另一方。此條文亦涵蓋任何因刑事法律程序中某一方不具充分理由的行爲而令另一方所招致的虛耗訟費。此外，根據現行法例，除訟務大律師可獲豁免被訴外，委託人有權就其法律代表的任何不正當行爲，提出法律訴訟。

16. 審議委員會因此提議當局刪除有關虛耗訟費的條文。有見及此，當局建議將在Ridehalgh訴Horsefield及其他 [1994]3 All ER 848一案中所闡明有關規管虛耗訟費的原則，納入日後根據草案第22條訂立的規則內。此舉會限制有關規定的適用範圍，只限於在極爲明顯的情況下，例如不出庭、遲到或疏忽而引致本可避免的延期聆訊，方可進行有關虛耗訟費的研訊。

17. 審議委員會在商議當局提出將Ridehalgh原則納入本條例草案的建議是否可行後，大部分議員認爲，儘管法例規定了在該等指明情況下援引虛耗訟費條文的準則，但最終須以法官的詮釋爲依歸。他們仍然認爲應刪除虛耗訟費條文，並強調首要的考慮因素，是大律師應可在全無限制或壓力的情況下處理案件，而議員建議刪除該等條文不應視作保護法律專業人士利益之舉。

18. 顏錦全議員表示支持訂定虛耗訟費條文及當局的建議，即將Ridehalgh原則納入本條例草案。

19. 審議委員會作出結論時，過半數議員表決通過由審議委員會動議委員會審議階段修正案，以刪除虛耗訟費條文。

LC Paper No. CB(2)557/06-07(01)

HONG KONG BAR ASSOCIATION'S VIEWS ON CONSULATION PAPER ON WASTED COSTS IN CRIMINAL CASES

Introduction

1. This consultation paper is a response to the Consultation Paper prepared by the Legal Policy Division of the Department of Justice dated August 2006, which deals with a proposal to amend the definition of "wasted costs" in the Costs in Criminal Cases Ordinance (Cap. 492) ("the CCC Ordinance"). That Consultation Paper was prepared in response to "strong statements" from the Court of Appeal and recommendations made by the Civil Justice Working Party ("CJWP") in S18 of the Civil Justice Reform Final Report ("CJR"). The Administration has now indicated that it considers it undesirable to treat wasted costs in civil and criminal proceedings differently and as a consequence wishes to bring the latter in line with the former.

2. Correspondence indicates a desire on the part of the Administration to include amendments to the CCC Ordinance in an omnibus bill to be promoted by the Department of Justice in early 2007. The Bar submits that the two regimes are not analogous and that no analysis has been undertaken of the wasted costs jurisdiction of the criminal courts by any body let alone a body as auspicious as the CJWP. Proper and timely consideration should be given to the introduction of any amendment to the CCC Ordinance regardless of whether it is intended to be on the same or on some other footing to that outlined in S18 of the CJR and which can be found in O62 r8(1) RHC.

Difference between the Civil and Criminal Jurisdictions

3. Civil procedural law is a separate, distinct branch of the law which exercises a pervasive influence over all the other branches of the law, except criminal law and procedure.[1] In the context of civil procedural law, "civil" is used in contradistinction to "criminal". The distinction between the civil and criminal judicial processes is manifested in many ways: each has its own structure, organization, administration and hierarchy of courts; its own procedure and practices, its own rules of court, its own modes and methods of processing its proceedings, its own rules regulating the place and mode of trial, its own method of adjudicating on and disposing of its proceedings and its own system of appeals. This is because the primary objective of civil procedure is remedial; to make good civil wrongs by compensation, restitution, satisfaction or restraint whereas the primary objective of criminal procedure is penal or punitive.

4. It follows from the above, that the historical basis for the development of the award of costs within each regime has been wholly different. The development of the issue of wasted costs, whilst bedded in the civil wasted costs regime has had a difficult infancy. This is not only because of the entirely different nature of the procedural regimes but also because of the entirely different nature of the role played by counsel.

5. All counsel acting as advocates have a tripartite duty; to their lay client; to the court and to the public. They have the duty to assist the court in the fair administration of justice and not knowingly to deceive or mislead the court. All counsel are bound to promote fearlessly and by all proper means their lay client's interests and to do so without regard to their own interests or to any consequences to themselves or other persons. In civil proceedings, counsel's duty is to succeed by whatever proper means are at his disposal subject to his duty to the court and the public[2]. In criminal proceedings, prosecuting counsel should not regard himself as appearing for a party at all but as providing the means by which all facts are fairly

[1] Halsbury's Laws of England (4th Ed) Vol 37 para1
[2] Rondel v Worsley [1967] 1 A.C. 191; Arthur JS Hall & Co v Simmons [2002] 1 AC 615

and impartially placed before the court. His duty to the court and the public are paramount. Defence counsel, on the other hand, has a duty first and foremost to protect his client from conviction except by a competent tribunal and upon legally admissible evidence. His duty to the court and public are severely limited by the Code of Conduct and by the common law e.g. whilst the prosecution have a wide ranging duty of disclosure analogous to discovery in civil proceedings, the defence do not; the defendant has a right to silence which carries with it very many ethical responsibilities for defence counsel including the right to remain silent as counsel when the prosecution fail to adduce relevant evidence, mislead the court as to fact or misdirect the court on the law; prosecution counsel is expected to assist the court on all points of relevant law, defence counsel need only do so where it would be advantageous to his client which could result in the court entering judgment on a wholly erroneous basis.

6. Added to this, it should be borne in mind that the submissions of the Hong Kong Bar Association in respect of CJR were made for the purpose of civil justice reform and that purpose only. Whilst there may be some submissions which stand the test of either jurisdiction, they were never intended to address the entirely different nature of criminal proceedings and the different role played by counsel and solicitor advocate. This can be illustrated by a more in depth analysis of Ridehalgh v. Horsefield [1994] Ch 205 ,where the essential distinction between the principles to be applied in consideration of the application of civil and criminal wasted costs is all too apparent. At p224F Bingham M.R. makes these opening remarks, "*Our legal system, developed over many centuries, rests on the principle that the interests of justice are on the whole best served if parties in dispute, each represented by solicitors and counsel, take cases incapable of compromise to court for decision by an independent and neutral judge, before whom their relationship is essentially antagonistic: each is determined to win, and prepares and presents his case so as to defeat his opponent and achieve a favourable result. By the clash of competing evidence and argument, it is believed, the judge is best enabled to decide what happened, to formulate the*

relevant principles of law and to apply those principles to the facts of the case before him as he has found them.

7. It is from this historically civil approach that Bingham M.R. goes on to discuss the reasoning for the introduction of the wasted costs order. *"Experience has shown that certain safeguards are needed if this system is to function fairly and effectively in the interests of the parties to litigation and of the public at large."* Hence the need for protection on costs. But he goes on to say *"None of these safeguards is entirely straightforward, and only some of them need to be mentioned here. (1) Parties must be free to unburden themselves to their legal advisors without fearing that what they may say may provide ammunition for their opponent. To this end a cloak of confidence is thrown over communications between client and lawyer, usually removable only with the consent of the client. (2) The party who substantially loses the case is ordinarily obliged to pay the legal costs necessarily incurred by the winner. Thus hopeless claims and defences are discouraged, a willingness to compromise is induced and the winner keeps most of the fruits of victory ..... (3) The law imposes a duty on lawyers to exercise reasonable care and skill in conducting their client's affairs. This is a duty owed to and enforceable by the client, to protect him against loss caused by the lawyer's default. But it is not an absolute duty. Considerations of public policy have been held to require, and statute now confirms, that in relation to proceedings in court advocates should be accorded immunity from claims for negligence by their clients: Rondel v Worsley [1969] 1 A.C. 191; Saif Ali v Sydney Mitchell & Co [1980] A.C. 198; S62 of the Courts and Legal Services Act 1990. (4) If solicitors or barristers fail to observe the standards of conduct required by the Law Society or the General Council of the Bar (as the case may be) they become liable to disciplinary proceedings at the suit of their professional body and to a range of penalties which include fines, suspension from practice and expulsion from their profession. Procedures have changed over the years. The role of the courts (in the case of solicitors) and the Inns of Court (in the case of barristers) has in large measure been assumed by the professional bodies themselves. But the sanctions remain, not to compensate those who have suffered loss but to compel observance of prescribed standards of professional conduct. Additional powers exist to order barristers, solicitors and those in receipt of legal aid to forgo fees or remuneration otherwise earned. (5) Solicitors and barristers may in certain*

circumstances be ordered to compensate a party to litigation other than the client for whom they act for costs incurred by that party as a result of acts done or omitted by the solicitors or barristers in their conduct of the litigation."

8. Sub paragraph (1) refers to legal professional privilege and is applicable to both civil and criminal lawyers. One obvious difference, for the purposes of the instant debate, is that a convicted defendant is less likely to waive privilege if he can see the opportunity for appeal as a result of the apparent conflict between bench and the bar. This places counsel in a difficult situation where the frustration of the bench may easily be answered by an exposition of instructions. This jurisidiction should not be applicable to actions or omissions that may be as a direct consequence of those instructions and to the exercise of his professional judgment. Some consideration needs to be given to the type of situation this will cover[3].

9. Sub paragraph (2) refers to costs. The award of costs in criminal proceedings is wholly dissimilar to those of civil proceedings. More often than not it is not in issue as both parties are publicly funded. A successful defendant who has privately funded his defence is usually entitled to his costs. There is less of a tendency to make costs orders against convicted defendants. In both instances however there is a discretion to reduce or disallow costs in certain circumstances but in none of these instances would this approach affect the decision to prosecute and there is no evidence to suggest it affects the decision to defend. It must be remembered that fundamental to the defence of criminal proceedings is not simply whether the defendant is guilty of the offence but rather, whether the prosecution can prove it. In the civil jurisdiction the issue of costs is paramount from day one, in the criminal jurisdiction it normally only requires consideration after the disposal of the proceedings.

10. The law has moved on from Rondel v Worsley [1969] 1 A.C. 191 and is now, in the United Kingdom at least, covered by Arthur JS Hall & Co v Simmons [2002] 1 A.C. 615. The first part of sub paragraph (3) is correct.

[3] Harley v. McDonald [2001] 2 A.C.678

All counsel owe a duty to exercise reasonable care and skill in the conduct of their clients affairs both inside and outside court. As a consequence, any breach, from which the client suffers loss, is actionable in tort by the lay client. Consideration should be given to situations where the criminal court imposes a wasted costs order on Counsel made payable to the defendant and the possibility of a separate action in tort. Issues of finality of litigation should be considered as well as issues of the collateral challenge as an abuse of process[4]. To what extent could any application of the wasted costs jurisdiction be prayed in aid by an appellant?

11. Sub paragraph (4) refers to the disciplinary powers of the Bar Council. It is always open to the public, and to any member of the judiciary, to make a complaint against any Counsel. These are investigated and, where appropriate charges are laid and heard by the Bar Disciplinary Tribunal. Under S37 of the Legal Practitioners Ordinance (Cap 159) counsel can be censured, suspended, struck off, order to pay the complainant, or ordered to pay a penalty (to the revenue) of up to $500,000.00. The Bar Disciplinary Tribunal also has a discretion to make any other order which it thinks fit.

12. Sub paragraph (5) is a direct reference to the wasted costs regime where a "winning" barrister may nevertheless be required to compensate a "losing" party for wasted costs. Costs in civil proceedings provide an area of law on their own account. As costs usually follow the event, the whole idea of how much and to whom it is to be paid, is widely understood. The mechanisms for it are in place and well rehearsed. The only live issue is the "default" and the test to be applied. But in the criminal arena, costs have been a minor issue. Not well canvassed with very little case law, certainly not as to amount and definitely not as to the mechanism to be employed. At present there is a facility for any award of costs to be taxed if not agreed but this is rarely exercised simply because costs are awarded only rarely. Considerable thought must be placed on the mechanism to be introduced in this regard.

[4] Hunter v Chief Constable of the West Midlands Police [1982] A.C. 529; Arthur JS Hall & Co v Simmons supra

13. It can be seen from the above that, even before the recent shift in approach on professional immunity, there were, and continue to be, several safeguards in place to protect a party to litigation for loss incurred as a result of the acts or omissions of barristers or solicitors in the conduct of litigation. What must be understood is that the historical basis of this jurisdiction is civil. It was not until the advent of the Prosecution of Offences Act 1985, and subsequent amendments to it, that the criminal jurisdiction for wasted costs was actively pursued. When it was pursued it was not surprising to find an adoption of the original language of the civil wasted costs regime but its application thereafter has been wholly different owing to the fact that the nature of the proceedings and the parties is wholly different. It has not been without difficulty in its application[5]. The rare instances of use of the regime have highlighted the difficulties for the bench in its approach and have indicated that, without careful thought and preparation, the costs of application are high and injustice to individuals may still be done.

14. The suggestion that such consideration can be given in time for submission in early 2007 is pre-emptive and will result in producing lacunae in the law, if it is not the subject of wide ranging and in depth analysis. Less haste, more speed.

Background

15. S18 of the CJR sought to consider the remit of O62 r8(1) of the RHC under a proposal (Proposal 33) to extend the court's power to make wasted costs orders against solicitors where wasted costs are incurred as a result of any *improper, unreasonable* or *negligent* act or omission on the part of a solicitor or employee of such solicitor..." (Interim Report paras 463-467). This reflects the wording of the regime in the United Kingdom. Proposal 34 was to consider the extension of the regime to barristers.

[5] In re A Barrister (No 1 of 1991) [1993] Q.B. 293; Re P (A Barrister) [2002] 1 Cr.App.R. 207; Practice Direction (Costs: Criminal Proceedings) [2004] 2 All E R 1070 at Part VIII.

16. The court's jurisdiction to make wasted costs orders in civil proceedings in Hong Kong is encapsulated in O62 r8 RHC which provides:-

(1) "Subject to the following provisions of this rule, where in any proceedings costs are incurred *improperly* or *without reasonable cause* or are wasted by *undue delay* or by *any other misconduct* or *default* , the Court may make against any solicitor whom it considers to be responsible whether personally or through a servant or agent –

(a) disallowing the costs as between the solicitor and his client; and

(b) directing the solicitor to repay to his client costs which the client has been ordered to pay to the other parties to the proceedings; or

(c) directing the solicitor personally to indemnify such other parties against costs payable by them.

(2) No order under this rule shall be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made (with certain exceptions)".

17. The CJR accepted the definitions of "improper" and "unreasonable" in the current O62 r8 to be satisfied by the explanation for those terms given in Ridehalgh v. Horsefield [1994] Ch 205 at p 232D-233B which had directed its mind to the UK wording of the rule. In essence it was considering lowering the threshold of liability to cases where wasted costs were incurred as a result of negligence but which did not include some form of misconduct. This concept was also taken from the judgment of Bingham M.R. in Ridehalgh supra where he said *"negligent should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession*: see R v H 232G-3B. No discussion of the test for "undue delay", "without reasonable cause" or " misconduct or default" can be found in the Final Report. In the event the CJR rejected the idea of lowering the threshold to include

negligence not amounting to misconduct and was in favour of maintaining the status quo in that regard whilst extending the remit of O62 r 8 to include barristers. It is assumed for the purposes of this paper that "undue delay' requires no further explanation and that misconduct means professional misconduct. The meaning of "default" remains at large. What is the difference between "improper", "misconduct" and "default"? Can you act or omit to act improperly if you have reasonable cause?

18. Importantly the CJR noted that there was a risk of increasing satellite litigation in respect of wasted costs[6] and it was conscious of the possibility of the power being misused to apply pressure on the opposite party[7]. As a result, the CJR was at pains to suggest safeguards[8] which could be put in place to encourage the jurisdiction to be used sparingly and only in the clearest of cases[9]. One question which arises is whether, by analogy with the civil jurisdiction, an application will be able to be made by any party to proceedings or whether it is envisaged that it will be a power that can be invoked by the court only. It is submitted that if the legislation does not make it clear that all counsel/solicitor advocates fall within the scope of the order in their personal capacity including those employed by the government, the Bar would oppose most strenuously the imposition of any wasted costs regime which fell within the remit of the court and the court alone.

Relevant legislation

19. S18 of the CCC Ordinance provides that:

(1) In any criminal proceedings a court or a judge may order the legal or other representative concerned to meet the payment of any wasted costs or any part thereof.

[6] Medcalf v Mardell [2002] 1 A.C. 120
[7] Orchard v. South Eastern Electricity Board [1987] QB 565
[8] CJR Recommendation 94 §562 and 95 §570
[9] Harley v McDonald [2001] 2 A.C. 678 at 703 §50

(2) No order under subsection(1) shall be made unless the legal representative concerned has been given a reasonable opportunity to appear before the court or the judge and show cause why the order should not be made.

(3) Any wasted costs ordered to be paid by a legal or other representative under subsection (1) shall be a debt due to the party to the proceedings in whose favour such order was made from the legal or other representative and enforceable as a civil debt, and where the legal or other representative concerned was a Legal Officer or Legal Aid Officer having or exercising a right of audience or conducting litigation on behalf of the Government, shall be charged to the revenue.

20. S2 of the CCC Ordinance currently defines wasted costs as:-

(a) any costs incurred by a party to the proceedings as a result of-

(i) any failure to appear; or
(ii) lateness,

without reasonable cause leading to an otherwise avoidable adjournment on the part of any legal or other representative or any employee of a legal or other representative; or

(b) any costs incurred by a party to the proceedings which, in the light of such failure or lateness occurring after they were incurred, the court or the Judge considers it unreasonable to expect that party to the proceedings to pay.

21. The equivalent UK legislation is S19A of the Prosecution of Offences Act 1985 as amended which provides:-

(1) In any criminal proceedings-

(a) the Court of Appeal;
(b) the Crown Court; or
(c) the Magistrates' Court,

may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with regulations.

22. Under S19A(3) "Wasted costs" means any costs incurred by a party-

(a) as a result of any *improper*, *unreasonable* or *negligent* act or omission on the part of any representative or any employee of a representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

23. The UK legislation does not include "misconduct or default", there will need to be a clear guideline as to what these terms mean.

<u>Proposal</u>

24. The Administration proposes that S2 of the CCC Ordinance be amended 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 a representative or any employee of a representative; or

(c) which, in the light of any such act, omission, delay, misconduct or dealt occurring after they were incurred, the court considers it unreasonable to expect that party to pay"

25. This is not a direct adoption of O62 r8(1) as can be seen from a comparison with paragraph 16 above. In the section "unreasonable" is used which is not contained in O62. O62 refers to "without reasonable cause". "Unreasonable" is to be found in the UK legislation and it is "unreasonable" which is defined by Bingham M.R. in R v H at p 232F. "Unreasonable" is said to cover conduct which is vexatious, designed to harass the other side rather than advance a resolution of the case, and it is said to make no difference if such conduct is the product of excessive zeal and not improper motive. Some criminal practitioners may see it as part of their duty to harass the prosecution, most would certainly not see any part of their duty to be cooperative with them. Some consideration must be given to the adoption of this word rather than the wording in O62.

26. In the light of the rejection of the CJR of proposal 33 to extend the civil jurisdiction to cover negligence, and assuming that the standard of negligence in question was the "untechnical" standard as adumbrated in Ridehalgh v Horsefield, what standard is to be implied into the word "default". If misconduct covers professional conduct what conduct comprises "default" which is not already covered by misconduct?

Purpose of reform

27. The purported purpose of the proposed reform is to "arm the courts with an effective remedy so that any costs incurred by a party to criminal proceedings as a result of "unjustifiable" conduct on the part of his or her legal or other representative will be borne by that lawyer or representative . " The provisions are not intended to penalize lawyers, but to compensate the injured party for the loss where it would be reasonable to expect him to pay.

28. If the sole purpose of the amendment is "compensatory", then this objective illustrates perfectly the thrust of the Bar's submission that this amendment, in its present form, is wholly misconceived. Who is to be compensated and by whom?

29. In its simplest form, criminal proceedings have a prosecution and defence. The prosecution is almost always (with rare exceptions) a government or quasi governmental body and is usually the Department of Justice ("DOJ"). For the sake of argument therefore the Bar will assume that the prosecution is the DOJ. The prosecution is therefore always publicly funded. Where loss is occasioned as a result of the acts or omissions of the legal representatives of the defence, then it will always be a loss to the public purse. Accordingly, in circumstances where the infringement is by the legal representative of the defence, the DOJ will be compensated. Is it envisaged that the defence representative will also compensate the defendant for his loss?

30. The defendant may be a private individual or corporation but, again for the sake of argument, the Bar will assume that the defendant is a private individual. The defendant may be legally aided or privately funding his defence. The former is the more common although the latter is not a rarity. Where the loss is occasioned by the legal representative of the defendant (in what ever capacity he receives his instructions) has any loss been occasioned by the defendant. Either the Director of Legal Aid ("DLA") has a liability to pay counsel's fees or the defendant has such liability. Neither is likely to have paid at the time that the issue of wasted costs arises, and in some instances there is no defined sum attributable to defence counsel's refresher where he is engaged upon a lump sum payment. How is that to be determined? Is it envisaged that counsel will be ordered to forego fees for X refreshers/ part of the brief? Or is it envisaged that a full fee note is submitted which is then to be repaid? Perhaps the DLA will be required to exercise a discretion to pay a lesser sum where work has not been reasonably undertaken? If so, under what mechanism is he to do this? Where counsel is privately funded, what

mechanism will be in place to ensure that the loss to the defendant is made good and not circumvented. Is the court to administer the payment of the "compensation" to the defendant/legal department?

31. Where loss to the defence is occasioned by an act or omission of the prosecution, then it will either be a loss to the public purse (DLA) or a loss to the private individual. The legal representative of the prosecution may be a government lawyer or counsel/solicitor advocate acting on fiat. In the latter case there can be no issue but that counsel acting on fiat stands pari passu with his government counter part. That being the case, how can it be correct to treat counsel acing on behalf of the Department of Legal Aid any differently? It is suggested at para 18 (3) of the Consultation Paper that the ambit of the regime is such that it is possible for it to bite over government lawyers representing government departments in their personal capacity. They "could" be subject to disciplinary proceedings and/or under S32 of the Public Finance Ordinance (Cap.2) ("PF Ordinance") the Finance Secretary "may" surcharge the government lawyer who has improperly incurred expenditure. This is not the situation at present where S18(3) allows for the costs to be charged to the revenue. Thereafter one supposes that there is a further exercise of discretion within the government department concerned as to what action to take personally against the individual. This cannot be right. Either the "infringing" legal representative is personally liable under any new regime regardless of their employment status (on the basis that this is a personal act or omission), or, they are covered by their government instructions (and it is a global act or omission attributable to the department). If the former, then guidelines must be in place to ensure equality of arms as between the two types of prosecutor. It would be a breach of natural justice if the government employed lawyer were to escape financial penalty/disciplinary censure for the very same transgression that his privately paid counter-part would be penalized for. If counsel for the defence was acting on instructions of the DLA, why should he not have the benefit of the same protection as counsel on fiat if counsel on fiat has the same protection as government counsel?

32. There is, in the circumstances, a clear and obvious need to define the type of situation in which this regime is likely to bite and, having done so, to assess the nature of the likely transgressor. If it is envisaged that this is a "personal" liability to be borne by the legal representative no matter what their professional status, then this must be taken into account at an early stage. It is not simply a case of adopting the most obvious language and waiting to see the consequences of such adoption.

Previous Debate

33. The background to the CCC Ordinance is adequately outlined at para 17 to the Consultation Paper of August 2006. The grounds of objection to the introduction of a wide wasted costs regime hold good today in that:

As to paragraph (1) of the Bar's submissions

" There was no demonstrated need for the provisions nor evidence that there was a real problem to be addressed or that with the provisions in place, the "problem" could be cured."

As to the response of the Administration

"The inability of the Court of Appeal to make a wasted costs order in circumstances illustrated by the above three cases highlights the insufficiency of the existing provisions"

The Bar submits:

(a) The problems as described in the cases cited could have just as easily been addressed by reference to the Bar Council by way of complaint. Although not pursued in the present instances,this is a step regularly taken by the judiciary at all levels and action is timeously taken by the Bar. This would address any "punitive" element. The Bar Council also has power to order compensation in appropriate circumstances to a complainant. The courts also have power under S17 of the CCC Ordinance to address any

compensatory element against a party to the proceedings which could then be the subject of civil action by that party against counsel in the light of the change in the law following Arthur JS Hall & Co supra.

(b) One way to "solve" the problem of (for want of a better word) "incompetent" Counsel is to encourage government departments and private solicitors to exercise better judgment in the instruction of counsel. The Legal Aid Department admits to exercising no judgment at all in circumstances where the legally aided party has requested particular counsel. The active use of S17 would address their minds to the issue but would also protect the individual legal representative whose apparent misconduct was actually caused by the instructions of his instructing solicitor/client.

(c) Many members of the judiciary take the view that they can manage their own courts without the need to resort to this jurisdiction. They consider judicial intervention, in public or in private, is effective if properly considered and feel the recipient of the judicial "advice' will see the error of his ways and correct his behaviour accordingly. Often a word in the ear of the representative's Head of Chambers or the Chairman of the Bar will also result in the individual realizing that his performance may need to be enhanced. There is nothing to stop the judiciary taking the age old step of having all counsel into chambers to express his displeasure and to ask for clarification. It is very unlikely that the transgressor will repeat his misconduct and if he does so, a written complaint will see the matter dealt with officially.

(d) In what way will penalizing the individual in costs address that individual's lack of professionalism unless it is also intended that disciplinary action should be taken. If the standard to which an individual is to be held is one which indicates that he is failing in his professional duty towards the court and his client, then that is a matter which should be properly brought before the profession. If

the legal representative is financially insured against a wasted costs order (and it is likely that the solicitor advocate will be covered by his firm and the government lawyer by his department) then how does this ensure that the problem is resolved. If uninsured, it could lead to financial ruin and that is probable if the intention is to adequately compensate the loser. If insured, the loss is born by the insurer who may increase the premiums required by the individual or across the profession. The latter may spur the profession to take an even more proactive part in its standards than it already does but it is surely not intended that the already over stretched junior bar should bear the costs of the one or two individuals who transgress.

(e) If the raison d'être is actually "compensatory", professional indemnity insurers will come to the rescue but the transgressor will continue to practice.

(f) It should not be assumed that the only transgressors are legal representatives in private practice. There are many occasions when employed lawyers have been the subject of criticism from the bench. The risk of a financial penalty upon the private lawyer will make practitioners in private practice all the more willing to point out and publicise the transgressions of the employed profession.

<u>As to paragraph (2) of the Bar's submissions</u>

"There might be an inhibitive effect on a legal representative in the conduct of the defence case which would be detrimental to a defendant. In the light of the public interest, lawyers should be able to conduct a case without inhibition or pressure".

<u>As to the response of the Administration</u>

"The public interest in the ability of legal representatives to conduct their cases fearlessly does not confer freedom to conduct cases in an improper, unreasonable or negligent way. On the contrary, the public interest requires that barristers should conduct cases not only fearlessly but also to the highest professional standards. Moreover in

Ridehalgh v. Horsefield [1994] Ch 205, the Court held that, before making a wasted costs order, it will make full allowance for the fact that an advocate in court often has to make decisions quickly and under pressure."

The Bar submits:

(a) It is trite to say that paragraph 21 of the Code of Conduct of the Bar requires the criminal practitioner to accept instructions which are within his professional competence and that the consequences of this are that Counsel must defend the most unsavoury of characters and the most devious. Often instructions are inadequate or misleading and there is little even the most experienced Counsel can do in the face of instructions intended to deceive until the moment arrives in the evidence where the deception becomes apparent. His response to any criticism from the bench may be subject to legal professional privilege and he may find himself professionally embarrassed, not able to answer for what appear to be his shortcomings rather than the shortcomings of his instructions. Where the tribunal is the tribunal of both fact and law, the situation is all the more difficult. Counsel does not have the benefit of the type of discovery available in civil proceedings. There will be full disclosure from the prosecution but a dishonest defendant will often not make full and frank disclosure to his Counsel.

(b) The Bar does not condone conduct which is improper, unreasonable or negligent (although it is noted that this is not the test suggested by the Administration). That is why it has a strict disciplinary regime. A regime that can only be implemented if it is informed of a transgression. High standards are required of all who seek to advocate before our courts. Professional misconduct is already accounted for within that regime. What acts, outside of professional misconduct, is it said should be dealt with by way of

wasted costs? Presumably a "default" is something that falls short of professional misconduct?

(c) Private practitioners are not the only advocates who pay too little attention to typographical errors; fail to understand legislation and become double booked. Individual practitioners do not have the back up that government departments have, yet time and again those government departments have the ear of the administration and the bench when seeking to adjourn or refix matters that the private practitioner does not have! And it is not only defence counsel who may find themselves in difficulty. There are occasions when prosecution witnesses do not come up to proof or are hostile; when police officers have failed to disclose evidence; when applications are made by prosecuting counsel which are spurious and ill thought out and evidence is relied upon which wastes valuable court time because of an inability to see the issues, let alone the multitude of times when witnesses have not been made available.

(d) Counsel regularly faces a hostile bench as well as hostile witnesses and it is not uncommon to see junior members of the Bar (and government lawyers) acquiesce the moment the bench appears to be frustrated. Such a reaction is likely to be magnified if the individual in question is faced with financial as well as verbal censure. The lay client is not best served by the reluctance of counsel to stand their ground and argue a point properly made.

(e) It would be wholly inappropriate to raise the issue of wasted costs during proceedings. This would place increased and unwarranted pressure on counsel to appease the bench.

<u>As to paragraph (3) of the Bar's submissions</u>

"There was inequity arising from the difference in treatment in respect of lawyers in private practice and government lawyers".

<u>As to the response of the Administration</u>

"In cases where any wasted costs are ordered to be paid by the Government, disciplinary proceedings may be instituted against the relevant government lawyer for unjustifiable conduct. Further, under section 32 of the Public Finance Ordinance (Cap 2) (" PF Ordinance"), the Financial Secretary may surcharge the relevant government lawyer who has improperly incurred expenditure or is responsible for any loss such sum as the Financial secretary may determine. "

The Bar submits:

(a) Much of this has already been rehearsed above. There will be complete inequity between the status of the private and public Bar unless any wasted costs sanction is to be ordered to provide for personal liability only. This is not an issue which has required scrutiny within the civil jurisdiction. The availability of the sanctions described above allow for a further arbiter over and above the judge. The Administration is requested to submit evidence of these sanctions ever being applied in a context akin to the one discussed here.

<u>As to paragraph (4) of the Bar's submissions</u>

"Adjournment of cases was often initiated by the court rather than on the request of the defence or prosecution".

<u>As to the response of the Administration</u>

"If the court initiates an adjournment without any improper, unreasonable or negligent act or omission on the part of counsel, no wasted costs order will be made".

The Bar submits:

(a) It should not be assumed that adjournments are regularly caused by the personal misconduct of legal representatives. These are rare. A great many adjournments are applied for by the prosecution because they are not ready, especially in the Magistracy. It is not

enough to say that the issue of wasted costs would not arise in this or other analogous events. Can the defence apply for the costs wasted by lack of progress? Many adjournments are ordered because of the lack of court time? Where is the compensation to the parties in these circumstances? Why should parties not be compensated in this situation but be compensated when, because of late court listing counsel finds themselves with a clash of engagements. With a little sympathy many of these situations could be dealt with efficiently and without any adverse effect upon the administration of justice. There are occasions without number in which cases, which have over run clash with other engagements of counsel. The bench is wholly unsympathetic to the difficulties of the private bar in this regard even where the cause of the overrun has been the judge's annual holiday or the intervention of numerous medical appointments. This in turn leads to difficulties with the instructions which have to be returned and for counsel who must pick up a brief at a late stage. How is the public being served in these instances.

(b) Many adjournments are ordered as a result of more than one application or by consent. Has any research been carried out to establish how often there has actually been loss to either party as a result of perceived misconduct by an individual legal representative?

(c) What is the "mischief" it is said needs to be addressed? The mischief which needed to be addressed within the civil jurisdiction of the courts was historically somewhat different and was not solely directed at incompetence but rather at the dishonest manipulation of the process of the court to gain advantage over an opponent. This is not the issue at hand here.

<u>As to paragraph (5) of the Bar's submissions</u>

The perceived problem of a defendant having to pay wasted costs incurred by his legal representatives could be dealt with by other means such as disciplinary proceedings".

As to the response of the Administration

" Disciplinary proceedings may act as a deterrent. However a defendant who has incurred unnecessary costs, wants to recover the costs concerned.

The Bar submits:

(a) The existence of established disciplinary proceedings adequately addresses any desire to see trangressors take account for their actions and allows for compensation. It is only right that defendants who privately fund their defence should receive recompense when costs have been thrown away as a result of the actions of others and where they are in no way to blame. This must include the acts or omissions of the prosecution and the recompense in question should be commensurate with outlay. The privately paying client is more likely to be able to seek civil redress than the publicly funded defendant. Will the DLA always make an application for wasted costs in these situations? Why can't the DLA make a complaint? Will the court always make an order where the defendant is legally aided? Or, will it always be the case that such orders will only be contemplated when the defendant is paying personally? If so, why should counsel who is acting for the DLA be held to a lesser standard than counsel who is being paid privately? In the United Kingdom in criminal proceedings counsel invariably appear publicly funded. If they are liable and if Crown Prosecutors and national Defence service lawyers are liable, why should they have some form of protection here.?

As to paragraph (6) of the Bar's submissions

"S17 of the CCC Ordinance empowers the court to make orders on costs in favour of a party to the proceedings as a result of an unnecessary or improper act or omission by or on behalf of the other party. That provision could serve the purpose of covering any wasted costs incurred by a party to criminal proceedings as a result of an

unjustifiable act by the other party. Moreover, under the existing law, subject to an advocate's immunity from being sued, a client might take legal action against his legal representative for any improper act."

<u>As to the response of the Administration</u>

" S17 of the CCC Ordinance only applies to parties to the proceedings, not counsel. It is unrealistic for most defendants to sue their counsel for costs incurred by their improper act.

The Bar submits:

(a) S17 of the CCC Ordinance is a remedy currently available to the courts against a party to the proceedings and is drafted widely. Following the House of Lords decision in Arthur JS Hall & Co v Simmons [2002] 1 A.C. 615, the client could now seek redress from Counsel in the tort of negligence. This would address and protect against situations where Counsel's apparent misbehaviour is actually a direct result of instructions given but subject to legal professional privilege Counsel cannot adequately explain them to the court. For which defendants is it unrealistic to take civil action? The majority are publicly funded and therefore the DLA could take action. The few that fund their defence privately may have the resources to take civil action and certainly have the ability to make a complaint to the Bar. This is a litigious community which is not shy of enforcing their rights. The lack of litigation post Hall, and the nature of the complaints to the Bar in recent times, indicates that the public makes use of the remedies available to it and is satisfied with those remedies for the most part. The true complainant here is the Court of Appeal. No complaint was made by that court to the Bar Council in respect of the matters raised by the administration which would have brought these matters to the attention o the profession. If the court had done so, action could have been taken.

As to paragraph (7) of the Bar's submissions

"There might be possible abuse of wasted costs provisions. The mere existence of the provisions might provide an avenue to the losing party to turn to his legal representatives for possible compensation.

As to the response of the Administration

The English provision can only be invoked when the costs incurred are a result of any improper, unreasonable or negligent act or omission on the part of counsel. S18 provides a safeguard in that the order is not to be made without giving counsel an opportunity to be heard.

The Bar submits

(a) There are situations in which it is possible that the extension of the regime could be open to abuse. Is it envisaged that it is available only at the discretion of the court or also upon application by the parties?

(b) The English regime is narrower than that suggested here. For what purpose has it been considered that S2(b) should be introduced other than it is similar to O62 r8(1)? If S19A of the Prosecution of Offences Act 1985 (as amended) has been implemented and refined in the UK based upon a considerable amount of authority, why is it considered necessary to extend the language of Hong Kong legislation further than that of the UK and against what extra mischief is this directed? Before any question of amendment can arise, the Administration must consider the mischief it seeks to protect more fully and the standard below which a practitioner will be held accountable.

The Mischief

Compensatory or Punitive?

34. The entire thrust of the criticisms made by the Court of Appeal is aimed at penalizing Counsel for unprofessional work and not at compensating the defendant or prosecution for loss occasioned by their infringing acts. In HKSAR v Yeung Mok YEH [2005] 4 HKLRD (CACC 483/2004) Counsel failed to address himself in part (or perhaps at all) to the relevant provisions upon which he wished to rely when seeking leave to appeal to the CFA. The Court of Appeal made several remarks about the lack of professionalism of Counsel and its inability to take any action in respect of that lack of professionalism. These criticisms of the current state of affairs in respect of wasted costs were not addressed as the need to compensate any party but to the need to indicate their displeasure to counsel. They were intended to discipline. In HKSAR v Ho Hon chung, Danel & Others (CA 269/2000) the CA wanted to "condemn" a practitioner for having double booked himself and thereby caused the adjournment of an appeal in which two other appellants were parties. Whilst the comments came about as a result of an application for costs made by the other appellants which the court had no power to entertain, the thrust of their comments indicated their desire to punish as well as to compensate. It was only in HKSAR v Cheung Kwok- kuen & others (CA 171 /2002) that the CA indicated its thought process was directed to compensating the public purse rather than punishing the infringing solicitors.

35. All of the case law in this area allows for the fact that this regime is both compensatory and punitive. It would be naïve to ignore this essential element and to try to dress it up otherwise.

Early tests - Compensatory v Punitve

36. In Myers v Elman [1940] A.C. 282 at p289 per Viscount Maughan: "*The jurisdiction as to costs is quite different "Misconduct or default or negligence in the course of the proceedings is in some cases sufficient to justify an order. The primary object of the court is not to punish the solicitor but to protect the clients who have suffered, and to indemnify the party who has been injured*".

37. At p318 per Ld Wright: '*....there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, and sometimes the costs of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had been guilty of professional misconduct (as it is so called) not, however, of so serious a character as to justify striking him off the Roll or suspending him. This was a summary jurisdiction exercised by the Court, which had tried the case in the course of which the conduct was committed...Though the proceedings were penal, no stereotyped form was followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the solicitor has full and sufficient opportunity of answering it...The underlying principle is that the court has the right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally. The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice... The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfill his duty to the court and to realize his duty to aid in promoting in his own sphere the cause of justice. This summary jurisdiction may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence. ...The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of.*"

38. Compare this to Ld Denning in R and T Thew Limited v Reeves (No 2) [1982] Q.B. 1283 at p1286D "*Our old books show that if a solicitor for one side has done something wrong - which has caused useless costs to the other party- he could be ordered personally to compensate the other party....It was a summary jurisdiction without pleadings. All that was necessary was notice telling the solicitor what was alleged against him and giving him an opportunity of answering it...This jurisdiction still exists in full force. As a rule*

the party- who has incurred useless costs- will himself make the application. But this is not invariable. Sometimes the court may act of its own motion. ..This compensatory jurisdiction still contains, however, a disciplinary slant...The cases show that it is not available in cases of mistake, error of judgment or mere negligence. It is only available where the conduct of the solicitor is inexcusable and such as to merit reproof.."

39. See also Privy Council decision in Harley v McDonald [2001] 2 W.L.R. 1749 at 1768D per Ld Hope: "*A costs order against on of its officers is a sanction imposed by the court. The inherent jurisdiction enables the court to design its sanction for a breach of duty in a way that will enable it to provide compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfill his duty to the court.*" At 1768F he states: "*The jurisdiction is compensatory in that the court directs its attention to costs that would not have been incurred but for the failure in duty. Punitive in that the order is directed against the practitioner personally, not the party to the litigation who would otherwise have had to pay the costs. As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with the view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts which can be easily verified*".

40. See the much more recent decision of the English Court of Appeal in RE P (A Barrister) [2002] Cr App R 19 at p219 per Kennedy LJ at paragraph 44 " *The three cases which we have cited thus far concern solicitors because until recently orders could not be made against barristers, but the message is clear namely-*

(1) *the primary object is not to punish, but to compensate, albeit as the order is sought against a non party it can from that perspective be regarded as penal*

(2) *the jurisdiction is a summary jurisdiction to be exercised by the court which has tried the case in the course of which the conduct was committed.*

(3) *Fairness is assured if the lawyer alleged to be at fault has sufficient notice of the complaint made against him, and a proper opportunity to respond to it*

(4) *Because of the penal element a mere mistake is not sufficient to justify an order. There must be a more serious error.*

(5) *Although the trial judge can decline to consider an application in respect of costs for example on the ground that he or she is personally embarrassed by an appearance of bias, it will only be in exceptional circumstances that it will be appropriate to pass the matter to another judge, and the fact that, in the proper exercise of his judicial functions, a judge has expressed views in relation to the conduct of a lawyer against whom an order is sought does not of itself normally constitute bias or the appearance of bias so as to necessitate a transfer*

(6) *If the allegation is one of serious misconduct or crime, the standard of proof will be higher but otherwise it will be the normal civil standard of proof.*

The Appeals Process

41. S19(3) will require amendment. What appeal will lie from an order for wasted costs made by the Court of Appeal? For the avoidance of doubt consideration should also be given for proper powers to be vested in each appellate court to order costs of the appeal as appropriate[10].

[10] Practice Direction (Costs:Criminal Proceedings) [2004] 2 All E.R.1070

Conclusion

42. It is submitted that the following steps should be taken:

(a) Identify the mischief against which legislation is needed in order to protect the public and uphold the maintenance of justice.

(b) Set the benchmark against which the practitioner is to be measured.

(c) Categorise those parties who may exercise this power.

(d) State against whom and in what capacity a practitioner is liable.

(e) Outline the proceedings to be used to hear such application and the timing, burden and standard of proof.

(f) Set out the appeals procedure; and

(g) Provide a mechanism for recovery and taxation.

9 October 2006
Hong Kong Bar Association

《2007年成文法(雜項規定)條例草案》

有關文件

委員會	會議日期	文件
司法及法律事務委員會	2006年5月22日	政府當局就"檢討妨礙司法公正罪的刑罰"提供的文件 [立法會CB(2)2037/05-06(01)號文件] 會議紀要 [立法會CB(2)2737/05-06號文件]
	2006年11月27日	政府當局就"《2007年成文法(雜項規定)條例草案》"提供的文件 [立法會CB(2)429/06-07(03)號文件] 會議紀要 [立法會CB(2)887/06-07號文件]
	--	香港大律師公會就有關刑事案件中虛耗訟費的諮詢文件提出的意見 [立法會CB(2)557/06-07(01)號文件] *(只備英文本)*