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Report of the Bills Committee on
Civil Justice (Miscellaneous Amendments) Bill 2007

Purpose

This paper reports on the deliberations of the Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007.

Background

2. As in many common law jurisdictions, the civil justice system of Hong Kong has to keep abreast with the needs and developments of modern times. With Hong Kong's economic development and social and technological advances, there has been over the years a sharp increase in the number and complexity of transactions, in particular commercial ones. Accordingly, there has been an increase in the scope and complexity of legislation. All these have put pressure on the civil justice system, generating large numbers of disputes and consequent civil proceedings and litigation over the past 20 years. Hong Kong's civil justice system, which has remained largely unchanged for several decades, has been criticized for not having kept up with the times.

3. In February 2000, the Chief Justice appointed the Working Party on Civil Justice Reform (CJR) (the Working Party) to review the rules and procedure 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. In November 2001, the Working Party published the Interim Report and Consultative Paper on the CJR containing various recommendations on changes to the civil justice system for seven months of consultation. The Working Party submitted its recommendations to the Chief Justice in the Final Report on the CJR (the Final Report) in March 2004. The Chief Justice in the same month accepted the Final Report and set up a Steering Committee on the CJR (the Steering Committee) to oversee the implementation of the recommendations therein. The Chief Justice had 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 are appropriate. In April 2006, the Steering Committee published the Consultation Paper on Proposed Legislative Amendments for the Implementation of the CJR (the Consultation Paper) to seek views from the legal profession and other interested parties.

4. The objectives of the CJR are –

(a) to preserve the best features of the adversarial system but curtail its excesses. One of the primary ways to achieve this is by giving even greater case management powers to the courts. This would prevent tactical manipulation of the rules to delay proceedings and also ensure that court and judicial resources are fairly distributed;

(b) to streamline and improve the civil procedures; and

(c) to facilitate early settlement by parties, cut out unnecessary steps and discourage (and if necessary, penalize) unnecessary applications.

In consequence, civil proceedings would become more efficient, expeditious and promote a sense of reasonable proportion and economy. The intention is to reduce delay and eliminate unnecessary expenses in litigation. There would also be greater equality between parties to proceedings and settlements would be both encouraged and facilitated. As far as the administration of the court is concerned, its resources would be more fairly distributed and utilized.

5. The Steering Committee has decided on a package of proposed amendments to both primary and subsidiary legislation. Amendments are recommended for-

(a) the following six Ordinances -

(i) High Court Ordinance (HCO) (Cap. 4);

(ii) Lands Tribunal Ordinance (LTO) (Cap. 17);

(iii) Law Amendment and Reform (Consolidation) Ordinance (LARCO) (Cap. 23);

(iv) District Court Ordinance (DCO) (Cap. 336);

(v) Small Claims Tribunal Ordinance (SCTO) (Cap. 338);

(vi) Arbitration Ordinance (AO) (Cap. 341); and

(b) the following three sets of subsidiary legislation -

(i) Rules of the High Court (RHC) (Cap. 4A);

(ii) Lands Tribunal Rules (LTR) (Cap. 17A); and

(iii) Rules of the District Court (RDC) (Cap. 336H).

The Bill

6. The purpose of the Bill is to amend the six Ordinances in paragraph 5(a) above as proposed by the Steering Committee to -

(a) implement some of the recommendations made in the Final Report published in 2004; and

(b) implement several recommendations proposed by the Steering Committee.

7. Parts 2 to 9 of the Bill seek to implement the relevant recommendations in the Final Report which are set out in the Schedule to the Bill. The recommendations not included in the Final Report but proposed by the Steering Committee relate to costs orders against non-parties (Part 10 of the Bill) and the Lands Tribunal (Part 12 of the Bill). In addition, in line with the objective that the two levels of Court should have the same set of procedures consequent upon the CJR, Part 11 of the Bill seeks to align the practice of the District Court with that of the Court of First Instance in relation to the execution of instruments.

Bills Committee

Composition

8. At the House Committee meeting on 27 April 2007, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

Views received

9. The Bills Committee has invited the two legal professional bodies and the respondents to the Consultation Paper to give views on the Bill. A list of the deputations which have given views to the Bills Committee is in **Appendix II**.

10. Taking into account the suggestions of the deputations, members have requested the Administration's team (comprising representatives from the Administration Wing of the Chief Secretary for Administration's Office, the Judiciary Administration, and the Department of Justice) to provide the latest draft version of the following items of subsidiary legislation for reference of the Bills Committee and have made reference to them, where appropriate, in the process of scrutiny of the Bill -

(a) those relating to Part 7 (wasted costs) and Part 10 (costs against non-parties) of the Bill;

(b) draft Orders 1A and 1B (case management powers of the court) of the RHC;

(c) draft Order 35 rule 3A (court's power to curtail the time allowed for cross-examining witnesses, for making oral submissions, etc) of the RHC; and

(d) draft Orders 62 and 62A (matters relating to costs) of the RHC.

Attendance at Bills Committee meetings

11. Under the chairmanship of Hon Margaret NG, the Bills Committee has held nine meetings with the Administration's team.

12. At the outset, the Administration's team attending meetings of the Bills Committee comprised Assistant Director of Administration from the Administration Wing of the Chief Secretary's Office, Judiciary Administrator and her staff from the Judiciary Administration, and a Senior Assistant Law Draftsman from the Department of Justice. The Chairman is of the view that it may not be appropriate for representatives of the Judiciary Administration to answer members' queries and concerns about the policy aspects of the Bill, as the subject matter of the Bill is related to the administration of justice, which should be a matter for the Judiciary and outside the remit of the Judiciary Administration. Since the Judiciary is in essence the sponsor of the Bill, the Chairman has asked whether it would be possible for representatives of the Judiciary to attend meetings of the Bills Committee to explain the proposals in the Bill.

13. In this respect, the Bills Committee has sought the advice of the Legal Adviser whose views are summarized below -

(a) the Legal Adviser is not aware of any rule which would prohibit the Bills Committee to invite judges to attend its meetings or any protocol which would make judges unable to come to the Legislative Council (LegCo);

(b) subject to the Chief Justice's agreement, the Chief Judge, in his capacity as Chairman of the Steering Committee, may be an appropriate person to be invited to attend the meetings of the Bills Committee, on the understanding that anything that might relate to judicial aspects of judges' functions would be outside the scope of discussion at these meetings. Alternatively, a representative of the Chief Judge who is knowledgeable enough to answer members' questions on the Bill may be invited to attend the meetings;

(c) in the United Kingdom, judges are increasingly involved in giving evidence to Select Committees in the House of Commons; and

(d) in working out a mutually acceptable arrangement, care should be taken to ensure that the arrangement does not have the effect of compromising judicial independence.

14. The Judiciary Administration has advised the Panel of the position of the Judiciary as follows -

(a) the Judiciary's position is that as a matter of constitutional principle, judges should not appear before the Bills Committee;

(b) the appearance of judges before a LegCo committee would undermine the independence of the Judiciary and its constitutional independence from the executive authorities and the legislature, which is guaranteed by the Basic Law and is fundamental to the rule of law. And as importantly, the perception of such independence would be jeopardized. Further, the appearance of judges before a committee of the LegCo would politicize the Judiciary and give rise to the perception of such politicization;

(c) in view of the constitutional role and independence of the Judiciary, it is the established practice that for matters relating to the Judiciary, the Judiciary Administration would act as the representative of the Judiciary to attend the relevant LegCo committee meetings to convey the Judiciary's views/stance on the matters and assist members in their discussion; and

(d) in accordance with consistent practice, together with the executive authorities who are responsible for piloting the Bill through the legislative process, the Judiciary Administration should continue, on behalf of the Judiciary and as authorized by the Chief Justice, to assist the Bills Committee in its scrutiny of the Bill. The Judiciary Administration's representatives have been closely involved in the process of the CJR, both in the work of the Working Party as well as the work of the Steering Committee.

15. In response to members' comment that Hon Mr Justice Rogers and Hon Mr Justice Stock had in the past attended committee meetings of LegCo, the Judiciary Administration has explained that the judges concerned had attended LegCo committee meetings in their respective capacity as the Chairman of the Standing Committee on Company Law Reform and the Chairman of a Sub-committee of the Law Reform Commission. They had attended meetings of LegCo committees in relation to law reform matters which were not related to the Judiciary's operation. They did not appear in their capacity as judges on behalf of the Judiciary and did not speak on matters relating to the Judiciary's operation. Such appearances are of a totally different nature from what is being suggested by the Bills Committee. The appropriateness of such appearances by judges would depend on the circumstances in

question, including the capacity and the subject matter in question. In any event, the appropriateness of such appearances may need to be re-visited in future.

16. Members have noted that according to the information provided by the House of Commons Information Office in response to the LegCo Secretariat's enquiry, when the Civil Procedure Bill, which was to implement Lord Woolf's recommendations on civil justice reform, was introduced into the UK Parliament, there was then no procedure for Standing Committees (the equivalent of LegCo's Bills Committees) to receive evidence from non-Members of Parliament. Mr Gary Streeter, a Minister in the Lord Chancellor's Department and a Member of the Parliament, was responsible for guiding the Bill through the Standing Committee. Mr Streeter was a lawyer and possessed the legal expertise to pilot the Bill through the legislative process.

17. The Chairman maintains the view that representatives of the Judiciary Administration are not in a position to explain the Bill to the Bills Committee as it is outside their job responsibilities to do so. According to the list of the main responsibilities of the Judiciary Administrator, she can only play a liaison role with LegCo on, inter alia, legislative proposals affecting the Judiciary. As the Administration has confirmed that the Chief Secretary for Administration is the sponsor of the Bill, the Chairman has requested the Administration to consider how best to provide legal expertise to answer members' questions and concerns about the Bill. One way of doing it is to instruct counsel with the relevant legal expertise (whether from within or outside the Department of Justice) to attend future meetings of the Bills Committee.

18. After consideration, the Administration has made arrangement for a Senior Assistant Law Officer (Civil Law) of the Department of Justice to attend meetings of the Bills Committee with effect from October 2007.

Deliberations of the Bills Committee

Costs-only proceedings (Part 2, clauses 3 to 6)

19. Part 2 of the Bill relates to Recommendation 9 of the Final Report. The purpose of Part 2 is -

(a) to amend the HCO and the DCO to empower the Court of First Instance and the District Court to make a costs order even though no proceedings seeking substantive relief have been commenced;

(b) to set out the circumstances in which such proceedings may commence and the scale on which costs are to be taxed;

(c) to empower the Court of First Instance to order the transfer of such proceedings to the District Court and vice-versa; and

(d) to amend the Schedule to the SCTO to make it clear that the Small Claims Tribunal does not have jurisdiction to hear and determine such proceedings.

20. The Bills Committee has asked for explanations as to why a much wider discretionary power is provided to the Court under the proposed amendments. It has questioned, in particular, if the parties to the dispute have already reached an agreement as to the liability of costs and the only remaining question is the amount of costs, the reason for seeking to give additional powers to the Court to re-open the question of who (including a non-party) should pay the costs of the dispute, and whether such provisions have been included in the consultation exercise on the CJR.

21. The Administration's team has advised that at present, where parties cannot agree on the amount of costs even though the substantive dispute has been resolved, it is necessary to litigate the whole dispute in order just to resolve the question of costs. To facilitate settlement, amendments are proposed to introduce a new cause of action called "costs-only proceedings" to enable parties who have reached settlement on a substantive dispute and have agreed who should pay the costs, but cannot agree on the amount of costs of the dispute, to apply for such costs to be taxed by the Court of First Instance and the District Court. Under the proposed amendments, the power of the Court is as follows -

(a) the Court may make an order for the costs of and incidental to the dispute to be taxed or assessed;

(b) as there will be costs of and incidental to the costs-only proceedings just like any other court proceedings, the Court may make an order awarding such costs to or against any party to the costs-only proceedings; and

(c) the Court may make an order awarding costs against a person who is not a party to the proceedings, if it is satisfied that it is in the interests of justice to do so and is intended to apply to the costs of and incidental to the costs-only proceedings, so as to give maximum flexibility to the courts.

22. Having noted the above explanations, the Bills Committee has suggested that the drafting of the proposed provisions be reviewed to ensure that the reference to "costs" therein refers to the costs of and incidental to the "cost-only proceedings", but not the costs of and incidental to the "substantive dispute". The Administration's team has agreed to introduce Committee Stage amendments (CSAs) to the proposed section 52B of the HCO in clause 3 and the proposed section 53A of the DCO in clause 5 to better reflect the policy intent.

Interim remedies and Mareva injunctions in aid of proceedings outside Hong Kong (Part 4, clauses 9 - 12)

23. Currently, a plaintiff in proceedings outside Hong Kong involving a defendant with assets in Hong Kong cannot seek interim relief from the Hong Kong courts. Only when substantive proceedings exist in Hong Kong can such interim relief be obtained. In the case of proceedings outside Hong Kong, interim relief can only be obtained if a judgment obtained in those proceedings is sought to be enforced in Hong Kong or if the same proceedings are instituted in Hong Kong.

24. Part 4 implements Recommendations 45 to 48 of the Final Report to provide assistance to plaintiffs in proceedings outside Hong Kong. The purpose of Part 4 is -

(a) to amend section 21L(3) of the HCO so that the power of the Court of First Instance to grant an interlocutory injunction under the new section 21M is also exercisable irrespective of whether the party against whom the injunction is made is domiciled, resident or present in Hong Kong (clause 9);

(b) to add two new sections to the HCO to empower the Court of First Instance to appoint a receiver or grant other interim relief in aid of proceedings outside Hong Kong which are capable of giving rise to a judgment which may be enforced in Hong Kong. The appointment of a receiver or the other interim relief may be sought as an independent form of relief without being ancillary or incidental to substantive proceedings in Hong Kong (clause 10);

(c) to amend section 2GC of the AO to give similar powers to the Court of First Instance to grant interim relief in relation to arbitration proceedings in or outside Hong Kong. But the power may only be exercised in relation to proceedings outside Hong Kong if those proceedings may be enforced in Hong Kong (clause 11); and

(d) to add a new section to the AO to empower the Rules Committee of the High Court to make rules of court relating to such applications for interim relief (clause 12).

25. The Bills Committee has requested the following information -

(a) the circumstances under which judgments made by foreign courts may be enforceable in Hong Kong at common law; and

(b) the considerations which would be taken into account by the Court in determining applications for grant of interim relief in foreign proceedings, and how such considerations compare with those taken into account by the Court in considering applications for interim relief in local proceedings.

26. The Administration's team has advised that -

(a) the foreign judgment must be a final one for a debt or liquidated sum which is not due in respect of foreign taxes or as a penalty. A judgment may be final even though subject to an appeal; and

(b) the foreign court must have jurisdiction to give the judgment. Such jurisdiction will arise if (i) the judgment debtor is present in the foreign country; (ii) the debtor counterclaims in the foreign court; (iii) the debtor submits to the jurisdiction of the foreign court; or (iv) if the debtor has previously agreed to submit to the jurisdiction of the foreign court (for example, by an exclusive jurisdiction clause in a contract).

27. In deciding whether to grant interim relief in support of a foreign judgment capable of enforcement in Hong Kong at common law, the Court is likely to apply the same criteria which it applies when deciding whether to grant interim relief in support of Hong Kong proceedings. For example -

(a) where a Mareva injunction is sought, whether there is a real risk of dissipation of assets if relief is not granted;

(b) where an interim injunction is sought, whether the balance of convenience test in the American Cyanamid case points to the grant of relief; and

(c) where an interim receiver is sought, whether there is a need to get in and protect assets pending resolution of the relevant dispute.

28. Moreover, in deciding whether to grant interim relief for court proceedings outside Hong Kong, the Court will take into account the fact that the proceedings here are only ancillary to the proceedings outside Hong Kong (proposed new section 21N of the HCO). Thus, where there is doubt as to whether relief should or should not be granted or whether relief would be effective, the Court may decide not to grant relief as a matter of discretion.

29. The Administration's team has advised the Bills Committee that having considered the views of the Working Group set up by the Department of Justice to consider proposals for reform of arbitration law, the Steering Committee agrees with the Working Group's views that reference to "arbitral tribunal" in the proposed section 21N(1)(b) of the HCO in clause 10 is not necessary because clause 10 is intended to deal with the grant of interim measures in aid of foreign court proceedings, whereas clause 11 already amends section 2GC of the AO to deal with the grant of interim measures in aid of arbitral proceedings. A CSA will be moved to delete the reference to "arbitral tribunal" in clause 10.

Vexatious litigants (Part 5, clause 13)

Proposals in the Bill

30. Part 5 implements Recommendations 67 and 68 of the Final Report. The existing section 27 of the HCO is replaced by the proposed sections 27 and 27A which introduce the following changes -

(a) it allows a vexatious litigant order to be made not only on an application of the Secretary for Justice, but also on an application of an "affected person";

(b) it raises the threshold for granting leave to a vexatious litigant to institute fresh proceedings, requiring the Court of First Instance to be satisfied that the proceedings are not an abuse of the process and that there are reasonable, not just prima facie, grounds for the proceedings;

(c) it makes it clear that a vexatious litigant order may be made for a specific period or remain in force indefinitely; and

(d) it also makes it clear that there is no appeal against a grant or refusal of leave unless leave to appeal has been given by the Court of First Instance.

31. The Administration's team has advised that at present, applications to restrict a vexatious litigant from issuing fresh proceedings except with the leave of the Court, can only be made by the Secretary for Justice under very narrow circumstances. The proposed amendments would help screen out vexatious litigation, thereby enabling fairer distribution of the Court's resources for genuine disputes.

32. At the request of the Bills Committee, the Administration's team has conducted research on legislation on prevention of vexatious proceedings in four common law jurisdictions, namely England and Wales, New Zealand, Canada (Ontario) and Australia, and has responded to members' views and concerns on the proposals in the Bill as follows.

The term "vexatious legal proceedings"

33. Under the proposed section 27(2) of the HCO, the Court of First Instance may make a vexatious litigant order if it is satisfied that the person against whom the order is to be made has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings against the same person or different persons. The Bills Committee has asked whether the term "vexatious legal proceedings" is defined in the law of other common law jurisdictions.

34. According to the Administration's team, the term "vexatious proceedings/litigants" is defined in the law of four States/Territories of Australia, but not in England and Wales, New Zealand and Canada (Ontario). The term "vexatious legal proceedings" is not statutorily defined in the HCO. Nevertheless, the meaning of the term can be found in the relevant case law. In short, all vexatious proceedings amount to an abuse of the Court's process.

35. The Administration's team has advised that substantial case law has been developed both in England and in Hong Kong on the meaning of "vexatious legal proceedings". Given the infinite wisdom of a litigant, there is always scope for new forms of vexatious proceedings. Hence, it is best to allow the case law to continue to develop by building on, as far as possible, the present formulation.

Threshold for granting vexatious litigant order

36. Under the proposed section 27(2)(a) of the HCO, the Court may grant a vexatious litigant order if it is satisfied that the person against whom the order is to be made has habitually and persistently and without reasonable ground instituted vexatious legal proceedings. Some members have suggested that the requirement of "habitually and persistently" be changed to "habitually or persistently".

37. The Administration's team has advised that the expression "habitually and persistently" involves an element of repetition and is the existing threshold of section 27 of the HCO. Members' suggestion would lower the threshold of a vexatious litigant order. In addition, the existing section 27 is based on section 51 of the Supreme Court Judicature (Consolidation) Act 1925 in England and Wales, which has since been replaced by section 42 of the Supreme Court Act 1981. Given its origin, the Hong Kong courts have been able to make reference to judgments in other common law jurisdictions, which share the common origin and similar wording, in construing section 27. It is considered inappropriate to make any change to the existing formulation, which has been well tested with a wealth of common law case law to refer to.

The definition of "affected person"

38. The term "affected person" in proposed section 27(5) is defined to mean a person who -

(a) is or has been a party to vexatious proceedings instituted by a vexatious party, or

(b) who has directly suffered adverse consequences resulting from such proceedings.

The Bills Committee has expressed concern whether the definition of the term is too wide, and whether the proposal to provide for a vexatious litigant order to be made on

the application of an "affected person" would open a floodgate of applications for vexatious litigant orders and therefore at variance with the objective of the CJR to, inter alia, streamline the civil procedures and discourage unnecessary applications.

39. According to the overseas research conducted by the Administration's team, in seven States/Territories of Australia, persons other than the Law Officer and the Registrar may apply to the court for an order to restrain a vexatious litigant from instituting or continuing proceedings. The term used to describe such persons varies from one State/Territory to another and generally includes "aggrieved person" or "person who has a sufficient interest in the matter".

40. The Administration's team has advised that the term "affected person" under the Bill means a person who has directly suffered adverse consequences resulting from vexatious proceedings, and such persons may include -

(a) persons served with orders in a vexatious litigation - as they may have to incur costs and time to respond to such orders; or

(b) beneficiaries to an estate who are not parties to the vexatious litigation but nevertheless are adversely affected - as they may not be able to get their entitlement to an estate until the vexatious litigation is over.

41. In the light of the overseas research findings and the explanation of the Administration's team, the Bills Committee agrees to accept the definition of "affected person" as proposed in the Bill.

Threshold for granting leave to institute or continue proceedings

42. Under the existing section 27 of HCO, leave may be granted for a vexatious litigant to institute or continue proceedings if the Court is satisfied that there are prima facie grounds for the proceedings. Under the proposed section 27A(1)(b), leave for the institution and continuation of any legal proceedings by a vexatious litigant shall be given if the Court is satisfied that there are reasonable grounds for the proceedings. The Bills Committee has requested an explanation for raising the threshold from "prima facie grounds" to "reasonable grounds" for granting such leave.

43. The Administration's team has advised that the existing section 27 of the HCO is modeled on section 51 of the Supreme Court Judicature (Consolidation) Act 1925 in England and Wales, which has since been replaced by section 42 of the Supreme Court Act 1981. One of the changes introduced by section 42 of the Supreme Court Act 1981 is raising the threshold for granting a vexatious litigant leave to issue fresh proceedings or for making a fresh application, requiring the court to be satisfied that the proceedings or application are not an abuse of the process and that there are reasonable, not just prima facie, grounds for the proceedings or application. The Working Party on the CJR considered that the amendments introduced by section 42 of the Supreme Court Act were plainly desirable.

44. Given that all vexatious litigants subject to an order under section 27 of the HCO would invariably have a history of instituting vexatious litigations, it is considered that the higher threshold of "reasonable", instead of "prima facie", grounds would not create any injustice to the vexatious litigant. The proposed amendment is also in line with the objective of Part 5 of the Bill to screen out vexatious litigation, thereby enabling fairer distribution of the court's resources for genuine disputes.

Mechanism for setting aside a vexatious litigant order

45. The Bills Committee has discussed whether a mechanism should be provided for a person who is subject to a vexatious litigant order to apply for setting aside the order.

46. According to the Administration's team, a vexatious litigant order can be appealed against under section 14(1) of HCO. If the appeal period is over, an application can be made to the Court of Appeal for extension of time for appealing. It is therefore considered unnecessary to introduce a mechanism for a person who is subject to a vexatious litigant order to apply for setting aside the order.

Safeguard to prevent unmeritorious applications

47. Since any party to the proceedings or any person who alleges that he has directly suffered adverse consequences resulting from such proceedings may apply for a vexatious litigant order under the proposed section 27 of the HCO, the Bills Committee has discussed whether there is any safeguard to prevent unmeritorious applications which may cause complications or delay in rightful proceedings.

48. The Administration's team has advised that under the proposed section 27, an "affected person" may apply for a vexatious litigant order without any leave requirement. It was originally considered that some safeguard could be provided by the exercise of the Court's discretion in dealing with such applications under section 27. Any abuse of the new provision may be addressed to by a suitable costs order. However, having researched into the relevant legislation on vexatious proceedings in other common law jurisdictions, it is noted that in Queensland, Western Australia and Northern Territory of Australia, leave of the court is required for lay persons (i.e. other than the law officers and the Registrar) to apply for a vexatious litigant order. Since the object of Part 5 of the Bill is to screen out vexatious litigation, thereby enabling fairer distribution of the court's resources for genuine disputes, the Administration's team has proposed to make CSAs to introduce a leave requirement for applications from affected persons.

49. After further deliberation, the Bills Committee considers that there is no need to introduce the proposed leave requirement for the following reasons -

(a) the definition of "affected person" in relation to a non-party under the proposed section 27(5)(b) is sufficiently narrow to filter out unmeritorious applications; and

(b) the addition of a leave requirement would be at variance with one of the objectives of the CJR to reduce unnecessary interlocutory applications as far as possible.

Having regard to members' views, the Administration will not proceed with the proposed CSAs.

<u>Discovery (Part 6, clauses 14 to 17)</u>

Proposals in the Bill

50. Currently, the Court's jurisdiction to order potential parties to make pre-action disclosure is limited to personal injuries and fatal accident claims. Part 6 implements Recommendations 75, 77 and 78 of the Final Report to promote greater transparency between the parties at an earlier stage with a view to facilitating settlement. The purpose of Part 6 is to amend the HCO and the DCO so that -

(a) the jurisdiction of the Court of First Instance and the District Court to order disclosure before commencement of proceedings covers all types of cases (and not merely cases involving personal injuries and death claims);

(b) orders for pre-action disclosure should relate to disclosure and inspection of specific documents which are "directly relevant" to an issue in the anticipated proceedings; and

(c) the jurisdiction of the Court of First Instance and the District Court to order post-commencement, pre-trial disclosure of documents against non-parties applies to all types of cases (and not merely to personal injuries and fatal accident claims).

51. Under the Bill, a document is only to be regarded as "directly relevant" to an issue arising or likely to arise out of a claim in the anticipated proceedings if -

(a) the document would be likely to be relied on in evidence by any party in the proceedings; or

(b) the document supports or adversely affects any party's case.

Impact on personal injuries cases

52. In response to the Bills Committee on the difference between "relevant" and "directly relevant" documents under the existing and proposed legislation respectively,

the Administration's team has advised that the term "relevant" in the existing legislation has been interpreted as having the same meaning as "relating to a matter in question" under Order 24, rule 1 of the RHC. Documents which are covered by this term would therefore extend to documents which might fairly lead to a train of inquiry in the Peruvian Guano sense. By contrast, the use of the term "directly relevant' and its definition in proposed section 41(2) of the HCO is intended to narrow the scope of pre-action disclosure by excluding "train of inquiry" or "background" documents. The use of the term "directly relevant" and its definition are intended to reflect Recommendations 75 and 77 of the Final Report. As stated in paragraph 487 of the Report, "[i]t is considered that such a rule strikes a reasonable balance between the need to protect against harassment and fishing applications on the one hand and the need to enable a potentially meritorious plaintiff to bring a claim which could not effectively otherwise be brought."

53. The Bills Committee points out that personal injuries litigation largely involves employees' claims in respect of industrial accidents, medical or other types of professional negligence and traffic accidents. Pre-action discovery in the existing sections 41 and 42 of the HCO gives a right to potential personal injuries claimants through pre-action discovery of relevant documents to ascertain whether they have a valid claim. The likelihood of their claims and hence the possibility of early settlement often depend on the outcome of pre-action discovery. A major concern of the Bills Committee is the impact of the new stricter test of "direct relevance" on personal injuries claims as it would restrict the claimants' right of access to "background" or "train of inquiry" documents, without which they do not know whether they have a valid claim.

54. The Administration's team has advised that all applications for pre-action disclosure will have to satisfy the new test. Although potential claimants in personal injuries claims will be required to meet the new, somewhat stricter, test of "direct relevance", it is considered that they will be able to obtain the same documents as they are presently able to obtain under the existing provision as applied in practice by the Court. In addition, it may be relevant to note that the concept of "directly relevant" is already set out (although not defined) in the existing Practice Direction 18.1 on the procedures of the Personal Injury List. Paragraph 7 of Practice Direction 18.1 states -

> "……In considering whether to make any order for specific discovery or disclosure, the court will have regard to … … whether the documents and matters sought to be discovered or disclosed are strictly and directly relevant to the issues between the parties."

55. The Administration's team has explained that the Steering Committee considers that it would be preferable to have a single, unified, "direct relevance" test for all applications for pre-action disclosure. It is difficult to justify why there should be a laxer test for pre-action disclosure in personal injuries claims, but a tighter one for other claims. In both situations, the purpose of ordering pre-action disclosure is the

same, namely, to enable the intending plaintiff to ascertain whether or not he has a viable claim.

56. In response to the request of the Bills Committee, the Administration's team has specifically sought the comments of the relevant committees of the two legal professional bodies on the proposed application of the "direct relevance" test to pre-action discovery in personal injuries cases. The Bills Committee notes that the Law Society has confirmed its support for the proposal and does not consider that the "direct relevance" test for pre-action disclosure, although slightly stricter than the previous "relevance" test, will restrict potential personal injuries claimants' right to access to "train of inquiry" documents. The Bar Association also supports the proposal as it would ensure that a uniform test would be applied to all claimants seeking pre-action disclosure. Its comments are summarized below -

(a) while the new "direct relevance" test would impact on the rights currently enjoyed by personal injury claimants to obtain pre-action disclosure, the actual impact, in practical terms, would be nil or negligible because "train of inquiry" documents are rare, if ever, ordered to be disclosed to potential claimants under the current law and practice;

(b) documentary evidence relevant to personal injuries claims usually takes the form of accident and other related reports. These would be recoverable under the "direct relevance" test. It is difficult to conceive a class of document relating to a personal injuries claim that would only qualify as a "train of inquiry" document but not as a "directly relevant" document; and

(c) there is no reason why personal injuries claimants should enjoy greater rights of discovery than other claimants. On the other hand, all claimants continue to enjoy the right to apply for discovery of "train of inquiry" documents after proceedings have been commenced.

Scope of the term "professional adviser"

57. The Bills Committee has noted that by virtue of section 41(b) and section 42(1)(b) of the HCO, the Court may, in appropriate cases, order the relevant documents to be disclosed to the applicant's medical, legal or professional adviser instead of the applicant himself. These two sections are modeled on section 33 of the Supreme Court Act 1981 of the UK and specifically enacted in 1987 for the special needs of personal injuries claims as a result of the recommendations of a sub-committee of the Supreme Court Rules Committee chaired by Kempster J. Members have asked about the scope and definition of the term "professional adviser" after the Court's jurisdiction is broadened to cover pre-action disclosure in all types of civil cases, and whether the drafting of Part 6 of the Bill should be reviewed to see if it is more appropriate to make separate and general provisions relating to pre-action discovery in cases other than personal injuries claims.

58. The Administration's team has advised that -

(a) the present scope of the term "professional adviser" is wide enough to cover any professional adviser employed by an intending plaintiff;

(b) in the personal injuries context, such professional advisers may include (apart from medical advisers) actuaries or other professionals qualified to advise on the quantification of damages. It may also include other professional advisers whose expertise may be relevant in the context of the particular claim that arises, e.g. architects or engineers whose views may be relevant to the issue of liability in a case involving injuries arising in an accident caused by an unsafe or dangerous structure; and

(c) if the scope of section 41 is expanded to cover all civil claims, the type of professional advisers whose input may be needed by an intending plaintiff would depend on the nature of his claim. It may therefore extend to advisers such as experts in accounting, financial or investment matters, or in relation to scientific or technical matters. There does not seem to be any reason why disclosure to such other professional advisers should not be provided for in an appropriate case.

Wasted costs (Part 7, clauses 18 to 19)

Proposals in the Bill

59. Part 7 relates to Recommendations 94 to 97 of the Final Report. It amends section 52A of the HCO and section 53 of the DCO to empower the Court of Appeal, the Court of First Instance and the District Court to make wasted costs order against barristers and solicitors.

60. Currently, the Court may make wasted costs orders against solicitors whom it considers to be responsible for any costs improperly incurred or wasted by undue delay or other misconduct. Under the proposed amendments, "wasted costs" means any costs incurred by a party as a result of -

(a) an improper or unreasonable act or omission; or

(b) any undue delay or other misconduct or default,

on the part of any legal representative, whether personally or through an employee or agent of the legal representative. "Legal representative", in relation to any proceedings, means a counsel or solicitor conducting litigation on behalf of the party.

Provision on "fearless advocacy"

61. Under the proposed section 53(4) of the HCO, the Court shall, in addition to all other relevant circumstances, take into account the interest that there be fearless

advocacy under the adversarial system of justice when determining whether or not to make a wasted costs order. The Law Society points out that the proposed provision is different from the one included in the Consultation Paper. It considers that the proposal to include "fearless advocacy" in the CJR is misconceived as the jurisdictions of civil and criminal law are not comparable and are two separate and distinct branches of the law. There is no duty on an advocate in the civil jurisdiction to be a "fearless advocate". The Law Society is of the view that the proposed provision on "fearless advocacy" should be removed from the Bill.

62. However, the Bar Association considers that the proposed provision will help address the profession's concern about the likely impact of the wasted costs provisions on their advocacy during proceedings. Moreover, the duty to fearlessly advocate for a client's case applies to all legal practitioners, barristers and solicitors alike, and there is no distinction between civil and criminal proceedings in this regard.

63. The Administration's team has advised that the proposed provision is included in the Bill, having regard to similar amendments proposed by the Administration to the Costs in Criminal Cases Ordinance (Cap. 492) in the Statute Law (Miscellaneous Provisions) Bill 2007. It is considered that there should be consistency in this regard for both civil and criminal cases.

Public funds to recompense wasted costs

64. The Bills Committee has requested the Administration to consider the legal profession's suggestion that public funds be made available to recompense a legal representative's costs in successfully defending a wasted costs order which is initiated on the Court's own motion.

65. The Administration does not find the suggestion justifiable for the following reasons -

(a) a useful body of case law exists that will assist the Courts in dealing with wasted costs orders;

(b) in line with amendments to the Costs in Criminal Cases Ordinance (Cap. 492) in the Statute Law (Miscellaneous Provisions) Bill 2007, the proposed wasted costs provisions in the Bill have specifically provided that "the interest that there be fearless advocacy under the adversarial system of justice" should be one of the circumstances which the Court should consider when it determines whether or not to make a wasted costs order; and

(c) the wasted costs provisions are modeled 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.

The Administration's team has also advised that 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.

66. To facilitate members to consider whether amendments should be proposed to the Bill at this stage, the Bills Committee has asked whether the legal profession's suggestion can be effected by subsidiary legislation after the passage of the Bill. The Administration's team has confirmed that as the suggestion involves the use of public funds, it cannot be effected by subsidiary legislation only.

Leave to appeal (Part 8, clauses 20 to 25)

67. Part 8 implements Recommendations 110 to 113 and 115 of the Final Report. Currently, appeals from the Court of First Instance to the Court of Appeal are as of right, i.e. leave is not required. To screen out unmeritorious appeals on interlocutory matters which do not determine substantive rights, amendments are proposed under the HCO to introduce the requirement that an interlocutory appeal to the Court of Appeal can only be brought with leave of the Court of First Instance or the Court of Appeal. Leave to appeal would only be granted if the Court is satisfied that the appeal has a reasonable prospect of success or there is some other compelling reason why the appeal should be heard. Refusal of leave by the Court of Appeal is final. It also provides that one or two Justices of Appeal can deal with such applications for leave to appeal. Part 8 also amends the DCO to similarly improve the procedures for applications for leave to appeal to the Court of Appeal.

68. Some members have expressed reservation whether the requirement of "some other compelling reason" would import too high a threshold for obtaining leave to appeal. The Administration's team has been requested to consider replacing the phrase "some other compelling reason" by "some other reason".

69. While the Administration's team considers that the requirement of "some other reason" would be too broad, it has agreed to propose CSAs to amend the phrase to read "some other reason in the interests of justice why the appeal should be heard". The Bills Committee has no objection to the proposed CSA.

Costs against a non-party (Part 10, clauses 27 to 28)

70. To allow the Court to order costs to fall where they are appropriate in cases where costs have been incurred as a result of the conduct of someone who is not a party to the proceedings, Part 10 amends the HCO and DCO to empower the Court of First Instance, the Court of Appeal and the District Court to make a costs order against a person who is not a party to the relevant proceedings.

71. The Bills Committee notes that the proposed amendments do not originate from the Final Report. They are recommendations proposed by the Steering Committee having regard to developments since the publication of the Final Report.

Members have expressed concern that the proposed changes mark a radical departure from the current practice, and have enquired about the practice in the UK, the criteria for awarding costs against a non-party, and whether there are safeguards to protect the right of non-parties.

72. The Administration's team has advised that the existing section 52A of HCO is modeled on section 51 of the English Supreme Court Act 1981. Section 51 of the English Supreme Court Act 1981 gives the court full power to award costs against non-parties. However, section 52A(2) of the HCO provides that subject to specific provision, no order of costs may be made against a non-party. As such, in order to seek costs against a non-party, a person must satisfy the court that the non-party is in fact a "party" within the meaning of section 2, or apply for a joinder to join the non-party to the proceedings in order to overcome the prohibition in section 52A(2). As many Hong Kong cases have recognized, a literal application of the existing section 52A of HCO can produce unjust results. Notably, it cannot catch funders behind the litigation who are not parties to the proceedings (or parties on the record).

73. The Administration's team has further advised that there are well established principles at common law governing the court in exercising its discretion to order costs against non-parties. For instance, a recent Court of Final Appeal case has recognized that justice would normally require that a self-interested funder behind a litigation who is not a party to the proceedings be ordered to pay the costs for the funded litigant's successful opponent. To safeguard the interests of the non-party concerned, it is proposed to add a new rule 6A to Order 62 of the RHC 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.

Rules as to costs and interest (new Part 10A, clauses 28A and 28B)

74. The Administration's team has advised the Bills Committee that under the existing Order 62 rule 22(3) of the RHC, in the event of undue delay, a taxing master is empowered to disallow any item contained in the bill of costs. The Steering Committee is of the view that a taxing master should have the power to make a global deduction of the bill, instead of the power to arbitrarily disallow an item. Hence, it has been proposed in the Consultation Paper issued in April 2006 that the existing rule 22(3) be amended to permit a taxing master to make any order as he sees fit as to any part of the costs and to disallow interest, to ensure that taxation is proceeded with expeditiously. These amendments are in line with the objective of the CJR for a case to be dealt with as expeditiously as is reasonably practicable. To pursue the proposed amendments, the Steering Committee has proposed that enabling provisions be introduced to HCO and DCO by way of CSAs to the Bill.

75. The Bills Committee notes that under the new clauses 28A and 28B, enabling provisions will be introduced in the HCO (proposed section 55D) and DCO (proposed

section 72CA) for rules of court to be made to empower the Registrar to -

(a) disallow all or part of any costs to be taxed pursuant to a costs order made by the Court of Appeal and the Court of First Instance, if there has been undue delay in commencing or proceeding with taxation;

(b) disallow all or part of any interest for undue delay in commencing or proceeding with taxation; and

(c) impose interest sanctions to penalize a party for unnecessary taxation as a result of his failure to accept "sanctioned offers and payments" on costs.

<u>Lands Tribunal (Part 12, clauses 30 to 38)</u>

Background

76. In response to members' request, the Administration's team has provided information on the background and the consultation on the proposed amendments in Part 12 of the Bill which do not originate from the Final Report on the CJR. The Bills Committee notes that in April 2005, the Judiciary completed a review of the LTO and the LTR (the Review) and informed the Panel on Administration of Justice and Legal Services (AJLS Panel) of its recommendations. Most of the recommendations are related primarily to application for possession of premises, with a view to streamlining the procedures. Recommendations are also made in respect of the jurisdiction and other practice and procedure of the Lands Tribunal, with a view to making the processing of claims in the Lands Tribunal more efficient and expeditious. Members of the AJLS Panel generally supported the recommendations in the Review.

77. The Judiciary Administration has also consulted the two legal professional bodies on the Review and responded to their comments. The two legal professional have indicated either agreement to or no comments on the proposed amendments.

78. The recommendations requiring amendments to the LTR were effected by the Lands Tribunal (Amendment) Rules 2006 which came into operation on 30 April 2007. As regards the recommendations in the Review requiring amendments to primary legislation, they are contained mainly in Part 12 of the Bill, which also contains amendments consequential to some of the amendments made in respect of the HCO and DCO for the CJR.

Proposals in the Bill

79. Part 12 amends the LTO to provide greater flexibility for the Lands Tribunal to adopt the practice and procedures of the Court of First Instance and streamline the processing of claims. Specifically, this Part –

(a) provides that the Lands Tribunal has jurisdiction to make an order for possession of any premises or for ejectment of a tenant from those premises, and make orders for the payment of damages in respect of a breach of tenancy or sub-tenancy in relation to any application for possession or for ejectment;

(b) makes it clear that the Lands Tribunal has the same jurisdiction, powers and duties of the Court of First Instance in respect of its practice and procedure;

(c) makes it clear that, unless provided for by other enactment, the Lands Tribunal does not have jurisdiction to deal with cost-only proceedings;

(d) empowers the Lands Tribunal to make costs orders against non-parties and wasted costs orders against barristers and solicitors; and

(e) specifies the persons who may tax the costs ordered by the Lands Tribunal.

This Part also amends the HCO and the DCO to empower the Court of First Instance and the District Court respectively to order the transfer to the Lands Tribunal of any action or proceeding brought before them and which is within the jurisdiction of the Lands Tribunal.

Proposed leave requirement for Lands Tribunal appeals

80. At present, section 11(2) of the LTO stipulates that any party may appeal against a determination or order of the Lands Tribunal to the Court of Appeal on the ground that such determination or order is erroneous in point of law. In the Consultation Paper published in April 2006, the Steering Committee proposed that the recommendations on the requirement for leave to appeal in the Final Report should be made equally applicable to the Lands Tribunal, and that accordingly, section 11 of LTO should be amended along similar lines as the proposed amendments to the HCO in relation to leave to appeal.

81. The Bar Association was against introducing a leave requirement in addition to the existing provision, which already confines the scope of appeals. The Bar Association considered that where an appeal not seeking in substance to argue a point of law was filed, the respondent (which was usually the Government or the public authority) could be relied on to act diligently to seek the striking out of the notice of appeal. In view of the Bar Association's position, the proposed amendments to section 11 of the LTO were not included in the Bill.

82. In 德喜大廈業主立案法團 與 黎明光 CACV 171/2006 (decision on 30 July 2007), the Court of Appeal commented that many of the appeals from the Lands Tribunal, particularly those where the appellants were unrepresented, had not

been made in accordance with the statutory ground, i.e. the Lands Tribunal's determination or order was erroneous in point of law. It was noted by way of contrast that appeals from the Labour Tribunal and the Small Claims Tribunal concerning points of law required leave. The Court of Appeal commented that there was a need to consider amending the LTO to introduce a leave requirement for appeals from the Lands Tribunal, so that only appeals involving questions of law would be dealt with at the substantive hearing.

83. The Steering Committee has therefore reconsidered the matter in the light of the Court of Appeal's comments in CACV 171/2006. The relevant considerations are -

(a) whilst there are Lands Tribunal appeals in which the Government is the respondent (mostly compensation cases), experience has shown that there are a very substantial number of appeals in which the respondent is not the Government (particularly in building management and possession cases). These are likely to be cases in which the appellants are unrepresented litigants. There are also applications for stay of execution pending appeals (mostly possession cases);

(b) for unmeritorious appeals not involving points of law, legal costs incurred by the respondents are very often disproportionate to the subject matter of the appeal, and in possession cases, such legal costs are probably unrecoverable due to the insolvency of the appellant; and

(c) unless there is a leave requirement, the objective of section 11(2) of the LTO to limit the scope of appeals to those determinations or orders which are erroneous in point of law is often defeated and such appeals become costly for the respondent.

84. In view of the above, the Steering Committee proposes to introduce a leave requirement for interlocutory and final appeals from the Lands Tribunal to the Court of Appeal to ensure that the appeal involves a question of law, and to achieve consistency with the grounds for granting leave for appeals to the Court of Appeal in the HCO and the DCO. To give effect to the proposal, the Administration will introduce CSAs to the Bill (addition of new clauses 32A and 32B).

85. The Bills Committee has noted that the two legal professional bodies have been consulted and indicated agreement to the Steering Committee's proposal. The Bar Association has reconsidered its earlier position, taking into account the number of disputes submitted to the Lands Tribunal in which the Government is not a party outnumbers those in which the Government is a party, and the Court of Appeal's concern expressed in CACV 171/2006.

86. The Bills Committee has no objection to the introduction of the proposed CSAs to implement the Steering Committee's proposal.

Committee Stage amendments

87. The Bills Committee supports the CSAs proposed to be moved by the Administration.

Consultation with the House Committee

88. The Bills Committee made a report on its deliberations to the House Committee on 18 January 2008 and recommended support of the resumption of the Second Reading debate on the Bill at the Council meeting on 30 January 2008.

Council Business Division 2
Legislative Council Secretariat
24 January 2008

Appendix I

Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

Membership list

Chairman	Hon Margaret NG
Members	Hon James TO Kun-sun Hon LI Kwok-ying, MH, JP Hon Ronny TONG Ka-wah, SC Total : 4 Members
Clerk	Mrs Percy MA
Legal Adviser	Miss Kitty CHENG
Date	15 May 2007

附錄 II
Appendix II

《2007 年民事司法制度(雜項修訂)條例草案》委員會
Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

曾向法案委員會表達意見的團體/個別人士名單
List of organizations/individual who have given views to the Bills Committee

團體/個別人士名稱	Name of organizations and individual
1. 香港大律師公會	Hong Kong Bar Association
2. 香港律師會	The Law Society of Hong Kong
3. 香港訟費員協會	Hong Kong Law Costs Draftsmen Association
4. 香港調解會	Hong Kong Mediation Council
5. 國際糾紛決議事務所(香港)有限公司	ADR Chambers (Hong Kong) Limited
6. W S CLARKE 先生	Mr W S CLARKE