

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

I. INTRODUCTION

1.1 The implementation of the majority of recommendations in the Final Report (“Final Report”) of the Working Party on Civil Justice Reform (“CJR”) requires legislative amendment. This Consultation Paper invites comments on the proposed legislative amendments. The proposed amendments to both primary and subsidiary legislation should be read in the context of the recommendations and text of the Final Report.

The Final Report

1.2 The Final Report of the Working Party on CJR was published on 3 March 2004. Having studied in detail the comments received on its Interim Report and Consultative Paper published in November 2001, the Working Party made a total of 150 recommendations in the Final Report. Most of the recommendations attracted considerable support from those who responded in the consultation exercise, including the Bar Association and the Law Society.

1.3 The majority of the recommendations involve amendments to the existing rules and practice of the High Court. Some involve amendments to primary legislation.

Steering Committee on CJR

1.4 In March 2004, the Chief Justice appointed the Steering Committee on CJR (“the Steering Committee”) with the following terms of reference -

“To oversee the implementation of the recommendations of the Final Report on Civil Justice Reform relating to the Judiciary.”

1.5 The Steering Committee is chaired by the Hon Mr Justice Ma, Chief Judge of the High Court. Other members are the Hon Mr Justice Woo, Vice-President of the Court of Appeal; the Hon Mr Justice

Hartmann, the Hon Madam Justice Chu, the Hon Mr Justice Barma and the Hon Mr Justice Reyes, Judges of the Court of First Instance; Deputy Registrar Poon, High Court; and HH Judge Au Yeung, Judge of the District Court and Acting Registrar of the Court of Final Appeal. Administrative and technical support is provided by the Judiciary Administration.

1.6 The work of the Steering Committee has so far focused mainly on the necessary amendments to the relevant primary and subsidiary legislation for the implementation of the CJR recommendations in the High Court. For the amendments to the Rules of the High Court (“RHC”) (Cap. 4A), the Steering Committee has consulted the High Court Rules Committee¹ in considering the proposed amendments. Where appropriate, reference has also been made to the relevant Civil Procedure Rules (“CPR”) in England and Wales.

Application to the District Court, Lands Tribunal and Employees’ Compensation Proceedings

1.7 As the practice and procedure in civil proceedings in the District Court largely mirror those in the High Court, it was considered appropriate for the two levels of Court to have the same set of procedures consequent on the CJR. To this end, the Chief Justice directed in December 2005 that the legislative amendment exercise for the implementation of CJR should apply to both the District Court and the High Court. The Chief Justice also directed that an assessment be made of the impact of the legislative amendments for CJR on proceedings in the Lands Tribunal and Employees’ Compensation (“EC”) proceedings.

1.8 With the assistance of Judges at the District Court and the Lands Tribunal, the Steering Committee has, since December 2005, identified those legislative amendments required for the extension of the CJR recommendations to the District Court, the Lands Tribunal and EC proceedings.

¹ The High Court Rules Committee is set up pursuant to section 55 of the High Court Ordinance (Cap. 4) to make rules of court regulating and prescribing the procedure and the practice to be followed in the High Court.

II. AMENDMENTS TO PRIMARY LEGISLATION

2.1 In respect of the High Court, the Steering Committee has identified that, of the 150 recommendations in the Final Report, 21 require amendments to the following Ordinances -

- (a) High Court Ordinance (“HCO”) (Cap. 4);
- (b) Law Amendment and Reform (Consolidation) Ordinance (“LARCO”) (Cap. 23); and
- (c) Arbitration Ordinance (“AO”) (Cap. 341).

2.2 These 21 recommendations are related to the following eight areas in the Final Report –

- (1) Pre-action protocols with regard to costs-only proceedings (also applicable to the District Court);
- (2) Pleadings with regard to the defence of tender before action (also applicable to the District Court);
- (3) Interim remedies and Mareva injunctions in aid of foreign proceedings;
- (4) Vexatious litigants;
- (5) Discovery (also applicable to the District Court);
- (6) Wasted costs (also applicable to the District Court, Lands Tribunal and EC proceedings);
- (7) Leave to Appeal (also applicable to the District Court, Lands Tribunal and EC proceedings); and
- (8) Appeals.

2.3 The following Annexes are attached –

- (a) **Annex A** – a consultation draft of the Civil Justice (Miscellaneous Amendments) Bill (“the Draft Bill”), which contains amendments for the implementation of the 21 recommendations in the High Court and those applicable to the District Court. (Amendments for the recommendations applicable to the Lands Tribunal and the EC proceedings are expected to be along the similar lines as the amendments to the HCO, and will be incorporated in the Bill in due course); **Annex A**
- (b) **Annex B** – the marked-up version of the relevant statutory provisions affected by the amendments in the Draft Bill; and **Annex B**
- (c) **Annex C** – a summary table setting out the 21 recommendations, the statutory provisions affected and the relevant clauses in the Draft Bill. **Annex C**

Matters for Attention

2.4 Whilst the proposed amendments relate primarily to the recommendations in the Final Report, they have also taken into account developments and various other matters deliberated on by the Steering Committee since the publication of the Final Report –

- (a) Costs-only Proceedings
 - (i) The Steering Committee considered that costs-only proceedings in Recommendation 9² of the Final Report created a new cause of action. Amendments to the HCO and DCO are therefore necessary (see Clauses 2 to 5 of Draft Bill).
 - (ii) Moreover, costs-only proceedings should be dealt with at the High Court or the District Court only, depending on the amount of costs involved, i.e. costs exceeding \$1 million at the High Court, and costs not exceeding \$1

² Recommendation 9 – A procedure should be introduced to enable parties who have settled their substantive dispute to bring costs-only proceedings by way of originating summons and subject to practice directions, for a party-and-party taxation of the relevant settlement costs.

million at the District Court, as other levels of courts may not have the necessary expertise to deal with taxation of costs.

(iii) Amendments should be made to section 8 of the (“Lands Tribunal Ordinance (“LTO”) (Cap. 17) to make it clear that the Lands Tribunal will not hear costs-only proceedings even if such proceedings arise out of a dispute which is within the jurisdiction of the Lands Tribunal.

(iv) Consequential amendments should be made to the Schedule to the Small Claims Tribunal Ordinance (Cap. 338) to make it clear that the Small Claims Tribunal shall not have jurisdiction to hear and determine costs-only proceedings, even if the amount of costs claimed is not more than \$50,000 (see Clause 23³ of Draft Bill).

(b) Costs Orders against Non-parties (Clause 2 of Draft Bill)

The Steering Committee considered that there should be amendments allowing costs orders to be made against non-parties.

(c) Interim Remedies and Mareva Injunctions in Aid of Foreign Proceedings (Clauses 8 to 11 of Draft Bill)

As the High Court has wide jurisdiction to deal with matters concerning foreign jurisdiction, the Steering Committee considers that the power to make interim remedies in aid of foreign proceedings should only be exercised by the High Court.

(d) Vexatious Litigants (Clause 12 of Draft Bill)

Section 27 of the HCO should be amended to take into account Recommendations 67 and 68 in the Final Report. It should be noted that the amended section 27 is not restricted to vexatious litigants in civil proceedings. Whilst it is rare for an individual to bring a private prosecution, it is not impossible. The Steering Committee therefore considers that the new section 27 in HCO need not be restricted to civil proceedings.

³ Clause 23 in Part 8 of the Draft Bill is to be moved to Part 2.

III. AMENDMENTS TO SUBSIDIARY LEGISLATION

High Court

3.1 The Steering Committee has identified 84 recommendations in the Final Report that require amendments to subsidiary legislation under the HCO, including the Rules of the High Court (“RHC”) (Cap. 4A) and the High Court Fees Rules (“HCFR”) (Cap. 4D). Some involve new Orders, and some require amendments to existing Orders.

3.2 The following Annexes are attached –

- (a) **Annex D** - a consultation draft of the Rules of the High Court (Amendment) Rules 2007 (hereafter referred to as the “Draft HC Amendment Rules”) which contains the amendments to the RHC; **Annex D**
- (b) **Annex E** - the marked-up version of the relevant Rules affected by the amendments in the Draft HC Amendment Rules; **Annex E**
- (c) **Annex F** - a consultation draft of the High Court Fees (Amendment) Rules 2007 (“HCF(A)R”); **Annex F**
- (d) **Annex G** - the marked-up version of the First Schedule of the HCFR affected by the amendments in the draft HCF(A)R; and **Annex G**
- (e) **Annex H** - a summary table setting out the 84 recommendations, the Rules they affect, and the relevant Rules in the Draft HC Amendment Rules and HCF(A)R. **Annex H**

Matters Requiring Attention

3.3 While most of the amendments in the Draft HC Amendment Rules are referable to the Recommendations in the Final Report, the Steering Committee has in the course of its deliberations proposed the following additional amendments –

(a) Order 15 – Costs Orders against Non-parties

As mentioned in paragraph 2.4(b) above, the Steering Committee considered that there should be amendments allowing costs orders to be made against non-parties. Amendments are proposed to Order 15 for this purpose.

(b) Order 22 – Offers to Settle and Payments into Court

Order 22 is to be changed almost entirely to introduce a system of sanctioned offers and payments along the lines of Part 36 of the CPR. However, the wording differs from Part 36. The Steering Committee considered it was important to make clear that the new scheme would apply equally to both claims and counterclaims. Accordingly, for example, in the interpretation part of the rule, the terms “plaintiff” and “defendant” can be used interchangeably where the context so permits or requires.

(c) Order 62 – Costs

(i) Rules 8, 8A to 8D and 32C - Wasted Costs

The draft amendments have taken into account Practice Direction 14.5 entitled “Application for Wasted Costs Order under Order 62 rule 8”, which came into effect on 1 March 2005.

(ii) Rules 9A to 9C – Summary assessment of costs

As presently drafted, these new rules do not apply to and in relation to a party who is an aided person within the meaning of section 2 of the Legal Aid Ordinance (Cap. 91). The Steering Committee proposed that, notwithstanding that a party is on legal aid, summary assessment of costs should apply to him subject to certain conditions laid down in the new Rules 9B and 9C.

(iii) Rule 13(1A) – Powers of Chief Judicial Clerks to tax costs

It is proposed that the Chief Judicial Clerk should have the power to tax costs if the amount of the bill of costs

does not exceed the sum of \$200,000 (currently \$100,000).

(iv) Rules 21(4) and 32B – Taxing fees

Taxing fees will be levied on the amount claimed in the bill of costs. There will be no refund after taxation. The receiving party will only receive reimbursement of taxing fees from the paying party based on the amount allowed.

(v) Rule 22 - Consequences for delay in filing bill of costs

The Steering Committee considered that the objective of CJR to ensure that a case is to be dealt with as expeditiously as is reasonably practicable and to facilitate settlement of disputes should be extended to taxation of costs as well. The Steering Committee proposes that taxation proceedings should be commenced within 3 months (see Rule 22(1)) of the costs order (currently it is one month) to enable parties to have more time to negotiate for settlement. If a receiving party delays in submitting the bill, the paying party can apply for an order that unless the receiving party commences taxation proceedings within a specified period or the amount due is agreed between the parties, the costs order shall be wholly discharged. The taxing master may make such an order subject to such conditions as he deems fit.

Under the current Rule 22(3), in the event of undue delay, a taxing master is empowered to disallow any item contained in the bill of costs. It is considered that a taxing master should not have the power arbitrarily to disallow an item. Instead, it is suggested that he should have the power to make a global deduction of the bill. Hence, the existing Rule 22(3) is amended to permit a taxing master to disallow any part of the costs awarded. Further, the power to disallow interest will also ensure that taxation is proceeded with expeditiously (see new Rule 22(4)).

(vi) Rule 22(5) – Limitation Period for Applications for Taxation

Currently, there is no limitation period for applications for taxation. (Compare this to taxation of criminal bills. The limitation period is 3 months from the date of the costs order unless extended by the taxing authority: rules 6 and 9 of the Costs in Criminal Cases Rules.) Whilst accepting that bills of costs in civil cases may be more complex, there is no justification for leaving taxation of a costs order outstanding indefinitely. The Steering Committee therefore proposes a limitation period of 2 years as suggested in Rule 22(5)(a) for application for taxation.

(vii) First Schedule - Fees to Counsel

Paragraph 2(3) of Part II in the First Schedule to Order 62 is amended to read as follows -

“(3) No costs shall be allowed in respect of counsel appearing before a master in chambers, or of more counsel than one appearing before a master in open court or a judge or the Court of Appeal, unless the master or judge or the Court of Appeal, as the case may be, has certified the attendance as being proper in the circumstances of the case.”

It is not the intention of the reform to affect the present position on rights of audience of the profession. The purpose of the amendment is to avoid argument on taxation as to entitlement of counsel’s fees.

(viii) First and Second Schedules

The Steering Committee considers that the scale costs laid down in the First Schedule needs review. Further, the fixed costs laid down in the Second Schedule are grossly inadequate. Views are invited as to the deletion or addition of categories of such costs and the appropriate quantum.

(d) New Order 62A – Costs Offer and Payments into Court

This new Order, as presently drafted, does not apply to and in relation to a party who is an aided person within the meaning of section 2 of the Legal Aid Ordinance (Cap. 91). It is proposed that, if a party is not legally aided, but is the subject of a pending costs taxation by the Director of Legal Aid (“DLA”), he should still be able to make an offer in terms of Order 62A. It would then be a matter for the DLA to make a decision whether it would be better to accept the offer or to proceed with taxation.

District Court

3.4 Most of the 84 CJR recommendations requiring amendments to subsidiary legislation at **Annex H** are applicable to the District Court as well. Accordingly, similar amendments should be introduced to the Rules of the District Court (“RDC”) (Cap. 336H). It is considered that provisions in the RDC should follow those in the RHC unless there are special considerations justifying differences between the two sets of Rules. Amendments are therefore proposed to the RDC, to (i) implement the relevant CJR recommendations, and (ii) achieve consistency with the RHC. A summary of the proposed amendments to RDC for these two objectives is at **Annex I**.

Annex I

3.5 However, the RDC will differ from the RHC in the following aspects -

- (a) The right of a director to represent a limited company is preserved in Order 5A of the RDC;
- (b) The present position is that leave is generally required to appeal against any decision made in the civil proceedings in the District Court. This position will be preserved. It will be different from the High Court, where leave to appeal is only required for interlocutory decisions; and
- (c) For taxation proceedings, the District Court will continue to follow its existing requirements of counsel’s certificates, which are different from those in the High Court. The “two-thirds cap” under Order 62, Rule 32(1A) of the RDC will also be preserved.

3.6 As mentioned in paragraph 3.3(c)(viii) above, the Steering Committee is inviting views as to the itemization and quantum of the scale costs and fixed costs as laid down in the First and Second Schedules of Order 62 of the RHC. Views are also invited as to the appropriate itemization and quantum of such costs in the District Court.

Lands Tribunal

3.7 Pursuant to section 10(1) of the LTO, the Lands Tribunal has a general power to adopt the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction in respect of the matters⁴ listed under that section. In a separate review of the procedures of the Lands Tribunal conducted in 2005, the Judiciary has proposed that section 10(1) be amended to make it clear that the Lands Tribunal has a general power to adopt all practice and procedure of the Court of First Instance as it thinks fit (and not restricted to the matters currently listed in section 10). With such wide powers therefore to adopt the practice and procedure of the Court of First Instance, any changes under CJR can likewise be utilized in the Lands Tribunal, as it thinks fit. However, rule 14(2) of the Lands Tribunal Rules (“LTR”) (Cap. 17A) has to be amended to make it clear that the powers conferred by that rule are in addition and without prejudice to the general case management powers of the Tribunal.

⁴ **Section 10 - Practice and procedure of Tribunal**

(1) The Tribunal shall have the powers which are vested in the Court of First Instance in the exercise of its civil jurisdiction in respect of the following matters -

- (a) the attendance, examination and payment of witnesses;
- (b) the hearing of any matter with the assistance of an assessor or assessors;
- (c) the consolidation or hearing of any matters;
- (d) the punishment of persons guilty of contempt;
- (e) the ordering of inspection of any premises or place;
- (f) the entering and viewing of any premises or place;
- (g) the enforcement of decisions, judgments and orders;
- (h) the making of orders as to interim payments;
- (i) the making of orders in default of any action by a party,

and, so far as it thinks fit, may follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction.

EC Proceedings

3.8 EC proceedings are governed by the provisions in the Employees' Compensation (Rules of the Court) Rules ("ECR"), Cap. (282B). Section 21⁵ of the Employees' Compensation Ordinance ("ECO") (Cap. 282) provides that, subject to the provisions in the ECR, the law, rules and practice relating to civil proceedings in the District Court shall *mutatis mutandis* apply to EC proceedings. Therefore, the RDC, after incorporation of the proposed amendments as set out at **Annex I** for the implementation of relevant CJR recommendations and consistency with the RHC, will be applicable to EC proceedings by virtue of section 21(1) of the ECO. There is no need for separate amendments to the ECR.

IV. COMMENTS SOUGHT

4.1 The Steering Committee would be grateful for comments on -

- (a) Proposed Amendments to Primary Legislation, including –
 - (i) the Draft Bill at **Annex A** (Marked-up version at **Annex B**); and
 - (ii) the matters set out in paragraph 2.4.
- (b) Proposed Amendments to Subsidiary Legislation, including –
 - (i) the Draft HC Amendment Rules at **Annex D** (Marked-up version at **Annex E**);
 - (ii) the Draft HCF(A)R at **Annex F** (Marked-up version at **Annex G**);

⁵ **Section 21 - Jurisdiction of the Court**

- (1) Save as is provided in this Ordinance and any rules made thereunder, the District Court shall, upon or in connection with any question to be investigated or determined thereunder, have all the powers and jurisdictions exercisable by the District Court in or in connection with civil actions in such Court in like manner as if the Court had by the District Court Ordinance (Cap 336) been empowered to determine all claims for compensation under this Ordinance whatever the amount involved and the law, rules and practice relating to such civil actions and to the enforcement of judgments and orders of the Court shall *mutatis mutandis* apply.

- (iii) the matters in paragraphs 3.3 and 3.6;
- (iv) proposed amendments to the RDC at **Annex I**; and
- (v) proposed amendments to the LTR in paragraph 3.7.

4.2 The draft / proposed amendments annexed to this Consultation Paper are subject to further revisions and refinements by the Steering Committee, in consultation with the Department of Justice, in the light of comments received before their introduction into the Legislative Council.

4.3. The Steering Committee would be grateful for comments by 12 July 2006. In view of the tight legislative timetable, the Steering Committee may find it difficult to give any extension of time for response, as this would affect and delay the progress of this legislative exercise. Please send your comments to the Steering Committee by any of the following means -:

Mail: Secretary,
Steering Committee on Civil Justice Reform
LG2, High Court Building,
38 Queensway

Fax: 2501 4636

E-mail: secretary@civiljustice.gov.hk

4.4 It may be useful for the Steering Committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments received in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Steering Committee will assume that the response is not intended to be confidential.