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Dear Sirs

LAW SOCIETY'S RESPONSE TO THE PUBLIC CONSULTATION ON CIVIL JUSTICE REFORMS

We refer to the Ministry of Law's consultation paper on the civil justice reforms released for public consultation on 26 October 2018.

Following the withdrawal of the proposals to fix solicitor-and-client costs by Minister of Law K Shanmugam SC at the Further Townhall with the Bar on 22 November 2018, the Law Society is pleased to enclose its response on the other proposed Civil Justice Reforms for the Ministry's consideration.

At the Further Townhall, Minister K Shanmugam SC also invited the Law Society to make representations on the issue of whether party and party costs should be revised upwards to be more realistic. This issue was not raised as part of the public consultation process. Given the data aggregation and analytics involved, the Law Society has set up a working group to study this carefully and is working towards submitting detailed representations on this aspect by end March 2019.

In the course of this week, we have also been copied on responses to the Civil Justice Reforms from various law practices and other stakeholders that we have not yet had an opportunity to review. We will be pleased to collate these responses, if the Ministry requires us to do so, by way of a cover note.

Please let us know if the Law Society can be of further assistance on the heralded civil justice reforms. Thank you.

Yours faithfully

Gregory Vijayendran, S.C.
President

Enc. Law Society's Response to the Public Consultation on Civil Justice Reforms

RESPONSE TO PUBLIC CONSULTATION ON CIVIL JUSTICE REFORMS

LAW SOCIETY OF SINGAPORE

31 JANUARY 2019

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Introduction

1.1. The Council of the Law Society of Singapore ("Council") welcomes the opportunity to provide its feedback on the recommendations by the Civil Justice Commission ("CJC") and the Civil Justice Review Committee ("CJRC") in the public consultation paper issued on 26 October 2018 by the Ministry of Law ("the Ministry") on civil justice reforms ("the Consultation Paper"). (In this response, "Council" will be used interchangeably with "the Law Society". The words "the Bar" refer to the wider membership of the Law Society.)

1.2. The Law Society is strongly supportive of procedural reforms to the civil justice system that are directed towards the public good of securing the rule of law. The Law Society is therefore heartened by the introductory statement in the Civil Justice Commission Report ("CJC Report") that the key to the proposed Rules of Court ("proposed ROC") is "the liberty to do right for each case".[1] It is also in the legal profession's interest that the proposed ROC, inspired by reforms in the UK and Australia, have been customised for local litigation to reduce counsel's time and costs.[2]

1.3. We first start with general, overarching observations on the civil justice system and the proposed changes to the procedural rules.

Complexity of civil justice system

1.4. The Law Society recognises that the civil justice system is a complex ecosystem involving multiple stakeholders including the courts, lawyers and the disputing parties. A well-designed civil procedural system must take into account three inter-related elements: (i) the entity or entities promulgating the procedural rules; (ii) the form of procedural rules; and (iii) the content of specific rules.[3]

Power to make procedural rules

1.5. While the power to make procedural rules vests in the Rules Committee, the legal profession plays an important role in the civil justice system as users of, and participants in, that system. It is thus critical that the profession's feedback is seriously considered, at an early juncture, in any proposed procedural reforms to the civil justice system.

Form of procedural rules

1.6. It has been suggested that "[t]he more flexible [procedural] rules are … the more latitude judges have to adapt procedures to the needs of particular cases".[4] The CJC has highlighted that under the proposed ROC, "[t]he Court and the parties are guided by the spirit of the rules, not shackled by the letter of the law".[5] This is a laudable objective. That said, the "optimal degree of rule specificity and flexibility"[6] must at the same time be worked out based on the nature of and rationale for each particular rule in question.

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[1] CJC Report, Introduction, at paragraph 1.
[2] CJC Report, Introduction, at paragraph 3(a)-(b).
[3] Robert G. Bone, "Economics of Civil Procedure" in Francesco Paresi, ed., *The Oxford Handbook of Law and Economics, Volume III: Public Law & Legal Institutions* (Oxford: Oxford University Press, 2017) 143 at p 146.
[4] Robert G. Bone, "Economics of Civil Procedure" in Francesco Paresi, ed., *The Oxford Handbook of Law and Economics, Volume III: Public Law & Legal Institutions* (Oxford: Oxford University Press, 2017) 143 at p 146.
[5] CJC Report, Introduction, at paragraph 1.
[6] Robert G. Bone, "Economics of Civil Procedure" in Francesco Paresi, ed., *The Oxford Handbook of Law and Economics, Volume III: Public Law & Legal Institutions* (Oxford: Oxford University Press, 2017) 143 at p 146.

Open-ended rules may compromise certainty, whereas over-specific rules may result in rigidity where flexibility is needed.

Content of specific rules

1.7. The proposed ROC comprise a fresh set of civil procedural rules to regulate the resolution of disputes. The content of these rules is, to a large extent, predicated on the CJC's assessment of their potential impact on: (i) the strategic interactions amongst the different actors; (ii) savings in process costs; and (iii) the ability of the new procedures to produce accurate (or just) outcomes.[7]

Aim of proposed reforms

1.8. We note that the CJC's mandate was to "transform, and not merely reform"[8] the current procedural regime. Hence, although all the recommendations are intended to be reformative, significantly, several are also transformative: seeking to effect radical changes to the civil justice system – sometimes, by introducing new underlying philosophies to civil procedure.

Classification of proposed reforms

1.9. The procedural reforms proposed by the CJC can be broadly classified into three categories.

1.10. Category A reforms are those that are novel, i.e. without precedent in other leading jurisdictions, and may therefore be characterised as "experimental". Category A reforms include the proposed single interlocutory application, and the truncated pleadings process.

1.11. Category B reforms are reforms that seek to transplant civil justice principles or procedures from other jurisdictions, with varying degrees of tailoring to fit local circumstances and to promote the development of an autochthonous civil procedural system. Category B reforms include the exchange of AEICs before discovery, and the use of a single court expert.

1.12. Category C reforms comprise mainly administrative recommendations introduced to streamline, consolidate or clarify procedural rules in the current regime. An example of a Category C reform would be the proposed changes to timelines for service of documents in Singapore.

1.13. Many of the Category A and Category B reforms are not merely reformative, but are also transformative in root and branch. Given the multi-faceted, inter-connected nature of the procedural reforms and the difficulty in predicting their interaction in "the highly strategic environment of adversarial litigation",[9] the Law Society urges the Ministry to be circumspect and cautious in considering and implementing such reforms.

1.14. In particular, with Category A reforms, it appears that no similar reforms have been undertaken in other jurisdictions. Such lack of precedents coupled with the uncertain

[7] Robert G. Bone, "Economics of Civil Procedure" in Francesco Paresi, ed., *The Oxford Handbook of Law and Economics, Volume III: Public Law & Legal Institutions* (Oxford: Oxford University Press, 2017) 143 at p 150-51.
[8] CJC Report, The Civil Justice Commission, at paragraph 1(a).
[9] Robert G. Bone, "Economics of Civil Procedure" in Francesco Paresi, ed., *The Oxford Handbook of Law and Economics, Volume III: Public Law & Legal Institutions* (Oxford: Oxford University Press, 2017) 143 at p 144.

outcomes of such experimental reforms may irreversibly alter the certainty, clarity, predictability and efficiency of the civil justice system. Contrary to the stated, salutary aim, they would fail to secure the rule of law.

1.15. For Category B reforms, the challenge in transplanting procedural reforms from other jurisdictions lies not only in adapting such reforms to local circumstances but also in assessing the issues and challenges that foreign courts have faced in implementing such reforms. Further, the likely ramifications of differentiating our rules should also be properly analysed. They may result in unintended consequences that ultimately hinder the development of a well-suited autochthonous civil procedural system.

1.16. Finally, the effect of implementing numerous transformative reforms simultaneously may irreversibly and irrevocably alter the nature of Singapore's civil justice system. Given that the proposed reforms signal a shift towards a quasi-inquisitorial system, they may create a perception that Singapore's legal system is dissonant from the dispute resolution regimes of other leading common law jurisdictions. This could have a withering effect on the quality of the proposed reforms.

Methodology

1.17. We briefly touch on the methodology behind both the CJC Report and the Report of the CJRC ("CJRC Report"). Although both the CJC and CJRC Reports had articulated the broad rationale driving most of the procedural reforms, there is a conspicuous omission of: (i) empirical data underlying the proposed reforms; and (ii) detailed analyses of the potential effectiveness of the proposed changes. If in-depth studies had been undertaken, such data and analyses could have been helpfully provided to the public in the respective Reports. Without such information, the wholesale implementation of the proposed reforms en-bloc may result in unintended adverse consequences.

1.18. Moreover, with the benefit of studying how similar reforms have been implemented in other jurisdictions, it would have been instructive for the CJC and CJRC Reports to highlight whether, and if so how, the learning points from these other jurisdictions had been taken into account in formulating the proposed reforms. We have thus distilled certain useful learning points from other jurisdictions, where relevant, to insert into our response on specific proposals below.

Our response

1.19. With these overarching points on principle as a backdrop, our response seeks to:-

(a) examine the need for the reforms. This is especially so where: (i) a reform has been proposed, but no clear issue, problem or need driving the proposal has been identified (let alone, analysed) in either the Consultation Paper or the CJC and CJRC Reports; and/or (ii) where no other jurisdictions have adopted similar reforms (especially where a transformative change is involved that will lead to radical changes to the civil justice system).

(b) evaluate the soundness of the reforms. Our analytical tools for assessing the viability of the proposed reforms are elaborated below. In our response, we cover wide-ranging views and comments on the soundness of the individual reforms as proposed, including any collateral issue(s) that may arise from implementing these reforms.

(c) consider whether any, or all, of the *transformative* reforms should undergo a pilot exercise first, especially given their novelty and innovation and the uncertain impact that they may have on the civil justice system if implemented en-bloc simultaneously.

1.20. We appreciate that the two anchoring principles for the reforms as set out in the CJRC Report are: (i) enhancing judicial control over civil litigation; and (ii) having a default case management track, with optional points of departure. Our response will thus also examine the advantages and disadvantages of implementing these anchoring principles with regard to the relevant recommendations.

1.21. Insofar as Principle (i) is concerned, we note in general that other common law jurisdictions such as England, Australia and Hong Kong have also introduced reforms allowing for enhanced judicial control of their civil procedure. One concern is that the line between "robust case management and disruptive judicial intervention"[10] is a fine one. Straying into the latter can undermine the perception of the Judiciary as a fair and impartial arbiter. This consideration informs our response to some of the proposals.

1.22. As for Principle (ii), a simplified and streamlined default track is, in theory, an attractive proposal. However, much depends on whether the default options are tracks that work best for the majority of cases and therefore what parties should normally choose on their own accord. If not, we envisage that process costs may increase if parties are compelled to make court applications to depart from the default track in a majority of cases. We have fleshed this out in our response to certain proposals.

1.23. In preparing this response, the Law Society has used multiple analytical tools to assess the proposed reforms:-

(a) **Data-driven analytics**: through feedback obtained from townhall and consultation sessions, as well from as a wide-ranging online survey of the legal profession (please refer to our Methodology section[11] for further details).

(b) **Comparative studies**: review of comparable civil procedural regimes in jurisdictions such as the UK, Australia and Hong Kong.

(c) **Law and economics**: based on the standard economic model of procedure i.e. a procedural system is efficient if adding a procedure "reduces error costs enough to justify the additional process costs it creates".[12]

(d) **Singapore jurisprudence**: although the proposed ROC is intended to transform the current civil justice system, the wealth of existing Singapore jurisprudence on civil procedure is still relevant in assessing the viability of some of the proposed reforms.

1.24. We consider that the multiple analytical tools used in this response provide a sharp and critical assessment of "how the recommendations can be improved or whether the changes are necessary".[13] We trust that our response will assist the Ministry to better

[10] *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch) at [2].
[11] The Methodology section is at p 11.
[12] Robert G. Bone, "Economics of Civil Procedure" in Francesco Paresi, ed., *The Oxford Handbook of Law and Economics, Volume III: Public Law & Legal Institutions* (Oxford: Oxford University Press, 2017) 143.
[13] Consultation Paper, paragraph 7(b).

evaluate the CJC's and CJRC's recommendations. As always, we stand ready to address any queries or clarifications that the Ministry may have on our response.

Methodology

2.1 In preparing this response, the Law Society engaged the Bar through the following principal modalities to obtain feedback on the Consultation Paper:-

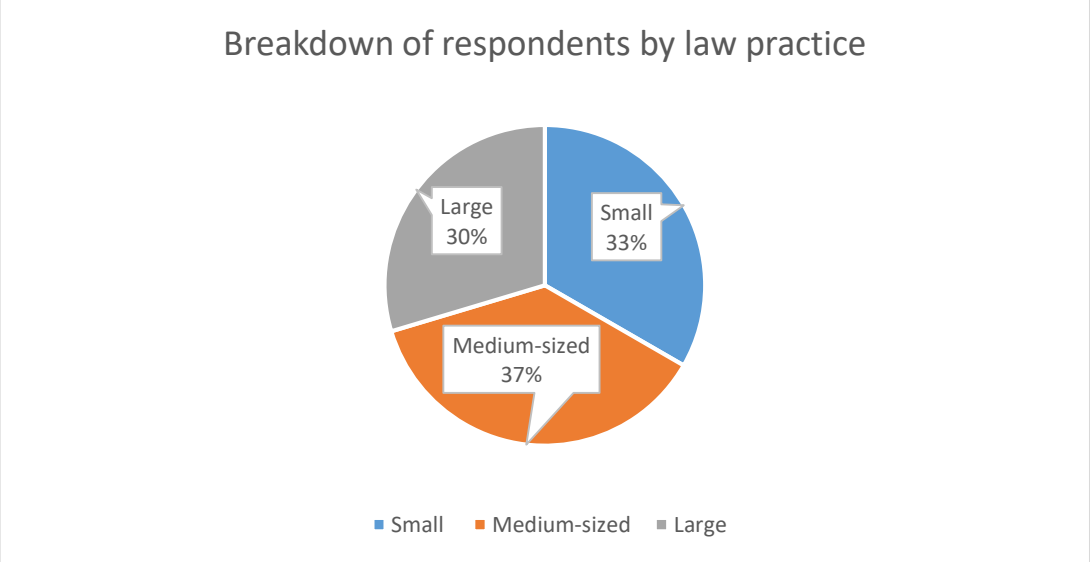
(a) an online survey of the Bar between 28 November 2018 and 16 December 2018 on selected key recommendations ("Law Society Online Survey"); and
(b) townhall and consultation sessions with different segments of the Bar.

Law Society Online Survey

2.2 The purpose of the Law Society Online Survey was to obtain views on the effectiveness and viability of implementing the key recommendations. The Law Society received 297 responses, with a total of 1,999 written comments.

2.3 Of the 297 respondents, 99 were from small law practices (1-5 lawyers), 110 from medium-sized law practices (6-30 lawyers) and 88 from large law practices (more than 30 lawyers).

Figure 2.1 Breakdown of respondents by law practice



2.4 The key survey findings will be shared in the detailed response to follow,[14] but it may be of interest to note that the six most unpopular recommendations were:-

(a) Exchange of AEICs before discovery (72% opposed);
(b) One-time extension of time by mutual consent (72% opposed);
(c) Single interlocutory application (71% opposed);
(d) Consequences of non-compliance (64% opposed);
(e) Inapplicability of the Interpretation Act and inclusion of non-court day in computation of time (61% opposed); and
(f) Single court expert (58% opposed).

[14] The margin of error of the survey is about 1% on average.

Townhall and consultation sessions

2.5 The Law Society conducted several townhall and private focus group sessions across different segments of the profession to seek their views on the recommendations in the Consultation Paper. The Law Society also invited members to send their written feedback by email. Relevant Law Society practice committees such as the Civil Practice Committee, the Personal Injury and Property Damage ("PIPD") Committee and the Small Law Firms Committee also provided feedback to the Council.

2.6 The Law Society received feedback from 44 unique respondents. The feedback was received through various forums:-

(a) Emails;
(b) Two townhalls in the State Courts Bar Room on 8 November 2018;
(c) Townhall with the Ministry of Law on 12 November 2018;
(d) Townhall with the junior bar on 21 November 2018 (please also refer to the section entitled "Concluding Thoughts from the Junior Bar" at the end of this response);
(e) Singapore Law Gazette article on the junior bar town hall published in January 2019;[15] and
(f) Private focus group sessions.

2.7 Appendix 1 contains selected feedback from the Bar received in November and December 2018 and reproduced verbatim, which elaborate on points in the Law Society's response herein, or which address points not covered in the response herein. Feedback from the Law Society's Civil Practice Committee is reproduced in Appendix 2.

[15] Ng Huan Yong, "The Proposed Civil Justice Reforms", Singapore Law Gazette (January 2019) < https://lawgazette.com.sg/news/updates/the-proposed-civil-justice-reforms/> (accessed 28 January 2019). The Law Society had the benefit of referring to an earlier draft of this article before its publication.

Section A: General Matters

I. Consultation Paper, paragraph 21 (Ideals)

21. Parties and the court will be guided by the following ideals in conducting civil proceedings: a. Fair access to justice; b. Expeditious proceedings; c. Cost-effective work proportionate to the nature and importance of the action, the complexity of the claim as well as the difficult or novelty of the issues and questions it raises, and the amount or value of the claim; d. Efficient use of court resources; and e. Fair and practical results suited to the needs of parties.

A. The interaction between "the Ideals" is unclear and should be unified by an explicit overarching objective.

Status quo

3.1 The Rules of Court currently in force ("current ROC") do not expressly set out any ideals to guide the court and parties in conducting civil proceedings. However, the courts have remarked on the role of procedural fairness in case law, observing that "procedural fairness and substantive justice interact with each other and cannot survive without the other. When procedure is defective, the very substance of the result may rightly be called into question."[16]

Stated objectives

3.2 The CJC recommends a set of five "Ideals" reflected in Chapter 1, Rule 3(2) of the proposed ROC. According to the CJC Report, these Ideals are "akin to constitutional principles by which the parties and the Court are guided in conducting civil proceedings".[17] The CJC also noted that although the Ideals "may not be achieved in every case", "parties are expected to assist the Court and to conduct their cases in a manner which will help to achieve the Ideals".[18]

Bar's feedback

3.3 More than 82% of the respondents to the Law Society Online Survey supported the Ideals. However, some respondents cautioned that the court should not emphasize expediency and efficiency at the cost of other Ideals, such as fair and practical results suited to the needs of parties. It was suggested that the Ideals had to be balanced against one another.

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[16] *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] SGCA 56 at [37], referring to *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [8]. See also Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 5-7 on the interaction between procedural and substantive justice.

[17] CJC Report, Chapter 1: General Matters, at paragraph 3.

[18] CJC Report, Chapter 1: General Matters, at paragraph 3.

Law Society's views

(A) Need for reform?

3.4 Although the need to expressly articulate a set of ideals is unclear from the Consultation Paper, nevertheless in principle, the Law Society is of the view that the Ideals taken as a whole are unobjectionable. The Ideals appear to draw inspiration from similar provisions in the UK Civil Procedure Rules 1998 ("UK CPR"), the New South Wales Uniform Civil Procedure Act 2005 ("NSW UCPA") and the Hong Kong Rules of the High Court ("HK RHC").

(B) Evaluation of recommendation

(1) No explicit overarching objective to reinforce cultural change

3.5 We are of the view that the recommendation may not fully meet the stated objectives, which ultimately seek to effect a paradigm shift in the litigation culture at the Singapore Bar. This is because unlike in the UK, NSW and Hong Kong, the Ideals do not espouse any one explicit overarching objective or purpose.

3.6 In this regard, Rule 1.1(1) of the UK CPR provides that the overriding objective of the UK CPR is to enable the court to "deal with cases justly and at proportionate cost", while section 56(1) of the NSW UCPA provides that the overriding purpose of the UCPA and of rules of court is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings". Order 1A, Rule 2(2) of the HK RHC stipulates that "the primary aim in exercising the powers of the Court is to secure the just resolution of disputes in accordance with the substantive rights of the parties".

3.7 The overriding objective in the UK CPR was "deliberately designed to emphasize a change in culture", namely that "[l]itigation must be conducted in an efficient, cooperative way, avoiding expense and delay".[19] The absence of an overarching objective of the Ideals does not sufficiently signal to the parties and their counsel the transformative effect envisaged by the proposed ROC, and may in fact result in satellite litigation on the overarching aim of the Ideals.

(2) Ideals appear to be exhaustive resulting in inflexibility

3.8 The Ideals itemized at Chapter 1, Rule 3(2) appear to be exhaustive. In contrast, Rule 1.1(2) of the UK CPR (as emphasised in Table 3.1) provides an inclusive definition of the overriding objective. This suggests that the UK courts may take into account other non-itemized factors which concern dealing with the case "justly" or "at proportionate cost". In *In re Guidezone Ltd*,[20] the petitioner, who brought an unfair prejudice petition under the UK Companies Act, objected to an application for an extension of time for service of the respondents' defences. In applying the overriding objective of dealing with cases justly, the English High Court opined that the lack of any disadvantage or prejudice to the petitioner in granting the extension was a "material consideration".[21] The court took this view despite the lack of prejudice not being an itemized factor under the CPR.

[19] Stuart Sime, *A Practical Approach to Civil Procedure* (Oxford: Oxford University Press, 21st edition, 2018), at paragraph 4.25.
[20] [2014] 1 WLR 3728.
[21] [2014] 1 WLR 3728 at [69].

Table 3.1 UK CPR – Dealing with a case justly and at proportionate cost

UK CPR, Rule 1.1(2)
"Dealing with a case justly and at proportionate cost ***includes***, so far as is practicable— (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate— (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders." [emphasis added]

3.9 In this regard, we also note that Ideal (c) does not take into account the financial position of each party (in contrast to Rule 1.1(2)(c)(iv) of the UK CPR) as a factor towards proportionality for cost-effective work. It is unclear why the CJC chose to depart from the UK CPR rule in this aspect. This example illustrates the inflexibility of the Ideals to accommodate other factors (particularly given the lack of an overarching objective in the proposed ROC).

(3) Inconsistent or incoherent interpretations of Ideals without explicit overarching objective

3.10 By not identifying a paramount philosophy behind the Ideals, inconsistent and incoherent interpretations of the proposed ROC may result. The court, required to give a purposive interpretation of the proposed ROC based on the Ideals,[22] would either have to strike an optimal balance between the multiple and potentially conflicting Ideals, or disregard one or more Ideals if irreconcilable with the rest. These divergent approaches, especially if applied inconsistently or incoherently, may give rise to a perception that some Ideals may be emphasised at the expense of others. This was also pointed out in the Bar's feedback above.

3.11 In addition, given that the proposed ROC would apply to all courts in the Singapore legal system, it is unclear why an overarching objective has not been prescribed for clarity across the different levels of courts. In Australia, only the High Court of Australia does not stipulate an overriding objective in its rules. This has been justified on the ground that the High Court of Australia "is not properly conceived of as a trial court and its case management function is minimal".[23] The same cannot be said of most of the courts in the Singapore legal system. Without an overarching objective, there is a risk that the State Courts and the Supreme Court may adopt different conceptions of the Ideals and apply them differently in practice, leading to inconsistent and unfair outcomes.

[22] Chapter 1, Rule 3(1) read with Rule 3(2).
[23] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraph 1.41.

(C) Conclusion

3.12 Given that the CJC Report had expressly stated that the key to the proposed ROC was "the liberty to do right for each case",[24] it is sub-optimal that this fundamental principle is not expressly stated anywhere in the proposed ROC. An overarching objective should be expressly stated in the proposed ROC. At the very least, the overarching objective should be stated in the Preamble so that litigants and their lawyers are aware of the focus of the proposed ROC.

B. The proportionality test in Ideal (c) may be difficult to apply in practice.

Bar's feedback

3.13 Many of the respondents to the Law Society Online Survey raised concerns about the proportionality test in Ideal (c), including the following:-

(a) it may be difficult to strike a balance among the three enumerated factors: (i) the action's nature and importance; (ii) the claim's complexity and the difficulty or novelty of its issues; and (iii) the claim's amount or value. For example, it was unclear how the costs of a low-value claim raising complex legal issues would be assessed.

(b) the claim's amount or value is not determinative of the work involved and should not be a relevant factor for Ideal (c). For instance, two claims of similar value but of varying complexity can entail different and disproportionate amounts of work from each lawyer.

(c) the lawyer's seniority and experience should be taken into account for Ideal (c).

Law Society's views

(A) Evaluation of Ideal (c)

3.14 The Law Society notes that the factors relevant to proportionality in Ideal (c) are similar to those found in Rule 1.1(2)(c) of the UK CPR (save for the UK CPR factor concerning each party's financial position as mentioned above). However, the UK CPR position does not represent the only approach to assessing proportionality of costs. For example, section 60 of the NSW UCPA refers only to "the importance and complexity of the subject-matter in dispute" in determining proportionate costs, without any reference to the amount in dispute.

(B) Conclusion

3.15 In principle, the Council recognises that the amount or value of the claim is relevant to the principle of proportionality so long as it is not the sole determinative factor. Other variables such as the complexity of the case are also relevant.

3.16 In addition, the Council would propose the following amendments to Ideal (c):-

(a) An additional factor – "the retainer's objective" – should be expressly stated in Chapter 1, Rule 3(2)(c) of the proposed ROC. Clients may pursue claims or actions on a point of principle and as such, are prepared to accept the costs of such

[24] CJC Report, Introduction, at paragraph 1.

litigation despite having evaluated the cost-benefit of pursuing the matter with their lawyers; and

(b) The word "cost-effective" (presumably borrowed from Hong Kong)[25] should be replaced with "cost-efficient". It is difficult to predict whether a lawsuit would be "effective". Cost-efficiency is also more consistent with a lawyer's existing ethical obligation under the Legal Profession (Professional Conduct) Rules 2015 ("PCR") to "evaluate whether any consequence of a matter involving the client justifies the expense of, or the risk involved in, pursuing the matter".[26]

3.17 Additionally, the Council observes that Ideal (a), "***fair*** access to justice", may not be intuitively understood by either the litigant or his counsel. We suggest that an alternative phrase such as "the just determination of proceedings"[27] may be more appropriate.

[25] One of the underlying objectives of the HK RHC is "to increase the ***cost-effectiveness*** of any practice and procedure to be followed in relation to proceedings before the Court": Order 1A, Rule 1(1)(a).
[26] Rule 17(2)(e)(i) of the PCR.
[27] See section 57(1)(a) of the NSW UCPA.

II. Consultation Paper, paragraph 22 (doing justice)

22. The court will be empowered to do what is right and necessary on the facts of the case before it to ensure that justice is done, provided it is not prohibited from so acting by any written law and its actions are consistent with the ideals.

A. It is unclear whether Chapter 1, Rule 5(2) is intended to encapsulate the court's inherent powers.

B. The court's power to fill any lacunae in the proposed ROC is conceptually unclear and may indirectly introduce overriding objectives.

Status quo

3.18 Order 92 rule 4 of the current ROC provides for "the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court".

Stated objectives

3.19 Chapter 1, Rule 5(2) of the proposed ROC effects this recommendation:

> "***Where there is no express provision in these Rules on any matter***, the Court may do whatever it considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the Court, so long as it is not prohibited by law and is consistent with the Ideals". [emphasis added]

3.20 According to the CJC Report, Rule 5(2) "empowers the Court to do what is right and necessary ***in a case where the Rules do not cater to a specific problem***, provided it is not prohibited by any written law and is consistent with the Ideals" [emphasis added].

Bar's feedback

3.21 The Law Society received feedback from a member that this recommendation appeared too broad as it did not distinguish between procedural and substantive issues. However, on examining Rule 5(2), the member noted that its scope was limited to procedural issues and was supportive of the rule as it did not overstep into substantive law.

Law Society's views

(A) Need for reform?

3.22 The Law Society does not object to the proposed Rule 5(2) if it is intended to reflect the court's existing inherent powers as set out in Order 92 rule 4 of the current ROC. However, it is unclear whether Rule 5(2) is intended to replace Order 92 rule 4 and if so, to what extent. We note that:-

(a) both Rule 5(2) and Order 92 rule 4 refer to justice and abuse of process as yardsticks for the court to exercise its discretion in a particular case;

(b) Order 92 rule 4 has not been reproduced in the proposed ROC; and

(c) the court's inherent powers under Order 92 rule 4 are wider than those envisaged in Rule 5(2). The latter only applies in the absence of an express rule in the proposed ROC on any matter. In contrast, the court may currently exercise its inherent jurisdiction "even though there are rules governing a particular application".[28]

3.23 We would be grateful if the Ministry could clarify the relationship between Rule 5(2) and the court's inherent powers. If Rule 5(2) is intended to encapsulate the court's inherent powers, why is Rule 5(2) narrower than the position under Order 92 rule 4? Also, will the court still have inherent jurisdiction even if the proposed ROC expressly provide for a particular matter?

(B) Evaluation of recommendation

3.24 We note that this recommendation reflects the overarching philosophy "for the court to do right in each case and not be shackled by the letter of the law".[29] While we generally agree that the court should have autonomy in carrying out procedural justice, the framing of Rule 5(2) suggests that one outcome may be that the court cannot act to do justice or prevent an abuse of process because it is inconsistent with the Ideals. This gives rise to an unnecessary conceptual dichotomy between the Ideals and the twin goals of justice and preventing abuse of process.

3.25 Moreover, although no overriding objective is prescribed in Chapter 1, Rule 3 (as discussed above), would Chapter 1, Rule 5(2) indirectly introduce two "overriding objectives" of justice and preventing abuse of process? This is because there would be scenarios where doing justice or preventing abuse of process are "consistent with the Ideals". We are mindful that this might not have been the intent, as Rule 5(2) could have been drafted only to track the language of Order 92 rule 4.

(C) Conclusion

3.26 To avoid misunderstanding by litigants and their lawyers about the relationship between the Ideals and the twin goals of justice and preventing abuse of process, we suggest that the courts make it clear in any explanatory notes to the proposed ROC what the actual intent of Rule 5(2) is i.e. whether to preserve the court's inherent powers only to some extent.

[28] Chua Lee Ming (editor-in-chief), *Singapore Civil Procedure 2019* (Sweet & Maxwell Asia, 2018), Order 92 Miscellaneous, at 92/4/3.
[29] Consultation Paper, paragraph 10; CJC Report, Introduction, at paragraph 1.

III. Consultation Paper, paragraph 23 (non-compliance with Rules)

> 23. Where there is non-compliance with the Rules which is not waived by the court, the court will be empowered to refuse to hear the matter or even dismiss it without a hearing. The court may dismiss, stay or set aside any proceedings and also give the appropriate judgment or order. This deviates from the norm today that non-compliance with the Rules could be compensated by costs. The court will also be empowered to impose a late-filing fee for each day of non-compliance to dis-incentivise persistent non-compliance.

A. The principle of proportionality should be a primary consideration in determining the severity of sanctions for non-compliance.

Status quo

3.27 The current ROC provide that a failure to comply with the Rules "shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein".[30] The court may only set aside either wholly or in part the relevant proceedings, step or any document, judgment or order. Alternatively, the court may allow such amendments to be made and make the appropriate order dealing with the proceedings generally.[31]

Stated objectives

3.28 Chapter 1, Rule 5(4) of the proposed ROC provides that the court will have the following powers with regard to any non-compliance with any written law, the court's orders or directions or any practice directions [emphasis added below]:

(a) waive the non-compliance;
(b) accept part of a document and reject the part that is in non-compliance;
(c) disallow or reject the filing or use of any document;
(d) refuse to hear any matter or dismiss it without a hearing;
(e) dismiss, stay or set aside any proceedings and give the appropriate judgment or order ***even though the non-compliance would be compensated by costs if the non-compliance is inconsistent with any of the Ideals in a material way***;
(f) impose a late filing fee of $50 or such amount as the Chief Justice may specify from time to time for each day of non-compliance, excluding non-court days;
(g) make costs orders or any other orders that are appropriate.

3.29 Chapter 1, Rule 5(5) provides that "[w]here the ***non-compliance is in respect of any written law other than these Rules***, the Court may waive the non-compliance only if the written law allows such waiver." [emphasis added]

3.30 According to the CJC Report, Rule 5(4) "modifies the precept that non-compliance is always curable so long as it can be compensated by costs" because that precept "tends to favour parties with deep pockets".[32] Instead of measuring the price of non-compliance "in purely monetary terms", the new test is "whether the non-compliance is inconsistent with any of the Ideals in a material way".[33]

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[30] O 2 r 1(1).
[31] O 2 r 1(2).
[32] CJC Report, Chapter 1: General Matters, at paragraph 5.
[33] CJC Report, Chapter 1: General Matters, at paragraph 5.

Bar's feedback

3.31 Approximately 65% of the respondents to the Law Society Online Survey did not favour this recommendation. Views expressed include:-

(a) any dismissal of a case should only be done after a hearing. The court should inquire as to the reasons for non-compliance as parties could have legitimate reasons for their non-compliance.

(b) the consequences of non-compliance should relate to its severity. While harsher sanctions could be appropriate for repeated or severe breaches, they should not be used for minor or inadvertent breaches as that would be draconian and contrary to access to justice particularly where there is no irremediable prejudice.

(c) even if the courts should de-emphasise the consideration of whether non-compliance could be compensated by costs, other factors such as the reasons for non-compliance should be considered.

(d) policies allowing automatic dismissal of cases would put lawyers at a greater risk of being sued for professional negligence or reported to the Law Society.

(e) the imposition of late filing fees[34] may impede access to justice if it did not take into account the demands of life on both lawyers and litigants and the complexity of each case. It may also be unfair to a party who had valid reasons for filing late. Should the court accept that party's reasons, that party might face administrative difficulties in recovering the fees paid.

3.32 Members who supported this recommendation were generally of the view that it would help to ensure compliance, with the caveat that the court should set realistic timelines. Currently, in some cases, the court imposed an unrealistic timeline despite lawyers having articulated difficulties in meeting it at the onset.

3.33 It was also suggested that the courts should publish clear guidelines on what factors it would consider in deciding what order to make. It would be stressful and unpredictable for both lawyers and clients if some judges were quicker to refuse to hear matters or dismiss them.

Law Society's views

(A) Need for reform?

3.34 Although we note the CJC's view on the undesirability of using costs sanctions to cure non-compliance, it is unclear why other current safeguards such as "unless orders" or personal costs orders are insufficient to address flagrant or egregious procedural breaches. In this regard, the CJC Report did not provide empirical evidence on whether instances of non-compliance were on the rise and if so, why the current powers of the court have been insufficient to address it. For example, if the court has been reluctant to exercise its powers to grant or enforce unless orders, the reasons for the judicial countenance should be examined. This is important because if the court has been reluctant to exercise existing draconian powers, the proposed reform may well be a "paper tiger". On the other hand, if there are good reasons why the draconian powers have not been exercised, then even more draconian powers are unnecessary.

[34] Chapter 1, Rule 5(4)(f).

3.35 In addition, the proposed Rule 5(4) seems to send the Bar back in time to the old days of the formalistic English regime, before the late 19th century, where "the courts regarded their main task as being to secure strict adherence with process requirements".[35] It was precisely because the English courts decided to embrace "the principle that doing justice on the merits of the case was more important than enforcing compliance with the rules or court orders" that they decided to enact, in 1883, a rule that Order 2 rule 1(1) of the current ROC is based on.[36] As observed by a judge shortly after the new English rule was enacted, "[c]ourts do not exist for the sake of discipline, but for the sake of deciding matters in controversy".[37]

3.36 As recently as 2014, the Court of Appeal in *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd*[38] recognised that substantive justice could be undermined if procedural compliance under O 2 r 1 was emphasised too strictly:[39]

> "Prior to the enactment of O 2 r 1, the law distinguished between "nullities" and "irregularities". A nullity referred to a step in the proceedings which was incurable by the Court and incapable of waiver by the parties: see *In re Pritchard, decd* [1963] Ch 502. In contrast, irregularities were steps which could be cured by the court or waived by the parties. ***Order 2 r 1 had the effect of abolishing this distinction.*** As Lord Denning explained in *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 ("*Harkness*") at 735-736:
>
> > This new rule does away with the old distinction between nullities and irregularities. ***Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice***. It can at last be asserted that 'it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.' [emphasis added in original]
>
> ***O 2 r 1 recognises the need for some indulgence to be shown to a party who is in default of the Rules. If undue emphasis is placed on compliance with procedural requirements, there may be cases in which substantive justice may be undermined***." [emphasis added]

3.37 Commentator Jeffrey Pinsler SC also emphasised the importance of substantive justice in his seminal text *Principles of Civil Procedure.* His text, which "distils the foundational rules and principles" of civil procedure,[40] suggested that a "main principle" of civil procedure is that "[it] is founded on principles which have evolved, and rules which have been developed, to manifest the objectives of substantive justice."[41] Two subsidiary principles he suggested were that procedural law "operates in a dynamic

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[35] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, Third Edition, 2013), at paragraph 1.68.
[36] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, Third Edition, 2013), at paragraphs 1.70-1.71.
[37] Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, Third Edition, 2013), at paragraph 1.70, citing Bowen L.J. in *Cropper v Smith* (1884) 26 Ch D. 700 at 710-11.
[38] [2014] 3 SLR 524.
[39] *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* at paragraphs 100-101. See also *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2019) on the history of O 2 r 1(1) and how it abolished the distinction between procedural nullities and procedural irregularities.
[40] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013), Foreword at p viii.
[41] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 3.

balance with substantive law to achieve justice in its fullest sense",[42] and that "[w]hile compliance with procedural requirements is necessary to the efficacy and integrity of the judicial process, the court is mindful that substantive rights should not be forfeited as a consequence of irregularity unless such an outcome is clearly just."[43] Hence the English courts, Singapore courts and Singapore commentators have all recognised that procedural compliance must serve the outcome of substantive justice.

(B) Evaluation of recommendation

3.38 While we acknowledge that the recommendation could deter well-funded parties from not complying with the proposed ROC, this cannot be the sole basis on which the court's powers will be exercised.

3.39 On a comparative analysis, the Law Society notes that the NSW UCPA gives the court wide discretion to make orders if a party fails to comply with a case management direction for the speedy determination of the real issues between the parties to the proceedings.[44] Such orders include dismissal of proceedings; striking out claims, defences or documents filed; and payment of costs. The UK CPR contains more nuanced non-compliance provisions e.g. Rule 3.4(2)(c) of the UK CPR allows the court to strike out a statement of case if it appears to the court that "there has been a failure to comply with a rule, practice direction or court order".

3.40 While there are comparable non-compliance regimes in the UK and NSW, both have endorsed the principle of proportionality based on their overriding objectives and case law. For example, UK case law has calibrated the sanctions for trivial and more serious breaches for non-compliance.[45] In NSW, the courts have recognised that it would be "disproportionate, for example, if the most trivial instance of non-compliance led to a dismissal of a litigant's case and judgment to the defendant on a counterclaim".[46]

3.41 However, the principle of proportionality is not paramount in determining the appropriate sanction for non-compliance in the proposed ROC. Rule 5(4)(e) states that if non-compliance with the proposed ROC is materially inconsistent with "any of the Ideals", the court may dismiss, stay or set aside any proceedings and give the appropriate judgment or order. If, for example, the non-compliance is materially inconsistent with only Ideal (b) (expeditious proceedings), it appears entirely open to the court to impose severe sanctions such as dismissal of proceedings.

3.42 Hence, the Law Society is of the view that the Bar's concerns that disproportionate sanctions could be applied to minor cases of non-compliance are well-founded. There is no assurance in Rule 5(4) that the power to impose wider sanctions would be exercised proportionately.

3.43 Finally, we assume that the "non-compliance" referred to in Chapter 1, Rules 5(4) and 5(5) refers to ***procedural*** non-compliance as opposed to substantive non-compliance. Rule 5(4) gives the court a broad range of powers to deal with "non-compliance with any written law, the Court's orders or directions or any practice directions", and Rule

[42] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 4. See also p 5-8 for an elaboration of this principle.
[43] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 4. See also p 41-44 for an elaboration of this principle.
[44] Section 61(3) of the NSW UCPA.
[45] Stuart Sime, *A Practical Approach to Civil Procedure* (Oxford: Oxford University Press, 21st edition, 2018), at paragraph 37.11.
[46] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraph 11.58.

5(5) addresses “non-compliance in respect of any written law other than these Rules”. While the context suggests that the rules are intended to deal with procedural non-compliance, we propose that this be expressly stated for clarity.

(C) Conclusion

3.44 In order not to be out of step with the non-compliance regimes in the UK and NSW and to avoid a perception that the courts are regressing to the formalistic English procedural regime before the late 19th century, the Law Society suggests that Rule 5(4) be amended to expressly provide that the principle of proportionality would be a primary consideration in determining the severity of sanctions to be imposed. This would also pave the way for a calibrated, step-wise approach consistent with the principle of proportionality to underpin the non-compliance regimes.

3.45 On a related note, the Law Society has received feedback that the courts should standardise their costs orders for repeated extensions or breaches of timelines. Anecdotal evidence suggests that such costs orders varied greatly and were generally insufficient to compensate the innocent party. The Ministry may wish to share this feedback with the courts.

3.46 Lastly, the Ministry should refine the language in Chapter 1, Rules 5(4) and 5(5) to expressly clarify that the proposed ROC refer to ***procedural*** non-compliance only.

IV. Consultation Paper, paragraph 24 (Interpretation Act)

24. The Rules will oust the application of the Interpretation Act and provide that a non-court day (i.e. Saturday, Sunday or public holiday) will be included in the calculation of time for a period that is 7 days or more.

A. The proposal to include non-court days in computing time periods of 7 days or more would compress timelines for an exact 7-day deadline.

Status quo

3.47 The current ROC provide that for calculating time periods of ***7 days or less***, non-working days (a Saturday, Sunday or public holiday)[47] are excluded.[48] Where the time prescribed by the current ROC, or by any judgment, order or direction, for doing any act expires on a non-working day, the act shall be in time if done on the next working day.[49]

Stated objectives

3.48 Chapter 1, Rule 6(7) of the proposed ROC replicates Order 3 rule 3 of the current ROC. However, Chapter 1, Rule 6(6) of the proposed ROC will provide that a non-court day (defined likewise as a Saturday, Sunday or public holiday)[50] is included in the calculation of a time period of ***7 days or more***. According to the CJC Report, "a 7-day deadline means exactly 7 days and does not exclude Saturdays, Sundays or public holidays".[51]

Bar's feedback

3.49 Approximately 61% of the respondents to the Law Society Online Survey did not support this recommendation. The key reasons included the following:-

(a) Most businesses and clients operate on a 5-day week, and including non-court days such as weekends may present difficulty in getting adequate instructions in time.

(b) The proposed reform opens up the possibility of aggressive opponents serving papers on the eve of non-court days so as to put pressure on counter-parties.

(c) If this becomes a common occurrence, it would further compress the tight timelines that lawyers already face. Lawyers would have to work on weekends and public holidays, and would have even less time to prepare during festive periods with multiple public holidays. Downstream consequences such as adverse consequences on work-life balance and professional burn-out would aggravate the problem of young lawyers leaving the profession.

[47] O 1 r 4(1) ("working day").
[48] O 3 r 2(5).
[49] O 3 r 3.
[50] Chapter 1, Rule 4.
[51] CJC Report, Chapter 1: General Matters, at paragraph 8.

(d) Law practices would also be affected as many have moved to a 5-day week. They would face administrative issues such as arranging for service of documents on a non-court day,[52] and incurring additional costs in overtime pay for staff working on weekends.

3.50 Members who agreed with this recommendation did so with the caveat that the proposed ROC should provide for adequate time for lawyers to do their work, such as by extending the timelines in the proposed ROC accordingly.

Law Society's views

(A) Need for reform?

3.51 It appears that the sole difference between the current and proposed regimes is that for an exact 7-day deadline, a non-court day is excluded under the current regime, but is included under the proposed regime. It is not clear from the CJC Report why this specific reform was necessary. Clearly, it only serves to compress the timelines for an exact 7-day deadline.

(B) Evaluation of recommendation

3.52 The Law Society is aware that rules similar to the proposed rule in Chapter 1, Rule 6(6) exist in the UK and Australia, which exclude non-court days if the period in question is 5 days or less.[53] Chapter 1, Rule 6(6) appears to be slightly more generous as it excludes non-court days where the period in question is 7 days or less.

3.53 However, given that the timelines in the current regime have been long ingrained in civil litigation culture, it does not seem necessary to expressly include non-court days for an exact 7-day deadline. Moreover, as courts commonly make orders with a 7-day timeline, the proposed change will have a significant impact on the profession.

(C) Conclusion

3.54 We urge the Ministry to consider whether the specific reform for the exact 7-day deadline is necessary given that the courts can easily prescribe shorter timelines in particular cases where time is of the essence.

B. The Ministry should consult the Attorney-General on whether the proposed Rule 6(1) is *ultra vires* the Supreme Court of Judicature Act.

Status quo

3.55 Currently, the Interpretation Act (Cap. 1) ("IA") applies to the interpretation of the ROC.[54]

[52] We note that the Bar's concern about needing to arrange for service on a non-court day may be addressed by Chapter 1, Rule 6(7) of the proposed ROC, which provides that "[w]here the time prescribed by these Rules, or by any judgment, order or direction, for doing any act expires on a non-court day, the act shall be in time if done on the next day, not being a non-court day." However, the Bar's feedback on this point is retained for completeness.
[53] See rule 2.8 of the UK CPR and rule 1.11 of the NSW Uniform Civil Procedure Rules 2005 ("NSW UCPR").
[54] O 1 r 3.

Stated objectives

3.56 Chapter 1, Rule 6(1) of the proposed ROC "expressly ousts"[55] the application of the IA in calculating time under the proposed ROC.

Bar's feedback

3.57 The Law Society received feedback from a member that ousting the IA's application in computing time under the proposed ROC seemed inconsistent with section 19(c) of the IA. This member's view was that Chapter 1, Rule 6(1) could not be validly enacted unless the IA was amended.[56]

Law Society's views

(A) Need for reform?

3.58 The Consultation Paper did not offer any rationale for ousting the IA's application in computing time under the proposed ROC.

(B) Evaluation of recommendation

3.59 Section 19(c) of the IA provides that ***unless the contrary intention appears***, no subsidiary legislation made under an Act shall be inconsistent with the provisions of any Act.

3.60 The Law Society notes that section 80(2)(a) of the Supreme Court of Judicature Act (Cap. 322) ("SCJA") provides that one of the purposes of the ROC is "prescribing the manner in which, ***and the time within which***, any application under [the SCJA] or any other written law is to be made to the High Court or the Court of Appeal shall be made".

3.61 It is, however, unclear whether section 80(2)(a) evinces an intent that the IA may be disregarded in prescribing the computation of time in the proposed ROC. If not, Rule 6(1) of the proposed ROC may be *ultra vires* the SCJA. Singapore case law does not provide sufficient guidance, as the only case in point considered the phrase "unless the contrary intention appears" in the context of section 19(b), not section 19(c), of the IA.[57]

(C) Conclusion

3.62 We suggest that the Ministry seeks the Attorney-General's advice on this point of interpretation.[58]

[55] CJC Report, Chapter 1: General Matters, at paragraph 8.
[56] See the member's feedback on this point at Appendix 1, proposal 5 at p 2.
[57] *Chiltern Park Development Pte Ltd v Ong Pang Wee* [2003] SGMC 20.
[58] We note that rule 1.11(5) of the NSW UCPR also ousts the application of section 36 of the NSW Interpretation Act 1987 in computing time.

V. Consultation Paper, paragraph 25 (extension of time)

25. The Rules relating to the parties' ability to extend time by consent will be modified such that parties may only extend time without an order of court once, by mutual consent in writing, and for a maximum period of 7 days.

A. Restricting the liberty of parties to extend time by mutual consent to a one-off maximum period of 7 days may not achieve a net reduction in process costs and is not in line with the equivalent UK rule.

Status quo

3.63 The current ROC do not specify the number of time extensions parties may consent to, or their duration. However, it already limits parties' ability to agree to extend time in various ways: (i) the court may override any agreement to extend time;[59] (ii) the consent only extends to service, filing or amendment of "any pleading or other document";[60] and (iii) parties cannot consent to extend the time of setting down an action for trial or hearing and the time within which any notice of appeal must be filed.[61] Feedback from the Bar reiterated the point that the current ROC already provide sufficient existing safeguards to ensure that cases progress expeditiously.[62]

Stated objectives

3.64 According to the CJC Report, the rationale for this recommendation (as reflected in Chapter 1, Rule 7(3) of the proposed ROC) is to "prevent parties from repeatedly delaying time and give the Court greater control of cases which are not progressing because of multiple extensions of time".[63]

Bar's feedback

3.65 Approximately 72% of the respondents to the Law Society Online Survey opposed this recommendation. Many of these respondents took the view that parties should have liberty to extend time by consent, as per the current regime. The court should not interfere if both parties agreed to extending time as parties might have legitimate reasons for needing to extend time. Under the proposed ROC, parties will now have to trouble the court even for short and inconsequential extensions of a few days.

3.66 Also, it was pointed out that the current regime already had sufficient existing safeguards to ensure that cases would progress expeditiously. For example, even where parties agreed to an extension, the practice was to write in to obtain the court's approval to vary the directions accordingly. Hence, the court already had a discretion to refuse a time extension by parties' mutual consent, or to call a PTC if it was of the view that a case was not progressing.

3.67 Some members observed that this recommendation would increase the number of applications to court for time extensions, which would waste court resources and lawyers' time in attending court to argue such applications. These effects would be contrary to the proposed Ideals of expeditious proceedings, cost-effective work and

[59] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 735, citing O 3 r 4(3).
[60] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 735, citing O 3 r 4(3).
[61] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 735, O 3 r 4(5).
[62] At paragraph 3.66 of this response.
[63] CJC Report, Chapter 1: General Matters, at paragraph 9.

efficient use of court resources. It was suggested that if parties had to apply to the court to extend time, this should always be done without the court requiring a hearing or an affidavit, so as to avoid wasting time and costs.

3.68 Further, a shorter timeline might hinder attempts to settle or to resolve the case by alternative dispute resolution (ADR). A blanket 7-day maximum period for extension would also not be meaningful for all cases. For example, general discovery timelines might need 2-3 weeks' extension.

3.69 Many respondents, including those who supported this recommendation, suggested a longer maximum period of extension such as 14 days, 21 days or 28 days (the last based on English practice).[64]

3.70 The Law Society's Civil Practice Committee also observed that if parties were able to agree on extensions, for example, with a view to resolving disputes during the course of proceedings with less acrimony and fewer legal arguments in court, such agreement should be allowed. Parties should not be forced to have to apply to court for otherwise agreed extensions of time.[65]

Law Society's Views

(A) Need for reform?

3.71 It is unclear whether the stated objective of preventing parties from repeatedly delaying time is supported by empirical data. Even if so, it is unclear to the Bar why the problem had been considered so serious that only a 7-day maximum period was prescribed as the most appropriate solution.

(B) Evaluation of recommendation

3.72 We are of the view that the recommendation may not meet its stated objectives. From an economic perspective, the savings in process costs (through reducing the opportunities for parties to extend time by consent) may be offset by the likely costs incurred by the making of multiple applications to the court for extensions of time due to the short 7-day timeframe.

3.73 The CJC Report also did not explain why the short 7-day timeframe was preferred when mature jurisdictions such as England had a much longer maximum period.

(C) Conclusion

3.74 For the above reasons, and in light of the Bar's feedback, the 7-day maximum period, coupled with the one-off extension, is sub-optimal. As practice has shown, the courts are able to manage timelines sensibly. The Law Society would urge the Ministry to reassess this recommendation and consider providing for more flexibility attuned to the needs and demands of legal practice.

[64] See Rule 3.8(4) of the UK CPR.
[65] See the Civil Practice Committee's feedback on this point at Appendix 2, proposal 1 at p 1.

Section B: Parties to Proceedings and Causes of Action

I. Consultation Paper, paragraph 28 (existing provisions on standing etc.)

28. The CJC proposes that existing provisions relating to the procedural rules on standing, certain causes of action, as well as the appointment, change and discharge of solicitors will be simplified and consolidated.

A. Amendments to the appointment, change and discharge of solicitors should be consistent with existing ethical obligations of solicitors.

Status quo

4.1. The procedural rules on standing, certain causes of action, as well as the appointment, change and discharge of solicitors are set out in Orders 1, 5, 15, 64 and 76 of the current ROC.[66]

Stated objectives

4.2. Chapter 2 of the proposed ROC is intended to simplify and consolidate the existing Orders mentioned above.[67]

Bar's feedback

4.3. Approximately 85% of the respondents to the Law Society Online Survey supported this recommendation. However, some had mixed views on whether the appointment, change and discharge of solicitors should be done by letter or by court filing. Some felt that the current procedure of court filing was simpler as the lawyer could use an "auto-generated e-form" instead of having to type out a letter, whereas others felt that using letters would be simpler and save "additional filing fees and charges". One respondent emphasised the need to retain "robust notification requirements for change of solicitors for the purpose of transparency".

4.4. Further, it was unclear from Chapter 2, Rule 8 of the proposed ROC whether the requirement for a solicitor to seek the court's leave for discharge has been removed. One respondent took the view that by removing this requirement, the client might be disadvantaged. Currently, a client had an opportunity to address the court on allegations raised against him in a discharge application, but the proposed ROC would remove the client's right to be heard. Additionally, there is present client protection in requiring a lawyer to seek the court's leave if he or she was seeking discharge late in the proceedings.

4.5. Some respondents also commented that they were unable to give feedback as the Consultation Paper had insufficient information as to how the procedural rules would be consolidated.

[66] CJC Report, Chapter 2: Parties to Proceedings and Causes of Action, at paragraph 1.
[67] CJC Report, Chapter 2: Parties to Proceedings and Causes of Action, at paragraph 1.

Law Society's views

(A) Need for reform?

4.6. The Law Society has, in principle, no objections to this recommendation which is intended to streamline existing provisions in the current ROC.

(B) Evaluation of recommendation

4.7. The Law Society is of the view that the proposed changes to the appointment, change and discharge of solicitors, which are set out in Order 64 of the current ROC, should be consistent with the existing relevant ethical obligations prescribed in Rule 26 of the PCR.

(C) Conclusion

4.8. It would be useful for the Ministry or the courts to provide a comparative table of the proposed changes as the existing case law relating to the various Orders is likely to still be relevant if and when the proposed ROC takes effect.

Section C: Amicable Resolution of Cases

I. Consultation Paper, paragraph 30 (duty to consider amicable resolution)

30. Parties will have to give sufficient consideration to resolving their disputes amicably before commencing or during the course of their action. In this regard, a duty should be imposed on a party to any proceeding to consider amicable resolution of the dispute before commencing any action or appeal. The party will have to make an offer of amicable resolution (being an offer to settle or an offer to resolve the dispute other than by litigation) unless he has reasonable grounds not to do so. The offeree shall not reject the offer unless he has reasonable grounds to do so.

A. More clarity is required on what constitutes "reasonable grounds" to reject an offer of amicable resolution.

B. Other jurisdictions do not consider that there is a duty (coupled with sanctions) to initiate ADR.

Status quo

5.1. Parties currently do not have a duty to consider ADR, although they are encouraged to do so. The court cannot order parties to attend ADR for civil cases, except under O 108 r 3(3) of the current ROC relating to "Simplified Process for Proceedings in Magistrate's Court or District Court". That rule provides that the court may order ADR without the parties' consent if it is "of the view that doing so would facilitate the resolution of the dispute between the parties."

5.2. Paragraph 35B of the Supreme Court Practice Directions ("Practice Directions") provides that lawyers have a professional duty to advise their clients on using ADR to resolve the dispute.[68] The Practice Directions encourage ADR to be "considered at the earliest possible stage in order to facilitate the just, expeditious and economical disposal of civil cases".[69] They also prescribe the form of an ADR Offer and a Response to ADR Offer, where a party wishes to attempt mediation or any other means of dispute resolution.[70]

5.3. The current ROC provide for offers to settle, with costs penalties to encourage parties to do so, under Order 22A ("O22A").[71]

Stated objectives

5.4. Under Chapter 3, Rule 1(1) of the proposed ROC, a party will have a duty to consider amicable resolution of his dispute both before the commencement ("pre-action ADR duty") and during the course of any action or appeal ("concurrent ADR duty"). As far as pre-action ADR is concerned, a party is required:-

[68] Part IIIA: Alternative Dispute Resolution, paragraph 35B(2).
[69] Part IIIA: Alternative Dispute Resolution, paragraph 35B(4).
[70] Part IIIA: Alternative Dispute Resolution, paragraph 35C.
[71] See O 22A (offers to settle) generally and O 22A r 9 (costs).

(a) to make an offer of amicable resolution before commencing action unless he has reasonable grounds not to do so ("Unreasonable Lack of Initiation Requirement");[72] and

(b) not to reject an offer of amicable resolution unless he has reasonable grounds to do so ("Unreasonable Refusal Requirement").[73]

5.5. According to the CJRC Report, the purpose of this recommendation is to encourage "appropriate dispute resolution".[74] Although "ADR may not necessarily lead to settlement in every case", "it will provide a forum for parties to ventilate key issues" and help "[move] the case forward by reducing the issues in contention".[75]

Bar's feedback

5.6. Approximately 59% of the respondents to the Law Society Online Survey supported this recommendation. However, feedback given noted that more clarity was needed on what "reasonable grounds" or a "reasonable offer" meant, especially since it would be hard for the court to police "reasonable grounds" *ex post facto* when the complexion of the case might have changed dramatically through its course. In order for a party to justify rejecting an offer, it might also require parties to reveal privileged legal advice.

5.7. In this regard, there is English authority in the leading case of *Halsey v Milton Keynes General NHS Trust*[76] which established several factors to assess what amounts to unreasonable refusal e.g. the nature of the dispute, the merits of the case, the extent to which other settlement methods had been attempted and whether the ADR procedure had a reasonable prospect of success. The CJC or the Ministry may wish to consider whether to list some or all of these factors (in a non-exhaustive manner). Doing so may avoid unnecessary litigation on what "reasonable grounds" means, provide guidance for lawyers and litigants as well as promote consistency in the factors that the courts will take into account.

5.8. One particular consideration that should be clarified is this. It is quite rare for a commercial party to commence proceedings without any prior efforts to resolve the dispute commercially. Often this occurs even before external counsel have been appointed. These negotiations may or may not be pursuant to any formal pre-litigation contractual obligations. It is important for parties to know if such attempts count.

5.9. Another respondent was concerned with the mechanics of Chapter 3, Rule 2(2) of the proposed ROC,[77] i.e. whether settlement offers could be made for less than 7 days if the limitation period expired in less than 7 days. It is not uncommon that parties commence proceedings just before the time bar.

5.10. Amongst those who did not support the reform, a few points were raised. First, as a matter of principle, the requirement to initiate a reasonable offer for amicable resolution effectively imposes a condition precedent to litigation. As far as commercial parties are concerned, it is already becoming more common for multi-tiered dispute resolution clauses to be found in contracts. Where parties have chosen not to include such

[72] Chapter 3, Rule 1(1).
[73] Chapter 3, Rule 1(3).
[74] CJRC Report, paragraph 85.
[75] CJRC Report, paragraph 85.
[76] [2004] EWCA Civ 576.
[77] "An offer of amicable resolution shall be open for acceptance within a reasonable period of time and in any case, for not less than 7 days, unless the parties otherwise agree."

clauses, there is a fundamental question of principle as to whether the courts should nevertheless compel it. This objection may be less pertinent in non-contract cases.

5.11. Related to this is whether the reform is suitable for all types of cases. Some cases may not be suitable for ADR, such as those that have to be commenced quickly (e.g. requests for a search order), debt recovery cases (as otherwise debtors could delay proceedings) or situations of urgency or where there is a risk of tipping off the other party (e.g. Mareva or Anton Piller scenarios). Similarly, commentator Jeffrey Pinsler SC recognised that cases where a party needs "urgent interlocutory relief such as an injunction or search order" would not be suitable for ADR.[78] He also suggested that ADR would not be appropriate for: (i) cases which involve "important issues of law" that thus "justify a judicial determination in the interests of parties and administration of justice"; (ii) where either party is confident in the strength of their position; or (iii) where the defendant believes that "the court has no jurisdiction or that Singapore is not the proper forum for the dispute."[79]

5.12. Secondly, there is a question of effectiveness. It appears to be the common experience of most lawyers that even where formal mediation is opted for, it is less successful in the early stages than in the later stages.[80] However, it may be useful for the Ministry or the CJC to consult the Singapore Mediation Centre which presumably curates data on the rate of successful mediations and the stage which parties are at in the litigation.

5.13. Thirdly, there is a question of necessity. Under the status quo, parties are already (strongly) encouraged to consider and engage in ADR. The courts have also tended to be more flexible with timelines where serious efforts at ADR are being undertaken. This can be encouraged more as there are still registrars who, not fully acknowledging that negotiations can be long-drawn, push cases along despite parties attempting to settle. There are also mechanisms including O22A offers to settle. In some ways, O22A is a more potent mechanism as it forces a binary choice on the counterparty with potentially drastic indemnity cost consequences.

5.14. It would be pertinent analytically in this regard if the courts could provide information as to: (i) how often and at what stages O22A offers are made; (ii) how often they are accepted or not (as the case may be); and (iii) how often the court orders indemnity costs when an offeree has failed to obtain a better outcome or not (as the case may be).

5.15. Fourthly, it was observed that where parties were reluctant to settle, they might "go through the motions" of ADR to comply with the rules. This would only drive up the costs of litigation without attendant benefit.

Law Society's views

(A) Need for reform?

5.16. We would point out that other jurisdictions do not consider that there is a duty to initiate ADR. In *Vale of Glamorgan Council v Roberts*,[81] the English High Court was reluctant to disallow costs incurred by a successful party merely because that party "did not

[78] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 56.
[79] Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 56.
[80] The Bar's additional feedback on the timing of ADR may be found in Appendix 1 at proposals 9 and 10, p 6.
[81] [2008] EWHC 2911.

initiate suggestions for a mediation".[82] While the High Court did not elaborate on its reasoning, UK commentators have suggested that *Roberts* "establishes that an adverse costs order should not be made against the successful party for failing to initiate ADR or mediation in situations ***where there is no offer to engage in ADR processes by the unsuccessful defendant***" [emphasis added].[83]

5.17. Other legitimate reasons for a party not initiating ADR may include the need for a legal precedent or the complexity of the case.[84] Commentators have observed that there are potential disadvantages in using ADR at the pre-action stage:-[85]

(a) waste of time and money and aggravating the dispute if the ADR process fails;
(b) difficulty in evaluating the use of ADR; and
(c) using ADR tactically rather than as a genuine attempt to settle.

5.18. An overwhelming majority of Council members polled (90%) did not support the proposal to impose a duty on parties to initiate ADR. A Council member gave feedback that it was unclear why the plaintiff should be burdened with an additional duty to initiate ADR. In practice, the plaintiff would already have sent a few letters of demand to the defendant, who would be at liberty to propose a compromise. It would be illogical for the plaintiff to compromise his claim before commencing any action against the defendant. This additional duty may incentivize defendants not to respond to letters of demand and tactically to wait for an ADR offer so that they can settle for less.

5.19. Another Council member also noted that a duty to initiate ADR should not be posited if it is more stringent than considering whether ADR is appropriate in a given case. In other words, a party may have considered whether to go for ADR but ultimately decided not to initiate it.

(B) Evaluation of recommendation

5.20. In the circumstances, the jury is out about the merits of the proposed reform in its current form. The mischief targeted should not be the failure to initiate ADR (an outcome), but whether the parties properly evaluated the use of ADR pre-action (a process). Admittedly, this is a much harder inquiry for the court. It may have to adjudicate on why a party did not even want to make an offer for ADR, which would entail incising into motivations and legally privileged materials. On the other hand, by focusing on the outcome, the courts may inadvertently be endorsing tactical uses of ADR offers by parties with no real interest to settle the dispute but simply to delay matters or drive up costs for the other party.

5.21. This is not to reject the ideal that parties should endeavour to settle their disputes where possible, but parties with a strong interest in the outcome of litigation (whether on a point of principle or for practical utility such as damages) may reasonably differ from the court's assessment (done with the benefit of hindsight) as to whether their disputes should be settled.

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[82] [2008] EWHC 2911 at [8].
[83] Susan Blake *et al*, *A Practical Approach to Alternative Dispute Resolution* (Oxford: Oxford University Press, Fifth Edition, 2018), at paragraph 8.48.
[84] Susan Blake et al, *The Jackson ADR Handbook* (Oxford: Oxford University Press, Second Edition, 2016), at paragraph 2.50 and paragraphs 2.55-2.56.
[85] Susan Blake et al, *The Jackson ADR Handbook* (Oxford: Oxford University Press, Second Edition, 2016), at paragraph 3.07. See also Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 59, noting that while one view is that ADR should be undertaken as early as possible, another view is that settlement processes "can only be meaningfully undertaken after the issues are clarified by the pleadings, or even after discovery so that the evidence is available for all to see."

(C) Conclusion

5.22. The Law Society's preference is for reform along these lines:-

(a) there is an obligation on parties to consider settlement and ADR opportunities at all stages of the litigation;

(b) without indicating the court's view of the merits, the court may, if it thinks appropriate at a PTC or JPTC, encourage parties to consider settlement options. However, the court should not solicit views from parties on whether such options have been explored and the content of any offers made;

(c) before rendering an award on costs, the trial judge may also enquire of parties whether settlement opportunities were explored and invite submissions on the reasons why they were not or were unsuccessful; and

(d) in any event, the proposed ROC should set out the factors to guide parties on what constitutes an unreasonable failure to engage in ADR.

II. Consultation Paper, paragraph 32 (mandatory ADR)

> 32. If the court is of the view that the duty to consider amicable resolution has not been discharged properly, the court will be empowered to order parties to attend ADR. Notwithstanding this power, the judge will, as far as possible, encourage parties to attend ADR by consent.

A. Mandatory ADR should be avoided as it is: (i) inconsistent with the duty to consider amicable resolution; (ii) dissonant with the English ADR regime; and (iii) unclear on its viability.

Status quo

5.23. As mentioned above, ADR is currently encouraged, but not generally mandated.

Stated objectives

5.24. The CJRC Report proposes that "[t]he court will have the power to direct parties to attend ADR (i.e. mediation, neutral evaluation, amongst others)".[86] If parties are not willing to participate in ADR, they "must demonstrate ***compelling reasons*** why ADR is inappropriate" [emphasis added].[87]

Bar's feedback

5.25. Although a good majority of the respondents (almost 69%) to the Law Society Online Survey supported this recommendation, many were of the view that ADR should be voluntarily entered into, that parties forced to attend ADR were not likely to reach an agreement and that the court might not be privy to a party's "valid business or personal reasons" for not opting for ADR. In addition, since a party's breach of its duty to consider ADR (and make a settlement offer) would not be revealed to the court until after the merits were decided (see Chapter 3, Rule 2(3)),[88] it was not clear how the court would be made aware of a breach so as to order parties to attend ADR.

Law Society's views

(A) Need for reform?

5.26. It is not clear why the CJRC departed from the notion that ADR should typically be by consent. One reason that appears from the CJRC Report is that although a dispute "may be more suitably resolved through ADR, parties may not be adequately apprised of their ADR options, and may not be aware of the advantages of resolving their disputes through ADR".[89] However, such mischief raises a question of educating certain types of litigants (such as litigants-in-person). It does not *per se* logically justify mandatory ADR across the board for all litigants.

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[86] CJRC Report, paragraph 83.
[87] CJRC Report, paragraph 86.
[88] "The fact that such an offer has been made and not accepted shall not be relied upon or made known to the Court until after the Court has determined the merits of the action or appeal and is dealing with the issue of costs, unless the parties otherwise agree."
[89] CJRC Report, paragraph 84.

5.27. Another reason appears to be that mandatory ADR is needed to compel parties who are unwilling to attend ADR, unless they are able to "demonstrate compelling reasons why ADR is inappropriate".[90] The CJRC also recognised that mandatory ADR would be a last resort as "the court will, as far as possible, encourage parties to attend ADR by consent".[91] However, the Law Society has three concerns with this explicated reason for the shift to mandatory ADR.

5.28. Firstly, it appears inconsistent to impose a duty on parties to ***consider*** ADR on the one hand, and to ***mandate*** ADR on the other hand if proper consideration of ADR is not done. This recommendation would send mixed signals to parties as to whether they were being encouraged by the courts to adopt ADR or that it was a *fait accompli* that ADR would ultimately be ordered in any case.

5.29. Secondly, mandatory ADR undermines a litigant's right to have access to the court. Mandatory ADR has yet to be adopted in England. It is not clear why the CJC and CJRC had recommended a contrarian position for Singapore. This is *a fortiori* when the proposed ADR reforms appear to be based on the English regime. The CJC and CJRC Reports themselves did not disclose well-supported policy reasons to impose mandatory ADR in Singapore. As it stands, English case law recognises that "the compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of Article 6 of the European Convention of Human Rights".[92] Although this view has been criticised in various quarters, it remains good law in England.[93] More recently, the Civil Justice Council in its Final Report on "ADR and Civil Justice" decided against a blanket compulsion of ADR as there was no support for such a proposal during its consultations.[94]

5.30. Thirdly, although mandatory mediation has been implemented in a number of common law jurisdictions, such as Australia, New Zealand, Canada and the United States, its viability remains unclear. For example, a study of mandatory mediation in the NSW Supreme Court in 2014 revealed a settlement rate of 50-55%, which reinforced the general trend of "lower settlement rates for court-directed mediation versus voluntary mediation recorded in other jurisdictions".[95] One reason offered for the "relatively lower settlement rates for mandatory mediation" was that by the time the court referred a matter to mediation, "the parties have already entrenched their positions and expended considerable resources to advance them".[96]

5.31. Moreover, another recent study suggests that slight nudges towards ADR (encouragement) may work better than more robust court-directed nudges (coercion).[97] A key insight from that study was that countries with voluntary court mediation programs (e.g. Singapore, the UK and Hong Kong) scored higher in areas

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[90] CJRC Report, paragraph 86.
[91] CJRC Report, paragraph 86.
[92] Susan Blake *et al*, *The Jackson ADR Handbook* (Oxford: Oxford University Press, Second Edition, 2016), at paragraph 9.06.
[93] Susan Blake *et al*, *The Jackson ADR Handbook* (Oxford: Oxford University Press, Second Edition, 2016), at paragraph 9.08; Susan Blake *et al*, *A Practical Approach to Alternative Dispute Resolution* (Oxford: Oxford University Press, Fifth Edition, 2018), at paragraphs 7.103-7.104.
[94] Civil Justice Council, "ADR and Civil Justice", CJC ADR Working Group, Final Report (November 2018), at paragraph 8.23(1).
[95] Vicki Waye, "Mandatory mediation in Australia's civil justice system" (2016) 45(2-3) Common Law World Review 214 at p 221.
[96] Vicki Waye, "Mandatory mediation in Australia's civil justice system" (2016) 45(2-3) Common Law World Review 214 at p 221.
[97] Shahla F. Ali, "Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation User Experience in Twelve Regions" (2018) 19 Cardozo Journal of Conflict Resolution 270.

such as efficiency of the legal framework in settling disputes, with no significant difference in other areas such as quality of civil justice, as compared to those with mandatory mediation programs (e.g. Australia and the United States).[98]

(B) Evaluation of recommendation

5.32. The yardstick for mandatory ADR is where the court is not satisfied that a party to the proceedings had properly discharged his duty to consider amicable resolution of his dispute.[99] Presumably, the court will turn to the factors cited in English case law as a starting point to determine whether a party had satisfied the Unreasonable Lack of Initiation Requirement (although there is not much English case law on this) or the Unreasonable Refusal Requirement (see paragraph 5.4 above).

5.33. A finding that a party had failed to discharge his duty to consider amicable resolution properly may well be tantamount to finding that a legal practitioner had breached his ethical obligation to evaluate with his client, in an appropriate case, the use of ADR processes.[100] Practically speaking, it would also involve a very high bar that is not easily discharged as a matter of practice.

5.34. On another note, it is not clear from the Consultation Paper why the CJRC or CJC did not advocate extending the "presumption of ADR" approach that had been instituted in the State Courts since 2012 for all civil cases. At a 2017 speech at the Law Society Mediation Forum, the Chief Justice had observed that after the "presumption of ADR" approach was introduced, the State Courts' user satisfaction rates had risen from 92% in 2013 to 96% in 2015.[101]

(C) Conclusion

5.35. Given that the "presumption of ADR" approach appears to be working well in the State Courts, the Council is of the view that notwithstanding the Bar's support for mandatory ADR, there is no compelling reason for the courts to make a giant leap to mandatory ADR (that goes beyond mandatory mediation adopted in the various common law jurisdictions mentioned above). Instead, there is much merit in extending the "presumption of ADR" approach to appropriate cases in the Supreme Court first. In this regard, the English Civil Justice Council also recently recommended in its Final Report that "[c]ourt documents, protocols, guidance material for litigants and case management should all be co-ordinated to express a presumption that ADR should be attempted at an appropriate stage on the route through to trial."[102]

[98] Shahla F. Ali, "Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation User Experience in Twelve Regions" (2018) 19 Cardozo Journal of Conflict Resolution 270 at p 277-281.
[99] Chapter 3, Rule 3(1) of the proposed ROC.
[100] Rule 17(2)(e)(ii) of the PCR.
[101] Sundaresh Menon, "Mediation and the Rule of Law" (10 March 2017) <http://simc.com.sg/mediation-rule-law/> (accessed 10 January 2019).
[102] Civil Justice Council, "ADR and Civil Justice", CJC ADR Working Group, Final Report (November 2018), at paragraph 8.23(3).

III. Consultation Paper, paragraph 33 (costs sanctions)

33. To discourage unreasonable refusals to attempt ADR or reach an amicable resolution of the matter, there will be more robust use of cost sanctions which take into account parties' conduct in relation to any attempt at resolving the matter by ADR. For example, there could be adverse costs orders against a successful party who has not discharged his duty to consider amicable resolution.

A. More robust costs sanctions for failing to discharge the duty to consider amicable resolution are unobjectionable if the scope of such duty is clarified.

Status quo

5.36. Order 59 rule 5(c) of the current ROC stipulates that in exercising its discretion to make costs orders, the court may take into account "the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution". The Practice Directions further state that lawyers "should advise their clients on potential adverse costs orders for any unreasonable refusal to engage in ADR".[103]

Stated objectives

5.37. The CJRC Report noted that more robust use of cost sanctions was required "to discourage unreasonable refusals to attempt ADR or reach an amicable resolution of the matter".[104]

Bar's feedback

5.38. Approximately 67% of the respondents to the Law Society Online Survey supported this recommendation.

Law Society's views

5.39. The proposed use of adverse court orders tracks English developments where following the Jackson reforms implemented in April 2013, "the courts have been more robust in penalizing parties who fail to take reasonable and proportionate steps to settle their dispute where it is appropriate to do so …".[105]

5.40. The Law Society is, in principle, agreeable to this recommendation subject to the concerns raised in Part I above on clarifying the scope of the duty to consider amicable resolution.

[103] Part IIIA: Alternative Dispute Resolution, paragraph 35B(5).
[104] CJRC Report, paragraph 88.
[105] Susan Blake *et al*, *A Practical Approach to Alternative Dispute Resolution* (Oxford: Oxford University Press, Fifth Edition, 2018), at paragraph 8.03.

Section D: Commencement of Proceedings

I. Consultation Paper, paragraph 40 (restricted ability to file generally endorsed Originating Claims)

40. A claimant's ability to file a generally endorsed Originating Claim merely to preserve his position and leverage on having filed an action in court will be restricted. As such, an Originating Claim has to be endorsed with a statement of claim unless the limitation period for the cause of action will expire within 14 days after the Originating Claim is issued.

A. Parties should be permitted to file a generally endorsed Originating Claim in urgent situations.

Status quo

6.1. The current ROC do not restrict the situations in which parties may file a generally endorsed writ of summons.[106]

Stated objectives

6.2. The proposed ROC will restrict a claimant's "ability to file a generally endorsed originating claim merely to preserve his position and leverage on having filed an action in court".[107]

Bar's feedback

6.3. The Law Society's Civil Practice Committee took the position that parties should not be limited to filing generally endorsed Originating Claims only in situations where the limitation period is about to expire. This is because parties may need to file generally endorsed Originating Claims in urgent situations, such as in applications for injunctions or freezing orders, or where writs need to be swiftly filed before defendants leave the jurisdiction and cannot be easily served.[108]

6.4. One respondent commented that allowing claimants to file generally endorsed Originating Claims in urgent situations would not infringe the stated objective of this reform, i.e. to discourage claimants from filing Originating Claims to preserve their position on having filed a court action. The same respondent raised concerns about the mechanics of the proposed ROC. The proposed ROC will restrict the filing of generally endorsed originating claims to the "special case". The "special case" is not defined and can engender unnecessary litigation. This respondent suggested amending Chapter 4, Rule 5(4) of the proposed ROC to allow for generally endorsed Originating Claims "***in cases of urgency***, or ***where it is impractical*** in the circumstances of the case for the claimant to prepare a concise description of the claim or with a statement of claim" [emphasis in original].[109]

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[106] O 6 r 2(1)(a) provides that "[b]efore a writ is issued, it must be endorsed with a statement of claim or, if the statement of claim is not endorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby".
[107] Consultation Paper, paragraph 40; CJC Report, Chapter 4: Commencement of Proceedings, at paragraph 7.
[108] See the Civil Practice Committee's feedback on this point at Appendix 2, proposal 4 at p 2.
[109] This respondent's feedback is set out in full in Appendix 1 at proposal 18, p 16.

Law Society's views

6.5. The Council recommends that parties should be able to file generally endorsed Originating Claims in urgent situations.

II. Consultation Paper, paragraph 46 (truncated pleadings)

46. There shall be no pleadings beyond the defence or the defence to counterclaim unless the court otherwise orders. This is to cut down on pleadings that do not add anything material.

A. The proposed truncated pleadings process: (i) incorrectly assumes that further pleadings will not add new material facts; and (ii) may lead to collateral disadvantages (such as hindering settlement and increasing process costs). This proposal should be piloted first.

Status quo

6.6. The current ROC allow parties to file a reply to the defence, and a defence to counterclaim, as of right. Parties must seek the court's leave to file pleadings subsequent to a reply/defence to counterclaim.[110] In practice, pleadings beyond a reply are rarely filed.[111]

6.7. Order 18 rule 3(1) provides that a plaintiff "must serve a reply on that defendant if it is needed for compliance with Rule 8 [matters which must be specifically pleaded]; and if no reply is served, Rule 14(1) will apply [implied joinder of issue]."

Stated objectives

6.8. Other than the stated objective of the recommendation "to cut down on pleadings that do not add anything material", the CJC Report did not elucidate the rationale.

Bar's feedback

6.9. A slim majority of the respondents (approximately 54%) to the Law Society Online Survey supported this recommendation.

6.10. Members who disagreed with this recommendation had various concerns:-

(a) As a statement of claim (or counterclaim) is meant to set out only material facts to sustain a claim, it would not necessarily pre-empt or address any defences that are the defendant's burden to plead. It may not in any event be feasible to anticipate every defence raised. It is, *inter alia*, the function of the reply to address the defence.

(b) Without a right of reply, there could be a number of consequences. First, it may be assumed that the defences pleaded (or such part as were not anticipated) are accepted. This could have the perverse consequence of prolixity of the plaintiff's statement of claim to anticipate every conceivable defence. Secondly, even on the joinder of issue principle, from the defendant's point of view, he may not know the plaintiff's rebuttal case to defences in advance of discovery or witness statements. For instance, in defamation actions, a plea of express malice (with particulars) would typically be pleaded in a reply that seeks to rebut a defendant's plea of qualified privilege or fair comment. The court itself may be none the wiser in

[110] O 18 r 4.
[111] Chua Lee Ming (editor-in-chief), *Singapore Civil Procedure 2019* (Sweet & Maxwell Asia, 2018), Order 18 rule 4, at 18/4/1.

assessing the ambit of discovery orders from a documentary relevance point of view. Thirdly, from a practical point of view, the court will be faced with applications to plead a reply in a large number of cases. It seems unlikely that the court should or would deny an opportunity to a plaintiff to answer defences raised if applied for. Quite apart from increasing judicial time and attendant costs to parties, this would result in this particular reform losing a significant amount of its utility.

(c) It is also the experience of counsel that they do not get all the relevant information from their clients at the initial brief. It is only upon seeing the defence or counterclaim that both counsel and party would sharpen their internal inquiries on instructions as to the material facts. An opportunity should be given for a reply as a matter of course.

Law Society's views

(A) Need for reform?

6.11. The Law Society notes that neither England nor Australia has adopted a similar truncated pleadings regime. The necessity of this reform is unclear – was the problem one of:-

(a) parties deliberately filing further pleadings that failed to add material facts?;

(b) parties not properly understanding the function of further pleadings such as a reply?; or

(c) parties being overly cautious in filing a reply, even though the current ROC provide for an implied joinder of issue on the defence if no reply is filed?[112]

6.12. Depending on what the actual problem was, eliminating an existing procedural right of litigants should only be a last resort where all other solutions (e.g. education, stricter procedural rules) have failed. However, the CJC Report did not explain the thought process behind the recommendation.

(B) Evaluation of recommendation

6.13. The recommendation appears to assume that in most cases, further pleadings will not add anything material to the parties' respective cases. However, the Bar's feedback casts doubt on this assumption. Moreover, it is often very difficult to ascertain what is "material" when the parties' respective cases have yet to be crystallised.

6.14. There are also other collateral disadvantages of the recommendation. First, if parties are unable to sufficiently assess the strength of each other's case through sub-optimal pleadings, this would not facilitate settlement of the dispute.

6.15. Secondly, from an economic perspective, although fewer pleadings filed will appear to reduce process costs, such gains may be offset by the time taken by the court to decide in each case whether to allow further pleadings. The lack of clarity in Chapter 4, Rule 10 of the proposed ROC as to when further pleadings will be allowed may also lead to protracted arguments on an application for leave to file further pleadings, ultimately resulting in higher process costs.

[112] O 18, r 14(1).

6.16. It is true, however, that parties do make immaterial amendments to pleadings at times out of a concern that a technical or narrow reading of the pleadings will prejudice their position, or to correct even obvious typographical or clerical errors. As long as there is no surprise, pleadings should not prejudice a party's ability to advance its case or defence. A more robust approach to pleadings may result in fewer amendments having to be made.

6.17. Finally, under the proposed ROC, it is unclear if parties who must file a reply because they wish to raise facts which must be specifically pleaded (i.e. a situation contemplated by the current Order 18 rule 8) also need to first seek the court's leave. This would further increase process costs.

(C) Conclusion

6.18. The Law Society suggests that a truncated pleadings process should be introduced first in a pilot scheme for low-value cases of low complexity. 80% of the Council members polled supported a pilot, with 20% undecided. This would allow all stakeholders in the civil justice system to address the concerns raised above.

III. Consultation Paper, paragraph 47 (forms for pleadings)

> 47. Separately, forms for pleadings for common types of claims such as personal injury will be introduced and encouraged, but not made mandatory. Today, pleadings are often either inadequate or prolix. Inadequate pleadings prevent the parties and the court from establishing the key issues until a much later stage while prolix pleadings result in wasted time and costs. These problems are exacerbated in cases involving litigants-in-person who do not know which facts are relevant, and which facts should or should not be adduced in pleadings.

A. The proposed forms for exhortatory but not mandatory pleadings are unobjectionable.

Status quo

6.19. The current ROC provide forms in Appendix A, which "shall be used where applicable with such variations as the circumstances of the particular case require."[113] However, the forms in Appendix A do not currently include sample pleadings forms.

Stated objectives

6.20. In addition to the points stated in the recommendation, the CJRC Report noted that "[t]he object of the forms is to provide more guidance, particularly for litigants-in-person, to facilitate the preparation of adequate pleadings".[114]

Bar's feedback

6.21. About 91% of the respondents to the Law Society Online Survey supported this recommendation. They believed that it would speed up the court process, aid litigants-in-person and help counsel because the costs recovery for such claims was "very low". The forms should be designed to "encourage litigants to provide material information", which would help both sides better understand the case and encourage an early resolution.

6.22. However, the minority was of the view that pleadings "define[d] the scope of parties' cases" and forms might not convey enough information for parties to know what the case was about.

Law Society's views

6.23. The Law Society has no objections to this recommendation.

6.24. We would point out that if the Ministry introduces the exhortatory, non-mandatory proposed pleadings forms, such forms should not be placed in the proposed ROC's equivalent of Appendix A, given that Order 1 rule 7 currently prescribes that forms in Appendix A are mandatory.

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[113] O 1 r 7.
[114] CJRC Report, paragraph 54.

Section E: Service In and Out of Singapore

I. Consultation Paper, paragraphs 50-51 (time for service)

50. Under the existing Rules for service in Singapore, a document is deemed served on a particular day if it is served on that day before midnight. However, for the purposes of computing any period of time after service of that document, it shall be deemed to have been served on a particular working day only if it is served on that day before 4pm.

51. This confusing formula will be removed. Instead, if service is effected before 5pm on any particular day, service is deemed to have been effected on that day. If service is effected after 5pm on any particular day, service is deemed to have been effected on the following day.

A. The proposed cut-off time of 5pm is acceptable.

Status quo

7.1 As stated at paragraph 50 of the Consultation Paper.[115]

Stated objectives

7.2 As stated at paragraph 51 of the Consultation Paper.[116]

Bar's feedback

7.3 Three-quarters of the respondents to the Law Society Online Survey supported this recommendation. However, one respondent noted issues with acceptance under the e-Litigation system at times, namely, that even though the document was filed on the day or date directed, it was only served at a later date when the court accepted the same.

7.4 Respondents who disagreed with the recommendation contended that there was no reason to modify the existing rule as the current regime was not confusing. Also, changing the cut-off time disadvantaged overseas parties in different time zones. One respondent said that the current system of two cut-off times "ensures both parties are not unduly prejudiced", as the filer of a document has until midnight to effect service, whereas the other party's time to respond to it is computed from the next day if served after 4pm.

7.5 Many respondents offered alternative suggestions as to the cut-off time:-

(a) Midnight: as lawyers would have more time after office hours to prepare a document for filing. There was no reason to impose a cut-off at 5pm as documents could be served via e-Litigation. Parties should be afforded the full day to serve a document.

(b) 6pm: in line with most law firms' official working hours.

[115] Based on CJC Report, Chapter 5: Service in Singapore, at paragraph 2. We note that the Consultation Paper and CJC Report refer to O 62 r 6A (service before midnight) and r 8 (service after 4pm) of the current ROC.
[116] Based on CJC Report, Chapter 5: Service in Singapore, at paragraph 3.

(c) Noon: as a party served at 4.55pm would not have time to look for legal advice on the same day.

(d) Two-tier system: 5pm for service of writ and originating process and midnight for everything else.

7.6 One respondent also noted that for personal service, it was difficult to serve before 5pm because service was normally done after working hours at the party's residence.

Law Society's views

7.7 The Law Society notes that in England, the cut-off time is 4.30pm for deemed service of non-claim form documents[117] and midnight for deemed service of the claim form.[118]

7.8 While a wide range of options is practicable for this recommendation, the Law Society is of the view that the proposed cut-off time of 5pm is acceptable and has no objections.

[117] Rule 6.26 of the UK CPR.
[118] Rule 7.5 read with Rule 6.14 of the UK CPR.

Section F: Case Conference

I. Consultation Paper, paragraphs 56-58 (Case Conferences)

56. The Case Conference (or Case Management Conference) will be the command centre for all matters relating to case management, and sets the timelines and tone of proceedings.

57. Currently, trial judges are only involved in a case at a fairly advanced stage of the proceedings. As a result, inadequacies in the pleadings, documents, or witness evidence are only unearthed during trial.

58. (CJRC & CJC) To minimise the problems above, a judge and/or relevant judicial officer will manage the case throughout its life cycle once the claim is filed.

A. Case conferences are welcome but judges need to be properly trained to conduct active case management.

Status quo

8.1. Currently pre-trial conferences (PTCs) are usually heard by registrars,[119] although judge-led PTCs (JPTCs) also exist.[120] According to the CJRC Report, "[a] judge is typically assigned to a case only after parties have finalised their bundle of documents, and filed their respective AEICs" and "[t]he judge's involvement at that stage is largely limited to issuing directions regarding opening statements and the duration of cross-examination of witnesses".[121]

Stated objectives

8.2. This recommendation is intended to allow the court to "meet the parties more regularly", so that it can "provide directions on case management, and work closely with the parties as the case progresses".[122]

Bar's feedback

8.3. A strong majority (approximately 80%) of the respondents to the Law Society Online Survey supported this recommendation. Those in favour were of the view that more judicial involvement in case management would help parties. The caveat is that judges should set reasonable and realistic timelines.

8.4. On the other hand, those who disagreed commented that this recommendation would increase pressure on lawyers and court time involved. In their view, JPTCs and docketed ARs currently perform the same case management function.

8.5. It was common ground for respondents to highlight that judges must not "pre-judge" the matter at the case conference or give the impression of doing so. Judges could

[119] Supreme Court of Singapore, "Pre-Trial Conference (PTC)" <https://www.supremecourt.gov.sg/rules/court-processes/civil-proceedings/pre-trial-matters/pre-trial-conference-(ptc)> (accessed 7 January 2019).
[120] Supreme Court of Singapore, "Pre-Trial Conference (PTC)" <https://www.supremecourt.gov.sg/rules/court-processes/civil-proceedings/pre-trial-matters/pre-trial-conference-(ptc)> (accessed 7 January 2019).
[121] CJRC Report, paragraph 56.
[122] CJRC Report, paragraph 57.

come across as pre-judging the matter if they attempted to narrow legal issues or evidential issues without the benefit of submissions.

8.6. Some respondents offered operational suggestions:-

(a) An agenda should be circulated before each case conference, with parties being limited to matters on the agenda unless they had a good reason.

(b) The court should request the Case Note as early as possible as it would help parties resolve disputes earlier if they had to fully analyse the legal issues at an early stage.

Law Society's views

(A) Need for reform?

8.7. The Law Society agrees that case management conferences are a necessary and welcome reform.

(B) Evaluation of recommendation

8.8. The Law Society sees the advantage of "active case management" to be that the designated trial judge sees through all the interlocutory applications. As the trial judge is familiar with the case, he should give better directions for the conduct of the trial suited for the case (for example, how bundles should be organised, the order and even dispensation of witnesses), and conduct the trial more effectively and efficiently. Equally, it is the trial judge with his experience and expertise who will be better able to appreciate and rule on interlocutory matters. In this regard, the proposed reform is that "a judge and/or relevant judicial officer" will manage the case. It is unclear if this means that the management of a case could switch between the trial judge and Assistant Registrars (as is presently the status quo).

8.9. In our view, the true value of active case management can only be realised if it is the trial judge who sees through a case from inception as is done in the English commercial courts. This will be *a fortiori* if the majority of proposed reforms are introduced. Such an advent of new procedural rules will entail very delicate and complex decisions such as e.g. whether AEICs should be exchanged prior to discovery, whether a second round of AEICs should be permitted and whether, and to what extent, more than one interlocutory application should be made.

(C) Conclusion

8.10. The Law Society has no objections to this recommendation subject to the above observations. In addition, the Ministry should carefully study the issues that arose in the UK with case management conferences following the Woolf reforms. Lord Justice Jackson noted that case management conferences in non-specialist courts "tended to become formulaic occasions, when judges either rubber-stamped the parties' proposals or gave their own "usual" directions".[123] It is therefore critical that judges are properly trained on the requirements of active case management before they conduct their first case management conference.[124]

[123] Stephen Clark and Sir Rupert Jackson, *The Reform of Civil Justice* (London: Sweet & Maxwell, Second Edition, 2018) at paragraph 13-008.
[124] Consultation Paper, paragraph 134.

8.11. Finally, we note that a suggested option was to schedule four case conferences after pleadings have been filed.[125] Currently, for JPTCs/docketed ARs, the waiting time is considerably long based on practitioner feedback. If the proposed four case conferences are implemented, the current problem may be exacerbated.

[125] Consultation Paper, paragraph 61.

II. Consultation Paper, paragraph 64 (attending Case Conferences)

64. (CJRC) The Case Conferences should be attended by the lead counsel, or a counsel who is familiar with the case and has sufficient authority to make decisions. Otherwise the court may stand down or adjourn the Case Conference until a counsel who has sufficient knowledge or authority is present.

A. The Ministry should consider the long-term development of the Bar. There are alternative cost-efficient ways for the court to obtain the necessary information at case conferences, instead of requiring a lead counsel or equivalent counsel to attend.

Status quo

8.12. The current practice is that PTCs are normally attended by junior lawyers.

Stated objectives

8.13. Neither the Consultation Paper[126] nor the CJRC Report[127] explained the reason for this recommendation.

Bar's feedback

8.14. The Law Society sought views from the Bar on the potential impact of this recommendation on advocacy opportunities for young lawyers. Most of the respondents to the Law Society Online Survey felt that this recommendation would negatively affect young lawyers' advocacy opportunities but a significant minority disagreed.

8.15. Members in the former camp highlighted that young lawyers currently gained advocacy experience through PTCs. It was not clear whether under the new regime, case conferences would replace PTCs entirely. If this was the intent, and if the court generally expected lead counsel to attend case conferences, young lawyers' advocacy opportunities would indeed be reduced.

8.16. Members in the latter camp commented that there were better opportunities for young lawyers to learn advocacy (e.g. interlocutory applications or State Courts matters), and that case conferences could mainly involve procedural matters requiring limited oral advocacy (assuming that case conferences were similar to PTCs) as these were largely housekeeping matters.

8.17. On this recommendation, many respondents pointed out that the court should not expect lead counsel to attend case conferences as a default rule. This would increase clients' costs, result in inefficient resource distribution and be impractical for lead counsel with heavy caseloads. They supported the proposed second limb allowing attendance by a counsel familiar with the case and who had authority to make decisions and could meaningfully assist the court. In this regard, some highlighted that even if a young lawyer was familiar with the case, he or she might not always have the "authority to make decisions". The court should allow young lawyers to take instructions

[126] Consultation Paper, paragraph 64.
[127] CJRC Report, paragraph 60.

from clients or lead counsel instead of asking them to "make decisions on the spot" at the case conference.

8.18. The Bar also provided some suggestions as to how young lawyers' advocacy opportunities could be preserved:-

(a) the Rules Committee should introduce seniority guidelines to ensure enough opportunities for young lawyers to learn.

(b) Assistant Registrars should indicate at the case conference or send a pre-conference status check letter on what specific issues counsel should address. This would help the young lawyer attending the case conference to prepare the information.

(c) the court should allow young lawyers to attend before registrar-led case conferences and require lead counsel only for judge-led conferences.

(d) the court should allow lead counsel to attend case conferences in a supervisory capacity.

Law Society's views

(A) Need for reform?

8.19. The Law Society notes that the UK and Australia do not require the lead counsel or an equivalent counsel to attend case management conferences. The *raison d'etre* for this reform was not articulated in the Consultation Paper or the CJRC Report. At the engagement session with the Ministry of Law on 4 January 2019, the Law Society was given to understand that the rationale for this reform was to make the civil justice system more efficient. However, efficiency *per se* should not be the sole determinant of the necessity for this reform.

(B) Evaluation of recommendation

8.20. As is apparent from the Bar's feedback mentioned above, this recommendation, if it eventuates, could bring about the collateral disadvantage of significantly reducing advocacy opportunities for young lawyers. As articulated during the engagement session with the Ministry of Law on 4 January 2019, this recommendation may have a long-term adverse impact on the development of the Bar.

8.21. Although some options were discussed at the engagement session (e.g. an understanding by some law practices that the lead counsel need not appear at case conferences, or a third chair appearing before the court instead), it is unclear how much flexibility the court would afford in practice.

(C) Conclusion

8.22. Even if, notwithstanding our contrarian views, efficiency will be the paramount consideration, the Ministry should consider whether there are other alternative, cost-efficient ways for the court to obtain the necessary information at case conferences (for example, the UK civil justice system uses directions questionnaires).[128]

[128] Rule 26.3 of the UK CPR.

III. Consultation Paper, paragraphs 65-66 (List of issues)

65. The CJRC proposes that parties should file a List of Issues ("LOI") prior to the first Case Conference. The LOI will be a neutral case management tool which identifies the principal issues in dispute in a structured manner, and enables the court and parties to determine matters such as the scope of disclosure of documents, as well as the scope of factual and expert evidence which should be adduced.

66. The judge should work with parties in formulating the LOI during Case Conferences, and reviewing and refining it as the case progresses. Where both parties are unrepresented, and thus unable to prepare the working draft LOI, the judge may work with parties to draft the LOI during the Case Conference itself.

A. The LOI is more optimal in cases involving litigants-in-person. Its efficacy at an early stage of proceedings involving represented litigants is untested.

Status quo

8.23. As noted in the CJRC Report, "the issues in any particular case are not crystallised until at a fairly late stage in the proceedings".[129] Currently, the LOI for trial is usually submitted as part of the Lead Counsel's Statement one week after objections to AEICs are taken.[130]

Stated objectives

8.24. The proposal to require parties to file a LOI at an early stage of proceedings is intended to compel parties to "narrow and crystallise the issues in dispute".[131] It seeks to address the following issues with the current system:-[132]

(a) lack of clarity on the issues in dispute;

(b) unsatisfactory case management and poorly defined scope of discovery of documents and witness evidence, leading to wasted time and costs; and

(c) difficulty for judges and registrars to issue meaningful case management directions.

8.25. The CJRC observed that although parties might not be able to agree on a LOI at the outset, they should submit a working draft of the LOI before the first milestone CMC. That way, they could "minimise the amount of discovery and preparation work to be done".[133] The CJRC envisaged that the LOI would continually be reviewed and refined by the parties and the court as the case progressed to trial.[134]

[129] CJRC Report, paragraph 62.
[130] CJRC Report, paragraph 62.
[131] CJRC Report, paragraph 61.
[132] CJRC Report, paragraph 63.
[133] CJRC Report, paragraph 64.
[134] CJRC Report, paragraph 64.

Bar's feedback

8.26. A member of the Bar noted that the LOI was unnecessary at the commencement of a proceeding as the issues ought to be clear from the pleadings that had been filed. As the LOI would simply summarise the pleadings, it was difficult to see what advantage additional documentation would add where parties were represented. However, where unrepresented parties were involved, the member saw the force in having the LOI.

8.27. At the engagement session with the Ministry of Law on 4 January 2019, the Bar gave feedback that practically speaking, it would be difficult for parties to agree to a LOI early in the proceedings. Also, by approving the LOI at an early stage, the court may give the mis-impression that it had made certain assumptions on the issues. Feedback was also given that similar LOIs used in SIAC and ICC arbitrations had either been removed or watered down.

Law Society's views

(A) Need for reform?

8.28. The Law Society agrees with the Bar's feedback that this reform may be necessary for cases involving litigants-in-person. While there may be good reasons for requiring a LOI to be filed at an early stage of the proceedings where both parties are represented, the practical effectiveness of this recommendation is untested.

(B) Evaluation of recommendation

8.29. We note that this recommendation is not reflected in the proposed ROC. We understand from the engagement session with the Ministry of Law on 4 January 2019 that if parties are unable to agree on a LOI early on in the proceedings, the court would not insist on it.

(C) Conclusion

8.30. Insofar as the LOI is a voluntary and neutral case management tool, the Law Society sees its merit but its practical effectiveness should be regularly assessed.

IV. Consultation Paper, paragraphs 67-70 (exchange of AEICs)

67. (CJC) The court may direct parties to file and serve their list of witnesses and to file and serve AEICs of all or some of the witnesses after pleadings have been filed and served but before any exchange of documents. (CJRC) Parties may file supplementary AEICs following disclosure of documents, but only with leave of court.

68. (CJRC) Filing and exchanging AEICs before disclosure of documents may not be easily done if counsel and parties continue to prepare cases the way it is done today. Specifically:

a. Parties will have to interview witnesses before disclosure to prepare the AEICs and repeat the process after disclosure, resulting in additional costs.

b. Parties may face difficulties identifying witnesses in the early stages of the proceedings.

c. In simpler claims where the disclosure process is straightforward, additional costs may be incurred in filing AEICs before disclosure which are not proportionate to the costs saved from a reduced scope of disclosure.

d. Parties may try to game the system by filing a bare AEIC at the outset, only to file a more substantive supplemental AEIC closer to trial (after discovery has taken place). Parties may also make more applications for leave to file supplemental AEICs.

69. (CJRC) The purpose of filing and exchanging AEICs before disclosure is to shift the focus of witness evidence to the case put forward through pleadings, so as to avoid the possibility that witness evidence may be tailored to match disclosed documents. Therefore, for the proposal for AEICs to be filed and exchanged before discovery to be effective, parties and their counsel will have to engage in more thorough preparation of witness evidence at an early stage of proceedings. While this may frontload the costs incurred to prepare witness evidence, it will result in greater time and costs savings in the long run.

70. The court will not exercise its powers to order AEICs to be filed and exchanged before disclosure of documents if parties are unable to prepare their AEICs without the disclosure of documents. This is especially so for cases where there is asymmetry of information.

A. The proposal for the court to order the exchange of AEICs before discovery may: (i) increase process costs; (ii) entail a risk of the stronger party gaming the system; and (iii) artificially distinguish between the stages of exchange of AEICs and discovery. Clarity on the factors that the court will take into account would provide more certainty and assist in the development of Singapore law. This proposal should be piloted first.

Status quo

8.31. As noted in the CJRC Report, parties "file and exchange their own and their witnesses' AEICs to support their case after the disclosure of documents but before trial".[135] The CJRC observed that there were two problems with the current system:[136]

(a) there was a risk of the parties or witnesses adjusting their AEICs to fit the evidence produced during discovery; and

[135] CJRC Report, paragraph 67.
[136] CJRC Report, paragraph 67.

(b) AEICs were currently filed too late in the proceedings to assist in narrowing the issues in dispute and the scope of discovery.

Stated objectives

8.32. As stated at paragraph 69 of the Consultation Paper.[137]

Bar's feedback

8.33. This recommendation was the most unpopular for respondents to the Law Society Online Survey. Only about 28% of the respondents agreed with this recommendation. In addition to the concerns already highlighted by the CJRC,[138] the main concerns with this recommendation are summarised as follows:-

(a) parties often needed documents obtained through discovery to prepare their AEICs. This was true not only in cases of information asymmetry which was the only scenario given in the Consultation Paper as to when the court would not order AEICs to be exchanged before discovery.[139] For example, it is not unusual that a party may simply not have (or no longer have) documents (even those it intends to rely on) in its custody, possession or control, particularly where it may involve historical disputes, staff turnover and missing or misplaced records.

(b) parties needed their AEICs to respond to issues raised in documents produced by the other side. For example, a party might call certain witnesses to rebut evidence produced by the other party or use the AEIC to explain why the other party's evidence did not support his or her case. The CJC's proposal to allow rebuttal AEICs only with leave would mean that witnesses would not be able to respond in writing before the trial (thereby unnecessarily lengthening trials) or there would be satellite litigation over whether rebuttal AEICs should be ordered. By way of comparison, in arbitration proceedings where AEICs are sometimes directed to be filed before specific discovery,[140] there will invariably be a second round of AEICs for both sides.

(c) this recommendation would be difficult to implement in "complex cases where parties would not know what allegations they had to meet before discovery", "claims involving fraud or conspiracy", cases where one party had significantly more resources, or "commercial cases with truckloads of evidence".

(d) delay and increased parties' costs could ensue.[141] To the extent that leave is given for supplementary or reply AEICs after discovery, this arguably increases costs as there would be two rounds of AEICs instead of one. Having additional AEICs would make cross-examination even more "convoluted". It would be difficult in practice to limit parties to simply "new" or "additional" matters raised by the discovery process because the documents discovered might change the complexion of cases, of witnesses' recollection and so on. In arbitration proceedings where this structure is

[137] Based on CJRC Report, paragraph 68.
[138] CJRC Report, paragraph 69.
[139] Consultation Paper, paragraph 70.
[140] In arbitration, there is no general discovery and documents relied on by a party are disclosed through their witness statements
[141] See also the Civil Practice Committee's feedback that this proposal would increase costs for matters which would otherwise settle before AEICs, at Appendix 2, proposal 5 at p 3.

employed, the reality is that the second round of witness statements can often be longer with additional witnesses being called to respond to the new documents.

(e) the use of ADR may be adversely affected where costs have been frontloaded.[142] This is because a party may perceive that it has already invested a significant amount of resources into the process and relative to the remainder of the process, may consider it more economically sensible to proceed. This may be true even in cases where the party perceives the merits of its case to be weak.

8.34. On the CJRC's view that this recommendation would "avoid the possibility that witness evidence may be tailored to match disclosed documents",[143] many respondents challenged this assumption. They were of the view that parties should be presumed to be stating the truth when they signed a document verified by a statement of truth (i.e. a witness statement) or an affidavit, unless the court found otherwise as to their veracity at trial. Trial was a more appropriate forum to address questions of a witness's truthfulness. Also, tools existed to address concerns about evidence being "tailored", such as drawing adverse inferences against belated changes in pleadings.

8.35. Many respondents also asked for more clarity as to when the court would order AEICs to be exchanged before discovery. One respondent called for "clear rules and guidelines" which had to be "strictly adhered to" because these would significantly affect how the client chose to proceed. It would also affect Singapore's reputation as a hub for dispute resolution if counsel could not advise their clients on the merits meaningfully due to uncertainty. One respondent suggested that the court should make the order only if it decided at the case conference that the disputed issues were sufficiently narrowed, and not otherwise. Another respondent suggested this order should be an option for parties to apply for.

Law Society's views

(A) Need for reform?

8.36. It is not entirely clear what precisely is sought to be achieved by this proposed reform. As part of an overall change in procedure, if the intention is to borrow from arbitral proceedings, there is good sense that witness statements could precede discovery. Unlike the conventional common law regime where documents are generally produced by way of a list, documents relied on by a party are produced by way of witness statements in arbitration.

8.37. However, in arbitration, a second round of witness statements is the norm. It is clearly and commonly understood that the disclosure of documents requested or ordered will require responses from witnesses already lined up or new witnesses (including potential new experts). If the proposed reform to have AEICs precede discovery is meant for this reason, a second round of witness statements and expert reports could be permitted as a matter of right.

8.38. Nevertheless, there are significant drawbacks to this regime. For example, having two rounds of witness statements by default is a generally more expensive and tedious process than a system under which there is a main round of witness statements (after discovery) followed by relatively shorter replies. On the other hand, not permitting this second round under a regime where witness statements precede discovery raises

[142] See also the Civil Practice Committee's feedback that this proposal would be counterproductive to helping parties reach settlement, at Appendix 2, proposal 5 at p 3.
[143] Consultation Paper, paragraph 69, which appears to be based on the CJRC Report, paragraph 67.

several issues: (i) due process concerns; (ii) potential inefficiency in the administration of justice (e.g. because of more extensive direct examination or cross-examination); and (iii) satellite litigation over whether a second round is necessary and if so, to what extent.

(B) Evaluation of recommendation

Sequencing of exchange of AEICs and discovery

8.39. The proposed ROC postulate that discovery will only occur after the court decides whether to order the exchange of AEICs. Chapter 7, Rule 7(1) of the proposed ROC states:-

> "If the application to challenge the jurisdiction of the Court has been dealt with or where there is no challenge to the jurisdiction of the Court, after pleadings have been filed and served but before any exchange of documents, the Court ***may*****, *in any particular case or class of cases***, order the parties to file and serve their list of witnesses and the affidavits of evidence-in-chief of all or some of the witnesses." [emphasis added]

8.40. If the court decides to order AEICs, the court will then give the necessary directions in respect of an application for document production.[144]

8.41. If the court decides not to order AEICs, it will then proceed to consider discovery matters. Chapter 7, Rule 7(2) of the proposed ROC provides: "Where the Court does ***not*** exercise its power under paragraph 1, it will ***proceed to consider*** the matters in Rule 8." [emphasis added] One of the matters set out in Rule 8 of the proposed ROC is the production of documents.[145]

8.42. One concern is that Rule 7 postulates an artificial distinction between the exchange of AEICs stage and the discovery stage. It is not clear practically how a party can successfully argue against an order to exchange AEICs before discovery without concurrently submitting an application for discovery, if, for instance, the party's basis is that the relevant information is within the other party's knowledge.

Gaming the system

8.43. The CJRC pointed out that one of the potential concerns with the recommendation was that "[p]arties may try to game the system by filing a bare AEIC at the outset, only to file a more substantive AEIC closer to trial (after discovery has taken place)".[146] In addition, "[p]arties may also make more applications for leave to file supplemental AEICs".[147] However, the CJRC took the view that this concern should not be an issue under the proposed ROC, as "parties and their counsel will have to engage in a much more thorough preparation of witness evidence at an early stage of proceedings".[148] Although "this may frontload the costs incurred to prepare witness evidence, it will result in a greater time and costs savings for parties in the long run".[149]

[144] Preamble, proposed ROC, paragraph 14.
[145] Chapter 7, Rule 8(4)(k) of the proposed ROC.
[146] CJRC Report, paragraph 69(d).
[147] CJRC Report, paragraph 69(d).
[148] CJRC Report, paragraph 70.
[149] CJRC Report, paragraph 70.

8.44. Be that as it may, it is not apparent that this mischief is completely addressed. Under the NSW regime, which this recommendation was derived from,[150] parties must exchange AEICs before discovery unless there are "exceptional circumstances",[151] which "arise where documents sought by way of discovery are necessary to fairly prepare a case for trial".[152] Whether "exceptional circumstances" exist is to be considered when an application for discovery is made.

8.45. In contrast, under the proposed ROC, the issue of whether adequate AEICs had been filed is not considered at the discovery stage, but only ***after discovery*** when parties seek leave to file supplemental AEICs.[153] The CJRC Report noted that "[p]arties may amend their filed AEICs ***following disclosure of documents***, but only with leave of Court" [emphasis added].[154]

8.46. Hence, this regime would favour a stronger party who, for tactical reasons, may elect to file a bare AEIC at the initial stage and exert pressure subsequently at the discovery stage to compel the weaker party to give up the suit or to settle on terms favourable to the stronger party. Thus, a stronger party may be able to get away with filing a bare AEIC if proceedings are terminated at the discovery stage, without having to satisfactorily explain to the court as to why a bare AEIC was filed.

<u>Increased process costs</u>

8.47. An ancillary issue is that from an economic perspective, the Bar's feedback suggests that the recommendation may in fact increase process costs because of, *inter alia*, the need to file supplemental AEICs. If the court fails to grant leave for parties to file supplemental AEICs such that not all the material facts are presented in court, decisional errors may arise. In this regard, the assumption that the arbitral regime is necessarily more efficient will need to be carefully examined.

(C) Conclusion

8.48. Although the CJC's deliberate departure from the NSW approach for the exchange of AEICs before discovery may have been intended to foster the development of an autochthonous civil procedural system, it is not clear at this juncture whether the CJC's modifications to the NSW model are workable in practice.

8.49. In particular, Rule 7(1) does not clarify what factors the court will take into account in deciding whether to make an order for the exchange of AEICs before discovery. Paragraph 70 of the Consultation Paper only identifies one scenario (similar to the NSW jurisprudence)[155] where the court will not order the exchange of AEICs before discovery, namely, "for cases where there is asymmetry of information".[156]

8.50. The Law Society appreciates that there may be good reasons for not adopting the NSW "exceptional circumstances" test. However, this does not preclude the CJC from stipulating, in Rule 7(1), a list of non-exhaustive factors that the court will consider in deciding whether to order pre-discovery AEIC exchange. Doing so will not hinder the

[150] CJRC Report, paragraph 66.
[151] Practice Note No. SC EQ 11, "Disclosure in the Equity Division" (22 March 2012), paragraph 4.
[152] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraph 15.25.
[153] CJRC Report, paragraph 66.
[154] CJRC Report, paragraph 66.
[155] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraph 15.25.
[156] Consultation Paper, paragraph 70.

development of Singapore law. Instead, it could be instructive for counsel and clients and give more certainty to litigants as to when such an order may be made. This would reduce process costs arising out of protracted arguments before the court on this point. 80% of the Council members polled agreed to this suggestion.

8.51. In addition, a substantial majority of Council members polled (80%) also suggested that the proposed ROC include illustrations, similar to those in the Penal Code, as to when the court will order pre-discovery AEIC exchange. Another popular suggestion with Council members (60%) was that should the recommendation be implemented, parties should have an automatic right to file supplementary or reply AEICs. However, the counterbalance to this is that an automatic right of reply could lead to a situation where the first AEIC filed would be a bare or "formalistic" AEIC, so that a more substantive reply could be filed subsequently. This might defeat the rationale of the recommendation i.e. to achieve more efficiency and save time and costs.

8.52. The Ministry should consider piloting this "experimental" recommendation. About 67% of the Council members polled supported a pilot while 22% were of the view that this recommendation should not even be implemented and 11% were undecided.

V. Consultation Paper, paragraphs 71-72 (single interlocutory application)

71. The CJC proposes that, other than excepted classes of applications, the court will control the number of and the period within which interlocutory applications may be filed by determining the applications which are required and order each party to file a single application as far as possible. Applications set out in the single application can be filed as of right. However, no further application may be taken out at any time without the court's approval.

72. Parties will not be able to take out any application within 14 days before trial except in a special case and with the trial judge's approval. This helps to eliminate strategic ambush near trial and avoids wasting court hearing time on matters that should have been dealt with much earlier.

A. The proposed single interlocutory application may not save process costs and should be piloted first.

Status quo

8.53. Parties may take out any number of interlocutory applications at different stages of the pre-trial proceedings.

Stated objectives

8.54. As noted at paragraph 72 of the Consultation Paper.[157] In addition, the CJRC Report observed that interlocutory proceedings should be streamlined as follows:[158]

(a) before the first CMC, each party should indicate which interlocutory applications it intends to file.

(b) the court will generally order all those applications to be made in one single interlocutory application.

(c) while applications indicated before the first CMC can be filed as of right, the court's permission must be obtained to file any further interlocutory applications which were not previously indicated.

Bar's feedback

8.55. A clear majority (approximately 71%) of the respondents to the Law Society Online Survey opposed this recommendation. Many raised numerous concerns about this proposal:-

(a) it would be unworkable because parties would not know in advance what interlocutory applications were required. Not all applications were foreseeable, and there would be some applications that ought to precede others. This was especially so since some applications were sequenced on the outcome of others. For example, a party would need to apply for further and better particulars ("F&BPs") first before deciding whether to apply for specific discovery. Another example was

[157] Based on CJC Report, Chapter 7: Case Conference, at paragraph 5.
[158] CJRC Report, paragraph 72.

security for costs: parties are required to (and should) apply early in proceedings and the applying party would, if successful, ordinarily not have to take further steps in the proceedings unless, and until, it obtains security[159]

(b) it might be counterproductive because parties might take out as many applications as possible embedded within the single omnibus application, even if not all were needed at that stage. Moreover, costs and delays would be increased if parties had to seek leave first before they filed subsequent interlocutory applications.

(c) The frontloading of all interlocutory applications as a single glorified summons-for-directions attracts the same concern as above – whether it might produce a counter-productive effect on settlement prospects. Indeed, successful interlocutory applications can sometimes produce incentives to settle. It should not be assumed that interlocutory applications were *ipso facto* wasteful costs-wise and time-wise.

(d) Interlocutory applications, when used properly, can also assist in producing more efficient trials. Striking out of particular parts of claims is an example. The Law Society's Civil Practice Committee also took the view that the recommendation ignored the relevance of interlocutory orders at different points of court proceedings.[160]

(e) Interlocutory applications can also affect the due process rights of parties – for example, discovery orders can sometimes make or break a case.

(f) While parties should be discouraged from taking out unnecessary or late applications, the fact is that proceedings can change complexion as new information is received or discovery is given.

(g) Advocacy opportunities for junior lawyers would be significantly reduced. Should only one interlocutory application be allowed, clients would put pressure on lead counsel to attend. Having lead counsel rather than junior counsel attend the interlocutory hearing could also delay court timelines, given the packed calendars of lead counsel in demand.

8.56. The majority view was that the current approach towards interlocutory applications was better. The mischief of unnecessary or wasteful applications could be dealt with as follows:-

(a) The court currently had the power to impose costs orders on unnecessary or wasteful interlocutory applications. In fact, party and party costs for interlocutory applications should be increased as it was currently a very "low cost" exercise.

(b) The filing of interlocutory applications was already supervised by Assistant Registrars and Senior Assistant Registrars at regular PTCs. This supervision could be strengthened under the proposed system where cases are docketed before a single judicial officer. If docketed before the trial judge from start to end, parties are less likely to take out frivolous interlocutory applications as well so as to maintain their credibility before the trial judge.

8.57. Some respondents suggested that as an alternative approach, a single interlocutory application could be used selectively. For example, a single interlocutory application

[159] See also the Civil Practice Committee's feedback on security for costs, at Appendix 2, proposal 7 at p 4.
[160] See the Civil Practice Committee's feedback on this point at Appendix 2, proposal 6 at p 3.

could be used for discovery, F&BPs or interrogatories, but not for applications that "delve into the merits". The latter category included applications to strike out pleadings, to obtain summary judgment or to determine questions of law or construction of documents. Other suggestions by the Bar can be found in Appendix 1.[161]

Law Society's views

(A) Need for reform?

8.58. Neither England nor Australia has adopted a similar regime. While the objectives of this reform had been articulated to some extent, neither the CJC nor the CJRC examined potential countervailing concerns about this recommendation. This is unlike the CJRC's analysis for the proposed reform on the exchange of AEICs before discovery. It is not clear whether the proposed single interlocutory application is the only way to address the problems identified.

(B) Evaluation of recommendation

8.59. The Law Society observes that the ostensible aim of this recommendation is to reduce duplicitous, wasteful or unnecessary interlocutory applications. However, the Bar's feedback is that it may be practically challenging – and in some cases, illogical – to have a single interlocutory application. While the objective may be desirable, there are also ways in which wasteful and unnecessary applications by parties can be sanctioned or controlled.

8.60. At the engagement session with the Ministry of Law on 4 January 2019, it was clarified that the applications within the single interlocutory application need not be dealt with at a single hearing. Instead, they could be staggered and heard over different days. The Law Society is of the view that this approach should be further refined. It would make sense to require the parties to inform the court of the interlocutory applications they contemplate filing as part of case management but not to require that all applications be filed simultaneously. These good faith indications by counsel could then be used to sequence potential applications in a logical, sensible and reasonable way without prejudice to a party adding or abandoning an application.

(C) Conclusion

8.61. We are therefore of the view that the Ministry should be circumspect in accepting this "experimental" recommendation. It would be more prudent to pilot this regime for a limited category of cases before considering its extension to all civil cases. 60% of the Council members polled supported a pilot, while the remaining 40% were of the view that this recommendation should not even be implemented.

[161] See the Bar's suggested alternatives to a single interlocutory application at Appendix 1, proposal 29, p 25.

VI. Consultation Paper, paragraph 77 (interrogatories)

77. The CJC proposes that interrogatories under the existing Order 26 and 26A will be abolished as they have long faded in effectiveness after AEICs were introduced.

A. The Law Society is neutral as to whether interrogatories should be completely abolished. If retained in some form, the Ministry may wish to consider requiring leave of the court as a compromise.

Status quo

8.62. The current ROC allow parties to serve interrogatories on any other party in certain situations.[162] Parties may serve interrogatories without the court's leave if these are "necessary either for disposing fairly of the cause or matter or for saving costs".[163] Interrogatories without leave may be served on a party not more than twice.[164]

Stated objectives

8.63. As stated at paragraph 77 of the Consultation Paper.[165]

Bar's feedback

8.64. The results of the Law Society Online Survey suggest that interrogatories are not completely otiose. Although about 67% of the respondents to the Law Society Online Survey agreed with this recommendation, a significant minority was of the view that interrogatories, at least in some form, still had a utilitarian purpose. One view was that because the purpose of interrogatories was to reduce time in trial by clarifying documents/positions taken, it should remain as an option as it supports the Ideals.

8.65. Other selected comments indicate that interrogatories are also useful in the following situations:-

(a) to narrow issues before trial, especially where pleadings were "bad or unclear", where AEICs were bare, or where the opposing party's position was not clear;

(b) where expert evidence was required and as against third parties;

(c) where documents were not available e.g. where AEICs were filed close to trial and meritorious reasons existed to require certain information to be provided beforehand;

(d) as a precursor to discovery in certain circumstances e.g. where a fact might have to be established before it could be reasonably concluded that a document existed;

(e) where a party needed to obtain another party's account of certain events before commencing an action to determine whether it could be sustained. This was of particular utility where documentary evidence was scarce and pre-action discovery would not be useful; and

[162] See generally O 26 (interrogatories) and O 26A (interrogatories before action, etc.).
[163] O 26 r 1(1).
[164] O 26 r 3(1).
[165] Based on CJC Report, Chapter 7: Case Conference, at paragraph 7.

(f) if the proposal for AEICs to be exchanged before discovery was implemented, there might be a "renewed need" for interrogatories.

8.66. Another comment was that the recommendation rested on flawed assumptions. Interrogatories were conceptually different from AEICs. Whereas AEICs reflected the positive evidence of a witness, interrogatories forced a party to give evidence on particular matters. Thus, if a witness steadfastly refused to address a key issue in his AEIC, a party could apply for interrogatories to compel the witness to address the issue. Moreover, the diminishing use of interrogatories should not be a sufficient or necessary reason to abolish them. Parties should have the option available to use interrogatories if seen fit.

8.67. Alternatives to this recommendation were suggested:-

(a) only interrogatories without order could be abolished.

(b) interrogatories should be permitted more liberally instead of leaving it to parties to raise questions during cross-examination at trial as it would be more time-efficient.

(c) if the problem was prolix interrogatories, the court could and should impose costs sanctions instead.

Law Society's views

(A) Need for reform?

8.68. We note that this recommendation appears to track case law developments in Australia. There the courts have "acknowledged that the benefit of interrogatories has diminished given that parties in modern litigation often exchange pre-trial witness statements or affidavits".[166] In another Australian case, the judge observed that "interrogatories in my experience in the conduct of commercial litigation over approximately 30 years have rarely resulted in a party tendering an answer", and "[m]ore rarely has such an answer shortened the trial or reduced costs and even more rarely has the answer proved to be decisive on any central question of fact or issue in the litigation".[167]

8.69. Be that as it may, despite its experience, Australia has not yet taken the exceptional step of abolishing interrogatories; albeit, the use of interrogatories is strictly regulated in some instances. For example, rule 22.1(4) of the NSW UCPR allows the court to make an order for interrogatories only if satisfied that the order is necessary at the time it is made, while the Commercial Court of the Supreme Court of Victoria permits the use of interrogatories only in exceptional circumstances and only with the leave of the court.[168]

8.70. However, the CJC Report did not explain why the CJC had decided to go even further than Australia to recommend an abolition of interrogatories in its entirety.

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[166] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraph 15.98, citing Owen J in *Dalecoast Pty Ltd v Monisse* [1999] WASCA 103 at paragraphs 5-6.

[167] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraph 15.98, citing Greenwood J in *Australian Competition and Consumer Commission v ANZ Banking Group Ltd* [2010] FCA 230 at [14].

[168] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraphs 15.96-15.97.

(B) Evaluation of recommendation

8.71. It is difficult to evaluate this recommendation in the absence of any empirical data on the use (or lack of use) of interrogatories in Singapore. Based on the feedback from the Law Society Online Survey, different views were expressed as to whether interrogatories were still efficacious with a substantial majority favouring abolition.

(C) Conclusion

8.72. In the final analysis, given the diverse views expressed and the lack of alternatives stated in the CJC Report, the Law Society is neutral as to whether interrogatories should be completely abolished. If interrogatories are to be retained in some form, the Ministry may wish to consider whether requiring leave of the court may be an appropriate and acceptable compromise.

Section G: Production of Documents

I. Consultation Paper, paragraph 79 (arbitration-style discovery)

79. (CJRC & CJC) The current process of general discovery followed by specific discovery has led to situations where the time and costs spent on discovery are disproportionate to the complexity and value of the claim. Thus, an arbitration-style disclosure of documents will be adopted by default in the new regime. Parties will first produce the documents upon which they rely for their respective cases. To counter the concern that the arbitration-style of discovery may enable parties to withhold documents adverse to their own case, the availability of specific discovery will enable a party to request documents (in particular, documents which are adverse to the party holding them) from the other party.

A. Arbitration-style discovery may well address the problems in the current discovery regime. The Ministry should consider piloting this reform first given its novelty and potential collateral disadvantages.

Status quo

9.1. Under the current ROC, a party must disclose documents on which it relies or will rely, documents that could adversely affect its own or another party's case, and documents that could support another party's case.[169]

Stated objectives

9.2. The purpose of the recommendation is to "introduce a new discovery regime which works on the principle that a claimant is to sue and proceed on the strength of his case and not on the weakness of the defendant's case".[170] The new discovery regime is also intended "to prevent parties from engaging in unnecessary requests and applications with the hope of uncovering a "smoking gun"".[171] The CJRC envisaged that the recommendation will "reduce time and money spent on the discovery process as well as the potential for dispute over discovery-related matters".[172]

Bar's feedback

9.3. Approximately 72% of the respondents to the Law Society Online Survey supported this recommendation, noting that it would save time and costs, prevent "document dumping guerrilla tactics" and encourage parties to make more specific requests.

9.4. However, there were concerns that arbitration-style discovery would allow parties to conceal documents adverse to their case. Respondents on both sides emphasised that the obligation to disclose adverse documents must remain for the following reasons:-

(a) otherwise, parties would take out many specific discovery applications or request very broad categories of documents to "fish" for such documents, which would also delay proceedings.[173]

[169] O 24 r 1.
[170] Consultation Paper, paragraph 78.
[171] Consultation Paper, paragraph 78.
[172] CJRC Report, paragraph 73.
[173] See also the Civil Practice Committee's feedback that this proposal would result in a greater number of specific discovery applications, at Appendix 2, proposal 10 at p 5.

(b) allowing parties to withhold adverse evidence would result in the court being presented with selective evidence that would compromise its ability to arrive at a correct decision.

(c) this proposal would especially affect cases where there was a knowledge gap (asymmetry of information) between the parties generally;[174] and involving specific causes of action where the law has developed to place the burden of proof on a party and the evidence relevant to such issue is wholly or peculiarly within the knowledge of the other party.[175]

(d) it would be difficult to successfully apply for specific discovery without knowing what documents the opposing party had. Under current law, the applicant had to show evidence that the category of documents sought existed, which would be difficult if the counterparty had no obligation to disclose adverse documents.[176]

(e) at some stage, the court might need to re-introduce a duty on parties to disclose unfavourable documents. An analogous development had occurred in criminal procedure where defence lawyers were unduly prejudiced by not having access to the prosecution's documents.[177]

9.5. Another comment was that arbitration and litigation had important differences making arbitration-style discovery less suitable for litigation. Litigation encompassed a wider range of matters than arbitration. Arbitration-style discovery might be suitable for commercial or contractual claims, but parties in other types of disputes still needed general discovery because they might not have the relevant documents in their possession, custody or power. Also, unlike litigation, arbitration was by consent underpinned by party autonomy.

9.6. Alternative suggestions included having arbitration-style discovery only for "certain classes of clearly defined cases", such as "straightforward breaches of contracts [or] personal injury".

Law Society's views

(A) Need for reform?

9.7. The Law Society acknowledges that it is necessary to reform the discovery regime in view of the problems highlighted in the CJC Report and CJRC Report.[178]

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[174] Such as cases in conspiracy or fraud; tort or equity claims; corporate claims against controlling shareholders; and employment cases where the employee lacked access to the employer's documents.

[175] An example of the latter is a bailment claim arising from damage to bailed goods. The claimant bailor initially has the burden to prove the contract and damage. The burden then shifts to the defendant bailee to explain the cause of the damage or establish a contractual exception. If the bailee does this, the burden then passes back to the bailor to negative the bailee's entitlement to rely on the defence or exception. The main obstacle facing the bailor is that once the goods have been bailed to the bailee, the bailor has little knowledge of what took place, and needs evidence in the bailee's possession. Under the new principles, the bailee is under no obligation to disclose unless the bailee intends to rely on it. See a member's feedback on this point at Appendix 1, proposal 36 at p 32.

[176] See also the Civil Practice Committee's feedback on the need for the court to allow broadly-scoped specific discovery applications, at Appendix 2, proposal 11 at p 6.

[177] See the Court of Appeal's landmark ruling in *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205. The Court of Appeal further clarified the scope of the Prosecution's disclosure obligation in *Muhammad bin Kadar and another v Public Prosecutor and another matter* [2011] 4 SLR 791.

[178] CJC Report, Chapter 8: Production of Documents, at paragraph 2; CJRC Report, paragraph 74.

(B) Evaluation of recommendation

9.8. The Law Society observes that arbitration-style discovery was one of the options identified by Lord Justice Jackson to reduce discovery costs in his review of the UK costs regime, but was ultimately rejected.[179] The Australian civil justice system does not have a regime of arbitration-style discovery.

9.9. The viability of arbitration-style discovery in litigation is therefore somewhat untested. On the one hand, the Bar's feedback evinces a marked discomfort with the move from the traditional standard disclosure regime towards a default position where adverse documents would be withheld. There are also concerns that the new discovery regime may adversely affect the ethos of a legal practitioner as an officer of the court and also create uncertainty as to a legal practitioner's ethical obligations.[180]

9.10. On the other hand, we note the CJRC's proposal that the court will still retain a residual discretion to allow a broader scope of discovery where it will be in the interests of justice to do so e.g. where it could aid in disposing fairly of the proceedings.[181] Parties may also agree to broaden the scope of discovery by applying the existing disclosure regime in their proceedings (i.e. general discovery followed by specific discovery).[182] Hence, the perception that there is no obligation to disclose adverse documents entirely may not be correct.

9.11. Council members polled on this recommendation were also split. 60% did not support arbitration-style discovery, while 40% were in favour. In addition, a concern was raised as to how arbitration-style discovery would interface with the law of evidence. Currently, the court could draw an adverse inference under illustration (g) in section 116 of the Evidence Act (Cap. 97) if a party withheld adverse evidence without good reason. However, under the proposed regime where adverse evidence may be withheld by default, how would section 116(g) of the Evidence Act operate? Can a party, for tactical reasons, choose not to make an application for specific discovery, so that he can ask the court in closing submissions at trial to draw an adverse inference against the opposing party for withholding adverse evidence? The Ministry should carefully consider the broader implications of how arbitration-style discovery could affect the existing body of evidence law, and whether the Evidence Act itself needs to be amended to reflect the new ethos of arbitration-style discovery.

9.12. Finally, it is uncertain whether the CJC or CJRC considered whether the availability of specific discovery (to counter the concern that arbitration-style discovery would enable parties to withhold adverse documents) would merely shift the battleground. In other words, a proliferation of specific discovery applications may be initiated by a litigant to obtain adverse documents that parties could have obtained as of right under the current discovery regime. As the former Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, observed in a 2014 speech:

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[179] Stephen Clark and Sir Rupert Jackson, *The Reform of Civil Justice* (London: Sweet & Maxwell, Second Edition, 2018) at paragraphs 14-013-14-014.

[180] A member of the Bar had queried on what counsel's ethical obligations were where counsel knew of the existence of a material adverse document in the client's possession or control, but which was not a document on which the client was relying and therefore was not required to disclose. See the member's feedback on this point at Appendix 1, proposal 49 at p 47. For an overview of counsel's existing ethical obligations relating to discovery by their clients, see Chua Lee Ming (editor-in-chief), *Singapore Civil Procedure 2019* (Sweet & Maxwell Asia, 2018), Order 24 rule 1, at 24/1/5.

[181] CJRC Report, paragraph 77; Consultation Paper, paragraph 80.

[182] CJRC Report, paragraph 78; Consultation Paper, paragraph 81.

"…***Imagine, for instance, to choose a neutral example, it was suggested that we alter the disclosure process in order to reduce its attendant cost. The suggested reform is that the default rule becomes that parties only have to disclose that which they intend to rely on***. That would certainly reduce both the scope of disclosure and its cost. No longer, for instance, would parties have to carry out any search of their own documents to ensure that they had disclosed those adverse to their case or which might assist their opponent's case.

Such a reform might appear attractive from a cost perspective. But let us assume the proposal on disclosure was to be the default position. The reform would permit parties to continue to make applications for specific disclosure of documents that they believed their opponent had or controlled and which assisted their own case or harmed their opponent's. ***Might the reform simply result in a massive increase in contested specific disclosure applications? Equally it might lead to more appeals from such decisions than the disclosure process currently creates. Might it thus increase costs, and use more court time and resources in dealing with them, than the present approach***?…"[183] [emphasis added]

9.13. In light of the former Lord Chief Justice's observation, the Ministry should consider the likelihood that this proposal may have the reverse effect of increasing process costs in litigation.

(C) Conclusion

9.14. On balance, arbitration-style discovery may well solve many of the problems in the current discovery regime. This is also manifest from the strong support by the Bar for this recommendation. But given its novelty and the potential collateral disadvantages (e.g. increased process costs arising from more contested specific discovery applications), the Ministry should consider piloting the proposed regime for a limited category of cases before considering extending it to all civil cases. 60% of the Council members polled supported a pilot, while the remaining 40% were of the view that arbitration-style discovery should not even be implemented.

[183] Lord Thomas of Cwmgiedd, "Reflections of a Serving Lord Chief Justice", in Jeremy Cooper (ed.), *Being a Judge in the Modern World* (Oxford; New York: Oxford University Press, 2017), at p 28-9.

Section H: Expert Evidence

I. Consultation Paper, paragraph 89 (single court expert)

89. (CJC) In light of the above difficulties, the general rule is that one common expert will be used. In a special case and with the court's approval, the parties may use their own experts but they cannot rely on expert evidence from more than one expert on all or any of the issues. The court retains the discretion to appoint a court expert in addition to or in place of the parties' common expert or all the experts. The Court will give all appropriate directions relating to the appointment of the common expert and the court expert, including the method of questioning and the remuneration to be paid. (CJRC) The single court expert will be granted access to all evidence to assist in the formulation of his expert opinion.

A. The single or court-appointed expert scheme has several disadvantages and does not address the criticisms of the status quo highlighted by the CJC. The Ministry should examine alternatives to this proposal.

Status quo

10.1 Under the current regime, parties usually appoint their own experts. The court has the power to appoint its own expert, although this is rarely done. The court has existing powers to: (i) limit the number of expert witnesses;[184] (ii) direct experts to hold a discussion before exchanging their reports in order to identify issues in the proceedings and agree on issues where possible;[185] and (iii) order experts to testify as a panel.[186] Also, single joint experts ("SJEs") are now commonly appointed in cases under O 108 of the current ROC relating to "Simplified Process for Proceedings in Magistrate's Court or District Court".[187]

Stated objectives

10.2 Paragraph 88 of the Consultation Paper stated a number of problems with the current system where each party appointed its own expert witnesses:[188]

(a) *Conflicting opinions*: Irreconcilable differences in experts' opinions "unnecessarily complicate the issues before the court" and do not assist the court.

(b) *Partisanship*: Experts are instructed based on the factual matrix presented by their instructing party, which "may influence their interpretation of the evidence".

(c) *Costly*: The preparation and presentation of expert testimony resulted in "disproportionately high costs".

[184] Under O 25 r 3(1)(d) of the ROC, "the Court shall consider the appropriate orders or directions that should be made to simplify and to expedite the proceedings and particularly … whether an order should be made limiting the number of expert witnesses".
[185] The court can also specify the issues the experts are to discuss, and direct the experts to prepare a joint statement, under O 25 r 3(1)(f) and O 40A r 5.
[186] The court can order expert witnesses to testify as a panel under O 40 r 6, with parties' consent.
[187] O 108 r 5(3).
[188] Based on CJRC Report, paragraph 95.

10.3 While the proposed single joint expert regime will be the default position, the CJRC recommended that the court will retain the discretion to allow party experts on the application of any party and "parties should be given the option to appoint their own expert witnesses if all parties so agree".[189]

Bar's feedback

10.4 About 58% of the respondents to the Law Society Online Survey opposed this recommendation. The following concerns were raised:-

(a) Appointing a SJE would deprive the court of the chance to hear differing views. It was a "fallacy" to assume that only one (correct) view existed in matters of professional opinion and judgment; almost all areas of expertise would benefit from "robust debate". Many suggested that encouraging or even mandating hot-tubbing between experts would be a better approach.[190]

(b) The recommendation equates the independence of an expert with the presentation of the "correct" view (if indeed, as stated above, there is such a thing in areas requiring expertise.) Many well-regarded experts are keenly aware of their professional obligations to the court and will not simply be "guns for hire." While there may be a few experts who are partisan, they are usually quickly exposed through cross-examination or hot-tubbing.

(c) The recommendation does not take into account the reality that parties would still appoint their own experts to help develop their case and/or cross-examine the common or court-appointed expert. The parties therefore have to bear the cost of their own appointment and that of the common or court-appointed expert.

(d) The recommendation "significantly depart[ed]" from the adversarial system where parties had both the obligation and the right to advance their case with the witnesses and experts they deemed fit. As observed by the Law Society's Civil Practice Committee, the court should continue to be required to attach the weight it deems fit to each expert's testimony, rather than force parties to have a single expert.[191]

(e) Parties would have significant difficulty agreeing on a common or court-appointed expert and the list of issues,[192] which might result in satellite litigation over which expert should be appointed and the list of issues. It is unclear if the court is in a position to determine the expert's suitability and/or the list of issues at an early stage of the proceedings, and this will have to be determined by the trial judge and not an Assistant Registrar.

(f) The recommendation also seems to assume in all cases, and even where parties can appoint their own experts, there can only be one expert. It is not clear if any exceptions are contemplated. But this assumption is not always correct as there will be cases where different experts are needed due to their different areas of specialisation.

[189] CJRC Report, paragraphs 97 and 98.
[190] See also the Civil Practice Committee's feedback on hot-tubbing as a possible solution, at Appendix 2, proposal 13 at p 6.
[191] See the Civil Practice Committee's feedback on this point at Appendix 2, proposal 13 at p 6.
[192] See the Civil Practice Committee's feedback on this point at Appendix 2, proposal 13 at p 6.

10.5 One respondent shared problems from his own experience with cases under Order 108 of the current ROC (single joint expert under simplified process for proceedings in Magistrate's or District Court). He was of the view that a SJE should not be implemented industry-wide until solutions were found to current problems with the Order 108 scheme. He identified the problems as follows:-

(a) experts were often chosen based on "irrelevant" criteria such as who had the lowest fees, or whether one party had breached the pre-action protocol (as the defaulting party's recommendation would not be chosen). There had to be clearer guidelines on how experts should be appointed.

(b) the joint expert scheme did not consider a situation where an expert was giving a combination of factual and expert evidence. A motor surveyor gave evidence "based on his observation after the accident as well as on pricing", and it would be unfair to replace that surveyor with another surveyor "who did not see the vehicle after it was damaged and merely [came] to a pricing opinion". Similarly, a doctor's evidence was "based on a combination of the primary facts that he was told and his expertise", and it would not be fair to supplant his evidence with that of another doctor "who [saw] the patient for 20 minutes before coming to his opinion". Appointing a single joint expert posed a problem where an expert had to give both factual and expert evidence, since it was "impossible to bifurcate the two".

10.6 At the engagement session with the Ministry of Law on 4 January 2019, another member of the Bar shared similar feedback regarding the arbitrary appointment process of an expert under the O 108 scheme. In addition, in PIPD cases, experts generally fell into 2 camps – pro-plaintiff and pro-workshop. The expert's view would usually be "shaped" by which camp he was from.

10.7 Subsequently, the Law Society received further feedback that the process of appointing a SJE under the O 108 scheme was time-consuming and costly, especially for PIPD work, as it involved a number of stages:-

(a) parties would file a Summons for Directions ("SFD") in the Civil Registry;

(b) invariably the 1st hearing of the SFD would be adjourned because the court would give directions for parties to file and exchange affidavits on the appointment of a SJE. The current practice was to have the parties propose 2 to 3 nominees. In the affidavit, the CV of the experts would be exhibited with their charges and estimated time to complete a SJE report. In some cases, which was not a universal practice in the State Courts, the party was to include in the affidavit why the other side's nominees should be rejected; and

(c) parties would then make the necessary arguments and the court would appoint from the names provided by the parties in the affidavits.

Law Society's views

(A) Need for reform?

10.8 At the engagement session with the Ministry of Law on 4 January 2019, more insight into the problems of the current system was provided. Besides the problems identified in the Consultation Paper, another problem was that one expert would give evidence on one issue, while another expert would give evidence on another issue. Some of the panellists also expressed the view that a SJE should be able to resolve the dispute in the majority of cases.

10.9 We are unclear if those assertions in the CJRC Report about expert evidence given under the status quo are necessarily justified.

Conflicting opinions

10.10 It is not in fact the common experience of lawyers that experts will have "irreconcilable differences in opinion." In fact, through pre-hearing expert conferencing, experts have often been able to narrow their differences. Such narrowing of differences also occurs during the hot-tubbing process and/or cross-examination. To the extent differences remain, this is often simply a reflection of genuine professional differences in opinion which remains the court's role to adjudicate upon. To try and overcome this through the appointment of a common or court-appointed expert is merely to sweep the problem under the carpet. This could result in less rigorous analysis of the common or court-appointed expert's views since there will be a general inclination to accept it at face value. Indeed, the recommendation seems to be premised on the belief that the common or court-appointed expert's views will generally be accepted. There is otherwise limited value to the recommendation.

10.11 Moreover, the Law Society's Civil Practice Committee observed that the problem of the expert witnesses having irreconcilable differences in opinion is not always because they are partisan but because they are putting forward two different interpretations of their particular expert field.[193]

10.12 Where experts express different opinions due to different instructions or on different issues, such divergent evidence can be remedied by more active case management under the proposed regime to ensure that the expert opinions are given based on a common set of instructions or on the same issues.

Partisanship

10.13 As stated above, it is not correct to assume that disagreements between experts is due to bias. It is often not difficult to detect such bias in the course of trial.

10.14 Disagreement also allows the judge the means by which to test each side's evidence. A single expert's evidence on the other hand is likely to hold sway as the judge will not have any means to critique or question the single expert.

Costly

10.15 To the extent costs is an issue, the recommendation is likely to increase rather than reduce costs as parties will still retain their own experts for the reasons stated above.

(B) Evaluation of recommendation

Default position

10.16 The proposal to appoint a SJE by default assumes that in most cases, it would be desirable to appoint a SJE. This is an untested assumption, given that the disadvantages of appointing a SJE are also well recognised:- [194]

[193] See the Civil Practice Committee's feedback on this point at Appendix 2, proposal 13 at p 6.
[194] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraphs 21.70-21.72.

(a) SJEs may become *de facto* judges and usurp the judicial fact-finding function;

(b) SJEs may be encouraged "to exceed the boundary of their expertise, and give an opinion based on matters on which they are not competent"; and

(c) it may not be fair to force the parties to choose a SJE in many cases, which will lead to a trial by expert, not judge.

10.17 In the long run, if judges defer to the opinion of the SJE in most cases, this will not only effectively result in the abdication of judicial responsibility but also create a moral hazard. Experts may become less rigorous, careful and precise due to the lack of opposing contrarian views, dialectical process and the inability of the judges or lawyers to test their evidence.

10.18 Moreover, a default rule for a SJE to be appointed does not sufficiently take into account the many variables involved where expert evidence needs to be presented. Such factors include:-

(a) whether the expert was engaged before proceedings were commenced in order to lodge or defend a claim, or whether the expert was engaged in the course of proceedings;

(b) the value of the claim;

(c) the complexity of the claim;

(d) the nature of the expert evidence to be adduced;

(e) the expert's field; and

(f) the area of law involved.

10.19 It is therefore doubtful that a simple default rule would be able to account for different scenarios. Indeed, it is more likely that the "special case" (to be discussed below) would become the norm, rather than the exception.

10.20 Furthermore, the Law Society notes that no default position is prescribed in the English and Australian regimes that also provide for the appointment of SJEs. The UK regime gives the court the discretion to appoint a single joint expert[195] while the NSW regime allows a single joint expert to be engaged or appointed "if it is practicable to do so without compromising the interests of justice".[196]

Special case

10.21 The Law Society observes that the CJRC Report provides for two exceptions to the default position for a SJE to be appointed. Parties can either apply to court for their own experts to be appointed or agree to appoint their own experts. In the first scenario, the court will take into account the following factors:[197]

(a) parties' views;

[195] Rule 35.7 of the UK CPR.
[196] Rule 31.17(d) of the NSW UCPR.
[197] Consultation Paper, paragraph 90; CJRC Report, paragraph 97.

(b) cost proportionality-related issues e.g. the amount of money or property involved, the complexity of the expert issue(s), whether parties have already engaged their own experts; and

(c) whether evidence from a party expert is necessary to reach a just outcome.

10.22 In the second scenario, "the judge should first approve a common brief which sets out the issues to be referred to the experts".[198] However, the Law Society's Civil Practice Committee commented that the proposed ROC did not appear to provide for the second scenario.[199]

10.23 According to Chapter 9, Rule 3(1) of the proposed ROC, the parties must agree on a SJE "[e]xcept in a special case and with the Court's approval". Assuming that Rule 3(1) was intended to cover both scenarios, it would therefore appear that in either scenario, whether the court grants the parties' application or approves the common brief, parties would need to prove a "special case". In addition, it is not entirely clear whether a "special" case might arise in other circumstances.

10.24 If this issue is left to the court's discretion, this will potentially give rise to satellite litigation and place judges in the invidious position of having to discern which cases are "special" enough to warrant parties appointing their own expert. Other than the two scenarios mentioned above, it is not clear at the moment what lines could be drawn on principle.

Putting forward a positive case

10.25 At the engagement session with the Ministry of Law on 4 January 2019, a member of the Bar noted that if only a SJE is appointed, parties may not be able to put forward a positive case as they are not permitted to appoint their own experts. In effect, they can only cross-examine the SJE without the benefit of adducing their own expert evidence.

10.26 Under the proposed regime, it would be difficult for the plaintiff to discharge his burden of proof without procuring expert evidence to put forward his case. This concern is heightened by the fact that the plaintiff may have to exchange AEICs earlier. It is unclear whether the issue of adducing expert evidence would only be addressed at the proposed single interlocutory application stage: at that stage, the exchange of AEICs may already have occurred.

Using more than one expert

10.27 We note that Chapter 9, Rule 3(1) of the proposed ROC also provides that a party must not rely on expert evidence from more than one expert on all or any of the issues, "[e]xcept in a special case and with the Court's approval".

10.28 The Law Society considers that more empirical information is needed as to whether, under the present status quo, parties are unnecessarily appointing more than one expert on a regular basis. As it is, expert evidence is expensive. The experience of most lawyers is that clients would not want to appoint more than one expert unless absolutely necessary. It is also tactically unwise to put up more than one expert on the same issue as it simply opens up opportunities for cross-examination and an opponent to pit one expert against the other. Further, under the current status quo, the court always has the discretion to control the number of experts as parties have to justify

[198] CJRC Report, paragraph 98.
[199] See the Civil Practice Committee's feedback on this point at Appendix 2, proposal 14 at p 7.

their appointment. Cost orders can also be made to reflect the court's disapprobation of experts unnecessarily appointed.

Pool of experts

10.29 At the engagement session with the Ministry of Law on 4 January 2019, the Bar shared that the SJE scheme under O 108 did not use a pool of experts. As noted above, the procedure is for the parties to nominate their preferred experts and the court will then approve the SJE to be appointed.

10.30 It is unclear how the court will appoint the SJE under the proposed regime if the parties do not agree. It appears that if the court is minded to appoint a SJE, it would have to do so unilaterally pursuant to its power under Chapter 9, Rule 3(3) of the proposed ROC, which provides that "[i]n a special case, the Court may appoint a court expert in addition to or in place of the parties' common expert or all the experts". However, the mechanism by which the court would unilaterally appoint a SJE is not stipulated in the proposed ROC.

10.31 It was suggested at the engagement session that a pool of experts might be created for the proposed SJE regime and the pool could be refreshed regularly to improve the quality of experts. Some of our Council members noted that the State Courts had established such a panel but later dismantled it. The success of an expert panel would depend on, amongst others, whether the selection process is properly conducted and whether the panel is representative. On the latter point, difficulties may arise if parties are forced to select a SJE from a panel that does not include sufficient experts of quality.

(C) Conclusion

10.32 From the above analysis, the default position for a SJE to be appointed is not desirable. It does not take into account the fact that the court can benefit from expert opinion that can touch on a range of reasonable views. Moreover, for a default rule to be workable, it should reflect a position that parties would gravitate to in most cases. Otherwise, process costs would be increased as parties seek to deviate from the default, artificial position in the majority of cases. The above difficulties indicate that appointing a SJE would not be the optimal or preferred choice in many instances and cannot be a "one size fits all" solution. 80% of the Council members polled also did not support the default rule, while the remaining 20% were undecided. A Council member was of the view that the untested default rule for a SJE to be appointed may hurt Singapore's reputation as an international legal hub. It is out of step with jurisdictions such as England and Australia which do not have a default rule for a SJE to be appointed.

10.33 We propose that the Ministry examine one or both of the following alternatives instead.

(a) *Menu option*: Parties can choose from 3-4 different ways to present expert evidence (e.g. hot-tubbing). This provides more flexibility for parties, and may also help to facilitate agreement on the mode of presentation on expert evidence. 60% of the Council members who rejected the default rule supported this option.

(b) *Judge to assess at case conference*: Parties should be encouraged to raise the issue of expert evidence to the judge at a suitable case conference at an early stage of the proceedings, so that the judge can give his views on whether a SJE is suitable. 80% of the Council members who rejected the default rule supported this option. This option would also be in line with the shift towards active case

management by the judge. Where appropriate, the judge may also wish to engage the parties' experts directly, so that he can discern the value propositions offered by the experts.

10.34 In addition, parties should be permitted to agree to appoint their own experts, and if they so agree, they would not need to prove a "special case" under Chapter 9, Rule 3(1) of the proposed ROC. Assuming that the intention was for Rule 3(1) to apply to this scenario, this does not preclude the court's ability to manage the experts, including requiring a common brief or joint expert conferences and reports.

10.35 Finally, we should point out that the SJE has been tried in various contexts by the Singapore courts (including under the Order 108 scheme). The Law Society is of the view that if a particular reform had been piloted in the courts, any proposal to extend that reform to all levels of courts in the Singapore court system should detail the findings of the pilot. That way, all civil justice stakeholders are fully aware of the strengths and weaknesses of the proposed reform and can give their informed views.

Section J: Court Hearings and Evidence

I. Consultation Paper, paragraph 97 (documents-only hearings)

97. (CJC) The court will be allowed to conduct hearings on documents alone for certain categories of cases so that the parties or their solicitors do not need to attend court. This avoids the problem of having to arrange suitable hearing dates for the parties and the court, and obviates transport expenses and travelling time to go to and from court. It also saves on hearing hours and, in some cases, court hearing fees. It means of course that the court has to spend time outside hearing hours to read the documents and then inform the parties of its decision.

A. Documents-only hearings should only be employed with the parties' consent and are not appropriate in all cases.

Status quo

11.1 The current ROC do not provide for the court to conduct documents-only hearings, although an opt-in documents-only civil trial or assessment of damages procedure was piloted in the State Courts in 2017/18.[200]

Stated objectives

11.2 As stated at paragraph 97 of the Consultation Paper.[201]

Bar's feedback

11.3 A sizeable majority (approximately 86%) of the respondents to the Law Society Online Survey agreed with this recommendation as it would save time and resources in attending court and not all disputes required witnesses to be examined. However, many of these respondents qualified their answers as follows:-

(a) the most common caveat was that documents-only hearings should only take place with both parties' consent. Otherwise, parties might exchange more correspondence in order to "posture".

(b) caution should be taken to ensure that both parties felt they had been given a fair hearing, and the court should not be able to "force" a documents-only hearing if parties wanted to be heard.

(c) limb (c) of Chapter 11, Rule 3(3) of the proposed ROC ("in matters where evidence has been adduced by affidavit, orally or by agreement and only submissions on facts and/or law are required") should be removed, so as not to reduce opportunities for oral advocacy.

(d) documents-only hearings would be suitable for other scenarios e.g. "where matters are premised entirely on documents or case law", "discovery applications" or documents-only PTCs.

[200] Via State Courts Registrar's Circular No 4 of 2017 (13 November 2017) <https://www.statecourts.gov.sg/cws/Resources/Documents/RC%204%20of%202017.pdf> (accessed 11 January 2019).

[201] Based on CJC Report, Chapter 11: Court Hearings and Evidence, at paragraph 2.

11.4 Those who disagreed with this recommendation had various concerns:-

(a) there was often utility to appearing before the court as the judge or registrar might have questions or clarifications. Counsel already provided written submissions for most matters, particularly matters fixed for a special date hearing.

(b) there was no jurisprudence in Singapore on when a "documents only" hearing would be sufficient. Order 14,[202] and in particular Order 14 rule 12,[203] already worked well. The court should perhaps have the power to order one or both parties to file such applications as an interlocutory application and not as a final hearing.

(c) counsel should be able to attend and respond to the court's concerns so that justice would be seen to be done.

(d) removing the right to cross-examine was "an incursion into the adversarial process".

(e) the court should invite parties to submit whether they agreed to a documents-only hearing, and parties should have the right to call for witness evidence if it became necessary.

Law Society's views

(A) Need for reform?

11.5 The Law Society observes that documents-only hearings have only been used by English courts for cases in the small claims track, and even so only with the parties' consent in view of the right to a public hearing under Article 6(1) of the European Convention on Human Rights.[204]

11.6 Although a documents-only procedure had been piloted in the State Courts, it is unclear what the learning points from the pilot were as the CJC Report did not refer to it. We would reiterate, as per the preceding recommendation, that if a particular reform had been piloted in the courts, any proposal to extend that reform to all levels of courts in the Singapore court system should detail the findings of the pilot so that all civil justice stakeholders are fully aware of the strengths and weaknesses of the proposed reform and can give informed views.

[202] Relating to summary judgment and disposal of cases on points of law.

[203] "12.—(1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter where it appears to the Court that —
(a) such question is suitable for determination without a full trial of the action; and
(b) such determination will fully determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.
(2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just.
(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.
(4) Nothing in this Order shall limit the powers of the Court under Order 18, Rule 19 or any other provision of these Rules."

[204] Stuart Sime, *A Practical Approach to Civil Procedure* (Oxford: Oxford University Press, 21st edition, 2018), at paragraph 27.09.

(B) Evaluation of recommendation

11.7 While the Law Society has, in principle, no objections to the proposed documents-only hearings, the Bar's feedback raises practical points of implementation that the Ministry should take into account.

(C) Conclusion

11.8 We advocate the use of documents-only hearings only if the parties consent and echo the Bar's feedback that this regime may not be appropriate for all cases. If implemented, it should be clearly stated or specified which cases fall to be decided on the documents.

II. Consultation Paper, paragraphs 98 and 99 (judge's powers during trial)

98. (CJRC) Additionally, there should be increased judicial involvement during the trial so that judges can take greater control of the conduct of the trial and avoid excessive time and costs being expended in lengthy trials.

99. (CJRC) In light of the above, the judge may exercise the following powers at any time during trial:
a. Directly question witnesses, including on issues outside the scope of pleadings if necessary.
b. Restrict the issues for examination of witnesses.
c. Restrict the time for examination of witnesses.
d. Direct the order in which any speech or evidence by a party or witness should be made or given.

A. The proposed power for the court to directly question witnesses during trial on issues outside the scope of pleadings should be piloted first for a limited category of cases. This is in view of: (i) issues concerning the appearance of judicial impartiality; and (ii) the need not to impede the fair conduct of the trial by counsel in an adversarial system.

Status quo

11.9 The respective functions of counsel and the court during trial are aptly summarised in the following commentary:

> "The nature of the adversarial system is such that it is the parties, through their advocate, who must take the responsibility of investigating the facts and of ensuring that their respective cases are comprehensively and effectively prepared for, and presented, at trial. ***It is not for the judge to give directions to the parties as to how their cases should be put forward. The function of the judge is to assess the relative merits of the parties' cases in the state that they are presented to him. He will generally not interfere with the manner in which a party conducts his case so long as the appropriate trial procedures and rules of evidence are complied with***."[205] [emphasis added]

11.10 Although the court has a broad power to ask questions of any witness under section 167(1) of the Evidence Act,[206] it does not extend to allowing it to decide on (or investigate) any issue not raised in the pleadings.[207]

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[205] Jeffrey Pinsler SC, *Evidence and the Litigation Process* (Singapore: Lexis-Nexis, Sixth Edition, 2017), at paragraph 23.036.

[206] "Judge's power to put questions or order production: 167.—(1) The Judge may, in order to discover or to obtain proper proof of relevant facts, ***ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant***; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, ***without the leave of the court***, to cross-examine any witness upon any answer given in reply to any such question." [emphasis added].

[207] *Yap Chwee Khim v American Home Assurance Co and others* [2001] 1 SLR(R) 638 at [27].

Stated objectives

11.11 The CJRC recommended enhancing judicial involvement during the trial by, for example, "giving judges powers to take greater control of the conduct of the trial, and in particular, the cross-examination of witnesses, always bearing in mind the need of judges to be impartial".[208] The CJRC also observed that one reason for prolonged trials was that "parties address[ed] issues which [were] not key to resolving the dispute, and engage[d] in unnecessarily extensive cross-examination of witnesses".[209] Hence, the CJRC proposed that the court exercise the powers as set out at paragraph 99 of the Consultation Paper.[210]

11.12 The CJRC also recommended that broad guidelines be introduced for judges who engage in the examination of witnesses as "[j]udicial impartiality remains an important feature of our civil procedure".[211] It was also suggested that the courts consider "a pilot project for judge-led cross-examination in certain types of cases e.g. family cases and Community Disputes Resolution Tribunal cases" as parties in these cases, especially litigants-in-person, "could benefit from the judge having greater control of the cross-examination of witnesses".[212]

11.13 The CJRC's above-mentioned recommendations stemmed from one of its two anchoring principles, namely, "enhancing judicial control over civil litigation".[213] The CJRC suggested moving from the current system "where the judge focus[ed] largely on adjudication to a role where the judge work[ed] more actively with parties to find the best way to resolve a case".[214] In particular, the CJRC contemplated that judicial intervention might take various forms, including "[d]irecting parties to address a relevant issue which has not been raised by either party".[215]

11.14 The CJRC also noted that judges played an increasingly active role in established common law jurisdictions, including Singapore.[216] For civil law jurisdictions with inquisitorial systems (e.g. Germany), judges played a highly active role.[217]

Bar's feedback

11.15 A member of the Bar agreed with the principle that measured judicial intervention, in appropriate circumstances, was helpful and avoided excessive time and costs. However, he raised the following concerns as to whether the reform was necessary:-

(a) it might appear to mark a departure from an adversarial system to an inquisitorial system;

(b) it might allow judges to intervene by asking witnesses questions that were ***outside of the parties' pleadings in civil cases***, and to do so ***much more extensively*** than permitted by the current case law; and

[208] CJRC Report, paragraph 100.
[209] CJRC Report, paragraph 101.
[210] See also CJRC Report, paragraph 102.
[211] CJRC Report, paragraph 104.
[212] CJRC Report, paragraph 105.
[213] CJRC Report, paragraph 25.
[214] CJRC Report, paragraph 29.
[215] CJRC Report, paragraph 38(a).
[216] CJRC Report, paragraphs 30 and 32.
[217] CJRC Report, paragraph 31.

(c) it was unclear whether the judges in the jurisdictions cited at footnote 6 to the CJRC Report were vested with the power to either "*[d]irect parties to address a relevant issue that has not been raised by either party*", or more importantly, to "*[d]irectly question witnesses, including on issues* ***outside the scope of pleadings if necessary***" [emphasis added].

11.16 The member emphasised the importance of pleadings in proceedings as set out in case law[218] and was concerned that the reform might have the unintended effect of changing the case that the parties had prepared to meet. Some specific queries were:-

(a) If a judge asked a question ***outside*** of the parties' pleadings to the witness (which presumably could happen at trial), what happened next? [emphasis in original]

(b) Would the witness be in trouble for refusing to answer on the basis that it was un-pleaded and that he did not prepare for the same? Or in the case of an expert witness, if it was outside his brief, would he be required to research the issue, and who would pay for this new work to be done by the expert?

(c) Would the solicitor (for the party calling the witness) be entitled to raise an objection that the question pertained to an un-pleaded point?

(d) Would the party be allowed to ***amend*** its pleadings on the basis that an un-pleaded point had been raised? [emphasis in original] Would further discovery be allowed flowing from the point?

(e) How would costs be dealt with, if an amendment of pleadings was allowed and an adjournment of the trial was necessary?[219]

11.17 Another point of feedback, from several small law practices, was that in the present adversarial process, lawyers were familiar with the principle that judges were not to "descend into the arena". Hence, clear guidelines should be made available to lawyers for them to understand what a judge can and should not do under the proposed regime.

Law Society's views

(A) Need for reform?

11.18 At the engagement session with the Ministry of Law on 4 January 2019, it was clarified that Singapore is not moving towards a civil law or inquisitorial system and that the primary purpose of the pre-trial and trial reforms is to make the litigation process more efficient. Putting aside labels of "adversarial" and "inquisitorial", efficiency, however, cannot be the only reason to support a reform that will drastically and radically alter the nature of the judge's role in civil trials in the Singapore courts.

11.19 It is unclear whether under the current trial regime, the court is prohibited from restricting the issues and the time for examination of witnesses, or from directing the order of proceedings. Practice suggests that the courts may already be exercising these powers at trial without the need for a formal rule in the current ROC. In any case, the Law Society does not view these reforms as controversial as the court's proposed

[218] See *PT Jaya Sumpiles Indonesia and another v Kristle Trading Ltd and another appeal* [2009] 3 SLR(R) 689 at [30]; *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [94]-[95].
[219] This member's feedback on this point is reproduced in full at Appendix 1, proposal 50 at p 49.

power to control such aspects of the trial is generally consistent with the position in Australia and England.[220]

11.20 The only innovative procedural reform therefore appears to be that the courts will be empowered to question witnesses at trial directly ***on issues outside the scope of pleadings***. The Law Society echoes the views expressed above on the need for this particular reform. Although courts in both England and Australia have the power to control evidence given during the hearing,[221] they do not have any express power to question witnesses on issues outside the scope of pleadings.[222] The CJRC Report did not explain why the proposal for greater judicial involvement during the trial required this specific power.

(B) Evaluation of recommendation

11.21 The proposed power to allow the court to question witnesses directly on issues outside the scope of pleadings appears to be found in Chapter 11, Rule 9(1) of the proposed ROC:

> "The Court may ask a witness any questions that the Court considers necessary at any time ***but shall allow the parties to ask the witness further questions arising out of the Court's questions***." [emphasis added]

Appearance of judicial impartiality

11.22 The CJRC Report recognised that the issue of judicial impartiality would be an important concern arising from the proposed increase in judges' powers during trial given that the judge would effectively be descending into the arena to some extent. However, it is not merely judicial impartiality but ***the appearance of judicial impartiality*** that must be preserved as an important feature of the civil justice system. For the "broad guidelines" envisaged by the CJRC to be effective, they should address specific scenarios in which the appearance of judicial impartiality may be compromised by inappropriate or excessive questioning.

11.23 The Law Society would emphasise that broad guidelines which leave it to each judge to decide what the appearance of judicial impartiality entails would be seriously inadequate. Subjective judicial restraint alone cannot be the guiding principle in determining what line(s) the judge should not cross in questioning witnesses. Specific illustrations should be provided in the guidelines. That way, even a lay litigant would be adequately informed and advised.

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[220] See Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraph 22.23; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, Third Edition, 2013), at paragraphs 22.32-22.34.

[221] For the English position, see rule 32.1 of the UK CPR. Also see generally The Right Honourable the Lord Neuberger of Abbotsbury (ed), *The Civil Court Practice 2018* (Vol 1) (LexisNexis, October reissue, 2018) at p 908. For the Australian position, see generally Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at p 854.

[222] For the English position, see rule 32.1 of the UK CPR. Also see generally The Right Honourable the Lord Neuberger of Abbotsbury (ed), *The Civil Court Practice 2018* (Vol 1) (LexisNexis, October reissue, 2018) at p 908. For the Australian position, see generally Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at p 854.

Not to impede the fair conduct of the trial by counsel

11.24 Apart from concerns regarding judicial impartiality and the appearance thereof, another important concern, which was not articulated in the CJRC Report, is the principle that the judge should not impede the fair conduct of the trial by counsel. This is a well-established principle enunciated by Andrew Phang JA in the leading case of *Mohammed Ali bin Johari v PP*[223] ("*Johari*") on the scope of judicial involvement in proceedings.

11.25 While Rule 9(1) provides that the court must allow the parties to ask the witness further questions arising out of the court's questions, this is only one aspect of not impeding the fair conduct of the trial by counsel. The CJRC Report did not explain how the *Johari* principles would be adapted, if at all, to the proposed regime whereby judges would be permitted to question witnesses directly on issues outside the scope of pleadings. In particular, it is unclear whether, and if so, how, the following principles that relate to the fair conduct of trial by counsel would continue to apply in the new regime:-

(a) the need to avoid engaging in sustained questioning until counsel had completed his questioning of the witness on the issues concerned. In practice, this would mean the judge should only raise questions after counsel has ended his examination;[224]

(b) that "any intervention by the judge should not convey an impression that the judge is predisposed towards a particular outcome in the matter concerned";[225] and

(c) the need to take into account "not only the quantity but also the qualitative impact of the judge's questions or interventions".[226]

11.26 In addition, to temper the use of quasi-inquisitorial powers, the Council suggests that the following limiting general principles be considered across the board:-

(a) the court should avoid questioning factual witnesses (as compared to expert witnesses); and

(b) the court should only use open-ended questions in examining the witness.

11.27 In formulating the guidelines, the Ministry should also consider adopting relevant principles from other jurisdictions which have implemented active case management for a substantial period and formulated principles on what constitutes excessive judicial intervention. For example, we have garnered some principles from English case law as follows:-

(a) the line of questioning should be conducted only in accordance with an overarching objective (as set out in our response above to paragraph 21 of the Consultation Paper, the overarching objective should be expressly stipulated in the proposed ROC);[227]

[223] [2008] 4 SLR(R) 1058, at [175(b)].
[224] *Johari*, [2008] 4 SLR(R) 1058, at [175(c)].
[225] *Johari*, [2008] 4 SLR(R) 1058, at [175(c)].
[226] *Johari*, [2008] 4 SLR(R) 1058, at [175(d)].
[227] *Southwark v Kofi-Adu* [2006] EWCA Civ 281 at [142].

(b) the judge should limit his intervention to what is strictly necessary, taking into account that his paramount duty is to discharge his judicial function, and not to act as an inquisitorial judge;[228] and

(c) the judge should not treat a party, his counsel and his witnesses with hostility which would convey an impression of bias or a complete lack of objectivity.[229]

Relevance of issues outside scope of pleadings

11.28 The CJRC Report also did not explain how a judge would be able to ascertain that a matter outside the scope of parties' pleadings would be relevant, given that the judge still operates in an adversarial system where he or she has no investigative powers. In particular, it is unclear how far this power is intended to undermine the traditional notion that the judge's role is "confined to arriving at a decision according to the evidence and arguments presented by the parties", or what has been termed as "limited judicial responsibility for outcomes".[230]

(C) Conclusion

11.29 For the above reasons, it is critical that the CJRC's proposed "broad guidelines" be sufficiently detailed to take into account the concerns raised above. All the Council members polled supported the use of limiting principles to temper the proposal to expand the judge's powers to question witnesses. It would be preferable if some of these guidelines are expressly stipulated in the proposed ROC so that the boundaries are clear even to a lay litigant.

11.30 The Law Society agrees with the CJRC's recommendation that a pilot project for judge-led cross-examination should be instituted in certain types of cases first. 80% of the Council members supported a pilot, with 20% undecided. One Council member suggested that on top of the CJRC's proposal to pilot judge-led questioning for family cases and Community Disputes Resolution Tribunal cases, judge-led questioning could also be piloted for accident matters and claims under the Protection from Harassment Act, because these matters featured many litigants-in-person.

[228] *Southwark v Kofi-Adu* [2006] EWCA Civ 281 at [145] and [148].
[229] *Shaw v Grouby & Anor* [2017] EWCA Civ 233 at [46]. See also *M&P Enterprises (London) Ltd v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch).
[230] Adrian Zuckerman *et al*, *Zuckerman on Australian Civil Procedure* (Australia: LexisNexis Butterworths, 2018), at paragraph 11.19.

III. Consultation Paper, paragraphs 106-109 (subpoena witnesses)

106. (CJRC & CJC) The judge may also exercise a power to call a factual witness if none of the parties intends to call a witness whose evidence, in the judge's opinion, is likely to be necessary to resolve the dispute.

107. (CJRC) This power will be exercised very sparingly. The judge should ask parties for the reasons why the witness is not called before exercising the power to call the witness on his own motion. After hearing the parties' reasons, the judge can exercise the power to call that witness on his own motion if he is still of the view that the witness' evidence is necessary to resolve the dispute.

108. If a factual witness is subpoenaed by a judge on his own motion, there are two possible proposals in relation to the questioning and costs of this witness. (CJRC) One of the proposals is that the judge will question that witness before parties may ask further questions. Parties will share the cost of a witness called by the judge on his own motion.

109. (CJC) Alternatively, the court may give directions for the cross-examination of such a witness, and may order one or more of the parties to pay for the reasonable expenses incurred by the witness.

A. The exceptional power of the court to call factual witnesses: (i) risks affecting the outcome of the case; (ii) makes judges vulnerable to allegations of bias; and (iii) invites disputes over the necessity of calling the witness. The Ministry should pilot this regime first for a limited category of cases.

Status quo

11.31 Factual witnesses are now called by parties. The current ROC do not provide for the court to subpoena a factual witness of its own motion.[231] Case law confirms that the court has the power to summon witnesses only with the parties' consent.[232]

Stated objectives

11.32 As stated at paragraphs 106 to 109 of the Consultation Paper.[233]

Bar's feedback

11.33 A majority of the respondents to the Law Society Online Survey (approximately 87%) supported this recommendation. However, the minority expressed concerns that the judge's role was too inquisitorial. The judge should not "descend into the arena" or come across as "assisting a party in a case". A judge who was overly-involved in examining witnesses might give the impression that he or she was not neutral, "particularly if the judge's questions appear[ed] to favour one side's case over the other." Parties were more likely to feel they had received a fair hearing if the judge was less involved in the examination process. It would be difficult to advise clients as the judge's intervention would become a "wild card".

[231] See generally O 38 r 14 and Form 67 on subpoenas.
[232] *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1994] 3 SLR(R) 38 at [151]-[152]. See also Jeffrey Pinsler SC, *Principles of Civil Procedure* (Academy Publishing, 2013) at p 771-772.
[233] Based on CJRC Report, paragraphs 92 and 93.

11.34 Moreover, parties might have strategic reasons for not calling a particular factual witness. The court calling witnesses on its own motion would interfere "in the way and in the type of evidence a party [might] wish to present for his case." Judges should question witnesses only after cross-examination because they risked misunderstanding the parties' case theories and going down unnecessary or unrewarding lines of questioning.

11.35 Existing measures (where parties might have inferences made against them for not calling relevant witnesses) were adequate safeguards. Moreover, the common law already allocates the burden of proof between the parties in a fairly clear way. If a party does not call a witness (for whatever reason), it bears the consequences of that choice if the evidence as a whole does not cross the requisite thresholds of proof.

11.36 Some respondents gave suggestions on how to improve this proposal:-

(a) there should be guidelines on how this discretion will be exercised "sparingly". The circumstances in which a witness should be subpoenaed should be clear, and parties should also be allowed to submit as to whether the judge should subpoena the witness.

(b) the proposed ROC should allow parties to subpoena unwilling witnesses.

11.37 Respondents supporting the proposal commented that:-

(a) it would help move the case forward.

(b) the proposal should be "subject to laws on competency and compellability".

(c) parties might face difficulty getting a witness or a family member to agree to testify. The court subpoenaing the witness instead would remove tension between the party and the witness.

Law Society's views

(A) Need for reform?

11.38 It is not clear what rationale is animating this particular recommendation. England and Australia do not have a similar regime. If the judge is dissatisfied with the evidence advanced by a party, that party will bear the consequences of its choices. Although on one view that is not entirely satisfactory, it may be a better system than one where the judge ends up being faulted by a party or an appeal court for his directions.

(B) Evaluation of recommendation

11.39 The Law Society notes that the CJRC has recommended moving from an adjudication-based system to one "where the judge works more actively with parties to find the best way to resolve a case".[234] The line between a judge-led adversarial regime and a full-fledged inquisitorial system is admittedly a fine one. As the CJRC Report noted, the proposed limited power given to a judge to call a factual witness on his own motion was "to protect the judge from being perceived as having taken a particular perspective of the proceedings and assessed as no longer being a neutral empire between parties".[235]

[234] CJRC Report, paragraph 29.
[235] CJRC Report, paragraph 93.

11.40 Even though the CJRC Report contemplated a calibrated procedure before the court decides whether to exercise this power,[236] there are a few collateral risks that may result in delay and increased costs of proceedings:-

(a) the risk of the court affecting the outcome of the case is significant, especially if the judge is not properly trained on when he or she should exercise this power;

(b) the judge is also vulnerable to allegations of bias that will increase the process costs for all parties involved; and

(c) disputes over whether the witness called by the court is "likely to be necessary to resolve the dispute" will invariably surface. It is also not clear what the interplay is between this test and the drawing of adverse inferences under section 116(g) of the Evidence Act for failing to call a witness. For example, if the court would draw an adverse inference where a witness was not called by the relevant party, would it still be "necessary" for the court to call the witness? Would the adverse inference be negated even though it was the court that called the witness?

11.41 The Council members polled were evenly split on this recommendation. Those who supported the recommendation felt that it would help the court in fact-finding and to ascertain the truth especially if both parties had no objections to the court calling the witness. However, it should be expressly stated in the proposed ROC that the power should only be used sparingly. This view was also echoed by the Law Society's Civil Practice Committee.[237] In addition, the court's proposed exceptional power should be tempered by limiting principles to avoid the collateral risks identified above.

11.42 Others who rejected the recommendation felt that the proposed change was "too inquisitorial for an adversarial system" and may result in irreparable damage to a party's case if it turned out that the judge had wrongly called a witness.

(C) Conclusion

11.43 Although this recommendation drew strong support from the Bar, it is likely to have an equal or greater impact on the functioning of the adversarial system than the preceding recommendation (allowing the court to question witnesses directly). The Council is therefore of the view that the Ministry should move cautiously on this reform and similarly pilot this regime for a limited category of cases. 30% of the Council members polled supported a pilot, while 40% were of the view that this recommendation should not be implemented with the remaining 30% undecided.

11.44 Besides the calibrated procedure proposed by the CJRC, the Ministry should also consider enacting limiting principles (based on the collateral adverse impact highlighted above) in the proposed ROC to ensure that the court's proposed exceptional power to call factual witnesses is exercised judiciously.

[236] CJRC Report, paragraph 93.
[237] See the Civil Practice Committee's feedback on this point at Appendix 2, proposal 15 at p 7.

Section L: Appeals

I. Consultation Paper, paragraphs 115-116 (appeals)

115. (CJC) The broad aims of the proposals are to:

a. Speed up appeals from applications by:
i. Requiring the parties to file only written submissions with the appeal proceeding by way of a rehearing based on the documents filed by the parties in the Court below;
ii. Hearing all such appeals together as the time for filing an appeal does not start to run until all matters in the single application have been disposed of;

b. Allow lower courts maximum autonomy in procedural matters with appellate intervention only if substantial injustice will be caused;

c. Move parties quickly from procedural skirmishes to the main battle on the merits of the case;

d. Save costs and reduce prolixity by requiring succinct documents to be filed with the imposition of page limits which can only be exceeded if the court approves and with the payment of a fee;

e. Draw a distinction by requiring less formality for appeals in applications and requiring more formality only for appeals on the merits after trials through the filing of Cases. The contents and format of the Cases are prescribed by the proposed Rules with court fees payable in addition to page limit fees if applicable; and

f. Make appellate hearings more effective by allowing parties to make only such oral submissions as the appellate court orders.

116. (CJRC) To reduce the number of applications for leave to appeal to the Court of Appeal, a High Court Judge and Judge of Appeal can jointly decide whether to grant the leave to appeal on the basis of written submissions without oral hearing. The decision on whether to grant leave is final and non-appealable.

A. The Ministry should take into account the Bar's feedback on the proposed automatic stay of proceedings pending appeal and issues relating to the filing of appeals.

Status quo

12.1 According to the CJRC Report, "[t]here is currently a large number of appeals in relation to interlocutory matters ("interlocutory appeals") to the Court of Appeal, not all of which are necessary e.g. interlocutory appeals are sometimes filed for strategic reasons such as to delay proceedings."[238]

[238] CJRC Report, paragraph 105.

Stated objectives

12.2 As stated at paragraphs 115 and 116 of the Consultation Paper.[239]

Bar's feedback

12.3 The key comments from the Bar on the recommendation are as follows:-

(a) appeals after trial should not automatically stay the enforcement of the lower court's decision (we note that this proposal was not highlighted in the Consultation Paper but in the proposed ROC). The winner of litigation should be entitled to the fruits of his judgment and also his costs. To put a blanket rule in favour of a stay is not encouraged as a losing party can use an appeal to automatically stay enforcement of a judgment. This is not desirable as the circumstances of each case may differ. There are cases where there may be a genuine risk of dissipation in the post-judgment period before an appeal is heard and decided. In circumstances where a stay is warranted, the current position already allows the losing party to apply for a stay.

(b) parties should be able to appeal decisions made at the case management conference, e.g. a decision to disallow a party from taking out an interlocutory application.[240]

(c) the timelines to file appeals from applications have been significantly reduced. The rules should retain existing timelines to file appeals. Otherwise, parties would have very little time to review the decision(s) made and take advice on the merits of possible appeals.[241]

(d) each party is allowed to file only one appeal for each application. Hence an appeal from the single interlocutory application could effectively become a rehearing of all the interlocutory applications. The rules should allow distinct appeals to be made for each interlocutory application.[242]

Law Society's views

12.4 The Ministry should take into account the Bar's feedback on the proposed automatic stay of proceedings pending appeal and issues relating to the filing of appeals.

[239] Based on CJC Report, Chapters 13, 14, 15: Appeals, at paragraph 3; CJRC Report, paragraph 106.
[240] This argument is set out in full in Appendix 1 at proposal 53, p 65.
[241] This argument is set out in full in Appendix 1 at proposal 54, p 65.
[242] This argument is set out in full in Appendix 1 at proposal 55, p 66.

Section N: Enforcement of Judgments and Orders

I. Consultation Paper, paragraph 121 (private enforcement)

121. (CJRC) Moving forward, the enforcement process for civil judgments will be privatised.

A. The Ministry should take into account the Bar's feedback on issues relating to the criteria for a private enforcement officer and the costs of enforcement.

Status quo

13.1. According to the CJRC Report, "[t]he tools currently available for enforcing both monetary and non-monetary judgments are limited and unsophisticated".[243]

Stated objectives

13.2. The recommendation is intended to address a number of problems with the current system for enforcement of court judgments.[244]

Bar's feedback

13.3. The two respondents who commented on this proposal were both supportive. Allowing private enforcement would improve time efficiency since clients would not have to wait very long for execution.

13.4. However, the criteria would have to be drawn up on who a private enforcement officer could be. It was suggested that the following groups of persons be allowed as private enforcement officers: (i) lawyers; (ii) former court bailiffs; (iii) accountants; (iv) ex-police and enforcement officers; and (v) private investigators. These groups already had some of the requisite skill sets to carry out enforcement processes. Training would also be required to ensure that any gaps in the skill sets were addressed.

13.5. Where the enforcement applicant required multiple modes of enforcement, he should be allowed to take out a single enforcement application so that he need not take out multiple applications for each method of enforcement. This would reduce the costs of enforcement.

Law Society's views

13.6. The Ministry should take into account the Bar's feedback on issues relating to the criteria for a private enforcement officer and the costs of enforcement.

[243] CJRC Report, paragraph 108.
[244] CJRC Report, Annex A (Post-Trial Procedure: Enforcement of Money & Non-Monetary Judgments), paragraph 1.

Section P: Prerogative Orders

I. Consultation Paper, paragraph 128 (preliminary affidavit by AG)

128. However, the Attorney-General has the liberty to file an affidavit on only preliminary objections or other legal issues against the application without stating the factual disputes yet. The court may hear these objections first and decide to dismiss the application for prerogative orders on the basis of the preliminary legal issues.

A. The Law Society is neutral on the proposed strike out rule on preliminary legal issues as there is no clear policy driver. It is also doubtful that a clear distinction between legal and factual issues can be drawn. Access to justice may be denied to administrative law litigants on technical grounds.

Status quo

14.1 Applications for prerogative orders require an application for leave as a distinct first step.[245] However, the current practice is that the solicitors for the applicant and the Attorney-General's Chambers "often agree to conflate the leave stage with the merits stages" as the same facts and arguments would be canvassed at both stages.[246]

Stated objectives

14.2 The recommendation seeks to abolish the application for leave, apparently because it does not reflect the current practice. However, the recommendation also gives the Attorney-General the right to effectively veto the application for a prerogative order at a preliminary stage.

Bar's feedback

14.3 The respondents to the Law Society Online Survey were evenly split on this recommendation. Opponents to this recommendation raised the following concerns:-

(a) the quality of jurisprudence could be affected e.g. because there would be fewer precedents for posterity, or because "[l]egal issues, without [factual] context, may then become a general rule that was not meant by the parties/judge in the first place."

(b) it would restrict access to justice or would offend natural justice to dismiss the applicant's case without a hearing.

(c) it was unfair to give the Attorney-General a "second bite of the cherry" when the state had more resources than the applicant.

(d) it could lead to "protracted proceedings" and add to the applicant's costs because "if the application [was] not dismissed based on preliminary legal issues, then extra time [would] be required for the filing of further affidavits and a second hearing".

[245] Consultation Paper, paragraph 127; CJC Report, Chapter 19: Prerogative Orders, at paragraph 3.
[246] Consultation Paper, paragraph 127; CJC Report, Chapter 19: Prerogative Orders, at paragraph 3.

14.4 One member who supported this recommendation suggested that where the preliminary legal issues which the Attorney-General identified could be rectified, the court should grant leave for the application to be amended.

Law Society's views

(A) Need for reform?

14.5 While part of the recommendation seeks to reflect the current practice, no information was given in the Consultation Paper or the CJC/CJRC Reports for the proposed additional avenue for the Attorney-General to effectively veto an application for a prerogative order at a preliminary stage.

(B) Evaluation of recommendation

14.6 It is uncertain why the proposed ROC should provide an additional avenue for a particular party to strike out a claim that is not frivolous or vexatious. It is also unclear whether the applicant would be afforded a right to respond to the Attorney-General's affidavit.

14.7 Moreover, it would appear artificial to separate "preliminary legal issues" from the "factual disputes" given that cases of this genre would inevitably involve questions of mixed fact and law. The Law Society echoes the Bar's sentiments that access to justice in administrative law cases should not be compromised merely on technical grounds.

(C) Conclusion

14.8 As there are several unsatisfactory aspects of this recommendation that may potentially impede access to justice, the Law Society is neutral as to whether it should be implemented.

Section S: Review Mechanism to Assess Implementation of Recommendations

I. Consultation Paper, paragraph 135 (two-year review)

135. If these proposals are implemented, the CJRC proposes that the Ministry of Law should work with the courts to assess the implementation of the recommendations after two years.

A. Review of the new procedural reforms should be conducted earlier before the proposed 2-year period in view of the number of experimental reforms. The Law Society should be officially and properly represented in the review mechanism to ensure that the civil procedural rule-making process is optimal.

Bar's feedback

15.1. 59% of the respondents to the Law Society Online Survey agreed with this recommendation for a two-year review, although a significant minority (31%) preferred that the review of the procedures be conducted sooner (e.g. 6 months or 1 year). Members in the latter camp were of the view that procedures that did not work should be quickly fine-tuned, while a smaller minority (about 10%) preferring a longer period (more than 2 years) commented that time would be needed for stakeholders to get used to the changes and for case law to develop. Some also suggested that the changes should be introduced in a "sandbox" or pilot (e.g. in the State Courts first), and reviewed on an ongoing basis.

15.2. In addition, virtually all the respondents to the Law Society Online Survey agreed that the Law Society must be represented in the review of the new procedural reforms.

Law Society's views

15.3. In light of the number of "experimental" reforms proposed by the CJC and CJRC, the review should be done sooner than two years. As stated at various parts of this response, some of the reforms (especially Category A reforms) may have an adverse impact on the civil justice system and it would be advisable to correct any issues and jettison unworkable rules as soon as possible to avoid compromising the rule of law.

15.4. On the representation of the Law Society in the review mechanism, we emphasise that the past practice of appointing any lawyer to any civil justice reform body would be sub-optimal. A representative of the Law Society must be officially appointed by the Council of the Law Society as he or she is expected to reflect the legal profession's views that may be garnered through, for instance, the communities of practice located in the Law Society's practice committees (including but not limited to the Civil Practice Committee). A lawyer who does not have access to such channels cannot properly, adequately or effectively reflect the Bar's views or represent the Law Society, even though he or she is a member of the Law Society. Given the importance of the rule-making process in implementing an optimal civil justice system for all stakeholders, the Law Society should be properly represented in future review mechanisms.

Concluding Thoughts from the Junior Bar

Impact of proposed reforms on junior bar

16.1. The proposed reforms will have a far-reaching impact on the junior bar. At the junior bar townhall held on 21 November 2018, two key concerns were raised by members of the junior bar, namely, the opportunities for oral advocacy and attrition. Each of these issues will be addressed in turn.

Opportunities for oral advocacy

16.2. It is widely acknowledged that there has been a decline in opportunities for oral advocacy, especially at trial and in appellate cases, for junior lawyers.[247] While the decline in opportunities for oral advocacy may be largely due to systemic reasons (for example, clients' expectations and the growth of alternative dispute resolution), the lack of opportunities for junior lawyers to cut their teeth in the courtroom is a cause for concern.

16.3. With the proposed changes to the current ROC, there is concern within the junior bar that opportunities for oral advocacy could be further eroded. The proposed duty to initiate ADR and exchange of AEICs before discovery are initiatives that may, for different reasons, discourage parties from pursuing litigation.

16.4. Less litigation is generally in the public interest. However, there are also certain drawbacks for the future of the junior bar. With fewer litigation cases headed to trial or appeal, there would inevitably be a decline in the number of litigation lawyers with trial experience especially within the junior ranks. The end result could be that the standards of the future bar would be weakened because of the lack of experience within its ranks. The costs of litigation could increase due to the lack of lawyers with trial or appellate experience.

Attrition

16.5. The lack of opportunities for oral advocacy, in and of itself, is one reason for attrition among junior lawyers. However, in addition to the aforesaid, a number of proposed reforms that seek to frontload the litigation process, including an arbitration-style discovery and the exchange of AEICs before discovery, could also lead to a greater number of junior lawyers leaving the industry.

16.6. The bulk of a junior lawyer's work is to assist senior lawyers with the heavy lifting. These include reviewing all documents and correspondence received from the client, handling client interviews and preparing the first drafts of affidavits and submissions.

16.7. For instance, while the move towards an arbitration-style discovery could lead to fewer documents disclosed in court, it does not necessarily reduce the workload of junior lawyers who would, in any event, be expected to comb through all the documents and correspondence received from clients to ensure that no useful documents are omitted from the list of documents. Given that the list of documents under the proposed ROC is to be filed within 14 days after the Case Conference, a scramble to meet this deadline is likely to ensue (especially for defendants' counsel), leading to stress and burnout on the part of the junior lawyers. They would likely be the ones put under pressure to go through all the documents in time for the tight 14-day deadline. It is anticipated that this

[247] Nicholas Poon, "The Decline of Oral Advocacy Opportunities: Concerns and Implications" [2018] SAL Prac 1.

pressure would be felt most acutely by junior lawyers in smaller set-ups where there is generally a higher workload owing to a leaner team.

16.8. Similarly, the single interlocutory application together with the compressed timelines means that there will be more "frontloading" of work at or close to the commencement of a case. The bulk of this work is also likely to fall on the shoulders of junior lawyers who will then face the pressure of sorting out the necessary court paperwork in time to file the documents in support of the single interlocutory application. This proposed reform may also exacerbate the situation of young lawyers facing a lack of advocacy opportunities: it would be harder for lead counsel to let young lawyers argue the single interlocutory application due to clients' perception that the stakes for the said application are high. Presently, junior lawyers would typically argue smaller and more discrete applications, such as those for amendments of pleadings, further and better particulars, etc. Clients perceive these to be routine and are comfortable to entrust these to the junior lawyers – and, for a lower cost. These furnish valuable advocacy opportunities.

16.9. In addition, a number of the proposals appear to be geared towards compressing the timelines applicable in court proceedings.[248] Inevitably, any attempt to compress such timelines will have an impact on junior lawyers as they are responsible for the heavy lifting in court proceedings.[249] On top of contributing to attrition, there are also additional concerns among young lawyers that these proposals may: (i) reduce or limit the time young lawyers have to explore and engage in areas of practice beyond billable work, such as pro bono work; and (ii) potentially expose them to greater liability and risks as there may be an increased likelihood of making mistakes.

[248] See for example Consultation Paper, paragraphs 24 and 25.
[249] See paragraph 16.6 above.

Appendix 1: Selected feedback from the Bar

Appendix 1 contains selected feedback from the Bar received in November and December 2018 and reproduced verbatim, which elaborate on points in the Law Society's response, or which address points not covered in the Law Society's response. Feedback from the Law Society's Civil Practice Committee is reproduced in Appendix 2.

A. General Matters

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
1.	21. Parties and the court will be guided by the following ideals in conducting civil proceedings: a. Fair access to justice; b. Expeditious proceedings; c. Cost-effective work proportionate to the nature and importance of the action, the complexity of the claim as well as the difficult or novelty of the issues and questions it raises, and the amount or value of the claim; d. Efficient use of court resources; and e. Fair and practical results suited to the needs of parties.	Consultation Paper, paragraph 21	Sub-paragraphs (b) and (d) have no place as a purpose for these reforms unless there is actual data showing that cases in Singapore move slower than those in other 1st world countries. Proceedings are already very fast by most standards, with cases moving faster than litigants can manage. Conversely, litigants experience significant delays as a result of adjournments not requested by litigants or their lawyers, and as a result of waiting for decisions after hearings/trials. This has not been addressed in any reform proposals.
2.		Consultation Paper, paragraph 21	Civil proceedings should also be compassionate and mutually respectful. Successful parties should be able to recover all reasonably incurred costs. The current cost recovery levels are far too low. The efficient use of resources should extend not only to court resources but also party resources (e.g. parties ought not to be required to over-engineer preparations because there is a lot of costs occasioned by that).

3.	22. The court will be empowered to do what is right and necessary on the facts of the case before it to ensure that justice is done, provided it is not prohibited from so acting by any written law and its actions are consistent with the ideals.	Consultation Paper, paragraph 22	The ideals are not in themselves problematic. The question is the extent to which the Court is empowered (at para 22) to do what is "right and necessary to ensure that justice is done...consistent with the ideals". One can easily envisage a situation where unrealistic timelines are given with a view to expediting proceedings, with the onus being put on lawyers to apply pressure on their clients as well as to attain a very short turnaround time.
4.		Consultation Paper, paragraph 22	While I agree with them as principles, and potentially as guides for exercise of discretion, I think there is serious risk of legal uncertainty if these principles are intended to somehow trump well established legal principles. Para 22 in particular gives concern as the concept of 'justice' is likely to be highly subjective. Equity was long criticised for being as long as the Chancellor's foot, which is why the courts have developed clear principles on equitable rights. Re-introducing a vague concept of 'justice' could have the unintended consequence of encouraging more litigation as lawyers and parties test the boundaries of this concept. Additional litigation is almost always the consequence where there is lack of clarity in the law.
5.	24. The Rules will oust the application of the Interpretation Act and provide that a non-court day (i.e. Saturday, Sunday or public holiday) will be included in the calculation of time for a period that is 7 days or more.	Consultation Paper, paragraph 24	**Calculation of Time** We have no view on the substantive proposal set out in Paragraph 24 of the Recommendations. However, Paragraph 24 of the Recommendations states that the Rules will “oust the application” of the Interpretation Act (Cap. 1) in the calculation of time under the Rules (see Cap. 1 Rule 6(1) of the Draft Rules of Court). However, Section 19(c) of the Interpretation Act expressly provides that subsidiary legislation cannot be inconsistent with the provisions of any Act. It is submitted therefore, that the objective of the Recommendations in including non-court days in the calculation of time can only be achieved by amending the Interpretation Act and not by the making of an inconsistent Rule. In the absence of any such statutory amendment, the Rule of Court proposed in Cap 1 Rule 6(1) of the Draft

			Rules of Court will have been made ultra vires and accordingly, will be ineffective.[1]
6.	25. The Rules relating to the parties' ability to extend time by consent will be modified such that parties may only extend time without an order of court once, by mutual consent in writing, and for a maximum period of 7 days.	Consultation Paper, paragraph 25 Proposed ROC at Chapter 1, Rule 6(1)	**A. Feedback on Chapter 1 – Calculation of Time** 1. The express purpose of Ch. 1 r 6(1) was to oust the application of only section 50 of the Interpretation Act[2] so that a 7-day deadline meant exactly 7 days. 2. The phrase "calculation of time" in Ch. 1 r 6(1) is wide enough to exclude the application of other provisions in the Interpretation Act[3], which also govern the definition and computation of time. These are useful provisions. 3. For example, section 2(5) of the Interpretation Act provides for a modified version of the postal acceptance rule[4]. Where documents are served by post, the party effecting service is only required to prove that the letter containing the document was properly addressed, prepaid and posted, leaving the party who wishes to allege that the document was not delivered to bear the burden of proving the same. This relieves the party effecting service from the onerous burden of obtaining, in each instance of service, proof from the relevant postal authority that the document has in fact been delivered in the ordinary course of post. 4. It is therefore suggested that Ch. 1 r 6(1) should clearly state that its effect is to exclude the application of **only** section 50 of the Interpretation Act, and to provide that the remaining provisions of the Interpretation Act in relation to time would continue to apply.

[1] See for example ***Augustine Zacharia Norman and another*** v ***Goh Siam Yong*** [1992] 1 SLR(R) 746; [1992] SGCA 24 at para 6.
[2] CJC Report, paragraphs 7 & 8, p 7.
[3] Interpretation Act, s 2(5), 51 to 53.
[4] *Chia Kim Huay v Saw Shu Mawa Min* [2012] 4 SLR 1096, at [46].

7.		Proposed ROC at Chapter 1, Rule 5(8)	Chapter 1(5)(8) – power to set aside own judgment – there is no time limit to this. This rule can negatively affect whether a judgment of the Court will be considered to be "full and final". This is important when attempting to enforce a Singapore judgment overseas – whether under REFJA, RECJA or the common law.
8.		Proposed ROC at Chapter 1, Rule 8(8) and (9)	**A. Feedback on Chapter 1 – Applications orally or by letter** 1. The Court may allow applications to be made orally or by letter,[5] but the applicant's solicitor is required to "know, believe or have confirmed with the party that the facts stated orally or in the letter are true".[6] 2. The standard of knowledge, belief or confirmation required is unclear. If a bare confirmation from the client would not suffice, then Ch. 1 r 8(9) would alter the existing law in respect of the solicitor's duty in such regard. 3. Such an intention, to change the existing law, cannot be discerned from perusing either the CJC Report or the CJRC Report. 4. The existing law is that there is no general duty on the part of a solicitor to verify the instructions of his client, unless: (a) there were compelling reasons or circumstances; (b) the solicitor has personal knowledge of the matter; or (c) his client's statements are inherently incredible or logically impossible[7]. 5. Ch. 1 r 8(9) is probably unnecessary. Advocates & solicitors already owe ethical duties to the Court, and the scope of such

[5] Ch. 1 r 8(8) of the proposed Rules.
[6] Ch. 1 r 8(9) of the proposed Rules.
[7] *Bachoo Mohan Singh v Public Prosecutor* [2010] 4 SLR 137 (CA) at [118] & [177] On this, also see Forms 4 and 7 of the proposed Rules. It may be a good idea for guidance to be circulated (this can be in the form of Practice Directions) as to the precise standard/s required before a solicitor is deemed to have discharged his ethical obligations and for such standards to be consistent with the existing principles.

			duties is already clearly delineated in the legal professional conduct rules and existing case law. 6. Alternatively, it is suggested that Ch. 1 r 8(9) be amended so that all that is required is for the solicitor to confirm his client's belief that the facts stated in the application are true. 7. This will mirror the requirements in England and Wales[8], and Hong Kong[9], and would be consistent with the certifications required under the proposed Forms for Statements of Claim and Defences[10] in the proposed Rules.

[8] Civil Procedure Rules, rule 22.1(4) read with paragraphs 3.7 & 3.8 of Practice Direction 22.
[9] Hong Kong Rules of Court, Order 41A r 4.
[10] Form 4 and Form 7 of the proposed Rules.

C. Amicable Resolution of Cases

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
9.	Timing of ADR 30. (CJC) Parties will have to give sufficient consideration to resolving their disputes amicably before commencing or during the course of their action. In this regard, a duty should be imposed on a party to any proceeding to consider amicable resolution of the dispute before commencing any action or appeal. The party will have to make an offer of amicable resolution (being an offer to settle or an offer to resolve the dispute other than by litigation) unless he has reasonable grounds not to do so. The offeree shall not reject the offer unless he has reasonable grounds to do so.	Consultation Paper, paragraph 30 Proposed ROC at Chapter 3, Rule 3(1)	Many respondents commented on the timing of ADR. Courts should not force parties to attempt ADR too early because parties often only had a better grasp of the facts closer to trial. In practice, for most cases when claimants offered ADR or settlement before litigation, the other party was not so inclined because there is a lack of information on the claimant's case. It was better for the court to make parties consider ADR and OTS in the PTC/CMC stage.
10.	30. (CJC) Parties will have to give sufficient consideration to resolving their disputes amicably before commencing or during the course of their action. In this regard, a duty should be imposed on a party to any proceeding to consider amicable resolution of the dispute before commencing any action or appeal.	Consultation Paper, paragraphs 30-31 Proposed ROC at Chapter 3, Rule 3(1)	**Amicable resolution of cases** The recommendations on amicable resolution of cases are set out at paras 30 to 35 of the Paper. At para 30 of the paper, the CJC suggested that a duty be imposed on a party to any proceeding to consider amicable resolution of the dispute m commencing any action or appeal. We disagree with the imposition of such a duty as it would likely lead to extra unnecessary costs and wastage of time, especially when read together with the recommendation of the CJRC at para 31

	The party will have to make an offer of amicable resolution (being an offer to settle or an offer to resolve the dispute other than by litigation) unless he has reasonable grounds not to do so. The offeree shall not reject the offer unless he has reasonable grounds to do so. 31. (CJRC) Alternative dispute resolution (ADR) will be conducted by a third party, namely: a. A private mediator or neutral evaluator (e.g., from the Singapore Mediation Centre); or b. An in-house court mediator or neutral evaluator who may be a High Court or a District Court judge who is not the trial judge allocated to the case. Such in-house ADR sessions may be provided to parties at a low cost or free-of-charge if feasible, bearing in mind the significant judicial resources likely required for implementation.		of the paper that alternative dispute resolution ("ADR") be conducted by a third party. In our experience, matters are most commonly settled after the action has been commenced and before trial. There are a number of possible reasons for this, such as: (1) The commencement of action by the plaintiff signals to the defendant that it is serious about taking formal action in Court; (2) There are Court-imposed timelines which place additional pressure on the parties to settle; (3) The process of pleadings firms up the parties" cases and crystallises key issues; and (4) The process of discovery grants the parties access to all relevant documents and allows them to more accurately assess their position. We would also respectfully disagree with the imposition of a duty to consider amicable resolution before an appeal, which we assume to mean after judgment has been delivered. in our experience, matters are rarely settled after judgment has been delivered and while an appeal is pending, because (I) the respondent has a judgment in hand and believes that is in a clearly advantageous position and (ii) the appellant disagrees with the judgment to the extent that it is willing to vindicate its position by potentially incurring a substantial amount of further costs in the appeal. This creates a situation where there is a significant disparity in the parties' expectations. Such a situation is generally unsuitable for productive ADR. Ultimately, the concern is that the recommendations would practically lead to parties having to undergo formal ADR at three separate junctures: (I) before the commencement of action, (ii) after the commencement of action and before trial, and (iii) after judgment is delivered and before an appeal is filed. This would needlessly increase

			costs and prolong proceedings, especially if all ADR is to be conducted by a third-party mediator or evaluator. We also note that the UK Civil Justice Commission has decided against recommending a presumption for parties to agree to or propose ADR, with the UK Law Society warning that "imposing a requirement of mandatory ADR would 'frustrate the principle' that litigants should have unimpeded access to the courts."
11.	32. (CJRC & CJC) If the court is of the view that the duty to consider amicable resolution has not been discharged properly, the court will be empowered to order parties to attend ADR. Notwithstanding this power, the judge will, as far as possible, encourage parties to attend ADR by consent.	Consultation Paper, paragraph 32 Proposed ROC at Chapter 3, Rule 2(3)	**Feasibility** 1. Under the proposed Rules, an offer shall not be disclosed to the Court until after it has determined the merits of the action or appeal, and is dealing with the issue of costs[11]. 2. However, the Court may order parties to attempt to resolve the dispute other than by litigation or to reconsider any offer of amicable resolution, if it is not satisfied that the duty to consider amicable resolution under Ch. 3 r 1 has been discharged properly[12]. 3. The latter rule appears to presuppose that the Court is or will be aware of attempts made towards amicable resolution, whilst the former rule is intended to ensure that the Court shall remain unaware of such attempts. 4. This begs the question - how can the Court be satisfied whether the parties have properly considered amicable resolution if information relating to offers made cannot be disclosed and/or cannot be disclosed in their entirety?

[11] Ch. 3 r 2(3) of the proposed Rules.
[12] Ch. 3 r 3(1) of the proposed Rules.

			5. To resolve this, it is suggested that the powers of the Court under Ch. 3 r 3 be exercised by a judicial officer who is **not** the trial judge. 6. This is similar to the existing practice in the Family Justice Courts, where a judge who had conducted a judge-led mediation would not decide the substantive merits of the matter.[13] 7. This judicial officer will maintain a separate record of the proceedings, which would not be disclosed to the trial judge until after the trial judge has determined the merits of the action.
12.		Nil	**Feedback on Chapter 3 – Amicable Resolution** **Certainty** 1. The proposed Rules will place the burden on litigants to show that it was reasonable for them **not** to attempt amicable resolution[14], but does not offer much guidance on the scope of this duty. 2. On the other hand, the existing Rules and Practice Directions[15] make it clear that litigants should consider ADR, and empower the Court to make adverse costs orders if a litigant should unreasonably refuse to engage in ADR[1617]. 3. Whilst seeking "to remove unnecessary technicalities",[18] the proposed Rules appear to have fallen short of providing the certainty and guidance provided by the existing framework[19].

[13] Paragraphs 11(18) and 12(12) of the Family Justice Courts Practice Directions.
[14] Ch. 3 r 1(3) of the proposed Rules.
[15] Paragraph 35C(1)-(3) of the Supreme Court Practice Directions; paragraphs 35(9), 35(18) and 36(11) of the State Courts Practice Directions.
[16] Order 22A r 9 of the existing Rules.
[17] Paragraph 35B(5) of the Supreme Court Practice Directions; paragraph 36(12) of the State Courts Practice Directions.
[18] Consultation Paper, [34]; CJC Report, paragraph 3, p 10.
[19] in particular, the offer to settle mechanism and its costs consequences under Order 22A of the existing Rules, and the ADR mechanisms under of the Practice Directions.

			4. In our view, the likely outcome of introducing Chapter 3 of the proposed Rules is **more, and not less litigation over technicalities**. 5. Order 22A of the existing Rules offers an "impetus to settle [by way of] a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early... and careful consideration of the merits of the case".[20] O 22A encourages plaintiffs to be realistic and defendants to make reasonable offers on pain of indemnity costs. This promotes responsible conduct and discourages obstinacy".[21] [sic] 6. We disagree with the premise that Order 22A is unnecessarily technical. Issues relating to Order 22A have been clarified by case law, and there is no reason to abandon what certainty there already is under the existing Rules, for the purported simplicity (albeit with much uncertainty for litigants) of the proposed Rules. 7. New measures to promote settlement do not require abandonment of the existing provisions. For example, when Order 22A was introduced, the ADR mechanism for payment into Court under Order 22 was nevertheless retained as one of several available mechanisms.[22] 8. In the interest of avoiding significant litigation arising from uncertainty, it is therefore suggested that: - (a) Order 22A of the existing Rules should be retained, with its set of self-contained rules for costs consequences, to

[20] *The Endurance 1* [1998] 3 SLR(R) 970 (CA) at [40].
[21] *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439 (CA) at [38].
[22] Chua Lee Ming J, *Singapore Civil Procedure* (Sweet & Maxwell, 2019) ("***Singapore Civil Procedure 2019***") at [22A/0/2], [22A/1/3].

			provide litigants with a wide array of options to suit their ADR needs, and the circumstances of their cases; (b) Ch. 3 r 1(1) and Ch. 3 r 1(3), which are likely to generate much uncertainty, and therefore, litigation over an amorphous duty to make and/or accept offers of amicable resolution unless there are "reasonable grounds" not to do so, be removed.
13.		Nil	The proposed rules does not provide for **offer to settle.** The claimant and defendant would be incentivised to settle. OTS must be present.

D. Commencement of Proceedings

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
14.	38. The current duration of the validity of originating processes for service will be modified from 6 months (or 12 months for service out of Singapore) to 3 months. The court's ability to extend the validity of originating processes for service indefinitely will also be modified to 2 extensions of 3 months each, except in a special case. The general rule therefore is that an originating process is valid for service for a maximum of 9 months.	Consultation Paper, paragraph 38 Proposed ROC at Chapter 4, Rule 3(1)	**A. Feedback on Chapter 4 – Validity Periods of Originating Processes** **The Original Validity Period** 1. Under the existing Rules, an originating process is valid for 6 or 12 months, depending on whether it is to be served in or out of Singapore respectively.[23] The validity of the originating process may be extended by the Court for up to 12 months at any one time.[24] 2. Under the proposed Rules, the original validity period of an originating process will be shortened to 3 months, regardless of whether it is to be served in or out of Singapore.[25] The Court may extend the validity of the originating process only twice and by not more than 3 months each time, except in a special case.[26] 3. Under the proposed Rules therefore, the existing difference in validity periods for originating processes (whether these are served in or out of Singapore) will be abolished. 4. The intention behind this rule is to "push claimants to take reasonable steps to effect service expeditiously and to give the

[23] Order 6 r 4(1) and Order 7 r 5 of the existing Rules.
[24] Order 6 r 4(2) and (2A) and Order 7 r 5 of the existing Rules.
[25] Ch. 4 r 3(1) of the proposed Rules.
[26] Ch. 4 r 3(4) of the proposed Rules.

			Court greater control over cases which are not progressing because the defendant has not been served".[27] 5. However, in our practical experience, there are many cases where a claimant does not have control over the service of the originating process[28]. The proposed changes do not take into consideration the significant practical difficulties encountered with effecting service outside Singapore. 6. It is inherent that a longer time will ordinarily be required for service out of Singapore. The claimant or his solicitors may have to instruct foreign solicitors, who may require time to effect service due to geographical or logistical reasons. Most jurisdictions are geographically larger, operate under different domestic procedural laws, and in various respects more complicated than Singapore. 7. The proposed Rules contemplate that at least twice the time is **required for reasonable steps to be taken to serve** an originating process out of Singapore, as compared to an originating process that is served in Singapore[29], but does not extend the eminent logic of this to the validity of the originating processes. 8. It is therefore suggested that **the original validity period of an originating process that is to be served out of Singapore should be at least twice that of an originating process that is to be served in Singapore**.
15.	38. The current duration of the validity of originating processes for service will be modified from 6 months (or 12	Consultation Paper, paragraph 38	Should make clear that in 'special cases', the time for service can be extended. Such 'special cases' include situations where the originating processes is to be served outside jurisdiction and the timeline for

[27] Consultation Paper, [39]; CJC Report, paragraph 6, p 12.
[28] for example, where the originating process is sent to the entities described in Ch. 6 r 2(1)(c)-(e) of the proposed Rules for service to be effected.
[29] Ch. 4 r 5(6) - (7), r 11(4) - (5) of the proposed Rules.

	months for service out of Singapore) to 3 months. The court's ability to extend the validity of originating processes for service indefinitely will also be modified to 2 extensions of 3 months each, except in a special case. The general rule therefore is that an originating process is valid for service for a maximum of 9 months. 41. To ensure that cases do not hibernate after commencement, a claimant must take reasonable steps to serve on the defendant as soon as possible and, in any event, within: a. 14 days after the Originating Claim is issued if it is to be served in Singapore; b. 28 days after the Originating Claim is issued if it is to be served out of Singapore.	Consultation Paper, paragraph 41	service is not within control of the Singapore party. One example is in jurisdictions where private service agents are not permitted.
16.	38. The current duration of the validity of originating processes for service will be modified from 6 months (or 12 months for service out of Singapore) to 3 months. The court's ability to extend the validity of originating processes for service indefinitely will also be modified to 2 extensions of 3 months each, except in a special case. The general rule therefore is	Consultation Paper, paragraph 38 Consultation Paper, paragraph 40	Originating process for service will be valid for 3 months (instead of 6 months) Where the Originating Claim is endorsed generally, a statement of claim must be served within 7 days after the Originating Claim has been served. A claimant must take reasonable steps to serve on the defendant within 14 days after the Originating Claim is issued if it is to be served

	that an originating process is valid for service for a maximum of 9 months. 40. A claimant's ability to file a generally endorsed Originating Claim merely to preserve his position and leverage on having filed an action in court will be restricted. As such, an Originating Claim has to be endorsed with a statement of claim unless the limitation period for the cause of action will expire within 14 days after the Originating Claim is issued. 41. To ensure that cases do not hibernate after commencement, a claimant must take reasonable steps to serve on the defendant as soon as possible and, in any event, within: a. 14 days after the Originating Claim is issued if it is to be served in Singapore; b. 28 days after the Originating Claim is issued if it is to be served out of Singapore.	Consultation Paper, paragraph 41 CJC Report, at Chapter 4, paragraph 4; proposed ROC at Chapter 4, Rule 3 Proposed ROC at Chapter 5, Rule 5(5) CJC Report, at Chapter 4, paragraph 8; proposed ROC at Chapter 4, Rule 5(6) and Rule 5(7)	<u>in Singapore, and 28 days after the originating Claim is issued if it is to be served outside of Singapore.</u> There should be provision for easier extensions of time as there may be necessity for protective writs to be filed before expiry of limitation periods. Longer time for service out of Singapore would be helpful as defendants may be located in overseas jurisdictions where they may be harder to locate. Should provide for time to run only after notice of intention to contest is served (see ROC Chapter 4 Rule 6(1)). This would allow for savings in costs to the plaintiff, if there is no intention to contest.
17.	41. To ensure that cases do not hibernate after commencement, a claimant must take reasonable steps to serve on the defendant as soon as possible and, in any event, within:	Consultation Paper, paragraph 41	**Service within a fixed time:** Then what is the validity of the writ for? Unreasonable. Sometimes people are away for months. This only helps the Court's administration. Does not serve general justice.

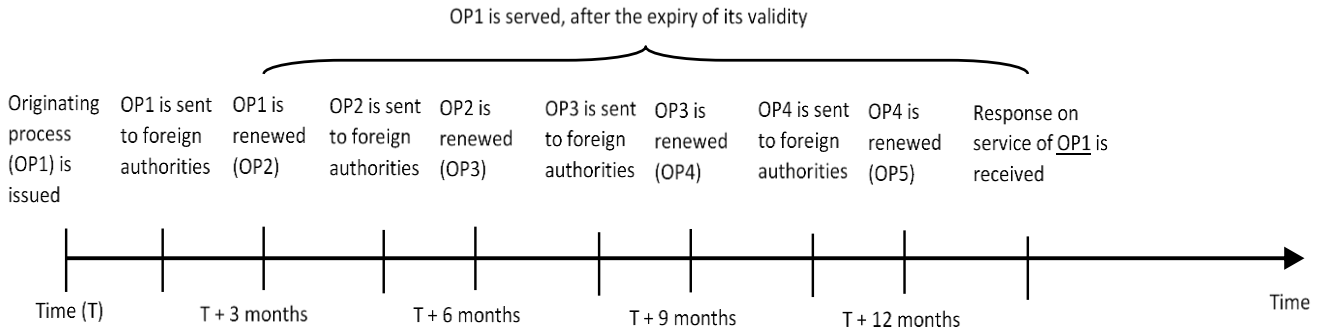
	a. 14 days after the Originating Claim is issued if it is to be served in Singapore; b. 28 days after the Originating Claim is issued if it is to be served out of Singapore.		
18.	40. A claimant's ability to file a generally endorsed Originating Claim merely to preserve his position and leverage on having filed an action in court will be restricted. As such, an Originating Claim has to be endorsed with a statement of claim unless the limitation period for the cause of action will expire within 14 days after the Originating Claim is issued.	Consultation Paper, paragraph 40	**A. Feedback on Chapter 4 – Generally Endorsed Originating Claims** 1. Under the proposed Rules, except in a special case, a claimant may endorse an originating claim generally with a concise description of the claim **only if** the limitation period for the cause of action will expire within 14 days after the originating claim is issued.[30] 2. The proposed Rules are intended to restrict a claimant's "ability to file a generally endorsed originating claim merely to preserve his position and leverage on having filed an action in court".[31] 3. There are instances where it is useful, necessary or justifiable to file a generally endorsed originating claim, for example, where, under conditions of extreme urgency, an urgent injunction or other court order has to be applied for. Giving claimants the ability to do so will not infringe the said intention. 4. On this, the proposed Rules are unsatisfactory in that although the injunction can be applied for before the issue of originating process in cases of urgency[32], the Court may order that the injunction not be served until **after** the originating process is issued[33].

[30] Ch. 4 r 5(4) of the proposed Rules.
[31] Consultation Paper, [40]; CJC Report, paragraph 17, p 12.
[32] Ch. 10 r 1(2) of the proposed Rules.
[33] Ch. 10 r 1(4) of the proposed Rules.

			5. The proposed Rules restrict the filing of generally endorsed originating claims to the "special case". However, there is no definition of "special case". This will engender unnecessary litigation. 6. It is suggested that instead of the phrase "special case", clear principles formulated around the specific issues of urgency and practicality be used to guide the Court. 7. For example, Ch. 4 r 5(4) may be amended to provide that an Originating Claim may be endorsed generally **in cases of urgency**, or **where it is impractical** in the circumstances of the case for the claimant to prepare a concise description of the claim or with a statement of claim. 8. Moving the focus away from the "special case", to urgency or impracticality will have the benefits of – a. anchoring the Court's exercise of discretion on the essential and material issues in this area; and b. mirroring the provisions in Ch. 10 r 1(2) and 1(3), which refer to "urgency".
19.		Consultation Paper, paragraph 40 Proposed ROC at Chapter 4 Rule 3(4)	**Renewals and Service through Foreign Authorities** 1. In our practical experience, there are many cases in which a foreign authority took more than a year (in one case, more than 3 years) to respond to a request for assistance with service. 2. If the proposed Rule to limit the validity period of originating processes is implemented[34], service through foreign authorities would be practically impossible. 3. The originating process would have to be renewed while the foreign authorities are in the process of serving the expiring (or

[34] Ch. 4 r 3(4) of the proposed Rules.

			expired) originating process, and a renewed originating process would have to be forwarded to the foreign authorities for service. 4. This will create a perpetual cycle of renewals of originating process and requests for service (of such renewed originating processes) through the foreign authorities, as illustrated below[35]. 5. One possible solution would be to provide that the time for calculating the validity period of an originating process will be **held in abeyance** from the date on which the originating process is sent to the entities in Ch. 6 r 2(1)(c)-(e) of the proposed Rules, to the date on which the aforesaid entities notify the claimant of the



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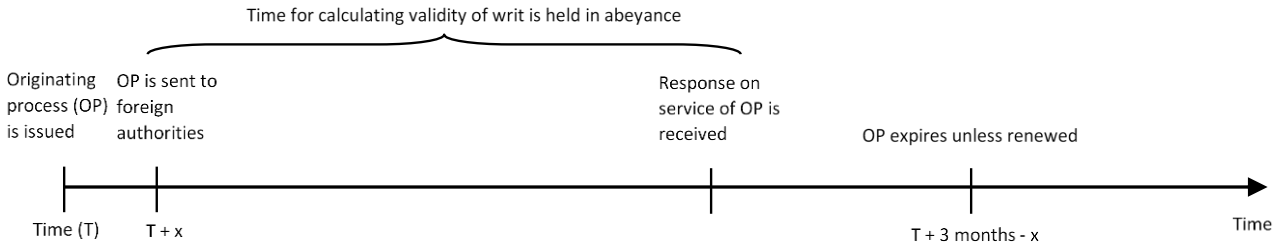
			outcome of the service attempt, during which period the originating process shall continue to be valid (as illustrated below[36]). 6. Alternatively, where the originating process is to be served through the entities in Ch. 6 r 2(1)(c)-(e) of the proposed Rules, the Court should be permitted, having regard to the circumstances of the case, to extend the validity of the originating process for such duration as it thinks fit and/or grant such extension upon the filing of the originating process.
20.		Consultation Paper, paragraph 40 Proposed ROC at Chapter 4, Rule 3(4)	**The "Special Case"** 1. The proposed Rules will limit the number of times that the validity of an originating process can be extended to only 2, unless there is a "special case". 2. This gives rise to concerns. There is no definition of "special case" and it appears that a higher threshold (than under the existing Rules[37]) will be imposed. 3. Given that the stated purpose is only for claimants "to take *reasonable steps* to effect expeditiously",[38] it is suggested that the additional, and higher threshold of having to show a "special case" is unnecessary for achieving *that* purpose, and should be



[36]

[37] *Singapore Civil Procedure* at [6/4/3] where the Court may grant an extension of the validity of the writ where there is a "good cause" or "sufficient reason" to do so.

[38] Consultation Paper, [39]; CJC Report, paragraph 6, p 12.

			removed. The suggestions set out at paragraphs [44 to 45][39] above should be adopted instead. 4. As observed at the beginning of this feedback, we are further concerned that moving away from the existing Rules, and having to work out what the "special case" is in the different areas where that phrase is deployed, will give rise to significant, costly and ultimately inefficient litigation.
21.	45. If the defendant is challenging the jurisdiction of the court, he may file and serve a bare defence, stating the ground of challenge on jurisdiction.	Consultation Paper, paragraph 45	Rather than allow a party to file a bare defence, to do away with the principle that a party by 'taking a step' in the action is deemed to have submitted to the jurisdiction of the courts. Instead, require the party to file an application opposing jurisdiction within a period of time, say 21 days after notice of intention to contest. If no such application is made within the said time, then any objection to jurisdiction is waived. A court can extend the time for such an application.

[39] Cross-reference in original. The referenced paragraphs may be viewed at proposal 19 at p 18, at paragraphs 5 and 6.

E. Service In and Out of Singapore

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
22.	52. As for the Rules relating to service out of Singapore with court's approval, the proposed Rules prescribe the criteria for obtaining the court's approval for service out of Singapore namely, showing that the court has the jurisdiction or is the appropriate court to hear the case. 53. This makes it unnecessary for a claimant to scrutinise the long list of permissible cases set out in the existing Rules in the hope of fitting into one or more descriptions. It also avoids the possibility that a particular category of cases which could and should be heard in Singapore is actually not in the list.	Consultation Paper, paragraphs 52-53 Proposed ROC at Chapter 6, Rule 1 *contra* Order 11 r 1	**A. Feedback on Chapter 6 – Service out of jurisdiction** **Grounds for service out of jurisdiction** 1. The removal of the list of grounds[40] to obtain an order for the service of documents out of Singapore may create unnecessary uncertainty in respect of the circumstances under which a Court will allow service out of jurisdiction. 2. The removal of the list of grounds may also encourage more argument about *forum conveniens* even where one of the current grounds for service out of Singapore exists. While the existence of one or more of the current grounds does not make the Singapore courts the *forum conveniens*, the absence of the list of grounds would make an order for service out of Singapore even more susceptible to argument. 3. The above point may be more acute where a jurisdictional objection is taken in a foreign jurisdiction. Foreign courts may be more willing to take jurisdiction if there are no express grounds under which the Singapore Courts will *prima facie* have jurisdiction. 4. Since the intention is for the proposed Rule to be more expansive, it should incorporate the current list of grounds,[41] and specify that the list is non-exhaustive. This will eliminate the risk of any uncertainty.

[40] Ch. 6 r 1 of the proposed Rules *contra* Order 11 r 1.
[41] Order 11 r 1.

F. Case Conference

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
23.	12. When an action is commenced, the court will take control instead of leaving parties to determine the pace and intensity of the proceedings. The trial judge and registrar will be given the autonomy and flexibility to manage their cases during Case Conferences. The Chief Justice may direct that certain rules do not apply or are modified for a particular category of cases. Case management tools such as the List of Issues and Case Note are introduced so that parties can narrow and crystallise the issues in dispute as well as set out their positions and arguments on disputed issues.	Consultation Paper, paragraph 12	Disagree as there is a risk of prejudging the case prior to trial. However the current CMC regime should be extended where the CMC registrar is not the trial judge.
24.	56. The Case Conference (or Case Management Conference) will be the command centre for all matters relating to case management, and sets the timelines and tone of proceedings. 57. Currently, trial judges are only involved in a case at a fairly advanced stage of the proceedings. As a result,	Consultation Paper, paragraphs 56-58 CJC Report, at Chapter 7, paragraph 2; proposed ROC at	<u>Trial judges / relevant judicial officers will manage the case throughout its life cycle once the claim is filed.</u> While there should be no issue in principle with more extensive and effective case management, it is important to balance this with a litigant's ability to conduct his case as he deems fit. There could be issues with finality of decisions (e.g. *Henderson v Henderson* abuse of process and *res judicata*).

	inadequacies in the pleadings, documents, or witness evidence are only unearthed during trial. 58. (CJRC & CJC) To minimise the problems above, a judge and/or relevant judicial officer will manage the case throughout its life cycle once the claim is filed.	Chapter 7, Rule 1(4)	
25.	58. (CJRC & CJC) To minimise the problems above, a judge and/or relevant judicial officer will manage the case throughout its life cycle once the claim is filed.	Consultation Paper, paragraph 58	(a) If the issues are procedural in nature, to have CMC before the docketed trial judge may not be the most effective use of judicial resources. This is especially so in the State Courts where the volume of cases is significantly higher than in the High Court. (b) Where appropriate, in addition to face-to-face CMCs, CMCs can be conducted either by: (i) telephone conferencing; (ii) video conferencing; (iii) email exchanges. Where appropriate a document similar to a Redfern schedule can be used.
26.	60. There are two possible proposals for when the first Case Conference should be scheduled. (CJC) A Case Conference will be held 8 weeks after an originating process is issued if the defendant is to be served in Singapore or 12 weeks if the defendant is to be out of Singapore.	Consultation Paper, paragraph 60	**A. Feedback on Chapter 7 – Rule 8 (The Single Application)** **The Single Application is not practicable/ feasible** *Timelines* 1. The Case Conference is fixed to be heard either 8 or 12 weeks (depending on whether service is within or outside Singapore) from the issuance of the originating processes under the proposed Rules[42]. 2. Considering the timelines for service of pleadings, parties can be expected to have filed all their pleadings between 3 to 7 weeks (for cases involving service within jurisdiction) or 5 to 11 weeks (for

[42] Ch. 7 r 1 of the proposed Rules – whether it is 8 or 12 weeks depends on whether the originating process was served out of jurisdiction, with the longer timeline applicable for cases involving service out of jurisdiction.

			cases involving service out of jurisdiction) after the issuance of the originating processes[43]. 3. This means that parties will have only between 1 to 5 weeks between the filing of pleadings and the first Case Conference. The Court shall order a single application pending trial (***"Single Application"***)[44]. 4. In our experience, those timelines for that objective will be unrealistic in many cases. 5. It will be extremely challenging for parties and lawyers to anticipate and prepare for all the possible interlocutory applications[45] (including but not limited to the addition/removal of parties, striking out, particulars, amendment and filing of pleadings, summary judgment, security for costs and discovery), with so little time and at such an early stage.
27.	66. The judge should work with parties in formulating the LOI during Case Conferences, and reviewing and refining it as the case progresses. Where both parties are unrepresented, and thus unable to prepare the working draft LOI, the judge may work with parties to draft the LOI during the Case Conference itself.	Consultation Paper, paragraph 66	**Active judicial management** carries a risk of pre-judging. **Judge to intervene when unrepresented party fails to identify issues:** Then why should the represented party pay for his lawyer?
28.		Consultation Paper, paragraph 66	**Greater Judicial Control** The experience with the CMC process does not result in greater efficiency and reduced time because there is a need to keep going back to court for directions at every turn. In fact, greater efficiency is achieved if the parties are given the autonomy to decide when and how any interlocutory application is to be made. Often, issues arise along the litigation process and limiting access to applications would

[43] Ch. 4 r 5(6) read with r 7(1) & 9(1) (service within jurisdiction), and Ch. 4 r 5(7) read with r 7(2) & 9(1) (service out of jurisdiction).
[44] Ch. 7 r 8(2) of the proposed Rules.
[45] See Ch. 7 r 8(4) for a list of the interlocutory applications that fall under the Single Application.

			not only result in injustice but could prevent the true issues from surfacing. The current PTC system in place in the High Court has already placed the Court in control of the litigation process. One must be careful not to stifle cases, evidence and witnesses in the name of greater efficiency and control by the Court. Why is there a need for greater control when many safeguards are already in place?
29.	71. The CJC proposes that, other than excepted classes of applications, the court will control the number of and the period within which interlocutory applications may be filed by determining the applications which are required and order each party to file a single application as far as possible. Applications set out in the single application can be filed as of right. However, no further application may be taken out at any time without the court's approval.	Consultation Paper, paragraph 71	Alternative suggestions to the single interlocutory application • Requiring the parties to inform the Court of what interlocutory applications they contemplated, but not to require that all applications be filed at the same time. • Setting a maximum number of applications allowed for each category of interlocutory application, but not limiting parties to a single interlocutory application. • Not requiring leave for a first supplementary round of AEICs, which would be restricted to only addressing new documents disclosed by the other party. • Allowing for one interlocutory application for each stage of the litigation process, ie one each for (i) the commencement stage, (ii) the pleadings stage, (iii) the discovery/evidence stage, and (iv) the stage leading up to trial. • Removing the existing Practice Direction that separate applications are to be filed under separate Summonses, to allow solicitors to consolidate appropriate applications into a single Summons where possible. • Allowing oral applications to be made at the Case Management Conference without the need to file Summonses and Affidavits unless the Court specifically directs, similar to the process currently in place for Magistrate's Court suits.

30.	73. The CJRC proposes that parties will be required to submit a Case Note to the court at the pre-trial stage, preferably before directions on evidence are given. This Case Note will replace the Lead Counsel's Statement. The Case Note will briefly set out parties' positions, arguments on disputed issues, and establish areas that are not in dispute. The Case Note is not binding on parties in terms of their eventual positions. Taken together with the LOI, the Case Note will assist the judge in identifying the factual and legal issues for adjudication, understanding each party's case, and in giving directions on evidence.	Consultation Paper, paragraph 73	At present, the Lead Counsel's Statement is prepared after AEICs are exchanged when legal and factual issues are well defined. Therefore a structured document like the Legal Counsel's Statement has utility. Since the Case Note is prepared before evidence is settled, parties should be allowed flexibility when preparing case notes. Other than routine volume cases, each case is unique and standardised case note templates may not be appropriate.
31.	73. The CJRC proposes that parties will be required to submit a Case Note to the court at the pre-trial stage, preferably before directions on evidence are given. This Case Note will replace the Lead Counsel's Statement. The Case Note will briefly set out parties' positions, arguments on disputed issues, and establish areas that are not in dispute. The Case Note is not binding on parties in terms of their eventual positions. Taken together with the LOI, the Case Note will assist the judge in identifying	Consultation Paper, paragraphs 73-75	We support the Case Note proposals in Paragraphs 73 to 75 of the Recommendations. However, we would submit that the Case Note ought to be requested as early as possible in the proceeding. We believe that it will greatly assist the early resolution of disputes for the Parties to undertake a full and proper legal analysis of the issues at the earliest possible stage, likely in most cases to be after the completion of discovery.

	the factual and legal issues for adjudication, understanding each party's case, and in giving directions on evidence. 74. The requirement to file a Case Note will require parties to think about their case and arguments at an earlier stage, and allow a party sufficient preparation time to address arguments raised by the opposing party. This will ensure that both parties are able to address arguments raised during trial, thus allowing proceedings to be conducted in a timely and efficient manner. 75. An appropriate page limit for the Case Note will be imposed.		
32.	76. Save for special cases, the CJC proposes that the court will not allow pleadings to be amended within 14 days before trial. The court may draw appropriate inferences if material facts in the pleadings are amended. This is to eliminate the prevalent practice of parties seeking to amend pleadings very close to the trial date or even on the first day of trial, which could result in wastage of court hearing time and possibly adjournment of trial.	Consultation Paper, paragraph 76 CJC Report, at Chapter 7, paragraph 6; proposed ROC at Chapter 7, Rule 13(3)	<u>The Court should not allow amendment of pleadings within 14 days before trial.</u> Disagree. Last minute amendments may sometimes be necessary for good reasons. For example, (1) late discovery of documents by the opposing side which may lead to new causes of action or new defences being raised; (2) new lawyers may be instructed as counsel at the eve of trial, and if there are defective pleadings at that stage, amendments ought to be allowed to remedy the defects as opposed to having litigants suffer the effect of defective pleadings.

			Nevertheless, it is recognised that late amendments should not be encouraged especially if such amendments lead to vacation of trial dates. In order to discourage such amendments, appropriate costs orders can be made.
33.		Proposed ROC at Chapter 7, Rule 3	**Feedback on Chapter 7 – Rule 3 (Absence of Parties at the Case Conference)** 1. Under the proposed Rules[46], the Court may set aside or vary the dismissal of default judgment granted at a case conference on proof that there were valid reasons for the absence of the defaulting party. 2. Under existing case-law, a party seeking to set aside or vary a dismissal or default judgment ordered in its absence is already required to give valid reasons for its absence[47]. 3. It is however unclear whether the intention behind stating **only** the requirement for proof of valid reasons for absence is to remove the other, substantive requirement – which is that the defendant has to establish a *prima facie* defence in order to set aside a regular default judgment[48]. 4. There is no explanation why the proposed Rules refer only to the requirement to prove that there were valid reasons for absence, and no indication (in the Consultation Paper, CJRC Report or CJC Report) whether the substantive requirement will be retained.

[46] Ch. 7 r 3(3) of the proposed Rules.
[47] Such reasons are material to whether the court will be less than ready to exercise its setting-aside jurisdiction, such as where the defendant deliberately decided not to give notice of intention to defend because it suited its interests. Inordinate delay in making a setting-aside application may be fatal in the absence of a valid reason for such delay: *Mercurine Pte. Ltd. v Canberra Development Pte. Ltd.* [2008] 4 SLR(R) 907 (CA) [30]-[36], [61], [97] citing *Lee Theng Wee v Tay Chor Teng* [2003] SGHC 173, [17].
[48] *Mercurine Pte. Ltd. v Canberra Development Pte. Ltd.* [2008] 4 SLR(R) 907 (CA) [54], [60].

			5. This is an example of the concerns raised in paragraphs 4[(b) and (c)] above[49]. 6. There is a pre-existing body of case law based on the existing Rules that while not perfect, is fit for purpose for most purposes. 7. The shift to a new body of civil procedural rules (and abandonment of much of the language of the existing Rules) will engage and exercise the various stakeholders (the Courts, lawyers and parties) in much unnecessary litigation to work out what will continue to apply and if so, to what degree. 8. There is value in retaining the existing wide discretion of the Court in relation to setting aside default judgments. 9. The Court of Appeal declined to lay down determinative guidelines as to the factors which ought to prevail in exercising the wide discretion to set aside a default judgment so as not to impose fetters on the court's discretion[50]. In doing so, it affirmed its earlier caution - rules of court practice and procedure exist to serve the ultimate and overriding objective of justice[51]. 10. In addition, the retention of the Court's wide discretion would be consistent with the intention behind the proposed Rules, which is to give case conference registrars and trial judges "broad discretion", and to have "maximum autonomy and flexibility in managing their cases"[52].

[49] Cross-reference in original. The referenced paragraphs may be viewed at proposal 56 at p 69, at paragraph 4(b)-(c).
[50] *Mercurine Pte. Ltd. v Canberra Development Pte. Ltd.* [2008] 4 SLR(R) 907 (CA) [99].
[51] *Mercurine Pte. Ltd. v Canberra Development Pte. Ltd.* [2008] 4 SLR(R) 907 (CA) [99] citing *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 (CA), [52].
[52] CJC Report, paragraph 5, p 2.

34.		Proposed ROC at Chapter 7, Rule 8(8) read with Chapter 13, Rule 2(2)	**The Single Application will lead to injustice** 1. Injustice will be occasioned if the Court takes an overly strict approach to restricting interlocutory applications outside the Single Application. 2. Meritorious interlocutory applications that may lead to just, efficient and cost-effective outcomes[53], but which were not anticipated at the time of the Single Application will be potentially shut out under the case management powers of the Court in the Case Conference[54]. 3. There does not appear to be any right of appeal if the Court does *not* give "approval" for an interlocutory application outside the Single Application[55]. 4. Injustice may therefore be occasioned if there is no right of appeal against the withholding of approval, as meritorious applications may be shut out. 5. The existing Rules do not give rise to the above complications. Interlocutory applications are dealt with on their own merits/demerits, and there is no requirement to get prior approval to file an application.
35.		Nil	Junior Bar's feedback Compressed timeline places greater strain on law firms with fewer resources and headcount, in particular where the firm has a number of active cases with overlapping timelines.

[53] For example, *Orient Centre Investments v Societe Generale* [2007] 3 SLR(R) 56.
[54] Ch. 7 r 8(2) & (7), (8) of the proposed Rules.
[55] See: Ch. 7 r 8(8) read with Ch. 13 r 2(2) of the proposed Rules.

			Compressed timeline and single interlocutory application results in more 'frontloading' of work at the commencement of a case, which would likely need to be addressed by junior lawyers. The delegation of work to junior lawyers would be particularly acute if costs proposals are implemented, as senior lawyers would want to mitigate cost pressures. Given the compressed timelines and omnibus interlocutory application, junior lawyers voiced concerns that they are worried that they may make a mistake which could potentially "blow up" a whole case and they may not have the chance or opportunity to rectify it.

G. Production of Documents

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
36.	78. (CJC) The proposed Rules introduce a new discovery regime which works on the principle that a claimant is to sue and proceed on the strength of his case and not on the weakness of the defendant's case. It aims to prevent parties from engaging in unnecessary requests and applications with the hope of uncovering a "smoking gun". 80. The court will retain a residual discretion to allow a broader scope of discovery on application by any party if it is satisfied that it is in the interests of justice. It will be in the interests of justice to allow such broader scope of discovery where it could aid in disposing fairly of the proceedings.	Consultation Paper, paragraphs 78, 80	Burden of Proof The proposed move away from general discovery may impact in a prejudicial manner those causes of action where a Party carries the burden of proof on an issue but is wholly reliant on the other Party to discover the evidence needed to discharge that burden. In some causes of action, the law has developed on the basis that general discovery will occur and the Parties' obligations have been determined accordingly. It is difficult to predict how the absence of general discovery will affect such claims. For example, in a bailment claim arising from damage to bailed goods, the burden is initially on the claimant bailor to prove the contract and damage. The burden then shifts to the defendant bailee to explain the cause of the damage or establish a contractual exception. If the bailee does this, the burden then passes back to the bailor to negative the bailee's entitlement to rely on the defence or exception.[56] The main obstacle facing the bailor is that once the goods have been bailed to the bailee, the bailor has little knowledge of what took place, whether on board a vessel, inside a warehouse or in other premises, and is wholly reliant on obtaining evidence that is in the possession of the bailee and which, under the new principles, the bailee is under no obligation to disclose unless the bailee intends to rely on it. The availability of specific discovery does not assist as there is often no evidence available on which to base an application, as referred to in our example above.[57] It cannot always be

[56] See for example ***J. Spurling Ltd*** v ***Bradshaw*** [1956] 1 WLR 461 per Lord Denning at 466.
[57] Cross-reference in original. The referenced paragraph is not reproduced in this Appendix. It reads:

			assumed that Parties will be honourable in disclosing the existence of information wholly within their knowledge. In our view, the provision in Paragraph 80 of the Recommendations of wider discovery in the interests of justice also does not address this issue since if one entire category of cases (i.e. bailment or other causes of action where the onus shifts in a similar manner) would end up being exempted from the default regime, it casts doubt on the general applicability of the proposed regime as a matter of principle. Finally, it is proposed to review the effectiveness of Civil Justice Reforms after two years of operation. However, it is impossible in our submission to review the effectiveness of the new discovery process since the non-disclosure of adverse documents is not a measurable metric. One simply cannot measure the number of occasions on which the outcomes of proceedings will have been influenced by the non-disclosure of evidence as there is no obligation on a Party to declare the adverse documents in its possession or control. We welcome an explanation of how it is proposed to assess whether the new process is enhancing the interests of justice if a key criterion cannot be measured. Overall, we submit that there ought to be no change to the existing discovery obligation set out in Order 24 Rule 1 of the Rules of Court.

"Paragraph 79 of the Recommendations refers to the availability of specific discovery but gives no further details. However, Paragraph 3 of Chapter 8 of the CJC Report and the corresponding draft Rule in Cap. 8 Rule 3(1) of the Draft Rules of Court place the onus on the Party seeking specific discovery to "properly identify" such documents and show their materiality. It is submitted that these requirements are impracticable where there is asymmetry of information between the Parties. We have often seen cases where adverse documents identified by a Party under the existing approach to discovery have had a material impact on the outcome. We have seen a recent example in an arbitration in which we participated in 2017 as Respondent in a dispute arising out of the contamination of a cargo of chemicals on a vessel. The Claimant released (at a very late stage) material evidence of coating deterioration in certain of the tanks in which the chemicals were carried. This deterioration was not evident from the tank inspection documents in our client's possession and the discovery of these documents by the Claimant enhanced our client's ability to defend the claim. If this matter had proceeded in Court under the proposed new discovery process, the Claimant would not be under any obligation to disclose these documents. More importantly, we would not have had knowledge of these documents nor would we have an evidential basis on which to claim specific discovery of them. We cannot see how the new discovery process can assist in the fair resolution of disputes where the non-disclosure of material documents is actively encouraged by the process and is, in fact, the default position."

37.	78. (CJC) The proposed Rules introduce a new discovery regime which works on the principle that a claimant is to sue and proceed on the strength of his case and not on the weakness of the defendant's case. It aims to prevent parties from engaging in unnecessary requests and applications with the hope of uncovering a "smoking gun". 79. (CJRC & CJC) The current process of general discovery followed by specific discovery has led to situations where the time and costs spent on discovery are disproportionate to the complexity and value of the claim. Thus, an arbitration-style disclosure of documents will be adopted by default in the new regime. Parties will first produce the documents upon which they rely for their respective cases. To counter the concern that the arbitration-style of discovery may enable parties to withhold documents adverse to their own case, the availability of specific discovery will enable a party to request documents (in particular, documents which are adverse to the party holding them) from the other party.	Consultation Paper, paragraphs 78, 79 and 86	**<u>Production of documents</u>** At paras 78 to 84 of the Paper, the CJC and CJRC suggest a shift from the current discovery process to arbitration-style discovery, where only documents which a party intends to rely on are disclosed. We respectfully disagree with this suggestion. In an arbitration, parties go in with knowledge of the discovery procedure. They must necessarily have agreed to it. It is a commercial decision, having taking into account the advantages and disadvantages of arbitration and its procedures. This is not the case in litigation. We believe that it is only fair in litigation that parties be made to disclose not just evidence which is beneficial to them, but also evidence which is adverse to them but relevant to the case. The interests of justice require a robust discovery process. While at para 79 of the Paper the CJC and CJRC suggest that the availability of specific discovery would enable parties to request documents from the other party and prevent them from withholding documents adverse to their own case, such recourse is only available if the party has knowledge of such documents. In many instances, a party would not know of the existence of such relevant documents and thus would be unable to seek specific discovery for those documents. For example, a party would likely not be privy to another party's internal correspondence or of their correspondence with third parties. Such evidence can prove critical. We would suggest that instead of an arbitration-style approach, a better way would be to impose costs sanctions against parties who conduct discovery in an oppressive manner, whether by disclosing voluminous irrelevant evidence or by taking out frivolous or vexatious specific discovery applications, [sic] In addition, para 86 of the Paper proposes that the Court may order pre-action or third- party discovery to *"identify possible parties to any proceedings, enable a party to trace his property, or for any other lawful purpose"*. It is not clear whether

	86. Finally, the Rules will allow the court to order pre-action production of documents and information or against a non-party for the following purposes: a. To identify possible parties to any proceedings; b. To enable a party to trace his property; or c. For any other lawful purpose.		this is an extension of the current O 24 r 6(5) of the Rules of Court, which is similar to the *Norwich Pharmacal* principle, or whether it restricts pre-action or third-party discovery only to the expressed purposes. Further, the *phrase "any other lawful purpose"* does not seem to have been defined in the Paper, the Proposed Rules or in the Civil Justice Commission's Report. If the objective of the proposal is to restrict the scope of pre-action or third-party discovery, we disagree with this as we see no basis for why a party who requires evidence in order to make out his claim should not be allowed to obtain it. In our view, the current rules requiring documents sought in pre-action or third-party discovery to be relevant and necessary strike the right balance. In this regard, we note that there is a tempering mechanism in O 24 r 6(9), which provides that, by default, the applicant bears the respondent's costs on an indemnity basis.
38.	83. The production of any "train of inquiry" document or a document that is part of a party's private or internal correspondence is prohibited except in a special case. "Special case" is deliberately left undefined to allow for flexibility and good sense should a rare case emerge.	Consultation Paper, paragraph 83 CJC Report, at Chapter 8, paragraph 5; proposed ROC at Chapter 8, Rule 5	Specific discovery is still available. However, the production of any "train of inquiry" document or a document that is part of a party's private or internal correspondence is prohibited except in a special case. Disagree. "Private or internal correspondence" may sometimes be critical to the case, as they can reflect the most candid discussions in an unguarded context. It is not immediately clear why these "private or internal correspondence" should be carved out as a separate exception from "train of inquiry" documents, subject of course to legal professional privilege. Furthermore, creating such a carve-out category of "private or internal correspondence" may lead to parties more frequently withholding, on the basis of the "new justification" of "privacy" or "internal documents."

39.		Consultation Paper, paragraph 83	*Private or Internal Correspondence and Confidentiality* 1. Apart from a reference to discovery being intrusive into privacy and confidentiality[58], it is unclear why private or internal correspondence should be deserving of special protection[59] **as a matter of procedural justice**. 2. There is an existing body of case law that deals adequately with confidentiality concerns – the Courts will balance the considerations of justice against the claims of confidentiality[60]. 3. In our view, insofar as private or internal correspondence are usually a good source of evidence which litigants suppress as they would assist the opposing party, such special protection is likely to undermine the interest of justice[61]. We repeat our point at paragraphs [152 to 156] above[62] – **speed and economy should not come at the expense of justice**. 4. The proposed Rules then make reference to the "special case" as an exception to the rule that production will not be ordered of private or internal correspondence. We have stated elsewhere in

[58] CJC Report, paragraph 2, p 19.
[59] Ch. 8 r 5(1)(b) of the proposed Rules.
[60] See paragraphs 24/3/41 and 24/3/42 of *Singapore Civil Procedure 2019.*
[61] *Hong Leong Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR (R) 292 [28 – 35], [211 to 239] and *Teo Wai Cheong v Credit Industriel et Commercial & anor appeal* [2013] 3 SLR 573 [39 (c) – (d)], [60 – 69].
[62] Cross-reference in original. The referenced paragraphs are not reproduced in this Appendix. They read:
"152. We are of the view that removing the obligation to produce documents which may assist the other party's case or which are adverse to one's own case is likely to undermine the interests of justice.
153. It will mean that, generally, documents which would otherwise have a bearing on the issues arising in, and the outcome of, the case will not have to be produced and/or will be suppressed.
154. The continuing obligation to provide discovery will also be removed, along with the Court's power to visit adverse consequences (such as striking out) for failure to comply with one's discovery obligations.
155. The overall effect of these changes is that the Court will see only selective evidence and not the whole picture, which will compromise its ability to arrive at a correct decision.
156. While the intention behind this may have to do with the imposition of the principle that claimants are to sue and proceed on the strengths of their cases and to reduce time and money spent on the discovery process, adherence to the abovesaid principle **should not be at the expense of fairness and impartiality, and both procedural and substantive justice**."

			this feedback that in our view, this is likely to give rise to unnecessary satellite litigation over the meaning and application of that phrase. 5. The preservation of the broader scope of discovery[63], and the carving out of the "special case" is indicative that there is awareness (at a fundamental level) of the complicated, interlocking, and competing interests between fairness and impartiality, procedural and substantive justice, and the time and money spent on discovery. 6. We suggest that this balancing exercise can be resolved within the ambit of the existing Rules – the Courts should be able and willing to decide that many discovery applications are not necessary for disposing fairly of the cause or matter or for saving costs[64]. 7. In relation to confidentiality, that has been elevated to a factor equal to privilege under the proposed Rules[65]. 8. As a preliminary point, in the interest of avoiding ambiguity and unnecessary litigation, it should be clarified whether documents that one regards to be confidential (*e.*g. one's own customer / pricing lists) is subject to these rules. This is because the phrase "duty of confidentiality" suggests the obligation to keep a third party's confidence. 9. The changes on confidentiality were said to be an attempt to codify case law[66]. 10. We wish to point out that the facts in *Wee Shuo Woon's* case do not justify treating confidentiality as equal to privilege. In that case,

[63]Ch. 8 r 1 (as modified) and Ch. 8 r 2(1) of the proposed Rules (note both the original and modified forms thereof).
[64] Order 24 r 7.
[65] Ch. 8 r 5(2) and r 7 of the proposed Rules.
[66] *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94, CJC Report, paragraph 6, p 20.

			the documents (in relation to which confidentiality had been compromised) were both confidential **and** privileged[67]. If those documents had been merely confidential but not privileged, then the treatment should have been a balancing exercise[68]. 11. In our practical experience, disallowing production of and reliance on confidential documents will present many difficult issues that will adversely affect the Court's ability to arrive at a just outcome. 12. For example, where litigation involving banks is concerned, banks will invariably rely on confidentiality so that their internal documents cannot be disclosed[69] but that will be very unfair to the other party. Cases decided under the existing Rules where big institutions were caught out by disclosure of their internal or confidential documents are likely to be decided very differently under the proposed Rules, with adverse consequences on whether justice is being done (or seen to be done) [sic] 13. On this (treating confidentiality as equivalent to privilege), we are of the view that the additional protections are unnecessary, and are likely to undermine the interests of justice, as well as of fair and impartial access to the Courts. 14. The existing protections are adequate, and if the overriding concern is to reduce time and costs spent on discovery, the cure can be found within the ambit of the existing rules, the Courts should be able and willing to decide that many discovery applications are not necessary for disposing fairly of the cause or matter or for saving costs[70].

[67] *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 [40], [44].
[68] Paragraphs 24/3/41 and 24/3/42 of *Singapore Civil Procedure 2019.*
[69] As was done in *Hong Leong Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR (R) 292 and *Teo Wai Cheong v Credit Industriel et Commercial & anor appeal* [2013] 3 SLR 573.
[70] Order 24 r 7.

40.		Proposed ROC at Chapter 8, Rule 5(2)	<u>Court shall not order production of any document subject to duty of confidentiality subject to written law</u> Remove the prohibition against Court ordering production of documents subject to duty of confidentiality. There are some documents subject to duties of confidentiality which are critical to cases and which the Courts previously had the power to award outside of written law. For example, hospital records of a patient could be subject to medical confidentiality but under common law such medical confidentiality can be lifted if a litigant seeks third party discovery and obtains an order against the hospital to disclose these records. This allows the litigant to understand a patient's treatment or medical condition for liability and quantification purposes. In addition, Singapore Court authorities have previously stated that the Court may grant discovery against a defendant that is subject to confidentiality obligations to others if disclosure is necessitated in the interests of justice. In *Haywood Management Ltd v Eagle Aero Technology Pte Ltd*, Tay Yong Kwang J noted that it would be open to potential abuse by scheming individuals as "*contracting parties may deliberately incorporate confidentiality clauses in their contracts or enter into separate confidentiality agreements for the sole purpose of avoiding downstream discovery obligations*". There is also already in existence established legal authorities limiting disclosure of documents that are subject to duties of confidentiality to guard against abuse of the discovery process to procure confidential or sensitive documents to address any potential mischief of excessive discovery of confidential documents. See for example *Wallace Smith Trust Co. v Deloitte Haskins & Sells* [1996], *Science Research Council v Nasse Leyland Cars* [1980], and *Re Borthwick (deceased)* [1948].

			This rule as currently stated may re write, and not merely codify, the existing law in this area.
41.		Proposed ROC at Chapter 8, Rule 5(2)	Pages 62 – 63. Chapter 8, Rule 5 (2), the provision that "the Court shall not order production of any document which is subject to any … duty of confidentiality…" This may lead to abuse as observed by the learned Tay Yong Kwang J. (as he then was) in *Haywood Management Limited v Eagle Aero Technology Pte Ltd* [2014] 4 SLR 478 (at [55]) when dealing with pre-action discovery: "55 In my opinion, the fact that the defendant may owe confidentiality obligations to other parties does not mean that the application for pre-action discovery must necessarily fail. If such contractual obligations of confidentiality are a sufficient reason to militate against the grant of discovery, this may very well give rise to potential abuse by scheming individuals. Contracting parties may deliberately incorporate confidentiality clauses in their contracts or enter into separate confidentiality agreements for the sole purpose of avoiding downstream discovery obligations. Legitimate claims may be stifled prematurely if defendants are allowed to raise the guise of confidentiality to wholly defeat applications for pre-action discovery. Therefore, any obligations of confidentiality that the defendant may owe to other parties cannot be a decisive consideration. It is but one factor that the court should take into account in ascertaining where the interests of justice lie." 1. Judge of Appeal Tay's words are consistent with the spirit of Section 4(6)(a) of the Personal Data Protection Act ('PDPA") [sic] which provides as follows: "(a) nothing in Parts III to VI shall affect any authority, right, privilege or immunity conferred, or obligation or limitation imposed, by, or under

			the law, including legal privilege, ***except that the performance of a contractual obligation shall not be an excuse for contravening this Act***" (emphasis added). In fact, the Fourth Schedule of the PDPA expressly provides that an organisation may disclose data and information if the "disclosure is necessary for any investigation or proceedings". The present draft Rule 5(2) appears to elevate contractual confidentiality above even the legislated restrictions of the PDPA. This cannot have been the intention, so clarification should be embedded in the Rules or else this may be an invitation to future satellite litigation on this point.
42.		Proposed ROC at Chapter 8, Rule 2(1)	List of documents and copies of documents to be exchanged within 14 days of CC: • Compression of timelines • No scope for variation of timelines to account for complexity of case and location of parties • Timelines for pleadings and discovery may be concurrent if the Court decides to hold CC earlier
43.		Proposed ROC at Chapter 8, Rule 2(1); CJC Report, at Chapter 8, paragraph 3; CJRC Report, at paragraph 77	<u>Exchange of lists of and copies of documents of (a) all documents parties will be relying on and (b) all documents which fall within the broader scope of discovery as agreed between the parties or as ordered by the Court shall take place within 14 days after the date of the Case Conference.</u> Early disclosure of documents will serve to crystallize the issues and facilitate settlement if parties are amenable to doing so. However, there should be flexibility in the timeline, as 14 days will often be too short especially in complex cases or cases where the facts date back a long time.

44.		Proposed ROC at Chapter 8, Rule 2(1)	**Feedback on Chapter 8 – Production of Documents** **Timelines for Production of Documents** 1. Under the proposed Rules[71], the Court shall order parties to exchange lists and copies of all documents on which they will be relying **within 14 days** after the Case Conference. 2. As set out in paragraphs [105 to 107][72] above, parties will have only between 1 to 5 weeks between the filing of pleadings and the first Case Conference. These timelines to prepare and exchange lists of documents are unrealistic in light of our practical experience. 3. In addition, the timelines for review, and to apply for production of documents appear unrealistic. 4. The application for production of documents is to be part of the Single Application which is to be filed 21 days after the Case Conference[73]. 5. Given that parties have only 14 days to furnish copies of documents[74], that leaves parties with a **mere 7 days** to – (a) review what has been disclosed; (b) request for approval to apply for production[75]; (c) apply for production of further documents (if approval is forthcoming);

[71] Ch. 8 r 2(1) of the proposed Rules.
[72] Cross-reference in original. The referenced paragraphs may be viewed at proposal 26 at p 23, at paragraphs 1-3.
[73] Ch. 7 r 8(5)(k) of the proposed Rules.
[74] Ch. 8 r 2(1) of the proposed Rules.
[75] Ch. 7 r 8(7) & (8) of the proposed Rules.

			(d) to consider whether to, and if so, request for approval[76] to apply for a broader scope of discovery[77]; (e) apply for the broader scope of discovery (if approval is forthcoming); 6. More time is probably required for the parties to do all the above, especially in light of the significant reduction of parties' ability to extend time by mutual agreement[78].
45.		Proposed ROC at Chapter 8, Rule 2(1)	*Shift away from the general obligation to provide discovery and the definition of "relevance"* 1. Under the proposed Rules[79], parties are to produce lists and copies of documents on which they will be relying. Exceptionally, documents that fall within the broader scope of discovery (either as agreed or as ordered by Court) are to be included. 2. We are of the view that removing the obligation[80] to produce documents which may assist the other party's case or which are adverse to one's own case is likely to undermine the interests of justice. 3. It will mean that, generally, documents which would otherwise have a bearing on the issues arising in, and the outcome of, the case will not have to be produced and/or will be suppressed[81].

[76] See above.
[77] Ch. 8 r 1 (as modified) of the proposed Rules.
[78] Ch. 1 r 7(3) of the proposed Rules.
[79] Ch. 8 r 2(1) of the proposed Rules (note both the original and modified forms thereof).
[80] Order 24 r 1(2)(b) and r 5(3)(b).
[81] Compare *Hong Leong Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR (R) 292 [28 – 35], [211 to 239] and *Teo Wai Cheong v Credit Industriel et Commercial & anor appeal* [2013] 3 SLR 573 [39 (c) – (d)], [60 – 69].

			4. The continuing obligation to provide discovery[82] will also be removed, along with the Court's power to visit adverse consequences (such as striking out) for failure to comply with one's discovery obligations[83]. 5. The overall effect of these changes is that the Court will see only selective evidence and not the whole picture, which will compromise its ability to arrive at a correct decision. 6. While the intention behind this may have to do with the imposition of the principle that claimants are to sue and proceed on the strengths of their cases[84] and to reduce time and money spent on the discovery process[85], adherence to the above said principle **should not be at the expense of fairness and impartiality, and both procedural and substantive justice**.
46.		Proposed ROC at Chapter 8, Rule 3(1)	Specific discovery – The Court will only order production of specific documents if the requesting party properly identifies the document and shows why it is material to the case: • What is "*material*"? Does it replace the test for relevance and necessity? • How does one define "*properly identifies*"? • More litigation as parties contend over specific discovery requirements

[82] Order 24 r 8.
[83] Order 24 r 16.
[84] CJC Report, paragraph 2, p 19.
[85] CJRC Report paragraphs 73 – 74.

47.		Proposed ROC at Chapter 8, Rule 4	**Changes from the existing Discovery regime** *Documents within the Power of Parties* 1. It is not clear why the scope of documents to be discovered is now limited to those categories in relation to which parties have possession or control, **but not power**[86]. Discovery under the existing Rules would include documents that fall within the power of parties[87]. 2. No explanation has been offered in the Consultation Paper, the CJRC Report or the CJC Report for this change. 3. In our view, and in the absence of clear reasons explaining the change, there is no clear benefit in limiting the scope of discovery in this particular way. *Inspection of Originals* 4. It is not clear why the Court's power to order the production of documents is limited to copies and does not expressly extend to ***original*** documents[88]. 5. This would potentially be a severe limitation in cases where inspection of the original documents would be essential, for example, where allegations are made that documents are fraudulent or have been tampered with, or if forensic examination is required of hard disks, phones, servers, documents etc. *Contra* under the existing Rules, parties are entitled to inspect documents and take copies[89].

[86] Ch. 8 r 4 of the proposed Rules.
[87] Order 24 r 1(1), r 5(1), r 6(3)(b) and r 12(1).
[88] Ch. 8 r 4 of the proposed Rules.
[89] Order 24 r 9, and r 10(1).

			6. No explanation has been offered in the Consultation Paper, the CJRC Report or the CJC Report for this change. 7. In our view, and in the absence of clear reasons explaining the change, there is no clear benefit in limiting the scope of discovery in this particular way.
48.		Nil	Junior Bar's feedback Reforms would negatively impact clients' interests / reforms detract more than they facilitate access to justice: (a) Compressed timeline is unfairly prejudicial to a defendant, who would not have the benefit of preparing for the case in the same manner that the claimant had prior to filing the OC/OA. (b) Compressed timeline increases the animosity of parties, as they would be under pressure to dedicate resources to prepare for the case. Problem is exacerbated where parties are still emotional and do not have time to 'cool down' over the course of proceedings. This could lead to fewer cases settled before trial. (c) Compressed timeline increases the risk of counsel making inadvertent mistakes in the conduct of proceedings as there may be insufficient opportunity to examine all facets of a case to the extent required. This could reduce the quality of 'justice' that clients have access to. (d) Discovery reforms are prejudicial to clients who have significantly fewer resources than opposing party, as it would be difficult for such clients to build a case with fewer documents up-front. (e) Single interlocutory application could disincentivise, or remove the opportunity for parties to, seek early resolution of the case. It would be more difficult for parties to assess the strength of their case

			based on the outcome(s) of a single set of interlocutory applications. (f) Compressed timeline and single interlocutory application may result in lawyers building cases that are superficial compared to more complex cases which typically require more time and interlocutory applications [to tease out the relevant issues]. In the short term, this may result in a decrease in the quality of cases and pleadings, which could detract from the ability of the legal profession to contribute to the development of Singapore jurisprudence / case law.
49.		Nil	**Counsel's Ethical Obligations** Our final concern relates to counsel's ethical obligations under the proposed discovery regime since it is not clear that the existing provisions of the Legal Profession (Professional Conduct) Rules 2015, in particular Rules 9(3) (b) and 10(3) to (6) are engaged where a client has material adverse documents in its possession or control but does not have any obligation to disclose these documents under the proposed new Rules. This lack of clarity can be contrasted with the existing ethical position where counsel know of adverse judgments that have not been disclosed to the Court and, in criminal cases, have knowledge of facts indicating their client's guilt. Where counsel knows of a material judgment that is adverse to its client's case, counsel is under a clear ethical obligation to draw the Court's attention to that judgment, arising from counsel's overriding obligation as an Officer of the Court. The question therefore is whether there is a similar ethical obligation under the new discovery regime where counsel knows of a document adverse to its client's position which does not need to be disclosed as it is not being relied on? We

			would expect many counsel to be uncomfortable in doing nothing where there is knowledge that such a document exists. In criminal matters, where counsel for an accused has knowledge of facts indicating its client is likely guilty, counsel may proceed in such a manner that ensures the Prosecution establishes all the elements of the offence and meets the burden of proof, but without making any submission or putting any question to a witness that is inconsistent with counsel's knowledge of the facts. Is there a similar obligation on counsel knowing of the existence of adverse documents which are in its client's possession or control, but which have not been discovered? In such cases, is there an ethical prohibition on counsel making submissions or questioning witnesses based on the disclosed facts but which are inconsistent with Counsel's knowledge of evidence contained in the adverse, non-discovered documents? In our submission, if the proposal for limited discovery proceeds, the ethical issues referred to above need to be clarified and amendments made to the Legal Profession (Professional Conduct) Rules 2015 so that the position of counsel and the latitude available in submissions and examination is made clear. We consider it important that counsel can avoid any risk of inadvertently breaching ethical obligations even in circumstances where the Rules of Court are being complied with to the letter.

J. Court Hearings and Evidence

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
50.	99. (CJRC) In light of the above, the judge may exercise the following powers at any time during trial: a. Directly question witnesses, including on issues outside the scope of pleadings if necessary. b. Restrict the issues for examination of witnesses. c. Restrict the time for examination of witnesses. d. Direct the order in which any speech or evidence by a party or witness should be made or given.	Consultation Paper, paragraph 99 Proposed ROC at Chapter 11, Rule 9	We now address the issue of the proposed amendment to allow the Court the power to ask a witness "*any questions that the Court considers necessary*", which we note is a power that is *already* being exercised by our Courts. **Proposed amendment to the Rules of Court** We note that in Chapter 11, Rule 9 of the proposed *Rules of Court*, it is stated that the Court has the power to "*ask a witness any questions that the Court considers necessary at any time*": "Questions and inspection by the Court 9.—(1) The Court may ask a witness any questions that the Court considers necessary at any time but shall allow the parties to ask the witness further questions arising out of the Court's questions. (2) The Court may inspect any object in the Courtroom or elsewhere and visit any place that is relevant to the action." We also note that the rationale for this proposed rule is set out in the *Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission* (the "Public Consultation"), where in paragraphs 98 – 100, it is envisaged that judges may directly question witnesses, *including* on issues that are outside of pleadings to allow judges "*take greater control over the conduct of trial and avoid excessive time and costs being expended in lengthy trials*":

			"98. (CJRC) Additionally, there should be increased judicial involvement during the trial so that judges can take greater control of the conduct of the trial and avoid excessive time and costs being expended in lengthy trials. 99. (CJRC) In light of the above, the judge may exercise the following powers at any time during trial: a. **Directly question witnesses, including on issues outside the scope of pleadings if necessary**. **b. Restrict the issues for examination of witnesses**. c. Restrict the time for examination of witnesses. d. Direct the order in which any speech or evidence by a party or witness should be made or given. 100. (CJRC) **Judicial impartiality remains an important feature of our civil procedure, and broad guidelines should be introduced for judges who engage in the examination of witnesses**. …" (our emphasis added in bold) In turn, this appears to stem from paragraph 29 of the Report of the Civil Justice Review Committee (the "CJRC Report"), where it is envisaged that there should be a move away from "*the current system where the judge focuses largely on adjudication to a role where the judge works more actively with parties to find the best way to resolve a case*", as well as paragraph 38 of the CJRC report, which we set out below for ease of reference: "38. Judicial intervention may take the following forms:

			(a) **Directing parties to address a relevant issue which has not been raised by either party**; (b) Directing parties not to address an irrelevant issue which has been raised by either party; (c) Encouraging parties, through questions, to consider material claims or defences; (d) Directing parties to clarify any ambiguity in the pleadings or evidence; (e) Directing parties or witnesses to adduce evidence in support of any relevant issue, subject to the law of evidence; and (f) Directing parties to remedy any technical deficiencies in their cases (such as lack of standing or jurisdiction, incorrect parties and material clerical errors).” (our emphasis added) Lastly, we note that in paragraph 104 of the CJRC Report (which has been adopted in the Public Consultation), it is suggested that the courts “*could consider a pilot project for judge-led cross-examination in certain types of cases, e.g. family cases and Community Disputes Resolution Tribunal cases. These are cases where parties could benefit from the judge having greater control of the cross-examination of witnesses (for example, because parties are often litigants-in-person).*” **Are the changes necessary?** While we agree with the principle that measured judicial intervention, in appropriate circumstances, is helpful and avoids excessive time and costs, we are concerned insofar as the proposed amendment may

			appear to mark a departure from an adversarial system into an inquisitorial system. This is insofar as the proposed amendments may allow judges to intervene by asking questions to witnesses that are *outside of the parties' pleadings in civil cases*, and to do so *much more extensively* than permitted by the current case law, and to even call on factual witnesses who are *not* in any of the parties' lists of witnesses. We are cognizant that in paragraph 30 of the CJRC Report, the Committee has noted that in established common law jurisdictions, "*judges are playing an increasingly active role throughout court proceedings, while maintaining the adversarial nature of the system.*" ***Outside the scope of pleadings*** Nevertheless, we note with concern that in the footnote to paragraph 30 of the CJRC Report (and we will happily stand corrected) that the judges in those jurisdictions do not appear have been vested with the power to either "*[d]irect parties to address a relevant issue that has not been raised by either party*", or more importantly, to "*[d]irectly question witnesses, including on issues* ***outside the scope of pleadings if necessary***" (our emphasis added). ***The importance of pleadings in proceedings*** In Singapore, it has been trite law that pleadings serve an important function of natural justice: it serves to inform parties of the case they have to meet, and if a plaintiff succeeds on a point not pleaded, then the action will be dismissed. See, e.g., *PT Jaya Sumpiles Indonesia and another v Kristle Trading Ltd and another appeal* [2009] 3 SLR(R) 689 at [30], and *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [94] – [95], which we have excerpted below for ease of reference:

			***PT Jaya Sumpiles Indonesia and another v Kristle Trading Ltd and another appeal* [2009] 3 SLR(R) 689 at [30]** "30 In relation to the first ground, the Guarantors argued that, if the issue of acknowledgment of liability had been pleaded, they would have been able to call evidence in the court below to rebut it. It was argued that the Judge's approach in unilaterally considering the issue of acknowledgment of liability and relying on it (among other grounds) to find that Kristle's counterclaim in S 12/2005 was not time-barred was wrong in law, and that the Judge should not have made any finding on acknowledgment of liability. In this regard, the observations of Scrutton LJ in *Blay v Pollard and Morris* [1930] 1 KB 628 (at 634) are apposite: **Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment**. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course. **We agree with this statement, which reflects a principle of fairness and transparency that has been approved by this court on numerous occasions** (see, for instance, *The Ohm Mariana ex Peony* [1993] 2 SLR(R) 113 at [49]–[53] and *Yap Chwee Khim v American Home Assurance Co* [2001] 1 SLR(R) 638 at [27])." (our emphasis added in bold) ***Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524** "94 We did not agree with Ms Foo's suggestion that she was at liberty to depart from her pleaded case. In an adversarial system such as ours, the general rule is that the parties, and for that matter the court, are bound by the pleadings: *Hadmor Productions Ltd v Hamilton*

			[1983] 1 AC 191 at 233. **The pleadings serve the important function of upholding the rules of natural justice. They require a party to give his opponent notice of the case he has to meet to avoid his opponent being taken by surprise at trial**. They also define the matters to be decided by the court. 95 Ms Foo was also incorrect in arguing that because the Judge had considered the BRA point as well as the loans to the other companies, she could raise these matters on appeal. In this regard, the authors of *Singapore Civil Procedure 2013* (Sweet & Maxwell Asia, 2013) have observed that (at p 274): **If the plaintiff succeeds on findings of fact not pleaded by him, the judgment will not be allowed to stand**, and the Court of Appeal will either dismiss the action … or in a proper case order a new trial if necessary … We agree with this." (our emphasis added) We are therefore concerned if the amendment allows a judge to ask a witness a question that is outside the pleadings for *civil cases* as it may have the *unintended* effect of changing the case that the parties have prepared to meet. Firstly, if a judge asks a question *outside* of the parties' pleadings to the witness (which presumably can happen at trial), then what happens next? Would the witness be in trouble for refusing to answer on the basis that it is un-pleaded and that he did not prepare for the same? Or in the case of an expert witness, if it is outside his brief, would he be required to research the issue, and who would pay for this new work to be done by the expert?

			Would the solicitor (for the party calling the witness) be entitled to raise an objection that the question pertains to an un-pleaded point? Would the party be allowed to *amend* its pleadings on the basis that an un-pleaded point has been raised? Would further discovery be allowed flowing from the point? How would costs be dealt with, if an amendment of pleadings is allowed and an adjournment of the trial is necessitated? We pose these questions as being urgent issues that spring to our mind. Secondly, while pleadings may be criticised for being unduly formalistic at times, they serve the important natural justice role of ensuring that when parties go to trial, they know the case that they have to meet. It also gives effect to party autonomy insofar as you are limited to the claims or defences that you raise. If judges have the power to ask questions to witnesses that are *outside* the scope of the parties' pleadings, *and if* this power may be exercised unfettered by any constraints, then this will result in a shift in our system from an adversarial system reliant on the parties giving each other notice of the case that has to be met early, into an *inquisitorial* system where the judges play an active role in *determining* what are the issues that the judge perceives to be relevant. In such circumstances, we are concerned because it may affect the rules in which current litigation is conducted. This is because similar to how the parties have the autonomy to decide to choose what witnesses to call, parties also have the autonomy to choose what to plead, and what courses of action they choose to proceed with.

			The failure to plead properly has consequences. For instance, the failure to plead a particular cause of action may attract the rule in *Henderson v Henderson* (1843) 3 Hare 100. In a more inquisitorial system, would such rules be changed? If so, it may be inimical to the purposes of limiting issues to be decided before the judge, and the objective of saving time and costs. Furthermore, pleadings also constrain the questions parties may pose. If a party wishes to cross-examine a witness on an *unpleaded* point, then it is open to the opposing counsel to object the relevancy of such a question. If judges are entitled to ask questions on *unpleaded* points (without constraints), then why should a party not similarly be entitled to ask questions on issues which are not pleaded but are relevant? ***Common law constraints on judicial intervention*** In this regard, we note that the common law has developed a series of measured constraints on judicial intervention. In the criminal case of *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 ("*Mohammed Ali*"), the Court of Appeal has made clear that in *appropriate* circumstances, the judge can ask witness questions, provided that the judge must be careful *not* to "*descend (and/or be perceived as having descended) into the arena*": "175 It is appropriate, in our view, to summarise the applicable principles that can be drawn from the various authorities and views considered above, as follows (bearing in mind, however, that, in the final analysis, each case must necessarily turn on its precise factual matrix (see also above at [162])): (a) The system the courts are governed by under the common law is an adversarial (as opposed to an inquisitorial) one and, accordingly,

			the examination and cross-examination of witnesses are primarily the responsibility of counsel. (b) It follows that the judge must be careful *not* to descend (and/or be perceived as having descended) into the arena, thereby clouding his or her vision and compromising his or her impartiality as well as impeding the fair conduct of the trial by counsel and unsettling the witness concerned. (c) **However, the judge is not obliged to remain silent, and can ask witnesses or counsel questions if (*inter alia*)**: (i) **it is necessary to clarify a point or issue that has been overlooked or has been left obscure, or to raise an important issue that has been overlooked by counsel**; **this is particularly important in criminal cases where the point or issue relates to the right of the accused to fully present his or her defence in relation to the charges concerned**; (ii) it enables him or her to follow the points made by counsel; (iii) it is necessary to exclude irrelevancies and/or discourage repetition and/or prevent undue evasion and/or obduracy by the witness concerned (or even by counsel); (iv) it serves to assist counsel and their clients to be cognisant of what is troubling the judge, provided it is clear that the judge is keeping an open mind and has not prejudged the outcome of the particular issue or issues (and, *a fortiori*, the result of the case itself). **The judge, preferably, should not engage in sustained questioning until counsel has completed his questioning of the witness on the issues concerned. Further, any intervention by the judge during the *cross-examination* of a witness should *generally* be *minimal*.** In particular, any intervention by the judge should not

			convey an impression that the judge is predisposed towards a particular outcome in the matter concerned (and *cf* some examples of interventions which are unacceptable which were referred to in *Valley* (see [138] above)). (d) **What is crucial is not only the quantity but also the qualitative impact of the judge's questions or interventions**. The ultimate question for the court is whether or not there has been the possibility of a denial of justice to a particular party (and, correspondingly, the possibility that the other party has been unfairly favoured). In this regard, we gratefully adopt the following observations by Martin JA in *Valley* (reproduced above at [138]): Interventions by the judge creating the appearance of an unfair trial may be of more than one type and the appearance of a fair trial may be destroyed by a combination of different types of intervention. The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might *reasonably* consider that he had not had a fair trial ***or*** whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial … [emphasis added in bold italics] (e) Mere discourtesy by the judge is insufficient to constitute excessive judicial interference, although any kind of discourtesy by the judge is to be eschewed. (f) Each case is both *fact-specific as well as context-specific*, and no blanket (let alone inflexible) rule or set of rules can be laid down. (g) The court will only find that there has been excessive judicial interference if the situation is an *egregious* one. Such cases will

			necessarily be *rare*. It bears reiterating what we stated earlier in this judgment (at [125] above): [T]he argument from judicial interference cannot – and must not – become an avenue (still less, a standard avenue) for unsuccessful litigants to attempt to impugn the decision of the judge concerned. This would be a flagrant abuse of process and will not be tolerated by this court. Parties and their counsel should only invoke such an argument where it is clearly warranted on the facts …" (our emphasis added in bold) We further note that in the very recent Court of Appeal decision of *BOI v BOJ* [2018] SGCA 61 ("*BOI v BOJ*") (which is a civil appeal), the Court of Appeal held that at [111] that "*[q]uite apart from apparent bias, there is also the separate ground of whether the Judge excessively interfered with the proceedings*", citing *Mohammed Ali* with approval. The Court of Appeal in *BOI v BOJ* was careful to highlight that: At [112], the "… *"excessive judicial interference" ground guards against the risk of a fair trial being compromised because of the failure of a decision-maker to observe his proper role and his duty not to descend into the arena … and is borne out of the fact that the system of justice in Singapore is founded on an adversarial model rather than an inquisitorial model …* ***The mischief arises from the decision-maker taking up a position and pursuing it with the passion of an advocate, thereby slipping into the perils of self-persuasion****…*" (emphasis in original) At [113], that "*… another mischief that the "excessive judicial interference" ground guards against is* ***impeding a party's presentation of its case****…*" (emphasis in original) Indeed, we note that in the recent United Kingdom Court of Appeal (Civil Division) case of *Karen Shaw v Peter David Grouby, Claude*

			Anthony Francis Barkham [2017] EWCA Civ 233 ("*Shaw v Grouby*"), where Patten LJ cited Jonathan Parker LJ's decision in *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281, the United Kingdom Court of Appeal highlighted certain risks: "42 Guidance on what can amount to procedural unfairness was given by this Court in *Southwark LBC v Kofi-Adu [2006] EWCA Civ 281; [2006] HLR 33*. In that case there were persistent interruptions by the judge including occasions when he told counsel that there was no point in cross-examining the witnesses or became involved in fairly heated exchanges with counsel about what evidence was relevant. At times the judge's interventions reached a point where the witness could, it was said, be forgiven for feeling that she was facing two simultaneous cross-examiners in the person of counsel and the judge. In his judgment Jonathan Parker LJ said: "142. It is important to stress at the outset that, within the bounds set by the CPR, a first instance judge is entitled to a wide degree of latitude in the way in which he conducts proceedings in his court. However, that latitude is not unlimited. Ultimately, the process must always be the servant of the judicial function of dealing with cases justly (see the overriding objective expressed in CPR 1.1). **In an adversarial system such as we have developed in this jurisdiction the discharge of that function requires the first instance judge (as Lord Denning M.R. put it in *Jones v National Coal Board [1957] 2 QB 55* at 63):** **"… to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large …."** …..

			145. **Nowadays, of course, first instance judges rightly tend to be very much more proactive and interventionist than their predecessors, and the above observations (made, in the case of Lord Denning M.R., almost 50 years ago, and, in the case of Lord Greene M.R., more than 60 years ago) must be read in that context. That said, however, it remains the case that interventions by the judge *in the course of oral evidence* (as opposed to interventions during counsel's submissions) must inevitably carry the risk so graphically described by Lord Greene M.R. The greater the frequency of the interventions, the greater the risk; and where the interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one.** 146. It is, we think, important to appreciate that the risk identified by Lord Greene M.R. in Yuill v Yuill does not depend on appearances, or on what an objective observer of the process might think of it. Rather, the risk is that the judge's descent into the arena (to adopt Lord Greene M.R.'s description) may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair. 147. In the instant case we are left in no doubt that the judge's constant (and frequently contentious) interventions during the oral evidence, examples of which we have given earlier in this judgment, served to cloud his vision and his judgment to the point where he was unable to subject the oral evidence to proper scrutiny and evaluation. This conclusion is confirmed by his irrational findings in relation to housing benefit and by his complete failure to address the credibility of Ms Kofi-Adu's evidence in his judgment or to explain why he rejected the evidence of Mrs Aitcheson's diary sheets. It is also supported by the fact that the references in his judgment to the evidence of the various witnesses are almost all derived from their witness statements, rather than from their oral evidence. Indeed, it is impossible to tell from his

			judgment what (if any) assistance he derived from the oral evidence which he heard, as opposed to the documentary evidence and the witness statements. 148 In our judgment, therefore, the manner in which the judge conducted the trial led to a failure on his part to discharge his judicial function. That is not to say, of course, that the decisions which he reached on the issues of nuisance and annoyance (including the issue of reasonableness in that context) might not have been reached following a proper evaluation and scrutiny of the evidence. Plainly, they might. The flaw in the instant case lies not so much in the decisions themselves as in the way in which the judge reached them, in that he allowed himself not merely to descend into the arena but, once there, to play a substantial part in the interrogation of the witnesses. **In effect, he arrogated to himself a quasi-inquisitorial role which (as Lord Denning M.R. explained in *Jones*: see [142] above) is entirely at odds with the adversarial system**." (our emphasis added in bold) So, the common law has built up a body of case law that has carefully circumscribed the permissible ambits of judicial intervention. Furthermore, these ambits are well-established, and have been carefully applied by the Courts. Nevertheless, the point which we wish to emphasize is that *the current law as it stands* already empowers a judge to ask questions to witnesses, and has carefully tempered and honed a set of constraints to limit the exercise of that power. **How could the recommendations be improved?** Therefore, in our opinion, the recommendations could be improved if there is an express reference that the amendment is **not** meant to change the current law on judicial intervention (at the very least in high-

			value or complex civil litigation, as opposed to situations involving criminal cases or litigants-in-person). ***Support for judge-led questioning for family and tribunal cases*** For the avoidance of doubt, we agree and we support the proposal for a pilot project for judge-led cross-examination in, e.g., family cases and Community Disputes Resolution Tribunal cases. However, we are, respectfully, unable to support such a proposal insofar as it relates to commercial cases bearing in mind the issues we have highlighted earlier. ***Broad guidelines should be promulgated for comments*** In this regard, we are heartened to note that the Public Consultation has adopted paragraph 100 of the CJRC Report which calls for "*broad guidelines [to] be introduced for judges who engage in the examination of witnesses*". In our opinion, such guidelines should be promulgated as swiftly as possible, so that the legal community may have the opportunity of providing their feedback on such guidelines.
51.	Affidavits filed as evidence-in-chief must bear a colour photograph of the maker of the affidavit. This will assist the trial judge in recalling what any particular witness looks like when the trial judge is considering a reserved judgment or is writing grounds of decision.	Consultation Paper, paragraph 112	Allows judge to pre-form opinion of person pre-trial if judge reads AEIC and sees the photo. If necessary to jog a judge's memory, take a picture of each witness at trial and stick it on the judge's copy of the AEIC thereafter.
52.		Proposed ROC at Chapter 11, Rules 17, 21, 22 and 27	Chapter 11(17), (21), (22) and (27) – will an affidavit signed by a Notary Public or Singapore Consular Officer no longer be accepted as an affidavit? Will an affidavit made overseas require a Singapore Commissioner for Oaths to fly to the location of the deponent?

		Proposed ROC at Chapter 11, Rule 26(1) Proposed ROC at Chapter 11, Rule 26(5)	Chapter 11(26)(1) – documents referred in affidavit must be annexed. So it will no longer be possible to refer to, say, document item X in the bundle of documents (re Chapter 7(24)(5)). It will make for thick affidavits in all cases and duplication of documents that will be in the bundle of documents. An exception should be made for AEICs, where reference to documents should be to the bundle of documents. Chapter 11(26)(5) – what does it mean that the annexures must be "identified by a certificate" – is it the same as present practice?

L. Appeals

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
53.		Proposed ROC at Chapter 7, Rule 8(8) read with Chapter 13, Rule 2(2)	**Non-appealability of case management decisions** 1. It is unclear whether there is a right of appeal from decisions at the Case Conference to disallow parties from taking out interlocutory applications[90]. 2. If the effect of the Court's decision will be to deny parties the right to take out an interlocutory application, it is suggested that this decision be made by the docketed trial Judge without the need for oral arguments (unless required, and requested by the trial Judge). 3. Another alternative is to have a mechanism for paper-only appeals from the registrar to the docketed trial Judge for such decisions.
54.		Proposed ROC at Chapter 13, Rules 2, 13, 15, 19 and 22	**Timelines for appeals** 1. Many of the timelines to file appeals from applications have been significantly reduced[91]. 2. Considering that appeals from applications are likely to mainly arise out of Single Applications, the very limited amount of time provided (7 days) for such appeals from State Court and High Court Registrars, and from the State Court District Judges/Magistrates to the High Court, will leave parties with very little time to review the decision/s made and take advice on the merits of possible appeals.

[90] See: Ch. 7 r 8(8) read with Ch. 13 r 2(2) of the proposed Rules.

[91] See: Ch. 13 rr 2 and 13 (appeals from Registrars to District Judge in applications – time reduced from 14 to 7 days); Ch. 13 rr 2 and 15 (appeals from District Judges/Magistrates to High Court – time reduced from 14 to 7 days); Ch. 13 rr 2 and 19 (appeals from Registrar in Supreme Court to High Court Judge – time reduced from 14 to 7 days); Ch. 13 rr 2 and 22 (appeals from High Court to the Court of Appeal – time reduced from 1 month to 14 days).

55.		Proposed ROC at Chapter 13, Rule 4	**Unwieldy Appeals from the Single Application** 1. Each party is allowed to file **only** one appeal for each application[92]. 2. Read together with the requirements for the Single Application[93] and the provision for time for appealing to run only after the Court has determined all matters in an application[94], appeals from the Single Application can effectively become a re-hearing[95] of all the interlocutory applications made under the rubric of the Single Application. 3. All the concerns that we have outlined above in the context of the feasibility of the Single Application (see paragraphs [110 to 124] above[96]) will therefore arise in relation to the single appeal from the Single Application.

[92] Ch. 13 r 4 of the proposed Rules.
[93] Ch. 7 r 8(2) of the proposed Rules.
[94] Ch. 13 r 3 of the proposed Rules.
[95] Ch. 13 r 14(4), r 16(4), r 20(4) and r 24(4) of the proposed Rules.
[96] Cross-reference in original. The referenced paragraphs are not reproduced in this Appendix. They read:
"Efficiency and economic disposal of pre-trial processes
110. In addition, it is foreseeable that the following difficulties (impacting efficiency and economic disposal) will be encountered:
(a) some interlocutory applications are necessarily determined sequentially
For example, applications for addition/removal of parties, striking out, amendments to pleadings, or summary judgment would normally have to be heard first.
However, if the Single Application is broken into stages or parts (ie. some matters in the Single Application are determined first while others are pending or scheduled later), the Single Application would in substance be no different from having separate applications.
We will end up in almost exactly the same position as we are currently in.
(b) The outcome of one interlocutory application can sometimes affect the necessity for, or provide the grounds for another interlocutory application
For example, outcomes from discovery and F&BP applications may lead a party in due course to decide that a striking out application is warranted.
In one case, 7 interlocutory applications for discovery and particulars were filed before the defendant was able to determine that there was no prima facie case.
The Court held that the prior interlocutory applications were required owing to the generality and vagueness of the claim. The defendant successfully applied to strike out the claim.
111. The Single Application procedure will compel parties and their lawyers to prematurely speculate on and include all potential applications, regardless of whether they might turn out to be unnecessary (in light of developments in other applications).
112. Instead of simplifying the process and improving efficiency and speed of adjudication, it is likely that this will instead, and dramatically increase complexity, inefficiencies and costs.
113. While it occasionally makes sense for certain types of interlocutory applications to be heard together, this can already be achieved on a case by case basis under the present system via case management.
114. The Single Application is unnecessary, and in any event, is unlikely to achieve this particular type of efficiency/savings of time and costs.

			4. In short, we are of the view that the present mechanism for a single appeal from the Single Application will lead to increased and unnecessary complexity, inefficiency and cost, and may also lead to injustice. 5. There is no requirement to compound one layer of potential complexity with another by insisting on having a single appeal from the Single Application. 6. We suggest that a lot of unnecessary complexity (as well as wasted time and costs) can be avoided by allowing distinct appeals to be made for each interlocutory application made under the Single Application's rubric.

The Single Application will lead to injustice

115. Injustice will be occasioned if the Court takes an overly strict approach to restricting interlocutory applications outside the Single Application.

116. Meritorious interlocutory applications that may lead to just, efficient and cost-effective outcomes, but which were not anticipated at the time of the Single Application will be potentially shut out under the case management powers of the Court in the Case Conference.

117. There does not appear to be any right of appeal if the Court does *not* give "approval" for an interlocutory application outside the Single Application.

118. Injustice may therefore be occasioned if there is no right of appeal against the withholding of approval, as meritorious applications may be shut out.

119. The existing Rules do not give rise to the above complications. Interlocutory applications are dealt with on their own merits/demerits, and there is no requirement to get prior approval to file an application.

The Single Application will increase delays and costs

120. The proposed Rules will introduce the additional step of sending letters, or making oral requests at the Case Conference, for approval to file interlocutory applications outside the Single Application.

121. This will likely result in more (as well as more contentious) correspondence or Case Conferences.

122. The overall effect will be to increase costs and delays for parties.

123. There also does not appear to be any avenue for successful parties to recover costs incurred dealing with requests for approval to file interlocutory applications. This seems contrary to the principle of access to justice, as successful parties are effectively penalised at the interlocutory stage for raising meritorious applications.

124. The proposals also envisage that there will be a single appeal after all the matters in the Single Application are determined. However:

(a) a single appeal may not be feasible where the outcome of one interlocutory affects another interlocutory

If lawyers have to prepare for the single appeal on the basis of all possible permutations, this will increase complexity and costs;

(b) where the Single Application is necessarily broken into stages or parts, **some applications may be decided at a prior stage but any appeals from such decisions would have to wait for all remaining matters in the Single Application to be determined before the single appeal can proceed**

This will lead to unnecessary delays and costs.

For example, a defendant who wants to appeal against an unsuccessful application for summary judgment (or striking out) would have to take additional steps in the pre-trial processes (such as discovery or expert evidence) in the Single Application before the appeal proceeds.

Even if the appeal on the summary judgment application succeeds, all the work done on the other interlocutory applications would have been wasted;

(c) it is envisaged that appeals from the Single Application will become extremely unwieldy, as they may conceivably involve all the interlocutory applications approved at the Case Conference, and taken out."

			7. This will help to avoid some of the difficulties that we reflected on earlier in relation to wasted work (see paragraph [124(b)] above[97])

[97] Cross-reference in original. The referenced paragraph is reproduced at footnote 96 above.

T. Other Feedback

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
56.		CJC Report, at paragraph 1 of the foreword; CJRC Report, at paragraph 7	1. The objective of the Civil Justice Commission (***"CJC"***), according to its Terms of Reference[98], is the transformation of the litigation process via:- (a) modernisation; (b) enhancement of efficiency and speed of adjudication; and (c) maintenance of costs at reasonable levels. 2. The guiding objectives[99] of the Civil Justice Review Committee (***"CJRC"***) are:- (a) advancing access to justice; (b) ensuring fairness, affordability, timeliness, simplicity and effectiveness. 3. These abovesaid objectives are obviously important, and [Law Firm Name] is fully in agreement that they are essential considerations in any attempt to reform the civil justice process. 4. [Law Firm Name] is of the view that the following considerations are also material in reforming the civil justice process: (a) **fair and impartial access to justice** – for example, where parties have asymmetric access to information and documents, if the litigation process leans too far in favour of

[98] Terms of Reference of the CJC, paragraph 1 of the foreword to the CJC Report dated 29 December 2017.
[99] CJRC Report, paragraph 7.

			efficiency or speed, the result will be that the party with less access to documents will be unable to obtain a fair and impartial hearing; (b) **certainty and predictability of the existing procedural rules** – there are at least decades of decisions interpreting the existing Rules of Court. This body of procedural jurisprudence has made it possible for clients to be reasonably advised of the range of possible outcomes in civil litigation. Moving away from the existing Rules will require litigants and advisers to embark on significant, costly and ultimately inefficient litigation. As an example, there are a total of 24 references[100] to the phrase "special case" in the proposed Rules of Court, with each of these covering distinct areas[101]. Compared to this, there is no reference to, or use of the phrase "special case" in the existing Rules of Court. The areas wherein the phrase "special case" is applicable give rise to vastly distinct concerns. It is therefore likely that litigants and advisers, and the Court, will spend at least years working out the contours of the various meanings of that phrase in the different contexts within which they will be deployed. (c) **Many of the issues identified can be resolved within the matrix of the existing Rules** – they do not require a wholesale abandonment of the existing jurisprudence. For example, if the concern is that there are too many interlocutory applications, perhaps the Courts can be more robust in making adverse

[100] Paragraphs 18 and 31 of the Preamble, Ch. 1 r 8(6), Ch. 4 r 3(4), r 5(4), r 12(6), Ch. 7 r 5(3), r 8(10) & (11), r 13(2) & (3), r 24(9), Ch. 8 r 3(4), r 5(1), Ch. 9 r 3(1),(2) & (3), Ch. 11 r 15(2), Ch. 16 r 1(2)(b), r 10(1)(b),(10) & (11)(a), Ch. 17 r 10(1)(b).

[101] Examples (non-exhaustive) include extensions of validity of originating processes [Ch. 4 r 3(4)], extension of time to file the defense [Ch. 7 r 5(3)], applications within 14 days before trial [Ch. 7 r 8(10)], discovery of train of inquiry documents and private or internal correspondence [Ch. 8 r 5], use of more than 1 common expert [Ch. 9 r 3].

			costs orders. They are already empowered to do so under the existing Rules[102]. This approach may be preferable to making new Rules that lead to more litigation over the interpretation thereof (see paragraph 4(b) above). (d) **the reduction of advocacy opportunities, and the public interest in a strong civil litigation Bar** – the focus on reducing the number of interlocutory applications and appeals must lead, on the whole, to the reduction of advocacy opportunities, and advocacy time, for younger advocates. The streamlining of the interlocutory process into the Single Application is likely to cause clients to insist that the most senior counsel available make all the arguments at all stages. The situation on opportunities for young lawyers to cut their teeth in advocacy is already considered to be less than ideal at this point, and it will get worse. 5. Subject and in addition to the over-arching material considerations set out above, [Law Firm Name] is of the view that in many areas (to be dealt with below), the proposed Rules appear to be unsatisfactory in that they will fail to achieve the stated objectives of the CJC and the CJRC. For example, the requirement for there to be a Single Interlocutory Application[103] poses significant difficulty, as parties will be unable to foresee, at such an early stage, all the necessary interlocutory applications. There will be more inefficiency and wasted time and costs instead of less.
57.		Nil	<u>Too many rules changes</u> The civil litigation system is generally working well.

[102] Order 59 r 5(b), (c), (d); r 6A, r 7, r 8 of the existing Rules of Court.
[103] Ch. r 8(2) & (3) read with (7) to (9).

			It took more than a 100 years for the current Rules of Court to evolve. The current proposal that changes the current Rules of Court wholesale overnight is too drastic. It could result in the degradation of the civil litigation system. I would respectively propose that there be **implemental changes** [sic] that can be fine-tuned along the way, instead of implementing such a drastic change.
58.		Nil	The proposed reforms have completely discarded the structure of the existing Rules of Court. There is a lack of continuity with existing practice. While there could be shortcomings in the existing Rules of Court, this is throwing the baby out with the bathwater. Large bodies of academic literature, such as the present editions of Singapore Court Practice and Singapore Civil Procedure, will cease to be directly applicable. This is confusing to the bar and, potentially, even to some laymen who have been conducting their cases as litigants-in-person and may have come to be familiar with the existing Rules of Court. The complete rewrite of the Rules of Court may also bring it into disharmony with the Family Justice Rules, a significant portion of which was based on the existing Rules of Court and may result in an extensive and potentially costly restructuring as a consequence.
59.		Nil	In principle, is it jumping the gun to completely transform a tried, tested and proven set of civil procedure rules which have been developed over time and which jurisprudence is inter-linked with existing Commonwealth and English jurisprudence? Would we end up an outlier like America, albeit without their bargaining power? (a) Would it be better to “Sandbox” the new rules to specific types of claims instead of jumping in headlong and adopting them as-is?

			(b) Do the overhaul of rules upend the system of certainty Singapore is known for? We're essentially taking the rules of civil procedure here back to year zero.
60.		Nil	**Revamp of the Rules of Court to simplify** There is a need for caution. Much of which has been developed was not achieved in a short time but after much thought and consideration. Much as simplicity has its merit but one also needs to consider and examine why these rules were put in place before removing much of it wholesale.
61.		Nil	If the proposed reforms to the civil justice system were so transformative, then the policy objective of such reforms should have been set out clearly. If studies of other jurisdictions had been done, then the basis of such studies should have been shared in the reports. For example, Japan, which subscribed to an inquisitorial system, had a tripartite collaboration between the judiciary, lawyers and parties. In addition, the reports did not appear to appreciate the backend work of practitioners, including sorting out documentation, taking considerable time to clarify clients' instructions and facilitating proper discovery. One grave consequence of such reforms was that unlicensed legal tech companies would be benefiting from unregulated administrative work at the expense of practitioners.

Appendix 2: Feedback from the Law Society's Civil Practice Committee

A. General Matters

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
1.	25. The Rules relating to the parties' ability to extend time by consent will be modified such that parties may only extend time without an order of court once, by mutual consent in writing, and for a maximum period of 7 days.	Consultation Paper, paragraph 25; proposed ROC at Chapter 1, Rule 7(3)	Not allowing parties to agree on extensions of time more than once and beyond 7 days may be counterproductive to cost effective work or the early resolution of disputes. If parties are able to agree to extensions for example with a view to resolving disputes during the course of proceedings with less acrimony and fewer legal arguments in Court, such agreement should be allowed rather than forcing parties to have to apply to Court for otherwise agreed extensions of time.

C. Amicable Resolution of Cases

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
2.	32. (CJRC & CJC) If the court is of the view that the duty to consider amicable resolution has not been discharged properly, the court will be empowered to order parties to attend ADR. Notwithstanding this power, the judge will, as far as possible, encourage parties to attend ADR by consent.	Consultation Paper, paragraph 32; proposed ROC at Chapter 3, Rule 3(1)	Court may order parties to attend ADR: ADR options such as mediation are premised on consent. It may not be proper to force parties to attend mediation, because: (1) Parties may attend mediation as a formality which is not conducive to settlement, and wastes time and costs; or (2) Parties may feel forced to settle.

			It may be better to instead strengthen the Court's ability to order costs to be paid by a party that unreasonably refuses to attempt ADR including but not limited to moving the courts ability to order adverse costs order from PD to the main rules.
3.		Proposed ROC at Chapter 3, Rule 3(2)	Court may suggest possible terms of settlement: It may send a wrong signal to the parties if the Court proposes terms of settlement. If the proposed terms lean to one side or the other, it may suggest that the Court favours that side's case.

D. Commencement of Proceedings

No	**Consultation paper paragraph extract**	**Consultation materials referred to**	**Feedback**
4.	40. A claimant's ability to file a generally endorsed Originating Claim merely to preserve his position and leverage on having filed an action in court will be restricted. As such, an Originating Claim has to be endorsed with a statement of claim unless the limitation period for the cause of action will expire within 14 days after the Originating Claim is issued.	Consultation Paper, paragraph 40; proposed ROC at Chapter 4, Rule 5(4)	Parties cannot file generally endorsed Originating Claims unless limitation period will expire within 14 days: There are a variety of reasons as to why generally endorsed Originating Claims are filed, and limits should not be placed to allow for it only in cases the expiration of the litigation period. Such reasons include the need for to apply urgently for injunctions, freezing orders, and where Writs need to be swiftly filed before defendants leave the jurisdiction and cannot be easily served.

F. Case Conference

No	Consultation paper paragraph extract	Consultation materials referred to	Feedback
5.	67. (CJC) The court may direct parties to file and serve their list of witnesses and to file and serve AEICs of all or some of the witnesses after pleadings have been filed and served but before any exchange of documents. (CJRC) Parties may file supplementary AEICs following disclosure of documents, but only with leave of court.	Consultation Paper, paragraph 67; proposed ROC at Chapter 7, Rule 7(1)	Court may direct parties to file and serve AEICs after pleadings are filed: Filing of AEICs after pleadings requires Parties to front load work that currently happens after discovery or after efforts to settle the dispute have failed. This may increase costs for matters which otherwise settle before AEICs. If this process occurs pre-ADR, it may be counterproductive to the goal of reaching settlement, from a costs perspective. It may also result in injustice if relevant and important documents that should be revealed in discovery are held by only one of the parties, and the other party is not able to file a complete AEIC until having had sight of these.
6.		Proposed ROC at Chapter 7, Rule 8(4) and 8(5)	The single application pending trial is to be filed within 21 days of the case conference, dealing with most current interlocutory applications. Striking out is part of the single application: (a) It is unclear why a defendant should not be able to apply to strike out a defective SOC before filing its own defence. This proposal ignores the relevance of interlocutory orders at different points of court proceedings; interlocutory applications are often taken out to assist at certain points or they may be occasioned as a result of other interlocutory applications e.g. specific discovery after discovery or further and better particulars.

7.		Proposed ROC at Chapter 7, Rule 8(4)(d) and Rule 11	Security for costs: As an example of point (a) above, an application for security for costs should be dealt with as soon as possible. Under the Draft Rules, an application for security for costs would only be dealt with at the Case Conference after AEICs. It would be counterproductive to have to wait after the filing of defence, pleadings, AEICs to apply for security of costs, especially as security for costs if granted will only apply to costs incurred after the order is made, not prior to that.
8.		Proposed ROC at Chapter 7, Rule 8(2) and 8(3) Proposed ROC at Chapter 8, Rule 3(1)(b)	As far as possible, the Court shall order a single application to be made by each of the parties to deal with all matters that are necessary for case to proceed expeditiously: It is impracticable for all applications to be dealt with in a single application: (1) Production of documents and request for Further and Better Particulars (FBPs) are both part of the single application. However, the requesting party for documents must show that the requested documents are "*material*". It is unclear how a party can file a production request and show that requested documents are material if the opponent's pleaded case is defective such that the issues have not been properly identified and would require FBPs; (2) If both parties intend to take out interlocutory applications, including amendment of pleadings or striking out, one necessarily must be dealt with before the other and it would not be practical for all applications to be filed together; (3) If parties are trying to add additional defendants or third parties, or consolidate actions, it would not make sense for parties to file other interlocutory applications at the same time. Otherwise once the additional defendants or third parties are added, they would not have had the opportunity to file their own applications and would

			require a fresh Case Conference for a fresh round of "single application", which would be highly artificial.
9.		Proposed ROC at Chapter 7, Rule 8(4)(i)	Summary judgment has inconsistent timelines: Summary judgment is included in the single application, which must be filed within 21 days after the Case Conference. The reply affidavit is then a further 21 days after the applicant's affidavit - Ch. 7 Rule 8(5). The rule on summary judgment (Ch. 7 Rule 16) however provides for the reply affidavit to be filed within 14 days. There is no explanation for this apparent inconsistency, i.e. (Ch. 7 Rule 16(3)) and Ch. 7 Rule 8(5).

G. Production of Documents

No	**Consultation paper paragraph extract**	**Consultation materials referred to**	**Feedback**
10.	79. (CJRC & CJC) The current process of general discovery followed by specific discovery has led to situations where the time and costs spent on discovery are disproportionate to the complexity and value of the claim. Thus, an arbitration-style disclosure of documents will be adopted by default in the new regime. Parties will first produce the documents upon which they rely for their respective cases. To counter the concern that the arbitration-style of discovery may enable parties to withhold documents adverse to their own case, the	Consultation Paper, paragraph 79; proposed ROC at Chapter 8, Rule 2	<u>Under the new discovery regime, parties are only required to produce documents they rely on for their case.</u> This may be counterproductive and may result in a greater number of specific discovery applications. Further, since the parties are not required to disclose adverse documents, the scope of specific discovery categories may be broad.

	availability of specific discovery will enable a party to request documents (in particular, documents which are adverse to the party holding them) from the other party.		
11.	80. The court will retain a residual discretion to allow a broader scope of discovery on application by any party if it is satisfied that it is in the interests of justice. It will be in the interests of justice to allow such broader scope of discovery where it could aid in disposing fairly of the proceedings.	Consultation Paper, paragraphs 79-80; proposed ROC at Chapter 8, Rule 3	<u>The Court retains discretion to allow specific discovery to counter the concern that parties may withhold adverse documents</u> If the Court then does not allow broadly scoped specific discovery applications (or more than a single one), this would then fail to address the concern that parties can simply hide adverse documents.
12.	83. The production of any "train of inquiry" document or a document that is part of a party's private or internal correspondence is prohibited except in a special case. "Special case" is deliberately left undefined to allow for flexibility and good sense should a rare case emerge.	Consultation Paper, paragraph 83; proposed ROC at Chapter 8, Rule 5	<u>The Court shall not order production of a party's private or internal correspondence</u> This appears to extend beyond privileged information or documents. This may have adverse consequences. The current existing rules on privilege should continue to apply.

H. Expert Evidence

No	**Consultation paper paragraph extract**	**Consultation materials referred to**	**Feedback**
13.	89. (CJC) In light of the above difficulties, the general rule is that one common expert will be used. In a special case and with the court's approval, the parties may use their own experts but they cannot rely on	Consultation Paper, paragraph 89; proposed ROC at Chapter 9, Rule 3	It may be impossible for parties to agree on an expert since the nature of science often allows for differing scientific opinion. The problem of the expert witnesses having irreconcilable differences in opinion is not always because they are partisan but because they are putting forward two different interpretations of their particular expert field.

	expert evidence from more than one expert on all or any of the issues. The court retains the discretion to appoint a court expert in addition to or in place of the parties' common expert or all the experts. The Court will give all appropriate directions relating to the appointment of the common expert and the court expert, including the method of questioning and the remuneration to be paid. (CJRC) The single court expert will be granted access to all evidence to assist in the formulation of his expert opinion.		It is unworkable and very difficult for parties to agree and/or for the Court to appoint a common expert. Further, a party should not be disallowed from adducing the evidence it feels is important to its case. The Court should continue to be required to attach the weight it deems fit to each expert's testimony, rather than forcing parties to have a single expert. If the concern is over partisan evidence, then 'hot-tubbing' the experts may address this.
14.	94. (CJRC) While the position that the court appoints an expert, if at all, will be applicable by default, parties will be given the option to appoint their own expert witnesses if all parties to the dispute agree to do so.	Consultation Paper, paragraph 94	Although the Consultation Paper states that parties will have the option to appoint their own expert witnesses if all parties agree, the Draft Rules do not seem to include this provision.

J. Court Hearings and Evidence

No	**Consultation paper paragraph extract**	**Consultation materials referred to**	**Feedback**
15.	106. (CJRC & CJC) The judge may also exercise a power to call a factual witness if none of the parties intends to call a witness whose evidence, in the judge's opinion, is likely to be necessary to resolve the dispute.	Consultation Paper, paragraphs 106-107; proposed ROC at Chapter 7, Rule 21	The Court may call factual witnesses, and the power will be exercised "*very sparingly*": The Draft Rules do not state that this power is to be exercised sparingly. This may need to be stated more clearly. In addition, the current Rules already allow for this.

	107. (CJRC) This power will be exercised very sparingly. The judge should ask parties for the reasons why the witness is not called before exercising the power to call the witness on his own motion. After hearing the parties' reasons, the judge can exercise the power to call that witness on his own motion if he is still of the view that the witness' evidence is necessary to resolve the dispute.		
16.		Proposed ROC at Chapter 7, Rule 21(3) and 21(4)	The Court may invite persons or entities who can assist on the issues in the case to give views in writing, and this person is not subject to cross-examination or required to attend the hearing: It may be unfair to allow evidence or views to be taken in Court, without allowing parties the opportunity to cross-examine the giver of such evidence or views. It is important for justice to be seen to be done. If there is such information which the Court wishes to rely on to reach a decision, whichever party eventually loses may well feel aggrieved that they had no opportunity to challenge this information through cross-examination.

M. Reforms to framework of legal costs (excluding scale costs)

No	**Consultation paper paragraph extract**	**Consultation materials referred to**	**Feedback**
17.	117. The CJC has the following recommendations for a fixed costs regime, under which:	Consultation Paper, paragraph 117(iv); proposed	*Points on scale costs extracted and placed in separate feedback document No costs of interlocutory applications:

	iv. No costs will be awarded for applications unless there is unreasonable conduct.	ROC at Chapter 16, Rule 4	There is no explained rationale in the Consultation Paper. In the CJC Report (page 30), the rationale of the regime of fixed cost was that would be "*no incentive for solicitors to prolong or complicate the proceedings by taking out multiple applications and appeals because there is only one fixed price. No costs for applications will be ordered unless there is unreasonable conduct on the part of any of the parties*". (1) Solicitors act in their client's best interests, and the purpose of filing applications is to help achieve the client's goals and usually not for the purpose of obtaining greater fees. (2) Not allowing costs of applications may encourage interlocutory battles and disagreements between the parties, since the applicant would have nothing to lose but their own time and their own legal fees, even if they lose a particular issue. (3) Parties are less likely to agree on matters, since they would know that even if the opposing party is forced to apply to Court and obtains an Order, they would not be ordered to pay P&P costs. This is unlike the present situation where parties are encouraged to agree to reasonable requests, because they know that if they refuse unreasonably, the opposing party can simply apply to Court for the same result and they would be ordered to pay costs for wasting time. As an alternative to not allowing costs completely, the court could choose to fix all costs at the end of proceedings.