Comments on Proposed Reforms to the Civil Justice System and Related Amendments to the *Rules of Court*

November 2018

Introduction

Reforms to civil procedure recently proposed by the Civil Justice Commission (CJC) and Civil Justice Review Committee (CJRC) cover a wide range of areas. Some of the proposed changes, and more importantly, the principles articulated, may be particularly relevant to actions initiated by or involving low-wage migrant workers. They affect migrant workers' access to justice in specific ways. HOME therefore offers our comments on these areas of the proposed reforms.

1 Judge-Led Approach

CJRC Report [37]–[40], [92], [93], [100]–[104]

1.1 The proposed reforms envision a more proactive judicial role. HOME welcomes this paradigm shift. The adversarial system is disproportionately onerous for disadvantaged litigants, and for those facing language and cultural barriers, such as low-wage migrant workers.

1.2 A substantively expanded judicial role at hearing is an important aspect of this. For example, empowering judges to call witnesses may ameliorate the difficulties when evidence is peculiarly within the control of a non-party. This especially affects low-wage migrant workers who often, in this as in so many other areas, are heavily dependent upon their employers, and associated entities such as principal contractors.

1.3 HOME welcomes enhancing professional training and development to prepare judges and lawyers for this new judicial role. We hope that this paradigm shift will also fruitfully fertilise adjudication in statutorily-created judicial tribunals, where many of the most disadvantaged litigants have matters ventilated without legal representation.

1.4 In the Employment Claims Tribunal, primary legislation actually mandates a "judge-led approach".[1] However, in the experience of HOME's clients, there appear to be a range of interpretations, far from clear, amongst judicial officers.[2] Comparing cases where the claimant workers appear equally disadvantaged: some judges are proactively inquisitorial; whereas others still have a 'hands-off' approach. HOME looks forward to greater clarity and consistency arising from the normalisation of and training for this approach in the broader context of mainstream civil litigation.

2 Proposed Privatisation of Enforcement

CJRC Report p36, Annex A

2.1 The CJRC Report recommends that enforcement be privatised. It outlines several problems with the current system: information asymmetry on assets, the onerous burden of investigation, cost efficiency, and the limited modes of enforcement available. HOME agrees with the CJRC Report's diagnosis of the current problems with enforcement. However, it is unclear that privatisation is a panacea for these issues.

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[1] *Employment Claims Act 2016* s 20(2).

[2] Cf Humanitarian Organisation for Migration Economics, *Migrant Workers' Access to Justice in Singapore's Employment Claims Tribunal: Preliminary Findings of a Qualitative Study* (online publication forthcoming at http://www.home.org.sg).

2.2 The foremost concern is that privatisation may well exacerbate the costs for litigants. It seems counter-intuitive that enforcement in the hands of private entities will be effectively regulable according to a prescribed scale of (proportion of) fees, when the current Court-centric system has been lacking. Further, privatisation may increase the burdens on the most vulnerable and impecunious judgment creditors, such as low-wage migrant workers, whose judgment sums are seldom large enough for a proportion-based fee structure to incentivise service providers.

2.3 More fundamentally, enforcement is the locus where the law meets reality, and where the protection of and respect for the administration of justice is tested on a quotidian basis. The transfer into private hands of such a vital function of public justice should be considered with great circumspection, as a matter of principle.

2.4 From a practical perspective, the removal of the intrusive compulsion of enforcement action from immediate milieu of the courts' legitimacy may risk a slippery slope of undesirable consequences, such as exacerbating the development of a black market for such services. It is the most disadvantaged judgment creditors who will be most vulnerable to unscrupulous peddlers.

2.5 HOME looks forward to the further study, as envisioned in the CJRC Report, of this important and difficult issue. To that end, we hope that the findings of the study visits to other jurisdictions will be publicised in some form to facilitate informed public engagement.

3 Appeals from Statutory Authorities — *Rules of Court 2018*, Chapter 15

3.1 Order 55 of the *Rules of Court*, which deals with appeals from non-judicial, statutorily authorised bodies, will be rewritten and reenacted as Chapter 15 of the new *Rules*. The rules governing such appeals, and appeals by case stated, have been streamlined and simplified, being now both under a single Chapter.

3.2 On the whole, HOME welcomes the simplification and condensation of rules of procedure for tribunal appeals. In some areas, Chapter 15 may in fact be too brief and require more detail for clarity. For example, Chapter 14 r 11 provides that the starting points for security for costs in an appeal from the Magistrate's or District Court to the High Court will be $3,000 or $5,000 respectively. Whilst Chapter 15 imports into the Court hearing such appeals "all the powers that [the appellate court] has when hearing an appeal after trial", it is unclear whether the guideline as to quantum of security for costs in Chapter 14 r 11 applies; and if so, which limb. Such clarity, at least as to starting point, would be most helpful for litigants contemplating whether to appeal.

3.3 Another instance is how the new *Rules* delineate the appellate Courts' dealing with appeals from statutory authorities. Chapter 15 imports into the appellate Court "all the powers that it has when hearing an appeal after trial," without qualification as to how those powers would usually be used. There are of course well-established differences between appeals from the ordinary courts and appeals from statutorily-created administrative fora. It may be helpful, especially if the new *Rules* aim at guiding unrepresented litigants, to indicate distinctions in how the appellate Court would exercise its powers on appeal.

4 Video Conferencing Evidence — *Rules of Court 2018*, Chapter 11

4.1 The advent of sweeping modernisations to civil procedure furnishes opportunity to reconsider the logistics of giving evidence. For a transient migrant worker, giving evidence for their own case is often an insurmountable barrier to accessing justice. Most of HOME's clients experience constant economic precarity, even in their own country. If, subsequent to their stay in Singapore, they have employment in their home countries or elsewhere, travelling to Singapore to testify would often fatally jeopardise their jobs. Yet requiring evidence (and cross-examination) in person remains a seemingly inexorable norm.

4.2 The conditions under which the Court may allow video-link evidence are non-exhaustively outlined in *Evidence Act 1997* s 62A and judicially considered in English cases,[3] which generally favour a relatively liberal approach. The English jurisprudence has been accepted *obiter* in Singapore. Furthermore, the revised *Rules* now permit hearings to proceed on documents alone in certain circumstances. While those cases would not be the norm, videolink evidence does not in itself prejudice any party, because it still allows for cross-examination. Clearly, the giving and weighing of evidence is now open to broad modernisations.

4.3 HOME urges that the foregoing are all compelling reasons for liberalising the availability of videolink evidence, subject of course to the satisfaction of technological requirements. This would contribute significantly to migrant workers' access to justice.

5 Justice Seen to be Done

Rules of Court 2018, Chapter 11

5.1 HOME is deeply concerned that the new *Rules of Court* provide for "all Originating Applications, summonses…and appeals" to be "heard in chambers." We believe that "not only must justice be done; it must also be seen to be done." At a general level, there is a public interest in the liberty to observe the nuts and bolts of our legal system: which after all, serves not only as a dispute resolution mechanism as between the parties; but also as authoritative interpreters of the law and its application.

5.2 As regards particular cases involving HOME's clients, or issues which affect HOME's clients, HOME has a real and significant interest in attending the hearings. Often, it is HOME's staff who has provided the support for the migrant worker litigants, and assisted them in engaging and liaising with their pro bono counsel. The migrant worker litigants would usually very much prefer our attendance. We acknowledge that the proposed *Rules* leave a discretion to the Court to permit our attendance. Nonetheless, for the reasons in the foregoing paragraph also, we believe that the *general* rule should be that justice be done in public.

[3] Summarised in Michael Hwang SC and Anthony Cheah Nicholls, 'When Should Video Conferencing Evidence be Allowed?', September 2012, *Singapore Law Gazette* 25, 27—29.