STATEMENT ON MEMBERS' COMPLAINTS
WITH REGARDS CURRENT COURT PROCEEDINGS

We, a collection of individual members of the Malaysian Bar, view gravely the following press statements that have been given by Chief Justice Tun Zaki Azmi (CJ) in the last few weeks namely:-

(i) The Sun Article entitled "CJ says 'greedy' lawyers causing postponements" dated 13 February, 2011
(ii) Bernama News Article entitled "Judicial system not responsible for increased legal costs" dated 17 February, 2011
(iii) Berita Harian Article entitled "Kes rogol 56 kali tangguh" dated 18 February, 2011
(iv) The Sun Article entitled "Keeping hearings on track" dated 23 February, 2011

The tone of the articles seems to strongly suggest that the cause of the delays and the backlog of cases in the courts are mainly, if not wholly, attributable to the lawyers.

We, a collection of individual members of the Malaysian Bar, would like to iterate that whilst the members of the Bar have always maintained a respectful decorum with the Bench and always attempted to discuss issues and problems faced by them in the Court in a cordial manner with the CJ or his managing judges and despite the CJ's apparent reassurances that these issues would be resolved personally by his team, the statements made by the CJ in the articles instead accuse the lawyers as the main cause of the delays and backlog that has become the bane of the litigants in Malaysia. The tone of these articles also suggest that in 'tightening the screws to the litigation process' and making the lawyers and courts work faster in disposing off matters, the CJ has managed to resolve all and sundry within the Malaysian judicial process.

We, a collection of individual members of the Malaysian Bar, would like to emphasise that although the CJ had repeatedly assured the Malaysian Bar and the State Bar Committees that there have been no directives by him to implement Key Performance Index (KPI) measurements within the court system, the opposite is evident to all lawyers appearing daily in the Malaysian courts. Lawyers and their clients are being chased through the system and hurried through Court corridors with one purpose in mind:- to close as many files as possible, within the least amount of time, so that these statistics can reflect that the Courts are "efficient".

We have repeatedly stressed that justice cannot be hurried as it leads to as much injustice and hardship as delayed justice as this numbers game sacrifices the justice to parties, which becomes secondary or forgotten altogether. The end result are litigants who are not given a reasonable and fair chance at being heard, are unfairly silenced and suppressed in their giving of evidence, and Malaysian litigation is reduced to a probabilities guess where the first party offering a chance to the Court to throw out a case will be rewarded.

Compilation of Complaints

Here are some glaring changes to the current legal system since the introduction of the KPI into the courts:-

PRE-KPI	**POST KPI**
Judges will exercise their discretionary power to postpone or adjourn cases when lawyer presents reasonable grounds for postponement or medical certificates to the court	Courts not granting any adjournments despite cogent reasons to do so, in the hope that the matter will be withdrawn or can be thrown out (dismissed)
Trials if not completed by 4pm were adjourned to	Courts conducting full trials beyond working hours ie. Until 8 or 9pm with the hope that there is one less

another day for continued trial	statistic for that month
Courts allowed witnesses to be examined, cross-examined and re-examined and provided leeway when expert witnesses and parties were unable to attend court due to circumstances beyond their control	Courts insist cases to be completed and closed even when parties and witnesses are unable to attend court
Lawyers are given sufficient time to review notes of proceedings, research the law and prepare oral or written submissions, at least several days or weeks after a full trial .	Courts require submissions after completion of full trials to be presented immediately or very soon thereafter (sometimes, on the same day or immediately the next day) without giving sufficient time to review notes of proceedings, research the law and prepare arguments
Upon completion of full trials, the trial judge's secretary will prepare notes of the proceedings, inform the lawyers when ready for collection. This often took between 6 months to a year.	Proceedings are electronically recorded. Courts require lawyers to give them a blank CD for the recording to be transferred and then require counsels to prepare the transcript of the proceedings themselves which require countless hours of work. This is forced to be completed within 6 weeks.
The party appealing against a Court decision is required to prepare a Record of Appeal within 6 weeks of receiving the Notes of Evidence prepared by the judge's secretary	Parties are deemed to have received the "Notes of Proceedings" by CD, and are required to file the Record of Appeal within 6 weeks (including time required to transcribe!)
Transcripts of proceedings were charged RM1 per page	Cost of transcription runs into hundreds of ringgit or more depending on urgency, a cost that is ultimately borne by the litigant.
Lawyer could obtain a postponement of cases when of ill health	Medical health of counsels are not recognised as a ground to request a postponement
A matter is fixed for hearing/trial once documents are in order and parties are ready to be heard.	Lawyers are required to be present in court on a monthly basis for each particular file and forced to proceed unless they wish their case to be struck-off by the Courts
Hearings and trials are scheduled according to the availably of lawyers and witness and parties.	Hearings are fixed arbitrarily only to the availability of the judge. Where deemed suitable by the judge or where instructed by superiors, hearing and trial dates already fixed are brought forward without notice or with minimal notice to lawyers and other parties.
Lawyers given proper notice of hearings and fixing	Hearings and trial dates are fixed on short notice and with little notice. Often dates already fixed are

of trials to enable themselves to be prepared	brought forward with extremely short notice to parties
Show cause notices are issued to both plaintiff and defendant counsels to be present in court and explain the delay in moving the file.	Show cause notices are sent only to the lawyers for the defendants (the party defending the action, instead of the Plaintiff who had initiated the action) and matters are promptly struck out and files closed
Submissions were done orally with written submissions being the exception.	Written submissions are ordered for each and every type of hearing including hearings for cost.
Decisions are given after considering the claim, the pleadings, the affidavit and the submissions of the parties together with authorities that were submitted	Decisions are given based purely on the written submissions filed by the parties and with minimum review of the actual file.
Judges took pride in their decisions and wrote quality decisions based on the facts and the applicable law.	Judges are instructed by CJ to write "short" decisions, grounds for decisions are hardly written and lawyers requiring such grounds have to write numerous reminders to obtain them.
Courts allowed matters to be held in abeyance where there was an appeal or an application which would have a bearing in the case was pending in another court	Courts are insisting on proceeding with matters even in cases where the other application or appeal or proceeding in another court would have a direct bearing in the matter.
Lower courts would allow adjournments where the lawyers had matters before a higher court at the same time or same day	All courts are insisting on proceeding with matters with no regards to hierarchy of courts.
Where the matter cannot be proceeded with due to the judge/registrar/magistrate being away or ill or busy the notation on the court file would be that the hearing was postponed by court due to that reason	All postponements are duly accorded to the lawyers even when the cause of the postponement is actually that the judge/registrar or magistrate is not available to hear the matter.
Written requests for adjournments or postponements are granted where sufficient notice is given to the court	Written requests for adjournments or postponements are not replied to or ignored forcing the lawyer to still come to court on the day to find out if his adjournment had been granted.
Courts recognised other lawyers who were present in court to 'mention on behalf' of the lawyer in charge of the matter	Courts insist that the lawyer in charge of the matter be present
The judge/registrar/magistrate who commenced hearing the matter completed the hearing	Many times different judicial officers are responsible for the file at the same time and the instructions to the lawyers during case management conflict or differ with each change.

The applicant files his written submissions which the respondent replies and the applicant has the chance to rebut the reply of the respondent	Judges/registrars/magistrates requiring opposing parties to file submissions at the same time with no opportunity to reply.
Lawyers exchanged pleadings and affidavits within the time provided in the rules and if necessary obtained extension of time to comply either by way of agreement between lawyers or with express permission of court	Judges/registrars/magistrates giving less time than is provided in the court rules for parties to comply with directions, file affidavits, exchange pleadings
During trials examination in chief is prepared in writing to merely assist court and then read out in court with leeway to ask additional questions and cross examinations are done after listening to the examination in chief so that the presiding trial judge has the opportunity to observe the demeanour of the witness in giving evidence.	Witness statements of examinationin chief is prepared professionally by the counsels with minimal or no actual input from the actual witness and "deemed read" to speed up trial process. Trial judge has no opportunity to observe demeanour of witnesses giving examination in chief.
Judges listened to trial proceedings and took notes and occasionally asked questions to clarify issues	Judges interfering during the examination of witnesses with comments that counsels are wasting courts' time and prompting counsels to 'go faster' and 'limit the issues'.
Before conducting trial, trial Judges often attempt to get parties to reconcile and settle the dispute without having to go through with full trial	Courts are 'forcing' parties to settle during a supposed mediation process, telling one party they have a weak case and cannot possibly succeed, so that one more case is concluded.

In general, members are reluctant to come forward with specific complaints for fear of repercussions and/or backlash from the Judicial officers and court staff, not to mention jeopardising their clients' cases. However, from the brave and frustrated few who did submit their dissatisfaction, a massive folders of documented complaints and grouses of the members of the Bar have been tendered by the members to the Malaysian Bar Council and subsequently to the CJ, but clearly these have fallen on deaf ears. Save for a few 'cosmetic' changes, the main thrust of the complaints has not been addressed at all.

We, a collection of individual members of the Malaysian Bar, are of the view that the changes to the court system have made the judicial officers 'stonehearted' or 'heartless' in their pursuit to close a file to fulfil new statistical requirements of their position. These changes to the court system have in fact caused hardship for all concerned, which include the following – a trial judge hospitalised due to exhaustion, a lady lawyer having labour pains in court and having to proceed with a hearing after being denied an alternative hearing date, a lawyer scheduled for chemotherapy treatment denied an adjournment, a lawyer requesting for a postponement after being involved in an accident was forced to come into court bleeding and continue with trial, and recently a lawyer collapsed in court after his request for an adjournment due to his ill health was denied.

Numerous changes to court system over the years

We, a collection of individual members of the Malaysian Bar state that the introduction of the KPI into the court system has not been the only change in the court system. Over the years many changes have been effected and implemented by the administrators of the courts, which the members of the Bar have managed to adapt and work with.

The initial introduction of the fast track system in 2002 by the then Chief Justice Tun Mohamed Dzaiddin Abdullah saw all files already scheduled in respective courts with respective hearing and trial dates being re-allocated to a central management system under a managing judge who was assigned to set the pace of a case, where he was the final arbiter of whether a case was ready for trial and before which new judge and court it would be fixed. During the time taken in this reallocation process, much delay and hardship was caused to counsels and litigants alike.

Subsequently in 2003, the then Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim decided to scrap the fast track system when he found that the old system was better than the fast track system. Counsels and litigants patiently waited through another set of delays when files were redesignated to the court when initially registered. Through this rearrangement and reassignment of cases and rescheduling of hearings and trials, the members of the Bar managed to adapt and conform.

Subsequently in 2005, Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim introduced the Court Recording and Transcription (CRT) programme system was to provide transcripts of proceedings and eliminate the need for judges to take notes themselves with the hope that it would cut the time taken by hearings by as much as two-thirds.

Later in 2007, the then Chief Justice Datuk Seri Abdul Hamid Mohamed approved a pilot project for a recording and real-time transcription service in two courtrooms in the Jalan Duta Court Complex and directed the current Chief Justice Tun Zaki to report on the viability of the new and existing systems. So, when the second largest court complex in the world opened on May 3, 2007, Kompleks Mahkamah Jalan Duta was equipped with two CRT systems – an analogue recording system in 65 courtrooms and a digital recording system in nine courts. Later at a Conference of Judges, Tun Zaki apparently said that the "analogue system should be thrown out the window". However, the digital system, two versions were being used wherein one provided a delayed transcription, while the second offered almost real-time transcription. The ideal in real-time transcription was that the judge and counsels could see the words on their (individual) screens as the interpreter typed them while the hearing progressed. Also, in high profile public interest cases, recordings of the day's proceedings could be burnt onto CDs and given to judge and counsels, along with a transcript, so that it could be checked for errors and corrections can be made the very next day.

High Court Judge Justice Ramly Ali who heard commercial and intellectual property cases was quoted to state that in his experience, using the CRT system had reduced the trials in his court by half the time. But even then the problem as recognised by the judges was the transcribers' lack of competency in English and knowledge of legal terms which resulted in only 60% to 70% real time speed because the judges' secretaries and court support staff who came from a Public Services Department pool and assisted in transcribing, could not keep up. However, a suggestion for a "closed service" towards a more professional and accurate transcribing and also so that there would be no possibility of them being transferred after time and money has been spent for their specialised training was duly rejected as the judges were concerned that a "closed service" might deprive the staff of promotions and career development opportunities.

Through these changes to the recording of hearing and trial transcripts, the members of the Bar learnt to state their cases slower, speak in a clearer tone and managed to remember to speak into the microphones whilst keeping an eye on the screen in front of them and prompt and correct the interpreter who was valiantly trying to keep up with the hearing or trial, the legal jargon and the English grammar.

However, despite the dramatic increase in the number of judges and support staff, the current stand is that court will record the proceedings and the lawyers are to come to court with a CD which will be burnt with the proceedings of the case and it is up to the lawyers to have it typed out and printed out for their purposes. This is despite the fact that in law, the duty of transcribing is that of the court. Transcribing notes of proceedings are not an easy task and require countless hours of toil. Even this, the lawyers have managed to adapt and work with by either doing it themselves or outsourcing to professional transcribers, the cost of this naturally being fully borne now by the litigants themselves.

But how is this cooperation rewarded? We aren't! Instead, lawyers and the litigants are being penalised for the ineffectiveness of the court system. In an appeal to the Court of Appeal, these notes of proceedings are required to be included as part of the appeal records. Under the rules, an appellant has 6 weeks to file the record of appeal and the time starts to run after the receipt of the notes of proceedings. However, nowadays, the Court specifies that time starts to run when the lawyers receive the CD recording of the proceeding.

Real reason for backlog

We, a collection of individual members of the Malaysian Bar, firmly state that much of the previous backlog of cases is in fact attributable to the ineffectiveness of the court system. Numbers problems identified by members of the Bar as having caused the backlog are as follows:-

(i) Transferring/promotion of judicial officers when hearings or trials are only partially complete;

(ii) Judicial officers not present to hear matters on days scheduled for hearings due to medical leave, emergency leave, attending a course, vacation, attending to visiting CJ, attending a function and staff meetings held during court hours (a non exhaustive list);

(iii) Judicial officers not present to hear matters scheduled for the day due to them being in the chambers of the judge assisting the judge with his matters for the day, leaving the lawyers waiting until late morning and into the afternoon to commence their matters;

(iv) Judges not writing grounds for decision for years after the decision thereby delaying the appeal process;

(v) Files for hearing not found at date of hearings/mentions/trials thereby necessitating taking of another date

(vi) The minuting of court files falsely state that the lawyers had requested for another hearing date when in fact the reason for another date was being fixed is that the judicial officer was not available to hear matters;

(vii) Judges and judicial officers have no knowledge of the matters before them on that day, are not ready for hearing as they have not read the file and rely heavily on what lawyers tell them orally;

(viii) Judicial officers not ready with decisions on the day scheduled;

(ix) On the date of a hearing, documents filed by counsels could not be located and thus the case cannot proceed;

(x) Files not being in order as documents previously filed not placed into court file;

(xi) General reluctance of the court support staff to locate files to place documents;

(xii) General reluctance of the support staff to locate files to send the respective courtrooms;

(xiii) General reluctance of the support staff to immediately process documents that have been filed and fix hearing dates;

(xiv) General reluctance of the support staff to be at the work place during working hours to attend to lawyers;

(xv) The general inability of the court administration to control the support staff that translates to countless hours of wasted time and resources.

(xvi) The general inability of the court administration to immediately provide replacement staff or back up staff whenever a staff is away or sick or on maternity leave.

Lawyers cannot turn away cases

Statistics show that of the 13,000 odd lawyers who are licensed to practise in Malaysia, 51% come from single operated firms (sole proprietorships) while 45% are from law firms containing 2-5 lawyers. That means 96% of law firms in Malaysia are small firms. There are also various types of legal work undertaken by law firms, generally these can be broadly categorised into corporate advisory and drafting of agreements and contracts, conveyancing of real property, and litigation. Even litigation can be divided into various categories that are general civil litigation, banking civil litigation, criminal litigation and personal injury or accident claims,

Since most lawyers tend to specialise and limit their work to one of these areas, it is not inconceivable that in fact, a mere small number of the 13,000 practising lawyers actually take up litigation work, which involves going to Court.

For this reason, we strongly object to the demand by the CJ for lawyers to 'stop taking in too much work' and 'farm it out', labelling lawyers as 'greedy'. There are clearly insufficient number of litigation lawyers (of sufficient experience) to cope with the amount of Court work available, if lawyers do not take on more work. Since no one person can be in the same place at the same time, it is unreasonable for the court not to allow adjournments should Counsel be involved in another case in another court.

This directive that lawyers should give away their cases also conflicts with the rights of any Malaysian citizen to employ a lawyer of his choosing for his own case, as this is enshrined in the Malaysian Constitution.

When it comes down to the 'dollars and cents' argument, members of the Public are outraged when the Bar announced recently that with the way the courts are moving, that a 300%-400% hike in legal fees could be expected, but this is indeed the reality of the situation is that if lawyers are forced to speed up their work to cater for the current court demands or alternatively turn away cases and only handle those that can pay. If this continues, it is the Public that suffers because there will not be enough lawyers who are willing to take on the smaller, less paying cases.

Court facilities

In addition to the aforementioned actual causes for the backlog and delay that has dogged the court system, the general infrastructure of the court also largely serves to hinder the smooth flow of cases and their disposal. Truly a problem found in all court complexes in the country, no matter how recently built or how they scale in size to the biggest court complex in the world is the problem of parking.

The lack of foresight to build sufficient car parks for a court house that houses amongst others the appellate and special powers courts, criminal high courts, civil high courts, commercial high courts, new civil high courts, new commercial high courts, family courts, bankruptcy courts, criminal sessions courts, civil sessions court, criminal magistrates courts, civil magistrates courts, traffic courts, intellectual property courts, civil deputy registrars, commercial deputy registrars, civil senior assistant registrars, commercial senior assistant registrars, bankruptcy department senior assistant registrars, family department senior assistant registrars all of whom hear numerous cases at the same time daily, necessitates even counsels who have matters scheduled later in the day to come as early as 8 a.m. in order to find parking as close as possible to the court house so that they may lug their files and statute books and briefcases into court without spraining any limbs.

This lack of foresight to build sufficient car parks for the Jalan Duta Court Complex, dubbed the second largest court complex in the world, containing roughly 30 courtrooms for the High Courts, 21 courtrooms for the Sessions Courts and 26 courtrooms for the Magistrates' Courts and many deputy registrars and senior assistant registrars, thereby necessitated lower court (magistrates and sessions) mentions to be heard in the afternoon from 2 p.m. onwards and consequently counsels to spend whole days in court to conduct hearings in the mornings and mentions in the afternoon (and at one point traffic court at night). This is a move which also served to confuse many a litigant who was not sure if his matter was scheduled in the morning (for either a case management or a hearing) or the afternoon (for a mention). Further hindrance to the litigant (and helping the courts to enter judgments and thereby close more files) was the fact of whether the file would be heard at the basement 1 registry (a place with limited to almost no cellular service) or in court several floors up and at the opposite wing. Even counsels were regularly seen running up and down between the basement and the courtroom looking for their files for the day.

Another form of prejudice to the litigant and general public caused by the infrastructure of the court is like the time when only two of the four Shah Alam Sessions Court were to be found at the MRCB Building in Shah Alam, as the other two courts were 'conveniently' located in Wisma Denmark at Jalan Ampang Kuala Lumpur! Many a litigant (and frequently lawyer) was caught unaware by this 'most logical move' and paid the price dearly.

Also causing delay and contributing to much backlog was the constant moving of the courts away from court complexes into commercial buildings and the relocation back into court complexes and then moving of some sections to commercial buildings. Examples of these can be seen in the courts at Kuala Lumpur, Shah Alam and Penang.

Mediation

Another spanner thrown into the mechanism of the court system is the introduction of mediation into courts. Mediation is generally viewed as a quicker and less costly than going to trial, 'helping' to repair the breach between the parties. Whilst the general stand of the lawyers is that mediation is a good way to settle the

dispute between parties, the manner in which mediation is actually conducted raises some cause for concern. Often it is the actual judge handling the case who attempts to mediate and the attempt usually takes in the form of 'cannot settle?' Lawyers who attend mediations daily report that Judges are in fact arm-twisting litigants into accepting a compromise, by telling them "you have a bad case, you will lose", which is clearly unacceptable since the Court has yet to even embark into receiving evidence to prove the merits of the case.

Conclusion

We, a collection of individual members of the Malaysian Bar, would like to state that it is in fact most glaring that the CJ in his recent statements has failed to acknowledge that lawyers have been bending over backwards and doing their best to accommodate the recent changes in the court system, despite all their complaints against the court system over the years. Lawyers, due to their training, have always carried themselves by affording the most reverent respect to the judiciary. But this respect cannot be blindly meted out any longer if mutual respect cannot be reciprocated in turn by the judiciary to lawyers.

In conclusion, we would like to call on the CJ to immediately cease making further prejudicial and baseless comments the legal profession. The legal profession has always strived to serve the litigants, the judiciary and the courts to the best of our ability and such statement to the media by the CJ only serve to belittle the profession and lower the esteem of the profession as a whole. Whilst it is commendable that the CJ has taken various steps to enhance the justice system in Malaysia, the total focus on speed and not quality has taken a counterproductive turn. While the pushing of lawyers, judges and court staff to move faster is a natural step towards better productivity, the CJ must also give equal if not more emphasis to the overall quality of output and spend some time fine tuning the support mechanisms in his quest to achieve his target of no backlog. There would be no point in having only statistics that look good on paper when the quality of decisions given are questionable and leaves a litigant unsatisfied. Truly, it is has been the stand of the Malaysian Bar that justice hurried is indeed buried.

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