EXECUTIVE SUMMARY

Chapter 1: Introduction

1.1 In addressing the subject matters of costs and delay as encountered in civil litigation in Hong Kong, the Law Society has considered the strengths or failings of all sections of the legal services industry.

1.2 The Law Society makes proposals which are, in some cases, radical and in other instances recommends the preservation of the *status quo*. The Law Society is not satisfied that the Woolf reforms in England & Wales have proven to be the panacea it purported to constitute. We believe that delay and expense can be addressed by more stringent adherence to and observation of the present High Court Rules subject to some modifications together with a radical analysis and review of court administrative systems and judicial resources.

1.3 Whilst review of the rules and working of the District Court was originally included in the LSWP's Terms of Reference, it became apparent during the deliberations that different issues arise in the District Court where relatively low value disputes are conducted, often by litigants in person. The potential negative impact of costs and delays in High Court litigation which is being looked at by the CJWP and the LSWP is likely to magnify in the District Court. It is felt by the Law Society that this is an important stand-alone subject which merits a full review by a Joint Working Party consisting of all four sectors of the legal services industry.

Chapter 2: Retainer

2.1 At present, a party to a civil dispute and his solicitor define their relationship by the solicitor's retainer. The retainer agreement is intended to ensure that the client is given the information he needs to understand what is happening, in particular on the costs of the legal services both at the initial stage and as the case progresses, as well as responsibility for other client matters.

2.2 The Law Society is of the view that as a proper discharge of a solicitor's duty to his client, the client is entitled to a concise written statement setting out the following information :

- the scope of the retainer and the services to be provided by the solicitor firm;
- agreement on the circumstances permitting termination of the retainer;
- how the solicitor (and/or barrister) will charge for costs of legal services, billing basis (e.g. hourly rates of fee earners), methods (e.g. units of charge for time costs, charges for disbursements, charges for travelling and waiting time for court hearings, etc), intervals (e.g. interim bills) and arrangements, the need for costs on account and for additional funds, and implications of late payment;

- on taking instructions, a best estimate of the likely costs of initial legal services required and a broad estimate of the potential overall costs of the litigation as well as an explanation of the uncertain variables that may affect the estimate;
- if court litigation is expected, the likely recovery on costs if the client is successful and the likely liability for costs if he is unsuccessful;
- advice on whether the other party is legally aided and potential liability (if any) for third party's costs;
- name of practitioner(s) who will be primarily responsible for the provision of legal services.

2.3 The LSWP recommends that the Law Society should set out in an annex to *The Hong Kong Solicitors' Guide to Professional Conduct* detailed guidelines as to the matters to be covered in the standard letter of retainer/engagement which solicitor firms in Hong Kong should use in handling civil contentious matters for their clients.

Chapter 3: Written Presentation of Case

The Law Society recommends the following changes:

3.1 There should be only one originating document, called a writ, which should be adaptable to all the various possible kinds of claim.

3.2 In the main, the system of setting out a party's case in pleadings and/or affidavits would be retained; but as regards pleadings, see the following:

3.3 Pleadings would in future have to be written in plain language, with no unnecessary technicality and no Latin.

3.4 Statements of Claim would have to be verified by a statement of knowledge. A variety of such statements would be permissible, to suit different evidential situations and to ensure that verification does not become a meaningless formality. An improperly given statement would be a contempt of Court.

3.5 The period for filing a Defence should in the first instance be 28 days, rather than the current 14 days, but extensions to that period would only be granted for substantial grounds which would have to be proved on affidavit evidence.

3.6 Every factual allegation made in the Statement of Claim would have to be answered in a positive and substantive way. Blanket denials would not be permitted.

3.7 A copy of any document referred to in a pleading would have to be annexed to it (subject only to rules to prevent excessively bulky copying).

Chapter 4: Disclosure of Documents and Documentary Evidence

4.1 Retain the *Peruvian Guano* test for disclosure of documents.

4.2 Introduce measures to streamline the process of listing, bundling and discovery of documents.

4.3 Impose a positive obligation to consider the nature, scope and extent of discovery to be given, by enhancing the present rules.

4.4 Introduce positive obligations of proportionality to curb excessive or unnecessary discovery.

4.5 Introduce the concept of *"asker pays"*, such that a party asking for significant documents of marginal relevance from an opponent may have to do so at their own cost.

4.6 Streamline and simplify the varied rules on pre-action and non-party disclosure to make this generally available, but with strong safeguards.

Chapter 5: Non Documentary Evidence

5.1 Rules to be enhanced to ensure effective sanctions for failure to serve proper witness statements or give statements on time.

5.2 Costs and other case management measures to prevent excessive or *'over-lawyered'* witness statements.

5.3 Measures to control the number and nature of expert witnesses.

5.4 Measures to enhance the independence of experts and co-operation between them through joint inspections or without prejudice meetings.

5.5 Rejection of wide-spread use of single court-appointed experts and preservation of privilege over experts' instructions.

Chapter 6: Case Management

6.1 The overall objectives of case management i.e. pro-active Judicial control of civil action, rather than leaving control over cases to the parties to the dispute, or their lawyers, are to minimise delays and encourage early settlement. The Law Society recommends the introduction of measures such as use of pre-action protocols in appropriate cases, tighten control over the level of costs awarded to successful parties at an interlocutory stage or even at trial and early identification of issues.

6.2 It is vital that every sector of legal services industry should be fully aware of the magnitude of the task of implementing a fully funded and consistent across-the-board Judicial case management regime before embarking on such a task, or the consequences could be considerably worse than the present system, despite its imperfections.

Chapter 7: Early Disposal Mechanisms

7.1 This Chapter considers the means and measures that are, or should be, available to facilitate the efficient and early disposal of:

(i) unmeritorious cases that do not warrant going to trial;

(ii) meritorious cases that are best dealt with other than by going to a full trial; and

(iii) cases in which the defendant is adopting *"scorched earth"* or *"filibuster"* tactics.

7.2 The focus is on *litigant-initiated* stand-alone disposal mechanisms in the HCR, rather than

- court-initiated disposal mechanisms, such as automatic striking out as under the old District Court Rules or under the CPR in England, and
- efficiency and cost related discretionary case management techniques.

The chief *themes* in the criticisms of the present arrangements are that:

- the machinery is cumbersome or archaic in the sense of being unnecessarily restricted, and
- the costs/time risks facing applicants are often unfair.

7.3 The three mechanisms that arguably require the most radical and urgent overhaul/introduction or consideration are:

- extension of *Summary Judgment* to defendants and reform of *Striking Out*;
- wider use of procedures for determination of *Preliminary Issues*; and
- abolition of *Payment-into-Court* in favour of a flexible CPR Part 36/Offer of Compromise vehicle available to both plaintiffs and defendants.

7.4 The concepts of *"overriding objective"* and *"proportionality"* should be written into the HCR to encourage proper case management.

Chapter 8: Interlocutory Injunctions and other Forms of Interim Relief

8.1 The Law Society considers that the current procedures in place are effective and work well and that in consequence little if any change is needed. This is not surprising in that this area of procedure has seen extensive development over the last 20 years or so, and is highly developed, even to the point that the Judiciary has developed plain English and Chinese precedents for commonly sought orders.

8.2 The only change that is recommended is in respect of the current procedure for an *"injunction day"* on each Friday. These hearings are in chambers, but applications listed for hearing are all heard together. This needs to be reviewed to the extent that it can cause problems if all parties and their lawyers are present at least initially, because such arrangements detracts from any degree of confidentiality required (and frequently interlocutory injunction applications by definition require confidentiality). Consideration should be given to separate appointments for such applications.

8.3 The Law Society also considers that Hong Kong ought to consider adopting the provisions currently to be found in Singapore whereby jurisdiction, especially in the case of *Mareva* and *Anton Piller* relief, can be based on the *"presence of assets"* test. The decision of the Privy Council in *Mercedes-Benz - v-Leiduck* should be overruled by amendment to the High Court Ordinance.

Chapter 9: Trial

9.1 No limit should be set on the time for giving evidence at trial. On the other hand, the rules of relevancy and admissibility should be strictly observed.

9.2 HCR Order 24 (Discovery) should be strengthened by imposing a positive duty on parties to agree on a list of issues or alternatively a list of categories of documents that parties are obliged to discover. This should be done prior to the Summons for Directions under HCR Order 25.

9.3 The existing rule on experts should be maintained, save that parties should be obliged to procure that their experts shall meet on a without prejudice basis and then prepare jointly a report on areas of agreement and disagreements.

9.4 Parties should be required to file written opening and closing submissions and the judge shall have the discretion to require the advocates to make oral submissions to supplement the written submissions where necessary. Submissions should be on the agenda for pre-trial conferences between parties' legal representatives. The Running List should be abolished and judges should not be allocated cases at short notice. If a trial scheduled under the Fixture List collapses the time should be reallocated for writing judgments or hearing interlocutory applications.

9.5 In rendering advice on evidence, the advocate conducting the trial should also have advised as to which documents should be included in the trial bundles, and parties should start preparing the trial bundles after they receive such advice.

9.6 Pre-trial conferences should be held between parties' legal representatives to discuss and agree, as far as possible, all matters concerning preparation and conduct of the trial.

9.7 If a party applies for an adjournment of the trial for its own reasons, such adjournment can only be allowed upon that party's immediate payment of costs of the adjournment.

9.8 The court should be given the power to give judgment or dismiss an action instantly when a party (having received notice of the trial date) fails to appear at the trial.

Chapter 10: Costs

10.1 The Law Society considers that costs are an issue which should be dealt with more exactingly and frequently during litigation. For example, costs orders can and should follow *each* interlocutory application with greater precision. Simply, the party in whose favour a costs order is made should be entitled to recover their costs quickly and easily from the unsuccessful party. This will provide an important advance in the issue of transparency.

10.2 The rule in relation to Counsel's Certificates requires consideration. Broadly, the Law Society consider that Counsel's Certificates should be required in *all* cases. The Court, on being apprised of the levels of *capped* counsel's fees, should determine at an early stage of the matter as to whether a certificate will or will not be granted.

10.3 Where a party is prejudiced by *"misconduct"* in litigation, (e.g. a disregard of procedures/Practice Directions; the filing of documents out of time or in an irregular fashion, etc.), this should be dealt with by punitive orders in costs *including*, if appropriate, orders against the counsel and/or solicitors of the parties responsible

10.4 The Law Society regrets the omission of proposals in the CJR on higher rights of audience which it considers a notable flaw on the analysis of costs.

10.5 The Law Society's proposals require fairly substantial, but not wholescale, amendment of the RHC, and in particular RHC Order 62. It proposes self-regulation in the capping of both solicitors' and counsel's fees on taxation. A *"Legal Fees Committee"* can monitor the situation for the benefit of the profession and consumers alike. This, to a significant degree, addresses the issue of hourly rates, so a taxation of costs would then be limited to endeavour and time expended.

This is something which is unlikely to trouble experienced litigators. However, even should that be the case, the Law Society proposal does provide the maximum analysis of those costs, incurred by solicitors and barristers, with far less upheaval in terms of modification of the rules and practices of Court, for greater effect, than the proposals of the CJR.

Chapter 11: Enforcement

11.1 A single simple procedure for enforcement of a money judgment. The judgment creditor applies *ex parte* on the basis of a multi-purpose Affidavit (setting out all known details of the judgment debtor's assets) for such orders for enforcement as are appropriate. This would cover: writs of *fi fa*, charging orders and garnishee orders in particular.

11.2 A single set of rules for examination of a judgment debtor or directors of a corporate judgment debtor rationalising and retaining the best elements of and the flexibility contained in HCR Orders 48 and 49B.

11.3 Consideration should also be given to providing a specialized section or department within the Judiciary to deal with enforcement so that there would a consistency of approach and a depth of expertise.

Chapter 12: Appeals

12.1 Consideration must be given to streamlining the process of interlocutory matters being dealt with by Master and Judges. There are a number of possible solutions.

12.1.1 One solution is to *"skip"* the Master for all interlocutory applications of any substance, with all such applications being dealt with by Judges.

12.1.2 Another solution is to adjust the balance between the sorts of applications that are dealt with by Masters and Judges respectively, so that a higher proportion of such applications is dealt with by Judges in the first place. For example, all applications listed for a hearing of more than, say, 1 hour could be heard by a Judge.

12.1.3 Another solution is to create a new class of Senior Master or Deputy Judge, who hears substantial interlocutory applications but from whom there is only a limited right of appeal to the Court of Appeal.

The Law Society considers that serious consideration must be given to the future role of Masters (is their role lessened, strengthened or left the same and do they become part of a docket system?) in the context of the overall reform, before a final view is reached as to the best arrangement.

12.2 In any event, the Law Society recommends that the scope of appeals from Masters be limited. Parties should not be entitled as of right to rely on additional evidence. Parties should only be allowed to do so if they meet the same tests currently used in respect of appeals to the Court of Appeal, namely the evidence is new, it is likely to have a material impact on the outcome of the appeal, and it could not reasonably have been filed earlier. Further, the scope of the appeal should be narrowed by a requirement to file grounds of appeal. To achieve this, it will be necessary for Masters to give written decisions. The Law Society considers that this would be a desirable development.

12.3 Further, in respect of interlocutory decisions which are not final, a condition of obtaining leave to appeal should be imposed, certainly for appeals against decisions of Judges to the Court of Appeal. This should certainly be the case for case management decisions, if introduced, where already the High Court is reluctant to entertain appeals, save in respect of manifestly incorrect decisions. (An automatic right of appeal to the Court of Appeal should, however, be retained in respect of all final decisions, namely decisions in respect of strike out applications, summary judgment, summary determination of issues and applications as to whether the High Court has jurisdiction to hear proceedings.)

12.4 In respect of cases where leave to appeal should be required, the test should be whether the appeal has a demonstrable and real prospect of success. In this respect, the following note of caution should be sounded. All Judicial Officers will have to work hard and focus on achieving consistency in the application of this test — the Law Society is concerned in this and other areas, for example case management, about whether and how this can be achieved. Unless there is consistency, there is a risk, of an increased level of litigation in that there will be an unduly large number of contested applications for leave.

12.5 The Law Society considers that, if a procedure is introduced requiring applications for leave to appeal, it must be efficient and quick. As regards appeals to the Court of Appeal, the Law Society considers that the simplest and most efficient mechanism is as follows. Each Judge at first instance should have the power to indicate at the time of giving a decision that it would be appropriate for leave to be given, but that there be no duty to give such an indication. In cases where a Judge does not give an indication at the same time as the decision is given, the application for leave is considered on paper by a single Judge of the Court of Appeal. The appellant must file draft grounds of appeal within 14 days of the date of the underlying decision and the Court of Appeal must consider the application within 14 days. If either the Court of Appeal considers that an oral hearing of the application is necessary, or a party is dissatisfied with the Court of Appeal's decision on paper, there will be an oral hearing.

12.6 In recent years the trend has been to reduce the amount of time necessary for oral hearings before the Court of Appeal, by increasing the requirements to file papers, including skeleton arguments. This trend is to be encouraged. The Law Society supports the introduction of wider powers of the Court of Appeal to limit the amount of oral argument before it.

12.7 To facilitate appeals, including the consideration by parties of the prospect of appeals, transcripts of hearings should be more readily available from the court, and at lower cost. (This can be funded in other ways, for example, an increase in fees for issuing originating process.)

12.8 There should be clearer identification of procedures for dealing with urgent appeals and applications for stays of execution of judgments. There should be a Duty Judge at first instance and in the Court of Appeal for this purpose. The position is unsatisfactory at the moment.

Chapter 13: Court Administration and the Judiciary

13.1 Commentary on the following matters of Court Administration which requires review:

13.1.1 Court Staff are part of a service industry, which requires considerable rationalisation and improvement of the existing service

13.1.2 Court Hours are out of tune with the requirements of modern practice. Proposals for increased flexibility in the court hours, namely staffing over the lunch hour, and extend filing hours to 17.00 hours.

13.1.3 Sealing of court documents out of Court hours: the Administration must conduct a review of the current practice of sealing court orders out-of-hours.

13.1.4 Litigants in Person: separate counters for litigants in person to be manned by specially trained staff.

13.1.5 Translation of Documents: introduce more user-friendly directions on format

13.2 Court Waiting Time

13.2.1 Over-running of such hearings is common. For those left outside Court, the aggregate costs of barristers and solicitors to their clients can be very significant. Is it appropriate that clients pay for this waiting time? Patently not, but is it fair that either the client has to pay or the time is written off by the lawyers? The Court must arrange its affairs so that these expenses are not incurred. The Law Society has experience of innumerable occasions where such delays occur.

13.3 Judicial/Master's Clerks

13.3.1 The Law Society urges that the roles of Judges and Master's Clerks be enhanced. The Judges/Master's Clerks should be sufficiently experienced to draft Orders on behalf of the parties for approval by the Judge/Master and then provided to the successful party for engrossment by fax or by email. It would reduce the scope for delay and assist in curtailing expense.

13.4 Court Files

13.4.1 The Law Society proposes that there be an all-party discussions on how to create a more user-friendly Court filing system which serves to reduce unnecessary costs in repeated production of Court bundles at various interlocutory stages of the matter, all of which are invariably superseded by further bundles at trial. Is it possible for the parties to agree a master file? Should there be a requirement to file discovered documents? (In New South Wales discovery documents are filed by CD-ROM.) Should there be core bundles of documents with consequential pagination, interlocutory documents perhaps not being included in the core bundles?

13.5 Judiciary Administrator

13.5.1 The creation of the role of Judiciary Administrator should have assisted in resolving some of the issues to which the Law Society refers. Unfortunately, this has not proven to be the case. If the Judiciary Administrator is to be an effective conduit between various arms of the industry, then she or he must ensure that the communications from other branches of the legal profession are dealt with by return, and certainly no later than three days, and not weeks, if at all. There is a need for a proactive Judiciary Administrator, not merely reactive.

13.6 The Judiciary

13.6.1 The present system in application of Judicial resources is wanting. It is of paramount important that the Judiciary are placed in a position whereby their timetable permits them to review Court files, skeleton arguments and authorities prior to hearings and that the Judiciary has ample time (and the resources) to review arguments, authorities, skeletons, etc. in reaching their judicial conclusions whether in terms of a reserved order or judgment. This is not the case at present.

Are there enough Judges? The Law Society considers that twenty High Court Judges and the present quota of Masters to deal with the plethora of litigation in Hong Kong in recent years is insufficient.

13.6.2 The CJWP did not explore this matter as part of the CJR. The Law Society considers the following matters are worthy of debate:

(a) Is the Judiciary adequately remunerated?

(b) Are the appointments appropriate?

(c) Case management: the CJR proposals suggesting greater case management by the Judiciary are not feasible against the backdrop we describe (even if the proposals as presently promulgated were warranted).

(d) Judicial Training: there should be formal training programmes for Judges.

(e) Judicial Support: Judges should have their own secretaries.

(f) Complaints against the Judiciary: introduce a mechanism for complaints against the Judiciary to be addressed — consider establishing a Judicial Ombudsman.

(g) Funding: the Government must provide sufficient resources. There is scope for increasing court fees to more realistic levels.

Chapter 14: ADR

14.1 Mediation only works — or only has a reasonable prospect of working — if the parties are committed to the process. One school of thought is that there is little to be gained by *"forcing"* reluctant parties to take part in the mediation process, given that their reluctance may be quite likely to make the process fail.

14.2 The Law Society considers that ADR should not be mandatory for all cases, but only where there has been a filtering process by the Court.

14.3 The Law Society is of the view that any implementation of ADR should be accompanied by sanctions, to discourage conduct that would derail the process. However, these recommendations are made on the following basis:

(a) that the rules by which the sanctions are implemented will be clearly worded as to what the potential sanctions are; and

(b) that the sanctions bite only in the case of refusal to take part (either outright or through setting of unreasonable conditions).

14.4 The Law Society for some time has recognised the need for properly trained mediators. The Society has set up a Panel of Mediators and is currently putting in place an Accreditation Scheme. The Law Society suggests that its Panel of Mediators, and its Accreditation Scheme, should be one of the Panels and Schemes to be approved by the Court.

Chapter 15: Conclusion

15.1 The Law Society in assessing whether and, if so, how the civil procedure rules can be improved, adopted a very different approach from that of the CJWP. The latter understandably looked at the Woolf reforms in England and Wales, it being the most comparable jurisdiction, and considered the extent to which similar proposals to the Woolf reforms should be adopted in Hong Kong. The Law Society also considered Woolf and, whilst anticipating that Woolf would be favoured by the CJWP, the Law Society has concluded that retaining the existing civil procedures and rules in Hong Kong to be in the best interests of the public and justice. The Law Society has nonetheless identified areas in which it considers reforms are required and has recommended appropriate changes to the procedures and rules in order to achieve the objectives of making dispute resolution more cost effective and expeditious.

15.2 Both the CJWP and the Law Society acknowledge the need for amendment of the civil rules and procedures; in some instances both bodies have identified similar areas in which changes should be made. However, the CJWP advocate Woolf as a panacea to cost and delay; the Law Society favours a more rigorous implementation of the existing rules and procedures, but with radically new approaches to some matters — i.e. taxation of costs. Some differences are thematic, others are as a result of the Law Society adopting a more conservative, but we consider a more pragmatic, approach to achieve the common ends of the CJWP and the Law Society.

15.3 The Law Society is of the view that many of the existing rules are capable of more exacting interpretation by Judges and Masters and that a more robust approach must be adopted by Judicial Officers to apply those rules.

15.4 We consider that far greater adherence to and application of the existing rules and procedures, by the Judiciary, the Court Administration, the Bar and our profession will better serve our masters, the public and justice, and will take an enhanced legal services industry for Hong Kong forward in the 21st Century.