REPORT ON CIVIL JUSTICE REFORM

CONTENTS

LIST OF ABBREVIATIONS

Alternative Dispute Resolution	ADR
Chief Justice's Working Party	CJWP
Civil Justice Reform: Interim Report and Consultative Paper	CJR
Civil Procedure Rules	CPR
High Court Rules	HCR
Hong Kong Solicitors' Guide to Professional Conduct	Guide
Hong Kong Special Administrative Region	HKSAR
Judicial Officers Recommendation Commission	JORC
Law Society's Working Party	LSWP

THE LAW SOCIETY'S WORKING PARTY ON CIVIL JUSTICE REFORM MEMBERSHIP AND TERMS OF REFERENCE

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Terms of Reference:

"To review the civil rules and procedures and working of the High Court and District Court with a view to the improvement of dispute resolution and provision of legal services to the public by every element of providers of legal services."

Note: At its initial meeting the LSWP identified subjects and topics for consideration. Sub-groups were then established to examine and prepare initial drafts for inclusion in this Report, and subsequently considered by the LSWP as a whole. The LSWP then reported to the Council of the Law Society which endorsed the publication for this Report.

EXECUTIVE SUMMARY

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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.

THE LAW SOCIETY'S REPORT

Including, where appropriate, commentary on the Civil Justice Reform Interim Report and Consultative Paper of the Chief Justice's Working Party

Chapter 1 INTRODUCTION

The Law Society convened a Working Party to consider Civil Justice Reform in September 2000. Its terms of reference were *"To review the civil rules and procedures and working of the High Court and District Court with a view to the improvement of dispute resolution and provision of legal services to the public by every element of providers of legal services"*. It first met on 13 November, 2000 and its membership of 13 solicitors has met on 16 occasions. The publication of the Report of the Law Society has been deferred by receipt of the *"Civil Justice Reform: Interim Report and Consultative Paper"* ("CJR") of the Chief Justice's Working Party ("CJWP"). It was considered sensible that the Law Society incorporated in its Report comments upon the CJR. Consequently, this Report contains: the conclusions of the Law Society's Working Party ("LSWP") on Civil Justice Reform as they presently stand, with commentary and proposals for change, where appropriate. Comment is also made in the Report upon the proposals of the CJWP.

In approaching the subject matter, the Law Society has considered the legal services industry as a whole and has focused upon how the four complementary sectors of the industry should and can engage in more constructive dialogue to serve their overriding masters, the interests of justice and the public. In addressing the subject matters of costs and delay as encountered in civil litigation in Hong Kong, the Law Society has also considered the strengths or failings of *all* sectors of the legal services industry.

It is to be hoped that prior to taking any further steps to implement changes to the civil rules and procedures, there will be much greater dialogue between and within the legal services industry. Following such liaison, further recommendations can be made in due course to the public and/or the Legislative Council as to whether and if so the extent to which the High Court Rules ("HCR") should be amended. This should achieve the common goals of the serving of justice and the public, whilst reducing costs and delay, where they exist, for the benefit of all those wishing to utilise the expertise and services provided by the High Court of the Special Administrative Region, ("HKSAR") and the Hong Kong legal services industry generally.

Correctly, much has been made of the Rule of Law in the HKSAR. Indeed, some commentators have considered that the bedrock of the HKSAR is its legal system. It is, in part, what makes the HKSAR *"special"*. It is in the interests of the four sectors of the legal services industry to sustain this pre-eminence for the benefit of the community as a whole.

The four principal sectors of the legal services industry, in no order of precedence, are:–

(a) The Judiciary;

(b) The Administrative and Civil Service which operate the Courts;

(c) The Bar;

(d) Solicitors,

There is a comity of interest between the four sectors in providing to their consumers a first-class product, on economic terms, with expedition. Solicitors, amongst their many responsibilities, *"market"* the legal services industry not only to the Hong Kong public, but internationally. This has proven to be of enormous tangible benefit to the Hong Kong taxpayer. For example, invisibles earned by the legal profession to a large extent match the costs to the Hong Kong taxpayers of *all* of the Court services in Hong Kong, extending to the District Court, the Magistracies, various Tribunals, as well as the salaries of all Judicial Officers and the Civil Service. This means that, in layman's terms, the legal services industry is to a large extent self-financing.[1] Very careful consideration should be given to the potentially adverse effect which radical reform may have, without proper regard to local conditions, on this valuable invisible earner for the Hong Kong economy.

Hong Kong has for a considerable time constituted the legal *"centre"* for East Asia, (although we acknowledge other jurisdictions might lay claim to that title). The public and all sectors of the legal services industry have vested interests in sustaining that role, as does Hong Kong itself. We trust that the proposals of the Law Society constitute a basis for constructive dialogue which will achieve that ambition, as well as providing realistic solutions to those most frequent criticisms that we in the legal services industry face, namely that we are expensive and the legal process is time-consuming.

The methodology adopted by the Law Society from the outset in its consideration of the need for reform was to examine the various stages of the litigation process chronologically from start to finish, identify shortcomings and propose pragmatic solutions. This is without preconceptions engendered by the temptation of wholescale adoption of an entire set of reforms in similar jurisdictions, such as the Woolf reforms in England and Wales. Having identified shortcomings and possible solutions, consideration was given to the approach taken in similar jurisdictions and where those jurisdictions appeared to have arrived at a better solution for a particular shortcoming, the Law Society has proposed the adoption of such solution. The result is a set of proposals which are, in some cases, radical and in other instances conservative in their recommendation of the preservation of the *status quo*.

The overriding concern of the Law Society is what is best for Hong Kong, taking cognisance of what is practically achievable without reference to any ideological considerations. We hope we have promulgated solutions which are perceived to be of benefit to the public and justice.

The terms of reference of the LSWP have forestalled detailed consideration of higher rights of audience by solicitors in the High Court. We consider that the public will demand that this matter be addressed in

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[1] Letter from Financial Services Bureau dated 17 January 2001 (See Appendix 1).

due course, especially in circumstances where Hong Kong is now the only significant legal jurisdiction where higher rights of audience for solicitors continue to be proscribed. Higher rights are available in England and Wales where Woolf has been introduced, a distinction not considered in the CJR.

Solicitors, who are at the forefront of the civil process, have one advantage over the other three sectors of the legal services industry in that they have the closest day-to-day contact with their clients, the public. It is solicitors who are usually the first port of call by a party contemplating litigation. Solicitors are involved throughout the whole course of litigation. They attend the client from inception of the litigation, which may or may not proceed to trial. They are responsible for initial advices, the issue of proceedings, preparing pleadings, albeit sometimes settled by counsel, discovery, and all interlocutory matters all the way up to, but excluding conduct of, the trial itself, which we address below. By the time counsel, and subsequently the court, receive the papers and trial bundles before trial, solicitors have been through all the civil procedures including, in particular, discovery, so that the product delivered in court has been refined. It is only solicitors which have to deal with the court administration in connection with the filing of documents, court orders and the fixing and listing of hearings and trial dates. As such solicitors, are uniquely placed to comment on the effectiveness of the civil rules and procedures of the High Court and any reforms that may be required. In this respect, we have had the benefit of the experience and knowledge of those sitting on the LSWP, who are all solicitors engaged full time in contentious work. Further, solicitors utilise and work with the other three sectors of the industry, none of which are in the same enviable position to consider the Rules and Procedures of the High Court and the Reform of Civil Justice with the breadth of experience and usage at levels enjoyed by solicitors. Consequently, we suggest that the enhancement of Civil Justice in Hong Kong will benefit by serious consideration being given to the recommendations of the Law Society, if not in priority to the proposals of the CJWP, certainly in tandem with them in order to serve the interests of both justice and the public.

What is clear though is that the interests of the public and justice will be best served by much greater *"cross-party"* dialogue between the four sectors of the legal services industry. The component parts of the industry should work together to ensure that the process of civil litigation evolves to meet the demands of contemporary society. On reading the following text of the Law Society's Report and the CJR, there are many matters of mutual concern. Sometimes the remedies or proposals dovetail; sometimes there are contradictions. An all-party approach to the problem and more comprehensive dialogue could have resulted in a report by the legal services industry to the public, and the fact that this has not been possible, or anticipated, is a matter of regret. It gives the impression to the public of an industry which is divided, and that must not continue to be the case.

Chapter 2 RETAINER

1. Current position

1.1 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.

1.2 The best practice rules for professional conduct in relation to a solicitor's retainer are set out in Volume 1 of *The Hong Kong Solicitors' Guide to Professional Conduct* ("Guide") issued by the Law Society of Hong Kong. They include the following guidance rules :

1.2.1 As a solicitor must act within his client's express or implied authority, he should at the outset agree clearly with his client the scope of his retainer. It is recommended that a solicitor should obtain confirmation of the scope of the retainer in writing (paragraph 5.12 of the Guide).

1.2.2 The client should be informed at the outset or as soon as possible thereafter in simple language the issues raised in the matter, how they would be dealt with and the immediate steps to be taken and he should keep his client informed of the progress of any matter, any significant development and the reason for any serious delay. The solicitor should explain the effect of any important and relevant document (paragraph 5.12 of the Guide).

1.2.3 The client should be informed of the name and status of the responsible handling solicitor and the partner who has overall supervision of the matter and of any transfer of responsibility to another solicitor or partner (paragraph 5.17 of the Guide).

1.2.4 A solicitor should advise his client when it is appropriate to instruct a barrister and seek the client's authority before doing so. Whenever there is a hearing at which the client is to be represented, he should be informed of the solicitor or barrister who will appear to represent him (paragraph 5.17 of the Guide).

1.2.5 A solicitor is under a duty at the commencement and during the retainer, where the circumstances indicate, to consider and advise the client on the availability of legal aid (paragraph 4.01 of the Guide).

1.2.6 On taking instructions a solicitor should normally give his client the best information he can about the likely costs of the matter and discuss with him how his legal charges and disbursements are to be met, including the option of and his eligibility

for legal aid as well as possible insurance coverage. If the solicitor cannot give an approximate estimate because of the nature of the work, he should inform the client and give a general forecast with an explanation of the method of calculation, taking care that his client is informed about costs as the matter proceeds. Clear and appropriate words should be used to indicate the nature of the estimate (i.e. whether it is on agreed fee basis or otherwise) (paragraph 4.01 of the Guide).

1.2.7 Oral estimates should be confirmed in writing and the final amount should not substantially vary from the estimate unless the client has been informed of the changed circumstances, preferably in writing (paragraph 4.04 of the Guide).

1.2.8 If fees have been agreed with the client, the solicitor should confirm this in writing stating what the fee is, what it covers and whether it includes disbursements. If no fee has been agreed or estimate given, a solicitor should tell his client how the fee will be calculated, e.g. on time spent and hourly rates, and what other reasonably foreseeable payments that he may have to make and the stages at which they are likely to be required (paragraphs 4.02 and 4.03 of the Guide).

1.2.9 A solicitor should keep his client informed on an appropriately regular basis the costs incurred to date. Particularly in non-legally aided contentious matters, the client should be informed at the outset and at appropriate stages thereafter :

(a) that he will be personally responsible for payment of his own solicitor's bill of costs irrespective of any court order on costs;

(b) of the probability that he will have to pay his opponent's costs as well as his own if he loses;

(c) that even if he wins, his opponent may not be ordered to pay the full or any amount of the client's own costs and/or may not be capable of paying costs as ordered;

(d) that if his opponent is legally aided he may not be able to recover costs even if he is successful (paragraph 4.01 of the Guide).

1.2.10 In all matters, a solicitor must consider with the client whether the likely outcome justifies the expenses and risk involved and such advice should preferably be confirmed to the client at the outset or at appropriate stages thereafter. In contentious cases, a solicitor should keep in mind that a settlement may be in the client's interest and to advise and act accordingly (paragraph 4.01 of the Guide).

1.3 The Legal Practitioners Ordinance Cap 159 also contains specific provisions on agreements on costs in contentious matters and other obligations/rights in relation to other aspects of the retainer. Section 58 provides that *"a solicitor may make with his client an agreement in writing as to his remuneration, in respect of any contentious business done or to be done by the solicitor for the client, which provides that the solicitor shall be remunerated either by a gross sum or by salary, or otherwise, and at either a greater or a lesser rate than that at which he would otherwise have been entitled to be remunerated."*

1.4 Further, in the absence of any agreement to the contrary, the *"entire contract rule"* applies generally to the retainer between a solicitor and his client so that the contract cannot generally be terminated before completion of the work and interim bills cannot be issued. The retainer engagement letter is therefore particularly important to protect the interests of both the solicitor and his client.

2. Reasons for change

2.1 It is recognised that not all solicitors firms in Hong Kong handling civil disputes issue letters of retainer to their clients. This can lead to unnecessary uncertainty and/or dispute over aspects of the retainer, such as billing, liability for party and party costs and termination of retainer.

2.2 In New South Wales, the client's rights to information about how a barrister or solicitor will charge for costs of legal services and an estimate of the likely costs of legal services have been provided for and are enforced by legislation to the effect that fees are not recoverable unless the requirement of a written retainer (subject to some exceptions) is met (sections 174–183 of the Legal Profession Act 1987).

2.3 In the United Kingdom, rule 15 of the Solicitors' Practice Rules 1990 provides, amongst other things, that solicitors shall give information about costs and other matters in accordance with a Solicitors' Costs Information and Client Care Code made from time to time by the Council of the Law Society with the concurrence of the Master of the Rolls. The 1999 Code promulgated by the Law Society of England and Wales provides detailed guidance on costs information and client care requirements for adoption by solicitors.

2.4 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.

2.5 Such concise statement should be set out in plain English/Chinese, whichever language that the client prefers. At appropriate stages of the matter and/or on a regular basis thereafter, the solicitor should advise on the progress of the matter, any significant developments and any anticipated delay or other issues arising and inform the client of the costs incurred to date and any revision to the estimate of costs provided.

3. Recommendation for change

3.1 The Guide already contains a comprehensive protocol as to key information, including the matter of costs, to be supplied by solicitors to clients both before and during the retainer. However, to further enhance client care, 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

1. Introduction

1.1 At present, the parties to litigation define the boundaries of the dispute by a series of formal statements of their position: the Writ, the Statement of Claim, followed by the Defence, followed by the Reply, and so on. These formal statements are referred to collectively as the Pleadings. The Defence must answer each allegation made in the Statement of Claim, either admitting it, denying it, or putting the Claimant to proof of it. The Reply must apply the same approach to the Defence, and so on. The aim is that at the end of the process the court and the parties know exactly what is in dispute by reference to the pleadings. Alternatively, in appropriate cases, the litigation can be commenced by another form of orginating process, in which case the parties will exchange affidavits rather than pleadings.

2. Reasons for change

2.1 It is widely perceived that the system of pleadings has become over-technical, making many pleadings difficult to read and to understand. This is sometimes exacerbated by the use of legal technical language and Latin phrases which obscure the meaning. The different types of originating process, which overlap in their uses, add to the obscurity of the present system.

2.2 The system is also open to abuse. A party with a weak case can conceal that fact at the pleadings stage by making blanket denials, without advancing any positive case. This has the effect of perpetuating hopeless cases which might be exposed and struck out if the Defendant were forced by the rules of pleading to give a more forthcoming response to the allegations against him.

2.3 The system also generates many small but time-consuming court applications. The existing timetable (generally 14 days between each pleading) is unrealistically short for all but the simplest cases.

3. Summary of Recommendations

3.1 The Law Society recommends the following changes:

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

3.1.2 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:

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

3.1.4 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.

3.1.5 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.

3.1.6 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.

3.1.7 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).

4. Response to the CJR

4.1 **Proposal 6:** Simplify the manner of commencing proceedings to two forms.

This Proposal is supported.

4.2 **Proposal 7:** Part 11 of the CPR should be adopted to govern applications to challenge the Court's jurisdiction.

This Proposal is unnecessary.

4.3 **Proposal 8:** Introduce procedures for making admissions and for the defendant to propose terms for satisfying money judgments.

The existing rules provide for judgment and admissions and a stay of execution on terms. The existing form should be redrafted and simplified to enable the parties to achieve this without involving the Court.

4.4 **Proposal 9:** Rules should be adopted aimed at returning pleadings to a simpler form.

- *The existing pleading system should be retained.*
- *Pleadings should be written in plain language, no latin and no unnecessary technicalities.*
- *Copy documents should be cited in the pleadings and be annexed (see 3.1.7 above).*

4.5 **Proposal 10:** Rules be introduced to require defences to be pleaded substantively.

This is Proposal supported. Every factual allegation should be answered.

4.6 **Proposal 11:** Requirement for all pleadings to be verified by statements of truth.

The Law Society recommends that endorsements of writs need not be verified but Statements of Claim should be.

4.7 **Proposal 12:** Rules to be adopted to establish a power to require clarification and information on pleadings.

This is a general theme which the Law Society endorses. The Law Society would prefer wherever practicable to use or enhance the existing rules (but see them substantially reinterpreted by the Judiciary) particularly with a view to more active case management and a more robust application of existing rules by the Judiciary. The objective appears to be the same; the route different. Therefore, there is no need to re-write the rules.

4.8 **Proposal 13:** Rules making it more difficult to amend pleadings.

This is supported in principle.

Chapter 4 DISCLOSURE OF DOCUMENTS AND DOCUMENTARY EVIDENCE

1. Introduction

1.1 The object of this Chapter is to consider ways to simplify and streamline the process of disclosure of documents and of other documentary evidence, in line with the overall objectives of cost saving and proportionality. This has to be balanced against the overall interests of justice. This Chapter also covers procedures for obtaining disclosure of documents pre-action or from non-parties.

2. Reform

2.1 Reform of the rules relating to discovery of documents in civil litigation has been a key subject of debate in many jurisdictions. In England, Lord Woolf referred frequently to the excesses of discovery, and one of the primary aims of his new rules of civil procedure was to reduce the scope, and therefore the cost, of discovery.

2.2 Hong Kong now remains one of the few jurisdictions which retain the very wide rule of discovery emanating from the 19th century case of *Peruvian Guano*. This provides an extensive obligation on parties to litigation to disclose documents directly or indirectly relevant, and documents which may only lead to a train of enquiry to relevant documents. Many believe that this obligation of discovery is excessive and results in significant costs being expended in the litigation process, for little or no benefit. Whether, and if so in what way, the scope of discovery should be narrowed has been the key issue of the Law Society's consideration in relation to discovery.

3. Possible Improvement Measures

3.1 After considerable debate, the Law Society has concluded that the existing *Peruvian Guano* test for discovery of documents should be retained. The principal reasons are as follows:

- There was wide acknowledgement of the excesses of discovery which can arise, particularly in large commercial cases, but it was found that the current test of discovery often did not produce excesses in small or medium cases.
- There was considerable reticence, in the interests of justice, to any narrowing of the scope of discovery: that was thought to provide too much latitude to the unscrupulous to hide relevant documents. There are many examples where only the broad test of discovery had allowed key documents to be unearthed, and examples where narrower tests had allowed parties to hide key documents, which had only come to light by accident (this applied particularly in arbitration proceedings). Whilst it was acknowledged that the unscrupulous will always make efforts to hide relevant documents, it was felt that a narrower test of discovery would unnecessarily facilitate this.

- Evidence from England was that, under the narrower discovery test, costs savings had been much less than anticipated. This was largely because more senior lawyers needed to spend more time assessing documents against the more complicated test of relevance.
- Many of the excesses of discovery would be effectively mitigated by the remaining reforms suggested by the Law Society (as explained below).
- There are problems with all other discovery tests, particularly the test under Woolf in England, used in arbitrations and under many continental European rules.

3.2 It was generally agreed that the process of listing and/or bundling of documents was over-complicated. It was found that in many cases it was the listing process itself which ran up significant unnecessary costs. Measures should be introduced into the rules to enhance the scope of listing by paginated bundles or other convenient order, the key requirement being that the opposing party could have a general idea of the nature and volume of the documents, and later be able to identify them (for example by their by pagination). It was not normally necessary to list documents individually.

3.3 There is an obligation on the parties to give discovery within 14 days after close of pleadings under HCR Order 24(2). It is therefore incumbent on the parties to consider the nature and scope of discovery to be given, whether and how it could be limited, and the method of giving discovery. Whilst scope for limiting and agreeing discovery already exists, for example, in HCR Order 24 rules 1(2), 3(3) and 8, these are little used in practice, and have not found favour with the courts. They need to be enhanced and used.

3.4 Similarly, measures to narrow the issues in dispute, together with enhancements of pleadings (particularly removal of bare denials) would assist in limiting and defining the issues, and hence limiting the scope of discovery which needed to be given.

3.5 The current rules allowing a party to object to giving discovery on the basis that it is oppressive should, in particular, be enhanced with some concept of reasonableness and proportionality. Whilst the underlying *Peruvian Guano* test of relevance would be maintained, it should be easier to refuse to give discovery of very large volumes of documents of only very marginal relevance.

3.6 It should no longer be possible for parties to disclose an unsorted warehouse full of documents in large cases, leaving the opposing party to plough through this in the hope of finding of what was relevant at very considerable cost. Excessive disclosure of irrelevant or unordered material could also be objected to.

3.7 The Law Society considered that a concept of *"asker pays"* might usefully be introduced. If one party considered that documents held by the opponent may contain something of marginal relevance, but the court would ordinarily refuse discovery as being unnecessary, then the requesting party could be given discovery of those documents on the basis that it was to bear the costs of that additional discovery exercise. A variant on this theme which could be used in marginal cases would be that the costs of giving additional discovery might be made conditional on the outcome of that discovery exercise: if it yielded significant documents, then the giver should pay. If it did not, the requester should pay.

3.8 It was considered that no real change was necessary to the current rules and procedures on seeking additional discovery, or having discovery verified by affidavit. These rules were well attuned to the *Peruvian Guano* test. Whilst there was some feeling that there were still fishing expeditions for discovery, in the hope of turning up something relevant, it was believed that other reforms set out above (particularly on proportionality/reasonableness) would assist in weeding out such excessive discovery requests. Experience under Woolf was that the narrower test of discovery had not in fact led to fewer fishing expeditions or requests for discovery. There was apparently an actual reduction in the number of discovery applications made to the court, but this was found to reflect an artificial limit of one discovery application per party per case being imposed by the court under case management.

4. Pre-action and Non-party Discovery

4.1 The current rules on pre-action discovery or discovery against a non-party are disparate and confusing. HCR Order 24 rule 7(A), bringing into effect Sections 41 and 42 of the High Court Ordinance, allows for such discovery only in personal injury actions. Stringent criteria are set out for justifying such discovery.

4.2 The issue is largely one of balance between allowing a potential plaintiff access to the documents which are key to putting together his case, but happen to be in the hands of opponents or unrelated parties, and on the other hand, oppression against potential defendants by plaintiffs with spurious claims, hoping to be able to put together a claim by access to the potential defendants' documents.

4.3 Liquidators have wide powers to obtain documents, which do in reality lead to litigation. Similarly, discovery actions can be commenced on the *Norwich Pharmacal* principles. In appropriate cases, documents can be obtained by subpoenas, or under an *Anton Piller* injunction. The criteria in each instance are different, and no one procedure covers all types of case.

4.4 The Law Society recommended the introduction of a comprehensive code for pre-action and non-party discovery. The hurdle which a plaintiff, or asking party, must overcome will remain high, akin to the test presently applicable to personal injury actions. The rules will, however, allow such discovery requests in all cases. The *Anton Piller* injunction should however remain as the appropriate way to seize and preserve evidence otherwise at risk of destruction.

4.5 It would usually be a requirement of discovery against a non-party that the asking party should bear the costs of the non-party giving the discovery, backed up by security for costs and/or undertakings in damages in appropriate cases.

4.6 Changes to the terminology of discovery which have been introduced in the Woolf reforms are unnecessary. A wholesale re-write of the rules relating to discovery is also unnecessary.

5. Summary of Recommendations

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

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

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

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

5.5 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.

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

6. Response to the CJR

6.1 **Proposals 25:** Automatic discovery should be retained, but the *Peruvian Guano* test of relevance should no longer be the primary measure of parties' discovery obligations. The primary test should be restricted to directly relevant documents.

These relate to the process and extent of disclosure of documents. This is an area of key difference between the Law Society and the CJR, with the CJR adopting a test for discovery of documents similar to that in the Woolf reforms. As set out in section 3 above, for the reasons given there, the Law Society strongly recommends the retention of the existing Peruvian Guano test for discovery. Accordingly, Proposal 25 is not supported.

6.2 **Proposal 26:** The parties should be free to reach agreement as to the scope and manner of making discovery. When no agreement is reached, they should be obliged to disclose only those documents required under the primary test, ascertainable after a reasonable search.

This supports the parties being free to reach agreement on the scope and manner of discovery, and that reasonableness in the searches for relevant documents should be taken into account. To an extent, this Proposal is supported, and the Law Society certainly agrees parties should be free to reach agreement, and an element of proportionality should be introduced into the discovery process, as explained above. Nevertheless, to the extent that this Proposal is based on the Woolf test for disclosure, it is not supported.

6.3 **Proposal 27:** In the alternative to Proposals 25 and 26, discovery should not be automatic, but should be subject to an inter-partes request.

This is largely consequential on the adoption of the Woolf test, and is therefore not supported.

6.4 **Proposal 28:** Parties should be empowered to seek discovery before commencing proceedings and from non-parties along the lines of the CPR.

This concerns pre-action and non-party discovery and is supported.

6.5 **Proposal 29:** The Court should be expected to exercise its case management powers with the view to tailoring an appropriate discovery regime for the case at hand. It should have a residual discretion both to direct what discovery is required, including full *Peruvian Guano* style discovery if necessary, and in what way discovery is to be given.

This is supported to the extent that it refers to the court exercising case management powers to tailor appropriate discovery for the case in hand. The Proposal is supported in giving the court a residuary discretion as to the nature of discovery, but is not supported where it suggests that Peruvian Guano discovery should be the exception rather than the norm.

Chapter 5 NON-DOCUMENTARY EVIDENCE

1. Introduction

1.1 This Chapter considers issues specific to factual and expert witness evidence. Many of the issues which arise for reform are considered in other contexts. In particular, the giving of witness evidence at trial, and issues relating to limits on the number of witnesses or the length of examination of witnesses are separately considered.

2. Factual Witnesses: Possible Improvement Measures

2.1 The present system of exchanging statements of witnesses of fact generally works well and effectively. A number of defects which had existed have been remedied by amendments to the rules of evidence and evidentiary procedure. A number of areas of detail may nevertheless be usefully amended. In particular, and consistent with enhanced case management, the rules should be amended to make it clearer that additional witnesses or witness statement evidence, not exchanged at the appropriate time, should not be adduced at trial without very good reasons. Such changes are broadly in line with similar changes made in England, and aim to cut down the present laxity in exchanging all witness statements well before trial, and ineffectiveness of orders in relation to witness statements. This change will be linked with the general procedural change that failure to comply with provisions of a court order will carry automatic sanctions, unless an extension of time is requested and granted.

2.2 In conjunction with that, some reform to the rules should be made to make it more clearly obligatory to give a statement of the nature of the evidence to be adduced, a *"gist statement"* under HCR Order 38 rule 2A(5) in all cases where a witness statement is not served, in order to give as complete a picture as possible of the evidence which would be adduced at trial at the witness statement exchange stage.

2.3 The real difficulty which has emerged with witness statements is that they have become *over-lawyered*. Since the evidence in chief of a witness must be set out, subject to some small exceptions, in a signed witness statement, the practice has grown of witness statements becoming extremely long, covering every possible issue in carefully drafted detail. This increases the cost of the litigation process. The Law Society considers it important to maintain the underlying objective that all factual evidence should be set out in witness statements before trial, and therefore do not advocate a general change to the rule. Nevertheless, some amendment to HCR Order 38 rule 2A(2) is necessary to make it clearer that witness statement should only give the essential evidence on the essential facts. They should exclude, in particular, legal argument, submission or commentary on large numbers of documents, which frequently are found appearing in witness statements. Such an amendment will complement the overall enhancement of case management, and greater rigour in cutting down unnecessary issues and unnecessary evidence.

2.4 The Law Society noted that the Woolf reforms had attempted to achieve the same objective, although experience suggested there had only been limited success, and witness statements remained as *"over-lawyered"* as before. There was also a concern that under the CPR introduced by Woolf, too great a flexibility was given to the court at trial to allow new evidence, which went against the important principle of having all essential evidence set out in statements in advance. Under CPR 32.5(4) additional evidence may be adduced at trial *"only if [the court] considers there is good reason not to confine the evidence of the witness to the contents of his witness statement"*. This highlights the difficult balance to be struck by the rules and the courts between simple witness statements, leading to more surprises at trial, and excessive witness statements, wasting time and costs. The Law Society believes rules could usefully be added to the orders on costs and taxation to give the court greater power to control excessive witness statements by costs penalties.

3. Hearsay

3.1 The rules relating to the admission of hearsay evidence in a civil trial, and the exceptions to the general rule of exclusion, grew up to form a complicated set of procedures involving notices, counter-notices and potentially a significant numbers of contested applications. The process has now largely been dispensed with for actions commenced after 1 June, 1999, by the amendments to the Evidence Ordinance. This broadly allows hearsay evidence in civil trial, subject to a simplified procedure. The Law Society broadly believes these amendments are effective and that no further change is presently necessary.

4. Expert Evidence

4.1 The Law Society identified a number of issues in relation to expert witness evidence. The number of expert witnesses, and the length and complexity of their reports continues to grow. Experts have, increasingly become advocates for their own side rather than aids to the court. The number and nature of experts continues to increase. In relation to personal injury actions particularly, there is growing evidence the parties seek to adduce substantial unnecessary expert evidence.

4.2 There is evidence that experts, left to their own devices, are quite often capable of agreeing many of the issues in dispute, and the rules already make provision for without prejudice meetings of experts with this in mind. Nevertheless, such meetings have to some extent become hijacked by the legal advisors, who constrain the freedom of the experts to discuss and agree on the issues. This leads to wasted time and costs, and unnecessary issues being dealt with by the court. A proper without prejudice meeting of experts is, we believe, a useful part of overall case

management and of narrowing of the issues. The rules can be enhanced to make the process more effective, and to put a greater burden on the parties and the experts to hold such a meeting in good faith and make genuine attempts to narrow the issues. The presumption is that there should be such a without prejudice meeting, save for good reasons.

4.3 The Law Society discussed at some length the system now introduced in England of having a single court appointed expert. This raised a number of potentially controversial issues. There is a danger that the court appointed expert becomes the arbiter rather than the Judge, and that the discussion between the court and the court appointed expert is not always transparent. The parties inevitably feel constrained to instruct their own experts for the purposes of monitoring and cross-examining the Court's experts. This increases rather than decreases the overall costs of the process. The Law Society concluded that general appointment of single experts would not be productive, and that no change to the rule should therefore be made. There may be exceptions to this, for example, personal injury or straightforward road accident cases, where a single expert would be effective. These are very much the exception.

4.4 Another area of reform put in place by Lord Woolf was the removal of privilege over instructions to, and communications with, experts. Whilst disclosure of these communications is not automatic, parties to litigation have to be prepared that it will be ordered. The unfortunate consequence of this is that the litigants feel constrained to instruct two experts. The first is the expert who will give evidence at trial, and whose instructions may be disclosed. The second is a *"back-up"* expert who is used to advise on the case, pleadings and other tactical issues. The Law Society believes that parties should remain free to discuss these issues behind the veil of privilege.

4.5 Nevertheless, there remains a concern about the true independence of experts. The Law Society would advocate enhancing the rules of expert evidence to incorporate the comments of the court in the *Ikarian Reefer* case, which illustrate the concerns of the court and the appropriate standard for experts.

4.6 Whilst HCR Order 38 contains provisions limiting the adducing of expert evidence, these are too easily circumvented. The rules should be enhanced to provide the court with a clearer duty to consider proposed expert evidence, and to limit this to only the number of experts and expert issues which are properly necessary. The parties should clearly need to justify each expert whom they propose to introduce. This overlaps with issues of case management generally.

4.7 Where expert evidence involves the inspection of an injured litigant, the location of an accident, or some other site or item, the Law Society believes the rules can usefully be enhanced to provide for this to take place in a more structured way and, where possible, for the experts from

both sides to attend inspections at the same time. This will not only save overall costs, and later debate about what state something was in at a particular time, but experience shows that with all experts carrying out inspection at the same time, an early narrowing of the issues and agreement can take place. In relation to personal injury actions in particular, it is plainly advantageous for medical experts from each side to see the injured plaintiff at the same time, particularly for the purposes of psychiatric reports. This is not only for reasons of litigation efficiency, but also to reduce the inevitable distress on the plaintiff.

5. Subpoenas

5.1 The Law Society does not advocate any general change to the system of subpoenas. If amendment is made to the rules on non-party discovery, then the process of *subpoena duces tecum* will be subsumed within that process. If there is a general move towards simplifying the process and language, then subpoenas would become witness summonses.

6. Summary of Recommendations

6.1 Rules to be enhanced to ensure effective sanctions for failure to serve proper witness statements or *"gist statements"* on time.

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

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

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

6.5 Rejection of widespread use of single court-appointed experts and preservation of privilege over experts' instructions.

7. Response to the CJR

7.1 **Proposal 37:** This Proposal would give the court flexibility in the treatment of witness statements, by expressly catering for reasonable applications for witnesses to be allowed to amplify or add to their statements.

This Proposal is supported, although the Law Society believes the test proposed in the CJR does not achieve the objective set by the Judiciary (see paragraph 2.4 above). The Law Society considers the test should be: "whether the evidence will take the other side by surprise, and whether it will assist with the fair resolution of the case".

7.2 Proposal 38

This contains measures to give the court greater control over the scope and use of expert evidence, and is supported.

7.3 Proposal 39

This Proposal improves the independence and impartiality of expert witnesses and is supported in general terms. However, of the 5 sub-points in Proposal 39, the first 3 are supported, but the second two are rejected. Points 1 to 3 cover expressly declaring the expert's duty to the court, emphasising the importance of independence and impartiality, and developing and annexing a code of conduct for experts. The 3rd and 4th points in Proposal 39 would permit experts to approach the court in their own name for directions, and remove (to an extent) privilege which would attach to instructions to experts. These are in line with the Woolf reforms in England. Experience from England suggests that both these reforms have created more problems than they have solved, or otherwise have not been taken up. A direct approach to the court could lead to inconsistency and confusion. The requirement to disclose instructions has led to each side having two experts: one who was put forward to the court, and one who helped the party with their case behind the scenes. It was felt that these Proposals were an unnecessary complication, added costs, and would have adverse consequences which did not warrant their introduction.

7.4 Proposal 40

This Proposal advocates, in line with the Woolf reforms, a broad introduction of a single court-appointed expert. For the reasons discussed above, this Proposal is not supported, save for a very limited range of cases (see paragraph 4.3 above).

Chapter 6 CASE MANAGEMENT

1. Introduction

1.1 In the context of the current debate on reform of the civil process, the term case management is understood to mean proactive judicial control of civil actions, as opposed to the traditional concept of party autonomy where control over a particular case is left entirely in the hands of the parties or their lawyers.

2. Reasons for Change

2.1 The perception in some quarters is that the high costs of litigation and the delay in disposing of cases before the courts have reached critical proportions to the extent that reform is absolutely necessary.

2.2 The principal legal system from which Hong Kong derives its own common law system, that of England and Wales, has undertaken a comprehensive reform of its civil justice system resulting in the Woolf reforms. Even in the post-colonial era, such a significant development should at least encourage thorough consideration as to whether a similar radical overhaul of Hong Kong's system is required.

3. Are the criticisms of the present system justified?

3.1 *"The law's delay"* has been a constant refrain from at least Shakespeare's day and no doubt long before. As long as the adversarial system remains the cornerstone of common law, which is enshrined in Hong Kong's Basic Law, lawyers will be doing their best to outwit their opponents and win cases (or attempt to stifle the more meritorious case of their opponent). This is the essence of the adversarial system.

3.2 Many litigation cases are inherently complicated and in order to do proper justice to both sides, cannot not be rushed through on an expedited timetable.

3.3 Statistically, most disputes do settle, either before or during an action. One of the main objectives of judicial case management as stated by its supporters is to address the timing so that those majority of cases which are amenable to settlement are settled sooner rather than later in the litigation process.

3.4 The Law Society welcomes the opportunity provided by the CJR to consider reforms generally aimed at addressing the question of delay and cost in litigation and the perceptions as to their cause. Hong Kong litigation solicitors' primary interest is to ensure that (as much from a

commercial perspective as any other) their clients are happy that litigation conducted on their behalf is dealt with efficiently, by the legal profession itself and the courts. Put bluntly, unless solicitors strive (as they do) to conduct litigation efficiently, their clients' level of satisfaction with not just their advisers but the system as a whole will diminish, and they may look for other avenues of resolving disputes, including opting for alternative jurisdictions in which to do so.

3.5 The reality is that, to the extent that inefficiencies have crept into the system, everyone involved bears a degree of responsibility. It is not however likely to be productive to engage in an exercise of apportioning blame for present deficiencies. The critical need is to address the perceived inadequacies going forward. The Law Society has for some years had in place for its members extensive training and guidance for those engaged in litigation work. The development of more extensive training continues apace. Further guidance will be developed. In addition, it is right that the question of case management of litigation must be addressed, albeit of course realistically within the constraints of what can be achieved in Hong Kong.

4. The Objectives of Case Management

4.1 To address certain features of the existing system perceived in some quarters as deficiencies, such as:

4.1.1 The progress of litigation remains in the hands of counsel, solicitors and the parties.

4.1.2 All cases are subject to the same procedures, events and timing.

4.1.3 The earliest assessment of the case, and generally the only means of monitoring the case, is the checklist callover at the time the case is being set down for trial.

4.1.4 Cases are listed on the *'first come first served'* basis with no reference to their type or complexity.

4.2 Case management objectives would include:

4.2.1 Improved use of the available judicial, legal and administrative resources and improvement in the resources themselves.

4.2.2 Greater predictability and certainty of process.

4.2.3 Improved economy and disposal of litigation.

4.2.4 The encouragement of early settlement.

5. Particular Case Management Techniques

5.1 Pre-Action Protocols

5.1.1 Pre-action protocols are designed to set out procedures for the exchange of information regarding the claim and the defence which should generally be followed in order to encourage settlement before action and thus reduce or avoid the costs of contested litigation.

5.2 Timetables

5.2.1 Timetables set at the outset of an action in which the parties are required to carry out various steps in the litigation process by certain dates may encourage speedier and more efficient resolution of litigation.

5.3 Judicially imposed caps on costs

5.3.1 Tight Judicial control over the actual amounts of costs awards to successful parties either at the interlocutory or trial stage of litigation may create additional pressure on parties to settle at an earlier stage of the litigation process. Even a successful party may only be able to recover a lower proportion of costs as actually charged to him by his legal advisers than has been the case previously.

5.4 Early identification of issues

5.4.1 There is concern that lawyers are raising too many legal and factual issues, many of which are irrelevant to the true issues in dispute between the parties. In this respect, early judicial intervention by at latest the summons for directions stage (and earlier if possible) may be welcome to define the real substantive issues between the parties. This should reduce the scope of discovery and the length of trial should the action proceed that far, with a consequent reduction of delay and costs.

5.4.2 Early identification of the substantive issues by amendment to the current form of pleadings, strengthening of the court's powers at the hearing for directions, discovery and pre-trial review stages have been discussed elsewhere in this Report.

5.5 Trial Case Management

5.5.1 Discussion has taken place elsewhere in this Report as to the need for increased use of skeleton arguments, lists of authorities, written opening and closing submissions, etc.

6. Is Judicial Case Management practically achievable?

6.1 Considerable criticism has been levelled at the performance of the parties' legal representatives. It is also important to ask whether the Judiciary and the Judiciary administration as a whole are equal to the task of efficient deployment of judicial case management techniques.

6.2 There is no question but that certain individual members of the Judiciary are highly attuned to the concept of case management and more than capable of applying it. However, consistency of approach is essential. The considerable progress made in extending case management in some of the specialist lists is to be highly commended, but at the end of the day a piecemeal approach will not do.

7. Recommendations

7.1 Pre-Action protocols

7.1.1 The use of such protocols should probably be restricted to cases which already fall within the Specialist Lists or Specialist Lists which may conveniently be created for cases which are amenable to categorisation, but which presently do not have Specialist List status.

7.1.2 We further suggest that such protocols should be relatively simple and straightforward and should avoid unnecessary complexity. A certain degree of *"front loading"* of costs, which is the perceived disadvantage of pre-action protocols, is probably an acceptable price to pay for a clear set of simple steps which should be observed by practitioners to explore the possibilities of settlement before action, the absence of adherence to which by either party may result in costs sanctions against even a successful party.

7.2 **Timetables**

7.2.1 Tight timetables set at the outset or following the close of pleadings stage of a civil action leading up to and inclusive of trial may also be appropriate and achievable in certain specialist lists where there is an established practice of the same individual judge being in charge of a case from its inception to trial ("the docket system").

7.2.2 In the absence of a radical overhaul of the court administration, however, we strongly doubt whether judicially imposed timetables at the outset or at an early stage of an ordinary action can work in practical terms.

7.3 Judicial Caps on Costs

7.3.1 Most, if not all, firms experienced in commercial litigation provide a standard retainer letter to clients as a condition of accepting instructions in any particular matter. Such retainer letters set out the basis of the firm's charges, relevant hourly rates, reserve the right to submit interim bills, etc.

7.3.2 Major commercial clients are for the large part extremely conscious of their bargaining position with regard to costs. The risk of losing such clients as a result of failing to provide a reasonably accurate estimate of costs in advance of embarking upon a particular strategy in the course of an action is, in most cases, a sufficient encouragement for solicitors to keep their clients regularly informed as to their liability for costs.

7.3.3 We consider that, provided clients are properly informed as to their liability for costs and the fact that they will only recover a proportion of their costs as actually paid to their legal advisers on party and party taxation, it is a matter for the clients and not for the Judiciary to take the commercial decision as to whether clients wish to spend more than what they may recover on party and party taxation in relation to a particular action.

7.3.4 We recognise that there is a proportion of solicitors who, through lack of experience or otherwise, do not follow best practice with regard to retainer letters outlined above. The Law Society recognises the need for ongoing education on these issues, including the provision of guidelines on retainer letters for recommended use (see Chapter 2).

7.3.5 In smaller cases handled by the District Court involving mainly individual clients, it would perhaps be appropriate to devise a protocol by which the Judge ensures that the solicitors for the parties have properly explained to their clients their respective liabilities for costs before allowing the action to proceed, in a manner somewhat similar to that employed in criminal cases.

7.4 Early Identification of Issues

7.4.1 The hearing for directions procedure should be strengthened in all cases so that it is mandatory for parties to attend a formal hearing (perhaps accompanied by their clients) in which there is informed discussion of the status of the case, including agreement on the real issues in dispute. Such hearings may be adjourned on good cause being shown by either party, but rules of court and/or practice directions should prohibit the current practice of orders being made with the consent of the parties without the necessity of a formal hearing.

7.5 Judicial Training

7.5.1 If a radical overhaul of the system is required, it must apply across the board. Judges must be educated in new techniques as well as the other providers of legal services. Whilst it is vital in order to avoid the possibility of political interference that Judicial appointments should only be revoked on strong well-defined grounds, a Judicial appointment should not be regarded as a job for life and there should be procedures for removing inefficient judges who are either incapable of adapting or unwilling to adapt to the new techniques.

7.5.2 There should be ongoing training programmes for judges in case management techniques and a means for ongoing assessment of their proficiency in applying them.

7.6 Judiciary Administration

7.6.1 Of equal concern is whether the Judiciary administration is equal to the task of providing the necessary administrative support if Judicial case management is going to work in future. Long established entrenched traditions of listing will require radical overhaul. Greater Judicial time will have to be allocated for judges to read in advance not only for trials but major interlocutory case management sessions such as hearings for directions and pre-trial reviews. The docket system of allocating cases to individual judges from inception to trial would have to be adopted to make the system work.

7.7 Governmental Support

7.7.1 Education of judges and radical changes in the present system of Judiciary administration may involve increased cost to the taxpayer. Will this be politically acceptable to the Government of the HKSAR?

7.8 Summary

7.8.1 It is vital that every sector of the 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 with all its imperfections.

8. Response to the CJR

8.1. **Proposal 2:** Introduce a rule placing a duty on the court to manage cases

Generally greater case management is welcomed. The concern, which is expressed in this Chapter and at various other points in this Report, is whether active case management can be carried out effectively by the Judiciary, particularly outside Specialist Lists/Courts. This concern in part at least stems from doubt as to the willingness of the Government, particularly in the present economic climate, to provide the necessary additional resources. It is also because of doubt as to whether the standards of the Judiciary will result in good quality case management and a consistency of approach. Matters such as funding, resources and training have to be addressed. There should be an induction course for new judges and ongoing training for all judges so as to develop the necessary Judicial "mindset", particularly in relation to proportionality.

8.2 **Proposal 3:** Rules listing the court's case management powers

This is supported, and see paragraph 8.1.

8.3 **Proposal 4:** Steps should be taken, in co-operation with interested groups, to develop pre-action protocols

The key emphasis is the development of pre-action protocols in relation to "specific types of dispute". Simple cases do not require elaborate pre-action protocols. Litigants should be able to withdraw without incurring full "front-loading" costs, a frequent criticism levelled at the Woolf reforms in England. Defendants should be given a pre-action opportunity to settle without having to undergo participation in elaborate pre-action protocols, which should be simplified to avoid rigidity.

8.4 **Proposal 5:** Rules to allow the court to take into account parties' pre-action conduct

This is supported, subject to the comments in paragraphs 7.1 and 8.3 above as to the extent to which pre-action protocols should be introduced.

8.5 **Proposal 18:** Rules providing for case management questionnaire and conference after defence, so that the court can set milestone dates

The Law Society's position is stated at paragraphs 7.2 and 7.4 above. The Law Society takes the view that the immovable milestones approach is insufficiently flexible, and instead proposes that milestones may be moved on penalty of immediate payment of compensatory costs. If immovable milestones are to be introduced, there will be significant resource implications. Such an approach would only work with a docket system. The Law Society takes the view that the existing rules are sufficient and can work well if the judges apply them more robustly and ensure that the party asking for an indulgence pays.

8.6 **Proposal 19:** Rules to give the court maximum flexibility when devising timetables and directions and encouraging the parties to make reasonable procedural agreements, without reference to the court, unless they impinge on milestone events

This Proposal appears to be a wholesale copying of the English CPR, as indicated by the reference in CJR para. 339 to a query as to whether the parties expect to be represented by counsel "or solicitors" (solicitors cannot represent parties at trial in the High Court in Hong Kong). The first element of the Proposal, which relates to encouragement of the parties to make reasonable procedural agreements without reference to the parties, is supported. For the reasons set out in paragraph 8.5 above, the immovable milestones approach is not supported. The proposed questionnaire would be ineffective if only adopted as a proforma exercise, since it is only a checklist by another name, and would have to be associated with a meaningful hearing for directions proposed at paragraph 7.4 above, where realistic timetabling could be set with a stricter threshold for any time extension application. This in turn requires a docket system operated by a judge fully trained in case management techniques and the additional resources necessary to achieve those basic criteria.

8.7 **Proposal 20:** Alternative to Proposals 18 and 19, a docket system for use generally or with particular categories of cases

This Proposal is supported at paragraph 7.6 above, subject to the availability of significant additional resources.

8.8 **Proposal 45:** Leave to appeal from case management decisions should generally not be granted unless there is a sufficiently significant point of principle

This is supported.

8.9 **Proposal 76:** Reforms must be adequately resourced.

This Proposal is supported and is of particular concern to the Law Society.

8.10 **Proposal 77:** Pre and post reform analysis of the system's demands

This Proposal is supported.

8.11 **Proposal 78:** Training programmes for Judges and other court staff

This Proposal is supported and see paragraph 7.5 above as well as Chapter 13 of this Report generally.

8.12 **Proposal 79:** Develop the court's existing computerised system

The Proposal is supported, both here and elsewhere in this Report.

8.13 **Proposal 80:** Research to monitor continuously the system's functioning and effect of reforms

The Proposal is supported, both here and elsewhere in this Report.

Chapter 7 EARLY DISPOSAL MECHANISMS

1. Introduction

1.1 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.

1.2 The present 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 latter are considered in Chapter 6 on Case Management. In other words, the means and measures to be examined in this section are *"weapons"* in the litigator's armoury.

2. Need for change

2.1 Arguably in Hong Kong the courts are too reluctant to bar anyone from litigating any issue at a full trial. This means that defendants often have it too easy. The effort, tenacity and expenditure required to bring a fully opposed complex matter to trial where the defendant chooses an uncooperative stance is enough to overwhelm even many substantial corporate plaintiffs, let alone individuals. The result of this is that many cases end up in abeyance with the tacit consent of both sides upon the plaintiff simply exhausting its will to litigate any further. This is often after both sides have spent considerable amounts on legal costs and considerable judicial resources have been consumed and results in dissatisfaction on both sides.

2.2 As very few cases are disposed of by way of full trial, the availability and proper use of appropriate and workable *"early disposal mechanisms"* is of key importance to the civil justice system.

3. Criticisms of the present system

3.1 Particular criticisms of the individual mechanisms currently available appear under paragraph 5 below, on a case by case basis. 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.

3.2 A balance must be kept. One must recognise that while it is unfair for a plaintiff with a strong case readily distilled into a few key issues capable of being disposed of efficiently to face years of *"scorched earth"* litigation to obtain justice, it would be equally unfair for a defendant defending a difficult and wide ranging case in good faith to be badgered constantly by applications from a plaintiff seeking unfair short cuts or hoping for only a superficial examination of the facts.

3.3 But matters have reached the stage where it is almost impossible to obtain summary judgment, except in debt collection cases, and the hearing of preliminary issues is almost never ordered and yet a High Court trial in a commercial matter can rarely be achieved for less than several million dollars in cost. This cost and delay barrier simply puts it beyond the reach (and patience) of many companies to pursue even relatively strong claims.

3.4 In England, at the time of modernising the rules in 1999 the concept of an *"overriding objective"* was written into the rules to guide Judges in exercising the many powers that are now available to them. In making case management type decisions such as whether to invoke an early disposal mechanism Judges are now required to take into account the importance of the case, the saving of expense, the financial position of the parties, the imperative that the parties be on an equal footing and the appropriate allocation of court resources. It is time for a similar approach to be adopted in Hong Kong.

4. Objectives of Early Disposal Mechanisms

4.1 See paragraphs 1 and 3 above.

5. Suggested Changes

5.1 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 procedure 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.

The particular recommendations are as follows.

5.2 Extension of the Originating Summons Procedure to Cover Simple Factual Disputes Triable on Affidavit

5.2.1 Possession actions aside, the existing Originating Summons procedure is confined to matters such as those involving construction of documents with little or no factual dispute and is not much used in Hong Kong.

5.2.2 As an alternative or complement to the extension of summary judgment (see paragraphs 5.5 and 5.6 below), this process could be used more widely in cases involving simple factual disputes capable of being tried on affidavit, for example where full correspondence is available and testimony is not likely to add much or where it is not cost effective to bring witnesses from abroad. There is always the safeguard that at a callover hearing the judge could direct the matter to proceed as a Writ action if necessary.

5.2.3 See HCR Order 7 and CPR 8.

5.3 Make it Harder to Set Aside Default Judgment

5.3.1 Entering judgment in case of default is a form of early disposal. It is difficult to understand why it should be so easy to set aside a properly obtained default judgment on the *Saudi Eagle* test. Litigants who do not comply with the rules should not be entitled to delay justice for the other parties indefinitely. A reasonable explanation for the delay should be required.

5.3.2 As a particular recommendation, the 48 hour notice rule for entry of judgment in case of default of defence should be abolished. The current discretion should be retained, but the time limits should be more stringently enforced.

5.3.3 See HCR Orders 13 and 19 and CPR 12.

5.4 Increased use of *"Unless Orders"*

5.4.1 This is related to paragraph 5.3 above as entering judgment for a failure to take part in the litigation process once it has started raises the same considerations as a total failure to take part.

5.4.2 Some judges refuse to make these orders at all. The concept of *"unless orders"* should be written into the rules rather than be treated as a matter of practice.

5.4.3 There should be no distinction between the litigant and its lawyer for this purpose.

5.5 Summary Judgment — Change of Test and Increased Use of Conditions on Leave to Defend

5.5.1 The current *"moonshine"* test where *"unless it is obvious that the defence put forward by the defendant is frivolous and practically moonshine, Order 14 ought not to be applied"* is far too strict. The Commercial Court in London has long been willing to determine even quite high value disputes on affidavits, experts' reports and limited

argument. This often happens in *"single issue"* commercial matters such as whether a cargo was contaminated, when a machine part broke etc, where the witnesses are professionals such as surveyors who are unlikely to buckle under cross examination and where little is to be gained by flying them in from overseas.

5.5.2 The courts fail to make use of the latitude the HCR currently allow. Curiously the Hong Kong courts seem to be moving in the wrong direction on HCR Order 14, i.e. making it ever harder to obtain. A formal adoption of an *"overriding objective"* (see paragraph 5.21 below) would enable the courts to be more robust.

5.5.3 See HCR Orders 14 and 86 and CPR 24.

5.5.4 The CPR test of *"real prospect"* of a claim of defence succeeding should be adopted.

5.6 Summary Judgment — Extension to Defendants

5.6.1 In Hong Kong, at present, only a plaintiff may apply for summary judgment. The extension of similar relief to defendants is regarded as one of the successes of the Woolf reforms in England and has long been standard in the U.S.

5.6.2 The current limited remedy available in Hong Kong to defendants faced with weak cases is striking out of the Statement of Claim or part of it. This requires the court to assume all the facts in the Statement of Claim are true.

5.6.3 There are two key issues with this. First, the existing remedy focuses unduly on *form* in requiring the defendant to show some manifest defect in the plaintiff's pleading document, rather than focusing on the utility and cost effectiveness of a full trial. Second, in appropriate cases, a defendant should be able to require the plaintiff to show that it has at least some evidence of its case and to place clear contradictory evidence before the court in a summary way.

5.6.4 See HCR Orders 14 and 18 and CPR 24. This reform should be adopted in Hong Kong.

5.7 Disposal on Point of Law — Use should be Increased

5.7.1 See paragraphs 5.5 and 5.6 above.

5.7.2 See HCR Order 14A and CPR 24.

5.7.3 It is difficult to lay down any new test for this. Introduction of the *overriding objective* should encourage use of this procedure where appropriate. HCR Order 14A should be combined with HCR Order 33.

5.8 Reform of Striking Out of Pleadings

5.8.1 See paragraphs 5.5 and 5.6 above and Chapter 3 of this Report. This remedy should be subsumed within the summary judgment remedy.

5.8.2 See HCR Order 18 and CPR 24.

5.9 Reform of Withdrawal and Discontinuance Rules

5.9.1 Under the present system a plaintiff is liable for the defendant's costs on discontinuing. Is this always appropriate, or should there be, in the interests of early disposal of unmeritorious claims, some opportunity for discontinuing early without paying costs?

5.9.2 Compare the right of defendants to satisfy a liquidated Writ claim with only fixed costs where the plaintiff may in fact have incurred very significant costs chasing the defendant for payment and preparing the Writ.

5.9.3 See HCR Orders 21 and 38 and CPR 38.

5.9.4 A plaintiff should have a right to withdraw with only fixed costs within 14 days of service of the Defence, subject to a right on the part of the defendant to apply for full costs in exceptional circumstances.

5.10 Reform of Payment into Court

5.10.1 The replacement of the traditional payment into court with CPR Part 36 is another success of the Woolf reforms. New South Wales replaced payment in with offers of compromise in the 1980s.

5.10.2 The only specially tailored mechanism in Hong Kong for encouraging settlement is the offer of amends procedure in defamation cases.

5.10.3 See HCR Orders 22 and 82 and CPR 36 and 37. This reform should be adopted in Hong Kong. Offers should not be restricted to simple cash payments as are payments into court. Further, plaintiffs should be able to make offers to accept less than their full claimed entitlement, with an entitlement to indemnity costs (should two levels of costs be retained) and full interest should they receive judgment at trial more favourable than their offer.

5.11 Directed Admissions/Notices to Admit

5.11.1 The current Hong Kong procedure of *"Notice to Admit"* is rarely used. Further, it only impacts on costs rather than issue management in that serving a Notice does not necessarily mean the factual issue in question is excluded from the trial, even if the judge thinks the issue is a non starter.

5.11.2 See HCR Order 27 and CPR 3.1(2)k. In the interests of the overriding objective, should the court have a power to direct that admissions be made? In *Cantor Fitzgerald v Tradition UK* [2001] All ER (D) 82 11/06/2001 (CA), under the CPR a party is referred to as having been *"directed"* to serve admissions, although the term *"directed admissions"* does not appear in the CPR.

5.11.3 These should be encouraged by the court on its own motion or by the parties on application. Coupled with the introduction of general powers to manage issues in the manner of CPR Part 3, the court should have the power to direct that *"admissions"* be made on particular subjects, rather like the power to order further and better particulars.

5.12 Judgment on Admissions

5.12.1 See paragraphs 5.5 and 5.6 above. Similarly, there should be increased willingness to grant this remedy.

5.12.2 See HCR Order 27 and CPR 14.

5.13 Preliminary Issues

5.13.1 The Hong Kong courts are currently perhaps overly zealous in ensuring that exercise of the jurisdiction to order that particular points be decided ahead of the main trial, which is designed to save court time, does not do precisely the opposite and waste court time. At present, a plaintiff effectively needs to satisfy the court that determination of a particular issue will almost certainly be dispositive of the whole case or a significant part of it and that a separate hearing of the issue will not prejudice the defendant in terms of cost and preparation before separate determination will be ordered.

5.13.2 The courts should be more flexible on this. If separate determination is likely to result in settlement of the balance of the action it should be ordered. It is difficult to prescribe a new test. The concept of proportionality and the overriding objective should be kept in mind when any decision is to be made.

5.13.3 See HCR Order 33.

5.14 Strike Out for Want of Prosecution

5.14.1 The rule in *Birkett v James* prevents cases being struck out if, under the rules of limitation, the plaintiff would be free to start over again, no matter how appalling the delay. But where an action is so old that it is fit to be struck out on current principles, if the plaintiff recommences the action the defendant will normally incur significant preparation costs over again because the lawyers will need to read into the matter again and, in light of changed circumstances, strategy might change etc. In that case the defendant should have all its costs paid up front before the plaintiff starts again. Alternatively, why retain the *Birkett v James* rule? A defendant should be able to have an action struck out with costs even if the plaintiff may in theory start again. It is unlikely that few struck out cases would be started again.

5.14.2 Further, perhaps the substantive law of limitation should be amended so that if an action has been commenced and abandoned then, unless good cause is shown, the plaintiff should be statute barred from proceeding even if the 6 years (or other period) has not expired, or only allowed to bring a new claim or reinstate an old one on exceptional grounds.

5.14.3 See HCR Order 25.

5.15 Leave to Amend — Restriction of Availability

5.15.1 See Chapter 3 of this Report. Where an action is prosecuted in a good faith further amendment of pleadings should generally be allowed to allow the true dispute to be identified and resolved. The whole purpose of pleadings is to assist the parties and they should not be artificially restricted.

5.15.2 However, under the present rules, applications to amend are made as late as the start of trial, or even during it. The view seems to be that subject to payment of wasted costs, pleadings need only be in order by the time of judgment. This should be reconsidered.

5.15.3 In view of the overriding objective and the requirement that case and issue management be proportionate to the size and importance of the dispute, some consideration should be given to restricting the current rules under which amendment is virtually always allowed, regardless of the circumstances. Amendment after discovery should only be allowed in exceptional circumstances. There should also be a requirement of an affidavit to explain the reason for the amendments on any application to amend post discovery.

5.15.4 See HCR Order 17.

5.16 Consent Order/Judgments

5.16.1 Availability should be widened. The rule should be drafted so as to identify the provisions to which it does not apply.

5.16.2 See HCR Order 42.

5.17 Introduction of Pre-Action Protocols, Introduction of Pre-Action Discovery

5.17.1 Arguably these are case management and evidence issues, but pre-action exchange of information is designed to make litigation the last resort, i.e. bring about the early disposal of disputes and issues not suitable to go to a full trial. These are dealt with elsewhere in this Report.

5.17.2 See HCR Order 31.

5.18 Mandatory or Recommended References to ADR

5.18.1 A power to recommend ADR is widespread in the US and Australia. A case is not allowed to continue unless a mediator's certificate of failed mediation is produced.

5.18.2 At this stage, given the maturity of the market for mediators in Hong Kong, there should be no mandatory mediation (See Chapter 14).

5.19 Introduction of "Early Judicial Evaluation"

5.19.1 Under the traditional English and Hong Kong practice, judges are effectively debarred from expressing views on the merits of a case in the early stages (although this actually happens to an extent where there is an HCR Order 14 application which fails). This is regarded as a *"bias"* issue. This is the wrong approach. It is very different from US practice where (anecdotally) judges routinely encourage settlement by this means.

5.19.2 The rules or practice should be amended to permit judges to express such views on their own initiative or where the parties request it, if necessary with that judge being debarred from sitting at the full trial.

5.20 Costs

5.20.1 Careful consideration should be given to the costs implications of all the applications discussed above. Loser pays at the end of the case, now the norm, may rarely be appropriate. For many of the procedures immediate taxation of costs would be appropriate, either to ensure proper compensation of successful applicants or to deter inappropriate applications.

5.20.2 For others, for example, an application for the determination of a preliminary issue, it might be appropriate for costs to be reserved, even if the applicant fails to get an order for separate determination, so that the judge can consider the matter again at trial and possibly award costs to the applicant which lost the application at the interlocutory stage if it is shown the issue was in fact determinative of the dispute.

5.20.3 See HCR Order 62.

5.21 General

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

6. Response to the CJR

6.1 **Proposal 1:** Adoption of provisions setting out the Overriding Objective

This is supported, including introduction of key concept of "proportionality". However, concerns were expressed on consistency, efficiency and the requirement of predictability. Greater judicial training will be necessary and thus there are budgetary considerations of great importance and there should, if possible, be measures to prevent abuse.

6.2 **Proposal 12:** Adoption of provisions to establish a power to require clarification of and information on pleadings

This is supported in the context of a power to order admissions to be made. The Law Society would however prefer wherever practicable to use or enhance the existing rules but see them substantially reinterpreted by the Judiciary, particularly with a view to more active case management and a more robust application of existing rules by the Judiciary. The objective appears to be the same; the route different. Therefore, there is no need to re-write the rules.

6.3 **Proposal 13:** Adoption of provisions to make it more difficult to amend pleadings

This is supported in principle on the basis set out in paragraph 5.15.3.

6.3 **Proposal 14:** Lower test for summarily disposing of proceedings or issues — *"Real Prospect of Success"*

This is strongly supported. Concerns about the standard and veracity of affidavit evidence can be addressed by judges adopting a robust approach to perjury. Concern about abuse or an increase in HCR Order 14 applications can be addressed by summary cost orders.

Additionally the Law Society considers that:

(i) *The HCR should be amended so that plaintiffs must wait for the Defence to be filed before filing an HCR Order 14 application.*

(ii) *The period for filing of the Defence should be extended to 28 days in all cases.*

(iii) *Any applications for further extensions must be supported by affidavit with substantial grounds and the defendant should bear the costs of the application.*

(iv) *Masters should adopt a robust approach regarding time extension applications.*

6.4 **Proposal 15/58:** Adopt procedure along the lines of CPR Part 36

This is supported.

Chapter 8 INTERLOCUTORY INJUNCTIONS AND OTHER FORMS OF INTERIM RELIEF

1. Introduction

1.1 The HCR permit parties, where appropriate, to apply for and obtain interim relief either at the outset or during the course of litigation so as to prevent another party from acting or failing to act in a manner which will prevent there being a fair trial or prevent the party obtaining judgment from enforcing it. Three examples are: first, where a party would otherwise destroy evidence relevant to the matter, the court may grant an injunction requiring the party in question to allow the other parties to preserve the evidence in question pending trial; secondly, if a party would otherwise hide or dissipate its assets so as to make itself judgment proof, the court may freeze the party's assets to the extent of the claim against it; thirdly, where a claimant is overseas and has no assets in Hong Kong, such that there is a real prospect that even if the defendant wins the litigation and gets an order that its costs be paid by the plaintiff, the defendant will not be able to find any assets against which to enforce the costs order, the court may require the plaintiff to provide security for the costs of the defendant as a condition of proceeding with the litigation.

2. Need for change

2.1 The Law Society considers that the current procedures 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 intensive development over the last 20 years or so, to the point that the Judiciary has created plain English and Chinese precedents for commonly sought orders.

3. Specific recommendations

3.1 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 any degree of confidentiality required is derogated from by such an arrangement (and not infrequently interlocutory injunction applications, by definition, require confidentiality). Consideration should be given to separate appointments for such applications.

3.2 The Law Society also considers that Hong Kong, as a responsible jurisdiction in its own right, 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 of the High Court Ordinance.

4. Response to the CJR

4.1 It appears that the CJWP is similarly of the view that no substantial reform needs to be made to the procedure in respect of interlocutory relief, from the absence of any specific proposals in the CJR.

Chapter 9 TRIAL

1. Introduction

1.1 The object of this Chapter is to consider the ways to strengthen the efficiency of a trial in terms of both time and costs.

2. Reasons for Change

2.1 The following are the major complaints about the manner in which a trial is conducted in Hong Kong:–

2.1.1 *"The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisers are able to conduct their case in all aspects in the way which seems best to them. The results not infrequently are torrents of words, written and oral, which are oppressive and which the judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive." per* Lord Templeman, *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1991] 2 AC 249 at 280

2.1.2 *"The complaint has often been made that the judges have been too ready to grant adjournments in the course of a trial and have been too passive in permitting prolix advocacy."* Reform of the Civil Process in Hong Kong by Michael Wilkinson and Janet Burton (ed.) at p.31.

2.2 Whilst it is recognized that justice delayed is justice denied and improvement measures should be introduced, a balance must be carefully struck so that such measures will not be overdone and the quality of the administration of justice is even more impaired.

3. Possible Improvement Measures

3.1 To confine the evidence to be called?

As a matter of principle, parties should be free in adducing at trial whatever evidence is conducive to their case, so long as the evidence is relevant and admissible. Therefore, judges can keep the trial on track by excluding irrelevant and inadmissible evidence. To go further than that, i.e. to empower judges to exclude relevant and admissible evidence because of efficiency, is too arbitrary and may jeopardize the fairness of the whole system. Therefore, 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.

3.2 To confine the issues to be tried?

3.2.1 At trial, parties should concentrate on the real issues in dispute (i.e. the determination of which will lead to resolution of the entire dispute between the parties). Therefore, it will be of assistance if parties could make an effort to agree on (1) a list of agreed facts and hence (2) a list of factual and legal issues to be tried at the trial ("Lists of Facts and Issues").

3.2.2 However, if the Lists of Facts and Issues are not finalized well before the trial there could be excessive discovery of documents, which may bring about pre-trial delay. The question is whether a positive duty should be imposed on the parties to agree on Lists of Facts and Issues; and if so, at what stage of the litigation process, e.g. as early as after the close of pleadings, or before the pre-trial review hearing.

3.2.3 One of the aims of the civil process reform is to introduce proportionality into the civil litigation system so that costs can be kept under control. Therefore, to enable trials to be conducted in a cost-effective manner, weak issues should have been pruned before the case goes to trial. The court should be more proactive in narrowing the issues.

3.2.4 However, expanded case management by the court means that there will be an increase in mandatory provisions. As such, additional mandatory pre-trial hearings may have to be fixed. This means more time and costs. The waiting time for trial is already very long and it seems that the Judiciary simply does not have sufficient resources to cope with the increased workload.

3.2.5 On the other hand, the court administration is not user-friendly. Check-list hearings inevitably start long after the time of the appointment. It is unfair for clients to pay for the costs of the waiting time, therefore, the listing of appointments of the check-list hearings should be staggered.

3.2.6 Further, the recommendation to combine HCR Order 14 (Summary Judgment), HCR Order 14A (Disposal of Case on Point of Law) and HCR Order 33, rule 7 (Trial of Preliminary Issues) should help narrow the issues at an early stage.

3.2.7 It is noted that if the discovery of evidence before the trial can be limited to the real issues in dispute, the trial dates can be more realistically assessed. Hence, delay and unnecessary adjournment can be avoided. Therefore, it is recommended that 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 stage of Summons for Directions under HCR Order 25. As such, unless the parties are in serious dispute on the list (in which event they would have to bear the risk of being penalized in costs of the additional hearings for arguing on the list), the chance of additional hearings is hopefully minimized.

3.3 To reduce or eliminate issues for experts?

3.3.1 It is noted that the Woolf reforms attempted to reduce the number of experts to one, i.e. only one expert is to be engaged by the court. However, in practice this attempt appears to have so far failed. If only one expert is authorised by the court, parties will usually engage "in-house" experts themselves advising on the questions and issues that parties should press before the court and the court-appointed expert. The result is that parties engage three experts altogether, hence an increase in costs.

3.3.2 While it is acknowledged that experts should be impartial, one cannot deny the fact that many experts when they are appointed regard themselves as part of the adversarial process. Further, if the opinions expressed by the experts were against the lay clients' case, their opinions would not even be produced. It therefore appears that the idea of only one court-appointed expert cannot really work as long as our civil litigation system remains adversarial.

3.3.3 In smaller cases, and possibly for personal injury cases, where issues in dispute are not complex, one court-appointed expert may be appropriate. In substantial litigation where complex issues are involved, different experts may genuinely hold different opinions. However, parties' experts should meet and resolve their differences, if possible, so that the issues can be narrowed as far as possible for the trial.

3.3.4 It is recommended that 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 jointly prepare a report on areas of agreement and disagreement.

3.4 To limit oral submissions?

3.4.1 Written submissions will save a lot of time (and hence costs), in particular time in reading aloud quotes from documents and authorities at the court during the trial. Naturally, the trial judge will have the discretion to ask the parties' advocates to make oral submissions to supplement the written submissions when necessary.

3.4.2 Further, parties' advocates should be given a time limit before the trial to file and serve their respective opening submissions. In short cases where issues are simple or few, skeleton submissions are sufficient.

3.4.3 However, this proposal will only be effective if judges are provided with sufficient time to read the written submissions and the materials.

3.4.4 Moreover, if this proposal is to be adopted, the Running/Warned List has to be abolished. This is because under the Running/Warned List, parties will be given one or two days' prior notice only, leaving no time for parties' advocates to write the written submissions and the judge to read them. To enable judges to be better prepared for a trial, judges should not be allocated cases at short notice. If the trial scheduled under the Fixture List collapses the time may be reallocated for writing judgments or hearing interlocutory applications (so as to reduce the current long waiting time).

3.5 To limit documents in the trial bundles?

3.5.1 Concise trial bundles save photocopying charges and also time and costs for parties and the judge to read unnecessary documents.

3.5.2 The current problem appears to be that parties tend to adopt a *"play safe"* attitude by including everything, some of which is in fact not expected to be referred to at the trial. It is noted that sometimes this happens because at the time when the trial bundles are prepared counsel has not yet advised which documents will be referred to at the trial and hence should be included in the trial bundles. This may be so because at the time counsel's brief for appearance at the trial has not yet been delivered, or counsel has not yet started to consider the matter.

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

3.6 To hold Pre-trial Conferences between Legal Representatives?

Pre-trial conferences are not pre-trial reviews before the trial judge but a working conference between parties' legal representatives to discuss and agree as far as possible on all matters concerning preparation and conduct of the trial. This will save the time and costs of parties sending correspondence to and fro.

3.7 To punish unnecessary adjournment of the trial?

Parties should be well prepared for the trial, particularly in preparation of the presentation of evidence. In order to deter unnecessary adjournment of the trial, if a party applies for an adjournment as a result of its own default, such adjournment can only be made upon that party's immediate payment of costs of the adjournment.

3.8 Giving Judgment or Dismissing an action for Non-appearance at trial

The court should be given the power to give judgment or dismiss an action when a party (having notice of the trial date) fails to appear at the trial. This is to save time and costs for a party's necessity to prove his case despite the non-appearance of the other party at the trial.

4. Summary of Recommendations

In summary, the recommendations in this Chapter are:–

4.1 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.

4.2 HCR Order 24 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 stage of Summons for Directions under HCR Order 25.

4.3 The existing rule on experts should be maintained, save that parties should be imposed with a duty to procure that their experts shall meet on a without prejudice basis, and a report on areas of agreement and disagreement should be jointly prepared by the parties' experts.

4.4 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 notices. If a trial scheduled under the Fixture List collapses, the time should be re-allocated for writing judgments or hearing interlocutory applications.

4.5 The Law Society should remind solicitors of their duties to ensure that in rendering advice on evidence, the advocate conducting the trial should also have advised on which documents should be included on the trial bundles, and that parties should start preparing the trial bundles after they receive such advice.

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

4.7 If a party applies for an adjournment of the trial as a result of its own default, such adjournment can only be made upon that party's immediate payment of costs of the adjournment.

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

5. Response to the CJR

5.1 **Proposals 35 and 36:** Proposals to extend the court's power to exclude evidence that would otherwise be admissible

5.1.1 *As noted in paragraph 3.1 above, this Proposal requires very careful consideration. The Law Society has expressed concerns on the ability of Hong Kong Judges to be sufficiently pro-active to the extent that evidence may be excluded before it could be considered.*

5.2 **Proposal 36:** Limits on cross-examination

5.2.1 *The Law Society notes that Hong Kong Judges in many cases adopt a passive attitude and let counsel cross-examine witnesses without exercising robust judicial control. The Law Society notes that litigating every point is an expense which parties may not be able to afford and supports the overriding objective of proportionality and effective case management. However, limiting cross-examination on certain points could be unfair as Judges may have already made up their mind thus preventing parties from addressing those points. To find a balance, the Law Society notes Order 34, rule 5A of the Supreme Court Rules of Western Australia (as referred to in paragraph 524.1 of the CJR), which provides as follows:–*

(1) A judge may at any time by direction —

(a) limit the time to be taken in examining, cross-examining or re-examining a witness;

(b) limit the number of witnesses (including expert witnesses) that a party may call on a particular issue;

(c) limit the time to be taken in making any oral submission;

(d) limit the time to be taken by a party presenting its case;

(e) limit the time to be taken by the trial; amend any such limitation;

(2) In deciding whether to make any such direction, a Judge shall have regard to these matters in addition to any other matters that may be relevant:-

(a) the time limited for a trial must be reasonable;

(b) any such direction must not detract from the principle that each party is entitled to a fair trial;

(c) any such direction must not detract from the principle that each party must be given —

(d) a reasonable opportunity to lead evidence and cross-examine witnesses;

(e) the complexity or simplicity of each case;

(f) the number of witnesses to be called by the parties;

(g) the volume and character of the evidence to be led;

(h) the state of the Court lists;

(i) the time expected to be taken for the trial; and

(j) the importance of the issues and the case as a whole.

The Law Society agrees that these rules ensure elementary procedural justice and that adoption of these rules would provide confidence that judges would exercise such powers with proportionality. Therefore, the Law Society recommends the adoption of Order 34, rule 5A of the Supreme Court Rules of Western Australia.

5.3 **Proposal 40:** Appointment of a single joint expert

5.3.1 *As discussed in paragraph 3.3 above, the Law Society is in favour of preserving the existing system. The Law Society takes the view that a court-appointed single joint expert should only be used in a limited range of cases and maintains the recommendation set out in paragraph 4.3 above.*

5.4 **Proposal 41:** To confer express powers on the court to case manage trials:

In principle, the Law Society agrees that the court should be given the power to case manage trials

5.4.1 *Recommendations of trial management examples are set out in paragraphs 4.1– 4.8 above, one of which is to confer on the court power to give judgment or dismiss an action when a party fails to appear at the trial.*

Chapter 10 COSTS

1. Introduction

1.1 HCR Order 62 of the HKSAR covers some 57 pages. Parts 43 to 48 of the CPR, introduced by the Woolf reforms which also deal with costs, covers some 131 pages. As a starting point, the CPR is therefore over twice as long and arguably even more cumbersome and detailed than the present costs regime in Hong Kong.

1.2 The CJR is critical of the costs of legal services. In Part 1, Chapter D (pages 17 – 36) it is noticeable that paragraphs 40.1, 40.2, 40.3 and 40.4 all focus upon the costs of *the Bar*. It is only in the concluding sentence of paragraph 40.3 that it is stated:

"... yet experience suggests that the solicitors' charges may significantly exceed those of the barrister in a particular case."

1.3 This statement is not supported by any examples. However, the Law Society concedes it is almost inevitable that this will be the case, bearing in mind the duration of the endeavours of a solicitor against the lesser involvement of a barrister, except for when Senior Counsel and/or teams of barristers are required in a case.

1.4 As the CJR states, adverse comments on costs have been directed at the Bar, often by solicitors (per paragraph 40.3). That said, paragraphs 46 to 49 are statements by members of the Law Society expressing their concerns at the cost of litigation in Hong Kong. There are no similar observations made on the part of members of the Bar. The CJR having raised the subject of high charges by members of the Bar chooses not to recommend proposals to address the issue. Unfortunately and perhaps in contradiction, the CJR then devotes much of the remainder of the text to an analysis and criticism of solicitors. See also Part II, Chapter H2 (page 74 to 83), and in particular paragraphs 215.7, 215.8 and 215.9 for a similar approach.

1.5 At Part II, Chapter K19 (pages 206 – 231) of the CJR, suggested reforms/proposals are made as to costs. Nowhere within the CJR is it suggested, as is the actual case, that costs in the majority of litigation matters are not the subject of complaint by either the client or indeed other parties. Until recently, it was the experience of many of the members of the Law Society that taxation was the exception rather than the norm. That is less true today, not solely because of discomfort over legal charges, but because taxation has become increasingly and regrettably used as a part of the armament of litigation. The Law Society would like to see the Judiciary take steps to prevent this. Taxation is procedurally cumbersome, expensive and delay is endemic.

1.6 The Law Society does, however, agree that costs are of great concern and the legal services industry *as a whole* will be prejudiced unless controls are brought to bear in some shape or form and largely by the Judiciary. The Law Society considers that this can be achieved by implementing or enforcing those procedural rules which presently exist. In this Chapter, the Law Society adopts a much simpler and more radical approach to the capping of costs in litigation in relation to both solicitors and barristers. This would considerably reduce, at a stroke, the ambit of that which a taxation purports to achieve, albeit at present, largely unsuccessfully.

1.7 As for direct costs to be incurred by a client, (as in all sectors of the legal services industry, and not just in relation to litigation), the starting point must be that this is a matter for negotiation between the barrister and/or the solicitor and the client. As the CJR concedes, some of the more "left-wing" tracts considered in the CJR are weighed so heavily in favour of the client as to be unreasonable. The starting point of any agreement as to costs and fees between a solicitor and his client must be based on *reasonableness* and, we suggest, trust and respect. Solicitors are professionals. They have considerable overheads in terms of professional staff and trainees; offices and communications systems; insurances; support staff and works of reference. Equally, the majority of solicitors operate on the usual commercial ethos of seeking to encourage repeat instructions from their clients. However, the CJR appears to assume, for the most part unfairly, that clients will receive poor professional services for inordinate fees. The Law Society would have liked to have seen the CJR raise and analyse issues as to costs in the context of, in the majority of cases, clients receiving competent professional assistance provided for reasonable and acceptable levels of costs. The Law Society accepts that there are unfortunately exceptions, but they are exceptions.

1.8 The Law Society is also concerned at omissions in the CJR which impact on costs. Nowhere is specific reference made to the difficulties encountered with court administration. An anachronistic administrative system applies within the court system/structure and by its staff. Failure to reply to communications from solicitors; the losing of documents; the inability to respond to enquiries from solicitors, let alone the impatience displayed to for example, litigants in person, are not uncommon. These matters add to the costs incurred by litigants. These are typical examples of *"defects in the administration of civil justice"* to which only general reference is made in paragraphs 18, 19, 20, 21, 24, and 26 of the CJR. There are no proposals for remedies for these matters.

1.9 The CJR in its proposals as to the saving of costs fails to subject the Judiciary (to include Judges, Recorders, Masters, Magistrates, etc.) to scrutiny as to efficiency and/or cost. The Law Society is fully appreciative of the difficulties faced by the Judiciary (See Appendix 3). However, if the present HCR were applied assiduously by the Judiciary, and the existing sanctions were administered with appropriate levels of diligence, (and in some unfortunate instances, levels of competence), which the legal services industry in Hong Kong and its consumers should reasonably expect, many of the proposals in the CJR would not be required. Solicitors, not infrequently, see their clients incur costs beyond their control and for reasons not apparent in justice; inordinate and unheralded delays in the commencement of hearings and premature determination of court days; lack of availability of members of the Judiciary and/or court congestion — sometimes for months; innumerable requests for preparation of court bundles; unmeritorious extensions of time; unjustified orders for exchanges of affidavit/affirmatory evidence; delays in the issue and/or approval of orders and judgments and frequent mislaying of them. These constitute not uncommon events which should be, for the most part, avoidable. When they occur, they can result in further unnecessary delay and expense for litigants, often not recoverable. Such shortcomings are not addressed in the CJR.

1.10 The CJR states the recurrent expenditure of the Judiciary (comprising 180 Judicial Officers and 1600 support staff) for 1999 – 2000 amounted to HK$928 million. The legal services industry, according to figures released by the Financial Secretary's Department in the same period of time earned *"invisibles"* for Hong Kong of approximately HK$640 million. Consequently, the legal services industry is, to a large extent, self-funding.

1.11 On that basis, perhaps the CJR could have proposed that where the Judiciary/Court Administration is culpably responsible for costs and delays to litigants, the Government should be obliged to recompense litigants for such costs? This would be a radical and appropriate initiative, however unpalatable.

1.12 The members of the Law Society have a legitimate, vested interest in preventing any decline in the services which are being provided by the legal services industry. The Law Society speaks with some authority as a consumer of the entire spectrum of the legal services industry and as its *"marketing"* arm. In that capacity, their concerns as to the services being provided to their clients encompass matters beyond the immediate fees with which their clients might be faced. Fees which are often increased by matters and/or events beyond the control of either the solicitors and/or the barristers representing those clients, but incurred because of the court and its administration.

1.13 As will be seen, much of that proposed by the CJR to address the expense of litigation is already available to the Judiciary — but not exercised to the extent required. In certain issues, the Law Society goes much further than the CJR to assist the consumer. The most patent omission in both the CJR and this Report is that of higher rights of audience of solicitors in the High Court. The failure to consider this topic — an expedient way to reduce costs in civil litigation — detracts intellectually from the CJR. The public should be apprised of the reasons why this is not addressed in the CJR. Legal services, like any other industry, has to provide a good service at reasonable cost. It has to keep abreast of the demands of contemporary society. This will not be achieved unless the debate is objective and comprehensive and the omission of considered debate of higher rights and other matters, such as conditional/contingency fees, prevents the CJR from meeting this criterion.

2. The Remedy of Costs

2.1 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 sought by the CJR at paragraph 563 and beyond and at paragraph 575. It also echoes the views of the CJR at Chapter K14.4 (paragraphs 451 to 468).

2.2 For example, a party which is awarded its costs on an interlocutory application, should be entitled to submit those costs for payment by the unsuccessful party as soon as possible thereafter, preferably at the hearing itself. (The Law Society is pleased to note that very recently the Master's court has sought to address this, albeit on an *ad hoc* basis.). In the event that the unsuccessful party challenges those costs leading to a taxation, the unsuccessful party (and not as, at present, the successful party) should pay the taxing fee within 14 days to either the court or the successful party, failing which the bill to be taxed, as submitted by the successful party, has to be paid. If not, a strike out of the unsuccessful party's pleadings/case will follow as a matter of right.

2.3 In the event of appeals, the costs order as made must be secured to the satisfaction of the court/ the successful party.

2.4 This radical measure should curtail many of the redundant and unnecessarily time consuming interlocutory applications presently made to court, often launched with the intention to delay the action or as a tactical ploy. In the event that such interlocutory proceedings are commenced and thereafter *"settled"* or abandoned, the parties would nonetheless be entitled to proceed as above.

2.5 In-court taxations may require judicial training. It will add to the burden of preparing information and documentation prior to a hearing, and thus costs. However, such costs will be significantly less than the costs involved in the current taxation procedures.

3. Scale Fees

3.1 Scale fees have been abolished in respect of conveyancing matters. The benefit to the public has been in reducing legal costs in that discipline. However, those scale fees imposed in litigation, for example such as for garnishee proceedings, HCR Order 14 proceedings, etc. can produce a commercially unrealistic return in costs for the successful party in relation to such an application. Hence, this is a significant disincentive for these otherwise useful remedies to be utilised.

3.2 The Law Society considers scale fees for any aspect of litigation should be abolished immediately. A time-costed basis is the appropriate norm to be utilised in all aspects of litigation, save and except for circumstances where solicitors/counsel agree *"all-in"* fees with their clients. If that benchmark is utilised, recovery of costs in excess of the *"all-in"* payment will not be permitted.

3.3 It was therefore with concern that the Law Society noted the compilation of *"benchmark costs"* for scale fees for defined categories of work. The system has its superficial attractions but, notoriously, scale fees do not increase or decrease, they tend to stay static and hence become of little benefit to potential consumers in that their use becomes marginalized due to the unrealistic costs recoveries which become available to successful litigants. In other words, like garnishee proceedings at present, they cost more to make than the application, if successful, may recover. Alternatively, as between a solicitor and his own client, the charges become inoperative, as has long been the case.

3.4 Thereafter, anticipating that the reference to *"benchmarks"* may be intended to relate to specific milestone events within the course of litigation, again, for the most part, clients can be and are kept fully apprised of events and the progression of the case, not only by solicitors seeking instructions as a matter progresses, but by the simple expedient of monthly billings. A *"benchmark"* in one case will bear no relation whatsoever to a *"benchmark"* in another. For the most part, both barristers and the Judiciary only encounter tail-end litigation matters and have little or no practical knowledge or experience of that which is required in relation to the important issue of client care and attention. This is reflected in the CJR where no consideration at all is given to the important role which solicitors (and to a far lesser extent members of the Bar) bear as advisors to their clients over and beyond direct billable work. The CJR is made a lesser document by its failure fully to address and understand the exigencies of the practice of solicitors. Its focus on costs and the refrain that costs are *always* too high is naive and hence does not actually address the realities of a solicitor's practice.

4. Capping of Fees

4.1 Party and Party Costs

The Law Society accepts that fees for recoverable costs purposes can and should be capped.

4.2 These fees and the capping thereof can be considered annually by a Committee comprising a Master; two barristers, two solicitors, representatives from the Legal Aid Department and two lay members.

4.3 Solicitor and Own Client rates

This proposal will not affect the rights of solicitors or barristers to charge their own clients in excess of the capping basis. However, the difference between fees in excess of the cap and the cap itself will fall to the account of the party paying such costs only — and not against a successful party against an unsuccessful party. It addresses much of the concern of the CJR in paragraph 198. It also removes one of the two issues considered at taxation — leaving only the endeavour/time expended in a case to be scrutinised.

5. Recovery of Costs

5.1 Costs should follow the event. In other words, as a rule of thumb, the successful party should be entitled to recover *all* their capped costs and not approximately 66% (party and party costs); 75% (Common Fund basis); 90% (solicitor and own client basis) and *"indemnity costs"* should not be so described. The costs incurred by a successful party at whatever stage the proceedings have reached, be this interlocutory and/or trial, should be awarded on a *"full recovery"* basis. In other words, 100% of the costs at any stage of the proceedings accrued to a successful party — subject to capping.

5.2 Judicial discretion may be exercised in *exceptional circumstances* in terms of percentage reductions of the 100% rule where conduct, professional or otherwise, on the part of the successful party might merit same. There is also the need to consider *"compassionate"* orders of costs in personal injury actions and/or defamation actions. The parties should be at liberty to agree the basis of or apportionment of costs on *"mutual"* applications or cross applications. Subject to that, it should be usual in civil actions to have the 100% full recovery costs (as capped) principle applied.

5.3 In the exercise of Judicial discretion to reduce the *"full recovery principle"*, full reasons, in writing, should be provided by the Judge and the HCR should be amended to make this provision mandatory.

6. Taxation Proceedings

6.1 The present practice of itemising with exacting precision such matters as service of documents, photocopying, etc. is outdated. It can cost more to undertake this exercise then the original costs which were incurred. The format of taxed bills and the procedures relating to the taxation of bills must be greatly simplified. Disbursements can be listed and, where appropriate, supported by invoices/receipts; the case for which a bill is proposed should be analysed and described chronologically, not sub-divided into arcane subject matters.

6.2 Call-over hearings as a component part of a taxation tend to be ineffective. A matter should proceed to a final taxation, only if it has not been possible to tax the matter at the actual hearing. The listing Judge/Master can determine the length of a taxation hearing.

6.3 All skeleton bills should have an entry column in which a party which requires taxation can either accept or challenge each entry on the skeleton bill of costs. Any point of challenge must be explained in writing. The time frame for the exchange of skeleton bills and completion of written submissions in opposition must precede any taxation by, we suggest, at least 14 days, to enable the parties to settle matters between them if at all possible.

6.4 It is manifestly unjust for a successful party to have to pay a *"taxing fee"* in support of their own claim for costs. The taxing fee should therefore be paid by the party insistent on the taxation and ultimately responsible for the costs. If the party seeking taxation does not pay the taxing fee, the right to taxation is forfeit. In the event of a bill being taxed down, then the party whose bill is taxed down should proportionately reimburse the other party for the taxing fee and proportionately the cost of the taxation.

6.5 The taxation procedure requires simplification in other respects. If, on a taxation, one sixth of the quantum of a bill (on a solicitor and own client basis) is taxed off or down, the client recovers the taxing fee. This arbitrary system of assessment should be replaced by a provision so that when a client successfully taxes down a bill of costs the client makes a proportionate recovery against the taxing fee. Thus, if on a taxation the bill is reduced, for example, by 7%, then 7% of the taxing fee be paid to the client. If taxed down by 50%, 50% of the taxation fee be paid over, and so on. If a taxation shows costs to be unreasonable, the Judge/Master be at liberty to make further awards reflecting the injustice of the bill put forward for taxation.

7. Taxation Fees

7.1 In relation to taxation of costs, pursuant to HCR Order 62, Rule 21(4), for every HK$100 or fraction of HK$100 of the amount allowed the taxing fee is calculated on a sliding scale:

The first HK$100,000	HK$6
next HK$150,000	HK$4
next HK$250,000	HK$3
remainder	HK$1

7.1.1 If the bill of costs is withdrawn less than seven days before the appointment of taxation, 10% of the taxing fee or HK$1,000 whichever is the less, is retained.

7.2 The above formula is arithmetically cumbersome and anachronistic. It requires frequent updates of small amounts. Broader percentage bands could be used and sustained along the following lines:

5% of any fees up to HK$250,000,	HK$12,500
and 4% of any fees between HK$250,001 and HK$500,000,	HK$10,000
and 3% of any fees between HK$500,001 and HK$750,000,	HK$ 7,500
and 2% between HK$750,001 and HK$1,000,000,	HK$ 5,000
and 1% for costs of HK$1,000,001 and over	minimum HK$10,000

7.3 The successful litigant, having been awarded costs, has to run the gauntlet of taxation. The onus of taxation should be redirected to place more responsibility upon the unsuccessful party against whom costs have been ordered. That party should be obliged to pay the taxation fee and have the conduct of the taxation to a much greater extent. There is the further incentive of interest on costs running from the date of the order/judgment awarding same. Thus any delay by the party obliged to pay costs will incur, as of right, a greater payment of interest. If the party entitled to its costs in any element of a taxation causes delay, that party should run the risk of the rate of interest and/or quantum in its favour being reduced or forfeited.

8. Instantaneous Taxation

8.1 Most interlocutory proceedings should provide for instantaneous taxation by the very same Judge or Master. When the parties appear before a Judge/Master at a hearing, they should file a further document with the court entitled *"Solicitors Certificate of Fees"*, explaining the capped charge out rates and time incurred in relation to the matter, etc. The matter can be taxed there

and then before the Judge/Master, with a provision that the payment of those costs be made within 14 days thereafter, failing which the litigation will be stayed apropos the party liable for costs for a further period of 14 days. At the expiry of the 28 days period, the party owed its costs should be at liberty to move the court on a paper application to strike out the case of their opponents. See the comment as to the new practice of Masters in paragraph 2.2 above.

8.2 If an appeal is pending in relation to the award/amount of costs, then security for those costs as originally ordered must be provided to the successful party in the original amount as taxed before the Judge/Master.

8.3 All taxations (however conducted) should provide for payment of costs within no later than 14 days of the date of the Order/Judgment being sealed. If not paid, then as an extension of the proceedings in question (rather than by the issue of further and separate proceedings), the party to whom costs are owed be at liberty immediately thereafter to take enforcement proceedings and to refer the matter back before the same Judge/Master. This would constitute a considerable saving in costs. This is not raised in the CJR.

9. Counsel

9.1 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 or not a certificate will or will not be granted.

9.2 Equally, the levels of Counsel's Certificates should be limited. Without exception, no Counsel's Certificate (for Senior Counsel as well) should be awarded for rates of charge in excess of HK$6,000 per hour.

10. Irregular Conduct

10.1 Where a party is prejudiced by "misconduct" in litigation (be this a disregard of procedures/practice directions; the filing of documents out of time or in an irregular fashion) this should be dealt with by punitive orders in costs including, if appropriate, orders against the counsel and/or solicitors to the parties responsible. The Law Society has in mind, *for example*, at its most benign, the failure by both counsel and solicitors in Hong Kong to adhere to Practice Directions in relation to the service of skeleton arguments, lists of authorities, in proper time before hearings, but extended to more serious matters such as incompetent pleadings, incompetent advocacy and the wasting of court time. The Law Society urges the Judiciary to curtail these bad practices.

10.2 In particular, in litigation, various unfortunate practices have arisen which are adopted by the many rather than the few, and to the detriment of justice. We refer to such matters as the late service of affidavits and affirmatory evidence, by either or both sides, giving limited opportunity for the protagonists to deal with same as justice demands prior to a hearing. The HCR in relation to the service of such documents need to be amended, quite considerably, with a severe sanction in costs against the party responsible, or their legal representatives, for failure to comply. *Costs can and should be used as the obvious remedy by the courts to deter sharp practice in litigation.*

10.3 The Law Society considers that costs should be used to a much greater and punitive extent as a sanction to ensure orthodox professional conduct in litigation at all times. For example, adjournments caused by sharp practice will result in all the costs occasioned by the adjournment being met on a full recovery basis against the party responsible for the adjournment, to include in appropriate cases, counsel and/or solicitors. If the offence is severe enough, the capped costs limit might be lifted.

10.4 As counsel are niggardly in raising such issues before the court and the courts are for the most part ostensibly disinterested in them, there should be a specific provision included in the HCR to address such untoward conduct. Such provisions would compel such complaints to be raised before the court and to oblige the court to adjudicate upon them.

10.5 In this respect, HCR Order 62 Rule 8 is discriminatory. Why should personal liability of a solicitor for:

costs being incurred improperly;
costs being incurred without reasonable cause;
costs being wasted by undue delay; and
costs being wasted by other misconduct or default

not be extended to members of the Bar?

10.6 Where *both* counsel and solicitors representing a party are deemed to have been responsible for misconduct, then unless they can agree to their respective proportions of liability within 7 days, they should address the Judge/Master who so determined their culpability, in writing, for him/her to make the assessment. Otherwise, the solicitor/counsel should appeal the matter and/or litigate between themselves in a contributory action.

11. Response to the CJR

11.1 **Proposal 51:** New general rule requiring the court to take into account the reasonableness or otherwise of the parties' conduct relative to the nature of the case in the light of the overriding objective when exercising discretion as to costs

This is generally supported. The Law Society favours the "costs following the immediate event" principle and much greater administration of costs orders throughout the proceedings. Many of the problems in relation to costs derive from the fact that costs orders are rolled up to final adjudication of the matter at trial. This should not occur. Moreover, the Law Society favours full recovery of capped costs.

11.2 **Proposal 52:** Rules requiring solicitors and barrister to provide to their clients full information about fees, estimates of costs and to update this information with reasons when it changes

The LSWP has recommended that the Law Society promulgate a mandatory retainer letter for use in litigation covering fees, estimates and updates, as well as other standard advice. However, the obligation should not be too onerous. The information should be based on information which the solicitor can provide "as far as practicable". Barristers must disclose the basis of their fees to solicitors.

11.3 **Proposal 53:** The public should have access to information regarding barristers and solicitors relevant to their choice of representation

This Proposal should also include more transparency on the qualifications of the Judiciary, possibly on its web site. The LSWP will recommend that the Law Society re-visit the implementation of a Specialist Accreditation Scheme under which suitable candidates will be accredited as specialists e.g. commercial litigation.

11.4 **Proposal 54:** Removal of presumption of reasonableness on taxation of lawyers' charges

The existing anachronistic procedures require overhaul. The Proposal is adopted except that the assessment should be without any presumption. The words "... that such costs are reasonable" should therefore be deleted. The submission of monthly billings would enable a client at any juncture of a litigation matter to query the bill in question and at that stage mount any challenge to their own lawyer's bill.

11.5 **Proposal 55:** Compilation of benchmark costs for use in Hong Kong

Any Benchmark costs should be realistic but should not apply to solicitor/own client fees which are governed by market forces. In addition, cost for waiting time in court should be allowed.

11.6 **Proposal 56:** Provision to require the parties, periodically and as ordered, to disclose to the court and to each other best estimates of costs already incurred and likely to be incurred

11.6.1 *The court should only order disclosure in appropriate circumstances. There should be a more realistic assessment of costs estimates in order to achieve proportionality.*

11.6.2 *Concern is expressed that this procedure could be abused as a scare tactic unless closely monitored by the court, which would require, inevitably, further court hearings.*

11.6.3 I*n paragraph 600, reference is made to: "... include an estimate of the amount of costs already incurred and the costs which would be incurred if the case proceeded to trial." The sentence needs modification. The costs which have been incurred will be known — not estimated. Estimates of costs which may be incurred if the case proceeds to trial can be no more than that, an estimate, and not a quote.*

11.6.4 *The position of overseas clients attending case management conferences and pre-trial reviews is not considered.*

11.7 **Proposal 57:** Remove exceptional treatment of counsel's fees on party and party taxations

The Law Society agrees with this Proposal. It has made its own detailed proposals as to the reform of taxation, to include the fees of counsel generally in taxation — and not specifically in party and party taxation, which the Law Society would have abolished.

11.8 **Proposal 58:** Rule to allow equivalent of Part 36 offers to be made in respect of costs to be taxed

The Law Society agrees with this Proposal.

11.9 **Proposal 59:** Benchmark costs to be presumptive of costs allowable on taxation

11.9.1 *If Benchmark costs are to be introduced they must be set at realistic levels and be flexible.*

11.9.2 *The Law Society prefer its proposals on taxation as being more radical, fairer to all parties, simpler, economic and expedient.*

11.10 **Proposal 60:** Procedure for provisional taxations on paper at the court's discretion

The Law Society would endorse this Proposal if the taxation is conducted by Masters, otherwise there could be great inconsistency.

11.11 **Proposal 61:** Rules requiring parties to a taxation to file documents in prescribed form

The Proposal made by the CJR is not as comprehensive as the proposals made by the Law Society, based very much on the present HCR Order 62. The Law Society's proposals include:

1. *Parties must consult each other rather than just filing standard objections, otherwise cost penalties should be imposed and Masters should take a robust approach on cost remedies.*

2. *New procedures recommended to shorten the taxation procedure, namely,*

   (i) *skeletons to be exchanged within 14 days,*

   (ii) *list of objections to be exchanged within 14 days before the call-over hearing; and*

   (iii) *the parties to meet 7 days before the call-over hearing with a view to agreeing the disputed items.*

3. *Overhaul of taxation bill. Solicitors should be allowed to submit edited solicitor/own client bills.*

4. *In respect of Legally Aided clients the Law Society considers the existing statutory anomaly favouring Legally-Aided plaintiffs is inequitable and should be amended as it is unfair to privately f unded litigants.*

12. Conclusion

12.1 The Law Society believes that its proposals set out a more comprehensive approach than that of the CJR in certain areas. The omission of proposals on higher rights of audience is a notable flaw in the CJR's analysis of costs. The further omission by the CJR to recognise the limitations of the present court administrative system, structure and staff is regrettable. In that capacity, the Law Society seeks to offer constructive areas for identification of issues for better consideration by the CJWP in its future deliberations.

12.2 The proposals recommended by the Law Society require fairly substantial, but not wholescale amendment of the HCR, and in particular HCR Order 62. The Law Society proposes self-regulation in the capping of both solicitors' and counsel's fees on taxation, a significantly radical departure from that proposed in the CJR. A *"Legal Fees Committee"* can continue to monitor the situation on an annual basis for the benefit of the profession and consumers alike. This, to a significant degree, addresses the issue of hourly rates, so a taxation 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

1. Introduction

1.1 When a party obtains a judgment, most commonly for payment of money, including interest and costs, the party who is obliged to pay (called in the HCR a "judgment debtor") can in practice do one of three things. First, they can simply pay the money due voluntarily. Secondly, they can appeal against the judgment, and apply for what is called a *"stay of execution"*. A stay of execution is an order of the court stopping the party who has the benefit of the judgment from taking any step to enforce it until after the appeal has been dealt with. Thirdly, the judgment debtor can fail to pay the money due. *"Enforcement"* concerns primarily this third issue, and also the second issue (stay of execution). The HCR contain a number of provisions which are intended to assist a party with the benefit of a judgment from securing compliance and satisfaction with the judgment.

2. Need for change

2.1 The HCR intended to assist parties in enforcing judgments have not been significantly changed for quite some time. In at least one respect they go significantly further than the equivalent rules in England and Wales, namely the ability in appropriate circumstances to obtain what is called a *"prohibition order"* to prevent a judgment debtor or someone who is a defendant and therefore may become a judgment debtor from leaving Hong Kong until the judgment is paid or satisfied. However, overall, it is the consensus of the Law Society that the HCR relating to enforcement are in need of reform.

3. Criticisms of the present system

3.1 First, the existing rules are complex and provide separately for a large number of different methods of enforcement of a judgment, depending on the nature of the assets which the judgment debtor has and which may be available. These can and should be streamlined. There should be one basic procedure, certainly for the enforcement of money judgments. Similarly, there should be only one set of rules for examination of a judgment debtor (or directors of a corporate judgment debtor) to ascertain details of the assets of the judgment debtor, whereas presently there are two sets of rules, with some confusing differences between them. A single set of rules can maintain the range of remedies available under the present rules whilst simplifying the procedure.

3.2 Secondly, in various instances, there is a two stage process involving provisional orders being made first on what is known as an *ex parte* application (i.e. without prior notice to the other party) by the party seeking to enforce the order (resulting in orders called "Orders *Nisi*") and thereafter a hearing at which the court can make the provisional orders into unconditional and

final orders (called "Orders Absolute"). This process quite properly allows third parties, who may have a prior interest in assets which appear to belong to the judgment debtor, or the judgment debtor themselves, to intervene in appropriate cases and stop an unconditional and final order being made. Two examples, will suffice: first, if what is called a garnishee order *nisi* is made over a credit balance held in a bank account in the name of the judgment debtor, the bank may be entitled to assert that it can set off that credit balance against a debit balance on another account with it, or in respect of outstanding fees. Secondly, assets such as motor cars may be held by the judgment debtor subject to hire-purchase agreements. The hire-purchase company may well be entitled to repossess the vehicle. The Law Society considers that this two-stage process can be streamlined so that a hearing is only necessary in the event that a third party wished to intervene.

3.3 Thirdly, generally the Law Society considers that the present regime errs too heavily in favour of the judgment debtor in at least one important respect. It does not put an immediate onus on the judgment debtor who fails to pay or to make any attempt to pay, to explain his failure. The Law Society recommends the introduction of a new rule which would require (with appropriate penalties for non-compliance) a judgment debtor who fails to pay a judgment debt within 14 days to file an affidavit setting out full details of his means and assets and liabilities. The party with the benefit of the judgment would then be in a much better position to take appropriate enforcement action. The effect of this rule would be to increase the pressure on the judgment debtor to pay or to explain quickly and clearly why they cannot pay, immediately.

4. Specific recommendations

4.1 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.

4.2 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.

4.3 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.

4.4 Penal notices should sensibly be in the body of the Order rather than a separate notice. They should be bilingual. They should be in standard form. The position of directors and representatives of companies in contempt of Court Judgments and Orders needs potentially legislative change to clarify and improve it.

4.5 A new rule requiring a Judgment Debtor who does not satisfy a debt within a set period of time of say 14 days to file and serve an affidavit setting out details of his assets with a view to assisting the Judgment Creditor in enforcing a judgment. This rule would be subject to provisions allowing the Judgment Debtor to apply for an extension of time or a stay of the operation of this Rule. A proforma draft could and should be prescribed by the HCR. A draft could and should be annexed to the judgment obtained when served on the Judgment Debtors.

4.6 **Debtors' Imprisonment**

The law is there, however the Masters seem reluctant to be enforce it. If it is considered to be inappropriate, it should be taken out from the HCR. If not, it should be used in appropriate cases.

5. Response to the CJR

5.1 *It is disappointing that the CJR has not sought to address the question of enforcement. It may be that, in following much of the Woolf Reforms, which did not address enforcement, the CJWP has simply decided, rather reflexively, not to consider enforcement and therefore recommend retaining the existing rules: see Proposal 62 of the CJR. If so, the Law Society would urge it to do so now. If it has been considered, and a decision made not to address it, the Law Society would like to understand the basis for the decision, as the Law Society considers that there is scope for meaningful reform to the benefit of litigants, in this area.*

5.2 *Finally, making it easier, subject to appropriate safeguards, to enforce judgments is one way in which Hong Kong's legal system can be made more attractive to litigants relative, for example, to arbitration or litigation elsewhere. The law is as good as it is enforced.*

Chapter 12 APPEALS

1. Introduction

1.1 The court system is structured to allow appeals to more senior Judicial Officers by losing parties against decisions made by the court that are adverse to them.

1.2 The appeals may be in respect of *interlocutory* decisions, i.e. decisions made on interim issues during the course of proceedings but before any trial or substantive hearing of the claims. Or the appeals may be against the decision made by the trial judge following a trial or a *final* decision made on a summary basis, for example the striking out an action or a defence or the entering of a summary judgment.

1.3 There are in theory three possible levels of appeal: from a decision of a Master (normally interlocutory decisions) to a Judge sitting in the Court of First Instance; from decisions of a Judge to the Court of Appeal; and from decisions of the Court of Appeal to the Court of Final Appeal.

1.4 There are restrictions on what appeals may be brought against decisions of the Court of Appeal, to the Court of Final Appeal. Essentially the appeal must be in respect of a matter where the amount in question exceeds a specified monetary limit (presently HK$ 1 million) or must involve a question of general or public importance. There are also restrictions on appeals in respect of certain types of interlocutory decisions, notably orders as to costs.

1.5 In addition, whilst appeals from a Master to a Judge are dealt with as a completely fresh application (with generally the right to put in supplemental evidence), appeals from a Judge to the Court of Appeal and to the Court of Final Appeal only involve a review of the underlying decision. In such appeals the appeal courts will be very reluctant to allow the parties to put in additional evidence, and will be similarly reluctant to overturn factual findings, particularly those findings of fact (e.g. reconciling two conflicting version of events) made by a trial judge who has listened to the evidence of live witnesses before him or her.

1.6 Subject to the above matters, however, and subject to other minor limitations, there is a general right of appeal against any decision by any Master or Judge. In short, the balance lies in favour of at least one automatic right of appeal against almost all types of decision, and two where the initial decision is made by a Master. This structure is replicated in most common law jurisdictions, and reflects three facts. First, that courts frequently hear difficult cases where it may not be easy for the court to ascertain the correct decision the first time it hears the case. Secondly, that new evidence can come to light after a decision has been made which demonstrates that the decision was not based on the true facts. Thirdly, judges make mistakes.

2. Need for change

2.1 The fundamental question is whether the balance is correct at the moment between on the one hand allowing parties the right to appeal, so that the correct result is reached, and on the other hand efficient and proportionate use of the court's resources.

2.2 The Law Society believes that the balance is broadly correct, but does need adjusting to ensure that fewer appeals are brought in respect of interlocutory matters, certainly appeals with relatively little merit which may be brought for primarily tactical reasons, and where the decision in question is *not* one which has the effect of finally concluding the litigation.

2.3 The Law Society is concerned that there are significant numbers of successful appeals at all levels (including from the Court of Appeal). We are not seeing any significant improvement in the quality of the Judiciary, in terms of legal ability; if anything, the aim at present appears to be to work hard simply to maintain standards, following an outflow of judges around the time of and subsequent to the Handover in 1997. Appeals should, at least in principle, be significantly less costly proceedings than trials at first instance where witnesses give evidence particularly if, in future, they occupy less court hearing time than they do at present. For all of these reasons, the Law Society does not wish to see any restriction on the existing right of appeal from any decision that disposes finally of a case. This includes not just decisions following trial, but also interlocutory decisions that have the same effect. Such interlocutory decisions are strike out applications, applications for summary judgment, summary determination of issues and decisions as to whether the court has jurisdiction to deal with proceedings or not.

2.4 However, the Law Society would wish to see, in the interest of the more efficient disposal of litigation, measures which cut down the time, cost and court hearing time involved in interlocutory appeals. Further, with the same objective in mind, particularly at the level of the Court of Appeal, the Law Society would wish to see more matters being dealt with entirely or in good part on paper, i.e. without the need for any, or at least a long, hearing.

3. Specific recommendations

3.1 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.

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

3.1.2 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 are dealt with by Judges. For example, all applications listed for a hearing of more than, say, 1 hour could be heard by a Judge.

3.1.3 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 further 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.

3.2 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 test 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.

3.3 Further, in respect of interlocutory decisions which are not final (in the sense described above), a condition of obtaining leave to appeal should be imposed, certainly for appeals against decisions of Judges to the Court of Appeal. If an effective case management system is introduced, this should certainly be the case for case management decisions, 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.)

3.4 In respect of cases where leave to appeal should be required, the test should be whether the appeal has a demonstrable real prospect of success. In this respect, the following note of caution should be sounded. The Judiciary will have to work hard and focus on achieving consistency in the application of this test across all Judicial Officers — 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, in fact, of an increased level of litigation in that there will be an unduly large number of contested applications for leave.

3.5 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 be under 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.

3.6 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.

3.7 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, the increase in fees for issuing writs and other originating process.)

3.8 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.

4. Response to the CJR

4.1 It will be evident that the Law Society supports a number of the proposals set out in the CJR, but not all of them.

4.1.1 **Proposals 42 and 43:** Interlocutory appeals to the Court of Appeal be brought only with leave and all appeals to the Court of Appeal require leave.

The Law Society supports the Proposal that appeals to the Court of Appeal be brought only with leave. The Law Society does not support such a Proposal in respect of decisions having a final effect, so supports Proposal 42 but not Proposal 43, on the basis of the understanding of what is meant by an interlocutory decision as set out above.

4.1.2 **Proposal 44:** Leave should only be granted where there is a real prospect of success or some other compelling reason why the appeal should be heard.

The Law Society supports the Proposal

4.1.3 **Proposal 45:** Appeals from case management decisions should generally not be granted.

The Law Society supports the Proposal

4.1.4 **Proposal 46:** Generally leave should not be granted against a decision which itself was given on appeal.

The Law Society supports the principle

4.1.5 **Proposal 47:** Generally the Court of Appeal will be entitled to hear applications for leave to appeal on paper, namely that it will be subject to a right to ask for there to be an oral hearing.

The Law Society supports a modified form of the Proposal

4.1.6 **Proposal 48:** Introduction of further rules to make the substantive hearing of appeals more efficient.

The Law Society supports the Proposal

4.1.7 **Proposal 49:** Appeals should be limited to a review of the decision of the lower court, subject to appellate court having a discretion to treat the appeal as a rehearing.

The Law Society would like to see all appeals, including appeals from Masters, dealt with on the basis that the party is required to provide grounds of appeal, and thereby the scope of the appeal will be limited.

4.1.8 **Proposal 50:** The approach to appeals in the Court of First Instance and the Court of Appeal should be the same, particularly as regards the scope for introduction of fresh evidence on appeal.

The Law Society endorses the principle

Chapter 13 COURT ADMINISTRATION AND THE JUDICIARY

1. Introduction

1.1 The Law Society emphasises from the outset that its observations on this subject are not intended to do more than suggest panaceas to the problems which are faced by solicitors and hence their clients, the public, on a day-to-day basis. Indeed, the Law Society has great sympathy with the economic constraints in terms of manpower and financial resources available to the courts generally. For example, the Law Society has in mind what they recall to have been a "time and motion" report on the Judiciary some few years ago. This appears to have been analysed on the time spent sitting in court by members of the Judiciary. It ignored, in its entirety, so far as we were aware, essential time required by members of the Judiciary to review court files prior to the hearings, and to make time available for the important judicial tasks of reviewing arguments, reviewing authorities, reviewing Judges' notes and/or transcripts, verbal or otherwise, considering orders, executing orders and for matters which have gone to trial, the lengthy task of writing judgments. This is an enormously arduous undertaking, and we doubt that the endeavours of the Judiciary are properly rewarded financially or otherwise by their appointments for what is, the Law Society acknowledges and accepts, a solitary existence and an often thankless appointment.

2. Court Administration

2.1 Much of the Law Society's comments have been predicated upon the fact that we, as solicitors, are a component part of the legal *services* industry. We repeat, for emphasis, that statement. It is a service industry, and this requires a provision of *service* which we find to be sometimes lacking.

2.2 Court administration staff, like any other employees in service industries, should be patient, polite and understanding in attending to the needs of the constituency which they serve. Where it is possible to use discretion to achieve the purpose of an approach, that discretion should be exercised. The propensity to instinctively respond in the negative to such approaches has to be addressed. It should not be easier to say: "No", it should be a prerequisite to endeavour to accommodate approaches when necessary. In this respect, the Law Society finds that the court administration system requires considerable rationalisation and improvement. Having said that, many members of the court administration are helpful and diligent, and despite (we expect) stretched manpower resources provide a reasonable service. We consider, however, that there is great scope for improvement in the service provided by the court administration.

3. Court Hours

3.1 The time for filing of court documents is inadequate and does not begin to meet the requirements of contemporary legal practice. The court has express counters for law firms wishing to file documents, but they are only open from 11.30 hours to 12.30 hours and 15.00 hours to 16.15 hours. To compound this anomaly, only five documents can be filed by one person at a time, and no writs can be issued at that counter. With the facilities being increasingly congested by litigants-in-person, the courts have to provide for a much more comprehensive facility with all counters open from 09.00 hours to 17.00 hours, and open continuously throughout that time — i.e. staffed during lunch hours. The courts should be open for the filing of documents from Monday to Friday (not Saturday). With official office hours in Hong Kong extending to 17.30 hours, the rationale is that a party still has thirty minutes in which to serve Writs/pleadings after the closure of the court.

3.2 In that it is becoming more and more unfashionable for law firms to be open on a Saturday morning, and with the court in Hong Kong rarely hearing cases on a Saturday morning, the Law Society suggest that Saturday be proscribed as a day of legal service. This would mean amendment to the HCR so that the counting of days should be in terms of *"days except Saturday and Sunday"*, rather than in terms of *"working days"*. This proposal should have some attraction to the court administration staff. It would, however, be possible for a Duty Judge or Duty Judges to sit on a Saturday, subject to liaison within the legal services industry as to the desirability of such matters.

3.3 Sealing of court documents out-of-hours is a continuing problem. For example, in respect of HCR Order 44A : on Prohibition Orders, if granted, late in the day and/or out of court hours, the authorities in Hong Kong do not always recognise the signature of a Judge absent a Court Seal. This anomaly could be cured by all members of the Judiciary being provided with Court Seals for out-of-hours sealing purposes, and the various authorities should be notified of this practice. (Obviously the documents would be filed on the next court day.)

3.4 The Court Registry should ideally be manned to meet the demand of the consumers. In other words, sufficient court staff should be available to ensure that no long queues or queues at all develop. A docket system could be introduced to assist in this respect.

3.5 It is also obvious that litigants-in-person are becoming an increasingly common element in litigation in Hong Kong, and it is appreciated by the Law Society that the needs of such members of the public must be accommodated. Consequently, special counters should be established to assist members of the public who choose to elect personal representation. Court staff assigned to such responsibilities should receive special training as we consider that the public interest demands such an initiative. It would be a saving in costs to other parties for litigants-in-person to be as well prepared as possible in anticipation of the litigation, and in this respect the Law Society applauds those members of their profession and the Bar who are sufficiently publicly-spirited to lend their time *pro bono*. In that respect, perhaps facilities might be made available at court to accommodate those assisting litigants-in-person.

3.6 The High Court has imposed stringent requirements for certification of translations by the court interpreters. These are arcane provisions which emanate from Practice Direction 10.2 and the HCR. Provisions as to the size of the words, margin space, line spacing and the number of days required for certification. These guidelines whilst perhaps helping the court staff, do little to control expense or delay. In fact, they tend to increase the same. More user-friendly regulations properly publicised are required in this respect and generally.

4. Judicial/Master's Clerks

4.1 Complaints are often made in relation to obtaining approvals of draft orders. It is a peculiarity that draft orders are pronounced by the Judge or Master, often at an unrealistic pace, and the successful party then retires to their offices, prepares the draft of the order and returns it for submission to the Clerk to the Judge or Master. The Master's Clerk then corrects or amends the order, if appropriate, then (without prior notice) leaves the order for collection. This is retrieved by the solicitor's firm in question. The order is amended, where appropriate, and resubmitted for sealing. This is an anachronistic practice, and is flawed.

4.2 Law Society members have experiences where draft orders as submitted are frequently mislaid. There are experiences of the draft orders not being approved within two weeks, and then being returned for sealing out-of-time (being 14 days). This requires attendance before the Practice Master to obtain leave to file the document out-of-time. This unnecessary expense — often borne by the solicitors themselves rather than passing it on to the client — must be curtailed. All orders must be approved within *no later* than 3 working days of submission — if the present system is to be maintained.

4.3 On the other hand, 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.

5. Court Files

5.1 The Law Society has noted that in England and Wales, there are no court files as such. This was the reason for the Practice Direction requiring that affidavits specifying the name of the deponent, the date of the affidavit, the number of affidavits filed and the party on whose behalf the affidavits are filed. For some reason, inapplicable in Hong Kong where there *are* court files, the same practice has been adopted.

5.2 The Law Society proposed that there be an all-party discussion 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?

5.3 A cross-party discussion on this issue between the Judiciary, the courts civil service, solicitors and possibly the Bar should consider this issue and agree a system whereby the present regimen, which encourages enormous photocopying charges be curtailed.

5.4 In this respect, the costs allowed in taxation for photocopying at HK$3.00 per page should be reviewed as there is no longer any commercial justification for such a high rate. The rules in this respect have not been amended since 1983, and a commercial rate of photocopying is now as low as HK$0.40 per sheet, also further discounted for bulk copying. Moreover, photocopying charges at the court and in the Court Library are exorbitant. The Costs Committee should meet on a regular basis to update the rules for such disbursements as photocopying.

5.5 Access to court files should be untrammelled for the parties to an action. The Law Society is given to understand that at least one Judge has issued his own edict which prohibits a party from an action for searching the court file and/or making copies of court documents. The Law Society suggests that this arbitrary decision be reversed immediately and that requirements imposed by individual judges, not properly publicised, not be permitted. This *"practice"* or propensity can cause delay and expense to unwitting parties ignorant of individual judicial requirements.

6. Court Waiting Time

6.1 All those appearing in court at 10.00 hours often review the court timetable with apprehension as to those hearings fixed for 09.30 hours and/or 09.45 hours. 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 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 — sometimes in excess of one hour, or longer.

6.2 Similarly, hearings before the Practice Master are not co-ordinated at all. In appearing before the Practice Master solicitors will be told to arrive at 15.00 hours. Invariably, the parties will arrive at court in good time — i.e. prior to 15.00 hours. Delays in excess of one or two hours are not uncommon. Such hearings should be fixed on a first-come, first-served basis of no longer than 5 minutes each. If the Practice Master's list is full, another Practice Master should be assigned. The present *"system"* is antediluvian. One member of the Law Society reports on a case who, when seeking an injunction, was obliged to wait from 10.00 hours until 14.30 hours. This delay does nothing for the reputation of the legal system in Hong Kong.

6.3 The Master's Lists are also prone to delays. The *"block"* listings do not work. Three minutes scheduling must be introduced to that list. At present, delays of an hour or so are common.

7. Judges/Master's Clerks

7.1 The Law Society pays tribute to some of the clerks with whom they work. However, the lack of diligence of some clerks detracts from the reputation which they enjoy generally. For example, failure to respond promptly or at all to communications from solicitors and failure to prepare orders in timely fashion.

7.2 The Law Society has considered the position in New South Wales, where the position of the Judges/Master's Clerk holds much greater standing. Clerks are recruited from law graduates and their experience as a Judges/Master's Clerks adds to their qualifications in the legal profession. These positions are highly sought after. Judge's Clerks should provide an important conduit especially between solicitors and the Judge, as well as barristers and the Judge, in relation to various matters, extending from the availability of the Judge, determining the documents are in order and properly available prior to the hearing; marshalling skeleton arguments and submissions for hearing; research; reviews of lists of authorities and actual authorities; specific requirements of the Judge in anticipation of the hearing; preparation of judgments and orders; enquiries to the parties, etc. The Law Society advocates training of and for Judges/Masters' Clerks and suggests that *"clerkship"* could form part of the legal qualification process in Hong Kong.

7.3 Judge's Clerks should be proactive in adopting a role to the benefit of expedition and economy in hearings. Equally, the Clerk should be in a position to forewarn parties of unexpected delays occurring in court, to avoid some of the excesses referred to above.

7.4 Those Clerks attending the Duty Judge or Practice Master need to be vested with authority to orchestrate a sensible timetable for hearings before their respective Judicial Officers. In particular, the present congestion endemic in the Practice Master's and Master's Lists must cease. Applications which will patently exceed a 5 minute slot should be adjourned for formal hearing before a Master, and those responsible for fixing such inadequate hearings, in terms of time estimates, should be penalised in costs.

7.5 The Clerks to the Judge/Master should determine prior to the hearing whether or not a translator is required. It has been the experience of the Law Society that delays can be caused to the parties in locating a translator, when the matter should have been determined long beforehand.

8. Judiciary Administrator

8.1 The creation of the role of Judiciary Administrator should have assisted in resolving some of the issues to which the Law Society refers. Unfortunately, it is the experience of the Law Society that this has not proven to be the case. If the Judiciary Administrator is to be an effective conduit between various sectors 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, and not merely reactive. Much of the foregoing commentary could be addressed by the Judiciary Administrator's Office under its present terms of reference.

10. The Judiciary

10.1 Introduction

It is a patent prerequisite to the success and reputation of an international legal centre that the Judiciary are consummate professionals. As the Law Society has emphasized at the commencement of this Chapter, we consider that the present system in application of judicial resources is wanting. Simply, the exigencies of judicial practice are not being borne in mind. 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.

10.2 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. Delay is, admittedly, sometimes the fault of solicitors; sometimes the fault of barristers. However, delays are more frequently the fault and direct consequence of court congestion caused by lack of judicial manpower. Fixtures of hearings are invariably scheduled months in advance, and in this respect the Law Society considers that the proposals of the CJR are only scratching the surface and do not purport to address the root-cause of delay in civil litigation. A much more radical approach needs to be considered to remedy this problem.

10.3 As the CJWP was composed mostly of members of the Judiciary, they perhaps felt constrained from exploring the matter as part of the CJR. The Law Society is not so hampered. We introduce to this debate the following issues :–

10.3.1 Are the Judiciary properly remunerated for their endeavours? We conclude in the negative. Significant increases in increments should attract more candidates to positions at the Bench.

10.3.2 Are the appointments to the Judiciary appropriate? The LegCo Panel on Administration of Justice and Legal Services published its *"Consultation Paper on Process of Appointments of Judges"* in December 2001. Our brief comments on the Consultation Paper appear below, but the Law Society considers that the present system of judicial appointments to be wanting.

10.3.3 The Court room is intended to be the acme of considered, dispassionate debate. There should be no room for discourtesy or temperamental behaviour in the rendering of legal services by any of the participants in our industry. We attribute such instances of behavioural conduct, when it occurs on the Bench, to oppressive timetables and commitments to which the Judiciary/Masters are subject. Simply, there is too much work for too few Judicial Officers. 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).

11. Judicial Training

11.1 There is no formal training of Judges as such in Hong Kong, although there is a Judicial Studies Board which we understand to be quite active. In England and Wales, the education of Judges is now handled by a similarly named body. The courses they provide are conducted by other Judges with extensive experience. The courses cover a miscellany of disciplines so that those with civil experience are exposed to criminal law experience, and vice versa. For criminal matters,

for example, it provides guidelines to ensure consistency in sentencing. Equally, on the civil side, it covers a large range of subject matters which specialised civil litigation lawyers may not otherwise face, such as housing, landlord and tenant, personal injuries, etc.

11.2 We consider that absent the establishment of equivalent training in Hong Kong, the authorities should avail themselves of such training overseas.

11.3 Specialist Courts tend to attract Judicial candidates from barristers who have practised in such areas of law, and thus it may be argued that practitioners in those Specialist Courts require little education on how to be a Judge. The Law Society disagrees. In the same way that solicitors have a continuing training programme, we consider that continuing education for Judges is desirable. Certainly, with our recommendation that the numbers of the Judiciary/Masters in the High Court be increased, there may be limited scope for speedy recruitment from the pre-Handover progression/system from Magistracies to District Court to High Court and thus candidates for Judicial Office from the Bar and solicitors' profession ought to be recruited and properly trained.

12. Judicial Support

12.1 We have learned of the fact that Judges do not have their own secretaries, and we consider that this omission should be addressed. Judges must be provided with the resources to conduct their professional obligations.

12.2 Our comments about Judge's/Master's Clerks are repeated.

13. Complaints about the Judiciary

13.1 As the Honourable Mr. Justice Ribeiro PJ stated at the forum to discuss the CJR held on 5 January, 2002, you may not be able to *"get rid"* of a judge. Regrettably, there are some members of the Judiciary who do not impress and thus do not serve the wider interests of the legal services industry, nor the public. Complaints about certain Judges are well known within the profession, but how can complaints be made about such Judges? The answer is with great difficulty. Examples of wanting conduct include delivering a judgment one year after a trial of five days; an undelivered judgment on an appeal against a HCR Order14 order after four months; over five months delay in giving judgment after a costs hearing of only 90 minutes; a nine week delay in giving judgment on a Chambers hearing; a decision on a HCR Order 14 application being outstanding three months after the hearing; a judge having made an order for a speedy trial in March 2000, which occurred in July 2000, and not giving judgment until April 2001, some nine months later. The CJR is not sufficiently self-analytical to consider such matters and remedies to thwart such injustices, as *injustices* they are.

13.2 The Law Society suggests the appointment of a Judicial Ombudsman. (See Appendix 3, Chapter 4)

13.3 This proposal is radical. It is, however, made with a view to ensuring punctual performance of Judicial responsibility in the interests of justice, in the saving of costs and to avoid the extraordinary delays, just a few examples of which we cite above. Again, cross-party dialogue between the four sectors of the legal services industry may make such an initiative unnecessary, but we table the proposal to address what we consider to be a blemish on the product of the legal services industry.

14. Appointment of Judges

14.1 It is paramount that the appointment of Judicial Officers is impartial, non-political and discreet. The Law Society not having been vested with consideration of the matter as a body has not formally considered this report, but do urge that the following proposal be considered.

14.2 At present, candidates to become Judges of the High Court are recruited, for the most part, from the Bar, although there are several examples of Judges who originally qualified as solicitors and by dint of their progress through Judicial appointments in Hong Kong, have become Judges.

14.3 From whatever discipline a candidate for the Judiciary emanates, we consider that it is important that the candidate receives much wider approbation from the profession itself. We consider that JORC should include at least 2 barristers and 2 solicitors, and these individuals be vested with the power to initiate discreet inquiry as to the candidature of Judicial Officers.

14.4 We make this proposal with one ambition in mind. That of ensuring that the quality of the Judiciary aspires to the highest possible levels of ability and expertise. In this respect, what greater recommendation to the JORC could there be than the endorsements for candidature of a Judicial candidate from those of his peers and equals in the profession which she or he had served?

15. Funding

15.1 Some of the proposals referred to above require greater funding from government resources. The Law Society does not purport to have the answer to the provison of funding, but would suggest that there is scope for increasing the fees payable to the Government for originating processes. For example, the fee for the issue of a Writ or Petition, could be increased. Additional fees could be levied on the issue of each summons, potentially another incentive to litigants not to partake in unnecessary interlocutory actions.

15.2 Again, across-the-board discussions between the four sectors of the legal services industry, and in this instance Government, could usefully address how the enhancement of court services could, by such examples as we cite above, in effect be self-funding. We caution, however, that such funding must not become an all-purpose tax; the funds raised from such matters must be utilised in the enhancement of the court administration and the services which the courts provide.

Chapter 14 ALTERNATIVE DISPUTE RESOLUTION ("ADR")

1. Introduction

1.1 The Law Society noted that the CJWP was impressed by the potential benefits of ADR, that it made various proposals to make ADR a pre-condition to court actions proceedings.

2. Mandatory Mediation (or other ADR) by Court Order

2.1 Should Hong Kong adopt a rule, similar to powers that exist in the USA and Australia, which would give the court a discretionary power to require the parties to resort to a standard mode or modes of ADR, staying the court proceedings in the meantime?

2.2 A general point should be noted. It is often argued that 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.

2.3 The Law Society considers that if the ADR is not to be mandatory for all cases, but rather one where there will be a filtering process undertaken by a Judge/Master who has sufficient knowledge of the case, this would seem to be a sensible and acceptable proposal. The Judge/Master who undertakes the filtering process should be someone other than the ultimate trial judge. The Judge/Master may need to be apprised of certain *"confidential"* or *"without prejudice"* matters during the filtering process, which would or should disqualify him or her from being responsible for determining the merits of the case.

2.4 Of course, care would be needed to ensure that the costs of the process are kept within reasonable bounds. In order to introduce ADR a significant amount of time and effort should be spent in formulating the rules and procedures to ensure (as far as possible), that the costs and time of standard ADR procedures are kept within reasonable control and limits.

2.5 When formulating the rules and procedures, there is a range of issues and concerns that will need to be addressed. These include the following:

2.5.1 Who will hear the application? See the comments above.

2.5.2 At what stage can or should the application be made?

2.5.3 The procedure for making the application. For example, can an *ex parte* application be made, to preserve confidentiality and/or without prejudice matters? Can an *ex parte* application be made, if one party fears that the other side might misconstrue a desire for mediation as a sign of weakness?

2.5.4 Should the Court's decision, on whether to require mediation, be made not subject to appeal? The Law Society supports this.

2.6 If a mandatory scheme is to be implemented in Hong Kong, it will of course add a layer of cost and time, if the mediation does not result in a settlement being effected. Given that hourly rates in Hong Kong are high (for all professionals), the cost of the procedure will not be inexpensive.

3. Mediation (or other ADR) at the Demand of One Party

3.1 Should a statutory scheme be introduced whereby any party to litigation can compel the other parties to take part in mediation, or some other form of ADR? For example, by that party serving a request / notice to mediate. The mediation or ADR process would then be mandatory, with the court proceedings being stayed in the meantime.

The Law Society considers mediation should be a voluntary process.

4. ADR as a Pre-condition to the Granting of Legal Aid

4.1 Should legislation be introduced to empower the Director of Legal Aid to make resort to ADR a condition precedent to the grant of legal aid?

4.2 The Law Society is of the view that there is no objection to the Director of Legal Aid being given power, in appropriate cases, to impose a condition that the legal aid recipient takes part in mediation. However, this condition should be imposed only in those areas where ADR otherwise is operative or appropriate. The Director should not be given power to force a non legal aid applicant to take part in ADR, simply because another party to the litigation is to be funded. One way to structure the power would be for the Director to be given power to say that it is a condition of the granting or continuation of legal aid that the applicant take part in mediation, *if* the court orders that a mediation should take place. (It might also be thought appropriate to give the Director power to require that, if the solicitors appointed to represent the applicant form the view that mediation is appropriate, an application should be made on the applicant's behalf to the court seeking an order that mediation takes place.)

5. Costs Sanctions for Refusal or Failure to take part in Voluntary ADR

5.1 Should rules be adopted (probably as part of the general review of the HCR) that make it clear that an unreasonable refusal of ADR, or lack of co-operation during the ADR process would, place the *"guilty party"* at risk of costs sanctions?

5.2 There are a number of issues here, including the following:

5.2.1 As a matter of general principle, if ADR is to be encouraged, there needs to be some real incentive for the parties. Possible costs sanctions is one such incentive.

5.2.2 If such sanctions were to be introduced, it is essential that the rules are very clearly worded about (i) what the potential sanctions are, and (ii) what conduct might attract them.

5.2.3 It will be difficult, in practice, to define and judge what conduct is *"a lack of co-operation"*, as opposed to tough tactics or robust negotiating. Just because parties engage in ADR, this does not mean that everyone must act in an enthusiastic and fraternal fashion during the process.

5.2.4 There is also the difficulty of confidentiality of the ADR process. In particular, mediation is a *"without prejudice"* process. Given this, it will be difficult to enforce sanctions, if a decision about the conduct of one party can only be made if the history of the mediation is opened up for external scrutiny.

5.2.5 Given the above factors, it may be that the costs sanctions should only bite (i) in the case of refusal to take part (either outright or through setting of unreasonable conditions), or (ii) in the case of unreasonable delay.

5.3 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:

5.3.1 That the rules by which the sanctions are implemented will be clearly worded as to what the potential sanctions are; and

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

6. Publicising ADR

6.1 If a scheme is contemplated then the court must provide litigants with information about and facilities for mediation on a purely voluntary basis, enlisting the support of professional associations and other institutions.

6.2 However, research has shown that voluntary schemes results in a very low take-up rate by litigants.

6.3 Even if the take-up rate is low, there can be no objection to such information being made available to the public. It might be different if the costs of this process were unsustainable, but this is unlikely to be so.

6.4 The Law Society is of the view that there is no harm in there being in place a scheme of public education about the benefits of ADR. However, if a system of wide spread mandatory ADR is introduced, a separate education scheme probably would not be needed.

7. Hong Kong's Pilot Scheme for Mediation in Family Cases

7.1 It is noted that the mid-term evaluation of the scheme is due in about March / April 2002.

8. Accreditation Scheme

8.1 The Law Society for some time has recognized 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.

8.2 Hong Kong already has in place a number of credible organizational and accreditation systems for mediators. Given this, the Law Society takes the view that the court should be approving some or all of these existing structures, rather than seeking to set up its own (new) structure.

9. Response to the CJR

9.1 **Proposal 63:** Rules making mediation mandatory in defined classes of case, unless exempted by court order

The Law Society is pessimistic about the prospects of introducing a substantial amount of mediation in Hong Kong. It should be encouraged on a voluntary basis but not made compulsory, given the current immature state of mediation.

9.2 **Proposal 64:** Discretionary power of Judge to require parties to use ADR, with a stay of proceedings in the meantime

9.2.1 *This seems to be more appropriate, because of the court-led filtering process that is involved in that Proposal.*

9.2.2 *However, if unsuccessful it adds an additional lawyer of costs. More discussion will be necessary as there are concerns over "satellite litigation".*

9.3 **Proposal 65:** Statutory scheme to enable one party to compel others to use ADR, with a stay of proceedings in the meantime

The Law Society notes the problems of "power unbalance" and does not support this proposal.

9.4 **Proposal 66:** Legislation to empower Director of Legal Aid to make use of ADR a pre-condition of grant of legal aid

9.4.1 *If it becomes a condition precedent then non-legally aided clients will be at a disadvantage. Legal Aid could be withdrawn when the aided client rejects mediation after the solicitor certifies the case is appropriate.*

9.4.2 *It is quite clear such a condition precedent can only be of limited application. The wording of Proposal 66 refers to "appropriate types of cases". Para 654 of the Report says that the option "only arises where the parties can both be directed to ADR".*

9.5 **Proposal 67:** Rules providing that where ADR is voluntary, an unreasonable refusal of ADR or a lack of co-operation in the conduct of ADR places a party at risk of a costs sanction

The Law Society is of the view that further research is needed before it could support the implementation of this Proposal into Hong Kong.

The Law Society expresses concern that there should not be mini-trials on failed mediations, otherwise it opens the door for satellite litigation.

9.6 **Proposal 68:** Scheme for the court to provide litigants with information about voluntary ADR/mediation

The Law Society recommends information be circulated about the Law Society's Panel of Mediators.

Chapetr 15 CONCLUSION

The Law Society committed substantial time and effort to considering the whole question of civil justice reform before the CJWP published the CJR. Whilst the Law Society did not originally intend to defer the publication of its Report until after the publication of the CJR, having had the benefit of reviewing the CJR and comparing its conclusions with our recommendations, the Law Society deliberated upon the CJR and expanded its Report. Despite the persuasive terms in which the CJR is drafted in advocating for Hong Kong the adoption of rules now applied in England and Wales, the Law Society is unable to reach a conclusion along similar lines for the reasons explained in the foregoing Chapters.

The Law Society feels strongly that no civil justice reform should be implemented without extensive consideration and input by and from all four sectors of the legal services industry, namely, the Judiciary, the Administrative and Civil Service of the Courts, the Bar and Solicitors. Each sector has an unique and important role to play in ensuring that the high standards of Hong Kong's legal system, and most important of all, the rule of law is maintained. Therefore, as much dialogue as possible between these interested parties should occur to ensure a convergence of views before implementing any reforms, if such reforms are agreed to be appropriate. We also welcome the opportunity that is presented to the public to express its views on the issues and we extend an invitation to the public to comment upon the Law Society's Report.

As we mentioned in the Introduction, 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.

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 — e.g. 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.

Some of the reforms proposed by the Law Society are radical; others are conservative, especially in relation to significant amendment of the existing rules. The Law Society is of the view that many of the existing rules are capable of more exacting interpretation and application by Judges and Masters and that a more robust approach must be adopted by Judicial Officers to apply those rules. If that very simple revision to the Judicial approach to the interpretation and application of the present rules and procedures is adopted, the tantamount repeal of the present rules and their replacement with an entirely new system as advocated by the CJWP becomes otiose, and the inherent uncertainties, as well as the major policy issues (in particular with regard to the allocation by Government of substantial additional resources) which the introduction of an entirely new system would inevitably cause, would be avoided.

It is unfortunate that the issue of Higher Rights of Audience for Solicitors was omitted from the terms of reference of the CJR. It is difficult to comprehend how this important issue was excluded from the terms of reference of the CJR, when Hong Kong is one of the, if not the only, remaining jurisdiction where archaic restrictions on rights of audience is maintained. There is no justification for not allowing Higher Rights of Audience for duly accredited litigators with significant advocacy experience and ability who are more than capable of arguing their client's case as well as any barrister. Members of the public should have the right to be represented in court by a duly qualified and accredited advocate of his or her choice. The question of higher rights of audience is being considered by another Working Party of the Law Society; suffice it to say that the Law Society views the concerns of the Bar on this issue to be unfounded.

It is important to remember that the four sectors of the legal services industry provide a cost effective and expedient service to the general public, be they individuals or large multi-national corporations, so that everyone has equal access to justice with expedition at affordable cost.

We therefore conclude that the interests of the public and justice will be best served by the four sectors of our industry meeting, with interested representatives of the public, to agree a pragmatic and uniform strategy to tackle the twin evils of expense and delay in civil litigation. Hong Kong's pre-eminence as the legal centre for East Asia is an achievement to be cherished and nurtured. The significant contribution which the legal services industry provides to the economy of Hong Kong needs to be sustained. 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.

The Law Society of Hong Kong
April 2002

APPENDICES

APPENDIX 1

香港特別行政區政府
財經事務局
香港夏慤道十八號
海富中心第一座十八樓

FINANCIAL SERVICES BUREAU,
GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION
18TH FLOOR
ADMIRALTY CENTRE TOWER 1
18 HARCOURT ROAD
HONG KONG

電　話 TEL.: 2528 9155
圖文傳真 FAX.: 2866 8869
本函檔號 OUR REF.:
來函檔號 YOUR REF.:

17 January 2001

Ms Joyce Wong
Director of Practitioners Affairs
The Law Society of Hong Kong
3/F., Wing On House,
71 Des Voeux Road,
Central,
Hong Kong

Dear Ms Wong,

Re : Invisible Earnings from the Provision of Legal Services in Hong Kong

Thank you for your letter of 29 December 2000, to which Mr Stephen Ip has asked me to reply on his behalf.

On the invisible earnings that solicitors and barristers firms bring to the Hong Kong economy, we can measure it in terms of their collective value added contribution to the Gross Domestic Product (GDP). Value added is the net output produced by a firm, or a sector upon aggregation of firms in the sector, or the entire economy upon aggregation of sectors, with consumption of intermediate input subtracted out (value added when extended to the entire economy represents GDP, as measured by the production approach). During 1990-1999, value added by the legal sector as taken in the statistics to cover solicitors and barristers firms grew by an average of 3.5% in money terms, reaching $6.4 billion in 1999. Its share in GDP was maintained at around 0.8-0.9% in the first half of the 1990s, but came down to around 0.6% in the more recent years. Due to data limitations, separate breakdown of the value added into solicitors firms and barristers firm is not available. A table showing the historical data is annexed.

Yours sincerely,

(Ms Linda Yu)
for Secretary for Financial Services

Annex

Value added contribution by establishments* engaged in the provision of legal services in Hong Kong

	Value added (HK$ Mn)	% change over a year earlier	% contribution to GDP
1990	4,748	4.3	0.8
1991	5,880	23.8	0.9
1992	5,904	0.4	0.8
1993	6,289	6.5	0.8
1994	8,347	32,7	0.9
1995	6,490	–22.2	0.6
1996	7,993	23.2	0.7
1997	9,557	19.6	0.8
1998	7,256	–24.1	0.6
1999#	6,416	–11.6	0.6

Notes: (*) Establishments include solicitors and barristers firms in Hong Kong.

(#) Figures are subject to revisions later on as more data become available.

Source: Annual Survey of Storage, Communications, Financing, Insurance and Business Services, Census and Statistics Department.

APPENDIX 2

Comparative Analysis of the Chief Justice's Working Party Proposals and the Law Society's Recommendations

Proposal 1

Summary of proposal

Provisions expressly setting out the overriding objectives

Law Society position

Supported, including introduction of key concept of "proportionality".

Commentary

The Law Society believes these can and should be introduced into the existing rules: see below.

Concerns expressed on consistency, efficiency and the requirement for predictability. Greater judicial training will be necessary and therefore budgetary considerations of great importance. Introduction of measures to prevent abuse.

See Chapters 6 and 7

Proposal 2

Summary of proposal

Rule placing duty on the court to manage cases

Law Society position

Generally greater case management is welcomed.

The concern is whether active case management can be carried out effectively by the Judiciary, particularly outside Specialist Lists/Courts.

There should be enhanced statements of the court's case management duty in a number of places in the existing rules.

Commentary

This is a general theme: the Law Society has taken a relatively cautious approach to introducing case management. This is in part at least because of doubt as to the willingness of the Government to provide the necessary additional resources, financial and otherwise to the Judiciary. It is also in part because of concerns as to whether the standard of the Judiciary will result in good quality case management and a consistency of approach.

Matters such as funding, resources, training have to be addressed. There should be an induction course for new judges. On-going training to change Judicial "mind set" particularly in relation to proportionality.

See Chapter 6

Proposal 3

Summary of proposal
Rules listing the court's case management powers

Law Society position
Supported: see 2 above.

Commentary
See Chapter 6

Proposal 4

Summary of proposal
Steps should be taken, in cooperation with interested groups, to develop pre-action protocols

Law Society position
Support for protocols in cases falling within Specialist Lists/Courts.
Protocols should be kept relatively simple.
There needs to be discussion with such groups before any conclusion can sensibly be reached as to whether the potential advantages of pre-action protocols in more areas than at present outweigh the potential disadvantages.

Commentary
Simple cases do not require pre-action protocols. Litigants should be able to withdraw without incurring full "front loading" costs. Defendants should be given opportunity to settle without the pre-action protocols which should be simplified to avoid rigidity.
Introduction of suitable pre-action protocols for Construction and PI.
See Chapter 6

Proposal 5

Summary of proposal
Rules to allow the court to take into account parties' pre-action conduct

Law Society position
Supported, insofar as pre-action protocols are to be introduced.

Commentary
Behaviour of parties to be taken into account when costs considered.
See Chapters 6 and 10

Proposal 6

Summary of proposal
Simplify the manner of commencing proceedings to two forms

Law Society position
Supported.

Commentary
There should only be 1 form which can be used either as Writ or Originating Summons.
See Chapter 3

Proposal 7

Summary of proposal
Part 11 of the CPR should be adopted to govern applications to challenge the court's jurisdiction

Law Society position
Not considered

Commentary
No need to introduce significant change in this area. Proposal unnecessary.
See Chapter 3

Proposal 8

Summary of proposal
Provisions along the lines of Part 14 of the CPR should be adopted to provide a procedure for making admissions and for the defendant to propose terms for satisfying money judgments

Law Society position
Not considered, but see below

Commentary
Existing rules provide for judgment and admissions and a stay of execution on terms. The existing form should be redrafted and simplified to enable parties to achieve this without involving the court.
See Chapter 3

Proposal 9

Summary of proposal
Rules should be adopted aimed at returning pleadings to a simpler form

Law Society position
Propose retention of existing requirements for statement of claim

Commentary
1. **Existing pleadings system to be retained.**
2. **Written in plain language, no latin and unnecessary technicalities.**
3. **Copy documents cited in pleadings to be annexed (subject to bulky copying).**

See Chapter 3

Proposal 10

Summary of proposal
Rules be introduced to require defences to be pleaded substantively

Law Society position
Supported

Commentary
Every factual allegation to be answered. No blanket denials.
See Chapter 3

Proposal 11

Summary of proposal
Requirement for all pleadings to be verified by statements of truth

Law Society position
Not supported

Commentary
Endorsement of Writs need not be verified but Statements of Claim and further and better particulars should be verified.
See Chapter 3

Proposal 12

Summary of proposal
Rules to be adopted to establish a power to require clarification of and information on pleadings

Law Society position
Not considered. Existing rules, at least on the face of the rules themselves, are adequate. It is for the Judiciary to apply them more pro-actively.

Commentary
This is a general theme which the Law Society endorses. The Law Society would prefer, wherever practicable, to use or enhance existing rules (but see them substantially reinterpreted by the Judiciary) particularly with a view to more active case management and a more robust application of existing rules by the Judiciary. The objective appears to be the same; the route different. Therefore, there is no need to re-write the rules.
See Chapters 7 and 15

Proposal 13

Summary of proposal
Rules making it more difficult to amend pleadings

Law Society position
Supported, in principle:
- Amendment after discovery only where demonstrably justified (e.g. because of information not reasonably ascertainable coming to light on discovery)
- Mandatory affidavit to explain need and timing of amendment

Commentary
See Chapter 7

Proposal 14

Summary of proposal

Lower test for summarily disposing of proceedings or issues — *"real prospect of success"*.

Law Society position

Supported. Also:

- Summary judgment procedure to be available to a defendant.
- Rationalise HCR Orders14, 14A and 33 procedures into a single set of provisions
- Court to have power to direct admissions to be made.
- Encourage more early determination of issues by the court.
- Higher standard required to set aside properly obtained default judgments.
- Wider use of Originating Summons procedure to enable more matters to be disposed of without the unnecessary need for pleadings.
- Consider making it easier for a claim to be withdrawn (at an early stage) without necessarily adverse costs consequences, subject to application by defendant for order entitling recovery of full costs, rather than fixed costs.
- Abolish the limitation period requirement of Birkett-v-James (and consider amending limitation legislation to prevent re-litigation of claims that have been struck out)

Commentary

Note: there may well be strong dissent from the Judiciary to lowering the test, in particular for HCR Order 14. The fear is that it will encourage significantly more applications.

HCR Order 14 test originally followed that in UK. The current *"moomshine test"* should revert to original test.

1. **Threshold for summary judgment should be lowered.**
2. **Concern about the standard and veracity of affidavit evidence can be addressed by Judges adopting robust approach to perjury.**
3. **Concern about abuse or an increase in HCR Order 14 applications can be addressed by summary cost orders.**
4. **Amend the rules so that plaintiffs must wait for the defence to be filed before HCR Order 14 application.**
5. **Period for filing of defence to be extended to 28 days.**
6. **Any application for extension must be supported by affidavit with substantial grounds.**
7. **Defendant to bear the costs of the application.**
8. **Masters to adopt robust approach regarding time extension application.**
9. **With enhanced pleadings (compare Proposals 9–13) unmeritorious HCR Order 14 applications will be discouraged.**

See Chapter 7

Proposal 15

Summary of proposal

Adopt procedure along the lines of Part 36 of the CPR

Law Society position

Supported

Commentary

See Chapter 7

Proposal 16

Summary of proposal
Rationalise rules for interim relief

Law Society position
Rules and procedure in respect of interlocutory injunctions and other HCR Order 29 matters are reasonably satisfactory, with the possible exception of the micro-issue of Friday "injunction day" procedure.

Commentary
System works well so no change required.
Security for Costs:
1. **Existing rules adequate therefore no change; can be extended to cover non-parties (compare paragraph 328 of the CJR).**
2. **Judiciary needs to review arcane practices on taxation.**
3. **Masters to adopt more robust approach.**

See Chapter 8

Proposal 17

Summary of proposal
Interim relief by way of *Mareva/Anton Piller* injunction should be available in relation to proceedings outside the jurisdiction

Law Society position
Not considered

Commentary
Agree by adopting the *"presence of assets"* **test.**
Expand the limbs of service out on the same basis
See Chapter 8

Proposal 18

Summary of proposal
Rules providing for case management questionnaire and conference after defence, so that the court can set milestones

Law Society position
Mandatory hearing at directions stage during which there is informed discussion with a view to identifying and circumscribing the real issues in dispute.
However, retain flexibility to allow party to obtain adjournment of trial even at late stage, provided they pay costs immediately.

Commentary
The Law Society has not gone so far, as yet, to propose the fixed major milestones approach of the English CPR. Instead, it would allow movement in milestones on penalty of immediate payment of compensatory costs.
If milestone dates are to be introduced there will be significant resource implications. It can only work with a docket system. The existing rules are sufficient and can work well if Judges apply them more robustly and make the party asking for indulgence pay.
See Chapter 8

Proposal 19

Summary of proposal
Rules to give the court maximum flexibility when devising timetables and directions and encouraging the parties to make reasonable procedural agreements, without reference to the court, unless they impinge on milestone events

Law Society position
First element supported — widen scope for consent orders.

Commentary
See above.
1. **More realistic dates can be fixed with a higher threshold for any time extension application.**
2. **The proposal appears to be a wholesale copying of CPR e.g. reference to "solicitor" representing the parties at trial (compare paragraph 339).**
3. **Questionnaire ineffective if only a proforma exercise.**
4. **Would only work with a "docket system" and if with the "right judge".**

See Chapter 6

Proposal 20

Summary of proposal
Alternatively (to Proposals 18 and 19) a docket system for use generally or with particular categories of cases

Law Society position
Supported

Commentary
Docket system should be introduced across the board.
Will require significant resources. Quality of the judges, particularly at Master level, and the court administration needs to be improved.
Judges' Clerks should be legally qualified.
Docket Masters:
This requires further research, as problems not addressed in the CJR.
See Chapter 6

Proposal 21

Summary of proposal
Specialist Lists should be preserved and Specialist Courts permitted to publish procedural guides modifying the application of the general body of rules

Law Society position
Supported

Commentary
Generally, the Law Society has been concerned about the status of Practice Directions. Insofar as possible they should be codified in rules or elaborated upon in procedural guides. There should be a consistency of approach and level of detail between Specialist Lists/Specialists Courts. One concern here is the discrepancy in standards/ approaches of Judges running Specialist Lists/Specialist Courts.
Existing Specialist Lists should be preserved.
See Chapter 6

Proposal 22

Summary of proposal

Consideration should be given to introducing further Specialist Lists, e.g. unrepresented litigants and group litigation

Law Society position

Supported as a general principle. Proposed additional lists do not include unrepresented litigants or group litigation.

Commentary

Additional Lists: Companies, Technology and IP; Media; Real Estate be established.
Codification of the Practice Directions
Specialist List for unrepresented litigants
See Chapter 13

Proposal 23

Summary of proposal

Procedures to deal with multi-party litigation

Law Society position

Supported — introduce equivalent to English Commercial Court rules.

Proposal 24

Summary of proposal

Provision regulating derivative action

Law Society position

Not considered

Commentary

Generally supported but is it really necessary in light of availability of such rights under common law (derivative action) and S.168A of the Companies Ordinance (unfair prejudice)?

Proposal 25

Summary of proposal

Automatic discovery to be retained. However, the *Peruvian Guano* test should no longer be the primary measure: the primary test should be directly relevant documents.

Law Society position

Retain the existing *Peruvian Guano* test for discovery. However:

- make it easier for a party to obtain an order directing that it is not required to give discovery of large numbers of documents of marginal relevance only
- impose costs penalties on party asking for documents not directly relevant *("the asker pays")*
- impose obligation on parties to agree list of issues in dispute and/or categories of documents to be discovered.
- Simplify procedure for listing documents
- Court should make greater use of case management powers built into the existing rules (e.g. HCR Order 24, r. 1(2), 3(3) and 8)

Commentary

This is a significant difference. But, even here the Law Society at least would like to see the party obliged to give wide-reaching discovery having an opportunity to persuade the court to disapply *Peruvian Guano*.
Problems under the present system arise because the Judges and the parties fail to adhere to and apply the existing rules.
See Chapter 4

Proposal 26

Summary of proposal

Parties should be free to reach agreement on extent of discovery. Where no agreement is reached, the new primary test should be applied on a reasonable search basis.

Law Society position

See above.

Commentary

See Chapter 4

Proposal 27

Summary of proposal

Alternatively (to Proposals 25 and 26), discovery should be pursuant to inter-partes request, with further discovery requiring a court order

Law Society position

See above

Commentary

See Chapter 4

Proposal 28

Summary of proposal

Pre-action discovery and discovery against non-parties along the lines provided for by the CPR

Law Society position

Supported

Commentary

Endorsed if sufficient safeguards on confidentiality and costs are in place.

See Chapter 4

Proposal 29

Summary of proposal

Court should exercise case management powers to tailor discovery as appropriate to the individual case

Law Society position

Supported, on the basis indicated above.

Commentary

See Chapter 4

Proposal 30

Summary of proposal

Rules designed to reduce the need for interlocutory applications by:

1. encouraging parties to co-operate and to agree procedural arrangements
2. authorising the court to unilaterally make directions in appropriate cases, with right of recourse for an aggrieved party; and
3. self-executing orders.

Law Society position

First and third points supported. Second point not considered.

Commentary

***"Unless orders"* should be written into the Rules.**

General concern whether Hong Kong Judiciary would apply this rule. Proposal is vague without examples.

The power should exist but only for plain and obvious cases where the court lacks information on lack of progress.

After 6 months, non-defaulting party should be entitled to issue a Notice to Show Cause.

Final prohibition on re-litigation. Costs must follow the event.

If no default then costs "in the cause".

Self -executing orders supported.

See Chapter 7

Proposal 31

Summary of proposal

Rules designed to streamline interlocutory applications:

- paper applications
- *"skip"* the Master; and
- dispense with attendance; and
- "long-distance" hearings.

Law Society position

Supported

Commentary

See Chapters 7, and 12

Proposal 32

Summary of proposal

Court encouraged to make summary assessments of costs for interlocutory applications

Law Society position

Supported

Commentary

See Chapter 10

Proposal 33

Summary of proposal

Wider power (lower standard) to impose wasted costs orders against solicitors

Law Society position

Supported

Commentary

See Chapter 10

Proposal 34

Summary of proposal

Power to make wasted costs orders should also cover barristers

Law Society position

Supported

Commentary

See Chapter 10

Proposal 35

Summary of proposal
Rule giving the Court express power to control the scope and extent of evidence to be adduced by the parties.

Law Society position
Not supported. However, system for identifying and circumscribing issues in dispute at trial is supported: compulsory lists of agreed and disputed facts and issues and mandatory pre-trial meetings between parties.

Commentary
Another significant difference of approach, but again the Law Society is certainly concerned to reduce trial lengths. Many Hong Kong Judges adopt passive attitude and fail to exercise robust judicial control. Approval of Western Australia rules as providing elementary procedural justice. Aim to achieve proportionality and prevent disproportionate costs.
See Chapter 9

Proposal 36

Summary of proposal
High Court Ordinance to be amended expressly to empower the court to restrict the use of relevant evidence

Law Society position
Not supported — see above.

Commentary
Evidence should be adduced provided not duplicative.
See Chapter 9

Proposal 37

Summary of proposal
Rule to promote flexibility of court's treatment of witness statements

Law Society position
Supported — one aim must be to eliminate *"over-lawyering"* of witness statements.

Commentary
Test outlined in paragraph 482 of the CJR cannot achieve Judiciary's objective. Test should be: *"Whether the evidence will take the other side by surprise and whether it will assist with the fair resolution of the case"*
See Chapter 5

Proposal 38

Summary of proposal
Provisions aimed at countering the inappropriate and excessive use of expert witnesses

Law Society position
Supported, although in good part it is a question of the court using the existing rules more effectively

Commentary
See Chapter 5

Proposal 39

Summary of proposal

Measures aimed at ensuring independence and impartiality of expert witnesses

Law Society position

Supported:

- codify the *Ikarian Reefer* principles
- the rules for "without prejudice" meetings of experts should be enhanced to make them more effective

Commentary

Agreement with:

- **Declaring supremacy of Expert's duty to assist the court over that of fee paying client**
- **Impartiality of Expert and inappropriateness of experts acting as advocates for a particular party.**
- **Annexing a Code of Conduct for Expert Witnesses.**

Rejected:

- **Disclosure of all material instructions, and abrogation of legal professional privilege**
- **Court to approach Expert direct without notice to the parties.**

See Chapter 5

Proposal 40

Summary of proposal

Procedure for court to direct the parties to cause single joint experts to be appointed

Law Society position

Court appointed single joint experts only to be used in a limited range of cases. Generally, preserve existing rules.

Commentary

Again, a thematically consistent difference of approach. Court appointed single joint expert should only be used in a limited range of cases.

See Chapters 5 and 9

Proposal 41

Summary of proposal

Express powers to case manage trials

Law Society position

Supported. Including power to give judgment or dismiss an action where one party is absent.

Commentary

See Chapter 9

Proposal 42

Summary of proposal
Interlocutory appeals to the Court of Appeal be brought only with leave

Law Society position
Supported (see below)

Commentary
Current judicial decisions erratic. Proposals will not work unless docket system adopted.
Test to be applied: If the order is dispositive of a case there should be an automatic right of appeal: HCR Order 14 (but not HCR Order 14A), strike-outs and on jurisdiction

- **Limit the right to certain interlocutory applications. (This requires discussion on the role of Masters/ Deputy Judges)**
- **Regard to proportionality**
- **Docket Master to deal with case management — therefore very limited right to appeal against procedural decisions. Docket Masters should only deal with applications lasting up to 1 hour**
- **Docket Judge to deal with substantial issues.**

See Chapter 12

Proposal 43

Summary of proposal
All appeals to the Court of Appeal require leave

Law Society position
Supported

Commentary
Appeal as of right after trial and at interlocutory stage where dispositive order made as outlined above.
See Chapter 12

Proposal 44

Summary of proposal
Leave to appeal should only be granted where there is a real prospect of success or some other compelling reason why the appeal should be heard

Law Society position
Not considered

Commentary
Although this point of detail was not considered, it seems unlikely that the Law Society would demur from what is proposed. This comment also applies to subsequent proposals concerning appeals.
Filtering process is required in order to cut down the number of appeals. Concern on ability of Judiciary to implement reforms as consistency is of paramount importance. The Law Society noted "with alarm" the high success rate of appeals from Court of Appeal to Court of Final Appeal.
Agreed to adopt CPR Test *"Real prospect of success"* **provided there is consistency.**
See Chapter 12

Proposal 45

Summary of proposal
Leave to appeal from case management decisions should generally not be granted unless there is a sufficiently significant point of principle

Law Society position
Not considered

Commentary
Support.
See Chapters 6 and 12

Proposal 46

Summary of proposal
Leave to appeal from a decision given on appeal should generally not be granted unless the matter raises an important point of principle or practice or there is some other compelling reason

Law Society position
Not considered

Commentary
Leave required apart from 3 exceptions.
See Chapter 12

Proposal 47

Summary of proposal
The Court of Appeal should have the power, in respect of any application for leave to appeal, to dismiss the application without oral hearing, subject to one final written application to show cause

Law Society position
Not considered

Commentary
Test in Proposal 44 will improve filtering process.
Law Society's position:
1. **Paper applications before the Court of Appeal.**
2. **Draft grounds submitted within 14 days of judgment and Court of Appeal to decide within 14 days thereafter.**
3. **No application to the deciding Judge unless clear indication given that Judge will grant leave. Judges should provide indication of appropriateness of appealing.**

See Chapter 12

Proposal 48

Summary of proposal

Rules designed to allow the substantive hearing of appeals to be dealt with more efficiently

Law Society position

Largely a question of more robust application of existing rules and Practice Directions.

Commentary

Rejection of the proposal.

In factually complicated cases, the Judge can, under current practice, seek confirmation from counsel on the facts. The Judge can also send factual findings, without the conclusion, to the counsel involved. It is objectionable for a barrister to have sight of draft judgment and prevented from disclosing to solicitor /client. What about litigants in person? The proposal premised on a misunderstanding of solicitor/client relationship.

See Chapter 12

Proposal 49

Summary of proposal

Appeals should be limited to a review of the decision of the lower court, subject to the appellate court having a discretion to treat the appeal as a re-hearing

Law Society position

Not considered except in respect of appeals from Masters. The interrelationship between Masters' hearings and Court of First Instance hearings (on appeal from Masters) needs to be re-aligned to eliminate duplicate hearings of interlocutory matters. Recommend:

- introduction of requirement of leave to appeal against a Master's decision for matters dealt with by a Master at hearings listed for no more than 1 hour.
- More hearings to go straight to a Judge

Commentary

Judiciary's preference is for Option (c): A review of the decision.

The Law Society acknowledges that if the Masters' authority is limited to procedural matters only, the job becomes unattractive and the quality of future candidates will deteriorate.

The Law Society endorses Option (b):

- **Issues in the appeal are narrowed**
- **Written judgments from Masters required**
- **Parties prohibited from adducing new evidence.**

See Chapter 12

Proposal 50

Summary of proposal
The principles upon which appeals are determined should apply uniformly to the Court of First Instance and the Court of Appeal

Law Society position
Not considered

Commentary
There should be provision for expedited appeals and availability of duty Court of Appeal Judge to deal with urgent appeals, e.g. against the lifting of an injunction by a Court of First Instance Judge.
Option (b) should apply to the Court of Appeal and the Court of Final Appeal.
See Chapter 12

Proposal 51

Summary of proposal
New general rule requiring the court to take into account the reasonableness or otherwise of the parties' conduct relative to the nature of the case in the light of the overriding objective when exercising discretion as to costs

Law Society position
Supported.

Commentary
See Chapter 10

Proposal 52

Summary of proposal
Rules requiring solicitors and barrister to provide to their clients full information about fees, estimates of costs and to update this information with reasons when it changes

Law Society position
Law Society to provide guidance on retainer letter for use in litigation covering fees, estimates and updates, as well as other standard advice.

Commentary
The Law Society does not go so far as to impose mandatory requirement.
No objection in principle however the obligation should not be too onerous. The information should be based on available information *"as far as practicable"*.
Barristers must disclose this information to solicitors.
See Chapter 10

Proposal 53

Summary of proposal

The public should have access to information regarding barrister and solicitors relevant to their choice of representation

Law Society position

Supported

Commentary

This should also include more transparency on the qualifications of the Judiciary, possibly on its web site. The Law Society should re-visit the implementation of Specialist Accreditation Scheme under which suitable candidates will be accredited as specialists in e.g. commercial litigation.

See Chapter 10

Proposal 54

Summary of proposal

Removal of presumption of reasonableness on taxation of lawyers' charges

Law Society position

Supported.

Commentary

Anachronistic procedures require overhaul. Proposal adopted excepted that the assessment should be without any presumption. The last five words of the Proposal *"... that such costs are reasonable"* **should therefore be deleted.**

See Chapter 10

Proposal 55

Summary of proposal

Compilation of Benchmark costs for use in HK

Law Society position

Supported

Commentary

The Benchmark should be realistic but should not apply to solicitor/own client fees which is governed by market forces. In addition, cost for waiting time should be allowed.

See Chapter 10

Proposal 56

Summary of proposal
Provision to require the parties, periodically and as ordered, to disclose to the court and to each other best estimates of costs already incurred and likely to be incurred

Law Society position
Not considered.

Commentary
Court should only order disclosure in appropriate circumstances. Require more realistic assessment of costs estimates in order to achieve proportionality.
See Chapter 10

Proposal 57

Summary of proposal
Remove exceptional treatment of counsel's fees on party and party taxations

Law Society position
Supported

Commentary
See Chapter 10

Proposal 58

Summary of proposal
Rule to allow equivalent of Part 36 offers to be made in respect of costs to be taxed

Law Society position
Support

Commentary
See Chapters 7 and 10

Proposal 59

Summary of proposal
Benchmark costs to be presumptive of costs allowable on taxation

Law Society position
Supported

Commentary
Benchmark costs must be reasonable and flexible
See Chapter 10

Proposal 60

Summary of proposal
Procedure for provisional taxations on paper at the court's discretion

Law Society position
Support if conducted by Masters, otherwise awards are inconsistent.

Commentary
See Chapter 10

Proposal 61

Summary of proposal
Rules requiring parties to a taxation to file documents in prescribed form

Law Society position
Taxation procedure requires complete overhaul.

Commentary

1. **Parties must consult each other rather than just filing standard objections, otherwise cost penalties should be imposed and Masters should take a robust approach on cost remedies.**
2. **New procedures recommended to shorten the taxation procedure, namely,**
   (i) **skeletons to be exchanged within 14 days,**
   (ii) **list of objections to be exchanged within 14 days before the callover hearing; and**
   (iii) **the parties to meet 7 days before the callover hearing with a view to agreeing the disputed items.**
3. **Overhaul of taxation bill. Solicitors should be allowed to submit edited solicitor/own client bill.**
   Legal Aid: Existing statutory anomaly favouring Legally-Aided plaintiffs is inequitable and should be amended as unfair to privately funded litigants.

See Chapters 9 and 10

Proposal 62

Summary of proposal
Rules similar to those listed in Schedule 1 of the CPR be retained in the HCR with only such changes as may be necessitated by changes to other parts of the HCR

Law Society position
Existing rules should in any event be retained. Rules governing enforcement of judgments should be substantially rationalised and improved.

Commentary
No wholesale change as the powers already exist and Judiciary should apply more robustly.
See Chapters 1 and 15

Proposal 63

Summary of proposal

Rules making mediation mandatory in defined classes of case, unless exempted by court order

Law Society position

Mediation should be encouraged on a voluntary basis but not made compulsory, given immature state of mediation market in Hong Kong and potential difficulties in developing it.

Commentary

The Law Society is pessimistic about the prospects of introducing a substantial amount of mediation in Hong Kong. This is based on the assumption that mediators should be legally qualified.
If mediation unsuccessful adds additional layer of costs.
See Chapter 14

Proposal 64

Summary of proposal

Discretionary power of Judge to require parties to use ADR, with a stay of proceedings in the meantime

Law Society position

See above

Commentary

Support.
More discussion necessary: At what stage would mediation be ordered?
By the Judge?
Timing very important but difficult to get it right.
Concern over "satellite litigation"
See Chapter 14

Proposal 65

Summary of proposal

Statutory scheme to enable one party to compel others to use ADR, with a stay of proceedings in the meantime

Law Society position

See above

Commentary

Problem of "Power imbalance" to be noted.
See Chapter 14

Proposal 66

Summary of proposal
Legislation to empower DLA to make use of ADR a pre-condition of grant of legal aid

Law Society position
See above

Commentary
If it becomes a condition precedent then non-legally aided clients will be at a disadvantage. Legal Aid could be withdrawn when the aided client rejects mediation after solicitor certifies case appropriate.
See Chapter 14

Proposal 67

Summary of proposal
Rules providing that where ADR is voluntary, an unreasonable refusal of ADR or lack of co-operation in conduct of ADR places party at risk of costs sanction

Law Society position
See above

Commentary
No mini trials on failed mediations, otherwise introduces "satellite litigation".
See Chapter14

Proposal 68

Summary of proposal
Scheme for the court to provide litigants with information about voluntary ADR/mediation

Law Society position
Support

Commentary
The Law Society has established its own Panel of Mediators.
See Chapter 14

Proposal 69

Summary of proposal
Reforms to simplify description of scope of judicial review and simplify terminology for forms of relief

Law Society position
Not considered

Commentary
The Law Society has not considered judicial review at all.
Support for Proposals 69 to 73 provided existing provisions codified and do not alter court's existing jurisdiction.

Proposal 70

Summary of proposal
Provision to facilitate participation in judicial review proceedings of persons interested other than the applicant and the respondent

Law Society position
Not considered

Proposal 71

Summary of proposal
Provisions requiring claims for judicial review to be served on respondents and other persons known to be interested

Law Society position
Not considered

Proposal 72

Summary of proposal
Require respondents who wish to contest judicial review proceedings to acknowledge service and summarise grounds of defence

Law Society position
Not considered

Proposal 73

Summary of proposal
Provisions to spell out court's power on quashing a decision

Law Society position
Not considered

Proposal 74

Summary of proposal
A new set of rules along the lines of the CPR

Law Society position
No — the reforms can and should be implemented (to the same degree in substance) by amending and supplementing the existing rules and where necessary re-interpreting existing rules

Commentary
Rejected.
See Chapter 15

Proposal 75

Summary of proposal
Alternatively, amend but otherwise retain the existing HCR

Law Society position
Supported — see above.

Commentary
See Chapter 15

Proposal 76

Summary of proposal
Reforms must be adequately resourced

Law Society position
Supported.

Commentary
This is of particular concern to the Law Society.
See Chapters 6 and 13

Proposal 77

Summary of proposal
Pre and post reform analysis of the system's demands

Law Society position
Supported

Commentary
See Chapters 1, 6, 13 and 15

Proposal 78

Summary of proposal
Training programmes for judges and other court staff

Law Society position
Supported.

Commentary
See Chapters 6 and 13

Proposal 79

Summary of proposal
Develop court's existing computerised system

Law Society position
Supported

Commentary
See Chapter 6

Proposal 80

Summary of proposal
Research to monitor continuously the system's functioning and effect of reforms

Law Society position
Supported

Commentary
See Chapters 6 and 15

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Proposals on additional matters considered by the Law Society which do not appear to have an equivalent in the CJR.

Proposal 1

Law Society position
Improvements to Masters' summonses lists

Commentary
See Chapter 13

Proposal 2

Law Society position
Improvements to listing procedure.

NB: The Law Society considers that the Judiciary's basis for statistics in respect of waiting time for trials is flawed. They only address time between setting down and the trial date; they do not take into account the long waiting time to get a listing appointment and the setting down time.

Commentary
See Chapter 13

Proposal 3

Law Society position
Rules making it clear that in appropriate circumstances judges can provide an *'early evaluation'* of the case to encourage issues to be resolved/abandoned.

Commentary
See Chapter 7

Proposal 4

Law Society position

Abolish the "running list", with the consequential advantage of ensuring judges have adequate time to actively case-manage.

Commentary

See Chapters 6 and 9

Proposal 5

Law Society position

Simplify procedure for enforcement of judgments and make it more Judgment Creditor friendly. This is an important prospect for reform which was "ducked" by Woolf.

Commentary

See Chapter 11

Proposal 6

Law Society position

Remove necessity for affidavits/affirmations to be made before solicitors of another firm.

Proposal 7

Law Society position

Continuation of Judicial appointments subject to performance reviews.

See Chapter 13 and Appendix 3

Overhaul of court's administration, including improvements to the Registry and the procedure for drawing up of orders.

Commentary

See Chapter 13

Proposal 8

Law Society position

Introduce facility for electronic filing of documents at court.

Proposal 9

Law Society position

Registry to have special team to cater for litigants in person

Commentary

See Chapter 13

APPENDIX 3

Comments by the Law Society's Working Party on Civil Justice Reform on the Panel on Administration of Justice and Legal Services' *"Consultation Paper on Process of Appointment of Judges"* December 2001

1. Introduction

As part of the deliberations of the Law Society's Working Party ("LSWP") on Civil Justice Reform, the Law Society has expressed views upon various matters which dovetail with those issues considered by the Panel on Administration of Justice and Legal Services ("the Panel") in its Consultation Paper on *"Process of Appointment of Judges"*.

In its report, the Law Society has commented upon a dearth of Judicial resources to cope with the increased use of the courts in recent years. As the leading international legal centre for East Asia, it is paramount to the interests of those using the courts not only from the domestic constituency of Hong Kong but also the international community which favour Hong Kong as a litigation centre, that the Judiciary not only meet the highest standards of legal and Judicial expertise, but that they are sufficient in number to acquit their responsibilities without delay.

As the Law Society's Report observes, many of the delays experienced by litigants in Hong Kong result from the fact that the Judiciary appears to be overwhelmed with work. One of the Law Society's suggestions is to increase Judicial salaries to assist in broadening the attraction of Judicial appointment to a greater number of potential Judicial candidates. We consider that members of the Judiciary should enjoy sufficient time to prepare for and conclude matters before them, and such time management requires a proper appreciation of the practical exigencies of Judicial appointment, which we feel is not the case at present. In this respect, the Law Society is entirely sympathetic to the Judiciary.

The scope of the Panel's Consultation Paper is concentrated on the appointment of Judges and we deal with the chapters of the Panel's Consultation Paper as follows:–

Chapter 1 — Background

We delve slightly further into the factual as opposed to legislative history of Judiciary appointments. Prior to the Handover, members of the Judiciary were appointed from an enormous international pool. This gave Hong Kong an abundant advantage in that the Judiciary, being drawn from many quarters of the globe, enjoyed a hugely cosmopolitan legal background. The considerable breadth of multi-jurisdictional experience was practically unique to Hong Kong and served not only Hong Kong's domestic clientele, but

the international clientele using Hong Kong and its legal services industry extremely well. Political considerations and sensibilities aside, we consider that Hong Kong, its court users and the legal services sector would benefit by that approach to judicial recruitment being revisited, favourably.

We note the contents of paragraph 1.2 and agree that the independent commission, the Judicial Officers Recommendation Commission ("JORC"), which recommends to the Chief Executive Judicial appointments should remain just that, an *independent* commission. In that such appointments require the endorsement of the Legislative Council ("LegCo"), we trust that LegCo will continue to be a *"rubber-stamping"* body for this purpose, rather than political considerations being voiced in respect of such appointments. We emphasize that we see no merit whatsoever in the intrusion of politics in respect of such matters if the Judiciary is to remain, as it must, non-political and independent.

Chapter 2 — Role of LegCo to endorse judicial appointments

The Law Society takes assurance from the acknowledgement that LegCo's power to endorse the appointment and *removal* of judges of the Court of Final Appeal and the Chief Judge of the High Court must only be exercised in such a way as to be compatible with the protection of judicial independence and quality.

In that LegCo observes that information provided to LegCo by the Administration (not defined in LegCo's Report) is sketchy and inadequate, this begs analysis. Surely, the independent commission, the JORC, should be brought to task?

As to transparency of appointments, the LSWP considers that a process such as that of Congress in the USA subjecting potential candidates to the Federal Bench to the most exacting of public examinations is not the optimum course of appointment, there being much to be said for appointments in the United Kingdom and Canada being conducted on an infinitely more discreet basis.

LegCo provides three options for consideration. The Law Society is minded to recommend the maintenance of the *status quo*. However, in so determining, it is the composition of the JORC which has the potential to undermine the whole process. We consider that the composition of the JORC be debated by LegCo to endeavour to ensure this body remains (or becomes) non-political.

So long as the JORC enjoys complete impartiality, we consider that many of the concerns of LegCo fall away. Full and proper reports and recommendations by JORC should, save and except in exceptional circumstances, sustain the roles of the Chief Executive and LegCo in validating the recommendations and hence appointments of candidates as members of the Judiciary by JORC.

We therefore conclude that the composition of the JORC requires careful scrutiny.

Chapter 3 — Process of Appointment of Judges

The use of the word *"secrecy"* in relation to the appointment of judges is, we consider, unfortunate and only serves to give the wrong impression. The process should be *discreet*. Again, much will depend upon how proactive the JORC is in its investigations leading to its recommendations to LegCo.

The Law Society would endorse all candidates for the Judiciary completing formal application forms, to an extent well beyond a *curriculum vitae* as such. In this respect, we note Appendix IV of the Panel's Consultation Paper, which surprisingly contains no request for candidates to describe, in detail, their legal experience and expertise. We refer to Appendix III in relation to the appointment of High Court judges in England and Wales, with 29 examples of fields of legal expertise. We consider that a combination of the US Senate Judiciary Committee questionnaire (See Appendix II and Appendix III of the Panel's Consultation Paper) be drafted and that Appendix IV (of the Panel's Consultation Paper) be significantly modified to accommodate that recommendation.

LegCo should consider and vet membership of the JORC, and for reasons already touched upon, we consider that this is probably the most important determining factor in the appointment of the Judiciary.

The Law Society considers it inappropriate that the Secretary for Justice ("SJ") be a member of the JORC, the SJ being a political appointment. Presumably, on the recommendation of the JORC, and after LegCo sanction, the Chief Executive would liaise with the SJ on the appointment of Judicial candidates. The input of the SJ would be of assistance to the Chief Executive at *that time*.

As to *"political figures"* appearing on the JORC, this the Law Society views to be adverse to the perception of judicial independence, and to adopt LegCo's comment, the credibility of the JORC. Quite appropriately, no LegCo member can be appointed as a member of the JORC; in such circumstances, one questions whether the JORC benefits from a membership which includes political representatives of the Mainland. This is of especial relevance with Hong Kong endeavouring to retain its status as the *"legal centre"* for East Asia, and with the potential for international litigants being deterred from agreeing to Hong Kong as the forum for the resolution of disputes where there might be a political taint, whether actual or merely perceived, to appointments to the Judiciary.

Moreover, the Law Society considers it essential that both the Bar Association and the Law Society have at least two representatives each on the JORC. No greater recommendation for candidature to the Judiciary can be obtained than through the endorsement of members of the legal services industry. However, the two members appointed by the Bar Association and the two members appointed by the Law Society should be for two years tenure only, to ensure continued impartiality. It is also perhaps appropriate that the Department of Justice be represented — but at Civil Service level.

We agree that annual reports should be published by the JORC to assist in its transparency and accountability, but again the JORC in preparing such reports must exercise such discretion as is required so as not to deter suitable candidates for judicial office coming forward.

The Law Society also agrees that there should be open recruitment for judicial vacancies, but that this be done by individual application to the JORC rather than through public advertisements. Again, some element of discretion in the application process is paramount. For example, if an application was public and the candidate rejected, it would only serve to cause embarrassment and constitute a deterrent to suitable candidates putting themselves forward. In this respect, we disagree with the Bar Association's proposal.

As for the proposal that the JORC consults with, for example, senior members of the Judiciary and the profession of the candidates, with the JORC having two representatives from each of the two professional bodies (the Bar Association and the Law Society) as part of its membership, then the scope of such liaison is reduced. As to the JORC liaising with existing or indeed former members of the Judiciary, we see no impediment.

Chapter 4 — Mechanism for handling complaints* against Judges

The Law Society considers that it is appropriate that a system be established to address instances of poor or inappropriate Judicial management, and its Report on Civil Justice Reform will endorse this. The Law Society considers this is a less adversarial nomenclature than "complaints"*. Various options are tabled by the Law Society for consideration by LegCo (in no order of precedence):–

A. *Judicial Ombudsman*

The Law Society is not aware of an equivalent appointment in any other jurisdiction, but considers that the creation of such a position could be commended to the Panel. If the position was created, further debate would need to determine whereabouts in the Administration the Judicial Ombudsman would be placed. In this respect there appear to be three alternatives, which are:–

(a) The office be entirely divorced from the Judiciary and the Judicial hierarchy, possibly in an office falling under the Chief Secretary's Department and not under the Secretary of Justice or the Chief Justice; or

(b) The office be under the Chief Justice's auspices but again outside the present framework of the Judicial hierarchy and administration; or

(c) The office be divorced from the Administration and/or Judicial hierarchy altogether, and answerable to the JORC only.

If the appointment of a Judicial Ombudsman is of attraction to LegCo, it must be emphasised that the position in question remains *absolutely independent*. The office of the Judicial Ombudsman would have to be established by ordinance, but presumably it would be possible to achieve the same by amendment to Judicial Officers Recommendation Commission Ordinance (Cap. 92).

Reports relating to poor or inappropriate judicial management or conduct concerning Judicial Officers could be made to the Judicial Ombudsman, who would be vested with statutory powers to investigate such reports, discreetly. The Judicial Ombudsman would be allowed to confer or consult with a barrister nominated by the Bar Association and a solicitor nominated by the Law Society, (something akin to the Joint Tribunal established between both professional bodies). Interviews by the Judicial Ombudsman, and the representatives of the Bar and the Law Society, could be held with the party making the report, which would be conducted and the records of such interviews maintained on the most confidential basis. A meeting would then be convened with the Judicial Officer, the subject of the report, to attempt to resolve the issue.

The Law Society appreciates the *"Star Chamber"* potential for such a position, but this will be tempered by the fact that the fundamental role of the Judicial Ombudsman and his office is one of conciliation leading to an efficient resolution of the problem reported and the prevention of any recurrence of the subject matter of such reports. There is the potential for a *"points"* system to be devised whereby matters which have been investigated and recur can be categorised, against which reports can be made to whomever LegCo determines the Judicial Ombudsman be answerable: the Chief Secretary, the Chief Justice or the JORC.

We anticipate that most reports are likely to focus upon delay, and in particular the handing down of orders and judgments, although we do not exclude the possibility of other grounds for such reports, such as a lack of ability; a lack of impartiality or discourtesy.

B. *The Chief Justice*

Reports about Judicial Officers be dealt with by the Chief Justice, but in conjunction with senior representatives nominated by the Bar Association and the Law Society, the appointments of the latter individuals to be made by the Chief Justice, subject to approval by the Bar Association and the Law Society Council respectively.

This proposal at first reading might be more attractive, is however fraught with one difficulty. If a party makes a formal report to the Chief Justice about a member of the Judiciary, for example, about the late delivery of an order or judgment, that party is duty bound to disclose that communication to opposing parties. There is every reason to be concerned that if an order or judgment is rendered after such a report, and it favours the party having made that report, that this could constitute a ground of appeal by the unsuccessful party. It would certainly place the Chief Justice in an if not untenable, certainly difficult, position if the matter moved forward to appeal.

The Law Society agrees that a mechanism for handling such reports about judicial process be introduced. The proposal for the creation of a Judicial Ombudsman or a refinement of a reporting procedure to the Chief Justice will require careful consideration by LegCo, and only after full consultation across-the-board between the four sectors of the legal community, being the Judiciary itself, the Bar Association, the Law Society and, possibly, the Court Administration/Civil Service. It is a radical step to take, but one for which there is a pressing requirement if Hong Kong is to sustain its pre-eminence as the legal centre for East Asia.

In their consideration of such issues, we ask LegCo to bear in mind that it is of paramount importance that the independence of the Judiciary remains inviolate, however unfortunate some judicial appointments may prove to be.

In both instances, whichever option is favoured, if at all, and assuming that the creation of a *"reporting"* mechanism is adopted, the terms of reference under which it operates will have *"conciliation"*, i.e. resolution of the problem as its principal responsibility. One would reasonably have expected that if a report was made, and the Judicial Officer in question is advised accordingly, his or her conduct in respect of salient matters would not be repeated. If, however, the conciliation route fails, should there be the right of dismissal of judges by either the Judicial Ombudsman, the Chief Justice or the JORC? Whilst reluctant to propose such a draconian initiative ourselves, LegCo will no doubt consider this issue.

C. *Fixed Term Contracts*

The Law Society has considered other options. For example, fixed term contracts for Judicial office. In this respect, the Law Society was not persuaded that this option was viable, for the following reasons. First, under the Hong Kong system, a Judicial Officer cannot return to the Bar to resume his profession as a barrister if he has enjoyed Judicial office. The same is not true to quite the same extent in relation to a solicitor. Consequently, if a judicial appointment is made on a fixed term contract basis, and not renewed, an individual would be deprived of his *"rice-bowl"*, and this issue of itself could act as a deterrent to otherwise suitable Judicial candidates coming forward.

Moreover, an example of why fixed term Judicial contracts should not be adopted lies in *The Thyssen Case*, a matter which recently came to trial in Bermuda. There, the trial judge was on a three-year contract which was not renewed (for reasons which we need not explore). As a result, and despite various proposals being promulgated, the trial was in effect abandoned. We do not, overall, believe that fixed term contracts of whatever tenure, be they three years, five years or other periods, are appropriate.

D. *Mechanism for handling Complaints*

The Law Society favours the creation of a mechanism for handling reports of inadequate or inappropriate Judicial management. They are, however, mindful of the need to sustain Judicial independence, and they are equally attuned to the fact that the Judiciary itself may well be opposed to such a regime being introduced. The matters considered in this paper are likely to be controversial and LegCo will have to approach the issue with the greatest of sensitivity.

The Law Society anticipates that the bulk of such reports will focus upon the late delivery of orders and Judgments. Perhaps such issues can be addressed in further consideration of the Civil Justice Reform by the Chief Justice's Working Party on Civil Justice Reform and/or the Law Society's Report on Civil Justice Reform in due course. Perhaps a more benign approach might be for the Judiciary itself to agree a Code of Best Practice whereby there will be undertakings that Judicial Officers will make pledges to the community which they serve in terms of their efficiency.

Conclusion

We conclude our response to the Panel's Consultation Paper by reiterating that the Law Society considers there are insufficient Judicial Officers in Hong Kong to cope with the amount of litigation being referred to the Courts, and that the role of Judicial Officers is not properly understood by the average layman. All Judicial Officers conduct an enormous amount of professional work outside the courtroom, and we do not consider that their endeavours on behalf of the community in this respect are recognised, let alone understood. Preparation for hearings include reviewing court files; consideration of legal authorities; review of the submissions of advocates, both written and by transcripts of oral submissions, etc., let alone the often arduous exercise of preparing lengthy and complicated judgments. This is an extremely time-consuming responsibility and proper time-and-motion studies need to be conducted to ensure that the Judiciary are vested with sufficient resources and time to acquit their essential role in society at the very high levels of professionalism.

The legal services industry in Hong Kong is greatly envied. It creates invisible earnings for the economy of Hong Kong which almost match the costs to the taxpayers of providing such services, including the underlying court administration. It is, to a large extent, self-funding. To continue the pre-eminence of Hong Kong as a legal services centre, then its *"flagship"*, an Independent Judiciary enjoying the most exacting of levels of professional expertise and ability must be sustained. We respectfully ask LegCo in their deliberations upon the Panel's Consultation Paper not to lose sight of this criterion.