E-Briefing – Detailed Version
(Covering the period from 17 March to 15 April 2009)

1. Professional Representation

1.1 Professional Rules and Regulation Committee (PR&RC)

As mentioned previously, The Law Society commissioned an independent review of the regulatory regime for law firms to be conducted by the Rt Hon Lord Hunt of Wirral. As a distinct sub-strand of this, The Law Society commissioned an independent review of whether the present arrangements for regulating law firms serving corporate clients are satisfactory. The Committee responded to this review (the "Smedley Review"), in response to a call for evidence. The Committee also responded to Lord Hunt's overarching Review of Legal Regulation. Click here for the call for evidence and click here for the response. The response stated, *inter alia*, that:

> 3. We would suggest that your review of regulation, like regulation itself, should not be done on a "one size fits all" basis. The reasons for this are twofold.
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> 4. First, a number of the objectives of regulation, as articulated by Clementi and which found their way in an extended form into the LSA, are not relevant to the practices of firms represented by our committee ("Corporate Work firms") nor, therefore, to the way in which those firms should be regulated. These objectives are improving access to justice, protecting and promoting the interests of consumers (as that expression is used to mean unsophisticated, infrequent users of legal services) and increasing public understanding of the citizen's legal rights and duties. Whilst these objectives concern many of our members (whose CSR and pro bono activities bear testament to this), we do not believe that they should have a bearing on the regulations that Corporate Work firms are subject to.
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> 5. Second, we believe that there should be a different method for regulating Corporate Work firms for the reasons set out in the Smedley Review. Whilst tackling the separate regulation of the corporate legal sector is clearly essential and we give our full support to Smedley, the wider legal market is itself further segmented and each segment might also demand a different regulatory approach. (For example, the correct regulatory approach for a traditional high street practice will not meet the needs of an intensive and process driven volume debt collection or remortgage business, or the needs of a specialist boutique, etc.) Other regulatory regimes (the FSA for example) recognise the complex segmentation of the markets they regulate and deliver targetted regulation which properly addresses the needs of the service providers and their clients in that sector; this approach is equally valid for participants in the legal market.
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> 6. We would therefore suggest that you conduct your review of the regulatory framework, or at least certain aspects of it, in separate work streams, one of which should be for Corporate Work firms.

The Committee also responded to SRA Consultation Paper 15 entitled "Regulatory-Risk Information Requirements - 2009". Click here for the consultation paper and Click here for the response. The consultation related to the information that the SRA proposes to seek from firms in 2009, as part of the processes that it is developing to regulate firms as well as individuals. In the paper, the SRA mentioned that it proposes to require information on turnover, work types, number of non-solicitor fee earners and negligence claims as part of the recognised body renewal process in October 2009. The paper looks in detail at the information required under each of these headings. The response called for more information as to how the SRA would use the information gathered, guarantees about the confidentiality of the information supplied to the SRA, and for an arrangement to allow firms that have supplied the information for another purpose in the last 12

months to be able to supply that to the SRA. The paper also responded to the specific headings mentioned above under which the SRA proposed to gather information.

The Committee also responded to SRA Consultation Paper 16 entitled "Better Regulation: A new approach to regulating legal services firms and individuals". Click here for the consultation paper and click here for the response. The paper set out the SRA's evolving new approach to regulation, and in particular how the shift towards regulating legal firms will affect the way in which it regulates. The CLLS response stated that many of the points mentioned in the consultation paper are relevant to the review conducted by Nick Smedley, and took the view that they are therefore best addressed once the SRA has responded in full to his report and stated the extent to which it intends to implement the recommendations in that report. The response stated that the CLLS would be happy to comment further at that stage.

1.2 Training & Education Committee

The Training Committee's report in the most recent edition of City Solicitor can be read here.

2. Specialist Committees & Working Groups

2.1 Financial Law Committee

The Financial Law Committee's report in the most recent edition of City Solicitor can be read here.

The Chair of the Financial Law Committee recently participated in the work of the HM Treasury Working Party on Protected Cells in investment funds. (The Chair of the Insolvency Law Committee was also involved on behalf of that Committee.)

The Financial Law Committee is also involved in ongoing liaison with the Financial Markets Law Committee sponsored by City institutions and the Bank of England.

2.2 Land Law Committee

The Land Law Committee's report in the most recent edition of City Solicitor can be read here.

The London Property Support Lawyers group has produced an alternative schedule 4 for the CLLS certificate of title, (6th edition, 2008 update) where property is subject to multiple occupational leases, which may be used in accordance with the commentary that accompanies it, where considered appropriate. This document can be downloaded here.

2.3 Litigation Committee

The Litigation Committee recently responded to the SRA consultation entitled “Solicitor higher court advocates – proposal for mandatory re-accreditation”. Click here

for the consultation document and click here for the response. The response dealt with the specific questions from the consultation paper, and stated generally that:

1. Our basic approach to the issue of mandatory re-accreditation has not changed since we submitted our response to the previous consultation paper dated 2 May 2008.

2. We accept that there needs to be formal accreditation for advocates but cannot see that:
   (a) it should be more onerous than any accreditation scheme for barristers, and should not therefore go beyond what would be required of barristers in any assessment of solicitors' eligibility to advocate.
   (b) we see no warrant for the introduction of mandatory re-accreditation any more than we do in respect of barristers -- to insist on such a process is to effectively cement into the system a two-tiered approach.

3. We believe that the overall approach of the current proposals, which is to protect the public, ought to be consistent with achieving equality of opprtunity and rights as between the two branches of the profession.

The Litigation Committee also recently responded to the Law Society Consultation entitled “Litigation Funding: key issues and background information”. Click here for the Law Society document and click here for the response. The response stated, *inter alia*, that the majority of the Committee were cautiously in favour of the introduction of contingency fees. The paper also mentioned that costs shifting should be retained if a contingency fee regime is introduced, albeit that the Committee did not consider that the contingency fee itself should be recoverable from the losing party.

Furthermore, the Review of Civil Litigation Costs being conducted by Lord Justice Jackson is about to enter its second phase. The Review was announced last November and started work in January, and the focus in the first phase has been on gathering evidence and views on a wide range of relevant matters identified by Lord Justice Jackson as relevant to his work. In January, representatives of the Litigation Committee attended a meeting with Lord Justice Jackson as part of this phase to contribute the Committee's views.

Phase 2 is expected to begin in May with the publication of a consultation paper, with the consultation period lasting until the end of July. The Litigation Committee will be considering the consultation paper when it is published and expects to put in a response.

2.4 Regulatory Law Committee

The Regulatory Law Committee recently responded to FSA consultation paper 08/24 "Stress and Scenario Testing". Click here for the consultation paper and click here for the response. The response stated, *inter alia*, that:

> The Committee does not take it upon itself to comment on any policy aspects of the Consultation Paper. Rather, our concern is to ensure that the obligations which would be imposed on firms, the standards of behaviour FSA would expect firms to meet and the likely steps which will be followed by FSA, each in conjunction with the matters discussed in the Consultation Paper, are clear and certain.

The Regulatory Law Committee also recently responded to FSA CP08/25 "The Approved Persons regime: significant influence function review". Click here for the consultation paper and click here for the response. The Consultation Paper stated:

Under the Financial Services and Markets Act (FSMA) we have powers to regulate two types of individuals: those that have a significant influence on a firm and those who deal with customers (or the property of customers). In this consultation we put forward proposals that focus on individuals who have a significant influence on a firm and, in particular, those who are responsible for corporate governance. Firms with robust corporate governance arrangements are more likely to be both willing and able to face up to their key risks.

The Committee responded to the nine questions contained in the consultation paper, and also stated generally that:

Before turning to FSA's nine questions we wish to make a preliminary observation, which is that FSA has failed to establish an adequate case for any of the proposed handbook amendments. While we appreciate the purpose underlying the existence of the approved person regime in its current form, FSA needs to justify the proposed changes by reference to some market failure – in other words, to explain why the current regime is inadequate. We acknowledge that FSA may have concerns over the role of the ultimate holding company of an FSA authorised firm in circumstances where FSA does not regulate the holding company, and that these concerns may have been brought into sharp focus during the recent financial instability and are, indeed, discussed in the recent DP 09/2. However, it is unsatisfactory for the reader to have to guess at FSA's reasoning rather than to have it properly laid out. If FSA does indeed have such reasons, it has not included them in the Consultation Paper and the Cost Benefit Analysis is therefore inadequate because, inconsistently with FSA's Policy Delivery Standards, there is no such explanation.

One justification that FSA raises for these changes in CP 08/25 is the outcome of the Northern Rock investigation. We are aware of the conclusions of the review by FSA Internal Audit of the quality of FSA's supervision of Northern Rock, but it is not easy to associate any of FSA's proposed changes with the recommendations that that report contained. We further understand that FSA seeks to increase the rigour of its day-to-day supervision pursuant to its "Supervisory Enhancement Programme" (SEP), but nobody knows whether it contains sufficient reasons to support these changes because FSA has not chosen to publish it.

In particular, it seems that none of the CP's recommendations relate directly to the competency of firms' management, which is stated to be a recommendation of the SEP. Instead, the main focus appears to be on "whether the regime reflect[s] corporate governance structures within the industry", which is a separate issue. In this respect FSA states (at 3.3) that while the current regime reflects the fact that a firm may be managed on function, product or matrix basis, it "does not necessarily reflect the increased significant influence exerted on an authorised firm by individuals based in parent undertakings or holding companies to which the authorised firm is accountable".

This is a surprising justification for a significant change because

• A statement that the present regime should be changed because "it does not necessarily reflect" a situation is a weakly formulated case; and

• FSA says nothing in support of the key justification for this change, which is that this kind of significant influence "has increased".

Instead, it seems to this Committee that this kind of influence has always been present, was taken into account by Parliament in passing the FSM Act in 2000, and was also within the understanding of FSA when devising the APER handbook in 2001.

Turning to the subsequently published DP 09/2, we note how FSA advances arguments (at paragraph 6.7 onwards) for the extension of regulation over currently unregulated companies within groups containing regulated firms. We do not now propose to comment on this, but would point out that FSA's concerns expressed in DP 09/2 do not justify the changes proposed in CP 08/25 because
(i) They are addressing the regulation of firms rather than of individuals;
(ii) They call for legislative rather than rulebook change (6.11); and

(iii) FSA recognises that global and consistent implementation is required, which is the antithesis of what CP 08/25 is seeking (6.14).

Furthermore, the Regulatory Law Committee's report in the most recent edition of City Solicitor can be downloaded here.

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