E-Briefing – Detailed Version
(Covering the period from 18 July to 21 August 2009)

1. Professional Representation

1.1 Professional Rules and Regulation Committee

The Professional Rules and Regulation Committee recently responded to the Legal Services Board's consultation paper "Wider Access, Better Value, Strong Protection Discussion paper on developing a regulatory regime for alternative business structures" (see http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/140509.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=635&lID=0 for the response). A copy of the executive summary from the consultation paper is set out in Annex "A" of this paper, for ease of reference. The Committee's submission responded to the specific questions in the consultation paper, and, *inter alia*:

- Expressed concern at the prospect of the LSB establishing itself as a front-line licensing authority under the new regime,
- Emphasised the importance of lawyers continuing to be regulated on an individual basis; and
- Expressed disappointment that the SRA is not trying to find a way to allow investment by third parties in solicitors' firms under the current rules, as a transitional measure which could be adopted while the ABS framework is being worked out.

1.2 Training Committee

The Training Committee made a number of detailed comments on the SRA's draft Training Contracts Handbook (which regards trainee solicitors). (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=610&lID=0 for the Committee's comments (which include a marked up version of the Handbook).) It is not anticipated that firms that have been following the existing requirements and guidance regarding the employment of trainees will have to make significant changes to their practices when the final version of the Training Contracts Handbook is published. (*Submitted on 10 July but not included in previous e-briefing.*)

2. CLLS Specialist Committees

2.1 Employment Law

The Employment Law Committee responded to the Department for Business Innovation and Skills (BIS)/ Department for Business, Enterprise and Regulatory Reform (BERR) consultation on implementation of the EU Agency worker directive. (See http://www.berr.gov.uk/consultations/page51233.html for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=616&lID=0.) As the introduction to the consultation stated:

> **Background to consultation**
> [BERR/BIS] is seeking views on the implementation of the Directive on conditions for temporary (agency) workers – Directive 2008/104/EC - more usually known as the "Agency Workers Directive" (the Directive). Member States have until 5 December 2011 to implement. We propose to implement on the basis of the CBI/TUC agreement of May 2008 which allows for equal treatment to apply after a temporary agency worker has been in a given job for 12 weeks. In doing so, our key objectives are to ensure appropriate protection for temporary agency workers whilst maintaining a flexible labour market.

Purpose of consultation
Our proposals reflect discussions held with key stakeholders since the text of the Directive was published in December 2008. We have sought to identify key concerns and the issues that will need to be addressed. This consultation opens up the debate so that implementation can reflect the real and legitimate interests of agency workers, temporary work agencies and hirers. This is the first stage of the Consultation process, running for 12 weeks until 31 July 2009. Following this, we will publish the Government's response and conduct a second stage consultation on draft Regulations, also inviting views on what practical advice users would welcome in the guidance which will accompany the Regulations.

Areas for consultation
In particular, we are seeking views on who should be covered by the Directive, eg the definition of: pay, holiday entitlement, duration of working time, the 12 weeks qualifying period, how the principle of "equal treatment" should be established, liability for compliance with obligations under the Directive, and dispute resolution.

The Committee's submission responded to a number of detailed questions in the consultation response form.

2.2 Financial Law

The Committee recently responded to the HMT consultation "Developing effective resolution arrangements for investment banks". (See http://www.hm-treasury.gov.uk/consult_investment_banks.htm for a copy of the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=615&lID=0 for the response.)

As indicated in the Budget, and the November Pre-Budget Report, the Government is conducting a detailed review of the resolution arrangements for failing investment banks. The consultation document outlined the Government's thinking on the changes to market practice, regulation and insolvency law that might be needed to deal with any future investment banking failure. The Government has stated that this document will be followed by further consultation in the Autumn.

In its response, the Committee made detailed comments with regards to:

- Trading, clearing and settlement issues;
- Client assets and money;
- Achieving effective resolution; and
- Consultation stage impact assessment.

2.3 Intellectual Property Law

The Intellectual Property Law Committee recently responded to the plans for reform of the Patents County Court (PCC) being considered as part of the Costs Review and as put forward by the Working Group set up by the IP Court Users Committee. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=620&lID=0 for the response.) The response stated "We entirely agree that reform is required, both to ensure that SMEs have access to a cost-effective way of resolving patent disputes, and so that smaller patent disputes can also be resolved at a reasonable cost, no matter how big the parties. We support the general thrust of the reforms proposed..". The paper also set out a number of specific suggestions for the reform of the PCC.

2.4 Litigation

The Litigation Committee responded to the Lord Justice Jackson's Preliminary Report on Civil Litigation Costs dated 8 May 2009 (the "Preliminary Report") (see

http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm for the preliminary report and http://www.citysolicitors.org.uk/FileServer.aspx?oID=624&lID=0 for the response). The submission mentioned that "In this response we address the points insofar as they concern commercial litigation, including litigation in the Commercial Court but keeping in mind that commercial cases also take place in other parts of the High Court including the Chancery Division and the general Queen's Bench Division... It is important in our view to keep at the forefront of this review that London is a popular venue of choice for international business clients for the resolution of their disputes. Any recommendations for reform of the civil justice regime in this jurisdiction should therefore be designed to ensure that this jurisdiction remains attractive to such clients for the resolution of their disputes." The submission also commented on the specific issues raised in the preliminary report. A list of the submission's main headings is set out in Annex "B", for ease of reference.

2.5 Planning & Environmental Law

The Planning & Environmental Law Committee recently responded to the Communities and Local Government's Consultation Paper "Greater flexibility for planning permissions". (See http://www.communities.gov.uk/publications/planningandbuilding/flexibilitypermissions for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=625&lID=0 for the response.) The consultation invited views on whether to introduce a mechanism for extending the time limits for the implementation of existing planning permissions, and to consider how to implement the procedure for making non-material amendments under section 190 of the *Planning Act 2008*. It also considered changes to the procedure for applications under section 73 of the *Town and Country Planning Act 1990*. The submission responded to the specific questions contained in the consultation paper, and also commented generally regarding:

- The need for clarification of
  - Regulation 3(3) of the Town and Country Planning (Applications) Regulations 1988;
  - the relevance of EIA Regulations; and
- The appropriate approach for making:
  - minor material amendments;
  - non-material amendments; and ,
  - material non-minor amendments.

2.6 Revenue Law

The Revenue Law Committee recently responded to the HM Revenue and Customs consultation "Modernising Powers, Deterrents and Safeguards: Working with Tax Agents" (see http://www.hmrc.gov.uk/budget2009/tax-agent-6440.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=626&lID=0 for the response). As the HMRC document states:

> Since the inception of its Review of Powers, deterrents and safeguards HMRC has consulted on a number of aspects of the tax system with a view to modernisation and, where it makes sense, alignment across taxes. As part of this process the Review is now looking at how HMRC interacts with tax agents to ensure that clients' returns and claims are correct when submitted.

The Committee's submission responded in detail to the questions contained in the consultation document, and stated in summary that::

> We consider the key points are as follows:
> - any new measures should be directed solely at increasing the quality of tax compliance, and should not be regarded as an opportunity to raise revenue by broadening the range of entities subject to tax penalties;
> - financial penalties for agents will not assist in increasing the quality of tax compliance, and may even have the opposite effect by increasing insurance costs for agents and hence fees; as a result they should not be introduced;
> - a system where agents can be reported by HMRC to their professional bodies in cases of persistent poor performance short of professional misconduct would have merit as long as the criteria for making a report were objective;
> - a registration system is likely to be complex, expensive, and only offer any potential benefit in relation to those agents which are not already members of professional bodies; a better way to deal with the issue of unregulated agents found to be of poor quality would be to adjust upwards the risk weighting of taxpayers who are advised by them; and
> - if a registration system were to be introduced and the cost passed to tax agents, this would increase the cost of advice to some degree and so potentially undermine the purpose of the new measures by decreasing the quality of tax compliance.

Annex "A"

Executive summary from the Legal Services Board's consultation paper "Wider Access, Better Value, Strong Protection Discussion paper on developing a regulatory regime for alternative business structures"

1. Executive summary

1.1. This discussion paper is an important step towards a liberalised, more consumer-driven market for legal services.

1.2. For centuries, legislation and professional regulatory rules have tightly restricted the management, ownership and financing of organisations that are permitted to offer legal services. Although the UK's legal services sector is internationally competitive and highly regarded, these regulatory restrictions have stopped it from realising its full potential. Regulation has limited innovation and competition in the way that legal services are delivered. It has constrained consumer choice and restrained normal market pressures on law practices to deliver their services efficiently and effectively. Regulation has gone beyond what is rightly necessary to protect citizens from the unethical practices of a tiny minority to a framework which has restricted businesses and consumers alike.

1.3. At the heart of the new regulatory environment for legal services is a process for scaling back these restrictions. Each of the approved regulators of the legal profession can become a licensing authority, able to grant licences to new types of providers with alternative business structures ("ABS"). The new types of firm might include a practice with a majority of non-lawyer managers, a high-street firm offering accountancy services alongside legal services, a large corporate firm offering personal client advisory work alongside larger scale work, in areas such as personal injury, which may be susceptible to "commoditisation" or even a law firm floated on a stock exchange.

1.4. As the new body responsible for overseeing the regulation of legal services in England and Wales, the Legal Service Board ("LSB") is committed to driving this agenda forward, because it potentially offers considerable benefits to consumers of legal services, be they private individuals or organisations of all shapes and sizes. We cannot predict precisely how the market will develop so we are keen to receive input from market participants. But we anticipate greater flexibility in service delivery, including better use of new technology; more effective use of staff from a variety of professional backgrounds; and firms seeking to better inform and engage with the users of their services as they seek to build loyalty and reputation in the marketplace.

1.5. We also foresee benefits for individual lawyers and firms that embrace new opportunities that a more competitive market place offers. The difficulties faced by parts of the sector in the current economic downturn adds to our conviction that modernisation of the restrictive regulatory framework is timely.

1.6. So we have moved beyond the debate about *whether* to open up the market to ABS. That was settled when the Legal Services Act 2007 ("The Act") was passed by Parliament. Instead, this paper sets out plans for *when* and *how* the market will be opened. It also seeks comments from stakeholders about how the new types of legal services providers should be regulated.

1.7. Our timetable for opening the market makes clear our objective that the first ABS licences should be granted in mid-2011. There is much work to be done to achieve

this ambition. Getting a new licensing framework in place will require sustained commitment and focus from a number of stakeholders. But we are convinced that it is achievable. We will give this matter high priority and we expect the approved regulators will do the same, given our shared statutory objectives. We will set up a high-level ABS Implementation Group which will bring together these key players and others to maintain momentum and foster a partnership approach to the development of the regime.

1.8. The LSB is primarily an oversight regulator with backstop direct licensing powers. We expect and hope that a number of approved regulators will seek to become licensing authorities and we will do what we can to facilitate that. By 2011 a regulatory landscape should be in place which offers different types of firm the opportunity to apply for a licence. However, as the LSB cannot be certain that will be the case, it will also make preparations to take on the responsibility of directly licensing firms with ABS if it proves necessary. We plan to issue our own licensing rules in the first half of 2011 if that is what is needed to deliver our ambition of a mid-2011 start date for ABS licensing.

1.9. Potential licensing authorities will need to develop licensing rules to deal with the risks associated with ABS. We are determined that clients will not have lower standards of protection using the services of licensed firms than they would if they went elsewhere in the market. Nor will licensed firms be able to ignore actual or potential conflicts of interest: to do so leaves clients unprotected and, by reducing confidence in legal services providers generally, undermines one of the LSB's regulatory objectives of upholding the rule of law.

1.10. There is a lack of clarity and consensus about the nature of the risks associated with opening the market to ABS. So this paper seeks views and evidence about the risks to the regulatory objectives from different types of ABS. It is important to ask which risks are unique to a more open market, and which are already a feature of the legal services sector today. Our initial assessment is that many risks fall into the latter category.

1.11. We are clear that regulators of ABS will need to make major changes to the way in which they regulate. A shift in focus is required, from regulating the conduct of individual lawyers, towards regulation of the entity providing legal services and we welcome recent moves in that direction made by some regulators. This will impact upon the way in which licensing rules are drafted and licensing applications assessed. But it will be of even greater significance to the way in which regulators and firms work together to ensure compliance on an ongoing basis.

1.12. There are parallels here with current debate about the future regulation of firms that provide legal services to corporate clients. We expect that regulators will want to take a joined-up approach to responding to these challenges, for example, in ensuring the right knowledge levels in staff, ensuring that relationships with large players are both challenging and well-informed and getting the right balance between a focus on principles and more detailed requirements. They need to develop an approach to regulation which is focused on the risks and is fit for purpose for the legal services landscape of tomorrow.

1.13. The Act includes considerable and important consumer protection safeguards, so we will approach calls for additional entry requirements with some caution. More detailed consultation on the content of licensing rules will follow later in 2009, but we are keen to get early input from stakeholders about the substantive issues. Ideas

about how regulators can manage and mitigate identified risks associated with ABS without erecting undue barriers to entry would be particularly helpful.

1.14. Finally, the paper starts an important discussion about the future regulation of “special bodies” including trade unions and not-for-profit organisations. These bodies are an important part of the legal services landscape and in some cases play a vital role in offering access to justice to disadvantaged consumers. Before including them in the licensing regime, we need to be clear about the nature and intensity of regulation merited by the particular risks associated with these bodies.

1.15. The deadline for written responses to this consultation is 5pm on **14 August 2009**. We urge all interested parties to respond and where possible include hard, ideally quantified, evidence. This will help us in shaping a regulatory regime which delivers wider access, better value and strong protection for consumers of legal services.

Annex "B"

Litigation Committee response to the Lord Justice Jackson's Preliminary Report on Civil Litigation Costs dated 8 May 2009 – main headings

PART 1: THE COSTS RULES AND THE COSTS WAR

Should the indemnity principle be abolished (Chapter 3, paragraph 5.48, page 37)?

Does the Costs War serve the public interest or benefit the profession as a whole (Chapter 3, paragraph 5.50, pp.37-8)? If not, what further measures should be taken to stamp out such litigation?

PART 2: COURT FEES

Should there be full-cost pricing for the civil courts (Chapter 7, paragraph 5.2, page 70)?

PART 4: THE FUNDING OF CIVIL LITIGATION

Before the event insurance

Third party funding

Are [conditional fee agreements ("CFAs")] in their present form satisfactory (Chapter 16, paragraph 5.7(i), page 173)?

If not, what reforms might be made in order to create appropriate incentives for all involved in the litigation process (Chapter 16, paragraph 5.7(ii), page 173)?

The impact of CFAs on particular categories of litigation (Chapter 16, paragraph 5.7(iii), page 173)

Self financing (Chapter 17, paragraph 4.1, page 176)

CLAF and SLAS (Chapter 18, paragraph 1.6, page 178)

Contingency fees (Chapter 20, paragraph 4.1, page 194)

Should solicitors and counsel be permitted to act on contingency fee agreements?

If so and if costs shifting remains, what form should that cost shifting take? In particular, should the losing party pay the additional element of costs (i.e. the amount by which the contingent fee exceeds costs assessed on the conventional basis)?

If contingency fees are permitted, what form of regulation should be imposed?

If the concept of lawyers working on contingency fees is unacceptable, do the considerations set out in this chapter militate in favour of setting up a CLAF or a SLAS, as discussed in chapters 18 and 19?

PART 5: FIXED COSTS

Fixed costs, tariff costs or predictable costs across the board? (Chapter 23, paragraph 5.1, page 218)

Retrospective assessment of costs by reference to the amount of work reasonably done?

Litigation divided into categories, with a fixed costs or similar regime for some categories only

Benchmark costs

PART 7: SOME SPECIFIC TYPES OF LITIGATION

Large commercial claims (Chapter 32, paragraph 4.2, page 281)

Chancery litigation

Should *Agassi v Robinson* ([2005] EWCA Civ 1507) be reversed (Chapter 33, paragraph 6.2, pp.299-300)?

The cost neutral regime and *Beddoe* applications (Chapter 33, paragraph 6.3, page 300)

What should be done about pre-action protocols (Chapter 33, paragraph 6.4, page 300)?

Should there be a limitation on the amount of costs which can come out of a trust fund or estate (Chapter 33, paragraph 6.5, page 300)?

What to do about neighbour disputes (Chapter 33, paragraph 6.6, pp.300-301)?

Should there be a Chancery fast track (Chapter 33, paragraph 6.7, page 301)?

Minority shareholder petitions (Chapter 33, paragraph 6.8, page 301)

Encouraging settlement of probate claims (Chapter 33, paragraph 6.9, page 302)

The role of conventional mediation (Chapter 33, paragraph 6.10, page 301)

Collective actions

Court of Appeal

PART 8: CONTROLLING THE COSTS OF LITIGATION

Electronic disclosure

Disclosure generally

Witness statements

Expert reports

Case management

Pre-action protocols

Simplification of the protocols / stricter time limits

Ability of defendants to issue proceedings

Process to trial

Docket system

ADR

Trials

Cost capping

Should the cost shifting rule be modified?

Preliminary observations

Issues identified in Chapter 46 of the Preliminary Report

The recoverability of success fees and ATE premiums (Chapter 47, paragraph 5.1, page 482)

The appropriateness of the levels of success fees currently set in different types of litigation

The appropriateness of the levels of ATE premiums currently charged in different types of litigation

Should success fees and ATE premiums continue to be recoverable under costs orders?

Costs management

General remarks

Should costs management become a feature of or adjunct to case management? (Chapter 48, paragraph 5.2(i), page 498)

Should section 6 of the [Costs Practice Direction ("CPD")] or any equivalent be "elevated" to a rule? (Chapter 48, paragraph 5.2(ii), page 498).

Should those provisions (whether in the rules or in a practice direction) be strengthened to give the court greater power to manage and control costs? (Chapter 48, paragraph 5.2(iii), page 498)

What further amendments are required to the rules to enable the court to carry out effective costs management? (Chapter 48, paragraph 5.2(iv), page 498)

What improvements, if any, should be made to Form H? In particular, should a detailed breakdown of costs estimate/budget be required? (Chapter 48, paragraph 5.2(v), page 498)

Should the more draconian forms of costs management canvassed in paragraphs 3.21 to 3.24 be introduced for any categories of litigation e.g. business disputes? (Chapter 48, paragraph 5.2(vi), page 498)

PART 10: THE ASSESSMENT OF COSTS

Summary assessment

Detailed assessment

FURTHER ASSISTANCE