E-Briefing Long Version
(Covering 01 June 2011 – 15 July 2011)

Newly formed Committee

Corporate Crime and Corruption Committee

The CLLS's newest Specialist Committee, the Corporate Crime & Corruption Committee, was recently formed. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=1014&lID=0 for the CLLS press release.) The Committee will be chaired by Michael Caplan QC, Partner at Kingsley Napley LLP.

As the CLLS press release stated:

> **PRESS RELEASE**
> **CITY OF LONDON LAW SOCIETY**
> **CONTINUES ITS EXPANSION WITH A LAUNCH OF A NEW COMMITTEE**
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> The City of London Law Society (CLLS) is pleased to announce that it has recently formed a new specialist working group, the Corporate Crime and Corruption Committee which will look at issues relating to corporate criminal responsibility.
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> The Committee will be chaired by Michael Caplan QC, Partner at Kingsley Napley LLP. Michael has been a solicitor working in the White Collar Crime area for over 30 years and was one of the first Solicitor QC's to be appointed from this practice area**.** He sits as a Recorder in the Crown Court, is authorised to sit as a Deputy High Court Judge and is a member of the Criminal Procedure Rule Committee chaired by the Lord Chief Justice.
>
> Michael commented, "I am delighted to become the first chair of the new committee. There is a great deal to consider in this area affecting the City including the much published Bribery Act and its guidance, the shape and future of the prosecuting and regulatory authorities, recent changes to the Criminal Procedure Rules, enforcement and civil settlements. There has also been the first prosecution under the Corporate Manslaughter legislation which cannot be ignored by all companies."
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> David McIntosh, Chair of CLLS said, "This new corporate Committee is the first City of London Law Society specialist Committee formed for some time and reflects the call for this sort of committee at a time when important regulatory enforcement changes are taking place. The Committee will incorporate into one entity the considerable number of solicitors who are regularly involved in major corporate and international corruption cases."
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> The committee has been looking at many issues relating to corporate criminal responsibility. Outlined below are some of the most interesting topics that they would be able to talk about:
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> - Position of the Serious Fraud Office
> - Prosecution by regulation authorities (SFO/FSA)
> - Money Laundering

Submissions

As mentioned in the previous e briefing, on 3 May 2011 the Commission published a "feasibility study" on the contract law issue, which included a 189 article draft code ("A European Contract Law for Consumers and Businesses: Publication of the Results of the Feasibility Study carried out by the Expert Group on European Contract Law for Stakeholders' and Legal Practitioners'

Feedback"). Stakeholder comments on the document were called for by 1 July 2011. The CLLS responded to the document. (See http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1023&IID=0 for the response.) The Law Society also submitted its response to the consultation (see <http://international.lawsociety.org.uk/files/LSEW_Feasibility%20Study%20Comments_Formatted2_1%20July%202011.pdf> for the response). As mentioned previously, the Commission's Work Programme (for May to end December 2011) has forecast 19 October as the date for the release of a "Proposal for a legal instrument on an optional European Contract Law". The Commission apparently intends to rely on Article 114 of the TFEU (http://ec.europa.eu/atwork/programmes/docs/forward_programming_2011.pdf).

As the consultation document stated:

> In its feasibility study, the Expert Group has delivered a text which strives to constitute a complete set of contract law rules covering those issues which, at a practical level, are relevant in a contractual relationship in the internal market of the European Union. It is now up to the Commission to decide if, how and to what extent this feasibility study could serve as a starting point for the preparation of a political follow-up initiative. In this sense the Commission services will use the Expert Group's text as a 'toolbox' in the preparation of a possible future initiative on European contract law.

In its response, the CLLS restated its strong opposition to the proposed introduction of an optional instrument. As the response stated*:*

> ….In January 2011 the CLLS responded to the Commission's "Green Paper on policy options for progress towards a European Contract Law for consumers and businesses" (issued 1 July 2010) (hereafter "the Green Paper"). ..The points raised in that response remain equally valid and unanswered but, to avoid duplication, are not repeated in detail here.
>
> The CLLS has seen a near-final draft of the Law Society of England & Wales' response to the Feasibility Study and, on the basis of that document, endorses the Law Society's final response, with the proviso that the CLLS does not support the initiative to create a non-binding "toolbox" to assist legislators in improving the quality and coherence of European legislation. In this regard, the CLLS restates its position, mentioned in its response to the Green Paper that while it is happy for the Results of the Expert Group to be published, it does not believe that any of the other options put forward by the Green Paper are useful, appropriate or justified, given the paucity of statistical evidence and analysis identifying any problems or any need for action.

In addition, the CLLS made specific comments under the following headings:

1. General concerns regarding consultation
    a. Consultation method
    b. Impact analysis of proposal
    c. Lack of rationale
2. General concerns regarding the proposed instrument
    a. Drafting style
    b. Other areas of uncertainty

Company Law Committee

The Joint Working Party of the City of London Law Society Company Law Committee and the Law Society Company Law Committee recently responded to the consultation paper issued by the Code Committee of the Takeover Panel entitled "Review of Certain Aspects of the Regulation of Takeover Bids: Proposed Amendments to the Takeover Code" (PCP 2011/1) (See http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201101.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1015&lID=0 and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1016&lID=0 for the response.)

As the consultation paper stated:

> **1. Introduction and summary**
>
> ***(a) Background***
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> 1.1 On 21 October 2010, the Code Committee of the Takeover Panel (the "**Code Committee**") published a Statement ("**Statement 2010/22**") setting out its response to a public consultation paper ("**PCP 2010/2**"), published on 1 June 2010, which had sought views on various suggestions for possible amendments to the Takeover Code (the "**Code**"). In Statement 2010/22, the Code Committee stated that it had concluded that:
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> > (a) "hostile" offerors (i.e. offerors whose offers are not from the outset recommended by the board of the offeree company) have, in recent times, been able to obtain a tactical advantage over the offeree company to the detriment of the offeree company and its shareholders, and that it intended to bring forward proposals to amend the Code with a view to reducing this tactical advantage and redressing the balance in favour of the offeree company; and
> >
> > (b) a number of changes should be proposed to the Code to improve the offer process and to take more account of the position of persons who are affected by takeovers in addition to offeree company shareholders.
>
> 1.2 The Code Committee concluded that amendments to the Code should be proposed in order to:
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> > (a) increase the protection for offeree companies against protracted "virtual bid" periods by requiring potential offerors to clarify their position within a short period of time;
> >
> > (b) strengthen the position of the offeree company by:
> >
> > > (i) prohibiting deal protection measures and inducement fees other than in certain limited cases; and
> > >
> > > (ii) clarifying that offeree company boards are not limited in the factors that they may take into account in giving their opinion and recommendation on an offer;
> >
> > (c) increase transparency and improve the quality of disclosure by:
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> > > (i) requiring the disclosure of offer-related fees; and
> > >
> > > (ii) requiring the disclosure of the same financial information in relation to an offeror and the financing of an offer irrespective of the nature of the offer; and
> >
> > (d) provide greater recognition of the interests of offeree company employees by:
> >
> > > (i) improving the quality of disclosure by offerors and offeree companies in relation to the offeror's intentions regarding the offeree company and its employees; and
> > >
> > > (ii) improving the ability of employee representatives to make their views known.
>
> 1.3 This Public Consultation Paper ("**PCP**") sets out the amendments to the Code that the Code Committee proposes to make in order to implement the conclusions described in Statement 2010/22.

The Code Committee invited comments on the amendments to the Code proposed in the PCP.

In response, the Joint Working Party stated, *inter alia*:

A. Context

We welcome a significant number of the clarifications which the PCP provides, in particular as regards:

(a) the position on extensions of time for bidders subject to the new PUSU timetable where the target supports the extension; and
(b) the position on break fees for "white knights".

Both of these support the Panel's objective of strengthening the position of offeree boards; we consider that the proposed clarifications which the Panel has put forward to its earlier proposals in these respects will be useful in practice in ensuring the interests of offeree shareholders are better protected and value opportunities for them are not inappropriately lost.

We also welcome the clarification of how scheme of arrangement timetables will be set and work and, subject to our points of detail on this, again we see this as consistent with the principle of enhancing target board control, whilst ensuring that a structured timetable will generally be pursued by targets.

Our two significant concerns relate to:

- the requirement for all potential offerors to be named at the time of any Rule 2.4 announcement (or, as an alternative for any potential offeror wishing to avoid being named, for it to withdraw, assuming no naming is then required for market disclosure purposes); and

- the imposition of a formalised private lock-out of potential offerors which have withdrawn, rather than be the subject of identification in a possible offer announcement.

We are concerned that in seeking to protect offeree companies from unsolicited " virtual bidders" these proposed changes present material impediments to the ability of offeree companies to negotiate recommended transactions with offerors who are welcome and provide an outcome for shareholders that the offeree board believes is the best available. Our proposed solution is in each case to restore the role of the offeree board in making determinations of whether the requirements should be imposed. We recognise that this may in some cases require the offeree board to make "a potentially difficult and contentious decision" but:

(a) those few cases should be balanced against the (we think very many more) cases where an offeree board wishes to manage an orderly process;

(b) offeree boards should not feel unduly vulnerable to pressure in making this determination; if, as we suggest, the rule is set up so that the default option is to require disclosure or impose the lock-out, the offeree board will be able more easily to defend a decision not to request confidentiality.

Our comments below include references to illustrations of situations which we foresee arising if no change is made to the proposals. These are appended as examples.

The paper then went on to make further detailed comments under the headings of:

1. Proposed requirement to name all potential offerors

    (a) Scope for abuse by offerors
    (b) Inconsistency of approach
        a. Parallel with offeree support for PUSU extensions
        b. Post offer disclosed but unidentified potential offerors
    (c) Complexity
    (d) What constitutes a "potential offeror"
    (e) Conclusion

2. Proposed lock-out of potential offerors withdrawing to avoid being named

Competition Law Committee

The Competition Law Committee recently responded to the BIS paper ”A Competition Regime for Growth: A Consultation on Options for Reform”. (See http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf for the consultation paper, http://www.citysolicitors.org.uk/FileServer.aspx?oID=1030&IID=0 for the response and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1031&IID=0 for a CLLS press release on the response.)

As the consultation paper stated:

> The Government's overarching objective in reforming the regime is to maximise the ability of the competition authorities to secure vibrant, competitive markets that work in the interests of consumers and to promote productivity, innovation and economic growth.
>
> To achieve the Government's overarching objective, it is therefore consulting on change to:
>
> - improve the robustness of decisions and strengthen the regime -
> - support the competition authorities in taking forward high impact cases
> - improve speed and predictability for business -
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> ...The Government will build on the successes of our world class competition regime, maximising its ability to sustain and develop its valuable contribution to competition, consumers and economic growth. In determining which reforms should ultimately be adopted, the Government will therefore focus on those reforms which can deliver benefits to competition, consumers and economic growth, and which can be implemented as soon as possible and without significant uncertainty and risks to the momentum and effectiveness of the regime.
>
> In this connection, the Government is consulting on a proposal to merge the competition functions of the Office of Fair Trading and the Competition Commission to create a single Competition and Markets Authority (CMA), which can play a leading role in achieving the overarching objectives and delivering the desired outcomes. Key arguments for the single CMA are to ensure the flexible allocation of scarce public resource to competition issues as they emerge, and for it to be a stronger advocate for pro-competition policy across government, including in the delivery of public services.
>
> Proposals for consultation include:
>
> Improving the robustness of decisions and strengthening the regime
>
> - considering ways to improve the voluntary merger notification scheme and the alternative of the mandatory pre-notification of mergers;
> - ways to strengthen the operation of concurrent competition powers, including joint working between the CMA and sector regulators on competition cases;

- reforming the dishonesty requirement of the criminal cartel offence to make it easier to secure convictions in serious cases;
- achieving the right governance and decision-making structures for the CMA.

Supporting the competition authority in taking forward high impact cases

- enabling the CMA to carry out investigations into similar practices across different markets;
- considering whether statutory objectives should underpin the competition focus of the CMA or whether the CMA should have a statutory duty to keep key sectors under review;
- strengthening the voice of small business by extending the super-complaint powers to SME bodies.

Improving the speed and predictability for business

- introducing more (and tighter) statutory deadlines in merger and market cases, coupled with appropriate information powers;
- introducing an exemption for small businesses from merger control;
- streamlining the handling of antitrust cases.

…Scope

> The Government considers that the proposed single CMA should have a primary competition focus. Chapter 9 of this consultation document discusses the current powers of the OFT to conduct consumer studies and enforce consumer law. The Government's document 'Consultation on institutional changes for the provision of consumer information, advice, education, advocacy and enforcement', to be published shortly, will discuss these issues in more detail and ask questions about the appropriate home for these functions in a reformed competition and consumer landscape.

As the press release stated:

> **PRESS RELEASE**
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> The proposed reforms discussed in the consultation document represent the most comprehensive revision of the UK competition system since 1973, and involve much more than the Government's declared intention to merge the Competition Commission and the OFT into a unitary competition authority .
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> ....It covers a range of issues including:
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> - a call for greater fairness in cartel investigations
> - for mergers, opposing the proposal to replace the current voluntary system for notifying mergers with a compulsory system, which the Committee sees as imposing an unnecessary regulatory burden on business
> - a demand that, within the unitary authority, merger and market investigations continue to involve two phases, with a fresh pair of eyes in the second phase to avoid unfairness
> - opposing the proposal to change the criminal offence for cartels at this stage before the new rules (which were introduced in 2003) have a time to prove themselves
> - pointing out the dangers of higher fees being imposed on businesses by the competition authorities
>
> The Committee looks forward to contributing further to the debate both in the formal consultation and, to the extent that Ministers and officials in the Department for Business, Innovation and Skills (BIS, which is the sponsoring Department) might find it helpful, more informally.
>
> Commenting on the CLLS response to the BIS consultation, **Robert Bell, Chairman of the Competition Law Committee at the CLLS and Competition Partner at Speechly Bircham LLP** said, "*Whilst we*

welcome certain of the Government's proposals we have serious concerns about the proposed changes to the Cartel Offence and in particular about the introduction of a mandatory merger control regime in the UK. Mandatory merger control would result in the imposition of unnecessary regulatory burdens on business and be another impediment to economic recovery"

Bell continued *"The Government's proposals represent the most significant change to the UK competition enforcement institutions for nearly 40 years and it is important the Government makes the right choices. We hope to have highlighted in our report to Government the direction of travel that would most benefit business, help further stimulate economic recovery and balance the rights of companies under investigation*.

Michael Grenfell, Chairman of the CLLS Working Party on Competition Reform and Competition Partner at Norton Rose LLP, added, *"This is a huge potential reform of the UK competition system - with a huge potential impact on British business, and international companies doing business here. We welcome many of the proposals, but are determined to ensure the removal of elements that impose unnecessary regulatory burdens on business. The consultation has been a valuable opportunity for business lawyers with expertise in competition law to explain their concerns to Government. We have been impressed by the willingness of the Government to listen so far, and we look forward to that productive process continuing."*

The CLLS Response

Whilst being generally supportive of certain aspects of the proposals, the CLLS has considerable concerns about other areas earmarked for reform in the Consultation.

Specifically, on the substance, the Committee strongly supports and advocates:
Greater procedural fairness in antitrust: We endorse the proposals that, in investigations under the prohibitions - so-called “antitrust” - greater fairness could be achieved if there were a proper separation of powers between the investigators and those taking the final decision and possibly imposing penalties. We see such proposals as necessary to redress the inherent unfairness of a single group of officials being investigator, prosecutor, judge and jury - the problem of “confirmation bias”.

On balance, we favor a modified form of Option 2 - the key features being (i) a second phase of antitrust investigation to be conducted within the CMA by a group of independent decision-makers separate from the original investigating team (essentially the independent decision-makers who make the Phase 2 market and merger decisions) (ii) but with no need for a full internal tribunal (iii) crucially, retention of a full merits appeal to the CAT.

Retention of voluntary merger notification: We welcome the consultation paper's recognition that mandatory merger notification is not necessarily the right way forward; indeed, we believe that it would be very damaging (see below). We believe mandatory merger notification represents an unnecessary regulatory burden on parties to mergers raising no competition issues, and would have the perverse effect that innocuous mergers would be caught by the regime while, as a consequence, many mergers with anti-competitive effects would escape scrutiny; - moreover, our analysis of completed mergers considered by the Competition Commission in recent years does not suggest a major crisis of completed anticompetitive mergers that would warrant the draconian legislative change to mandatory merger notification. We welcome the consultation paper's identification of more proportionate, and practical ways to address concerns about completed mergers by strengthening interim measures (prohibiting the parties to put a merger into effect until clearance or prohibition), including the possibility of an order to reverse integration. We favor giving the CMA the discretion to apply these interim measures at an early stage.

Two Stage Decision Making Process for Merger and Market Investigations: -If there is to be a single CMA, the Committee welcomes, and considers essential that there should be a "fresh pair of eyes" in both the decision making processes of merger and market investigations to avoid confirmation bias. The Committee welcomes the proposals that, within a single CMA, the decisions in “Phase 2” of both merger control and markets processes should be made by different people from those conducting the initial examination at “Phase 1” - so as to minimise the dangers of “confirmation bias” that might otherwise arise from an amalgamation of the two existing competition authorities; The committee also strongly supports the proposal that those “Phase 2” decision-makers within the CMA should be senior and experienced individuals to which the companies under investigation have access, and who are of roughly equivalent status and experience to those senior management executives of the investigated companies who appear before them.

The Committee has serious concerns about the following issues:

Cartel Offence:- The Committee has a number of serious concerns about those proposals relating to the cartel offence. We do not believe that there are grounds, at this stage, to remove the "dishonesty" element in the offence.

Mandatory Merger Control:-As mentioned above we believe mandatory merger notification represents an unnecessary regulatory burden on parties to mergers raising no competition issues, and would have the perverse effect that innocuous mergers would be caught by the regime while, as a consequence, many mergers with anti-competitive effects would escape scrutiny.

Fees for Merger Control and Antitrust Investigations:- The Committee considers the proposals relating to merger control fees, and to [the] ability to charge guilty parties in anti-trust investigations, disproportionate and excessive in the case of mergers, contrary to proper principles of the administration of justice in the case of antitrust investigations, and out of line with international best practice in the case of both.

SME "super-complaints" in market investigations:- The committee does not consider it is appropriate to confer privileged status on SME's as a class. If the Government is anxious to ensure SME's as a business grouping are adequately heard and represented with in the CMA we would advocate the establishment of an SME desk within the CMA to specifically focus on SME issues and concerns.

Insolvency Law Committee

The Insolvency Law Committee recently responded to the Insolvency Service Proposals for Technical Amendments to the Insolvency Act 1986 and other related Insolvency Legislation. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=1024&IID=0 for the response.)

The Committee made a number of detailed comments on the proposals

The Committee also recently responded to the Insolvency Service Consultation on the Insolvency (Amendment) (No 2) Rules 2011 (dealing with pre-packaged administration sales). (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=1017&IID=0 for the response.)

As the response stated:

> Our comments on the Rules assume that a policy decision has already been taken to introduce measures to regulate the practice of pre-packing to connected persons. However, we note that any such measures will inevitably reduce the scope for such pre-packing and the logic of doing so is not obvious in circumstances where neither pre-packing (which is recognised to be necessary to prevent the destruction of value in some cases) nor sales to connected persons (who are often those who are willing to pay the best, or only, price) are not considered to be of themselves objectionable.
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> By according a higher priority to transparency than to the preservation of value for creditors, the policy will cause some damage to the UK economy. In our experience, the absence of protection from contractual termination during administration and the difficulties with the law on administration expenses have been significant contributors to the growth in the practice of pre-packing. These difficulties will continue to militate against trading in administration after the introduction of the Rules and we doubt whether stakeholders will be any more willing to support continued trading during the notice period than before.
>
> One particular consequence of regulating pre-packing may therefore be to increase the number of cases where the employees of a company are dismissed at the time of appointment which may in turn lead to an increased level of employee claims against the National Insurance Fund.
>
> Furthermore, unless financial restructurings at the holding company level are excluded from Part 3 of the Rules (as suggested below), the Rules are likely to have a seriously detrimental effect on UK restructurings at the higher end of the market.

> For all of these reasons, we urge you to do an impact assessment before making the Rules.
>
> The Rules set out to deal with both administration and liquidation. We do not think that the procedures are analogous as regards pre-packs because liquidation does not afford the same opportunity to conduct an asset sale before third parties are aware of the insolvency. We therefore concentrate our comments on the provisions of the Rules dealing with administration (but those comments, on matters of pure drafting, are equally applicable to the equivalent provisions in the Rules which deal with liquidation).

The response then went on to make detailed comments on the drafting of the Rules Subject to those general observations.

Litigation Committee

The Litigation Committee recently responded to the Ministry of Justice consultation on solving disputes in the county courts (CP6 2011). (See http://www.justice.gov.uk/consultations/consultation-cp6-2011.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1020&lID=0 for the response.)

As the consultation paper stated:

> …. we are proposing significant reforms to the system of administration in the county courts including:
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> - expanding significantly other appropriate forms of dispute resolution by requiring all cases below the small claims limit to have attempted settlement by [mediation], and introducing mediation information/assessment sessions for claims above the small claims limit;
> - a simplified claims procedure on a fixed costs basis, similar to that for road traffic accidents under £10,000, for more types of personal injury claim; and,
> - a simpler and more effective enforcement regime.
>
> Together, these and the other proposals outlined in this paper should mean fewer cases coming to court unnecessarily, more rapid resolution, lower costs to participants and thus a system that delivers justice more effectively. Business, which has found the current system a real burden, stands particularly to benefit.
>
> … The proposals in this paper relate particularly to claims proceedings in the county court which is where the bulk of civil claims are dealt with. However, they are part of a much wider package of reform, which aim to radically improve the experience of court users.
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> … This paper sets out consultation proposals on the transformation of how civil claims are dealt with in the county courts and on improving the claims process for lower value personal injury cases.

The Committee responded to the specific questions contained in the consultation paper.

The Committee also recently responded to the Ministry of Justice Consultation on the Draft Defamation Bill. (See http://www.justice.gov.uk/consultations/draft-defamation-bill.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1013&lID=0 for the response.) As the response stated:

> The Ministry of Justice ("MoJ") consultation dated March 2011 (the "Consultation Paper") asked for views on its draft Defamation Bill. We respond below. In responding, we have addressed the numerous questions posed by the MoJ. We have also included some further general comment in respect of the issues for consultation which have not been included in the Bill at this stage.

By way of general comment, the response stated:

….Part B - Comments on Other Issues for Consultation

9. **Liability of Internet Service Providers and other Secondary Publishers (Q23 – Q29)**

9.1 Whilst the CLLS is not in a position to comment directly on practical problems arising from interpretation of the existing law (section 1 of the 1996 Act and the E-Commerce Directive), it is concerned that the current law does not provide sufficient certainty to ISPs and other secondary publishers. The growth of the internet, and especially of user-generated content, brings the issue into sharper focus. The use of the internet should not be restricted or constrained by legal uncertainty which, at best, could lead to unnecessary litigation and, at worst, unduly limit freedom of expression.

9.2 A balance needs to be struck, of course, between the right to freedom of expression on the part of the publishers of information, and the rights of an individual or organisation whose reputation has been unfairly damaged.

9.3 The CLLS supports the proposal of a system whereby the ISP acts as a liaison point between the complainant and the person posting the offending material, thereby providing a relatively quick and easy remedy for the complainant. Such a regime would need to establish a clear limit on the extent which the ISP becomes involved. If there was no prompt resolution within the defined parameters laid down by statute, it would be for the complainant to initiate legal proceedings against the person who posted the material. The effect would be that the passive ISP does not face liability for defamatory material posted by a third party and so freedom of expression is not unduly inhibited. However, the ISP's provision of its service carries with it a responsibility for providing a limited platform for early resolution of complaints.

Notice and take down

9.4 The most effective means of stemming potential damage flowing from a defamatory publication is likely to be its early removal. Notice and take down, if conducted within a clear framework, is a quick and inexpensive remedy.

9.5 The proposal to clarify the framework by codifying a notice and take-down procedure is welcome. The CLLS considers that such a procedure should include:-

(a) clear written formulation of the nature of the complaint, i.e. the words complained of and why they are defamatory;
(b) a relatively short period for take down. This should be not more than seven days; and
(c) the right of resort to the Court if take down is not effected.

10. **A new procedure for defamation cases and summary disposal procedure (Q30 – Q37)**

10.1 The CLLS considers that it is sensible, and in keeping with the proposals and pilot projects designed to contain the cost of litigation, to introduce a new procedure for defamation cases. This is particularly apposite in defamation cases, where costs can dwarf the potential damages.

10.2 The procedure envisaged in the consultation paper is a reasonable approach in that direction. However, the CLLS is concerned that under the current proposal, certain issues would automatically be treated as preliminary issues. This disregards the fact that there may well be cases in which the determination of these issues as a preliminary matter will not in fact result in a saving of costs or time overall. Court management of a case should not be fettered. Accordingly, the Court should have residual discretion in any case to determine which, if any, of the key issues identified in the paper (and we agree with the nature of those) should be dealt with as a preliminary issue.

10.3 Consideration should also be given to instituting a system where a shorter summary process, more akin to the adjudications used in construction cases, is available where the potential quantum of damages, the nature of the defamatory statement or some other reason dictates that full scale litigation is not appropriate. Such a process could be engaged either by agreement of the parties or by the Court on the application of a party. This would replace the current summary disposal procedure, which is seldom used in practice, although the reasons for its unpopularity have not been identified. The process proposed would not have the same constraints as the existing summary disposal procedure. Whilst it would involve a truncated litigation process, there would be no restriction on the amount of damages that could be awarded.

11. **Ability of corporations to bring a defamation action (Q38)**

11.1 As the consultation paper acknowledges, corporations have reputations, and a damaged corporate reputation can be extremely expensive, ultimately affecting individuals. Accordingly, the CLLS considers that corporations should not, as a matter of principle, be restricted from being able to bring proceedings for defamation; it should not be made more difficult for corporations to sue by requiring proof of financial or other loss. The CLLS does not consider, as has been suggested, that any restriction on the ability of a corporation to sue would, in some cases, be off-set by the right of individual directors to sue in their own names; this ignores the damage to the corporation and that of its stakeholders, such as employees and shareholders.

11.2 The principal argument in favour of restricting the rights of corporations to sue is the supposed inequality of arms between the corporation and the potential defendant. This argument can be made for any case in which a large corporation faces an individual or impecunious counterparty. The CLLS does not consider that there is any reason in principle why a corporation harmed by a defamatory statement should be treated any differently than it would if harmed by other means.

11.3 Moreover, the CLLS considers that to introduce legislation limiting a corporation's right to sue for libel in the manner contemplated could expose corporations to attack and serious risk of reputational damage from careless reporting, disgruntled employees, disappointed investors and others. The impact on a corporation of defamatory statements in respect of which it has no redress could be profound. Even if ultimately the loss is financial, this may not be apparent except with the benefit of lengthy hindsight. Accordingly, the harmed corporation would not pass the financial loss threshold for bringing a claim under the proposals being considered.

11.4 The CLLS considers that the proposals for the reform of civil litigation funding costs referred to in the consultation paper should be adequate to address the inequality of arms argument, and that further safeguards are not necessary.

12. **Ability of public authorities and bodies exercising public functions to bring a defamation action (Q39-40)**

12.1 In contrast, the CLLS considers that the position of public authorities is different. Damage to reputation of a public body is unlikely to generate the same potential for damage to individuals as is possible in the case of a non-public corporation. The principles in the case of *Derbyshire County Council v Times Newspapers Limite*d [1993] AC 534 should be preserved.

12.2 There is merit in codifying this through statute to avoid uncertainty and to identify by what is meant by a public authority. The CLLS considers that it would be helpful to have a definition of what is a public body within the meaning of the legislation in the event that the *Derbyshire* principle becomes enshrined in statute. Whilst it is recognised that the current definition applicable to the Human Rights Act 1998 has been the subject of litigation, such litigation can be drawn upon as a basis for honing a new definition to be used for the purposes of a Defamation Act.

Planning & Environmental Law Committee

The Planning & Environmental Law Committee recently responded to the DCLG consultation on the relaxation of planning rules for change of use from commercial to residential. (See http://www.communities.gov.uk/documents/planningandbuilding/pdf/1883189.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1022&lID=0 for the response.)

As the consultation paper stated:

> The consultation seeks views on the Government's proposals to amend the Town and Country Planning (General Permitted Development) Order 1995 (as amended) to grant permitted development rights to changes of use from commercial to residential use i.e. to allow such changes of use without the need for planning applications.
>
> ….The Use Classes Order is a deregulatory device which allows change of use between land uses that have similar impacts, without applying for planning permission. The Government wishes to review the scope

for extending the freedoms available through this route, while ensuring that planning and land use impacts are properly taken into account. To this end, the Government is proposing action on three fronts:

- To provide for the change from commercial (B use classes) to residential (C3 use class) without the need to apply for planning permission. This responds to the recognised and urgent need to increase housing supply at a national level and recognises the fact that, in general, housing is likely to have fewer wider land-use impacts than commercial uses. Proposals are set out in this consultation document.

- A call to local communities and local authorities to use imaginatively the powers they already have to relax planning constraints locally to target local issues, encourage development, support local economic strategies and make best use of existing properties.

- To remove unnecessary barriers to change of use through a wider review of how change of use and permitted development is managed within the planning system. This will include consideration of how the system could be liberalised in ways other than to promote housing supply.

A key barrier to increasing housing supply is the lack of land available for residential development. The changes proposed in this consultation document offer an opportunity to contribute to reducing that shortage by recognising the scope for allowing as permitted development the change of use from commercial to residential. The proposals will also promote regeneration of commercial land, and help bring empty commercial buildings back into productive use.

The response dealt with the specific consultation questions, and stated generally:

We support the policy objectives underlying the issues being consulted upon. Our concern and criticism is that the proposed solution is ill advised and, with respect, in our view will not achieve such objectives but will create more issues which would have to be resolved in the long run. The policy objectives can best be achieved by use of guidance and local planning policies. This initiative will not succeed because it deals only with land use and will not result in dwelling houses "happening" freely as suggested in the consultation paper simply because there will still be a need for planning permission for operational development.

Examples of the complex planning issues which planners properly consider when evaluating residential planning applications include:

- policies to prevent the use of the housing by non-permanent residents

- policies to ensure a range of housing sizes and thereby to ensure a proper social and economic mix of occupants

- policies to ensure mixed use developments on the site in question and where desirable for the specific site in question and the surrounding neighbourhood;

- policies to prevent residential uses in "pure" business/commercial areas, for example, see the concerns which have been raised with regard to certain parts of the City of London;

- policies to ensure provision of affordable housing (whilst this is a political issue, all parties seem to accept that some affordable housing should be provided as part of new housing developments). If the extension of permitted development rights does not result in more affordable housing, the effect may well be that the local planning authority would have to increase the burden of the provision of such affordable housing when dealing with planning applications which relate to more traditional residential developments requiring express planning permission;

- in a similar vein, policies to ensure the availability of key worker homes, particularly in areas such as Greater London;

- policies to encourage the provision of special needs housing and housing for long term housing needs, for example ensuring that a percentage of the units in a development are constructed for wheelchair users;

- planning policies with regard to the provision of gardens and amenity areas in general including the provision and funding of open spaces;

- policies concerning housing density and in the light of that density the provision of amenity areas including off street parking spaces.

If this change in permitted development proceeds these planning issues will not be capable of being considered nor dealt with unless the proposal also involves operational development. Clearly, some of these issues are disliked by developers not least because of the cost implications. But on many sites with conversion potential some if not most of these issues will be valid and appropriate if the intention is to facilitate high quality residential stock fit for the 21st century and beyond.

Finally, this proposal will not facilitate a complete consideration of sustainability issues relevant to a proposed conversion. Some sustainability aspects will be caught by the Building Regulation approvals but the remainder, being planning policy based, will be by passed. One consequence of that may be to create the impression that the Government is not fully committed to its sustainability aspirations. It will also result in the country slipping further away from achieving its zero carbon targets.

Revenue Law Committee

The Revenue Law Committee recently commented on the OECD discussion draft of 29 April 2011 entitled “Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention”. (See http://www.oecd.org/dataoecd/49/35/47643872.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1028&lID=0 for the response.)

As the executive summary of the response stated:

- Our overall concern is that by seeking to clarify the meaning of "beneficial owner" the OECD's proposed revised commentary may actually create uncertainty and possibly result in the denial of treaty benefits where there is no abuse.

- Our main observation is that treaty shopping should not be dealt with through the meaning of “beneficial owner”. Clarification of that term should be for contracting states to define in treaty negotiations with the commentary providing background and suggested approaches. Treaty shopping should be addressed using specific Treaty anti-abuse rules rather than a nebulous interpretation of "beneficial owner".

- In any event, there is no international consensus that the "full right" definition used in the draft commentary is the correct test. Also the "substance" approach is not accepted by all jurisdictions and further that approach will lead to uncertainty.

- Many commercial arrangements which do not involve Treaty shopping will be adversely affected and in some cases there will be a risk of double taxation.

The response went on to make detailed comments in response to the consultation.

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CLLS