E-Briefing Detailed Version
(Covering the period from 31 January to 28 February 2010[1])

1. Professional Representation

1.1 Professional Rules and Regulation Committee

The Professional Rules & Regulation Committee ("PR&RC") responded to the SRA's second "Conflict and confidentiality" consultation on amendments to rules 3 and 4 of the Code of Conduct (See http://www.sra.org.uk/sra/consultations/conflict-confidentiality-december-2009.page for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=749&lID=0 for the response.)

The consultation paper stated:

> **1. Introduction**
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> 1.1 We invite views on draft amendments to rule 3 (conflict of interest) and rule 4 (duties of confidentiality and disclosure) of the Solicitors' Code of Conduct 2007 ("the Code"). The relevant provisions of the current rules 3 and 4, and guidance, with the proposed changes shown in revision mode, are annexed to the consultation paper. We propose to make these changes now, despite our longer-term plans to re-draft the Code in a more principles-based form and to make changes to accommodate alternative business structures (ABSs).
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> 1.2 This consultation follows an earlier consultation launched in December 2008. In this consultation, we sought views on proposals put forward by the City of London Law Society (CLLS) suggesting that we relax some of the provisions of rule 3 and rule 4 in circumstances in which the clients are sophisticated users of legal services. Most of the respondents to that consultation supported the proposals, provided that adequate safeguards are put in place.
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> 1.3 In light of the responses, we believe that the current rules are not sufficiently flexible to provide for the needs of sophisticated users of legal services. We think it is possible to draft amendments to the current rules that will meet these needs while continuing to protect the best interests of these clients and the public.
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> 1.4 The responses identified some key risk areas that we would like to ensure are minimised. We invite your views on whether the draft rules achieve an appropriate balance between allowing the changes and dealing with the risks so that the clients and public are protected. In particular, we ask for input as to whether the protections are set at the right level.

The CLLS response suggested a number of detailed amendments to the rules.

The PR&RC also responded to the LSB's consultation "Alternative business structures: approaches to licensing. Consultation paper on draft guidance to licensing authorities on the content of licensing rules" (See http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/consultation_181009.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=756&lID=0 for the response.)

The consultation document stated, in part:

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[1] Except where indicated

Foreword
[DAVID EDMONDS, CBE (**Chairman, Legal Services Board)]** This document is the next step in realising the potential of the Legal Services Act 2007. Significant changes in the way that legal services are delivered in England and Wales will be enabled through the relaxation of ownership and management rules allowed by the introduction of alternative business structures ("**ABS**"). ABS will provide new opportunities for innovation and entrepreneurship in the provision of legal services. Restrictions on what types of services can be packaged and delivered together will be removed. And ownership by non-lawyers of firms will be allowed.

With the right framework of responsive regulations in place, ABS can open the market and provide the protections consumers need. The Legal Services Board does not want to regulate ABS directly. We prefer to have competent "licensing authorities" that directly license ABS. So we have developed a set of core principles that we expect all licensing authorities to use. This can create a consistent market for all legal service businesses with the ability for regulators to tailor requirements. ABS firms can be regulated best by focussing on the outcomes we are trying to achieve rather than a set of strict rules.

This is a significant step forward. I see it as the way that we can achieve good outcomes for consumers, lawyers and investors. The approach encourages good ideas and will ensure that consumers are protected. The Legal Services Act itself sets out a number of protections for lawyers and consumers; this document gives these protections flesh and, more importantly, teeth.

Many of the practices allowable under ABS already take place, often by "working around the rules". We propose an ABS framework to manage these arrangements in a way that provides the protections consumers need and the flexibility that will benefit consumers. The Legal Services Board has a clear mandate to change the provision of legal services, in the interests of consumers and citizens. This document sets out what we mean by "access to justice", the issue of where to draw the line on the activities to be regulated, and indemnity provisions.

…Executive Summary:
The [Legal Services Act 2007 (the "**LSA 2007**" or "**the Act**")] sets out a new regulatory framework for the operation of regulators and the ownership of legal service providers. It gives the LSB a new power to approve "licensing authorities" ("**LAs**"). These are approved regulators who have also been approved by the LSB to license [ABS]

3. ABS, regulated by newly designated LAs, remove many of the barriers in relation to non-lawyers owning organisations providing legal services and provide new opportunities for innovation, wider access to justice and the re-shaping of legal services in the consumer interest. We consider that the barriers to these outcomes in the current regulatory framework can be safely removed, because the overall framework will ensure that consumers interests are considered, best professional principles safeguarded and the public protected. This document sets-out how we propose to achieve this and consults on the proposed strategy. This consultation follows on from our previous discussion paper on ABS ("Wider Access, Better Value, Strong Protection" – published on 14 May 2009).

….**Major themes of this consultation**
New approaches to regulation

We expect LAs to take an "outcomes-based approach" to regulating ABS which focuses on the outcomes that we expect will support the regulatory objectives. The Legal Services Board ("**LSB**") will therefore set-out a framework of core outcomes that LAs will be required to adopt. We believe that, over time, this will guide the approach taken by LAs also when they are acting in their capacity as approved regulators ("**AR**") regulating non-ABS.

…Furthermore, we are proposing that LAs will take a risk-based approach to regulation, both at the time of assessing an application for ABS status and in overseeing legal service providers that subsequently appear to pose the highest risk. We expect LAs to focus their resources correspondingly. Both regulatory policy and supervision should provide a more cost effective and proportionate approach to regulation.

….This document is a break from the past as it proposes a much stronger regulatory focus on the entity – the systems and activities of the legal service provider as an economic unit – rather than

the individual behaviour of lawyers within it. The regulation of the conduct of individual lawyers will remain an important element of consumer protection and the safeguarding of professional practice, but, alongside this, there will be a new focus on regulating the environment in which individuals operate and the compliance systems that govern behaviour within organisations providing legal services.

- …As well as the regulatory objectives, the LSA 2007 outlines several protections to ensure that non-lawyer ownership does not undermine the professional principles of lawyers. Three key protections are:
    - a test to ensure that non-lawyer owners and managers of an ABS are fit and proper;
    - the introduction of two new roles in ABS: the Head of Legal Practice ("**HoLP**") and Head of Finance and Administration ("**HoFA**") who will ensure compliance with licence requirements; and
    - a widening of the complaints handling system to deal with complaints from multi-disciplinary practices (i.e. ABS that do not deliver legal services in isolation but instead offer these alongside other services – for example, financial services) and access to the Office for Legal Complaints ("**OLC**").

The summary also referred to:

Ownership tests
Indemnity and compensation
What are "reserved legal activities"?
LA enforcement and penalties
Access to justice
Appellate bodies
Special bodies
HoLP/HoFA
Complaints
Diversity
International issues
LDPs
Duration and cost of licence
Managing overlapping regulation

The CLLS response made a number of detailed comments in relation to the following questions:

1. What is your view of basing the regulation of ABS on outcomes?
2. Do you think our approach set out to the tests for external ownership is appropriate?
3. Do you have views on how indemnity and compensation may work for ABS?
4. Do you agree with our position on reserved and non-reserved legal activities?
5. Are the enforcement powers for LAs suitable?
6. What do you think of our approach to access to justice?
7. What is your view of our preference for a single appeals body?
8. Do you agree with our approach to special bodies?
9. Do you think that our approach to HoLP and HoFA is suitable?
10. Do you think that our approach to complaints handling is suitable?
11. What are your views on our proposed course of action to conduct research and, depending on the results, either compel transparency of data or encourage it?
12. Do you agree with our approach to international issues?
13. Should LDPs, Recognised Bodies and other similar firms have transitional arrangements into the wider ABS framework in the way we propose?
14. Should ABS licences be issued for indefinite periods?
15. Do you agree with our approach to managing regulatory overlaps?

The PR&RC also responded to the Legal Services Consumer Panel Investigation into Referral Arrangements (see http://www.legalservicesboard.org.uk/about_us/lsb_consumer_panel/pdf/referral_arrang

ements.pdf for the consultation document and
http://www.citysolicitors.org.uk/FileServer.aspx?oID=757&IID=0 for the response

As the terms of reference for the investigation stated:

> The Consumer Panel is defining referral arrangements as any arrangement under which business is received from, or referred to, a third party. In the legal services sector, the third party may be another lawyer, but it may also involve introducers such as claims management companies, insurance companies and estate agents. Referral arrangements are often characterised by payment in return for referral of business, but fees do not need to be involved. The Consumer Panel will be examining the use of referral arrangements by authorised persons across the whole legal profession, although we will prioritise areas that have the greatest consumer impact. In considering different types of referral arrangements, the Panel will be looking at both the payment and the receipt of referral fees by lawyers under a number of different models, as well as non-monetary arrangements that are linked to the introduction of clients, such as the provision of free or below-cost services in exchange for the referral of other business.

As the CLLS response stated:

> We do not propose to comment on the current and very lively debate concerning the payment of referral fees in personal injury or other cases or matters for private individuals, as this is not the type of work in which our members are predominantly involved.
>
> It is true to say, however, that our member firms will regularly be referring business to, and receiving referrals of business from, lawyers, other professionals such as accountants and third party providers of services, such as intermediaries. These referrals are commonplace and arise for a multiplicity of reasons, e.g.:
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> - Conflicts
> - The work involved is outside the expertise of the firm concerned (e.g. divorce or other private client work)
> - Jurisdictional issues, where work is referred to local lawyers for specialist, local law, advice
> - Use of counsel, for advocacy and advice.
>
> Moreover, as part of customary networking and business development activities, partners and lawyers in our member firms may from time to time have loose, informal understandings and/or arrangements with intermediaries such as investment banks, brokers and accountants for the mutual referral of opportunities, which may or may not result in legal work.
>
> Such referrals are not characterised by payment in return for referral of business. Nor are they characterised by other non-monetary arrangements linked to the introduction of clients, such as the provision of free or below-cost services in exchange for the referral of other business.
>
> Rule 9 (Referrals of Business) of the Solicitors' Code of Conduct does in any event regulate referrals of business by our member firms to third parties (other than referrals between lawyers). Specifically, Rule 9.03 of the Solicitors' Code provides that if a solicitor recommends a client use a particular firm, agency or business, this must be done in good faith, judging what is in the client's best interests. That Rule goes on to provide that we may not enter into any agreement or association which would restrict our freedom to recommend any particular firm, agency or business (outside of certain mortgage, insurance and financial services related contracts).
>
> It's our view that such referrals made and received by our member firms are a necessary part of the discharge of our duties to our clients and facilitate the delivery of high quality advice. We take it that such referrals are not the focus of the Panel's investigation. If this assumption is incorrect, we would want to be further involved in the investigation.

2. Specialist Committees

2.1 Company Law

The Company Law Committee responded to the BIS: consultation "Companies Act 2006 Statements of Capital - Consultation on Financial Information Required" (See http://www.berr.gov.uk/consultations/page53695.html for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=758&lID=0 for the response.)[2]

As the consultation document stated:

> The last tranche of provisions of the Companies Act 2006 was commenced on 1 October 2009. Among the changes introduced then was a new "statement of capital" – a snapshot of a company's share capital that must be produced at various stages in a company's life-cycle, including each year in its annual return.
>
> In the summer of 2009, it became clear that for certain companies, it could be difficult to comply with one of the requirements of the Act for financial information in the statement of capital. We published an FAQ on our website (at Annex A) acknowledging the problem, and undertaking to consider and consult on how to resolve it.
>
> This consultation sets out proposals for amending the requirements that balance the interest of third parties in obtaining information with the cost to the company of supplying it.
>
> We hope that you will let us know if our assessments of the availability and value of information are accurate, and give us your views on our proposed options for changes in the information to be required.

The CLLS submission responded to the specific questions contained in the consultation document, and stated in relation to question 2 in the paper that:

> We have a further concern in addition to those described in the consultation paper. We understand that Companies House are adopting the position of rejecting any statement of capital where the figure for share premium is stated in a different currency from the currency of the shares' nominal value. This is likely to be an issue for companies which have a functional accounting currency different from the currency (or currencies) of its share capital. The legislation and the accounting rules permit a company to state share premium in its accounts in a currency different from the currency of its share capital, and we can see no reason for the statement of capital to be different. If share premium is to be included in statements of capital, it should be clarified that a company may state share premium in whatever currency it chooses for accounting purposes. Pending a reformulation of the statutory requirements, we think Companies House should change their policy.

The Company Law Committee also responded to the consultation paper issued by the Code Committee of the Takeover Panel regarding amendments to Rule 5.2(c)(iii) of the Takeover Code (See http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP200903.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=759&lID=0 for the response.)

As the consultation document stated:

> Before it introduces or amends any Rules of the Takeover Code (the "**Code**"), the Code Committee of the Takeover Panel (the "**Code Committee**") is normally required under its procedures for amending the Code to publish the proposed Rules and amendments for public consultation and to consider responses arising from the public consultation process.

[2] Response dated 11 January 2010, but not included in the previous e-briefing

The Code Committee is therefore inviting comments on this Public Consultation Paper ("**PCP**").

Executive summary

1.1 Rule 5.1 of the Code restricts a person from acquiring interests in shares in a company when that acquisition would result in him, together with persons acting in concert with him, being interested in shares carrying 30% or more of the voting rights of that company. The primary purpose of Rule 5.1 is, broadly, to provide an opportunity for the board of a company to consider an offer and give advice to its shareholders before effective control can be obtained by a new controller or consolidated by an existing controller. Rule 5.2 sets out certain exceptions to the restrictions in Rule 5.1. In particular, Rule 5.2(c)(iii) provides that an offeror may make acquisitions that would otherwise be restricted by Rule 5.1 after:

(a) the first closing date of its offer or, if earlier, of any competing offer, having passed; and

(b) confirmation having been received that either its offer or (if earlier) any competing offer will not be the subject of a "phase II" investigation by the Competition Commission or the European Commission (unless the offer, or any competing offer, falls outside the jurisdiction of the UK and EC competition authorities).

1.2 The Code Committee believes that it is no longer appropriate for Rule 5 to restrict an offeror from acquiring interests in shares and, consequently, restrict other persons from disposing of interests in shares to the offeror beyond the first closing date of an offer, notwithstanding that uncertainty as to whether there will be a phase II investigation may persist beyond that date. In addition, the Code Committee understands that there are difficulties in establishing with certainty that an offer falls outside the jurisdiction of the UK competition authorities, such that that particular limb of the exception in Rule 5.2(c)(iii) is, in effect, redundant

1.3 The Code Committee is therefore proposing a partial liberalisation of Rule 5.2(c)(iii), with the result that Rule 5 would no longer impose restrictions on acquisitions of interests in shares by an offeror following the first closing date of its offer (or, if earlier, of any competing offer).

1.4 In addition, the Code Committee is proposing, in due course, to undertake a more general review of Rule 5 in order to establish whether there might be a case for further amending, or deleting, certain (or even all) of provisions of the Rule and would welcome any views on these issues ahead of commencing that review.

As the CLLS response stated:

Below are the views of the Takeovers Joint Working Party of the City of London Law Society Company Law Sub-Committee and the Law Society of England and Wales' Standing Committee on Company Law (the "Working Party") on PCP 2009/3.

Q.1 Do you agree that Rule 5.2(c)(iii) should be amended as proposed?

The benefit of retaining the competition limb of Rule 5.2(c)(iii) is that it may allow the target board more time to put together a defence to a hostile bid. Absent the competition limb, the state of siege on the target is increased: the target board will only have 21 days to mount a defence, as a hostile bidder will be able to acquire interests in shares (or obtain irrevocable undertakings in respect of shares) to take it beyond 30% as soon as Day 21 has passed. Likewise, the time for any potential competing bidder to mount a bid will be limited and the proposed amendment may therefore prevent a higher competing offer from being made in circumstances where the target board has decided the existing offer does not represent a fair price.

The disadvantage of retaining the limb is that it seems arbitrary that the speed with which a hostile bidder can gain control of a target is determined by whether the bid falls within the statutory provisions for a possible competition reference. This is even more the case given the scope for uncertainty in this area (as discussed in the consultation paper). A bidder may also be able to take advantage of the lack of clarity on competition: the uncertainty may push the share price down, enabling the bidder to acquire shares in the market at a lower price.

On balance, the working party believes that, given there are arguments both for and against the proposed amendment, Rule 5.2(c)(iii) should not be amended as proposed at this stage. Instead it may be preferable for any amendments to be considered as part of a wider review of Rule 5.

The Committee also responded to FSA: CP 09/28: "Listing Regime review. Consultation on changes to the listing categories consequent to CP09/24" (See http://www.fsa.gov.uk/pubs/cp/cp09_28.pdf or the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=765&lID=0 for the response.)

As the consultation paper stated:

1 Summary

1.1 Over the last two years we have carried out a review of the structure of the Listing Regime. The overall purpose of this review has been to ensure that there is greater clarity of the Regime's structure and the obligations on issuers under it, so that: (i) investors will be able to make more informed investment decisions, and (ii) issuers have additional flexibility over the route they wish to pursue to raise capital.

1.2 Our consideration of these issues was set out in DP08/01, *A review of the structure of the Listing Regime* and CP08/21, *Consultation on amendments to the Listing Rules and feedback on DP08/01 (a review of the structure of the Listing Regime)*. We set out our policy conclusions and final rule changes in CP09/24, *Listing Regime review (Policy Statement for CP08/21 and further minor consultation)*.

1.3 The principal amendments were to:

- restructure the regime into two segments, premium and standard – 'premium' being a listing that meets the more stringent super-equivalent standards and 'standard' being a listing that meets EU-minimum standards;
- further sub-divide these segments into listing categories according to the characteristics of each security and the type of entity issuing them (e.g. commercial company or investment entity);
- strengthen the corporate governance standards for overseas companies by requiring overseas companies with Premium Listed securities to 'comply or explain' against the UK Combined Code;
- require overseas companies with Standard Listed securities to comply with the EU Company Reporting Directive, which requires them, among other things, to provide a corporate governance statement and to describe the main features of their internal control and risk management systems; and
- make the Standard Listing segment, which is only currently available for the securities of overseas companies, also available to those of UK companies in order to provide a level playing field.

The CLLS response made comments in relation to the "Eligibility of non-voting shares for Premium listing" and "Pre-emption rights" and commented generally that:

The position of convertible preference shares could be made clearer - we think they must be "shares" (although It would be helpful if paragraph 3(c) of the definition of "share" referred to the listing rules as well as to chapters 4, 5, 6 and 7 of DTR) but they do not fall within the definition of "preference share".

We note that no change has been proposed to LR 12.4.7 to 12.4.9 but it is not clear whether these rules would only apply to convertible securities that have a premium listing (which may theoretically exist but must be very rare in practice) or these rules are intended to benefit convertible securities with a standard listing. The reference to LR 13 in LR12.4.9 suggests the former but we can see sense in the latter approach.

We wonder whether the reference to preference shares that has been retained in LR12.3.1 is appropriate?

2.2 Insolvency Law

The Insolvency Law Committee responded to The Insolvency Service: Consultation: "Reforming Debtor Petition Bankruptcy and Early Discharge From Bankruptcy" (See http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/Debtor%20Petition%20Reform%20Final%20Nov%2009.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=746&lID=0 for the response.)

As the executive summary of the consultation document stated:

> This consultation is about two aspects of bankruptcy. The first is how debtors apply for themselves to be made bankrupt. The second is about granting early discharge to bankrupts. It builds upon information gathered during previous reviews and consultations and sets out detailed proposals for a reformed debtor petition procedure and for streamlining early discharge. We now invite your views on these detailed proposals.

The Committee's response addressed some of the specific issues raised in the consultation paper, and stated generally that:

> 2. **SUMMARY**
>
> 2.1 In summary, we broadly welcome the proposal to make it easier for debtors to commence their own bankruptcy, if this is in the interests of the debtor concerned and does not have an additional adverse impact on his or her creditors.
>
> 2.2 However, the Consultation Paper raises three points of concern to the Committee:
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> (a) the payment system that will apply to an online application;
>
> (b) the relative ease with which a debtor could initiate his or her own bankruptcy without any external advice from the CAB or other bodies; and
>
> (c) the lack of a cooling-off period.
>
> 2.3 We set out our thoughts in relation to each of these points below.

2.3 Litigation

The Litigation Committee responded to the Ministry of Justice Civil Law Reform Bill Consultation (See http://www.justice.gov.uk/consultations/civil-law-reform-bill.htm for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=752&lID=0 for the response.)

As the executive summary of the consultation document stated:

> This paper seeks views on the draft Civil Law Reform Bill, which proposes changes to the law of damages, pre- and post-judgment interest, distribution of estates and appeals in barristers' disciplinary hearings. The text of the draft Bill, explanatory notes and impact assessments for the reforms are attached.
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> The main elements of the draft Bill are:
>
> - To reform the law of damages to provide a fairer and more modern system – in particular in relation to damages under the Fatal Accidents Act 1976.

- To reform of the law relating to how pre- and post-judgment interest is calculated on claims for debt and damages. This will give greater flexibility in setting the interest rate so that it can be adapted more readily to different circumstances.

- To reform the law relating to the distribution of estates of a deceased person where an inheritance is forfeited or disclaimed. This amends the law of succession so that where a person is disqualified or refuses an inheritance, his or her heirs are not disinherited.

- To bring the appeal process for barristers into line with the appeal process for solicitors in disciplinary hearings. This transfers the jurisdiction for appeals in barristers' disciplinary hearings from the Visitors of the Inns of Court to the High Court.

The explanatory notes contain a clause by clause commentary on the draft Bill. Views are also sought on the impact assessments that have been prepared to accompany the draft Bill.

The CLLS response stated:

Scope of Response

This paper responds to the Consultation with respect to the proposals regarding interest on civil judgments and rights of appeal in barrister's disciplinary proceedings, which are the subject respectively of Chapters 3 and 5 of the Consultation. The other matters covered in the Consultation fall outside the areas of direct concern and expertise of CLLS Litigation Committee membership and so are not dealt with in this response.

Interest

Question 4. Do you have any comments on the draft clauses of the Bill relating to the setting of pre- and post-judgment interest?

Comments:

We recognise that there are competing interests of certainty and flexibility.

Pre-judgment interest: We favour the court retaining full discretion regarding the award of interest, both as to period and rate. We therefore support the original Law Commission proposal that a default rate should be set annually but with the court retaining the discretion to depart from it.
We also consider that the court should have the general power to award pre-judgment interest on a compound basis. We do not agree that this should be regarded as controversial since it does no more than reflect the everyday commercial reality. We do not see the need for a presumption, but if there is to be a presumption, we do not see why it should only apply to amounts above £15,000.
Post-judgment interest: We consider that the balance comes down differently in relation to post-judgment interest. Such interest is compensatory but also has a function of encouraging prompt compliance with the court's judgment. This element, coupled with the advantages of avoiding the need for court argument on the appropriate rate, leads us to favour a fixed rate of interest with a moderate penal element.

The Court of Appeal should have power to vary the rate applicable to the period between judgment and the disposal of the appeal.

Rate: To the extent that it is decided to adopt a fixed rate or a fall back rate in any reforms, we agree that there should be a requirement for this to be specified annually, to ensure that it is kept up to date.

Question 5. Do you agree with the impact assessment on the proposed reforms relating to the setting of pre- and post-judgment interest at Annex D?
Comments:

We agree with the policy objectives and the intended effects. It is not clear to us that the chosen options for reform reflected in the present draft Bill will improve on the present situation.
Rights of Appeal

Question 8. Do you have any comments on the provisions of the draft Bill relating to rights of appeal?

Comments:

We support the proposed reform. A right of appeal to the High Court appears sound in principle and is consistent also with the disciplinary regime applicable to solicitors.

Question 9. Do you agree with the impact assessment on the proposed reforms relating rights of appeal at Annex F?

Comments:
Yes.

The Committee also made a submission to the House of Commons Public Bill Committee on the Financial Services Bill 2009-10 (http://www.citysolicitors.org.uk/FileServer.aspx?oID=745&lID=0) (See also the Regulatory Law Committee's submission on the Bill, below.). As the submission stated:

4. The provisions in the Financial Services Bill (the **"Bill"**) relating to consumer redress would, if enacted, have far reaching implications for the financial services industry. The Bill proposes two major changes in the area of consumer redress. First, it contains provisions that would introduce a "collective action", enabling a representative claimant to bring proceedings on behalf of a class of customers or other claimants. Secondly, it would give the FSA unprecedented new powers to impose redress schemes upon the industry. Although framed as relating to "consumer redress", these provisions go far beyond consumers and are of relevance to the wholesale side of the industry, as much as the retail side.

5. As a general point, it is not clear to us whether the government, in formulating these provisions, has considered the European dimension. Given the attempts to create a harmonised financial services market in the EU (by way of measures such as MiFID, for example), consideration ought in our view to be given to whether the collective redress provisions for financial services proposed in the Bill are consistent with the collective redress regimes in that sector operated elsewhere in the EU.

Overview

6. We have two over-arching concerns about clauses 18-26 of the Bill: (i) they are out of step with the proposed development of a framework for collective actions as set out in the Ministry of Justice's July 2009 response (the "**Government's Response**") to the paper "Improving Access to Justice through Collective Actions" published by the Civil Justice Council (the "**CJC Recommendations**") in December 2008 and (ii) they leave a number of extremely important matters to be dealt with by regulations and/or court rules which should, instead, be given proper legislative scrutiny.

Departure from the Government's Response

7. The collective action proposals are being introduced in one specific area (financial services) in advance of the anticipated Ministry of Justice consideration of an appropriate framework for collective redress mechanisms as a whole that could be used or adapted on a sector-by-sector basis. The Ministry of Justice intended that its framework document would identify the options and, where appropriate, a preferred approach, and address, for example: regulatory and other alternative options; criteria for designating or authorising representative bodies; funding options; issues regarding "opt-in", "opt-out" and hybrid models; issues regarding damages; and enforcement and cross-border issues (see paragraphs 51-2, 'The Way Forward', at page 16 of the Government's Response). We consider that it would be helpful to proceed in that way so as to be able to consult and obtain consensus on some of the generic issues that need to be addressed in the introduction of collective actions.

8. The Ministry of Justice also stated in the Government's Response that it would work with the CJC and the Civil Procedure Rule Committee ("**CPRC**") to develop flexible generic procedural rules for collective actions (see paragraphs 53-4, 'The Way Forward' at page 16 of the Government's Response).

9. However, as we understand it the Ministry of Justice has not yet completed the exercise of producing the template or draft rules for a sector based collective action, or consulted on the details of that template and draft rules, which are critical legislative steps to ensure a workable result. So, in enacting these provisions, Parliament would be making a very significant – precedent-setting – change to the legal system which raises novel and fundamental points of English law and procedure without the details having been worked through or consulted upon.

2.4 Planning & Environmental Law

The Planning & Environmental Law Committee responded to the DFT consultation on the draft ports national policy statement and associated documents (See http://www.dft.gov.uk/consultations/closed/portsnps/ for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=755&lID=0 for the response.)

As the consultation document stated:

> Introduction and purpose of this document
> **1** The Department for Transport is publishing this consultation document in order to invite views on the draft National Policy Statement for ports, which the Secretary of State for Transport proposes to designate under the Planning Act 2008, and the accompanying documents listed below. This consultation document explains the context of the NPS and sets out the key policies. The documents being published alongside this consultation document are:
> - A draft National Policy Statement (NPS) for ports;
> - A consultation stage Appraisal of Sustainability (AoS) of the draft NPS;
> - A consultation stage Appropriate Assessment (AA) of the draft NPS under the provisions of the habitats Directive (EU Directive 92/43/EEC); and
> - A consultation stage Impact Assessment (IA) for the NPS.
>
> In order to get a full understanding of their content, we encourage consultees to read the sections of these documents relevant to their specific interests in addition to reading this consultation document.
>
> **2** National Policy Statements (NPSs) are a part of the Government's plans to establish a more transparent, efficient and accessible planning system. The Planning Act 2008 provides for the creation of a new independent body, the Infrastructure Planning Commission (IPC), which will take over responsibility for considering and deciding applications for Nationally Significant Infrastructure Projects (NSIPs). The IPC will decide applications in accordance with NPSs, which make the case for the national need for the infrastructure and set out the social, economic and environmental impacts. This will establish a clearer separation between policy making and decisions on individual applications and give developers a higher degree of predictability, allowing them to make investment decisions with more confidence. The new system also facilitates more effective participation in decision-making, strengthening the voice of local communities.

The CLLS submission responded to the detailed questions in the consultation paper, and stated generally that:

- As a general comment, we think that, whilst helpful, the guidance for the assessment section of the NPS is too detailed and detracts from the main purpose of the document as a statement of policy. We think this part of the NPS goes beyond the requirements of Section 5 of the Planning Act 2008 and may be more appropriately dealt with in separate guidance. As currently drafted, we think there are risks that this section will be a straight-jacket for applicants and the IPC and an area for objectors potentially to exploit. If it is retained, as a minimum we suggest removal of the text which is intended to guide the applicant's assessment, since in practice the applicant's approach to assessment will be addressed and determined through the normal Environmental Impact Assessment scoping procedures.

- It will be helpful if the NPS, both in the context of the development of ports themselves but also in relation to inland connections, was to set out clearly the anticipated relationship between the NPS and local development frameworks/regional strategies.

- To be given its full weight, the draft NPS needs to be subject to full and rigorous consultation. In particular, we think it is unfortunate that there is a mismatch between the deadline for consultation responses and the deadline for evidence to be placed before the Select Committee which will be responsible for scrutinising the draft NPS. In this latter regard, we think it is important that the department identifies a way of placing consultation responses received after 15 January 2010 before the Select Committee.

- Subject to this, we look forward to designation of the NPS at the earliest opportunity in order to bring certainty to the new system.

The Committee also responded to the DECC consultation on the draft National Policy Statements for energy infrastructure (See http://data.energynpsconsultation.decc.gov.uk/documents/condoc.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=754&lID=0 for the response.)[3]

Executive Summary
Introduction

…In the past, obtaining planning permission ('development consent') for large energy infrastructure projects has often been an inefficient and slow process. Consideration of applications can sometimes take years, and the consent process often involves lengthy discussions over the need for a particular type of infrastructure, rather than focusing on the specifics of a proposed project. This is why the Government has embarked on fundamental reform of the planning system for nationally significant infrastructure. The main component of this reform is the Planning Act 2008, which provides for a more efficient, transparent and accessible planning system. Under this system, development consent for nationally significant infrastructure will be administered by a new independent body, the Infrastructure Planning Commission (IPC).

National Policy Statements (NPSs) lie at the centre of the new regime. They will be the primary consideration for the IPC when it makes decisions on applications for development consent.

The Government currently envisages that there will be 12 National Policy Statements, covering major infrastructure for energy, transport, waste, water and waste water. This consultation seeks views on the six draft National Policy Statements for energy infrastructure:

- The draft Overarching National Policy Statement for Energy (EN-1)
- The draft National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (EN-2)
- The draft National Policy Statement for Renewable Energy Infrastructure (EN-3)
- The draft National Policy Statement for Gas Supply Infrastructure and Gas and Oil Pipelines (EN-4)
- The draft National Policy Statement for Electricity Networks Infrastructure (EN-5)
- The draft National Policy Statement for Nuclear Power Generation (EN-6)

The draft Overarching Energy NPS (EN-1) sets out the Government's energy policy, explains the need for new energy infrastructure and instructs the IPC on how to assess the impacts of energy infrastructure development in general. The other draft energy NPSs contain supplementary information for specific types of infrastructure. These draft 'technology-specific' energy NPSs (EN 2-6) must be read in conjunction with the draft Overarching Energy NPS.

[3] Response dated 21 January 2010, but not included in the previous e-briefing

….The principal purpose of this consultation is to identify whether the draft energy National Policy Statements are fit for purpose: in other words, whether they provide a suitable framework for the Infrastructure Planning Commission to make decisions on applications for development consent for nationally significant energy infrastructure. In the case of the draft Nuclear NPS, the consultation also seeks views on the Government's assessment of the potential suitability of sites for the deployment of new nuclear power stations, and the Government's assessment of arrangements to manage and dispose of waste from new nuclear power stations.

The CLLS submission responded to the specific questions contained in the consultation paper, and stated more generally that:

- It would be helpful if the NPS were to set out clearly the anticipated relationship between it and local development frameworks/regional strategies.
- In addition, to be given its full weight, the draft NPS needs to be subject to full and rigorous consultation. In particular, we think it is unfortunate that there is a mismatch between the deadline for consultation responses and the deadline for evidence to be placed before the Select Committee which will be responsible for scrutinising the draft NPS. In this latter regard, we think it is important that the Department identifies a way of placing consultation responses received after 15 January 2010 before the Select Committee.

2.5 Regulatory Law

As above, the Regulatory Law Committee made a submission to the House of Commons Public Bill Committee on the Financial Services Bill 2009-10 (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=744&lID=0 for the response.)[4]

As the submission stated in the introduction:

> We set out below our comments on a number of provisions in the Bill. It is a common theme that many provisions amount to a transfer of fundamental legislative responsibilities from Parliament directly to the Financial Services Authority **("FSA")** without the intervening constitutional protections provided by Parliamentary scrutiny of delegated legislation. It is of course the case that the FSA currently has extensive rule making powers, but the exercise of these powers is subject to a number of legislative constraints within the Financial Services & Markets Act 2000 (the **"FSMA"),** which, as we note below, appear to be missing from the Bill. As drafted the FSA has extraordinarily wide rule making powers (and in some cases is required rather than empowered to make rules) without much, if any, direction within the statute as to any limitations on its use of them. This will result in an increasing lack of predictability in dealing with the regulator. In our view the Bill represents the high water mark of an increasing tendency to eliminate substance from primary legislation and to confer executive power without proper Parliamentary scrutiny at the level of either primary or secondary legislation. The specific issues we raise below in this context are in our view particularly serious and we very much hope that these defects are amended before the Bill becomes law.

The submission went on to deal with the following issues:

> Section 1. Objectives, scope and rule-making powers
> The Financial Stability Objective – Clause 5
> Meeting the FSA's regulatory objectives - Clause 7
> Performance of Controlled Function without approval - Clause 16
>
> Section 2. Remuneration of executives of authorised persons
> Remuneration of executives - Clauses 9 to 11
> Remuneration reports
> FSA rule-making

[4] Response dated 14 January 2010, but not included in the previous e-briefing

Section 3. Short selling - Clause 13

A. Overview
B. Excessive delegation
C. Territorial scope
D. Urgent Cases
E. Ancillary powers

Section 4. Recovery and resolution plans

Section 5. Proposed FSA information gathering powers

The Committee also responded to the HMT consultation on Mortgage regulation (See http://www.hm-treasury.gov.uk/d/consult_mortgage_regulation.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=753&lID=0 for the response.)

As the consultation paper stated:

> …1.5 The Government is committed to ensuring that the regulatory framework [for mortgages] remains robust and up to date. In July 2009, HM Treasury published *Reforming financial markets*, setting out the Government's proposals for the reform of the financial system.[5] This document made specific announcements in relation to the regulation of mortgages, namely that the Government would:
>
> - review the case for FSA regulation of second-charge mortgages;
> - review the case for FSA regulation of buy-to-let mortgages; and
> - consult on measures to protect consumers when lenders sell on mortgage books.
>
> 1.6 This consultation document sets out the Government's proposals on each of these three issues, and seeks stakeholder views on these proposals. A draft Statutory Instrument, by which the Government could enact its proposals, is included with this document in Annex D, and the Government welcomes responses to the specific questions on this draft order.
>
> **...**1.11 On 19 October [2009], the FSA published a discussion paper on its approach to mortgage regulation and a package of proposals to improve its existing regime.5 This paper also expresses the FSA's support for the proposals set out in this consultation document. Stakeholders may wish to view this paper, which is available on the FSA's website.

The CLLS submission responded to the specified questions in Chapter 4 of the consultation paper (Questions 21 and 22), and commented generally that:

(i) We note that the proposed definition of "managing a regulated mortgage" is not intended by HMT to bring within the scope of regulation firms that own or hold a regulated mortgage contract, but do not carry out any activity that is material to the borrower, in that they do not have power to exercise or control the exercise of any rights of a lender under such a contract. This is based, in particular, on the view that special purpose vehicles (SPVs) and similar vehicles may own or hold relevant contracts, but have no role in decisions which affect borrowers. Our members' experience, based on the structuring of such transactions, is that this view is not strictly correct. A SPV which acquires a portfolio of mortgages will generally purchase a beneficial interest in the portfolio from the seller (normally a credit institution). The legal title to the assets will normally either be retained by the seller or, more commonly, will be transferred to a professional agent/manager

[5] Reforming financial markets, *HM Treasury,* July 2009. Available at: http://www.hm-treasury.gov.uk/reforming_financial_markets.htm.

which administers the portfolio on behalf of the purchaser (a "servicer"). The servicer will be regulated by the FSA if the portfolio includes regulated mortgage contracts. Under such structures, though most decisions affecting borrowers will in practice be taken by the servicer, it is equally true that, under the services contract between the purchaser and the servicer, the purchaser will retain discretion to exercise or control the exercise of rights under contracts comprised in the portfolio. This may be important for commercial reasons, but is more generally important for tax purposes in order to establish the substance of the purchasing entity. Consequently, it is not correct to analyse a SPV purchaser as being a wholly "passive" owner; it is important in such structures that the purchaser should have the right to take decisions or to direct the servicer, and that, in appropriate cases, it should actually do so.

(ii) Furthermore, in practice, hedge funds, private equity firms and similar purchasers will normally acquire an interest in a portfolio using a SPV. Therefore, to this extent, HMT's policy objective of bringing such firms within the scope of mortgage regulation, but at the same time to exclude SPVs, are at odds with each other. For the reason given above, it is also likely to be very difficult, if not impossible, to distinguish in the legislation between SPVs formed by such financial firms (on the one hand) and other SPVs (on the other), since, in both cases, the SPVs will enjoy the rights and powers described in (i) (that is to say, they may not be categorised as wholly "passive").

(iii) It is also common practice for lenders to appoint third parties, such as estate agents or bailiffs, to carry out certain activities in the event of, for example, a repossession of a property. In such cases, the lender delegates his power to exercise his rights under a regulated mortgage contract to that third party, although he retains primary control over the exercise of such rights. Under the proposed definition of 'managing' a regulated mortgage contract then, such third parties would be inadvertently caught under this definition as 'having the power to exercise... any of the rights of a lender under a regulated mortgage contract'.

(iv) For the reasons given in (i), (ii) and (iii) above, we believe that the chosen method of achieving HMT's policy objective is flawed. While it may catch the types of purchaser referred to, it will also catch other vehicles which are apparently intended to be excluded. In this regard, we do not believe that, as drafted, the proposed exclusion in Article 62A will assist, because the servicer's (B's) rights to manage the contract and to make decisions will be subject to the rights of the purchaser (A) described above. As such, the proposed exclusion is likely to be inadequate, unless it is made clear in Article 62A (a) that B's powers may be subject to powers retained by A (which, we appreciate, would probably undermine the intended scope of the exclusion).

(v) We believe, however, that the stated policy objectives may be achieved in a simpler way. As noted above, servicers will be regulated by FSA, to the extent that a portfolio includes regulated mortgage contracts. Further, any rights and obligations of the servicer under its management/services agreement with the purchaser will be subject to the servicer's duties under FSA's principles and rules. Put a different way, the purchaser will accept under such an agreement that, in managing a portfolio, the servicer will be bound by FSA principles and rules. It would therefore be possible to achieve the stated policy objective by adding appropriate FSA's rules and guidance in order to clarify that servicers should not take any step which would, or would be likely to, result in the adverse consequences for borrowers which are identified in Chapter 4. In our view, this would not require

> substantial extensions to MCOB, since MCOB 12 and 13 already contain relevant obligations which apply to mortgage administrators. We do not consider that this approach would entail any risk of "regulatory arbitrage", since a purchaser could not dispense with the requirement to appoint a servicer without either obtaining authorisation itself to act as mortgage administrator or arranging for the selling bank to retain administrative duties (in which case, the bank would similarly be obliged to treat its customers fairly under FSA principles and rules).
>
> **...**
>
> (vii) Furthermore, we believe that a distinction should be made by HMT between those who have primary decision-making powers over the enforcement of a regulated mortgage contract (i.e. those who effectively 'manage' the regulated mortgage contract) and those who are delegated the power to exercise rights under a regulated mortgage contract, who should fall outside the proposed definition.
>
> We would urge HMT, together with FSA, to reconsider its suggested approach in the light of these factors. If the proposed approach is followed, we believe that the consequences for the market may be severe.

In regards to the **Boundary between FSMA and the Consumer Credit Act ("CCA")**, the submission also highlighted "..a problem with the existing boundary between FSMA and CCA regimes (to which reference is made in paragraphs 2.25 and 2.30 of the consultation paper) relating to the CCA ancillary activity of 'debt administration' in relation to regulated mortgage contracts." The submission proposed a new exclusion be inserted into the CCA (s. 146(5E)) to deal with this problem.

2.6 Revenue Law

The Revenue Law Committee responded to the HMRC consultation "Disclosure of Tax Avoidance Schemes (DOTAS)" (See http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_029990 for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=767&lID=0 for the response.)

As the consultation document stated:

> **Subject of this consultation:**
>
> Draft legislation containing five measures revising and extending the Disclosure of Tax Avoidance Schemes (DOTAS) regime, that requires promoters and users of certain tax avoidance schemes (concerning income tax capital gains tax, corporation tax and stamp duty land tax) to provide information to HM Revenue & Customs (HMRC).
>
> **Scope of this consultation:**
>
> This consultation is intended to explore the implementation of the proposed legislation and seeks views as to whether the legislation would be effective and proportionate to the problems it seeks to address.

The CLLS response commented on the specific measures and questions contained in the consultation document, and stated generally that:

> We understand the Government's desire to make rapid legislative change when it becomes aware of avoidance schemes. However, we would urge the Government not to lose sight of the importance of not overburdening UK business with complex compliance. The first line of defence against tax avoidance should be effective drafting of the relevant legislation in the first place. If this is achieved – and here we would emphasise the need to achieve this in the law, rather than (as too often) enacting widely drawn law and then reducing its scope by guidance – the scope for avoidance is greatly reduced. Conceptually, the DOTAS regime should be seen as a back up for when statutory drafting has failed. It is not, and should not be, the front line in the defence against avoidance.
>
> The existing DOTAS regime has proved relatively trouble free to operate now it has bedded in. We do not feel it is unduly burdensome. Although there are some (probably inevitable) areas of uncertainty, HMRC's published guidance is in this case appropriate and helpful.
>
> Most importantly, the existing rules coupled with the guidance in most cases make it fairly clear both whether a scheme is disclosable, and if so when it must be disclosed. Our view is that retaining this clarity is absolutely essential. Especially where it is also proposed to drastically increase penalties for non-compliance with the DOTAS regime, it is critical that all parties' obligations can be clearly identified.
>
> Many of the proposed new measures are targeted specifically at abuses which can only arise with mass marketed schemes (eg the sudden implementation of a large number of schemes for pre-identified clients who were not previously told full details of them). Our view is that these specific measures (which we have identified in our comments below) should only apply to mass-marketed schemes. We wonder whether it might be appropriate to consider whether the wider DOTAS regime should apply to bespoke structures? Given that such structures are unlikely to lead to prioritised legislative change (since by their nature they are not readily repeatable) we wonder whether DOTAS has proved useful in such cases. Certainly from the practitioners' perspective, we find the most difficult questions in the operation of the DOTAS regime arise in relation to tax planning carried out as part of a wider set of transactional instructions.

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