E-Briefing – Detailed Version
(Covering the period from 16 September to 21 October 2009[1])

1. Professional Representation

1.1 Professional Rules and Regulation Committee

The Professional Rules and Regulation Committee (PR&RC) responded to the SRA consultation paper "Schedule of Charges – SRA (Cost of Investigations) Regulations 2009" (see http://www.sra.org.uk/sra/consultations/schedule-charges-sra-cost-investigations-regulations-july-2009.page for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=693&lID=0 for the response.) The consultation paper related to the proposed changes to the SRA (Cost of Investigations) Regulations 2009, which the SRA stated it hopes to introduce in January 2010. As the consultation paper states:

> These costs are only applied where an investigation results in a formal regulatory sanction….
>
> …It is the intention of the SRA to move to full cost recovery from 2011. ..
>
> .. The SRA proposes to undertake further work on the move towards full cost recovery, and to consult upon proposals in preparation for introducing a new regime from 1 January 2011…
>
> .. It is proposed that the principle of charging a fixed or standard cost will be maintained, using the same methodology of average actual costs including overheads.

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

The PR&RC also responded to the SRA's Consultation Paper 19; "Moving towards a fairer fee policy". See http://www.sra.org.uk/sra/consultations/moving-toward-fairer-fee-policy-june-2009.page for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=693&lID=0 for the response. The Committee responded to the detailed questions contained in the consultation paper.

The Committee also responded to the Legal Services Board's discussion paper "Designating new approved regulators and approving rule changes: *Discussion paper on developing rules to approve applications for designation as an approved regulator and to approve changes to the rules of approved regulators* ". (See http://www.legalservicesboard.org.uk/what_we_do/consultations/2009/pdf/210709.pdf for the discussion paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=701&lID=0 for the response.) As the discussion paper stated:

> The [Legal Services Act 2007] mandates that, as it comes into force, a number of existing Approved Regulators are automatically authorised to carry on the regulation of certain of the Reserved Legal Activities, but enables the addition of both new Approved Regulators and changes to the rules of existing ones. This paper sets out how the LSB proposes to discharge its responsibilities in both these areas and includes drafts of the rules that the LSB proposes to make in this regard.[2]
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> **Designation of New Approved Regulators**

1 Except where indicated
2 Paragraph 1.5

There are two sorts of body which may apply for designation as a new Approved Regulator. These are:

- existing Approved Regulators; and
- new bodies who wish to become an Approved Regulator for the first time.[3]

The LSB will ensure that its rules adequately provide for these different types of applicant.[4]

Existing Approved Regulators adding Reserved Legal Activities

In relation to the second type of potential applicant, during evidence given to the Joint Committee on the Draft Legal Services Bill, Ministers explicitly endorsed the idea of new entrants creating competition between Approved Regulators to undertake licensing of alternative business structure7 ("**ABS**") firms, on the basis that regulatory diversity within a framework of oversight regulation would help to drive up standards of regulation and hence also improve the performance of regulated firms

The Act therefore provides that new bodies may become Approved Regulators either to regulate Reserved Legal Activities in the context of Part 4 of the Act or to go on and also become a Licensing Authority9 for ABS under the terms of Part 5 of the Act.[5]

…In the event that there are a number of new entrants, oversight regulation will be essential to ensure that benefits are captured and pitfalls avoided. Among the potential risks are:

- some Approved Regulators competing for firms and individual affiliation by lowering their practice fees and intervening less. Such moves could obviously be detrimental to consumer protection;
- a maze of regulation which consumers find difficult to comprehend. The more complex this regulatory system, the greater will be the need for public legal education in order to help consumers to make informed choices.

Against this background, the LSB is mindful that an oversight regulator must set a firm framework to manage entry and prevent any erosion of acceptable standards. Such a framework will make sure that overall standards remain consistent, that the same activity regulated by different Approved Regulators is regulated to directly comparable standards and will encourage public legal education to aid choice. Regulatory competition will also give the regulated community (i.e. the profession and the industry) a real voice in driving up regulatory standards.[6]

….The current document is designed primarily to deal with the "nuts and bolts" of transferring current arrangements dealing with Approved Regulator recognition from the Ministry of Justice (the "**MoJ**") to the LSB rather than these broader strategic issues.[7]

….We expect the combination of the LSB's regulatory reviews and, in some cases, competition between regulators to drive up standards of performance.[8]

The PR&RC's response stated, *inter alia*, that:

> … As a general comment, we echo the concern raised in the second bullet point of paragraph 1.12 about the risks of a "regulatory maze". The supposed existence of such a maze and the desire to get away from it have formed a significant part of the reasoning behind recent developments in the regulation of legal services. In our view, there is a serious risk of even greater uncertainty than before for consumers and practitioners alike if there are a number of new entrants in the field of legal regulation. For that reason, we believe that the LSB should have this concern at the forefront of its mind when considering applications for approval. …

The PR&RC also responded to the SRA's Consultation Paper 20 "Repeal of Solicitors' (Non-Contentious Business) Remuneration Order 1994. Legal Services Act 2007: Proposed new rule on information about how to question a bill". (See

3 Paragraph 1.6
4 Paragraph 1.7
5 Paragraph 1.9-1.10
6 Paragraph 1.12-1.13
7 Paragraph 1.15
8 Paragraph 1.22

http://www.sra.org.uk/sra/consultations/3254.article for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=700&lID=0 for the response.) As the consultation paper stated:

> **Background**
>
> 1. As of 30 June 2008 the Legal Services Act 2007 (LSA) amended section 56 of the Solicitors Act 1974 (orders as to remuneration for non-contentious business) so as to replace the provision for the Secretary of State's Advisory Committee on Non-Contentious Remuneration to make
>
> > "general orders prescribing and regulating ... the remuneration of solicitors in respect of non-contentious business"
>
> with a provision for the Lord Chancellor's Advisory Committee on Non-Contentious Remuneration to make
>
> > "general orders prescribing the general principles to be applied when determining the remuneration of solicitors in respect of non-contentious business".
>
> Rewriting the Remuneration Order
>
> 2. As of 11 August 2009 the Solicitors' (Non-Contentious) Remuneration Order 1994 will be replaced by a new Solicitors' (Non-Contentious Business) Remuneration Order 2009.
> 3. The current Order contains not only general principles to govern remuneration for non-contentious business but also procedural provisions, including the provision for remuneration certificates whereby the client can require the solicitor to ask the Legal Complaints Service (the LCS) to assess a bill.
> 4. The new Order will omit the remuneration certifying procedure and other procedural provisions, and will contain only the general principles to govern remuneration for non-contentious business.

The submission responded to the specific questions in the consultation paper, and stated in response to question 8 (*Do you have any other comments?*) that:

> Increasing numbers of clients are using e-billing technology and insist that professional service providers, including lawyers, bill them electronically. These clients and the software they use prescribe the information and the format of electronic bills; many systems do not allow for additional data to be added.
>
> A rule making the provision of this information mandatory is incompatible with this technology, is not required or necessary when dealing with sophisticated clients (who know how to complain), and would add unnecessarily to the costs and administrative burden of the firms involved.

1.2 Training & Education Committee

The Training Committee responded to the SRA's Consultation Paper "An Agenda for Quality: A discussion paper on how to assure the quality of the delivery of legal services" (submitted on 7 September but not included in the previous e-briefing). (See http://www.sra.org.uk/sra/consultations/agenda-for-quality-june-2009.page for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=652&lID=0 for the response.) The consultation paper looked at what "quality" is in the context of the provision of legal services, and the factors that might affect it. As the paper stated,

> 16. It is clear that the question of quality in the provision of legal services is complex. It goes further than simply meeting the client's expectations, and might not necessarily be achieved by the provider of legal services alone without intervention and support from the regulator….

> 20. Our current thinking is that we should seek to strike an effective balance between requirements on individuals and requirements on entities to ensure both the basic standard of the legal work and an adequate quality of the service experience. It would then not be necessary to measure routinely the standard of legal work itself. This is our proposed quality assurance approach.

The consultation paper further stated that the SRA would envisage developing a "Professional Standards Framework" that would specifically:

> • identify the standards of knowledge, skills and behaviours which qualified solicitors should demonstrate in defined roles that they take in their practising environment;
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> • identify requirements, where appropriate, for SRA-regulated entities;
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> • identify requirements, where appropriate, for individual solicitors;
>
> • identify what aspects might be mandatory regulatory requirements, what might require regulatory guidance of good practice, and what should be left to individuals and individual law firms.

The paper also stated that firms [should] take the primary responsibility for delivering a quality assured service within the broad parameters of a regulatory framework, and referred to the "minimum standards" that the framework would set for all "SRA regulated entities".

It was mentioned that the SRA would develop the "agenda for quality into firm proposals for [a] consultation" which will take place in 2010.

The response "welcome[d] the SRA's initiative to promote a debate on ways the profession can maintain its reputation as a leading "thought" profession offering top quality services to its "consumers". It agreed that the principal areas which need to be considered at least are those highlighted in the Discussion Paper, namely:

- the "quality" of the members of the profession;
- the "quality" of the environment in which they operate; and
- the "quality" of the service experience for "consumers".

The response also distinguished between professional "competence" and "quality", and questioned the role of regulation in regards to "quality".

2. CLLS Specialist Committees

2.1 Company Law

The Takeovers Joint Working Party of the City of London Law Society Company Law Committee and the Law Society of England and Wales' Standing Committee on Company Law produced a response to the Takeover Panel's Consultation Paper (issued by the Code Committee of the Panel) entitled "Miscellaneous Code amendments revision proposals relating to various rules of the Takeover Code" ("PCP 2009/2"). (See http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/pcp200902.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=658&lID=0 for the response.) The Joint Working Party responded to the detailed questions contained in the consultation paper.

2.2 Insolvency Law

The Insolvency Law Committee responded to the Evaluation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=663&lID=0 for the completed questionnaire form.)

In addition to responding to the specific questions in the consultation, the response to the question"does the Regulation work satisfactorily and, if not, what principal changes would you want to see?" the submission stated:

> The Regulation has led to an overall improvement in the conduct of insolvency proceedings in a European cross border situation. Whilst the Regulation does not seek to harmonise insolvency procedures themselves, it provides a framework for determining jurisdiction, recognition and cooperation. As with any new framework there are areas that require clarification and improvement. Our members have set out below their practical experience of the Regulation and highlighted where the difficulties arise.
>
> Some of the issues raised by our members may be easier to solve than others. For example, the introduction of an EU registry of insolvency proceedings would greatly assist on a practical level in determining whether main proceedings have already been opened. However, the difficulties experienced in the context of the insolvency of groups of companies is an area fraught with difficulty to which there is no simple solution.

2.3 Intellectual Property Law

The Intellectual Property Law Committee responded to the Department for Business Innovation and Skills' consultation on legislation to address illicit Peer-to-Peer file sharing.[9] (See http://www.berr.gov.uk/files/file51703.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=669&lID=0 for the response.)

The consultation document stated:

> This consultation sets out the Government's legislative approach for addressing the problem of illicit use of Peer-to-Peer (P2P) file-sharing technology to exchange unlawful copies of copyright material. This takes forward Recommendation 39 of the Gowers Review of Intellectual Property which addressed the issue of illicit use of P2P, the recent BIS consultation on possible regulatory options and Action 13 of the Digital Britain Interim Report. The proposals will provide a legislative baseline aimed at changing the behaviour of the majority of file-sharers, provide a mechanism for identifying any further action to be taken against repeat infringers if appropriate, and facilitate rights holder efforts in taking legal action against the most frequent infringers. We hope these will assist industry in devising commercial agreements which both offer consumers the kind of content, when where and how they want it, at a price they are prepared to pay and include bi-lateral solutions which address unlawful file-sharing via a range of technical and other measures.
>
> **....This consultation is relevant to:** industry, in particular ISPs and copyright holders such as music, film, publishing, software, TV, sports and games sectors. Consumers and consumer organisations will also have a close interest.

The submission responded to the questions contained in the consultation document, and also stated that

9 As the consultation paper stated, "P2P [peer to peer] file-sharing is where users on a computer network share content files containing audio, video, data or anything in digital format by means of a series of ad hoc connections without the need of a central file server."

(a) ***s97A Copyright, Designs and Patents Act 1988***

1. Currently rights holders have the ability to obtain an injunction against a service provider where that service provider has actual knowledge of another person using the service to infringe copyright. It is not clear how this section will work with the new provisions as there may be some conflict.

(b) ***Costs***

2. We think the Government should further consider the extent to which rights holders require a court order (or how to obtain one) more cheaply and quickly to obtain the names of serious infringers, which would significantly reduce the cost and administrative burden for rights holders and not prejudice ISPs' businesses.

The proposed legislation relates to potential civil proceedings against an individual. However, the act of uploading infringing content is also likely to amount to an offence under s1072A of the Copyright, Designs and Patents Act 1988 ("CDPA"). ISPs processing information (including collating such information in a database and disclosing information to rights holders) on serious infringers are likely to be processing "sensitive personal data" under the Data Protection Act 1998 ("DPA") (defined under the DPA as including information as to the commission or alleged commission of an offence). This means that ISPs will need to comply with the conditions applicable to processing sensitive personal data. These include obtaining the consent of the individual unless they fall within any of the exceptions. We think that ISPs can rely on the exception under Schedule 3 (6) (a) and (c) of the DPA, where the processing is necessary for the purposes of or in connection with legal proceedings (including prospective legal proceedings) or is necessary for defending legal rights. We think this applies equally to the disclosure of sensitive personal data to rights holders as it does to the preparation and management of a database of serious infringers. The acknowledgement that this exception applies would remove the additional burden of rights holders having to apply to Court for a Norwich Pharmacal order to obtain the names and addresses of the individual infringers.

2.4 Planning & Environmental Law

The Planning & Environmental Law Committee responded to the DCLG consultation "on a new planning policy on development and coastal change" (see http://www.communities.gov.uk/archived/publications/planningandbuilding/consultationcoastal for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=679&lID=0 for the response)

The consultation paper stated:

> … We anticipate there will be a widespread 'roll-out' of any revised policy, with a wide range of stakeholders, to promote the robust implementation of the policy and accompanying guidance….
>
> …The consultation forms part of a wider package of actions to deliver sustainable coastal risk management. It is linked to the *Consultation on Coastal Change Policy*, issued by Defra for consultation on Monday 15 June 2009, which sets out ideas for how coastal communities can successfully adapt to the impacts of coastal change, and Government's role in supporting this.
>
> … The consultation text reflects extensive discussions with stakeholders on the effectiveness of current policy and possible changes. A companion guide is being prepared to provide practice guidance and support for the implementation of the policy.

The Committee responded to the specific questions in the consultation document.

2.5 Regulatory Law

The Regulatory Law Committee responded to the Walker Review ("Shareholder engagement and change in control requirements under the EU Acquisitions Directive") (see http://www.hm-treasury.gov.uk/d/walker_review_consultation_160709.pdf for the original consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=668&lID=0 for the response)

As an HMT webpage relating to the Walker Review stated:

> Sir David Walker is leading an independent review of corporate governance in the UK banking industry.
>
> **What is being covered?**
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> The original Terms of Reference for the review are to examine corporate governance in the UK banking industry and make recommendations, including in the following areas:
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> - the effectiveness of risk management at board level, including the incentives in remuneration policy to manage risk effectively;
> - the balance of skills, experience and independence required on the boards of UK banking institutions;
> - the effectiveness of board practices and the performance of audit, risk, remuneration and nomination committees;
> - the role of institutional shareholders in engaging effectively with companies and monitoring of boards; and
> - whether the UK approach is consistent with international practice and how national and international best practice can be promulgated.
>
> On 21 April, the Terms of Reference were extended so that the Review shall also identify where its recommendations are applicable to other financial institutions.
>
> **When is it happening?**
>
> The review started in February 2009. A consultation document was published on 16 July 2009. The second consultation period will run with a submissions deadline of 1 October and with final recommendations published on 26 November 2009.

As the Committee's submission referred to the concern that shareholder collaboration of the kind recommended by the Report may bring certain shareholders within the controller regime even though their activities are not linked to the acquisition of shares or voting power in the relevant regulated financial institution. The submission also stated that:

> …In light of [the matters raised in the submission], and given the Report's recommendations concerning shareholder engagement, we would very much welcome the support of the FSA and HM Treasury in initiating a review of the current form of the Guidance.

The Committee also responded to the EU Commission's Consultation Paper on the UCITS Depositary Function (See http://ec.europa.eu/internal_market/consultations/docs/2009/ucits/consultation_paper_en.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=651&lID=0 for the response.

The Committee's submission stated, *inter alia*:

> We are responding to the Commission's consultation paper because of its important implications for the structure of both the UCITS and the alternative investment fund market. We are not commenting on policy choices, but on the importance of ensuring that there is a sound framework which provides legal certainty both to the depositary and the manager as well as investors. We are therefore addressing the following questions in our response.
>
> Q1. Do you agree that the safe-keeping and administration duties of depositaries should be clarified?

Q13. Do you agree that there should be a general clarification of the liability regime applicable to the UCITS depositary in cases of improper performance of custody duties

Q14. What adjustments to the liability regime associated to the custody duties of the UCITS depositary would be appropriate and under what conditions?

Q25. Do you agree that only institutions subject to the CDR should be eligible to act as UCITS depositaries?

Q26. If not, which types of institutions should be eligible to act as UCITS depositaries, and why?

2.6 Revenue Law

The Revenue Law Committee responded to the HMT consultation paper "Simplification Review: Capital Gains Rules for Groups of Companies" (see http://www.hm-treasury.gov.uk/consult_capitalgains.htm for the discussion paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=672&lID=0 for the response

As the introduction to the consultation paper stated:

> Since the Related Companies Simplification Review was announced at the 2007 Pre-Budget Report, dialogue between business and the Government has identified the capital gains rules for groups of companies as an area where simplification would be particularly useful. The Government would like to hear the views of business, as well as those of representative bodies and tax advisers, on the policy options outlined in this discussion document, in order to develop more detailed proposals.
>
> … [The] Government is committed to ensuring that simplification is a priority when designing and reviewing tax legislation, alongside sound public finances and promoting fairness. In the context of corporate taxation, the focus on fairness includes ensuring that companies receiving the same economic returns bear the same amount of tax, to the extent this can be achieved consistently with other objectives…
>
> The aim of [the] initial discussions [with business] has been to identify specific rules within the capital gains legislation (as it applies to groups) that would benefit most from simplification, and to develop workable proposals for simplifying these rules…

It also stated that the Government expects to publish more detailed proposals "in a future full consultation document by the end of 2009, with a view to bringing forward clauses for legislating at the earliest opportunity"

The Committee responded to the questions contained in the consultation paper with detailed comments.

The Committee also responded to the HMT consultation "A Code of Practice on Taxation for Banks: Consultation Document June 29, 2009" (See http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_029639 for the consultation paper and http://www.citysolicitors.org/FileServer.aspx?oID=699&lID=0 for the response.) The Committee responded to questions 1 and 3 of the Consultation Paper:[10]

10 The questions were:

> "1. What issues are likely to arise in introducing and complying with the Code and how can these issues be overcome? (3.4)"
> "3. What support should banks expect from HMRC to help them implement and abide by the Code? (3.22)"

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