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CLLS RESPONSE TO HMG CONSULTATION ON INTRODUCING A STATUTORY REGISTER OF LOBBYISTS

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 18 specialist committees. This response in respect of the HMG Consultation on Introducing a Statutory Register of Lobbyists has been prepared by the CLLS Professional Rules and Regulation Committee.

EXECUTIVE SUMMARY

- A UK Statutory Register of Lobbyists must not in any way interfere with the relationship between a lawyer and his or her client, or the right to legal representation.

- The legal profession is highly regulated. The regulatory structure was established by the Legal Services Act 2007. That is based on 8 "regulatory objectives", one of which is to "promote and maintain adherence to the professional principles". One of the 5 professional principles is that "the affairs of clients should be kept confidential".

- The front line regulator for solicitors is the Solicitors Regulation Authority ("the SRA") and all employees in UK law firms (not just solicitors) are bound by the SRA Code of Conduct (SCC). The SCC also requires solicitors to keep the affairs of their clients confidential.

- For solicitors, the fact that you act for a specific client is, of itself, confidential. If the proposed Statutory Register is to apply to solicitors, its effect is inconsistent with one of the fundamental tenets of the regulatory regime for solicitors established by parliament.

- There is ample existing regulation of solicitors which ensures that they will not mislead government officials, act in an underhand manner or take advantage of third parties. A further layer of regulation for what is already a heavily regulated profession is unnecessary.

- We caution against adopting a definition of categories of lobbyists similar to the EU Transparency Register. Only one or two City law firms in London have registered with the EU system because of the difficulty of complying.

- The business of law firms is providing clients with legal advice. Occasional policy work and lobbying are incidental to the other professional services of lawyers. A UK Statutory Register of Lobbyists should therefore exempt firms regulated by the SRA. This is currently the case in the Australian system.

- If a UK Statutory Register of Lobbyists does apply to the legal profession, there should be a *de minimis* rule, i.e. only those lawyers who devote more than, say 20%, of their time lobbying should be required to register. This is currently how the system operates in the United States. Similarly, Canada refers to 'a significant part' of a person's duties as a means of identifying who should be captured by the register.

- In any event, lobbying activities carried out by law firms as employers and businesses in their own right (in-house lobbying) should not be captured. Similarly, responding to HMG / public consultation papers or to HMG etc requests for information (or helping clients to do so) should not be caught by the definition of lobbying.

- If SRA regulated lawyers are included in the register, it should be the SRA that is responsible for setting up and managing the register as it applies to lawyers. It would not be appropriate for another organisation specific to the new register to become involved in the regulation of the legal profession.

- There should be no financial disclosure about confidential commercial information such as fees.

- There should be no criminal sanctions for failure to register.

- Any UK Statutory Register of Lobbyists must comply with the relevant provisions of the EU Services Directive.

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1. SPECIFICITY OF THE LEGAL PROFESSION

1.1 The City of London Law Society welcomes the opportunity to comment on the Government's proposals for a register of lobbyists.

1.2 We welcome the statement that the register is not intended to capture or deter a range of activity that is essential to a vibrant democracy. In addition, the register must not in any way interfere with the relationship between a lawyer and his or her client, or the right to legal representation.

1.3 Solicitors are fiduciaries, as a result of which they have legal duties, one of which is the duty of confidentiality. In contrast, others involved in lobbying are unlikely to be fiduciaries. The importance of confidentiality is reflected in the exhaustive regulatory structure which governs the conduct of solicitors. Client confidentiality is one of the five fundamental "professional principles" which the Legal Services Act 2007 set as a "regulatory objective". (See clause 1 of Part 1 of the Act).

1.4 In addition, all solicitors are regulated by the SRA and bound by the SRA Code of Conduct (SCC). The primary duty of solicitors and law firms is to comply with the professional and ethical rules and obligations that govern their activities. The SCC includes, among other things, mandatory principles on upholding the rule of law and proper administration of justice; acting with integrity and independence; and not behaving in a way that is likely to diminish the trust the public places in him / her and the provision of legal services. These rules are enforced through disciplinary measures and sanctions, such as withdrawing a solicitor's right to practise or imposing fines.

1.5 The proposals on public disclosure present specific difficulties for law firms. Clients who are represented by a solicitor have a right to confidentiality. Solicitors and law firms are bound not only by fiduciary duties at common law but also by Chapter 4 of SCC to protect the confidentiality of the affairs of clients: 'you must... keep the affairs of clients confidential'. This rule of confidentiality is fundamental to the rights of clients and the duties of lawyers in a democratic society. It is underpinned by the Legal Services Act and the regulatory regime which parliament has superimposed on solicitors. Obligations under the SCC extend to the law firm as a whole and all its employees (in the UK), which will include non-lawyers.

1.6 We question the appropriateness of a system that would in effect either oblige lawyers' clients to accept disclosure or oblige lawyers to refuse to represent clients who did not.

1.7 Public disclosure, as opposed to direct disclosure to an interlocutor, presents specific issues. In practice, whether in the context of interest representation or other client work, when a lawyer contacts a Government representative or elected official on a matter that involves more than simply receiving general information, the client's identity may well be given. When such contacts are made in relation to sensitive matters, the relevant degree of disclosure can be made on the understanding of confidentiality. Clients will almost always consent to such disclosure, and when they do not, lawyers should be able to explain to their interlocutor why not. Lawyers should also advise their clients on the necessity or appropriateness of such disclosure.

1.8 There is ample regulation which applies to solicitors and which ensures they would not mislead any governmental official. For example, two of the fundamental principles in the SCC are that each solicitor must:

- act with integrity, and
- behave in a way that maintains the trust the public places in [the solicitor] and the provision of legal services.

In addition, Outcome 11.1 provides that a solicitor must "not take unfair advantage of third parties in either [his/her] professional or personal capacity".

2. DEFINITIONS

2.1 The Consultation Paper does not put forward a specific definition of lobbying. However, unless such a definition is very tightly worded, it will inevitably include

some activities which may be conducted by a solicitor, even though the primary business of law firms is providing clients with legal advice.

2.2 Occasional policy work and lobbying are incidental to the other professional services of lawyers. There is already an extensive statutory regulatory regime for legal practitioners (and non-qualified staff working with them) engaging in legal practice in the United Kingdom and little purpose would be served in providing further overlapping regulatory regimes.

2.3 There should therefore be an exemption from the register for the legal profession. This is currently the case under the system in place in Australia.

2.4 If the Government decides that a UK Statutory Register of Lobbyists *should* include the legal profession, applying a *de minimis* rule might offer a pragmatic way forward. According to a *de minimis* rule, only those lawyers who devote more than, say, 20% of their time would be required to register. This is currently how the system operates in the United States. Similarly, Canada refers to 'a significant part' of a person's duties as a means of identifying who should be captured by the register.

2.5 Such a solution would help to ensure that those law firms whose lobbying activities are of a relatively insignificant nature, would not be covered. We believe this will assist in meeting requirements of proportionality and remove an unnecessary administrative and regulatory burden that would otherwise be imposed on businesses whose activities are not primarily targeted by the Government's proposals.

Activities to exempt

2.6 Regardless of whether a *de minimis* rule is applied, certain preparatory activities must still be exempt from the register if there is a reasonable prospect that such activity may lead to proceedings before any of the following:

2.6.1 a court;

2.6.2 another judicial or quasi-judicial forum; or

2.6.3 alternative dispute resolution.

2.7 The representation of a client in the context of, for instance, a planning committee or inquiry should *not* be captured by the proposal.

2.8 Activities carried out by a law firm to clarify the meaning of the law or of proposed legislation (or policy) should *not* be captured. This will usually be carried out with a view to advising a client on his or her legal position and would not normally involve an attempt to influence the policy objectives of decision-makers. There is added value to law firms engaging with the Government on technical legal matters. This is best explained by reference to examples in the area of tax law. It is a stated aim of HMRC to encourage dialogue with taxpayers, especially the large corporates whom CLLS member firms act for, to ensure that tax law is fit for purpose. HMRC understand that there are circumstances where taxpayers do not wish to be identified individually but legitimately wish to explore the meaning and intent of the existing or draft legislation and the interpretation that HMRC put on it. As a result of approaches HMRC may well want to alter legislation or draft legislation or produce guidance to

remove anomalies and uncertainties and ensure legislation is fit for purpose. Forcing taxpayers to disclose their identity in such approaches would inhibit this dialogue.

Example 1: A client asks for legal advice on their potential UK tax liability under legislation that has been published in draft but not enacted. The law firm speaks to HM Revenue & Customs to understand the meaning and intent of the draft legislation and the interpretation that HMRC put on it. As a result of the approach, HMRC alter the draft legislation or produce guidance to remove anomalies and uncertainties. The client does not wish to be named in the approach to HMRC because that might prejudice their ability to take positions in relation to the legislation if enacted and fundamentally infringes their ability to receive privileged and confidential advice on their legal rights and obligations.

Example 2: As example 1 but the legislation is already in force and the client is concerned about its application to their affairs. The client asks for legal advice on their potential UK tax liability under existing tax law. The law firm speaks to HM Revenue & Customs to understand the meaning and intent of the legislation and the interpretation that HMRC put on it. As a result of the approach, HMRC alter the legislation or produce guidance to remove anomalies and uncertainties. The client does not wish to be named in the approach to HMRC because that might prejudice their ability to take positions in relation to the legislation and fundamentally infringes their ability to receive privileged and confidential advice on their legal rights and obligations.

2.9 Contacts with members of the civil service or other persons in governmental departments who are not in the top policy-making echelons of government should *not* be included in the definition of lobbying. For example, a meeting with persons at BIS on what ought to be included in a decommissioning plan required by a petroleum licence in the North Sea or with planning or environmental personal on any consents application should not be considered as lobbying, although those contacts could relate to matters of policy and to governmental decisions. These are just examples of the myriad of contacts that solicitors may have with governmental officials on a day-to-day basis in connection with transactions, financings, real property and other matters.

Law firms (and others) acting on their own behalf

2.10 Member firms of CLLS regularly participate in business and advisory groups at the request of the Government and as part of the Government's Growth Agenda, for example the Professional and Business Services Group (PBSG) run by the Department for Business, Innovation and Skills (BIS). When a law firm is engaged in these types of discussions as a business and employer in its own right it should be exempt in the same way that individuals engaged on their own behalf rather than for a client are exempt.

2.11 In addition to the points made above, we think the definition of lobbying would need to make it clear that it did not catch any of the following activities (regardless of whether these activities are carried out by lawyers or others):

2.11.1 responding to, or helping another person to respond to, any HMG consultation;

2.11.2 responding to, or helping another person to respond to, any HMG request for information; and

2.11.3 lobbying on behalf of another associated company, partnership or other entity (effectively, this should be deemed to be lobbying on your own behalf).

Given that this consultation paper is fairly high level, we think it should be followed by a second consultation paper setting out the detail (and wording) of HMG's proposals.

3. SCOPE

3.1 There should be no distinction between commercial and *pro bono* work in relation to the register. Solicitors are subject to fiduciary duties and to SRA regulation irrespective of the type of client they are working for. A system that exempted *pro bono* activities would provide an unhelpful loophole. It would create an incentive to circumvent the register by claiming that advice is being offered *pro bono* when in fact it is simply being charged back to the client in some other way.

3.2 The international ambit of the proposed register is unclear. Is it envisaged that it will only be necessary to register if an organisation has a place of business in UK? If that was the case, US or continental European law firms that represent clients doing business in the UK could for example lobby on behalf of those clients without necessarily having any UK footprint. If they were not required to register it would put firms that have operations in the UK at a disadvantage in relation to any matter where client confidentiality could be a particular sensitivity. If organisations with no UK presence are caught by the proposals, how will the sanctions be applied outside the UK?

4. INFORMATION TO BE INCLUDED IN THE REGISTER

4.1 Financial information should not be included in the register. We agree that it is more important to know who is lobbying than to know the cost.

4.2 For law firms, the duties of confidentiality are a professional obligation, enshrined not only in the common law but also in the SCC. Overriding these rules would be a major shift for clients and for society as a whole. If, in addition, the fees being charged to clients had to be disclosed, that would risk undermining the fundamental tenet of confidentiality.

4.3 In relation to the fees issue, there is also a practicality issue. Suppose that a law firm is acting for a client on a complicated transaction, as a result of which it is necessary to liaise on and off with a government department. It is impractical to expect the firm be able to account for the fees that were earned through 'lobbying' as compared to the transaction as a whole. Being accurate would require the firm to go down to the level of detailed time recording records and that is clearly disproportionate. Disclosing financial information presupposes that lobbying is a stand alone, delineated, activity which is inapplicable for law firms.

5. FREQUENCY OF RETURNS

5.1 In view of our response above, we have no comments.

6. FUNDING

6.1 Lawyers are subjected to a strict regulatory regime and contribute to the funding of the Solicitors Regulation Authority (SRA). Little purpose would be served in providing further overlapping regulatory regimes. Therefore, if lawyers are included in the Statutory Register of Lobbyists the SRA should be responsible for managing the registration of lawyers.

7. SANCTIONS

7.1 In view of our answer above, any sanctions against lawyers should be applied by the SRA. It would not be appropriate for another organisation specific to the new register to become involved in the regulation of the legal profession.

7.2 For legal professionals registered with the Law Society, there are already a number of sanctions and penalties in place for unethical or illegal behaviour. As such, any complaint against lawyers should be referred to the appropriate complaints-handling organisation, such as the SRA or Legal Ombudsman.

7.3 Any system of penalties or sanctions must follow due process and include a robust appeals procedure.

7.4 In addition, we do not think that there should be criminal sanctions (with all the reporting and other issues this might pose under the Proceeds of Crime Act 2007) for a mischief which essentially relates to not making it clear who you are lobbying for but which does not prohibit the underlying activity itself. We think that this would be disproportionate.

8. THE REGISTER'S OPERATOR

8.1 For law firms undertaking activities that fall within the register, it should be the SRA that is responsible for the register. As noted above, it would not be appropriate for another organisation specific to the new register to become involved in the regulation of the legal profession. In addition, the SRA would have a better understanding of how law firms operate.

9. FINAL COMMENTS

9.1 City law firms employ lawyers from around the European Union and not just those who are UK qualified.

9.2 In the event that non-UK lawyers or organisations wish to register, the register must comply with the relevant provisions of the EU Services Directive.

12 April 2012

THE CITY OF LONDON LAW SOCIETY
PROFESSIONAL RULES & REGULATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Chris Perrin (Clifford Chance LLP) (Chair)

Roger Butterworth (Bird & Bird LLP)

R. Cohen (Linklaters LLP)

Ms S. deGay (Slaughter and May)

Ms A. Jucker (Pinsent Masons LLP)

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