THE CITY OF LONDON LAW SOCIETY

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CONFIDENTIAL

Rt Hon The Lord Hunt of the Wirral MBE
C/O 100 Fetter Lane
London
EC4A 1BN

9th April 2009

Dear Lord Hunt

Introduction

1. The City of London Law Society (CLLS) represents over 13,000 City lawyers, through corporate membership of 53 firms, including some of the largest international law firms in the world, and through individual memberships. 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.

2. The CLLS responds to a variety of consultations and other requests for views on issues of importance to its members through its 17 specialist committees. The call for Evidence has been considered by the CLLS's Professional Rules and Regulation Committee. The Committee has representatives of 12 firms, as listed in the appendix to this letter. It is inevitably the case that firms will have differing views on the detail of the points raised by your review. The views set out below are held by all 12 firms represented on the Professional Rules & Regulation Committee. In addition, this letter is being made available to all 52 CLLS member firms who may wish to respond on their own account.

General comment

3. We would suggest that your review of regulation, like regulation itself, should not be done on a "one size fits all" basis. The reasons for this are twofold.

4. First, a number of the objectives of regulation, as articulated by Clementi and which found their way in an extended form into the LSA, are not relevant to the practices of firms represented by our committee ("Corporate Work firms") nor, therefore, to the way in which those firms should be

regulated. These objectives are improving access to justice, protecting and promoting the interests of consumers (as that expression is used to mean unsophisticated, infrequent users of legal services) and increasing public understanding of the citizen's legal rights and duties. Whilst these objectives concern many of our members (whose CSR and pro bono activities bear testament to this), we do not believe that they should have a bearing on the regulations that Corporate Work firms are subject to.

5. Second, we believe that there should be a different method of regulating Corporate Work firms for the reasons set out in the Smedley Review. Whilst tackling the separate regulation of the corporate legal sector is clearly essential and we give our full support to Smedley, the wider legal market is itself further segmented and each segment might also demand a different regulatory approach. (For example, the correct regulatory approach for a traditional high street practice will not meet the needs of an intensive and process driven volume debt collection or re-mortgage business, or the needs of a specialist boutique, etc.). Other regulatory regimes (the FSA for example) recognise the complex segmentation of the markets they regulate and deliver targeted regulation which properly addresses the needs of the service providers and their clients in that sector; this approach is equally valid for participants in the legal market.

6. We would therefore suggest that you conduct your review of the regulatory framework, or at least certain aspects of it, in separate work streams, one of which should be for Corporate Work firms.

Smedley Review

7. We would endorse the main recommendations made in the Smedley Review, including his call for urgent implementation of his recommendations. We would support a steady building up of the number of firms covered by the new Corporate Work group at the regulator.

8. We would also support the proposition that a new regulator for Corporate Work firms be established if there was a broad consensus or lead from the LSB in that direction or if the SRA does not implement the Smedley recommendations in full within the time period which he suggests.

9. We would add specifically that you might wish to make clear that regulations on access to justice, consumer rights and educating citizens on their rights and duties should not to apply to Corporate Work firms.

Cost of regulation

10. We are concerned about fairness in spreading the costs of a regulatory framework between those who are regulated and that the regulator and the LSB can properly be held to account for their expenditure. As detailed in the Smedley Review, our members currently pay a disproportionate amount of the costs of the regulator, as the cost of regulating our member firms does not take up a proportionate amount of the resources of the SRA when considered in relation to the resources put into regulating smaller and more generalist firms. With the introduction of the proposed new group at the SRA regulating Corporate Work, as per the Smedley Review, we would expect to see

a clear delineation of cost incurred in that division from the rest of the SRA regulatory work, with the costs being split accordingly. We would wish to make clear that we do not, as a matter of principle, object to part of the funding that our member firms provide finding its way to supporting access to justice, etc., projects.

11. We are also concerned that ABSs are likely to provide legal services without having many qualified solicitors and the current formula for charging for practising certificates and obliging our member firms to pay for practising certificates for all our solicitors may well be inappropriate in the post-ABS market. The advent of ABSs throws into sharp focus the need for a thorough review of the funding of the regulatory framework, as the market will have to accommodate legal businesses with multi-million pound turnovers, but few solicitors, legal businesses owned by companies which conduct other businesses which will benefit financially from referrals from their solicitors' business (e.g. banks) and perhaps others where current charging arrangements are inappropriate. The rationale behind Corporate Work firms cross-subsidising other firms may well disappear, if a few large, profitable corporates come to dominate the market now occupied by small high street firms.

12. Further, we believe that there is no good reason for giving Government solicitors an exemption from practising certificate fees (which we understand to be the case) and, indeed, if the Government departments have to include practising certificate fees in their budgets, they might have a more sympathetic view when others seek to put a brake on spending by the regulator. Our view is that the guiding principle in determining a fair method of funding is that all solicitors should contribute a basic amount to funding the general overhead of a regulatory framework, but then the obligation to pay should follow the costs of regulation, monitoring and enforcement, so that those on whom the resources of the regulator are expended will meet the cost.

ABSs

13. We are concerned that certain aspects of the impact of ABSs on the legal market have not been fully addressed.

14. Our concerns include the following. First, we are concerned that consolidation and concentration within the legal market could lessen competition if concentration results in a reduction of a particular segment of the market to merely a handful of firms.

15. We believe that the regulator should take steps, as a matter of public interest and to promote competition, to ensure that no small group of firms is allowed to dominate any tier of the legal market and not leave this matter to the competition authorities.

16. A related concern is that substantial investors with other lines of business and who have consolidation of the legal market as a business strategy may use predatory pricing and other techniques available where there exists an oligopoly to drive out competition. The regulator should take this into account in fulfilling its objective of promoting competition.

17. We are concerned at the lack of progress that the SRA has made on the proposed regulation of ABSs. The LSB has indicated that an ABS regime should be introduced in 2011, rather than 2012, and we would like to see the SRA respond to the LSB's suggestion, subject to the SRA working up and consulting fully on the regulation of ABSs.

18. Allied to the lack of progress and perhaps as a result of it, the SRA has been, so far, unwilling to engage seriously with solicitors in trying to work up transitional arrangements under the current code of conduct which will allow solicitors' firms to put themselves in a position to compete with others seeking to enter the market when ABSs are permitted.

19. There are more than a dozen high profile entrants to the legal services business which market themselves as legal service providers, are not regulated in any way and which are funded by non-solicitors. They are creating substantial brands and will have the advantage of another two years of promoting their brands, putting their IT and other systems into good order, etc., before solicitors can do the same using outside investors' money. The SRA say they cannot regulate these entrants to the legal services market.

20. At the same time, the SRA are taking the approach that solicitors cannot have outside investors under the existing code who want to create ABSs when this is permitted, as they would be "jumping the gun". The SRA's concern is believed to be that they do not know what safeguards outside investors would be subject to until the ABS rules are made and they are, on that basis, unwilling to allow outside investment in solicitors' firms now, as a precursor to forming an ABS when permitted, notwithstanding that in our view the current code clearly allows this. The basic stumbling block is that the SRA believes it can rely on its interpretation of a requirement in the current code that solicitors must be "independent" to prevent outside investment under current rules. We are concerned that the intransigence of the SRA will starve solicitors of funding and ultimately see a reduction in competition as solicitors are driven out of business or find themselves unable to attract outside investment when it is finally permitted.

Independence of solicitors

21. We are concerned that the LSB gives proper weight to the importance of maintaining the independence of solicitors. In particular, we consider it vital that the Board and its members are neither too close, nor seen to be to close, to the Government and the Ministry of Justice. When considering the concept of independence, the first question that should arise is independence from whom and, of the answers that most readily spring to mind, the State and its manifestations is likely to be one. We would strongly advise that the Ministry of Justice should have no say whatsoever in the appointment of members to the Board. Likewise, we are concerned about political interference with the concept of the rule of law and for this reason again would wish the Ministry of Justice to be kept at arm's length from the regulator. We are concerned that the LSB and the SRA should value the concept of independence as highly as solicitors do and, when balancing the competing objectives of the LSA, should ensure that consumer and other interests do not trump independence and the rule of law.

Employment in Corporate Work firms

22. Our member firms are very much alive to diversity issues and, indeed, a number of our member firms employ staff whose main or only function is to promote and ensure diversity. Access to employment, including training contracts in Corporate Work firms, is available to all regardless of gender, ethnic origin and sexual orientation and many Corporate Work firms have developed programmes to encourage young people from all walks of life to consider a career as a solicitor. That said, we remain concerned that more work needs to be done by the profession as a whole to encourage as wide a range of entrants to the profession as is possible and to engage with young people at a stage prior to university.

Consultation processes

23. We and the SRA are suffering, we believe, from "over-consultation" at present. Too many consultation papers in too short a period has put stresses on all our resources and may have resulted in poorer quality outcomes and a lower level of response than the SRA would have liked. We would encourage the regulator to engage more actively with solicitors in the consultation process. We believe such engagement – meetings prior to the drawing of consultation documents to help the regulator focus on key issues, meetings to discuss the published consultation documents, explanations or debriefings after the consultation period to explain why proposals have been re-cast, suggestions have been rejected, etc., - would increase the level of response and produce better quality regulations. Our committee puts in a great deal of time on responding to consultations, often to little avail, and we have sometimes felt that the regulator is simply going through the motions in carrying out consultations.

Overseas issues

24. In 4.28 of your call for evidence, you consider it "worth reflection upon the possible regulatory impacts from other sectors, such as the financial services sector; from other jurisdictions; and from multinational bodies...". The extra territorial reach of England and Wales SRA regulations, and the burden created where these duplicate or overlap with regulations which apply locally, is a significant issue for English firm's with offices outside the UK and can create a competitive disadvantage for English firms. Many of our member firms would have an interest in reducing the extra territorial reach of the English Code, in particular where overseas businesses are already subject to competent local regulation.

Principles of regulation

25. We believe that the most important competing factors in determining principles of regulation are the eight objectives of regulation. Balancing them will require the regulator to enunciate principles of precedence of one objective over another and to adhere to those principles. We believe that such an order of precedence would have the rule of law and the independence of solicitors at the top.

26. In 4.21, you consider the balance to be struck between regulation of individuals and regulation of entities, and whether there should be a hybrid system. One of the key strengths of the English profession has been the high standard of personal integrity and professionalism demonstrated by individual practitioners. The danger of moving towards increased regulation of entities is that this professional ethic becomes diluted, people may come to see compliance as someone else's problem, and the firm or its management may be made accountable for breaches outwith their power to prevent or control. Further consideration might therefore be given to weighing the costs and benefits of moving to an entity-based system of regulation.

Yours sincerely,

Chris Perrin
Chairman
CLLS Professional Rules & Regulation Committee

Appendix: List of Committee member firms

APPENDIX

CLLS PROFESSIONAL RULES & REGULATION COMMITTEE

Chris Perrin - Clifford Chance LLP (Chairman)

Raymond Cohen – Linklaters LLP

Sarah de Gay - Slaughter and May

Alasdair Douglas - Travers Smith LLP

Brian Greenwood - Taylor Wessing LLP

Antoinette Jucker - Pinsent Masons LLP

Jonathan Kembery – Freshfields Bruckhaus Deringer LLP

Heather McCallum - Allen & Overy LLP

Julia Palca - Olswang

Mike Pretty - DLA Piper UK LLP

John Trotter - Lovells LLP

Claire Wilson - Herbert Smith LLP