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Professional Rules & Regulation Committee response to Committee on Standards in Public Life consultation "LOBBYING: Issues and Questions Paper"

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 19 specialist committees. This response in respect of the Committee on Standards in Public Life Consultation on lobbying has been prepared by the CLLS Professional Rules and Regulation Committee.

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EXECUTIVE SUMMARY

- Adopting a blanket statutory register of lobbyists will aggregate those that are already highly regulated in relation to lobbying activities and those that are not.

- For those that are regulated, such as solicitors, their law firms and their employees (who are bound by Solicitors Regulation Authority ("SRA") regulation), the initiative may create overlapping, and potentially contradictory, regulatory regimes. It may also have the effect of stifling productive, even essential, dialogue between legislators and those who consider the implications and practicalities of relevant legislation on a day-to-day basis.

- Regulatory overlap is important not just in terms of causing confusion but also because of the risk that it may undermine a regulatory objective of the Legal Services Act 2007 ("the Act"), namely the encouragement of an independent, strong, diverse and effective legal profession.

- In considering regulation in this area, we would caution against adopting a definition of lobbyists that is so wide as to capture lawyers providing legal advice to clients.

- If a Statutory Register of lobbyists were to be set up, there should be a *de minimis* rule so that only those who are meaningfully engaged in lobbying i.e. those devoting more than 20% of their time to the activity should be required to register. This is currently how the system operates in the United States and similar rules apply in Canada.

- Requirements for solicitors to disclose details of their clients and matters would raise substantial concerns. Clients have a right to seek confidential help from a lawyer and, again, it is a professional principle set out in the Act and enshrined in SRA regulation that the affairs of clients should be kept confidential.

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INTRODUCTORY COMMENTS

The CLLS welcomes the opportunity to comment on the consultation on lobbying by the Committee on Standards in Public Life.

Before responding to the questions set out in the consultation, it is useful to bear in mind the role played in society by lawyers and their law firms, the framework within which lawyers operate and the rules to which they adhere.

All solicitors and their law firms are regulated by the SRA and bound by the SRA Code of Conduct ("SCC"). The primary duty of solicitors and law firms is to represent their clients' interests faithfully but in compliance with applicable professional and ethical rules and obligations. Again reflecting the requirements of the Act, there is ample regulation which applies to solicitors and their law firms and which ensures they would not mislead public officials. 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, it is a requirement that a solicitor must "not take unfair advantage of third parties in either [his/her] professional or personal capacity".

These rules are enforced through far reaching disciplinary measures and sanctions, which include withdrawal of a solicitor's right to practise and fines.

In April 2012, we responded to the Government's consultation on the introduction of a statutory register of lobbyists. We attach a copy of that response. We would like to draw particular attention to comments we made in that response to particular ways solicitors practise and which, in our view, should *not* be caught by any statutory register. These are to be found in particular in paragraphs 1.7 and 2.7 to 2.11.

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RESPONSES TO SPECIFIC QUESTIONS

Question 1: Is there any reason to think that lobbying per se is a problem; and is there any evidence that abuse of lobbying is widespread or systemic, as opposed to exceptional behaviour by a few?

We are not aware of compelling evidence to suggest that lobbying abuse is widespread generally, but particularly not in the case of solicitors or their law firms. For example, we have not been able to identify a single case involving lobbying activities before the Solicitors Disciplinary Tribunal in the last ten years. Given the onerous and negative implications of regulation for those who are acting appropriately in their lobbying work, we think that such evidence should be clearly demonstrated as a condition of moving forward with new regulation.

Question 2: How wide should the definition of lobbying be? What activities should be excluded from the definition?

The definition of lobbying should not include activities of law firms, in particular when providing clients with legal advice. In Australia, there is an exemption from the register of lobbyists for members of professions who make occasional representations to Government on behalf of others in a way that is incidental to the provision of their professional or other services. We would strongly argue that the UK should follow that approach. It follows that we would accept that a law firm which has lobbying as a substantial portion of its business should not be exempt.

Adopting a wide definition of lobbying may have negative repercussions more generally. As the Committee says in paragraph 3 of its paper, lawyers and others provide a vital role in testing the practicality of legislation through informed argument. If lawyers were inhibited in engaging with policy makers to clarify the meaning of the law or of proposed legislation (or policy) we feel, given the points made above about the stringent regulation that applies to the conduct of lawyers in this area, this would result in a net disadvantage to the country.

Question 3: Is the proposed legislation for a Statutory Register of lobbyists likely to be sufficient to address the problem; and are the Political and Constitutional Reform Committee's proposals (wider registration, disclosure of issues and enhanced Ministerial disclosure) necessary, either as an interim measure or longer term?

As noted above, we have not been presented with compelling evidence as to the width or precise nature of the problem, in particular in relation to the activities of solicitors.

However, were it to be demonstrated that solicitors were involved in inappropriate lobbying behaviour, we would advocate addressing the issue by means of the SRA rather than by creating overlapping and potentially contradictory regulation. We are concerned that broad brush regulatory initiatives, which, at least in relation to the legal profession, do not seem to be justified by reference to identified problems, have the potential to create confusion and uncertainty as well as costly red tape.

Question 4: To what extent should the focus of finding a solution to the problems around lobbying be on those that are likely to be lobbied rather than those who do the lobbying?

Were further regulation to be justified, there may be a benefit in looking at the actions of those who are being lobbied. A person may receive lobbying from a variety of different sources. We would argue that, to the extent that lawyers are a source, there is no need for further regulation but we acknowledge that the degree of regulation of those carrying out lobbying is likely to vary. There may therefore be a value in considering the conduct of the recipient as a common denominator.

However any rules must protect the ability of lawyers to engage with minsters and others on behalf of anonymous clients.

Question 5: Do you consider that the existing rules are sufficient? If not how should they be changed?

With reference to City solicitors, who we represent, our existing professional conduct rules in conjunction with the general law are sufficient and little purpose would be served in additional overlapping regulatory regimes.

As set out in our introductory comments, all solicitors and their law firms are regulated by the SRA and bound by the SCC. The primary duty of solicitors and law firms is to represent their clients' interests faithfully, but in compliance with applicable professional and ethical rules and obligations. Reflecting the requirements of the Act, there is ample regulation which applies to solicitors and their law firms which ensures they would not mislead public officials. 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, it is a requirement that a solicitor must "not take unfair advantage of third parties in either [his/her] professional or personal capacity".

These rules are enforced through far reaching disciplinary measures and sanctions, which include withdrawal of a solicitor's right to practise and fines.

Question 6: Do you think it is a good idea to have a code of conduct or guidance directly applicable to any individual or organisation that is lobbied? If so, what are the main elements that should be included in any code of conduct or guidance and how could it be enforced?

We have no comment on this.

Question 7: Is there a case for establishing an external regulator for lobbying or are existing oversight mechanisms sufficient?

We would point out, as we have above, that any solicitors who engage in lobbying on behalf of clients are already subject to very stringent regulation. This may well also be the case for other professionals.

The Law Society and the SRA are responsible for the regulation of solicitors and their law firms and there is real risk of regulatory overlap if a regulator responsible for the operation of a Statutory Register were to become involved in regulating the activities of the legal profession. As well as being unnecessarily expensive, we would argue that duplicating regulation has the possibility to undermine some of the regulatory objectives regarding lawyer independence and client protection enshrined in the Act.

A variation of this point was made by the CCBE in its General Response to the European Commission Consultation on the Transparency Register:

"It would be inconceivable for a public authority to have the power to impose sanctions on a lawyer as that would be inconsistent with the principle of professional self-regulation, and of independence of the members of the legal profession towards public authorities. This principle is based on the consideration that lawyers may oppose such authorities to defend clients who are in a dispute with them, and that one could not conceive, in a democratic society, that lawyers may suffer any pressure from public authorities against which they may have to act or even that there could be the slightest suspicion that any such pressure could be exerted."

Question 8: Do you agree that some form of sanctioning is a necessity? What form could it take?

Further clarity is required on the particular activities that might be sanctioned. There is already a body of criminal law (for example, anti-bribery and fraud offences) that might be deployed in egregious cases. Further, in the event of inappropriate behaviour by a solicitor (or his or her employee), the SRA would already be able to invoke far reaching disciplinary measures and sanctions, which include withdrawal of a solicitor's right to practise as well as fines.

Any sanctions against lawyers should be applied by the SRA. It would not be appropriate for another organisation specific to a Statutory Register to become involved in the regulation of the legal profession.

Question 9: Do you think an outcome which relies on individuals who are lobbied taking proactive personal responsibility for being transparent in dealings with lobbyists is desirable and feasible?

(a) ***If not, what are the impediments stopping such a process?***

(b) ***How could it be monitored properly without leading to an increase in bureaucracy?***

We have no comment on this.

Question 10: What should an individual do to ensure that he/she is aware of the dangers of potential conflicts of interest?

There may be some technical or procedural steps that could be taken to better track potential conflicts of interest. Solicitors have a regulatory obligation not only to avoid acting for a client if there is an actual or potential conflict of interest with regard to another client, but also to maintain adequate systems and processes to avoid conflicts.

However equally effective might be an educational programme conducted within Government departments or other relevant units in order to raise awareness of conflict issues and to sensitise staff to the potential risks. Training might be particularly helpful in enabling those being lobbied to take a wider perspective and to consider how their actions and relationships might be viewed by a third party. Again, as well as looking at client relationships, solicitors are trained to consider whether their ability to act in the best interests of their client(s) is impaired by, for example, any financial interest, a personal relationship, a commercial relationship or the lawyer's appointment (or the appointment of a family member) to public office.

Question 11: Would enhanced disclosure by individuals and organisations provide the pertinent information on who is lobbying whom and sufficient incentive for decision makers and legislators to be balanced in the views they seek? Would this taken together with the Freedom of Information regime ensure sufficient transparency and accountability to enable effective public scrutiny of lobbying?

As we have argued above, a requirement for disclosure may have consequences in terms of limiting the extent of potentially valuable communication that may take place between a lawyer acting on behalf of clients and those formulating law or policy. If they cannot safeguard the identify of clients who do not wish to be identified, lawyers will simply not

be able to engage with policy makers without being in breach of stringent professional regulation regarding the confidentiality of client affairs.

Public disclosure, as opposed to direct disclosure to an interlocutor, presents specific issues. In practice, 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 is likely to be approved by the client on the understanding of confidentiality. If that commitment cannot be made by the party being lobbied, helpful communications may be stifled.

THE CITY OF LONDON LAW SOCIETY
PROFESSIONAL RULES AND REGULATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Chris Perrin (Clifford Chance LLP) (Chair)

Tracey Butcher (Mayer Brown International LLP)

Roger Butterworth (Bird & Bird LLP)

Raymond Cohen (Linklaters LLP)

Sarah de Gay (Slaughter and May)

Antoinette Jucker (Pinsent Masons LLP)

Jonathan Kembery (Freshfields Bruckhaus Deringer LLP)

Heather McCallum (Allen & Overy LLP)

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