# Response of the City of Westminster and Holborn Law Society to the Legal Services Board ("LSB") Consultation "Enhancing consumer protection, reducing regulatory restrictions"

## 1. The City of Westminster and Holborn Law Society

The City of Westminster and Holborn Law Society ("CWHLS") enjoys perhaps the most diverse membership amongst local Law Societies, encompassing as it does, a membership ranging from larger firms, including those which have been called in recent years "the silver circle" down to small high street practices and individual in-house solicitors, including those working for public bodies and government. Our membership includes those who practice at all levels of the profession, including those who regularly represent solicitors in SRA investigations and members of the Solicitors Disciplinary Tribunal, and those who have practised extensively in the field of solicitors' negligence and professional indemnity insurance.

Membership is voluntary and CWHLS is run by a committee comprising 33 solicitors representing a very wide range of specialisms. Its work is carried out by 11 specialist sub-committees, one of which, the Professional Mattes Sub-Committee, concentrates on matters such as regulation of solicitors, and matters affecting their practice, including matters relating to professional indemnity etc.

## 2. Introductory Comment

2.1 This Consultation Paper ("the Consultation") raises some fairly basic and potentially important questions. Unfortunately too many of the questions raised are set at a high level of abstraction. In our view there are two flaws in this approach which undermine the utility of the Consultation:

2.1.1 It seeks to achieve too much. Whilst the principles enunciated usually sound unexceptionable, in practice the questions posed are difficult to respond to in a manner that is helpful or constructive. Simply to express agreement with the principles set out will in many cases not be saying very much in practice. That is because the more important issues are those that arise at a level or two down, in particular how to achieve the appropriate balance between the principles, and how to apply them in practice. The Consultation does not properly address how those issues should be resolved.

*2.1.2* It ignores (or deliberately bypasses) the experience of legal practitioners and consumers of legal services in its attempt to "re-invent the wheel". There is a tendency in the Consultation to regard the consumer protections provided by regulation as equally balanced by the perceived detriment in terms of lessening competition, in particular price competition. We do not think that experience shows these considerations to be of equal weight. The impact of regulation on competition

is often far more limited than the Consultation recognises. There is already fairly widespread competition in the provision of legal services and that has driven down price. In domestic conveyancing for instance (perhaps the area where most members of the public require legal services) there has been concern that despite regulation the prices quoted by some providers (including solicitors) are uneconomically low, and that quality will suffer as a result.

We are alarmed by the tone of paragraph 130 of the Consultation which refers to regulation involving "*controlling entry"* and "*setting conduct and practice codes and other on-going requirements as conditions of practice*" as being "*Preventative tools…at its most extreme".* We do not think that these are just negative "*preventative tools."* Nor are they extreme. On the contrary, they help to uphold professional standards and provide consumer reassurance. Relying on "*remedial measures*" such as financial compensation as the sole regulatory tool where "*impacts of poor outcomes…are reversible"* (as paragraph 130 suggests) is not reassuring to consumers (for whom the seeking of compensation is likely to be worrying and uncertain in outcome) or likely to improve the service provided by providers of legal services. This is a negative and retrograde approach.

2.2 There is a further confusion caused by the constant reference to the issue of reserved activities. We accept that in the modern world any decision to reserve an activity should be undertaken only where there in a strong consumer case for doing so. We also accept that where an activity is reserved it need not be reserved exclusively to the solicitors' profession. What matters is that those undertaking reserved activities should provide the appropriate consumer assurances and protections. In this context it is unfortunate that we and the LSB are stuck with the fact that Section 24 of the Legal Services Act 2007 appears to provide that the only method available to extend regulation to new areas of legal activity is to reserve that activity. That may be a convenient mechanism, but at times the Consultation too readily confuses reserving an activity with regulating it.

2.3 It is very important to make clear that the issue of reserved activities is only one aspect of the regulation of legal services, and in our view an increasingly anachronistic one. The Solicitors' profession (from which we come) and the Bar do not regulate the activities of its members by reference to whether activities are reserved. Much of the work undertaken by solicitors-including most high level commercial work- is not reserved. As recognised by the Consultation, the regulation of the solicitors' profession is of members of it insofar as they are acting as solicitors (or may act in a way that reflects discredit on their profession). That is a practical approach, and one that the profession, consumers and the public are all likely to understand. In our view, if members of other professions (such as accountants, licensed conveyancers or will writers), undertake legal work then they should be subject to regulation either by their professions or by the Solicitors Regulatory Authority (SRA). We favour harmonisation of such regulation where possible, provided that is with a view to achieving the right level of consumer protection rather than the lowest common denominator.

2.4 The Consultation makes two important statements as to how it foresees regulation developing:

- Paragraph 95 states: "*This will likely require continued movement towards activity based regulation that is organised around clearly identified risks. The extent to which*

*this would make regulation via professional title obsolete is arguable, however."* As mentioned in our answer to Question 5, we think that this approach has very serious dangers which the Consultation has not recognised.

- Paragraph 124 quotes with approval the statement in the Clementi report that: "*the change in regulatory emphasis proposed …is a shift towards regulation of the economic unit and away from regulation of individual lawyers."* As mentioned in paragraph 2.6 below, we are broadly supportive of this approach provided that regulation of individual lawyers remains part of the equation.

2.5 We note the Chairman's introductory comment that: "*We expect the overall direction to be one of liberalisation. That is already happening with regard to ownership, external investment and control. That liberalisation needs to be underpinned by the right consumer protections and oversight….Whichever direction we take in any circumstance, the objective is simple: the legal services market must work for the consumer and the public, for it is they to whom we all, regulators and professionals alike, are accountable."* We do not disagree with this. We support much of the liberalisation proposed, provided that the consumer protections currently applying to the solicitors' profession are not watered down as a result but are applied to all those undertaking legal work. The consumer protections in our view include: control of entry to the profession, to ensure that those entering are of appropriate character and have appropriate qualifications; upholding proper professional standards (both ethical and in terms of continuing education) of those in the profession; and provision of redress when things go wrong. (The redress is very important, but the other protections should minimise the occasions when it is required.) They should not be watered down to assist some potential ABSs (well-run and respectable ABSs would not wish this as they would wish to uphold proper professional standards) or to remove perceived barriers to price competition (arising from the very regulation that is designed to protect consumers from unscrupulous or incompetent potential providers of legal services), because consumers will inevitably suffer as a result.

2.6 Alternative Business Structures ("ABS") should work satisfactorily if the regulatory structure is appropriate. In our view this will involve a balance between entity-based regulation and profession-based regulation. The move towards entity-based regulation makes sense in this context, provided that this regulation is of the appropriate sort and does not water down the responsibility of individual members of the entity to observe proper professional standards. The responsibility of individuals should be underpinned by profession-based regulation.

## Response to Questions in Consultation Paper

***Question 1***: **What are your views on the three themes that we have put at the core of our vision for the legal services market? If different, what themes do you believe should be at the core of our vision?**

We agree with the three themes set out in paragraph 41 of the Consultation. The important issue however is achieving the correct balance when implementing them. We do not think that the Consultation provides any clear guidance or answers as to that.

***Question 2*: What is your opinion of our view that the purpose of regulation is to ensure appropriate protections and redress are in place and above this there are real competitive and cultural pressures for legal services to deliver the highest possible standards with a range of**

**options for consumers at different prices? If different, what do you consider that the role of regulation should be?**

In our view this question is trying to achieve too much**.** We think that it sets a series of goals for regulation which taken together are unrealistic, particularly when the expected outcome of the Consultation is *"towards liberalisation*". We acccept that regulators should bear in mind the effect on competition of any regulatory requirement. That is a reasonable consideration, (which has to be weighed against the need for consumer protection) when setting the regulatory framework. We fail to see how regulation can be expected to deliver "*a range of options for consumers at different prices*". That is the function of competition. The best that regulation can do in this context is not to impede such competition except to the extent necessary to provide essential consumer protections.

As indicated in our introductory comment, the purposes of regulation should include: the control of entry to the profession, to ensure that those entering are of appropriate character and have appropriate qualifications; upholding proper professional standards (both ethical and in terms of continuing education) of those in the profession; and provision of redress when things go wrong. These are important assurances and protections for consumers, and should not be watered down. Consumers usually consult and instruct lawyers because they require services they cannot undertake themselves. It is difficult for consumers to judge quality precisely because they will only know of failures when things go wrong (which may only emerge after a long time). (The same of course applies to many householders employing say roofers or electricians, to name but a few.)

The Consultation seems to assume that regulation is of primary benefit to uninformed private individuals and of far less benefit to sophisticated consumers of legal services. In our experience that is incorrect. We speak for members who include in-house lawyers instructing outside lawyers. That usually arises because the work is beyond the capacity of the in-house lawyer (probably because the in-house lawyer lacks expertise or manpower capacity or both). The in-house lawyer will usually not know of any potential conflicts of interest faced by the outside lawyer. Equally where the lawyer instructed has a particular expertise, the instructing lawyer cannot be expected to be able to check for accuracy and appropriateness all the advices and actions of the instructed lawyer. The same considerations apply where a solicitor instructs a specialist barrister. Regulation of the instructed lawyer still provides essential protections and reassurances to the consumer in such circumstances even if the consumer is a lawyer.

There is no reason why the maintenance of these assurances and protections should create cosy monopolies. Competition is healthy but can be promoted within the context of upholding proper professional standards and assurances and protections for consumers.

***Question 3:*** **In light of the changing market do you think that specific action may be needed to ensure that more legal services activity can unequivocally be included within the remit of the Legal Ombudsman and, if so, how can this best be achieved?**

Possibly. There is no objection to more legal services activity being included within the remit of the Legal Ombudsman (LeO), provided that this is done on a proper basis. The LeO is an example of regulation imposing a cost on the profession for the benefit of consumers. Inevitably that cost is directly or indirectly passed on to consumers. If consumers of legal services expect to get the benefit of the LeO then they should instruct those who contribute towards the cost of the LeO. If providers of legal services not currently subject to the LeO properly contribute towards the cost of the LeO then we have no objection to the jurisdiction of the LeO being extended to cover them. However there will be problems in achieving this. Conversely we would favour those providers of legal services not subject to the LeO's jurisdiction being required to tell their customers that the LeO is not available to them.

***Question 4:*** **What are your views of our diagnosis of the weakness of the existing system and the problems within it?**

Our introductory comments largely cover this.

***Question 5***: **What do you see as the benefits and downsides of regulating through protected title such as solicitor and barrister?**

The advantages are clarity and ease of enforcement combined with a clear message to consumers.

It is tempting-and at first sight logical- to attempt to recast this regulation by reference to the tasks undertaken rather than by reference to who undertakes it. The introduction of Alternative Business Structures ("ABS") provides an obvious reason for attempting this. This however is fraught with danger if the result is that certain types of work undertaken by individuals or entities are regulated and others not.

That is particularly so because the definition of legal work is fluid and is likely to change in the next few years as much as it has done in the past few years. Definitions of it for regulatory purposes are always likely to trail behind practice, and will inevitably and foreseeably lead to gaps in consumer protection and confusion amongst consumers. The Chairman's Foreword refers to "*emerging risks and new issues*". How is the regulator to anticipate these and provide appropriate regulation in advance of their emergence? That is to ask the impossible. This can be readily observed in practice. A lawyer working for an EU agency regulating pharmaceuticals recently told one of our members that the biggest problem the regulator faces is keeping up with developments in the industry. The legal world is not exempt from such realities of everyday life.

Current regulation of solicitors and barristers does not carry that risk because regulation automatically extends to new areas of legal practice.

***Question 6***: **What are you views on whether there should be a consistent approach to the allocation of title to authorised persons? What are your views on whether the title should be linked directly to the activities that a person is authorised to undertake or linked to the principal approved regulator that authorises them?**

There should be a consistent approach, and the title should be linked to the principal approved regulator that authorises them.

***Question 7***: **What are your views on our proposal that areas should be examined "case- by-case", using will-writing as a live case study, rather than through a general recasting of the boundaries of regulation? If you disagree, what form should a more general approach take?**

Subject to our answer to question 5, we agree with the proposal. A case by case basis is far less likely to result in mistakes than an over- ambitious attempt to "reinvent the wheel".

***Question 8***: **What are you views on our proposed stages for assessing if regulation is needed, and if it is, what regulatory interventions are required?**

We have no useful comment beyond repeating our answers to Questions 5 and 6.

***Question 9***: **What are your views on the implications of our approach for professional privilege?**

Legal professional privilege is a vital ingredient of a free society. It belongs to the client and not the adviser. However it is a unique privilege which could be open to abuse. It is essential that advisers understand its importance and its limitations, and do not abuse it. Any extension of the classes of

adviser to whom a consumer can seek advice to which privilege attaches needs to be treated with caution so as to ensure that those advisers are properly regulated, and that the same rules apply in all cases where legal professional privilege may be claimed. The international context also needs to be borne in mind. This international consideration may be as important (if not more so) to very vulnerable clients (such as those involved in asylum and immigration cases) as to multi-national companies. It could be very damaging to any such clients if they are advised that advice they receive from certain providers of legal services in the UK (other than solicitors and barristers) is subject to legal professional privilege but that privilege is not accepted in other jurisdictions. The issue of whether privilege attaches to the seeking of advice from in-house lawyers illustrates this problem.

***Question 10***: **Do you believe that any of the current reserved legal activities are in need of urgent review? If so, which activities do you think should be reviewed and why?**

We have no doubt that they will all be looked at, although we do not think that any are in urgent need of review. We repeat the point in Introductory paragraph 2.2 that where an activity is reserved it need not be reserved exclusively to the solicitors' profession. What matters is that those undertaking reserved activities should provide the appropriate consumer assurances and protections.

***Question 11*: What are your views on our analysis of the regulatory menu and how it can be used?**

We share the view expressed in the Consultation that the difference between reserved and unreserved activities is somewhat anachronistic. We appreciate that the mechanism for regulating the provision of additional legal services such as will writing may be to make them reserved activities. However we do not think that it follows that the deregulation of non-reserved legal services is a sensible option. Appropriate regulation provides important assurances and protections for clients. There is no easy distinction between sophisticated and unsophisticated clients or between commercial and private clients. Some commercial clients will be unsophisticated or operating on a small scale. Even when one lawyer instructs another-such as where a solicitor instructs a barrister or an in-house solicitor instructs an external lawyer on behalf of his employer- it should not be assumed that they are in a position to make a very sophisticated or well-informed choice. One of the reasons for the instruction my often be that they are outside their own comfort zone or the scope of their resources. They will rely on the professionalism, integrity and competence of the lawyer instructed. They cannot be expected to be aware of issues such as potential conflicts of interest faced by the instructed lawyer. It is fallacious to assume that such clients can be expected to look after themselves and do not require the protections that regulation provides. In a similar vein the SRA recently postulated that compulsory professional indemnity insurance should only be a regulatory requirement for non-commercial clients. We expressed the view that such a proposal would bring on a wholly predictable disaster both for the solicitors' profession and for their clients. We maintain that view and think the same applies by analogy here.

***Question 12:* Do you have any comments on our thoughts on other areas that might be reviewed in the period 2012-15, including proposed additions or deletions, and suggestions on relative priority?**

We agree that will writing should be considered as subject to inclusion as a regulated activity if that is the means of bringing it within the scope of regulation. We do not think that there are any areas for deletion from the scope of regulation (regardless of whether or not they are reserved activities).

***Question 13***: **Do you have any comments on the approach that we have adopted for reviewing the regulation of will- writing, probate and estate administration?**

We agree that will writing should be a reserved activity, without giving a monopoly to solicitors. Will writing has certain unusual characteristics. A will is very seldom intended to benefit the

client for whom it is prepared (mutual wills might be an exception). Quite frequently it will be revoked by a subsequent one so that it never takes effect. If it does take effect, it will often do so many years after it was executed (so that the availability of redress for any errors may well raise problems such as whether say any professional indemnity insurance is available to provide it). The sums involved however will often be substantial and of major significance to the beneficiaries.

There can be important issues arising when drafting a will which go beyond the simple drafting of what appear to be the intended testator's intentions (although some skill may be required to interpret these properly in some circumstances). The will writer must be satisfied that the testator has testamentary capacity, and is acting of his or her own free will. There may be important tax implications of an intended bequest which may not be apparent to someone unfamiliar with tax. Other issues might include the implications of divorce or relationship break-ups for the testator or intended beneficiary. Will writers should at least be able to recognise where a tax or other issue is likely to arise. It is important that they have sufficient training-including continuing education requirements- to enable them to do this. If properly done, there should be at least 2 elements to initial and continuing education: creating, reinforcing and updating expertise in specialist practising areas; and wider education on issues where exact knowledge is less important than being able to recognise where an issue arises on which it may be necessary to research further or consult a colleague or other expert. A will writer who is too narrowly trained would very likely miss tax and other issues, and thus to give an inadequate service.

It is also important that there should be controls to try to ensure that will writers are persons of integrity because there is considerable scope for them to commit fraud or exert undue influence.

These are all very good reasons why will writing should be subject to regulation.

**CWHLS**