RESPONSE TO THE LEGAL SERVICES BOARD CONSULTATION PAPER

"ENHANCING CONSUMER PROTECTION, REDUCING REGULATORY RESTRICTIONS"

THIS RESPONSE HAS BEEN PREPARED ON BEHALF OF TLT LLP

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COMPANY PROFILE

TLT LLP is an award-winning, top 100, commercial law firm. TLT delivers expert legal advice innovatively, efficiently and cost-effectively. The firm has leading strengths in the Financial Services and Leisure sectors and in depth experience in the Retail, Technology & Media and Built Environment sectors. TLT has been commended for innovation in the Financial Services sector by the Financial Times in its Innovative Lawyers Report 2009.

TLT provides specialist expertise in banking, commercial, finance, litigation, employment, IT, real estate and international trade. TLT advises an increasing number of FTSE-listed, national and international businesses including Punch Taverns, Merlin Entertainments, Orange, WHSmith, Barclays Bank and British Waterways Board.

TLT employs approximately 650 people across its offices in Bristol, London and Piraeus, Greece.
TLT is a responsible business and has a programme of corporate social responsibility activities. The firm encourages and supports involvement in the wider community which includes staff volunteering and pro bono legal advice to a variety of charities. TLT is committed to improving the firm as sustainability, and an environmental audit has rated TLT above the Best Practice benchmark for carbon emissions.

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RESPONSE

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?

The Board is under a duty to promote the Regulatory Objectives, of which there are eight. It is difficult to see how the Board can select three of eight principles upon which to base its vision of the Legal Services Market. It is a collective obligation, and the eight threads of the Regulatory Objectives should be integral to all that the Board undertakes. The Legal Services Act in Section 3 states that the Board must act (so far as practicable) in a way which is compatible with its regulatory objectives. By selecting three are the Board satisfied that that the remaining five objectives will be achieved?

The LSB state in the paper that the five remaining objectives taken together define regulation in the public interest. It is helpful for the Board to identify its understanding of public interest. We would disagree however that the interpretation is correct. Protecting and promoting the public interest is a specific objective and should be treated as such. As with the Professional Principles if any two objectives conflict then the one that promotes and protects the public interest should prevail.

Having various front line regulators with differing standards of regulation (a topic we shall return to later in this response) is not necessarily and indeed some may say is definitely not protecting and promoting the public interest. This is due to the high risk of confusion on the part of a consumer of legal who may find that the services offered are subject to regulation by differing regulators. The example that springs to mind is a consumer purchasing probate services from a solicitor, but utilising the services of a conveyancer to sell a property comprising part of the estate. One may be regulated by the SRA the other by Council for Licensed Conveyancers.

Whilst this may achieve the LSB's desire for alternative choices to achieve best price, it also introduce considerable confusion for a consumer. Is the consumer really in a position to make an informed decision as to the standards of regulatory protection that is on offer from differing regulators (and there are differing standards, for example enforcement of undertakings and conflict rules in respect of the SRA and the CML codes).

Q.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 the role of regulation should be?

We agree that the purpose of regulation (along with other purposes) is to ensure that there are appropriate protections and redress in place. However we would submit that regulation has no part in attempting to manipulate markets to control or influence price. The market is well able to do this of its own volition without assistance from the LSB.

The purpose of regulation is to ensure that services are delivered to the consumer in a controlled manner and that the services are (by way of example)

- Timely
- In accordance with the clients expectations
- Free of error
- At a predetermined or identifiable cost
- Meet the pre determined service levels

Further the Regulator needs to ensure where there is a failure, that there is the appropriate redress available to the consumer through a clearly defined, independent and easily identifiable procedure.

It is not the purpose of regulation to control prices. There is already considerable price competition between the providers of legal services (which do not, as the paper later identifies quite correctly) consist simply of solicitors. Deregulation leads to price competition. This will be achieved by the service providers becoming more sophisticated in how they supply legal services (such as through the use of IT, fewer highly qualified and expensive employees such as solicitors, outsourcing, and other market tools available). There is already evidence to show that similar services may be supplied at differing levels of cost and service, depending on the client's expectations. For example some consumers may be happy with an automated service delivery of a property transaction with little or no interaction between supplier and consumer. Other consumers will wish for a more traditional bespoke service from an identifiable supplier at a higher cost.

The advent of highly sophisticated suppliers into the arena duly authorised to provide the relevant services will dictate market price. Regulation needs to be applied to the manner in which the service is delivered and by whom. This is where the focus of a regulator should lie.

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

In terms of regulation the one specific area that must be easy to understand, easy to identify, and easy to do is the ability of a consumer to complain. There will be legal services provided by a wide range of suppliers as a result of deregulation. Whilst there will be a variety of regulators for reserved activities, there will not be regulators necessarily of those providers supplying legal services which do not consist of reserved activities. Specific action will most certainly be needed by the LSB to ensure legal services activity in its entirety comes within the remit of the LeO. The fact that consumers are already purchasing what they perceive to be a legal service with they think redress to LeO, or indeed an regulator, only to be disillusioned of that fact indicates there is a pressing problem that needs to be addressed.

How difficult is the question? Elsewhere in the paper the LSB says that reserving all legal services is unrealistic. The obvious answer however to bring all legal services into the remit of the LeO is to reserve all legal services. That however may run contrary to the better principles of regulation (transparent, targeted, proportionate. consistent, and accountable). However such a move would not necessarily contravene certain of the regulatory objectives, especially

- Promoting and protecting the public interest
- Protecting and promoting the interests of consumers
- Increasing public understanding of the citizens legal rights and duties

This presents a dichotomy.

Any scheme to bring unregulated legal service providers within the LeO scheme would have to be mandatory, and have "enforcement teeth" to back it up. Subscribing voluntarily to LeO regulation is not a "pick and mix exercise", i.e. to advertise membership for marketing purposes when it suits and then leave the scheme when it does not suit, such as to avoid any enforcement process.

This would mean most likely that there would have to be some from of statutory enactment to facilitate this. There would have to be a clear definition of the services that would fall within the LeO jurisdiction within the statutory provision. The class of consumer who may complain would also have to be identified.

By extending the reserved activities remit to all legal services (in principle, there may be some exclusions) the solution would be obtained.

Q.4. What are your views on our diagnosis of the weakness of the current system and the problems within it?

Whilst we have not conducted or reviewed any research on the subject we have no reason to disagree with your statements in paragraph 87. The LSB does need to focus on the individual and small business element of the market. They may be best termed as unsophisticated users of legal services. (It is worth making the point that large businesses may be termed unsophisticated as well, for example if they are based in a foreign jurisdiction and are using legal services in this jurisdiction for the first time).

Our view is that simplicity is paramount. A consumer needs to know who to complain to in relation to service delivery and who to complain to about conduct issues. Public awareness in this respect needs to be raised

However the same legal services delivered, some regulated, some not, by different organisations regulated by different bodies is hardly conducive to this. We agree that consistency is key to effective regulation of legal services. The LSB make the point in

paragraph 90. However it may be said that the regulatory framework that is developing is simply in danger of being too complex for the ordinary consumer.

The SRA code of conduct in the handbook adopts the principles which are referred to as being the bedrock upon which the regulatory framework of solicitors is built. The principles are supported by outcomes. If these are adhered to it is difficult to see why any further levels of regulation for specific areas of work are needed. If they are needed because other regulators are failing to address the delivery of legal services by their regulated bodies in their handbooks/codes then that is a fundamental failing and the LSB should look at the regulatory framework of those bodies.

A point made by us throughout this paper is that there must be consistency in the regulatory framework controlling the delivery of legal services amongst the various regulators. .

Q. 5 What do you see as the benefits and downsides of regulating through the protected title such as solicitor and barrister and:

Q.6 What are your 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?

We have taken the liberty of replying to questions five and six together.

A potentially emotive question and one doubtless designed to stimulate debate! It is interesting that the LSB refer to professional titles whilst the The Law Society has commonly referred to the titles as a brand. One definition of brand is:

"A brand is a product, service, or concept that is publicly distinguished from other products, services, or concepts so that it can be easily communicated and marketed".

That being the case perhaps it is perhaps not right to refer to solicitors as a brand. Rather the brand is the law firm that delivers the solicitors services. We believe this is an important distinction to make. If the term solicitor is a brand then it would follow in our view that this in not something that the LSB may properly interfere with. If the LSB were to dispense with the title solicitor the argument would follow that they would have to tell any new entrant into the Legal services market to drop their brand name as it may effectively prevent other entrants to the market being able to access that market!

However the term solicitor signifies that the title holder is able to provide all reserved activity services. That is an anomaly in the current environment in any event as the "general practitioner" is rapidly becoming something of the past and indeed those who undertake general practice may potentially be classified as high risk (and indeed are by some underwriters). The power in the title attaches to an entity. We are solicitors and we are therefore able to provide reserved activities. It follows from what we have said earlier that reserved activities should be extended, but we agree that they should not be the sole remit of solicitors. It is only right that competition is opened up and that properly trained, qualified, regulated and supervised individuals may provide reserved activities. Some may choose to supply limited reserved activities. That being the case this needs to be identified to the consumer. This may be done by granting the title of "authorised to provide will writing services". The word authorised should convey to the public that the individual in question is properly trained, is regulated to a particular standard, and is also subject to the LeO complaints service. If an organisation is authorised to provide all reserved activities, they should be entitled to describe themselves as Solicitors.

The public would need to be educated that a specific service (such as litigation) will be delivered in a regulated environment and that their choice of provider may have consequences in terms of style or manner of delivery.

Further the development of the title authorised to provide would have other benefits. At TLT, in our commoditised business areas we employ non solicitors who are very good at the job they do. However a clear career path is difficult to identify for such people in a law firm. The advent of the title authorised would be a catalyst for change. For example people joining from school would have a qualification objective to work to and a training and career plan geared to achieve this may be implemented.

People may choose to be authorised in more than one area of reserved activity. The areas that they are authorised in would have to be clearly identified to the public. The areas that would be delivered by authorised persons would also have to be clearly identified to the public.

If such use of titles were adopted then it may follow that over a relatively short period of time the term solicitor may all but disappear in the individual small business market. As competition enters the market from other brands such as the Co Op.

Our view is that the title should be linked to the service provided. It is unlikely that linking the authorisation to a particular regulator would mean much to a consumer.

Q. 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?

We recognise the dilemma that currently confronts the LSB. There is merit to the complete review and overhaul of the current system and the provision of legal services by authorised persons. However action is needed now in respect of will writing by reason of the Panels intervention. We support the extension of reserved activities for the reasons stated earlier on this response. We do not think that the gradual introduction of new reserved activities is beneficial to the public. Neither necessarily is it in the interests of the legal providers. Business plans are being developed taking into account what is a reserved activity and what is not. Areas falling outside of regulation can be supplied far more cheaply and without regulatory burden by suppliers.

There is a real attraction to "stripping out" legal services from the regulatory burden if it is unnecessary saving time and costs. Therefore both supplier and consumer would suffer if the process becomes protracted.

There is of course merit to use one area as a live case study. However if it is possible to identify other areas that need to be brought within the ambit of a reserved activity at an early date then the opportunity to do so is not lost.

Q.8.What are your views on our proposed stages for assessing if regulation is needed, and if it I, what regulatory interventions are required?

We have no particular comment on the proposed stages. Whether intentional or not they loosely follow the basic principle of risk management, identify analyse, implement and monitor. The LSB should take into account all their regulatory objectives and also take into account the professional principles and S3 (3) obligations.

Q.9 What are your views on the implications of our approach fro professional privilege?

We have no comment on this question

Q.10 Do you believe any of the current reserved legal activities are in need of urgent review

We are of the opinion that reserved activities need to be extended generally in line with what we have said previously**.** One area that we are aware that there is focus on is the administration of estates and conveyancing. Conveyancing is we understand soon to be the subject of a major review by the SRA and the LSB. This is an area where there has been regulatory failure, albeit the clients who have suffered loss are in the main sophisticated users of legal services. There can be no doubt that fraud, let alone other regulatory breaches, have been widespread amongst solicitors. This failure could well be used as a case study by the LSB on what can, and does, go wrong.

This emphasises the point that whoever delivers the legal service it is of paramount importance that there is a strong effective regulator able to react quickly and intervene where there is regulatory breach. This we believe again reinforces our point that numerous regulators would only bring confusion to the regulatory market, and would potentially hamper the ability to react in a uniform manner at an early date.

The LSB is in danger of finding itself potentially having to shepherd a number of diverse regulators to act in a uniform manner. Whilst standing by our view that there should be a review of all legal service activities and a general extension of what constitutes reserved activities, we feel that subject to a general review will writing should remain the sole activity to be reviewed at this time.

Q.11 What are your views on our analysis of the regulatory menu and how it may be used.

We have a fundamental problem grasping the concept that to have multiple regulators, regulating the same services in different ways, with some of the services allowing recourse to LeO and others not, can be in the public interest.

It is accepted that if the reserved activities are extended then existing regulators will need to apply to be licensed to regulate these areas. It is difficult to see how such procedures could be viewed as proportionate and consistent. Consistency will always difficult to achieve where several regulators are involved. The chances for confusion on the part of the consumer (and indeed the supplier) are legion.

The paper identifies that there are several routes to becoming an authorised person. As identified we would envisage persons being authorised to undertake specific areas of work, such as conveyancing or litigation. If they chose to be authorised in more than one area there would be no bar to this. The regulators reach would extend to that authorised person in respect of the work that they do. The LSB promotes Outcome Focused Regulation; we support the LSB in this view. The authorised person/entity would be subject to the principles and outcomes of the code in so far as they relate to the authorised service they provide. Your example is a good one; the SRA could regulate authorised persons supplying legal services without providing claim to the title of solicitor. The key point is that the person is authorised.

Returning to the main point of the question, the regulatory tool kit and the preventative and remedial tools that are available.

Our view is that good regulation should be preventative rather than reactive. The paper refers to situations where remedial measures should be favoured. The emphasis should always be on preventing the poor outcome in the first place and it is to this that resources should be directed. Remedial measures are of course necessary, but as a last resort. A client would we are sure prefer a good job well done, than the comfort of "if it goes wrong then you will be compensated."

We agree strongly with what the LSB say in paragraph 132. Outcome Focussed Regulation has allowed us to be more flexible in our application of Outcomes and indicative behaviours and to focus our energies and resources on managing those areas that present the most risk to our firm's particular profile.

Q.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 have no comment on the reviews**.**

Q.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 do not propose to answer this question as there will be responses from interested parties who operate in these areas and have greater expertise.