RESPONSE OF CITY OF WESTMINSTER & HOLBORN LAW SOCIETY TO CONSULTATION PAPER PUBLISHED BY LEGAL SERVICES BOARD ON REGULATORY INDEPENDENCE

A. Introduction

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 as well as incorporating a number of highly specialist "niche practices" located in London's West End. Our membership includes those who practice at all levels of the profession, those who regularly represent solicitors in SRA investigations and members of the Solicitors Disciplinary Tribunal.

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 Matters Sub-Committee, concentrates on matters such as training of solicitors, their regulation, etc.

While the response below was a task initially undertaken by the Professional Matters Sub-Committee, the paper has been approved by the full Committee as being representative of their views.

B. General Comments

1. CWHLS welcomes the opportunity to comment on the LSB's consultation paper "REGULATORY INDEPENDENCE". It fully accepts the need for regulation to be ring fenced from any representative interests (paragraph 2.4 on page 14 of LSB's Consultation Paper). Where we part company with LSB's proposals is that we do not believe that this aim or objective requires that "any reality and perception of regulatory decisions being compromised or led by representational interest – whether directly or indirectly – is completely removed", as suggested in paragraph 27. Sir David Clementi's objection was to regulators performing a representational role, a view with which we totally concur. We should note that there is a danger in relying too much on "perception" to drive regulatory change. Whilst it is undeniable that the public should have complete confidence in the branches of the legal profession, it is the fact of

independence, both in the face of professional lobbying and with respect to political pressures which is of paramount importance.

2. Quite apart from the pejorative narrative of words used – do they exclude "influence"? - we do not believe that such "removal" is even desirable. If influence were to be excluded, there would be a strong argument for disallowing the appointment of any lawyers to the Board of the Regulator. Indeed, it could be argued on that basis that legal professionals (known in many English-speaking countries as "lawyers") should not be consulted on proposed new rules, etc. In our view, their involvement is essential if high standards are to be maintained, the profession's core values are to be retained and its reputation is to be sustained. Existing members of the profession are, after all, stakeholders in all these aspects and who better understand the needs and requirements of "customers" (often known to lawyers as "clients") than those providing them with legal services? Furthermore, they are better able to appreciate the practicalities of regulatory requirements, their implementation and enforcement. Indeed their understanding of the law and the rule of law is likely to lead to better draftsmanship of any new rules etc, which will be prone to challenge by aggrieved lawyers, who believe that they have been unfairly victimised.

3. We note with concern the Board's avowed intent to require a lay majority on the board/equivalent of the regulatory arm as declared in bullet point 3 of paragraph 3 on page 6. This is not a requirement of the LSA or of Sir David Clementi's Review, when it would have been very easy to legislate for such a requirement. We recognise the need to avoid the dominance of any professional self-interest, whether real or perceived. That said, we consider it equally important to emphasise that professional activity must continue to be carried out, and be seen to be carried out, independently and in the overarching interests of justice, free from improper influence by political and sectional interests. We are conscious that in many foreign jurisdictions, particularly in those countries whose governments are undemocratic, "licensing" is in the hands of Government agencies, notably the Ministry of Justice, all too often viewed by the indigenous population as ministries of "injustice". Yet, little is said about this.

4. There is a danger in requiring regulators to concentrate on the "right of consumers" when there are far broader issues to be considered. Solicitors in England and Wales are also Officers of the Court and owe certain duties to the Court, which on occasion can override their obligations to their clients. It is very important that such obligations are understood by those seeking to regulate the profession. They are best understood by practising solicitors. There are also obligations imposed on members of the profession to act contrary to the interests of their clients, for example, by reporting unproved suspicions of money-laundering and by concealing from the clients the fact

that they have done so. Again, the balance to be maintained between public and private interest is best understood by lawyers in practice.

a. Lay members are likely to be primarily concerned with issues affecting consumers. By nature, they are less likely to be aware of overriding duties to Courts and the protection of the rule of law. As lawyers are all too well aware, it is not always appropriate to follow client's instructions where these are unlawful and to provide for a lay majority is likely to result in the promulgation of rules which favour the consumer interest over the wider constitutional issues and the public interest.

b. Legal practitioners appointed to regulatory boards will be required to maintain the professional standards they promulgate. Not only will they have a greater practical understanding of the necessity and desirability of proposed rules, they will be professionally accountable for their actions. Lay members will have no such accountability and will be free to pursue their own sectional, representative or political interests in promulgating and enforcing rules.

c. Regulation will only be effective if it is carried out proportionately and in accordance with the law, both national and international. Laws derived in Europe are having an increasing impact on our legal system generally and there must be a sensible and open dialogue between our lawyers and our colleagues abroad, particularly in Europe. There is a strong feeling amongst foreign lawyers that the legal profession must remain profession led in order to fulfil the primary role in safeguarding the rule of law and access to justice. We are at risk of compromising our credibility in the international arena if this aspect is not carefully considered.

d. Lawyers will be better placed to comprehend the relationship between national and supra national legal provisions affecting regulation, the status of regulation as a *sui generis* jurisdiction and the likelihood of successful challenge to proposed rules.

e. Finally on this point, it should be noted that the regulator's role encompasses not only promulgation and enforcement of rules but also the setting of standards for entry into the profession. It is difficult to comprehend how a board comprising a majority of lay members could have a proper appreciation of the practical considerations involved in practising as a lawyer and therefore what standards are appropriate to ensure that the integrity and core values of the professions are not put at risk.

5. We agree the proposals for the appointment of members of the regulatory boards, which may, of course, provide adequate protection against political intervention and encroachment of sectional interests– and, we could say, undue professional pressures. Little, however, is said about the requisite qualifications or experience required, nor is there any indication of what, if any, training would be given to members of the Board. One of the reasons we believe that the Board/Committee should have a majority of lawyers is that they bring the relevant expertise to the table, such as a proper understanding of professional core values and requisite standards.

6. The risk of political interference has become all too apparent over the last decade. Issues in respect of Miners' compensation cases, for example, have been subjected to unprecedented external pressure. Of more general and immediate concern is the political impetus driving matters relating to legal aid and the stringent and draconian measures which have been brought in under counter-terror provisions, not to mention the very deep concerns which must be raised about the FSA and parliamentary regulation given recent events.

7. It cannot be said that political and sectional interference in the regulation and conduct of the legal professions is remote against a background of continuing erosion of civil liberties and very real concerns over access to affordable justice as reflected in the consultation paper at paragraph 4.16, we do not believe that, as a profession, we can afford to drop our guard especially at this turbulent time. In addition to resisting the pressures and blandishments of pressure groups, we believe that political independence is of particular importance, especially when the continual extension of Government powers increases the need for lawyers to champion individual rights, often in conflict with Government agencies.

8. As noted above, the continuing erosion of professional self-regulation is causing concern amongst our colleagues in other jurisdictions. They are increasingly expressing misgivings about allowing English solicitors to practise in their jurisdictions. There is an increasing danger of conflicting deontology between different law societies and bars or regulators. That is likely to impact on foreign lawyers practising here and, indeed, damage the competitiveness of the legal professions on a global and, in particular, European basis rather than promote competition as intended by Sir David Clementi.

C. Specific Responses

9. Turning now to the specific questions raised in the paper our comments are as follows:-

Q1 While we agree the LSB proposals for ring-fencing an approved regulator, and we accept that such a regulator should be free from interference in setting its business objectives, we do believe that there may be a role for LSB to receive submissions where the representative body believes the objectives go too far or its strategy appears misguided or disproportionate. It would appear sensible for the LSB to have procedures in place to assist in the resolution of genuine disputes between the regulator and the representatives of those it regulates and to ensure that representative arms will not need to resort to litigation or judicial review proceedings in the unlikely event that regulation is considered to be inappropriate or unlawful. It need hardly be said that swift resolution of any such disputes through an appropriate administrative procedure is preferable to judicial involvement.

Q2 We agree your proposals relating to regulatory Board appointees set out in paragraph 3.15.

Q3 However, as is made clear above, we believe that it would be wrong to require chairs of regulatory boards to be "non-lawyers".

Q4 We believe that it is more appropriate for a response on this to be made by The Law Society of England and Wales insofar as they are more likely to be involved in shared resources.

Q5 We agree that care has to be taken for guidance not to be too prescriptive insofar as they then become rules themselves, indeed, this is wholly consistent with Sir David Clementi's criticism of unnecessarily prescriptive regulation.

Q6 We take no issue with the proposals relating to the oversight role for representative controlled approved regulators, and note that in the event of a dispute between the regulatory arm and its overseer the LSB may need to be involved. It seems to us that the most likely differences will arise from whether the budget requirements of the regulatory arm exceed the expectations of the overseeing representative body and it might be desirable for some guidance to be given on that aspect.

Q7 We do not agree with the "Dual" aspect of the self-certification (and have not found any supporting rationalisation in the consultation) but we otherwise agree with paragraphs 3.40 to 3.44. Parliament has made the approved regulator responsible for the exercise of its regulatory functions in compliance with the LSA generally and the internal governance rules in particular. It is the approved regulator that is answerable to the LSB for compliance and the "dual" self-certification adds nothing to

approved regulator self-certification. It could potentially result in important management information by-passing the approved regulator.

There are models in industry for compliance programmes that normally involve regular training (with evidence of attendance), a personal certification in writing to senior management, and a confidential hotline for whistleblowers. It should not be too difficult to establish an appropriate programme.

These two paragraphs answer questions 7 & 8.

Q8 See above.

Q9 We agree that the mandatory permitted purposes should be widened to include explicit provision for regulatory objective (g). We believe that the regulator should be able to undertake activities such as increasing public understanding and indeed the promotion of human rights both here and abroad.

Q10 Support for pro bono work generally should be included in the section 51 rules.

Q11 We agree the LSB proposal to seek evidence that links the regulatory objectives in the Act, but we would go further in saying that care needs to be taken that the different legal professionals are practising on a level playing field. For example, solicitors are required to contribute to a compensation fund and it would be interesting to know what proposals the LSB have in mind for alternative business structures.

Q12 No comment.

Q13 No comment.

Q14 Regulators must obviously consult with interested parties and stakeholders. However the range and extent of consultation should remain a matter of judgement for the regulator. The LSB should not make any detailed rules restricting the scope of that judgement, unless and until experience should show that such rules would be really necessary or helpful. We see no reason to distinguish between those with elected representative councils or boards and those which have no such elected body.

Q15 It is difficult to comment until we see how these matters will work in practice.

Q16 No comment.

Q17 The draft proposed rules are a very worthy first attempt but some, particularly those relating to independent governance arrangements, are vague and/or ambiguous. Indeed, to state that "independence governance arrangements must ensure that the independent regulatory authority has the power to do anything calculated to facilitate or incidental or conducive to the carrying out of any of its functions" (Rule 3 (3) (b)) is much too sweeping.

Q18 No comment

Q19 Review of regulation of lawyers in overseas jurisdictions might prove helpful in putting LSB proposals in perspective. We attach a copy of an extract from a speech made in May 2009 by the President of Federation of European Bars at their AGM highlighting some concerns expressed about the future of regulation.

City of Westminster & Holborn Law Society

26 June 2009

The Federation needs the Bars, just as Europe needs Lawyers

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The congress which has been held at BRUGES was remarkable both for the quality of work done and the friendly social exchanges, concluding with the traditional election for the presidency.

I have had both the honour and the pleasure to be elected President of the Federation by the Chairmen of the different Bars or their representatives.

There is no shortage of work which needs to be done.

Europe is developing a series of major projects which are of direct concern to us. In the first place I would like to mention the deregulation of the legal profession, which is intended to open it to competition but lacks consideration for the professional code of ethics and the safeguarding of the client's interests. I must also mention proposals for an e-justice strategy, work concerning the publication of a consumer directive to which the legal profession must comply and discussions about the creation of an "European notarial act" which will be valid in every member state of the Union, benefitting the legal profession .

On all of these matters, Lawyers must be heard. They must be consulted, give their opinion and convince the people they are addressing of its pertinence.

We intend to rise to this challenge. A real mobilisation is necessary in the committees of the European Bars Federation.

We ourselves must succeed in our projects and think over the harmonisation of the rules about the professional code of ethics, starting with the rules about conflict of interest.

We should also reflect about the elaboration of the Stockholm programme; the action programme for the years 2010 to 2014, on which the Commission is now engaged. Officially it is a question of developing an area of liberty, security and justice. However, in this programme the police are visible everywhere and justice is nowhere to be seen.

The Federation, that is to say all European Bars, should make their contribution to improving this programme taking into account the interests of every person in the relevant jurisdictions, of their advisors and their attorneys.

I am inviting our Member Bars to participate in this work. It is useful to deepen and broaden reflection and discussion within the Federation so that as a result the point of view of the Presidents of national and local Bar Associations shall be clearly taken into account by European Institutions.

Europe is a day to day reality. By having the protagonists of European law and justice collaborate closely we can manage to meet the challenge of a real Union, taking the daily life of our citizens into account.

Michel BENICHOU.