

Alternative business structures: appeal arrangements

Consultation paper on arrangements for appeals against decisions of licensing authorities (including a draft order to be made under section 80 of the Legal Services Act 2007)

This consultation will close on **Friday 12 November 2010**.

Contents

Executive Summary	1
Background	3
Our proposal	4
Our proposed recommendation to the Lord Chancellor	4
The operation of the appeal mechanism.....	4
Proposed draft order to be made under section 80 of the Act	12
Operational issues	13
Draft ABS Appeal Rules	14
Draft Impact Assessment.....	15
How to Respond.....	16
Annex A: A list of questions raised in this document.....	17
Annex B: Proposed recommendation.....	19
Annex C: List of licensing authority decisions appealable under the Legal Services Act 2007.....	21
Annex D: Draft Supplementary Guidance to Licensing Authorities	22
Annex E: Draft statutory instrument	24
Annex F: Draft ABS Appeal Rules.....	30
Annex G: Draft Impact Assessment	32

Executive Summary

1. The Legal Services Act 2007 (“the Act”) sets out a new regulatory framework for the operation of regulators and the ownership of legal service providers. It gives the LSB a new power to recommend to the Lord Chancellor the designation of “licensing authorities” (LAs). These are approved regulators with the power to license a particular type of legal service provider, conventionally known as “alternative business structures” (ABS). The LAs will regulate ABS according to their licensing rules, the requirements for which are set out in the Act.
2. We anticipate that approved regulators will be able to apply to the LSB for designation as an LA from October 2010, and that ABS will be licensed from 6 October 2011.
3. An appeals mechanism is required under the Act to enable a specified body to hear appeals against some decisions made by LAs. The Act gives the Lord Chancellor an order making power (to be exercised on the recommendation of the LSB) to make provision about the body that will hear these appeals.
4. We have previously consulted on our proposal that the appeals should be heard by the General Regulatory Chamber of the First-tier Tribunal (“the GRC”). The proposal received broad support from consultees, and this consultation therefore sets out more detailed proposals.
5. We are seeking comments on a number of draft documents:
 - our proposed recommendation to the Lord Chancellor
 - our proposed draft order to be made under s.80 of the Act
 - draft supplementary guidance to approved regulators on the content of licensing rules in relation to appeals, to be issued under s.162 of the Act
 - draft ABS appeals rules
 - a draft Impact Assessment.
6. In addition, we are seeking views on a number of detailed issues about how the appeals mechanism will work. We have set out our proposals about the scope of the appeals mechanism, including the types of decisions that should be appealable under licensing rules, the grounds of appeal in relation to those decisions and the powers of the Tribunal in relation to the appeals. We propose that decisions should be appealable under licensing rules if they could amount to the determination of someone’s civil rights – e.g. affect their right to practise their profession. We have suggested that the grounds of appeal in relation to such decisions should not be limited, and that the Tribunal should have a wide range of powers to quash the decision, modify it or make a new one.

7. We have made proposals about the membership and composition of the panels that will hear the appeals (these matters are within the discretion of the GRC President). We have also suggested that the existing rules of procedure of the GRC are suitable in relation to these appeals without further amendment.
8. We propose that the Tribunal should not have a general power to award costs against either party, except in the limited circumstances where the GRC already has this power (i.e. where there is unreasonable behaviour or wasted costs). We also propose that the onward appeal routes to the High Court provided in the Act should be removed, and that such onward appeals should instead go to the Upper Tribunal.
9. Finally we set out the estimated costs of the appeal arrangements and propose that these should be recovered from licensed bodies as part of the licence fee.
10. A summary of all the questions we are asking is at Annex A. We look forward to receiving your consultation response.

Background

11. The Legal Services Act 2007 (“the Act”) sets out a new regulatory framework for the operation of regulators and the ownership of legal service providers. It gives the LSB a new power to recommend to the Lord Chancellor the designation of “licensing authorities” (LAs). These are approved regulators with the power to license a particular type of legal service provider, conventionally known as “alternative business structures” (ABS), which may have owners and managers who are not “authorised persons” for the purpose of carrying on reserved legal activities. In some circumstances the LSB itself can act as a licensing authority.¹ We anticipate that approved regulators will be able to apply to the LSB for designation as an LA from October 2010, and that ABS will be licensed from 6 October 2011.
12. An appeals mechanism is required to hear appeals against some decisions made by LAs. The Board must not grant an application (and recommend to the Lord Chancellor that an approved regulator is designated as a licensing authority) unless it is satisfied that there would be a body with the power to hear and determine appeals.²
13. Section 80 of the Act gives the Lord Chancellor an order making power (to be exercised on the recommendation of the LSB) to either: establish a new body to hear appeals against decisions appealable under part 5 of the Act or licensing rules; or make provision in relation to an existing body for the purpose of enabling it to hear such appeals.
14. We consulted on our proposal for a single appellate body to hear all ABS-related appeals in the *Approaches to Licensing* consultation³ in November 2009. We suggested that the appeals should be heard by the General Regulatory Chamber of the First-tier Tribunal (“the GRC”). The paper set out the rationale for this approach, and an analysis of the options.
15. The proposal received broad support from consultees, as reflected in our response to the consultation published in March 2010.⁴ The LSB has since been developing the proposals for implementation in more detail with the Tribunals Service and approved regulators.
16. This paper sets out our detailed proposals, including:

¹ Section 73(1)(a) and schedule 12 of the Act

² Schedule 10, para 11(2)(b) of the Act

³ Available at <http://www.legalservicesboard.org.uk> > What we do > Closed consultations

⁴ Available at <http://www.legalservicesboard.org.uk> > What we do > Closed consultations

- our proposed recommendation to the Lord Chancellor under s.80 of the Act
- the proposed draft order to be made by the Lord Chancellor under s.80 (“the Order”)
- draft guidance to approved regulators on the content of licensing rules in relation to appeals, to be issued under s.162 of the Act
- draft ABS appeals rules
- a draft Impact Assessment.

Our proposal

Our proposed recommendation to the Lord Chancellor

17. We propose to make a recommendation to the Lord Chancellor under section 80 of the Act that appeals against decisions of licensing authorities should be to the First-tier Tribunal. Within the Tribunal, it is proposed that the appeals will be allocated to the General Regulatory Chamber (“GRC”). A draft of the proposed recommendation is attached at Annex B.

Question 1

Do you have any comments on the draft proposed recommendation to the Lord Chancellor at Annex B?

The operation of the appeal mechanism

18. Following detailed discussions with the Tribunals Service, we have developed the following proposals about how the appeal mechanism will operate.

Scope

19. In accordance with the Act and its licensing rules, a licensing authority will be empowered to make a number of decisions in relation to licensable bodies. For example, it will determine an application for a licence, it may grant a licence subject to conditions, impose a financial penalty on a licensed body, disqualify individuals from holding certain posts within the licensed body and revoke the licensed body’s licence.

20. The appeals will all be against decisions of LAs. Appellants may be licensed bodies, licensable bodies applying for a licence, investors in such bodies, or individuals working in an ABS.

21. If a LA’s designation is cancelled by order under s.76 of the Act, appealable decisions taken by the licensing authority prior to the cancellation of its designation will continue to be appealable (provided an application is made to the Tribunal within the prescribed period).

Appealable decisions

22. The Act provides an explicit right of appeal in relation to some decisions of licensing authorities – for example in relation to the imposition of a financial penalty (s.96) and in relation to decisions about ownership under Schedule 13. A list of such decisions is attached at Annex C.

23. The Act also allows for a right of appeal against other decisions to be included in the licensing rules made by licensing authorities. There are some decisions where we consider it is desirable to provide an appeal in the licensing authority's rules to ensure a fair and proper determination of an appellant's civil rights. Article 6(1) of the European Convention on Human Rights requires that "in the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law", and case law has held that "civil rights" in this context includes the right to practice one's profession.⁵ We consider that the following decisions of licensing authorities should be appealable as they may affect a person's civil rights (the relevant sections of the Act are shown in brackets):

- refusal of application for a licence (s.84)
- imposition of conditions on a licence (s.85)
- modification of licence (s.86)
- refusal to designate as Head of Legal Practice, or withdrawal of approval (Schedule 11, paragraph 12)
- refusal to designate as Head of Finance and Administration, or withdrawal of approval (Schedule 11, paragraph 14)
- disqualification from some or all roles within a licensed body (s.99)
- suspension and revocation of licence (s.101)
- power to modify application of licensing rules etc to special bodies (ss.106 and 107).

24. The licensing rules will also need to make clear who can appeal. This should be limited to those who are the subject of the decision – for example the licensed body, licensable body, special body or individual (as appropriate). We do not consider it appropriate for those who are indirectly affected by a decision (for example a competing business) to have a right to appeal to the Tribunal. Judicial Review of licensing authority decisions will be available and could be used by a person indirectly affected by a decision of a licensing authority to challenge the decision.

25. Licensing rules will need to contain provision for internal review of some decisions made by licensing authorities. In some cases this is required by the

⁵ See for example *Bakker v Austria* (2004) 39 EHRR 548

Act⁶ and we have previously set out in our *Guidance to licensing authorities on the content of licensing rules*⁷ our expectation that licensing authorities should have a published, comprehensive and quick internal review system providing for a review to be conducted by a person or persons who have not been involved in making the original decision. We propose that where decisions are appealable under licensing rules (as opposed to under the Act), the rules should provide that appellants must first seek an internal review. Where there is an explicit right of appeal under the Act the licensing rules may provide an optional right to seek internal review, but this cannot be mandatory as the rules cannot prevent appellants exercising their right under the Act to appeal to the relevant appellate body. The requirement for internal review should minimise the number of appeals to the Tribunal and ensure that some matters are resolved more quickly and cheaply through the internal review mechanism.

26. We propose to issue supplementary guidance to approved regulators under s.162 of the Act about the types of decisions that we consider ought to be appealable under licensing rules and the requirement that appellants should first seek an internal review. Draft supplementary guidance to licensing authorities is attached at Annex D.
27. The list of appealable decisions in the draft guidance is not exhaustive, and approved regulators will need to consider whether their proposed licensing rules provide appropriate rights of appeal before submitting them to the Board for approval. In some cases it may also be appropriate to include a right of internal review under the rules, but not a right of appeal to the appellate body.

Question 2

Do you agree with the list of decisions which should be appealable to an appellate body and that this list should be based on decisions that affect a person's civil rights? Do you agree that licensing rules should require that appellants seek internal review before an appeal can be made to the Tribunal? Do you have any comments on the draft supplementary guidance at Annex D?

Grounds of appeal

28. The grounds of appeal in relation to the imposition of a financial penalty are set out in the Act (s.96) and rely on alleged unreasonableness. In relation to

⁶ Schedule 11 paragraphs 3, 12 and 14

⁷ Available at <http://www.legalservicesboard.org.uk> > What we do > Closed consultations

the Schedule 13 rights of appeal, no specific grounds of appeal are specified so appellants will have a general right to appeal against the relevant appealable decision.

29. For matters appealable under the licensing rules, where the grounds of appeal are not explicit in the Act, the grounds for appeal will need to be specified in the Order. Since decisions appealable under licensing rules are likely to be decisions which determine a person's civil rights, we consider that they merit a substantive re-hearing rather than simply a procedural review of the original decision. Therefore we do not propose to include specific, limited grounds of appeal (for example a ground that the decision is unreasonable). Rather, we propose that the right of appeal should be available whenever an individual or ABS entity is aggrieved by a decision of the licensing authority that is appealable under the licensing rules.

Question 3

Do you agree that there should be a general right of appeal available whenever an individual or ABS entity is aggrieved by a decision of a licensing authority that is appealable under the relevant licensing rules?

Powers of the Tribunal

30. The powers of the appellate body in relation to explicit rights of appeal are specified in the Act. In relation to financial penalties the powers in s.96 are to:
- quash the penalty
 - substitute a penalty of a lesser amount
 - adjust the timescales for payment.
31. In relation to the decisions appealable under Schedule 13 to the Act, the appellate body has specific powers in relation to each appealable decision – including, for example, the power to:
- order the licensing authority to approve an investor's holding of a notified or notifiable interest (with or without conditions)
 - remit the matter to the licensing authority
 - quash or modify conditions (where the appealable decision is the imposition of a condition).
32. However, the powers of the Tribunal in relation to matters appealable under the licensing rules are not specified in the Act and will need to be specified in the Order. In considering appropriate powers for the Tribunal, we have taken account of the fact that the appealable decisions are likely to be ones which determine a person's civil rights and therefore merit a substantive re-hearing.

We have also considered the powers available to the GRC in other jurisdictions (for example in s.144 of the Gambling Act 2005 in relation to appeals against decisions of the Gambling Commission, and in s.13 of the Compensation Act 2006 in relation to appeals against decisions of the Claims Management Regulator). If there is to be a substantive re-hearing, it follows that the Tribunal should have broad powers to reach any decision which the licensing authority itself could have made. We therefore propose that the Tribunal's powers in relation to such matters should be to:

- affirm the licensing authority's decision in whole or part
- quash the licensing authority's decision in whole or part
- substitute the whole or part of a licensing authority's decision with a new decision of a kind the licensing authority could have made
- remit the matter to the licensing authority (generally, or for determination in accordance with a finding made or direction given by the Tribunal).

Question 4

Do you agree with the proposed powers of the Tribunal in relation to matters appealable under the licensing rules?

Membership & composition of panels

33. The Tribunals, Courts and Enforcement Act 2007 established a unified structure for Tribunals, combining a large number of previously separate bodies. There are now two tiers – the First-tier Tribunal and the Upper Tribunal – with each tier split into chambers. The General Regulatory Chamber encompasses a number of jurisdictions including immigration services, gambling, and claims management services.
34. The deployment of members of the First-tier Tribunal to hear appeals within the GRC is entirely within the discretion of the President of the GRC. Usually the pool of members from which a panel is selected to hear a case is based on the historical membership of the original tribunal before it was transferred into the unified structure. The Tribunals Service has proposed that ABS appeals will be heard by members drawn from the immigration services panel and other panels, to ensure members have appropriate and relevant expertise in dealing with appeals about similar regulatory matters. (The immigration services panel hears appeals against decisions by the Office of the Immigration Services Commissioner in relation to immigration advisers – for example in relation to their fitness to practise and in relation to disciplinary matters - under the regulatory framework established by the Immigration and Asylum Act 1999.)

35. The GRC President may consider the expertise required bearing in mind the nature of ABS appeals, and decide whether other members of the First-tier Tribunal should be “cross-ticketed” to supplement the existing membership of the immigration services panel. Members of the gambling and claims management services jurisdictions may also have relevant experience (the latter has the same membership as the financial services jurisdiction, which deals with appeals against decisions of the Financial Services Authority). It is not proposed at this stage to appoint additional members to the First-tier Tribunal for the purposes of dealing with appeals against LA decisions, as there is likely to be sufficient expertise within the existing Tribunal membership.
36. The Tribunals Service will also consider with the Tribunals judiciary an appropriate name for the new jurisdiction to reflect the expanded role of the panel.
37. It is envisaged that appeals will be heard by a panel of two members – a legally qualified chairperson and a lay member, although the composition of panels is a matter for the Senior President of Tribunals. We consider that this would provide an appropriate balance of skills and be cost-efficient.

Question 5

Do you have any comments on the proposed membership of the pool from which panels will be selected, or on the proposed composition of panels?

Rules of procedure

38. The GRC has one combined set of procedural rules which cover proceedings in all jurisdictions assigned to the chamber. These are set out in the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976 as amended by SI 2010/43).⁸ The Rules are made by the Tribunals Procedure Committee (TPC).
39. Having analysed the rules, we consider that they are suitable for the purposes of hearing appeals against the decisions of licensing authorities, and we do not propose to make any recommendations about their amendment to the TPC.

⁸ <http://www.tribunals.gov.uk/Tribunals/Documents/Rules/GRCRulesConsolidated.pdf>

40. It is important to note that the Tribunal will consider appeals in the context of the legislative framework under the Legal Services Act 2007, including the criteria used by the licensing authority to make a decision (for example about an application for a licence). Consistency with the regulatory objectives under the Act will be part of this consideration.

41. When answering the consultation questions regarding the GRC Rules, please keep in mind that the Rules should be simple and easy to follow, and should not include provisions that contain unnecessary requirements or repeat requirements that are contained elsewhere.

Question 6

Do the existing GRC Rules require any particular additions in order to accommodate ABS appeals? Please be specific about what is required and why it is needed.

Question 7

Are there any of the current GRC Rules that need amending in order to accommodate ABS appeals? Please be specific about why the amendment is necessary.

Award of costs incurred by parties

42. Some stakeholders have suggested that the Tribunal should have a power to award costs against the losing party, in the same way as the Solicitors Disciplinary Tribunal.

43. There is provision in the GRC rules (rule 10) for the Tribunal to award costs where a party has acted unreasonably in bringing, defending or conducting the proceedings, or where there are wasted costs. These provisions will be effective in relation to ABS appeals.

44. Beyond this, the general policy within the unified Tribunal system is that each party should bear their own costs – this is one of the characteristics that distinguishes tribunals from courts and is designed to ensure access to justice in relation to administrative decisions by reducing the potential legal costs. The Tribunals Service would need considerable persuasion to depart from this rule. If costs could be recovered, it must be borne in mind that licensing authorities would have to pay the appellant's costs if an appeal was successful.

Question 8

Do you agree that the First-tier Tribunal should not have any power to award costs in proceedings relating to ABS appeals, beyond the existing powers of the GRC in relation to unreasonable behaviour or wasted costs?

Onward appeal routes

45. Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides a general right of appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal. The Upper Tribunal is a superior court of record whose decisions bind the tribunals and public authorities below.
46. Where the Legal Services Act 2007 provides an explicit right of appeal to the relevant appellate body against a decision of the licensing authority (see Annex C), there is also a right of onward appeal on a point of law to the High Court.
47. This right of appeal to the High Court would duplicate the onward appeal right under the existing Tribunals framework, where onward appeals go to the Upper Tribunal and subsequently the Court of Appeal. We consider that an appeal to the Upper Tribunal is likely to be quicker and cheaper for the parties than an onward appeal to the High Court, and therefore represents a more proportionate approach. For these reasons, and to ensure consistency with the broader Tribunals framework, we propose that the Order amends the Act to remove the right of appeal to the High Court on a point of law arising from a decision of the relevant appellate body. (Amendments to the Act are provided for by section 80(4)(b) of the Act.)
48. The Order will also need to make appropriate amendments to the Act to ensure the right of appeal under part 1 of the Tribunals, Courts and Enforcement Act 2007 can be exercised in relation to the appeal rights in s.96 and Schedule 13.
49. The amendments to the Act could be drafted in a way that excludes the possibility of appeals against decisions of licensing authorities being heard by any body other than the First-tier Tribunal. We made the case for a single, consistent appeals mechanism for ABS appeals in our *Approaches to Licensing* consultation. However we did not at that stage envisage excluding the possibility of a licensing authority proposing an alternative arrangement if it could make a strong and compelling argument for doing so.
50. The Order must be made with the consent of the body from whose decisions the appeals are to be made; at the moment there are only three such bodies (the LSB, the SRA and the CLC). So the Order has been drafted so that the Act is amended to provide a right of onward appeal to the Upper Tribunal for those bodies named in the Order.

51. We still consider that it would be desirable for there to be one appellate body (the Tribunal) for all ABS appeals and that there should only be one onward appeal route (to the Upper Tribunal). This would avoid creating two bodies of case law that might have inconsistent outcomes for appellants and may not therefore be in the public interest or support the rule of law. However, since the proposed Order can only relate to those licensing authorities named in it, we will consider future designation of appellate bodies and onward appeals on a case by case basis when an approved regulator applies for designation as a licensing authority.

Question 9

Do you agree that onward appeals from decisions of the First-tier Tribunal in relation to ABS appeals should be to the Upper Tribunal rather than the High Court for those bodies named in the Order?

Proposed draft order to be made under section 80 of the Act

52. In order to implement the approach outlined above, an order needs to be made to designate the First-tier Tribunal as the appellate body for the purposes of Part 5 of the Act and make connected provision.

53. A draft order is attached at Annex E. In summary, the order makes provision:

- That the First-tier Tribunal is the body which will hear appeals against decisions (that are appealable under the Act or under licensing rules) of the specified licensing authorities.
- About the grounds of appeal and powers of the Tribunal in relation to matters appealable under licensing rules.
- Amending the Legal Services Act 2007 to remove the right of appeal to the High Court against a decision of the appellate body, and to make provision instead for appeals to the Upper Tribunal under Part 1 of the Tribunals, Courts and Enforcement Act 2007.

54. The Order names the LSB, Law Society and the Council for Licensed Conveyancers as LAs, and is expressed as conditional on the designation of the two approved regulators as licensing authorities. We have included the Law Society and Council for Licensed Conveyancers as they have already begun detailed discussions with us about their intention to make an application for designation. Should other approved regulators express a firm intention to apply for designation before we make our recommendation to the Lord Chancellor, they may be added to the list of licensing authorities in the

draft order. In relation to approved regulators designated as licensing authorities in the future but not listed in the initial Order, appropriate provision will need to be made using the powers in s.80 (following appropriate consultation) to either amend the initial Order or make a separate order.

55. The amendments to the Act made by the order also remove the references under Schedule 13 to appeals being made before the end of the prescribed period (i.e. prescribed by rules made by the Board). The effect of this change is that the period for appeals specified in rule 22 of the GRC rules will apply – i.e. 28 days from the date on which notice of the decision was sent to the appellant.

Question 10

Do you have any comments on the draft order at Annex E to be made under s.80?

Operational issues

56. Based on the experience of the Tribunals Service in dealing with similar appeals in other regulatory frameworks, we anticipate that the number of appeals against decisions of licensing authorities will be low. We have forecast the following likely range of appeals in the first year of operation: 5 (low), 20 (medium), 40 (high). For planning purposes we have used a working assumption of 20 appeals per year.
57. Administration will be provided from the Tribunals Service office in London. Preliminary and full oral hearings will take place at existing Tribunals Service buildings (in London and potentially elsewhere, based on the location of the appellant). We have assumed that each appeal will require, on average, a two day hearing.

Operating costs of the Tribunal

58. The costs of establishing and operating the appeals mechanism in the First-tier Tribunal are anticipated to be minimal, as we are able to utilise the existing infrastructure and administrative structures of the Tribunals Service. The approximate set-up costs, including training for members and administrative staff and project costs, are anticipated to be in the region of £16,000.
59. The annual operating costs, assuming 20 appeals in the first year, are estimated to be around £50,000. This cost will be fixed unless the actual number of appeals is below 10 or more than 30, in which case a reduction or additional contribution (as appropriate) will be agreed.

60. The Tribunals Service will only accept the new jurisdiction if these set-up and operating costs can be recovered. We have considered recovering them via a fee on application payable by appellants. This approach is not widespread in Tribunals generally, and could restrict access to justice for those unable to pay (particularly individuals working in ABS). Given the relatively low costs and the complexity of designing and implementing a fee on application system where the number of appeals is unpredictable, we consider that the best approach is for the Tribunals Service to recover the costs from LAs. LAs will therefore incorporate the costs as an element of the licence fee charged to ABS. If the LSB acts as a licensing authority directly, it will also pay a contribution.

61. Payment of the set-up costs and first year operating costs will need to be made to the Tribunals Service by the end of the 2011/12 financial year. It is proposed that licensing authorities will pay contributions in proportion to the number of licensed bodies holding a current licence as at 31 January 2012.

Question 11

Do you agree that the costs of the appeal arrangements should be borne by licensing authorities and recovered as part of the licence fee on ABS? Do you have any comments on the proposed approach to apportioning the costs between licensing authorities?

Draft ABS Appeals rules

62. The Act enables the Board to make rules⁹ prescribing the period within which appeals may be made to the relevant appellate body. We propose that the period during which appellants may appeal should be 28 days of the date when notice of the LA's decision was given to them.

63. In relation to appeal rights under Schedule 13 and licensing rules, rule 22 of the GRC rules will apply. Appellants will therefore need to start proceedings before the Tribunal by sending a notice of appeal so that it is received within 28 days of the date when notice of the LA's decision was sent.

64. Draft rules are attached at Annex F.

Question 12

Do you agree with our proposal about the time period for appeals? Do you have any comments on the draft rules at Annex F?

⁹ Section 96(1) of the Act

Draft Impact Assessment

65. A draft impact assessment has been prepared to support this proposal, and is attached at Annex G. The final impact assessment will accompany our recommendation to the Lord Chancellor.

66. The impact of ABS more broadly will be covered in a separate impact assessment that is currently being developed. The appeal arrangements are necessary to enable ABS, so the impact assessment is closely linked to the ABS impact assessment.

Question 13

Do you have any comments on the draft impact assessment?

How to Respond

Our consultation period ends at 5 p.m. on **Friday 12 November 2010**. The consultation period is 12 weeks.

In accordance with section 81(3) of the Legal Services Act 2007, you are given notice that any representation about the proposals in relation to the appellate body must be made to the Board by the end of this period. In accordance with section 205(3) of the Legal Services Act 2007, you are given notice that any representation about the rules must be received by the end of this period.

In framing this consultation paper, we have posed specific questions to help inform our final decision. These questions can be found in the body of this consultation paper, and also as a consolidated list at Annex A. We would be grateful if you would reply to these questions, as well as commenting more generally on the issues raised (where relevant). Where possible please can you link your comments to specific questions or parts of the paper rather than making general statements.

We would prefer to receive responses electronically (in Microsoft Word or pdf format), but hard copy responses by post or fax are also welcome. Responses should be sent to:

Email: consultations@legalservicesboard.org.uk

Post: Michael Mackay,
Legal Services Board,
7th Floor, Victoria House,
Southampton Row,
London WC1B 4AD

Fax: 020 7271 0051

We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our decision document.

We are also keen to engage in other ways and we would welcome contact with stakeholders during the consultation period.

If you have any questions about this consultation, please contact Michael Stacey, Regulatory Project Manager by telephone (020 7271 0089), e-mail (michael.stacey@legalservicesboard.org.uk) or by post at the address above.

Annex A: A list of questions raised in this document

Question 1

Do you have any comments on the draft proposed recommendation to the Lord Chancellor at Annex B?

Question 2

Do you agree with the list of decisions which should be appealable to an appellate body and that this list should be based on decisions that affect a person's civil rights? Do you agree that licensing rules should require that appellants seek internal review before an appeal can be made to the Tribunal? Do you have any comments on the draft supplementary guidance at Annex D?

Question 3

Do you agree that there should be a general right of appeal available whenever an individual or ABS entity is aggrieved by a decision of a licensing authority that is appealable under the relevant licensing rules?

Question 4

Do you agree with the proposed powers of the Tribunal in relation to matters appealable under the licensing rules?

Question 5

Do you have any comments on the proposed membership of the pool from which panels will be selected, or on the proposed composition of panels?

Question 6

Do the existing GRC Rules require any particular additions in order to accommodate ABS appeals? Please be specific about what is required and why it is needed.

Question 7

Are there any of the current GRC Rules that need amending in order to accommodate ABS appeals? Please be specific about why the amendment is necessary.

Question 8

Do you agree that the First-tier Tribunal should not have any power to award costs in proceedings relating to ABS appeals, beyond the existing powers of the GRC in relation to unreasonable behaviour or wasted costs?

Question 9

Do you agree that onward appeals from decisions of the First-tier Tribunal in relation to ABS appeals should be to the Upper Tribunal rather than the High Court for those bodies named in the Order?

Question 10

Do you have any comments on the draft order at Annex E to be made under s.80?

Question 11

Do you agree that the costs of the appeal arrangements should be borne by licensing authorities and recovered as part of the licence fee on ABS? Do you have any comments on the proposed approach to apportioning the costs between licensing authorities?

Question 12

Do you agree with our proposal about the time period for appeals? Do you have any comments on the draft rules at Annex F?

Question 13

Do you have any comments on the draft impact assessment?

Annex B: Proposed recommendation

RECOMMENDATION TO THE LORD CHANCELLOR UNDER SECTION 80 OF THE LEGAL SERVICES ACT 2007

1. At its meeting on [date] the Legal Services Board resolved to recommend to the Lord Chancellor that he should make an order under s.80 of the Legal Services Act 2007 (“the Act”). The Board recommends that the order provides for appeals against the decisions of the persons specified (in their capacity as licensing authorities) to be to the First-tier Tribunal. A draft order is annexed to this recommendation.
2. In accordance with s.81 of the Act, the Board has published a draft of the proposed recommendation and the proposed draft order on 23 August 2010 and invited representations about the proposals to be made to the Board by 12 November 2010. The Board has had regard to the representations duly made.
3. This recommendation is made with the consent of the following from whose decisions the appeals are to be made:
 - The Legal Services Board
 - The Law Society
 - The Council for Licensed Conveyancers.This recommendation is also made with the consent of the First-tier Tribunal, the body to which appeals are to be made.
4. The Board considers that it is desirable for there to be a single appellate body for all appeals under Part 5 of the Act or licensing rules. The appeals mechanism must be consistent with the regulatory objectives under the Act – and in particular the objectives to protect and promote the public interest, and support the constitutional principle of the rule of law. It must also support the Better Regulation principles that regulatory activity should be transparent, accountable, proportionate, consistent and targeted.
5. In reaching its decision, the Board has had regard to the views of a wide range of interested parties, expressed through responses to the formal consultations and in separate discussions. It has also taken account of the existing expertise of the First-tier Tribunal, its capacity to handle the additional workload and the costs of delivering the appeal arrangements through this and alternative mechanisms.
6. Having considered the options, and the representations made by interested parties, the Board considers that the First-tier Tribunal is the most appropriate

appellate body. The Tribunal has considerable expertise in regulatory matters, and also has a well established infrastructure and administrative support function, making it a cost-effective option. In addition, this approach will:

- support consistency in decision making (both in relation to licensing authority decisions about ABS ownership/regulation; and in relation to disciplinary decisions about all authorised persons working in ABS)
- enable a body of expertise to be developed in relation to ABS regulatory appeals
- achieve economies of scale in relation to administrative and appellate functions.

David Edmonds
Chairman, Legal Services Board

Annex C: List of licensing authority decisions appealable under the Legal Services Act 2007

Financial penalties

1. Section 96 – appeals against financial penalties imposed on an individual or an entity.

Ownership of licensable/licensed bodies

2. Schedule 13 - appeals against decisions on ownership of licensed bodies:
 - Paragraph 18(1): conditional approval of notified interest
 - Paragraph 20(1): objection to notified interest
 - Paragraph 29(1): conditional approval of notifiable interest
 - Paragraph 31(1): acquisition of notifiable interest
 - Paragraph 34(1): imposition of conditions (or further conditions) on existing restricted interest
 - Paragraph 37(1): objection to existing restricted interest
 - Paragraph 50(1): power to notify the LSB where share or voting limit breached

Annex D: Draft Supplementary Guidance to Licensing Authorities

Supplementary guidance on the content of licensing rules in relation to appeals against decisions of licensing authorities

1. This guidance is issued by the Legal Services Board under s.162 of the Legal Services Act 2007 (“the Act”). It is supplementary to the guidance issued by the Board entitled *Alternative business structures: approaches to licensing. Guidance to licensing authorities on the content of licensing rules.*
2. We expect licensing rules to make appropriate provision for appeals to the relevant appellate body against decisions made by licensing authorities.
3. There are statutory rights of appeal provided under s.96 and Schedule 13 of the Act. In addition, we expect licensing rules to provide a right of appeal against decisions of licensing authorities which may amount to the determination of a person’s civil rights for the purposes of Article 6(1) of the European Convention on Human Rights. A person’s “civil rights” in this context includes the right to practice one’s profession¹⁰.
4. We expect the following decisions of licensing authorities to be appealable as they could affect a person’s civil rights (the relevant sections of the Act are shown in brackets):
 - Refusal of application for a licence (s.84)
 - Imposition of conditions on a licence (s.85)
 - Modification of licence (s.86)
 - Refusal to designate as Head of Legal Practice, or withdrawal of approval (Schedule 11, paragraph 12)
 - Refusal to designate as Head of Finance and Administration, or withdrawal of approval (Schedule 11, paragraph 14)
 - Disqualification from some or all roles within a licensed body (s.99)
 - Suspension and revocation of licence (s.101)
 - Power to modify application of licensing rules etc to special bodies (ss.106 and 107)
5. Licensing rules should require appellants to seek an internal review of such decisions before they may appeal to the relevant appellate body. Guidance on the nature of an internal review mechanism has already been provided.

¹⁰ See for example *Bakker v Austria* (2004) 39 EHRR 548

6. The licensing rules will also need to make clear who can appeal. This should be limited to those who are the subject of the decision – for example the licensed body, licensable body, special body or individual (as appropriate).
7. In addition, we expect licensing authorities to consider whether any other provisions of their proposed licensing rules involve the determination of a person's civil rights, and if so provide a right of appeal to the relevant appellate body.

Annex E: Draft statutory instrument

Draft Order laid before Parliament under section 80 of the Legal Services Act 2007, for approval by resolution of each House of Parliament.

STATUTORY INSTRUMENTS

2010 No.

LEGAL SERVICES, ENGLAND AND WALES

The Legal Services Act 2007 (Appeals from Decisions of Licensing Authorities) Order 2010

<i>Made</i>	- - - -	***
<i>Coming into force</i>	-	***

The Lord Chancellor makes the following Order in exercise of the powers conferred by sections 80 and 204(3) and (4)(a) of the Legal Services Act 2007⁽¹⁾.

In accordance with section 80(3) of that Act, the Order is made following a recommendation made by the Legal Services Board.

The Legal Services Board has made the recommendation with the consents required by section 81(1) of that Act and after complying with the consultation requirements in section 81(2) to [(5)] of that Act.

Citation, commencement and interpretation

1.—a) This Order may be cited as the Legal Services Act 2007 (Appeals from Decisions of Licensing Authorities) Order 2010.

(1) This Order comes into force on [*date*].

(2) In this Order—

“the 2007 Act” means the Legal Services Act 2007;

“appealable decision” has the meaning given in article 3(1).

⁽¹⁾ 2007 c.29.

Licensing authorities to which this Order applies

2.—b) This Order applies to—

- a) the Legal Services Board in its capacity as a licensing authority under Part 5 of the 2007 Act; and
- b) if a person listed in paragraph (2) satisfies the condition in paragraph (3), that person in its capacity as such a licensing authority.

(2) The persons are—

- a) the Law Society;
- b) the Council for Licensed Conveyancers.

(3) The condition is that the person is designated as a licensing authority under Part 1 of Schedule 10 to the 2007 Act in relation to one or more reserved legal activities.

(4) In the rest of this Order any reference to a licensing authority, in relation to an appealable decision, is to a licensing authority to which this Order applies at the time when the decision was made.

Appeals from decisions of licensing authorities to be made to First-tier Tribunal

3.—c) An appeal from an appealable decision made by a licensing authority is to the First-tier Tribunal.

(1) In paragraph (1) “appealable decision” means a decision made by a licensing authority which is appealable under any provision of—

- a) Part 5 of the 2007 Act;
- b) the authority’s licensing rules.

(2) In section 111(1) of the 2007 Act (interpretation of Part 5), the definition of “relevant appellate body” has effect in relation to a licensing authority as if the reference to “the body having power to hear appeals from those decisions (whether by virtue of an order under section 80 or otherwise)” were a reference to “the First-tier Tribunal”.

Allocation to General Regulatory Chamber of appeals from licensing authority decisions

4. For the purposes of article 5B of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008⁽¹²⁾ (which provides for the allocation of certain First-tier

⁽¹²⁾ S.I. 2008/2684. Article 5B was inserted by S.I. 2009/1590.

Tribunal functions to the General Regulatory Chamber), each licensing authority is a regulatory body.

Licensing rule decisions: grounds of appeal and powers of First-tier Tribunal

5.—d) In this article “licensing rule decision” means any decision made by a licensing authority which is appealable under the authority’s licensing rules.

(1) Any person aggrieved by a licensing rule decision made in relation to that person may appeal to the First-tier Tribunal.

(2) The First-tier Tribunal may—

- a) affirm the licensing authority’s decision in whole or in part;
- b) quash the licensing authority’s decision in whole or in part;
- c) substitute for all or part of the licensing authority’s decision another decision of a kind that the authority could have taken;
- d) remit a matter to the licensing authority (generally, or for determination in accordance with a finding made or direction given by the Tribunal).

Amendments to the 2007 Act

6. The Schedule to this Order (which amends provisions of the 2007 Act that provide for an appeal from certain decisions of a licensing authority) has effect in relation to the licensing authorities to which this order applies.

Signed by authority of the Lord Chancellor

Name

Parliamentary Under Secretary of State

Date

Ministry of Justice

Amendments to the 2007 Act

1. The 2007 Act (alterative business structures) is amended in accordance with paragraphs 2 and 3.

2. In section 96 (appeals against financial penalties)—

- a) omit subsections (6) and (7);
- b) for subsection (8) substitute—

“(8) Except as provided by this section or Part 1 of the Tribunals, Courts and Enforcement Act 2007⁽¹³⁾, the validity of a penalty is not to be questioned by any legal proceedings whatsoever.”

3.—e) Schedule 13 (ownership of licensed bodies) is amended as follows.

(1) In paragraph 18 (appeal against decision to approve notified interest subject to conditions)—

- a) in sub-paragraph (1), omit “before the end of the prescribed period”;
- b) omit sub-paragraphs (3) and (4);
- c) in sub-paragraph (5), for “an appeal under this paragraph” substitute “any appeal under this paragraph or Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(2) In paragraph 20 (appeal from decision to object to a notified interest)—

- a) in sub-paragraph (1), omit “before the end of the prescribed period”;
- b) omit sub-paragraphs (3) and (4);
- c) in sub-paragraph (5), for “an appeal under this paragraph” substitute “any appeal under this paragraph or Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(3) In paragraph 29 (appeal from decision to approve a notifiable interest subject to conditions)—

- a) in sub-paragraph (1), omit “before the end of the prescribed period”;
- b) omit sub-paragraphs (3) and (4);

⁽¹³⁾ 2007 c.15.

- c) in sub-paragraph (5), for “an appeal under this paragraph” substitute “any appeal under this paragraph or Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(4) In paragraph 32 (appeal from decision to object to acquisition of a notifiable interest)—

- a) in sub-paragraph (1), omit “before the end of the prescribed period”;
- b) omit sub-paragraphs (3) and (4);
- c) in sub-paragraph (5), for “an appeal under this paragraph” substitute “any appeal under this paragraph or Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(5) In paragraph 34 (appeal from decision to impose conditions (or further conditions) on existing restricted interest)—

- a) in sub-paragraph (1), omit “before the end of the prescribed period”;
- b) omit sub-paragraphs (3) and (4);
- c) in sub-paragraph (5), for “an appeal under this paragraph” substitute “any appeal under this paragraph or Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(6) In paragraph 37 (appeal from decision to object to existing restricted interest)—

- a) in sub-paragraph (1), omit “before the end of the prescribed period”;
- b) omit sub-paragraphs (4) and (5);
- c) in sub-paragraph (6), for “an appeal under this paragraph” substitute “any appeal under this paragraph or Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(7) In paragraph 47 (notifying the Board of objection or condition as to a person’s holding of a restricted interest), in sub-paragraph (4) for “to the High Court” substitute “under Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(8) In paragraph 48 (notifying the Board of approval of holding of a restricted interest by a person included in the Board’s list of persons subject to objections and conditions), in sub-paragraph (3) for “to the High Court” substitute “under Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(9) In paragraph 50 (appeal from decision to notify the Board where share limit or voting limit breached)—

- a) in sub-paragraph (1), omit “before the end of the prescribed period”;
- b) omit sub-paragraphs (3) and (4);

- c) in sub-paragraph (5), for “any appeal under this paragraph” substitute “any appeal under this paragraph or Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

EXPLANATORY NOTE

(This note is not part of the Order)

Annex F: Draft ABS Appeal Rules

Rules on the period for the making of appeals against decisions of a licensing authority in relation to financial penalties

Version 1: XX 2010

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under section 96 of the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Appeal grounds	has the meaning given in section 96(2) of the Act
Approved Regulator	has the meaning given in section 20(2) of the Act
Board	the Legal Services Board
Licensing authority	has the meaning given in section 73(1)
Relevant appellate body	has the meaning given in section 111(1) of the Act

C. WHO DO THESE RULES APPLY TO?

3. These Rules are the rules that the Board has made to prescribe the period within which a person on whom a financial penalty is imposed by a licensing authority under section 95(1) of the Act may appeal to the relevant appellate body on one or more of the appeal grounds.

4. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. THE PERIOD FOR MAKING AN APPEAL

5. A person on whom a licensing authority has imposed a financial penalty under section 95(1) of the Act may appeal to the relevant appeal body within a period of 28 days from the date on which the notice of the decision to impose the said penalty is given to the appellant.

E. FURTHER INFORMATION

6. If you have any questions about the period within which a person on whom a penalty is imposed under section 95 of the Act may appeal to the relevant appellate body you should contact the Board at:

Legal Services Board
7th Floor
Victoria House
Southampton Row
London
WC1B 4AD

Email: contactus@legalservicesboard.org.uk

Telephone: 020 7271 0050

Annex G: Draft Impact Assessment

[See separate document attached]