

Consultation on Bar Standards Board licensing authority appeal arrangements

**Decision document relating to a recommendation and
Order to be made under Section 80 of the Legal Services
Act 2007**

17 May 2016

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Introduction

1. In March 2016, the Legal Services Board (LSB) granted an application submitted by the Bar Standards Board (BSB) under Part 1 of Schedule 10 to the Legal Services Act 2007 (the Act), seeking a recommendation to the Lord Chancellor that an order be made designating the Bar Council as a licensing authority. The regulatory functions of the Bar Council are delegated to the BSB.¹
2. In order to be designated as a licensing authority, there must be in place an appellate body to hear and determine appeals about the decisions of the licensing authority. Section 80 of the Act is the mechanism through which the Lord Chancellor may by order establish a body to hear and determine such appeals. Such an order can only be made on the recommendation of the LSB. Section 81 of the Act sets out the procedural requirements for such orders and includes a requirement for the LSB to consult on both the proposed recommendation and the proposed draft order.
3. The LSB's policy position is that there should be a single appellate body to hear all appeals on licensing authority decisions and that that body should be the General Regulatory Chamber of the First-tier Tribunal (FTT).² The BSB has selected the FTT as its appellate body for appeals against licensing decisions.
4. In accordance with the procedure in section 81 of the Act, on 21 January 2016 the LSB published a consultation document containing a proposed recommendation and order and invited interested parties to make representations on them.³ We also published a draft regulatory triage assessment with the consultation.
5. Respondents were invited to comment on two matters:
 - a. whether the draft recommendation and draft order delivered the policy intention of allowing the FTT to be established to hear and determine appeals from decisions made by the BSB in its capacity as a licensing authority; and

¹ See: Bar Standards Board licensing authority application
http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/BSB_Licensing_Authority_Application.htm

² See: Alternative business structures: appeal arrangements
http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/20110509_absappeals_decision_doc.pdf

³ See: Consultation on Section 80 order on licensing authority appeal arrangements for the Bar Standards Board
http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

- b. whether there were any comments on the draft regulatory triage assessments.
6. This was the fifth time that the LSB had consulted on such orders which are technical in nature, being directly linked to the designation orders for licensing authorities. The BSB had also consulted on the policy decision to use the FTT. The consultation was open for eight weeks.
7. This paper summarises the LSB's decision and the next steps.

Outcome of consultation

8. Only one representation was made. This was from the Bar Council which said that it supported the proposals outlined in the consultation and did not have any comments on the draft recommendation or the draft section 80 Order. The Bar Council said the regulatory triage assessment is clear and agreed with the reasons given (namely cost and appropriateness) for choosing to use the FTT for regulatory appeals instead of the High Court. The response has been published on the LSB website.⁴

Next Steps

9. As no comments have been made on the draft order or draft recommendation, the LSB has concluded that it should proceed with the recommendation and the order in the form consulted on and which are reproduced in Annex A.

Annexes

- A. Recommendation and order
- B. Regulatory triage assessment

⁴ The response is available at:
http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

Annex A: Recommendation by the LSB to the Lord Chancellor under Section 80 of the Legal Services Act 2007 and draft statutory instrument

Dear Lord Chancellor

Recommendation under section 80 of the Legal Services Act 2007: Appeal arrangements for licensing decisions of the Bar Council

In accordance with the process specified by the Legal Services Act 2007 (the Act) on 27 April 2016, the Legal Services Board (LSB) decided to make a recommendation to the Lord Chancellor asking you to make an order under section 80 of the Act that will establish the First-Tier Tribunal as the body to hear and determine appeals against decisions made by the Bar Council when acting in its capacity as a licensing authority (should it be designated as such). A draft of the order (which has been agreed with your officials) is attached to the recommendation.

In accordance with the requirements of section 81(2) of the Act, the LSB published a draft of the proposed recommendation and draft order on 21 January 2016 and invited representations about the proposals to be made to the LSB by 5pm on 16 March 2016. The LSB has had regard to the representations duly made.

In accordance with section 81(1) of the Act, the recommendation is made with the consent of the Bar Standards Board and HM Courts & Tribunals Service.

Chair, Legal Services Board

17 May 2016

D R A F T S T A T U T O R Y I N S T R U M E N T S

2016 No.

LEGAL SERVICES, ENGLAND AND WALES

The Legal Services Act 2007 (Appeals from Licensing Authority Decisions) (General Council of the Bar) Order 2016

Made - - - -

Coming into force in accordance with article 1

The Lord Chancellor makes the following Order in exercise of the powers conferred by sections 80(1)(b), (4)(b) and (5) and 204(3) of the Legal Services Act 2007(a).

In accordance with section 80(3) of that Act, the Order is made following a recommendation made by the Legal Services Board to which was annexed a draft order which was in a form not materially different from this Order.

The Legal Services Board made its recommendation under section 80 of that Act with the consents required by section 81(1) of that Act and having complied with the requirements of section 81(2) to (5) of that Act.

A draft of this Order has been approved by a resolution of each House of Parliament pursuant to section 206(5) of the Legal Services Act 2007.

Citation and commencement

1.—(1) This Order may be cited as the Legal Services Act 2007 (Appeals from Licensing Authority Decisions) (General Council of the Bar) Order 2016.

(2) Except as provided in paragraph (3), this Order comes into force on the day after the day on which it is made.

(3) Articles 3 and 4 of this Order—

(a) do not have effect unless an order is made under Part 1 of Schedule 10 to the 2007 Act designating the General Council of the Bar as a licensing authority in relation to one or more reserved legal activities, and

(b) where such an order is made, come into force at the same time as that order.

Interpretation and application

2.—(1) In this Order, “the 2007 Act” means the Legal Services Act 2007.

(a) 2007 c. 29.

(2) This Order applies to appeals from decisions made by the General Council of the Bar in its capacity as a licensing authority.

Appeals to be made to the First-tier Tribunal

3.—(1) The First-tier Tribunal may hear and determine appeals from decisions made by the General Council of the Bar which are appealable under any provision of—

- (a) Part 5 of the 2007 Act, or
- (b) the General Council of the Bar’s licensing rules(a).

(2) The First-tier Tribunal may suspend the effect of a decision of the General Council of the Bar (whether or not the decision has already taken effect) while an appeal against that decision has been brought and has not yet been finally determined or withdrawn.

(3) The First-tier Tribunal may, in relation to appeals from the decisions which are appealable under the licensing rules—

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

Modifications of the 2007 Act

4. The Schedule to this Order (which modifies provisions of the 2007 Act) has effect.

Date

Name
Parliamentary Under Secretary of State
Ministry of Justice

SCHEDULE

Article 4

Modifications to section 96 of the 2007 Act

1. Section 96 of the 2007 Act (appeals against financial penalties) has effect in relation to a penalty imposed by the General Council of the Bar as if—

- (a) in subsection (1), “, before the end of such period as may be prescribed by rules made by the Board,” were omitted;
- (b) subsections (6) and (7) were omitted,
- (c) for subsection (8) there were substituted—

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

(a) Section 83 of the 2007 Act defines and makes other provision relating to licensing rules. By reason of article 3, the First-tier Tribunal is the “relevant appellate body” as defined in section 111 of the 2007 Act.
(b) 2007 c. 15.

Modifications to Schedule 13 to the 2007 Act

2.—(1) Schedule 13 to the 2007 Act (ownership of licensed bodies) has effect in relation to decisions of the General Council of the Bar with the following modifications.

(2) Paragraph 18 (appeal from decision to approve notified interest subject to conditions) has effect as if—

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

(3) Paragraph 20 (appeal from decision to object to a notified interest) has effect as if—

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

(4) Paragraph 29 (appeal from decision to approve a notifiable interest subject to conditions) has effect as if—

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

(5) Paragraph 32 (appeal from decision to object to acquisition of a notifiable interest) has effect as if—

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

(6) Paragraph 34 (appeal from decision to impose conditions (or further conditions) on existing restricted interest) has effect as if—

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

(7) Paragraph 37 (appeal from decision to object to existing restricted interest) has effect as if—

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

(8) Paragraph 47(4) (notifying the Board of the outcome of an appeal against an objection to holding a restricted interest or the imposition of conditions) has effect as if, for “to the High Court” there were substituted “under Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(9) Paragraph 48(3) (notifying the Board of the outcome of an appeal against the imposition of conditions) has effect as if, for “to the High Court” there were substituted “under Part 1 of the Tribunals, Courts and Enforcement Act 2007”.

(10) Paragraph 50 (appeal from decision to notify the Board where share limit or voting limit breached) has effect as if—

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

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

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision under section 80 of the Legal Services Act 2007 (c. 29) (“the 2007 Act”) for the First-tier Tribunal to hear and determine appeals from decisions made by the General Council of the Bar, in its capacity as a licensing authority. Licensing authorities regulate licensed bodies under the provisions of Part 5 of the 2007 Act (alternative business structures). The decisions are those which are appealable under Part 5 of the 2007 Act or the General Council of the Bar’s own licensing rules. Section 83 of the 2007 Act defines licensing rules as rules about the licensing and regulation of licensed bodies. It is envisaged that a separate Order will designate the General Council of the Bar as a licensing authority. Articles 3 and 4 of this Order will not have effect until such an Order is made and will come into force at the same time as that Order.

Article 3 provides for such appeals to be heard and determined by the First-tier Tribunal and sets out the powers of the First-tier Tribunal in relation to an appeal under the licensing rules. The 2007 Act provides for the grounds of appeal and the First-tier Tribunal’s powers in relation to an appeal under Part 5.

Certain provisions of the 2007 Act are modified by the Schedule to this Order. The modifications take account of the provision in Part 1 of the Tribunals, Courts and Enforcement Act 2007 (c. 15) for appeals from the First-tier Tribunal to go to the Upper Tribunal.

A Regulatory Triage Assessment has been prepared for this instrument and can be found at www.legislation.gov.uk or obtained from the Head of Legal Services Policy, Access to Justice, Ministry of Justice, 102 Petty France, London SW1H 9AJ.

Annex B: Regulatory triage assessment

Regulatory Triage Assessment	
Title of regulatory proposal	Bar Standards Board (BSB Section 80 Order) Appeals from the General Council of the Bar as a Licensing Authority
Unique identifying number	MoJ012/2015/RTA
Lead Department/Agency	Ministry of Justice
Expected date of implementation	10 September 2016
Origin	Domestic
Date	16/12/2015
Lead Departmental Contact	Mel Panteli
Departmental Triage Assessment	Non qualifying regulatory provision (Fast track)

Rationale for intervention and intended effects

The General Council of the Bar (Bar Council) is an approved regulator under the Legal Services Act 2007 (LSA). It has applied to be a Licensing Authority for alternative business structures (ABS). The LSA requires a Licensing Authority to make provision for appeals in relation to decisions that it makes. Government intervention is required because, if these appeals go to the General Regulatory Chamber of the First Tier Tribunal, the power to do this can only be established by an order under s80 of the LSA.

Viable policy options (including alternatives to regulation)

There is no alternative to regulation as it is a requirement of the LSA that an appeals mechanism is in place in order for the Bar Council to be designated as a Licensing Authority.

Two options have been considered:

- Using an existing power under the Crime and Courts Act to establish rules to enable all appeals from the Licensing Authority to be heard by the High Court; or
- Use a s80 Order to establish a jurisdiction for such appeals to be heard by the First Tier Tribunal. This is the preferred option for certain appeals, as it is a more appropriate and lower cost than hearing the same decisions in the High Court.

Initial assessment of business impact

Total impact on business is estimated to be £2,650 per year. This will be recovered from ABS entities authorised by the BSB, which is an equivalent of £132.50 per individual entity. However, as fees for entity authorisation are scaled according to size of entity, the precise contribution made by an individual entity will vary depending on size. The BSB has consulted separately on ABS authorisation fees. Set up fees to be paid by the BSB will be around £3,600.


One-in, Three-out status

The measure is a non-qualifying regulatory provision as it makes or amends provision imposing a fee as defined under the Small Business, Enterprise and Employment Act 2015. It will not therefore be in scope for One-in, Three-out or the Business Impact Target.

Rationale for Triage rating

This is a non-qualifying regulatory provision (a fee) which meets the requirements for the low cost fast track process.

Triage approval

	NAME	DATE
Departmental signoff (SCS):	Elizabeth Gibby	15/01/16
Lead Economist signoff:	 Ewen Macleod Bar Standards Board	14/01/16
Better Regulation Unit signoff:	Sheila Morson	15/01/16

The Deputy Chief Economist confirms this for the Fast Track as a deregulatory/low cost regulatory measure:	Andrews Meads	15/01/16
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Supporting evidence

1. The policy issue and rationale for Government intervention

The LSA requires that an appeals mechanism must be in place for any decisions made by a Licensing Authority. Depending on the destination of these appeals, Government intervention is needed so that an appellate body can be established under s80 of the LSA.

If no provision is made for appeals, it will not be possible for the Bar Council to become a Licensing Authority. If the Bar Council is not a Licensing Authority this will reduce the opportunity for barristers and other advocacy-focused lawyers to form new business structures with lay owners and managers – the effect of this would be to reduce innovation and choice in the market for legal services. Such entities would have to seek authorisation from another Licensing Authority without the same specialist focus as the Bar Council.

2. Policy objectives and intended effects

The policy objective is to put in place an appeal mechanism to hear appeals against decisions made by the Bar Standards Board (BSB) under delegation from the Bar Council as a Licensing Authority. The costs and processes for the appeal mechanism are intended to be transparent, efficient, fair and public. The body hearing the appeals should have sufficient expertise to deal with the issues that may arise in ABS appeals – the First Tier Tribunal is already an appellate body for other Licensing Authorities so it is considered to be the appropriate body for certain appeals from BSB decisions.

3. Policy options considered, including alternatives to regulation

No alternative to regulation is available.

Option 1: High Court to act as an appellate body.

In the absence of a s80 order, the Bar Council could make rules under s24 of the Crime and Courts Act 2013 to enable such appeals to be heard by the High Court. This is the intended route for appeals against disciplinary decisions, in order to ensure consistency with wider disciplinary arrangements for the barrister and solicitor professions. The High Court currently acts as the appellate body for non-disciplinary decisions for non-ABS entities authorised by the BSB, but this was intended to be on a temporary basis and separate legislation will give the BSB the ability to transfer this jurisdiction to the FTT. As the BSB has set out its intention to do this, it would not be appropriate to take the route of the High Court for equivalent ABS decisions.

Option 2 (preferred option): FTT to act as appellate body

The preferred option is for non-disciplinary appeals to be heard by the FTT. This is more appropriate and more efficient than hearing the same decisions in the High Court.

4. Expected level of business impact

Costs

Costs to HMCTS

HMCTS will recover its costs per hearing from the BSB – this will be an average of £2,650 per appeal (assuming that 90% of appeals will be decided on the papers and 10% will require a hearing). In addition, applicants will pay fee of £100 per appeal direct to HMCTS (plus an additional £500 where an oral Hearing is required). Set-up costs apportioned to this order will be an additional £3,600 (the same amount being apportioned to another order under s69 of the Act, which will create a similar jurisdiction for non-ABS entities).

Costs to individuals or entities seeking to appeal

The BSB will not seek to recover the costs of appeals directly from those who are appealing. HMCTS will charge an administrative fee to applicants – this will be lower than the fee that is currently charged to bring an appeal to the High Court. There will therefore be no additional cost to appellants. The BSB will, however, seek to recover these costs from the ABS regulated community as a whole and will take these into account in setting fees for ABS authorisation and annual renewal. The BSB expects to authorise around 20 ABS entities per year and expects one in 20 such authorisations to result in an appeal. The average ongoing cost will therefore be £2,650 per year. This will be recovered via from ABS fees, which would equate to an increase in authorisation fees of £132.50 per entity (the precise contribution will depend on the size of the proposed entity, as the fees will be determined by the size of the entity so larger entities will contribute proportionately more).

Benefits

Benefits to HMCTS

The current appeal route to the High Court (for authorisation decisions related to non-ABS entities) was agreed by HMCTS as a temporary measure, on the understanding that the role was intended to move to the FTT in due course. This proposal ensures that HMCTS can recover relevant costs for administrative appeals associated with ABS from the BSB. It also ensures that capacity in the High Court is not taken up by those appeals.

END OF DOCUMENT