

The Right Honourable Michael Gove MP
Lord Chancellor and Secretary of State for Justice
Ministry of Justice
102 Petty France
London
SW1H 9AJ



LEGAL SERVICES
BOARD

Legal Services Board
One Kemble Street
London
WC2B 4AN

T 020 7271 0050
F 020 7271 0051

www.legalservicesboard.org.uk

17 May 2016

Dear Lord Chancellor,

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

In accordance with the process specified by the Legal Services Act 2007 (the Act), on 27 April 2016, the Legal Services Board (the Board) decided to make a recommendation to the Lord Chancellor asking you to make an order under section 80 of the Act. That order will establish the First-Tier Tribunal as the body to hear and determine appeals against decisions made by the General Council of the Bar 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 this recommendation.

In accordance with the requirements of section 81(2) of the Act, the Board 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 Board 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 and Tribunals Service.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Michael Pitt', is written over a light blue rectangular background.

Sir Mike Pitt
Chair, Legal Services Board

DRAFT STATUTORY INSTRUMENTS

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.

EXPLANATORY MEMORANDUM TO
THE LEGAL SERVICES ACT 2007 (APPEALS FROM LICENSING AUTHORITY
DECISIONS) (GENERAL COUNCIL OF THE BAR) ORDER 2016

2016 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to make provision under section 80 of the Legal Services Act 2007 (“the 2007 Act”) for the General Regulatory Chamber of 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.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matter of interest to the House of Commons

3.2 This entire instrument applies only to England and Wales.

3.3 The instrument only applies in England and Wales because the General Council of the Bar only regulates legal services professionals and bodies in England and Wales. The instrument does not have minor or consequential effects outside England and Wales.

3.3 In the view of the Ministry of Justice, for the purposes of the House of Commons Standing Order 83P, the subject-matter of this Order would be within the devolved legislative competence of the Northern Ireland Assembly, if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament, if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

3.4 The Ministry of Justice has reached this view because it considers that the primary purpose of the Order relates to the regulation of the legal profession and/or the provision of legal services, which is within the devolved legislative competence of both of the devolved legislatures. The primary purpose of the subject matter of the Order is included as an exception to the reservation of the regulation of anti-competitive practices and agreements, abuse of dominant position, monopolies and

mergers in Schedule 5, Part II(002), paragraph C3 of the Scotland Act 1998. What is excepted from the competition reservation is the regulation of particular practices in the legal profession for the purpose of regulating that profession or the provision of legal services. The primary purpose of the subject matter is also not within Schedule 5 to the Scotland Act 1998 and is not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act). The primary purpose of the subject matter of the Order is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act).

3.5 In summary, the Ministry of Justice considers that the Order would meet the two part test for certification on the basis that:

(a) it relates exclusively to England and Wales; and

(b) its subject matter is within the legislative competence of one or more of the devolved legislatures.

4. Legislative Context

4.1 The 2007 Act sets out a framework for the regulation of legal services in England and Wales. It establishes the Legal Services Board (“the LSB”) as the oversight regulator for this framework and requires that reserved legal activities may only be carried out by those who are authorised to do so, or who are exempt from such authorisation. It makes provision for the regulation by approved regulators of those providing reserved legal activities. The General Council of the Bar is already an approved regulator for the reserved legal activities of the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities and the administration of oaths.

4.2 Part 5 (alternative business structures) of the 2007 Act sets out arrangements under which approved regulators which have been designated as licensing authorities may license firms (“licensed bodies”) which are partly or wholly owned or controlled by non-lawyers to provide legal services (or a mixture of legal and non-legal services). Part 1 of Schedule 10 to the 2007 Act allows the Lord Chancellor, on the recommendation of the LSB, to designate approved regulators as licensing authorities for the purpose of Part 5. It is anticipated that the General Council of the Bar will be designated as a licensing authority around the end of 2016 for the five reserved legal activities for which it is currently an approved regulator.

4.3 The LSB’s rules state it may only grant an application (which would then be recommended to the Lord Chancellor) to become a licensing authority in relation to a reserved legal activity if it is satisfied that there would be a body with the power to hear and determine appeals.

- 4.4 Section 80 allows the Lord Chancellor, on the LSB’s recommendation, to establish appellate bodies or modify the functions of existing bodies to allow them to hear licensing appeals. As noted above, this Order makes provision for the First-tier Tribunal to hear appeals from the General Council of the Bar in its capacity as a licensing authority. The operative provisions of this Order will not come into force until the General Council of the Bar is designated as a licensing authority.

5. Territorial Extent and Application

- 5.1 This instrument applies to England and Wales.
- 5.2 The territorial application of this instrument is set out in Section 3 under “Other matters of interest to the House of Commons”.

6. European Convention on Human Rights

- 6.1 The Parliamentary Under-Secretary of State, Lord Faulks QC MP, has made the following statement regarding Human Rights:

In my view the provisions of the Legal Services Act 2007 (Appeals from Licensing Authority Decisions) (General Council of the Bar) Order 2016 are compatible with the Convention rights.”

7. Policy background

- *What is being done and why*

- 7.1 This Order gives the First-tier Tribunal the power to hear and determine appeals from decisions made by the General Council of the Bar, in its capacity as a licensing authority. The decisions are those which are appealable under Part 5 of the 2007 Act and the General Council of the Bar’s licensing rules. It also sets out the powers of the First-tier Tribunal in relation to appeals from decisions made under licensing rules.
- 7.2 The Order is necessary to enable the Lord Chancellor, if he decides to do so, to designate the General Council of the Bar as a licensing authority under Part 5 since, as explained above, such designation cannot take place without an appropriate appeals mechanism.
- 7.3 Licensing authorities regulate licensed bodies under the provisions of Part 5 of the 2007 Act (alternative business structures). 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.

- **Consolidation**

7.13 This is a standalone order which does not make amendments to any other SI, so no question of consolidation arises.

8. Consultation outcome

8.1 Section 80(3) of the 2007 Act provides that the Lord Chancellor may make an order under section 80 only if the LSB has made a recommendation that he does so. Under section 81 of the 2007 Act, that recommendation may be made only with the consent of the body whose decisions are to be appealed, and with the consent of the body to which appeals are to be made. Before making the recommendation, the LSB must publish the proposed recommendation and draft order and have regard to any representations made.

8.2 The LSB has satisfied these requirements. The LSB consulted on its draft application (including a draft of the Order) for 8 weeks (21 January to 16 March 2016). The consultation received one response from the Bar Council who agreed that the draft Order delivers the General Council of the Bar's policy intention of allowing the First-tier Tribunal to hear and determine appeals from decisions made by the General Council of the Bar as a licensing authority and had no comments on the Order or impact assessment.

8.3 Taking into account comments from the consultation, the LSB made a recommendation to the Lord Chancellor for an Order to be made.

9. Guidance

9.1 The LSB has issued guidance to licensing authorities under section 162 of the 2007 Act on the content of licensing rules. The guidance specifies those decisions which, as a minimum, the LSB considers ought to be appealable. These include: refusal of an application for a licence; imposition of conditions on a licence; modification of a licence; refusal to designate a person as a Head of Legal Practice or withdrawal of approval; disqualification from some or all roles within a licensed body; suspension and revocation of a licence; and power to modify the application of licensing rules etc. to special bodies.

10. Impact

10.1 This Order has no impact on charities or voluntary bodies. The only impact on business will relate to those directly affected by the Order, that is the General Council of the Bar and those they regulate.

10.2 This Order has no impact on the public sector.

- 10.3 Although HM Courts and Tribunals Service will face additional costs associated with a potential increase in cases heard by the First-Tier Tribunal, the General Council of the Bar will meet the set up and operating costs, so there will be no net financial impact on the public sector.
- 10.3 A regulatory triage assessment has been specifically prepared for this instrument and can be found at www.legislation.gov.uk or obtained from the Head of Legal Services Policy, Law and Access to Justice Group, Ministry of Justice, 102 Petty France, London, SW1H 9AJ.
- 10.4 A full regulatory impact assessment (RIA) was prepared for the Legal Services Bill in November 2006 and can be found at <http://www.dca.gov.uk/risk/ria-legal-services.pdf>. A further full RIA, together with a detailed Equality Impact Assessment, was prepared in relation to S.I. 2011/2196 which commenced most of Part 5 of the 2007 Act, and this can be found at: <http://www.legislation.gov.uk/uksi/2011/2196/introduction/made>.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 This instrument is not expected to have any disproportionate impact on small firms.
- 11.3 Having considered the Small Business, Enterprise and Employment Act 2015, a statutory review provision is not appropriate as a review would be disproportionate taking into account the economic impact of the regulatory provision on the qualifying activity.
- 11.4 Furthermore, the General Council of the Bar, through their licensing authority application submitted to the Legal Services Board, has committed to carrying out a formal review of its entity regulation arrangements after two years of operation as a licensing authority. The Legal Services Board, as oversight regulator, will consider this as part of their wider oversight of regulatory performance.

12. Monitoring & review

- 12.1 The appeal arrangements will be monitored by the HM Courts and Tribunals Service. The LSB, as oversight regulator of the legal services industry, will keep the regulatory arrangements under review.

13. Contact

- 13.1 Please contact Mel Panteli at the Ministry of Justice (Tel: 0203 334 6147 or email: Mel.Panteli5@justice.gsi.gov.uk) about any queries regarding this Order.