

# Alternative business structures: appeal arrangements

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Summary of responses to consultation and decision document on arrangements for appeals against decisions of the Solicitors Regulation Authority as a licensing authority

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## Background

1. The Legal Services Board (“the **LSB**”) was created by the Legal Services Act 2007 (“**the Act**”) and is responsible for overseeing legal regulators, (referred to as the approved regulators (“**ARs**”) in the Act) in England and Wales. The LSB’s mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system.
2. The Act sets out a new regulatory framework for regulators and the ownership of legal service providers. It gives the LSB a power to recommend to the Lord Chancellor that he should designate competent licensing authorities (“**LAs**”). Once designated, licensing authorities will be able to license and regulate a particular type of legal service provider, called alternative business structures (“**ABS**”). The LAs will regulate ABS according to their licensing rules, the requirements for which are set out in the Act.
3. The appeals mechanism must be consistent with the regulatory objectives under section 1 of 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.
4. We previously consulted on our proposal that there should be a single mechanism provided by the First-tier Tribunal for hearing appeals against LA decisions. We have granted an application from the Council for Licensed Conveyancers (“**CLC**”) to be designated as a LA and the CLC has consented to our proposal regarding the appeal mechanism. We therefore recommended to the Lord Chancellor that he make an order under section 80 of the Act providing for the First-tier Tribunal to hear appeals against decisions of the CLC as a LA. Following Parliamentary debate, the order was made on 12 July 2011.<sup>1</sup>
5. The SRA originally supported our proposal that the First-tier Tribunal should act as the single appellate body for all ABS appeals, but withdrew its support because agreement could not be reached to amend the First-tier Tribunal’s rules on costs. We could not proceed with our proposal in the absence of consent from the SRA, as required under section 81(1)(a) of the

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<sup>1</sup> The Legal Services Act 2007 (Appeals from Licensing Authority Decisions) Order 2011 (SI 2011/1712)

Act. The SRA therefore decided to put forward its application to be a LA naming the Solicitors Disciplinary Tribunal (“**SDT**”) as its appellate body.

6. On 5 May 2011, we published a consultation paper setting out the steps necessary to give effect to this proposal, and seeking views<sup>2</sup> on a draft recommendation by the LSB to the Lord Chancellor that he should make an order under s.80 of the Act providing for the SDT to hear and determine appeals against decisions of the SRA as a licensing authority.
7. The consultation period ended on 2 June 2011. We received three responses to the consultation, from:
  - The Law Society (“**TLS**”)
  - ILEX Professional Standards (“**IPS**”)
  - City of Westminster and Holborn Law Society (“**CWHLs**”).
8. All responses have been published on the LSB’s website. This document sets out a summary of the key issues raised by respondents to our consultation. It also sets out our response. Alongside this decision document, we are publishing:
  - final draft section 80 order to be recommended to the Lord Chancellor
  - final impact assessment
  - rules made under Schedule 13 prescribing the period for appeals against LA decisions under that Schedule.
9. The Board’s long term policy aim is for a single, consistent route for all legal services regulatory appeals (relating to both ABS and ‘traditional’ law firms, and all legal professionals). We are carrying out further work during 2011/12 to explore how this rationalisation could be achieved. It is therefore likely that the arrangements put in place by this order will need to be amended in due course.

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<sup>2</sup> As required by section 81(2) and (3) of the 2007 Act

## Consultation Responses

### General comments made by consultees

10. Both TLS and CWHLS supported the proposal that the SDT should hear appeals against decisions of the SRA as a Licensing Authority. TLS highlighted its view that in principle all SRA regulated firms should have appeals heard by the same Tribunal. IPS did not express a view on whether SDT should hear the appeals.

### Question 1 – Expertise and experience

*Do you have any comments about whether the SDT has the expertise and experience required to hear ABS appeals available within its existing membership? Do you agree with the proposed composition of panels?*

11. Both TLS and CWHLS highlighted the experience and expertise of the SDT. TLS considered the SDT “at least as well suited as any other potential body to hear such appeals”, although it highlighted that some matters (such as fitness to own in the context of the legal profession) were novel and may require additional training as the market develops. CWHLS also suggested that where additional specialist expertise is required, the parties could be required to adduce expert evidence or the SDT could appoint its own expert.
12. CWHLS supported the proposal that appeals should be heard by two solicitor members and one lay member, for consistency with non-ABS matters. The Law Society agreed this was a sensible starting point, but suggested that the SDT should retain the flexibility to adjust the size or composition of panels where this was appropriate. IPS suggested that the absence of a lay majority could hinder public confidence and give the impression that members of the profession have majority control in regulatory decisions.

### **LSB’s response**

13. We agree that the SDT does have significant relevant expertise and experience within its existing membership, enabling it to hear ABS appeals. We strongly support the principle that policy decisions about the approach to regulating legal services (and the formulation of regulatory outcomes and rules) should be made by Boards with a lay majority. However, the professional background and qualifications of the individuals on an appellate body should not prevent them from acting impartially in this judicial capacity, and the inclusion of a lay member acts as an additional safeguard. The SDT will be making new appeals rules which will include provision about the constitution of appeal panels, and these have been the subject of a separate consultation by the SDT.

## Question 2 - Rules

*Do you have any comments about what the rules should cover, or on what the detailed content of the rules should be?*

14. CWHLS considered that the rules should be aligned with the SDT's existing procedure as far as possible. TLS agreed that the outline of the rules annexed to the consultation seemed adequate, subject to seeing the full rules once drafted.

### **LSB's response**

15. The draft SDT appeals rules have since been the subject of a separate consultation by the SDT and have now been submitted to the LSB for approval.

## Question 3 - Costs

*What are your views on the SDT having a general power to award costs in proceedings relating to ABS appeals?*

16. TLS agreed that the SDT should have a general power to award costs and suggested that the SDT should issue guidelines on how the discretion is likely to be exercised. It suggested that where the original decision is plainly wrong, the SRA should be ordered to pay costs. CWHLS saw no reason why costs should not be awarded in ABS appeals, and suggested this might act as a deterrent where appeals are wholly without merit.

### **LSB's response**

17. The draft order to be made under s.80 of the Act provides the SDT with power to make such order as it thinks fit in relation to costs.

## Question 4 – Onward appeals

*What are your views on the proposal that onward appeals from decisions of the SDT in relation to appeals about a decision under the SRA's licensing rules should be to the High Court?*

18. All respondents agreed. IPS highlighted that the High Court is specified as the destination of onward appeals in relation to decisions appealable under the Act and that Upper Tribunal decisions could be subject to judicial review in limited circumstances.

### **LSB response**

19. The draft order to be made under s.80 of the Act provides for onward appeals to the High Court on a point of law in relation to decisions appealable under licensing rules.

## **Question 5 – Order under section 80 of the Act and recommendation**

***Do you have any comments on the draft order to be made under s.80 of the Act, or on the draft recommendation to the Lord Chancellor?***

20. No comments were provided by consultees.

### ***LSB response***

21. As a result of further discussions during the consultation period, we have made some changes to the draft order. The commencement provisions in article 2 have been amended to bring the rule making power in article 4(3) into force on the day after the day on which the order is made. This will enable the SDT to make its new rules and apply to the LSB for its approval of the rules under s.178 of the Act in advance of designation of the SRA. All necessary arrangements can therefore be in place if and when designation occurs. We have published separately a statement detailing the material changes to the order from the version published on 5 May 2011, as required by s.81(5) of the Act.

22. Our final recommendation in relation to the s.80 order will be published once it has been sent to the Lord Chancellor.

## **Question 6 – Prescribed periods for bringing an appeal**

***What are your views on the draft rules setting out proposed prescribed periods for bringing an appeal?***

23. TLS agreed that 28 days is an acceptable period, although it suggested that there should be power for the SDT to extend (or the parties to agree to vary) the time limit in appropriate circumstances.

### ***LSB response***

24. We consider that it is desirable to have certainty about the period within which appeals can be made, and do not agree that the SDT should have a power to extend the time limit for bringing an appeal. The wording of the Act does not suggest that Parliament envisaged the prescribed period would be capable of extension (the appellant “may before the end of the prescribed period appeal to the relevant appellate body”). Providing an appeal notice is lodged within the time limit giving basic details of the appeal, the SDT will be able to use its discretion to vary the time limits at any stage of the proceedings if this is appropriate in the circumstances. It will not be essential for appellants to set out their case in detail to enable the appeal to be lodged. ABS will be commercial organisations and it is reasonable to expect them (or their owners, investors or employees) to lodge to appeal within the prescribed period.

25. The Board has made the rules under Schedule 13 in the same form as they were published with the consultation.

### **Question 7 – Funding and operational issues**

***What are your views on the proposed approach to funding the set-up and operating costs of the appeals mechanism? Are there any other operational issues that the LSB should consider?***

26. TLS highlighted that to enable appropriate provision in its budgeting process, SRA and TLS should receive early indications about the numbers of appeals.

27. CWHLS highlighted that some appeals may be ‘time sensitive’ for the ABS firms involved (for example to comply with professional indemnity insurance rules or to make appropriate arrangements with third party investors or lenders). They suggested that the appeal timescale should allow for the possibility of an expedited hearing where circumstances require.

#### ***LSB response***

28. We agree that the SDT should have the flexibility to hold a hearing quickly if this is required in the circumstances of a particular appeal. The draft SDT appeals rules make provision about the listing of appeal hearings.

### **Question 8 – Impact assessment**

***Do you have any comments on the draft impact assessment?***

29. No comments were provided by consultees.

#### ***LSB response***

30. The final impact assessment is being published alongside this decision document.