

To:	Board	
Date of Meeting:	13 June 2011	Item: Paper (11) 43

Title:	Alternative business structures: appeal arrangements for SRA as a licensing authority – recommendation to Lord Chancellor and consultation response
Workstream(s):	Workstream 3B: Widening access to the legal market
Introduced by:	Fran Gillon, Director of Regulatory Practice fran.gillon@legalservicesboard.org.uk / 020 7271 0087
Author:	Michael Stacey, Project Manager michael.stacey@legalservicesboard.org.uk / 020 7271 0089
Status:	Protect

Summary:
<p>The Board cannot make a decision to recommend that an approved regulator (AR) should be designated as a licensing authority (LA) unless it is satisfied that there would be a body able to hear and determine appeals against decisions of the LA.¹</p> <p>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. The SRA therefore decided to put forward its application to be a LA naming the Solicitors Disciplinary Tribunal (SDT) as its appellate body. We have considered whether the Board should make a recommendation to the Lord Chancellor on those terms and, after due consideration and consultation, now recommend that it does so.</p> <p>This paper updates the Board on the consultation and invites the Board to agree in principle that a formal recommendation should be made to the Lord Chancellor to make the relevant Order. It invites the Board to delegate authority to the Chairman and Chief Executive to:</p> <ul style="list-style-type: none"> • make the final recommendation after final legal checks by Parliamentary Counsel and JCSI • publish the final version of the summary of responses and decision document.

Risks and mitigations	
Financial:	None.
FoIA:	None.
Legal:	None.

¹ Schedule 10, paragraph 11(2)(b) of the Act.

Reputational: None.

Resource: Resource currently considered sufficient.

Consultation	Yes	No	Who / why?
Board Members:		✓	Update only.
Consumer Panel:		✓	
Others:	N/A.		

Recommendation(s):

The Board is invited:

- (1) to agree in principle to make the recommendation at **Annex A** to the Lord Chancellor in relation to the proposed s.80 order;
- (2) to make rules under Schedule 13 to the Act about the relevant period for appeals against licensing authority decisions about the ownership of ABS (see **Annex C**); and
- (3) to agree to delegate authority to the Chairman and Chief Executive to make the final recommendation to the Lord Chancellor and publish the final version of the summary of responses and decision document (current draft attached at **Annex D**).

LEGAL SERVICES BOARD

To:	Board		
Date of Meeting:	13 June 2011	Item:	Paper (11) xx

Alternative business structures: appeal arrangements for SRA as a licensing authority – recommendation to Lord Chancellor and consultation response

Background

1. The Board cannot make a decision to recommend that an approved regulator should be designated as a licensing authority (LA) unless it is satisfied that there would be a body able to hear and determine appeals against decisions of the LA.² Before making a recommendation that the SRA should be designated as a LA, the Board must therefore be satisfied that appeal arrangements will be in place on designation.
2. Following consultation in autumn 2009 as part of the *Alternative Business Structures: Approaches to Licensing* consultation, our policy position is that there should be a single mechanism for all ABS-related appeals (including regulatory decisions affecting regulated entities and individuals working in such entities). The SRA originally supported our proposal that the General Regulatory Chamber of the First-tier Tribunal (**GRC**) 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. The SRA subsequently decided to put forward its application to be a LA naming the Solicitors Disciplinary Tribunal (SDT) as its appellate body.
3. The Board therefore agreed (in response to an out of meeting Board paper circulated on 15 April 2011) to make a recommendation under s.80 of the Act that the Lord Chancellor should make an order providing that the GRC should hear appeals against decisions of the CLC as a LA. That order has now been laid before Parliament in draft and is expected to be debated and made before the summer recess.
4. On 5 May 2011 we published a consultation paper on arrangements for appeals against decisions of the SRA in its capacity as a licensing authority, together with a draft order to be made under s.80 of the Act. The consultation closed on 2 June and we received three responses, from:
 - The Law Society (**TLS**)
 - Ilex Professional Standards (**IPS**)
 - City of Westminster and Holborn Law Society (**CWHLS**)
5. The following next steps are required to progress the establishment of the SRA's ABS appeal mechanism:
 - Making a recommendation to the Lord Chancellor to make an Order under s.80 of the Act (see **Annex A**), with a draft Order annexed (see **Annex B**)

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

- Making rules under Schedule 13 to the Act in relation to the relevant period for appeals against licensing authority decisions in relation to the ownership of ABS (see **Annex C**)
 - Publishing our response to the consultation (see **Annex D**).
6. In 2011, we plan to do further work to explore best practice in relation to the disciplinary rules, enforcement and appeals processes used by ARs. This will include exploring the scope for greater alignment of processes, not least in the formal architecture of disciplinary decision-making and appellate bodies. While it is not proposed that sending SRA ABS appeals to the SDT should formally be expressed as an interim arrangement (or that the order under s.80 should be time limited), it may be that, subject to the findings of the review, different arrangements would be more appropriate in the longer term.

Draft s.80 order

7. As a result of further discussions during the consultation period, we have made some minor changes to the draft order at **Annex B**. 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. We do not consider this a material change to the draft order – it is merely the most appropriate way of achieving the policy intention of there being an effective appeals mechanism available at the point of designation (if SRA is designated). In the Executive’s view a statement of material changes under s.81(5) is therefore unnecessary. The Board is invited to agree the recommendation on this basis.

The SDT and proposed new procedural rules

8. While the approach to ABS appeals proposed by the SRA is not in line with the Board’s policy of a single mechanism for ABS appeals provided by the GRC, the Act does not allow us to impose this approach if the relevant AR does not consent. This implies that the Board should consider any reasonable proposal made by an AR. Clearly the SDT has relevant expertise in relation to dealing with the professional misconduct of solicitors, and also has an existing jurisdiction over recognised bodies. It was also clearly envisaged that the SDT might be an ABS appellate body at the time the Act was passed, since it is named in s.80(2)(a) as a body whose functions may be modified by an order under s.80(1). The SDT has given assurances that it has the capacity to handle the additional appeals, and the likely costs are broadly equivalent to the costs of the GRC (although there will inevitably be some duplication in costs, for example training and set-up costs, that could have been avoided by having a single appeal mechanism).
9. The test in relation to the decision whether to recommend that the SRA is designated as a LA is whether, if designated, there would be a body with the power to hear and determine appeals.

10. The proposed order under s.80 of the Act would give the SDT the power to hear the appeals. In order to determine the appeals, the SDT will require appropriate procedural rules. The SDT's current rules relate to its existing disciplinary jurisdiction, and are not adequate for the purposes of dealing with this new appellate jurisdiction.
11. The SDT therefore proposes to make new appeals rules to govern its appellate jurisdiction (both in relation to ABS appeals and appeals against SRA decisions under s.44D of the Solicitors Act 1974 and Schedule 2 to the Administration of Justice Act 1985, which enable the SRA to issue a rebuke or fine a solicitor or recognised body up to £2000). Since there are currently no rules in place enabling the SDT to deal effectively with appeals in relation to these existing powers to rebuke and fine, it is proposed that new appeals rules are made as soon as possible, prior to the s.80 order being made – a draft is attached at **Annex E**. Once the s.80 order has been made, the SDT will have the power to make rules in relation to ABS appeals, and amendment rules will then be made expanding the scope of the appeals rules to cover this new jurisdiction (and coming into force on the designation of SRA as a LA) – draft amendment rules are attached at **Annex F**.
12. The rules are based on some relevant provisions of the existing SDT rules, but largely replicate the procedural rules of the GRC. This has the advantage that the procedure followed by the SDT will be consistent with the approach followed by the GRC in relation to appeals against decisions of the CLC as LA. Both sets of SDT appeals rules will need to be approved by the Board under s.178 of the Legal Services Act 2007 before they can have effect. The Board is not being asked to approve the rule at this stage. The SDT intends to consult on the rules over the coming weeks, and will then submit the final version to the Board for approval.
13. We have sought assurances from the SDT that where the grounds of appeal are not specified in the Act or licensing rules, it will conduct a rehearing. By rehearing in this context, we mean that where grounds of appeal are not specified in the Act or licensing rules, the SDT will not merely consider procedural flaws of the kind giving rise to claims for judicial review, but that it will undertake a full reconsideration of the facts of the case (the extent of the rehearing being proportionate to the nature and complexity of the decision in question). This is important for compliance with Article 6 of the European Convention on Human Rights (the right to a fair trial) and for consistency with the approach to be taken by the GRC. We will update the Board at the meeting on the SDT's response.
14. For the reasons given above, and subject to receiving appropriate assurances in relation to rehearsals, the Executive is satisfied that the proposal put forward by the SRA is reasonable and will mean there is a body with the power to hear and determine appeals against decisions of the SRA as a LA.

Consultation responses

15. A draft summary of responses and a decision document is attached at **Annex D**. Two out of three respondents supported the proposal that SDT should act as the appellate body in relation to decisions of the SRA as a LA, and the third did not express a view. The draft impact assessment annexed to the consultation has

been amended to reflect comments received from MoJ economists. The final draft is attached at **Annex G**.

Rules under Schedule 13

16. The Board needs to make rules prescribing the period for bringing an appeal under Schedule 13 (see **Annex C**). These are consistent with rules already made by the Board under s.96 in relation to appeals against financial penalties imposed by LAs. Similar rules under Schedule 13 were not required in relation to appeals against decisions of the CLC as a LA, since the s.80 order made in relation to CLC modified Schedule 13 so that the GRC rules apply to determine the appropriate period (in practice this is also 28 days).

Recommendation

17. Before making the recommendation, we are required to obtain consent from the person(s) from whose decisions the appeals are to be made, and from the body to which appeals are to be made³. We have sought the necessary consents in writing and will provide an update at the Board meeting on responses.

18. The Board is invited:

- (1) to agree in principle to make the recommendation at **Annex A** to the Lord Chancellor in relation to the proposed s.80 order at **Annex B**
- (2) to make rules under Schedule 13 to the Act about the relevant period for appeals against licensing authority decisions about the ownership of ABS (see **Annex C**); and
- (3) to agree to delegate authority to the Chairman and Chief Executive to make the final recommendation to the Lord Chancellor and publish the final version of the summary of responses and decision document (current draft attached at **Annex D**).

02.06.11

³ S.81(1) of the Act.