LEGAL SERVICES BOARD

Alternative business structures: appeal arrangements

Summary of responses to consultation and decision document

Contents

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. On 23 August 2010, we published a consultation document *Alternative business structures: appeal arrangements.* This set out our detailed proposals for providing a single mechanism for hearing appeals against some decisions made by LAs.

5. We had previously (in November 2009) consulted on our proposal that these appeals should be heard by the General Regulatory Chamber of the First-tier Tribunal ("**the GRC**"). The proposal was supported by the majority of respondents (including the Master of the Rolls), although we accept that the Law Society and Solicitors Disciplinary Tribunal both expressed opposition. The SRA proposed that initially only licensing matters (such as licensing appeals, fitness to own and fitness to hold particular posts) should be dealt with through a single mechanism, until all disciplinary and conduct matters relating to individuals working in ABS and 'traditional' firms could be heard by a single body.

6. The August 2010 consultation built on our proposal that there should be a single mechanism for dealing with all ABS appeals, and set out in more detail how we proposed to approach implementation. However, an order designating an appellate body requires the consent of both the potential

appellate body and the potential licensing authority. The LSB cannot insist upon a recommendation for a particular appellate body to be used, since the potential appellate body and/or the potential licensing authority could refuse to consent. The LSB's Guidance on licensing rules[1] and our rules for considering applications to be recommended for designation as a licensing authority[2] do not therefore specify a particular approach to specific appellate bodies.

7. We sought comments on a number of draft documents:
   - our proposed recommendation to the Lord Chancellor
   - our proposed draft order to be made under section 80 of the Act
   - draft supplementary guidance to approved regulators on the content of licensing rules in relation to appeals, to be issued under section 162 of the Act
   - draft ABS appeals rules stating the period within which appeals against the imposition of financial penalties must be made
   - a draft Impact Assessment.

8. In addition, we sought views on a number of detailed issues about how the appeals mechanism will work – for example 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 also addressed the composition of the panels hearing the appeals and our proposals on how the appeal mechanism should be funded.

9. We received six responses to the consultation, from:
   - The Law Society ("**TLS**")
   - Solicitors Regulation Authority ("**SRA**")
   - Solicitors Disciplinary Tribunal ("**SDT**")
   - Bar Standards Board ("**BSB**")
   - Ilex Professional Standards ("**IPS**")
   - Council for Licensed Conveyancers ("**CLC**")

10. 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. The final draft order and draft impact assessment are being published alongside this decision document.

[1] Available on the LSB website: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/abs_guidance_on_licensing_rules_guidance.pdf

[2] Available on the LSB website: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Designating_LA_rules.pdf

Update

11. There have been a number of developments since the consultation closed. Both the SRA and the CLC consented in principle to a section 80 order designating the GRC as the appellate body to hear ABS appeals, subject to changes to its rules to provide a general power to award costs. On 1 March, the Tribunal Procedure Committee (TPC) considered whether it should change its rules in this way. It came to the preliminary view that the GRC Rules in their current form[3] are adequate to determine whether one party is to pay the costs of another and do not require any particular additions in order to accommodate ABS appeals. The TPC has indicated that a final decision will not be made until the report (by Mr Justice Warren) reviewing the awarding of costs within the two tier tribunals structure has been released. In addition, the TPC requested further clarification on several points to supplement its understanding of the issues.

12. Following this, the CLC decided to consent to the GRC being its appellate body on the basis of the current rules, although it still considers that the rules should be changed as proposed. However the SRA Board decided that it would include within its licensing authority application the Solicitors Disciplinary Tribunal (SDT) as its appellate body. This decision is reflected in its licensing authority application received by the LSB on 25 March.[4] As a result, a new consultation[5] is being held on what section 80 order is required if the LSB considers that it should make a recommendation to the Lord Chancellor that the SRA should be designated as a licensing authority.

13. Discussions are continuing with the Ministry of Justice about commencing the provisions relating to the LSB in the ABS commencement order and the need for a section 80 order that includes the LSB. The LSB does not want these ongoing discussions to jeopardise consideration of the Order necessary to designate the GRC as the CLC's appellate body and this document therefore focuses on the recommendation for a section 80 order in relation to the CLC alone.

14. Alongside this document, we are publishing a statement under section 81(5) of the Act detailing the material changes in the draft recommended section

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[3] Which allow costs to be awarded where there are wasted costs, or if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings.

[4] Available on the LSB website: http://www.legalservicesboard.org.uk/what_we_do/regulation/sra_licensing_authority_application.htm

[5] Available on the LSB website: http://www.legalservicesboard.org.uk/what_we_do/consultations/open/index.htm

80 order, compared to the version published on 23 August 2010, and our reasons for those changes.

Consultation Responses

General comments made by consultees

15. Two consultees expressed their broad support for our proposed approach. The CLC thought it was “proportionate and fair”. The BSB considered that “the case has been made that the arrangement provides the opportunity to utilise a body which has expertise in regulatory matters as well as having an established infrastructure which should ultimately lead to lower costs and a consistent approach on appeals from licensable bodies across the sector”.

16. The SRA did not object to the proposal that the Lord Chancellor should designate the GRC in relation to ABS appeals. However, it expressed concern about the potential for inconsistency in the treatment of ‘traditional’ law firms (with disciplinary decisions dealt with by the SDT) and ABS (with disciplinary decisions dealt with by the GRC). It therefore suggested that the arrangements proposed should be an interim measure pending the appointment of a single body to hear all legal services appeals. TLS also expressed support for considering the establishment of a single disciplinary tribunal for all legal services discipline and appeals matters.

17. IPS made a number of detailed comments on the proposals but raised no fundamental objections.

18. TLS is opposed to our proposals in relation to ABS appeals, on the basis that they are inconsistent with the principle of equal treatment between ABS and other law firms. It argues that the SDT could readily be adapted to deal with the challenges of the new legal regulatory regime. The Society accepts in principle that issues specific to ABS firms (such as licensing appeals, fitness to own and fitness to hold particular posts) could be dealt with by a separate body.

19. The SDT is also firmly opposed to the proposal that ABS appeals should be heard by the GRC, suggesting the proposal is “seriously flawed” and “potentially damaging to the efficient and effective regulation of the solicitors’ profession”.

Our long term strategy - a single appellate body

20. We have been consistent in proposing that there should be a single mechanism for ABS appeals, and why we think the GRC is an appropriate body to carry out that role. However, we recognise that we cannot insist on a recommendation for a particular appellate body to be used, since the potential appellate body and/or the potential licensing authority could refuse to consent. In the meantime, we note that the CLC’s decision is consistent with our longer term aim.

21. Broadly speaking, there are three possible approaches to dealing with ABS appeals:

- **Option A**: a single, consistent mechanism as proposed in our consultation (which we consider could be delivered by the First-tier Tribunal, General Regulatory Chamber)

- **Option B**: different mechanisms that are consistent with the existing arrangements each licensing authority uses in their capacity as an approved regulator

- **Option C**: a 'hybrid' approach where appeals about "ABS specific issues" (e.g. licensing appeals, fitness to own and fitness to hold particular posts) would go through a single mechanism, but all appeals about the conduct of individual authorised persons would be dealt with via the existing disciplinary tribunals/committees used by the relevant approved regulator.

22. The Law Society and SDT favour option B, although the Law Society also states in its consultation response that option C is acceptable in principle.

23. We agree that it is desirable for there to be consistency in regulatory outcomes for ABS and other firms, regardless of their business model or regulator. We do not consider that our proposed approach is incompatible with the principle of consistent regulatory outcomes.

24. It remains our view that there are a number of compelling reasons why it is a desirable policy objective for legal services appeals to be dealt with through a single, consistent mechanism in the context of reviewing appeal and disciplinary practice and mechanisms as a whole across all Approved Regulators (as explained in paragraphs 34 - 35 below). We therefore intend to take forward this issue as part of our work as a priority in 2011-12.

25. Our recommendation is that the GRC will hear appeals against any decisions of the CLC as a licensing authority that are subject to a right of appeal under the Act, or under its licensing rules. All matters relating to ABS entities will be dealt with under the statutory framework in part 5 of the Act. In relation to individuals who are authorised persons, there is the possibility that the CLC will have other statutory powers outside part 5 of the Act which could be used in relation to an individual working in an ABS. Our expectation is that it will wish to use the powers under part 5 of the Act to deal with all matters relating to the conduct of individuals working in ABS, regardless of whether they are an authorised person. There are two reasons for this:

- s.52 (4) of the Act establishes the principle that in situations of regulatory conflict, an “entity requirement” prevails over an “individual requirement; and

- the powers available to licensing authorities in relation to the discipline of individuals working in an ABS (regardless of whether they are an authorised person) are stronger than other statutory powers available to approved regulators.

26. The only circumstances where we envisage the CLC will need to refer a matter to an approved regulator (whether to CLC in its capacity as an approved regulator or to another approved regulator) is where an authorised person has committed a breach of the licensing rules so serious that the relevant approved regulator should consider whether their authorised person status should be removed (i.e. whether they should be “struck off”).

Option C – the “hybrid” option

27. A consistent mechanism for ABS appeals will provide clarity for ABS and potential ABS about the process for appeals. It is essential to the effective regulation of ABS that a licensing authority has the powers to deal with all regulatory issues relating to ABS – whether they concern the entity or individuals who own, manage, or are employed by the entity. We do not consider that it would be feasible for a licensing authority to refer all matters relating to the individual conduct of authorised persons (or indeed another non-legal professional) to the relevant ‘individual’ regulator (option C). There would be a high likelihood of dispute, with the risk that some cases could fall into a gap.

28. Regulatory issues in an ABS could involve a range of different individuals (some lawyers authorised by other legal regulators, some other non-legal professionals, and some with no legal or other professional qualification). It is likely that in many cases a regulatory issue will not be a self-contained breach of the code concerning one individual that is capable of being referred on to another regulator as a ‘stand alone’ issue.

29. For example, an investigation into the alleged mishandling of client money might lead the licensing authority to conclude that the entity itself is partially responsible (because of a deficiency in internal systems), together with three employees (one who is an authorised person regulated by the licensing authority in its capacity as an approved regulator, another who is an authorised person regulated by another approved regulator, and another who has no legal or other professional qualification). In such a scenario it is difficult to see how the conduct issues relating to an authorised person regulated by another regulator could be separated from the consideration of the whole matter by the licensing authority.

30. Any attempt to draw a line between those matters that should be dealt with by an ABS-specific appeal mechanism and those that should be dealt with by existing disciplinary tribunal/committee arrangements would run the risk of matters arising in practice that were not contemplated in advance falling outside the agreed definitions. There is also the possibility that licensing authorities and approved regulators will be distracted by disagreements about where appeals should properly be heard, when their priority should be to deal with the alleged breach and impose a sanction as soon as possible.

31. Having proposed option C in their response to our earlier consultation, the SRA has considered this further. Its response to our latest consultation acknowledges that "hiving off" some but not all appeal rights could be "too complex and confusing", with parallel rights of appeal potentially arising from the same facts. The SRA considers that such an approach is "potentially confusing, duplicative and more costly".

32. For these reasons, we do not accept TLS's assertion that our concern about this issue is not "well founded". Nor do we accept its suggestion that the route for appeal could simply be defined in relation to the nature of the decision. As discussed above, a decision on a single alleged breach could involve a consideration of the systems put in place by the ABS, and the conduct of a number of individuals who may be a mixture of authorised persons and other employees. The issue therefore needs to be considered in the round to ensure appropriate judgements can be made about the appropriate way to apportion responsibility between those involved and an appropriate sanction (or sanctions). A single appeal mechanism for all decisions of a licensing authority will provide ABS (and individuals who own, manage or are employed in ABS) with certainty about how appeals will be dealt with.

33. There will also be costs associated with the additional complexity of a hybrid system which have not been quantified in the Impact Assessment – for example the costs of several different disciplinary and appeal bodies considering issues arising from the same set of facts and the costs to licensing authorities of preparing for multiple hearings. While this duplication may be unavoidable in relation to the 'striking off' of authorised persons, in all other matters the licensing authority and its appeal body can deal with all the remaining issues.

Future strategy

34. A single mechanism for all ABS appeals would enable a body of expertise to develop in relation to licensing and other regulatory matters under the framework of part 5 of the Act. The jurisdiction of the GRC can easily be expanded in the future to accommodate appeals against the decisions of any additional licensing authorities that are designated (or against decisions

of the Board, should it be necessary for it to act in its capacity as a licensing authority). We therefore expect that 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
- lead to economies of scale in relation to administrative and appellate functions.

35. We have previously expressed our view that it would be desirable to explore whether there should be a single body to hear all legal services appeals (about ABS and 'traditional' firms, and all authorised persons). Establishing a single mechanism has not been feasible in the timescales for introducing ABS. Approved regulators currently have a range of separate discipline and appeals arrangements in place, and we intend to consider whether it is appropriate to rationalise these in the future. Both TLS and SRA support the principle of a single mechanism for all legal services appeals in the future. The concerns they have raised about consistency between ABS appeals and appeals under the existing arrangements suggest we should explore the feasibility of rationalising existing mechanisms sooner rather than later. We have included this as a priority workstream in our 2011/12 business plan.

Question 1

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

36. Responses to this question broadly depended on whether or not the respondent agreed with the policy to have the GRC hear all ABS related appeals. The Law Society and the SDT therefore opposed the draft recommendation as they both consider that the SDT should be the body to hear appeals against decisions made by Licensing Authorities.

37. The CLC, BSB, IPS and the SRA were all broadly content with the recommendation. However the BSB commented that it would like to see more background information about the need for the order and, "why it has been determined that a single appellate body is considered preferential to the separate bodies specified in 80(2) of the Act". The SRA considers that designation of the First-tier tribunal should be an interim measure, "pending the appointment of a single body to hear all legal services appeals".

LSB's response

38. While we agree in principle that it would be desirable to have a single mechanism to hear all legal services appeals, we consider that much more work is required to explore the feasibility of this approach. Our Business Plan for 2011-12 therefore prioritises further work on this issue with a view to making findings and recommendations in Q3.

39. Our final recommendation in relation to appeals against the decisions of CLC as a LA will be published once it has been made.

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?

40. The CLC, SRA, BSB and IPS all agreed with the list of decisions, with the SRA, BSB and IPS commenting that they would like to see LSB guidance on the circumstances for appeals. However, while TLS considers that in principle all decisions having an impact on an ABS should be appealable, it commented that it objected to "appeals from firms regulated by the SRA going to different bodies depending on the business model the firm chooses to adopt".

41. Apart from the SDT, which did not specifically comment about internal reviews, all respondents agreed that appellants should be required to seek internal review before an appeal can be made.

42. The BSB expressed concern about the potential inconsistency between licensing rules and regulatory arrangements relating to appeals for individuals and suggested that the LSB should consult further with approved regulators and potential licensing authorities before issuing the supplementary guidance. There were no substantive responses on the content of the draft supplementary guidance.

LSB's response

43. Having considered the responses we have concluded that LA decisions about the following issues must have a right of appeal (after the internal review process is exhausted) 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).

44. The Board therefore issued guidance in December 2010 about what licensing rules should contain about the right to appeal to the appellate body. [6] This will help to ensure that LAs' licensing rules are developed in a consistent way since, in exercising its functions such as making a recommendation for designation as a LA or in approving licensing rules, the LSB may have regard to the extent to which an approved regulator has complied with any relevant guidance. This does not prevent a licensing authority departing from the guidance with suitable justification.

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?

45. TLS, SRA, BSB and the CLC agreed that there should be a general right of appeal. However, the SRA commented that while it would have liked the rules to be more specific about the type of grounds on which appeals could be made, it recognised that this would have, in practice, been difficult. The SRA also considered that a substantive rehearing of all decisions made by a LA may be disproportionate and that in some cases only a review of the decision rather than a complete rehearing would be appropriate. It therefore suggested that if appeals were dealt with as re-hearings it "would expect the GRC to exercise robustly its extensive case management processes to ensure that matters are dealt with in a proportionate and expeditious manner". Additionally the BSB felt that there was lack of incentive not to appeal given that, for appeals against financial penalties, a higher penalty could not be awarded by the appellate body. The BSB considers that this

[6] Available on the LSB website: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/supplementary_guidance_on_licensing_rules.pdf

fact and a general right of appeal could result in unnecessary substantive rehearings in cases where the grounds for appeal were not solid.

46. IPS felt that a general right of appeal was too wide and cited the cost of dealing with groundless claims and the fact that an appellant would not have to prove anything other than they had been aggrieved by a decision. IPS considers that defined grounds of appeal would make appellants think more seriously about whether then can and should appeal.

LSB's response

47. We consider that the GRC applies a robust case management process and can ensure the system operates efficiently and without undue costs within its existing rules. The TPC is considering whether to change its rules to give it a general power to award costs for ABS appeals.

Question 4

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

48. Respondents broadly agreed with the proposal. Although there were some concerns including:

- IPS commented about the potential difficulties around the power of the Tribunal to 'force' a LA to license an entity that was previously refused
- The BSB highlighted the lack of disincentives around appeals although recognised the risk of creating disparities between the Tribunal's powers in respect of statutory appeals and those made under licensing rules. The BSB recognised that there was the potential for a consistent approach to appeals decisions across the profession providing the Tribunal adopted a consistent approach in matters where it substituted a new decision. The BSB considers that if new decisions were substituted on a regular basis, parties should work together to achieve greater consistency
- The SRA noted that there was currently no power for the Tribunal to increase financial penalties upon appeal.

LSB response

49. We recognise that one outcome of a LA's decision being overturned on appeal may be that a licence application is granted that had previously been refused. We consider that this highlights the importance of having an independent appeal mechanism. Although respondents are concerned about the possible perverse incentives that might arise from the fact that the

appellate body is unable to increase a financial penalty, that is the way that the Act is drafted and would be the case whatever the appellate body. Licensing Authorities using the GRC will be able to seek permission to appeal to the Upper Tribunal on a point of law against a decision made by the GRC. There is also the possibility of seeking a judicial review of a GRC decision in the High Court if one of the judicial review grounds has been met.

50. We agree that if, over time, the GRC is substituting new decisions on a regular basis, for example for one LA or on one type of appeal, that we should work with the GRC and with LAs to identify the cause of the issue and to try to rectify it.

51. The Tribunal's powers in relation to appeals against financial penalties and certain decisions made under Schedule 13 of the Act are set out in the Act. For all other appeals, we consider that, given the wide range of issues that ABS appeals can cover, the Tribunal Service needs wide discretion when coming to a decision and that its powers 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 taken
- remit the matter to the licensing authority (generally, or for determination in accordance with a finding made or direction given by the Tribunal).

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?

52. IPS, SDT and CLC all commented that they thought that the Panel should consist of three, rather than two, members. TLS and the SDT queried the experience and expertise of the GRC, with TLS suggesting that the Panel should include at least one qualified lawyer. The CLC suggested that there should be a licensed conveyancer and/or an individual involved with a licensed body as well as a legally qualified Chair. Conversely, the BSB queried whether the LSB had considered panels with a lay majority.

53. The SRA considered that the jurisdiction should be renamed.

LSB response

54. Some of the responses to this question may be partly a result of a misunderstanding about the current appeal bodies. The panel that currently considers immigration services issues hears regulatory appeals

from immigration advisers about decisions on issues such as fitness to practise that have been made by the Office of the Immigration Services Commissioner. It does not consider appeals against decisions made by the Home Office about immigration, asylum and nationality matters.

55. The composition of panels is entirely a matter for the GRC President. Our discussions with the HM Courts and Tribunals Service during the consultation period indicate that it is likely that panels will be composed of three members.

56. The President intends to select the most appropriate members to hear appeals from across the First-tier tribunal, based on the expertise required in a particular case. This provides additional reassurance that the panels hearing ABS appeals will have relevant expertise. We have identified one member of the CLC's Discipline and Appeals committee who is also a member of the First-tier Tribunal, and will recommend to the President that she is allocated to hear ABS appeals. This mitigates the concerns expressed that there is insufficient relevant experience within the First-tier Tribunal.

57. Having three member panels rather than two member ones will impact on the costs, but ultimately the panel composition in any particular appeal is a matter for the Tribunals judiciary.

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.

58. Comments in response to Question 6 and Question 7 came from the SRA and the BSB. The BSB queried whether the definitions of appellant and respondents as described in the GRC's rules should include specific reference to definitions in part 5 of the Act.

59. The SRA thought that while the existing Rules were generally adequate, clarification or changes in two areas would be helpful. Firstly, they thought it would be desirable to ensure that where the SRA uses Regulatory

Settlement Agreements and seeks a consent order from the Tribunal, there are powers for the Tribunal to consent to agreements that include provisions as to costs. They suggest that Rule 17 (2) should be revised to reflect an express provision "that the consent to withdrawal may be given on such terms as the GRC sees fit including payment of costs".

60. Secondly, the SRA suggested that it would be helpful if the Rules provided a clear power for the Tribunal to stay decisions made by Licensing Authorities pending an appeal.

LSB response

61. As the SRA no longer proposes to use the GRC to hear appeals we will not pursue these proposed rule changes.

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?

62. IPS and BSB both agreed with this proposal with IPS going on to comment that if the Tribunal did have the power to award costs, it is unclear how this would be enforced by the Licensing Authority, given that there would be no contractual relationship between the two as the applicant's licence would have been refused.

63. CLC, TLS and the SRA did not agree. This was mainly on the basis that it would encourage unmerited appeals. The SRA restated its view in response to the previous question that the GRC's Rules should be amended to require that costs should be paid by any party judged to be responsible for unnecessary costs – this would also ensure a consistent approach to the treatment of law firms and ABS. While the power of the GRC to strike out frivolous appeals was recognised, the CLC also suggested that a general power to award costs would act as a suitable disincentive and again highlighted the point about consistency with current appeal arrangements. The CLC suggested that the following should be added at 10(1) of the GRC Rules:

> "Where a Licensing Authority is the respondent and a decision, direction or order or a Licensing Authority is the subject of proceedings, the Tribunal may make such order as it considers fit as to the payment of costs by one or more of the parties".

LSB response

64. Consultees have made strong arguments in favour a broader power to award costs. Firstly, they argue that the absence of such a power means there is no disincentive in relation to costs, which is likely to encourage unmeritorious appeals. This is a particular risk in relation to ABS appeals since it is likely that the appeal will be a substantive rehearing rather than a procedural review of the original decision, and in relation to the imposition of a financial penalty the Tribunal will have no power to increase the amount of the penalty on appeal (only reduce it or quash it). This will mean appellants have nothing to lose in pursuing an appeal, so may not make much effort to assess the strength of their case before lodging an appeal.

65. Secondly, there is the principle that the costs of the licensing authority in defending an appeal ought to be borne by an unsuccessful appellant. Consultees argued that it would be unfair for the licensing authority to be responsible for meeting its own costs in relation to unsuccessful appeals, since the effect is that the costs are met by the licensed community as a whole rather than appellant. This is consistent with the proposal by the SRA and CLC to include a provision in licensing rules that the costs of an investigation are recoverable.

66. At its meeting on 1 March the Tribunals Procedure Committee (TPC) considered whether it should change its rules in this way. Its preliminary view is that the GRC Rules in their current form are adequate to determine whether one party is to pay the costs of another and do not require any particular additions in order to accommodate ABS appeals.

67. The TPC has indicated that a final decision will not be made until the report reviewing the awarding of costs within the two tier tribunals structure (by Mr Justice Warren) has been released. The current GRC rules allow costs to be awarded (amongst other things) for wasted costs, or if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings.[7] The CLC has consented on the basis of these rules, although CLC and LSB will continue to press for a change in the rules as proposed.

[7] The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009 No 1976)(as amended) - Rule 10

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?

68. Mainly respondents did not agree with this proposal, with only CLC expressing support for it. The main concern of those who disagreed with the proposal was that respondents thought it would be inconsistent with arrangements for appeals by non-ABS legal entities who may appeal to the High Court. The SRA commented that the Courts should be "involved in deciding points of law" in relation to "delivery of legal services/the legal system".

69. The BSB had some concerns given that it is currently amending its own appeal arrangements to allow for appeal to the High Court and sought clarification about how the onward appeal procedure would work alongside the appeal arrangements for non-ABS appeals. IPS's concern was mainly around the fact that in limited circumstances (when the Upper Tribunal decides a case that it has no authority to) decisions of the Upper Tribunal can be judicially reviewed, whereas those of the High Court could not.

LSB response

70. The purpose of our proposed changes is to achieve consistency with the approach generally taken to onward appeals from decisions of the First-tier Tribunal, which includes a further right of appeal (with permission) to the Court of Appeal.

71. If the amendments were not made as proposed, there would be two parallel onward appeal rights in relation to some decisions – a right of appeal to the High Court under the Legal Services Act 2007, and the right to onward appeal to the Upper Tribunal against any decision of the First-tier Tribunal by virtue of part 1 of the Tribunals, Courts and Enforcement Act 2007. It is unclear how the High Court or Upper Tribunal would deal with a situation where these rights were in conflict (i.e. an appellant bought two parallel appeals to the High Court and Upper Tribunal simultaneously).

72. An additional complication would arise from the fact that in relation to the onward appeal routes for ABS appeals, some matters are subject to a statutory right of onward appeal to the High Court under the Act, and others will be appealable under licensing rules and therefore not appealable to the High Court. Decisions appealable under licensing rules would, however, be subject to the right of onward appeal to the Upper Tribunal provided under the Tribunals, Courts and Enforcement Act 2007.

73. The Upper Tribunal is a superior court of record, which means that its decisions are binding decisions on the tribunals and public authorities below. The Upper Tribunal also has powers both to enforce its own procedures and the procedures of the First–tier Tribunal. The Upper Tribunal will therefore have the ability to develop a body of case law in relation to ABS appeals. There is a right of onward appeal (with permission) from decisions of the Upper Tribunal to the Court of Appeal.

74. For those bodies using the GRC, our approach will ensure consistency between decisions and approach on ABS and so we consider that it is appropriate for all appeals from decisions by the First Tier Tribunal to be heard by the Upper Tribunal. We will therefore proceed with the proposals as set out in the consultation paper.

Question 10

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

75. The only comments were from the SDT and TLS stating that they were opposed to the principle behind the order in general.

LSB response

76. This does not require further consideration in relation to the drafting of the order. A revised order is being published alongside this decision document. We are also publishing a statement under s.81(5) of the Act detailing the material changes made to the order published on 23 August 2010, and the reasons for those changes.

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?

77. IPS, CLC, TLS and SRA all agreed that the cost should be borne by Licensing Authorities and recovered as part of the licence fee. However TLS only agreed “insofar as they are not met by the unsuccessful appellant” and thought that costs, “should be apportioned according to the share of costs attributable to appeals from each licensing authority, offset by costs recovered in those cases”.

78. The BSB had some concerns and suggested basing the costs on the number of persons within the bodies and the regulatory risks they present.

79. IPS, CLC and SRA also agreed with a system where setup costs are paid upfront and running costs paid retrospectively at the end of each financial year.

LSB response

80. We agree that the costs should be met from licence fees. It will be for LAs to decide, if costs are recovered, how that should be reflected in their overall budget. An approach based on the number of people within an ABS and the risk they present is likely to be complex to design and implement. The revised approach agreed with HM Courts and Tribunals Service is that licensing authorities using it for appeals will be billed on a per case basis, which will mean that less complex cases will attract lower costs.

Question 12

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

81. CLC, BSB and IPS all agreed with the proposal. TLS thought that it should be up to each LA to decide, following consultation, what the time period should be and that all SRA regulated entities should follow the same time periods.

LSB's response

82. We think it is appropriate for all ABS to have the same time period in which to appeal against a decision. This will help to ensure consistency across LAs and reduce the administrative burden for ABS, LAs and appellate bodies of checking whether an appeal has been made in time. The rules were made by the Board on 13 December 2010.[8]

Question 13

Do you have any comments on the draft impact assessment?

83. TLS and SDT both commented that they did not think that there would be any savings by using the Tribunal compared to the SDT.

84. The BSB questioned why net impact was not highlighted and commented that there was no impact assessment for smaller bodies, nor did the Impact Assessment consider the risks represented by bodies of differing size and

[8] Available on the LSB website: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Rules_under_s96.pdf

nature and what the impact might be should bodies other than the SRA and CLC become Licensing Authorities.

LSB's response

85. We have amended the Impact Assessment to reflect the revised approach agreed with HM Courts andTribunals Service. We have also reflected our expectation that the panels hearing appeals will consist of three members rather than two. A revised impact assessment is being published alongside this decision document.