



**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

**Bar Standards Board response to  
LSB Consultation – ‘Alternative Business Structures: appeal arrangements’**

**Introduction**

1. The Bar Standards Board (BSB) welcomes the opportunity to comment on the consultation paper on the proposed arrangements for appeals against decisions of licensing authorities and draft order to be made under section 80 of the Legal Services Act 2007 (the Act).
2. In responding to this consultation, the BSB draws reference to its consultation paper “Regulating Entities” published on 27 September<sup>1</sup>. The consultation paper discussed the need to establish appropriate disciplinary and appeals procedures should the BSB begin to regulate entities, noting the powers, disciplinary and appeals procedures of current entity regulators such as the Solicitors Regulation Authority (SRA).
3. The BSB acknowledges the separate consultation published by the LSB regarding an Order under section 69 of the Act in relation to powers of the SRA and Council for Licensed Conveyancers (CLC). The BSB recognises the importance of ensuring a consistent approach to the appeal process for all regulated persons and entities and while this response focuses on the specific proposal for the appeal arrangements under section 80 of the Act, is mindful of the need to ensure they are consistent with the appeal procedures in respect of all approved regulators and all authorised persons.

**Context**

4. The BSB notes that the consultation is a development of proposals made in the LSB’s earlier consultation ‘Alternative Business Structures: approaches to licensing’.

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<sup>1</sup> <http://www.barstandardsboard.org.uk/consultations/OpenConsultations/regulatingentities/>

Responding to that consultation, the BSB suggested that consideration should be given to permitting each licensing authority to establish its own appellate body and that a single appellate body could prove expensive and lack the flexibility to manage the flow of cases (for example fast-tracking where appropriate) that smaller individual appellate bodies may have<sup>2</sup>.

5. The BSB's response also noted a linkage to the consultation on the Civil Law Reform Bill which proposed to bring the appeal process for barristers into line with the appeal process for solicitors in disciplinary hearings<sup>3</sup>. This would transfer the jurisdiction for appeals in barristers' disciplinary hearings from the Visitors of the Inns of Court to the High Court.
6. This response therefore focuses on the appeals arrangements under section 80 of the Act without prejudice to any programmes of work relating to Civil Law Reform, any arrangements the BSB would have to make in relation to entities that are not licensable bodies under section 73 of the Act, nor its response to the current section 69 Order consultation.

### **Comments on the consultation**

7. The BSB broadly welcomes the proposals set out in the draft recommendation to the Lord Chancellor.
8. The basis of the BSB's previous concerns over the establishment of a single appellate body centred on the risk of that arrangement being more expensive due to lack of flexibility around case management. However, following discussions with the LSB and the First-tier Tribunal, 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.
9. However, in taking forward the proposal under section 80, the BSB believes it is important to consider how other appeal arrangements, for example those of approved regulators over individual lawyers and appeals against disciplinary decisions, work alongside the section 80 arrangements.

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<sup>2</sup> <http://www.barstandardsboard.org.uk/consultations/bsbresponsestoconsultations/>

<sup>3</sup> <http://www.justice.gov.uk/consultations/docs/civil-law-reform-bill-consultation-paper.pdf>

10. A key concern of the BSB is to ensure there is a consistency of approach between the appellate body and an approved regulator's appeal body when both are making determinations over similar matters, for example a particular malpractice that is common to both licensable bodies and other authorised persons. It would be helpful to know how such consistency would be achieved in practice.
11. We would also like clarification on how future applications will be considered given that the Order only relates to bodies named within it.

### **Proposed recommendation to the Lord Chancellor**

#### **Q1: Do you have any comments on the draft proposed recommendation to the Lord Chancellor at Annex B?**

12. The BSB supports the principle behind establishing a single appellate body to consider appeals made by licensable bodies under section 80 of the Act and is broadly content with the draft recommendation. However, given the concerns raised by a number of respondents to the first consultation on the principle behind the approach, it would be helpful to set out in the draft recommendation some further background as to the need to make the order, and why it has been determined that a single appellate body is considered preferential to the separate appellate bodies specified in 80(2) of the Act.

#### **Q1: 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 at Annex D?**

13. As a statutory appellate body, the BSB agrees that it is appropriate to establish a list of appealable decisions based on decisions that affect a person's civil rights. We note the list of statutory rights of appeal in Annex C that are appealable under the Act and that the guidance in Annex D prescribes a list of additional decisions that would be appealable as they could affect a person's civil rights.
14. However, the BSB considers it important for the LSB to provide guidance as to how arrangements should be made with respect to appeals against regulatory and disciplinary decisions that do not fall within the list. Paragraph 29 of the consultation suggests that decisions appealable under licensing rules are likely to be decisions

which determine a person's civil rights. However, the list in paragraph 4 of Annex D is specific, and may not cover all decisions made under licensing rules.

15. There is potential for a lack of consistency among licensing authorities' licensing rules, and the regulatory arrangements relating to appeals for individuals which may serve to vary the right of appeal by the appellant.
16. The BSB therefore believes further consultation should be sought with approved regulators and potential licensing authorities before issuing supplementary guidance under section 162 of the Act.
17. We are also concerned that the appealable decisions are prescribed in guidance as an expectation of the decisions that will be appealable to the Tribunal. We would expect an appeal route to be given a stronger footing.
18. The BSB agrees that licensing rules should require that appellants seek internal review before appealing to the Tribunal.

**Q3: 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?**

19. Given the potential impact on civil rights, the BSB agrees that it is appropriate to allow a general right of appeal rather than a procedural review. However, we do have concerns about the practical implications of this. The response to question 4 below outlines our concern about the lack of disincentive on appellants to appeal decisions where only a lower penalty can be substituted. The combination of this and a general right of appeal could result in unnecessary substantive re-hearings where the grounds for appeal are not solid.

**Q4: Do you agree with the proposed powers of the Tribunal in relation to matters appealable under the licensing rules?**

20. As above, the BSB notes the potential for the powers of the appellate body in relation to explicit rights of appeal specified in the Act (such as the powers in s.96 to quash the penalty, substitute a penalty of a lesser amount or adjust the timescales for payment) may mean there is no disincentive on appellants from seeking appeal. The BSB recognises the justification for this approach, but notes that it could result in a

disproportionately large number of appeals in respect of such decisions, increasing the cost of the appeal system.

21. Providing a different power in relation to matters appealable under the licensing rules, such as the power to substitute a new decision could act as such a disincentive, and the potential for the Tribunal to impose a more stringent decision may act as a deterrent for some appellants.
22. However, this would represent a disparity between the Tribunal's powers in respect of statutory appeals and those made under licensing rules decisions. In itself this could have the effect of bringing a consistent approach to appeals decisions across the profession, however that would rely on the Tribunal adopting a consistent approach wherever it substitutes a new decision.
23. Should the Tribunal find that it is substituting a new decision on a regular basis; for example in respect of a particular licensing authority or over a particular type of decision, the BSB would expect the Tribunal to work with the LSB to develop further guidance for licensing authorities in order to achieve greater consistency across all licensing decisions.

**Q5: 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?**

24. The BSB understands the need to balance skills and expertise with cost efficiency. However, given the LSB's general approach in relation to the composition of regulatory bodies, the BSB questions whether consideration should be given to panels in which there is a lay majority.

**Q6: 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.**

25. The GRC Rules define the appellant as a person who—
  - “(a) commences Tribunal proceedings, whether by making an appeal, an application, a claim, a complaint, a reference or otherwise; or
  - (b) is added or substituted as an appellant under rule 9 (addition, substitution and removal of parties)”and the respondent as

“(a) in proceedings appealing against or challenging a decision, direction or order, the person who made the decision, direction or order appealed against or challenged;  
(b) a person against whom an appellant otherwise brings proceedings; or  
(c) a person added or substituted as a respondent under rule 9 (addition, substitution and removal of parties)”

26. The BSB questions whether specific reference should be made to appellants and respondents as defined under section 80 of the Act.

**Q7: 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.**

27. See above.

**Q8: 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?**

28. The BSB agrees with this approach.

**Q9: 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?**

29. As set out in the introductory paragraphs, the BSB believes it is important to ensure a consistent approach toward appeal arrangements in respect of all authorised persons. Under the present arrangements of most approved regulators, disciplinary action is taken by a disciplinary body with a single route of appeal. In the case of the Bar Council, appeals against decisions made in relation to individual barristers are determined by the Visitors to the Inns of Court, although as set out in the introductory paragraphs above, it is anticipated that in future, appeals will be considered by the High Court as is consistent for example with appeals made against decisions of the Solicitors Disciplinary Tribunal.

30. Against this context, the BSB is concerned that there may be an imbalance of appeal processes between arrangements in respect of individuals/ members of entities that are not licensable/licensed bodies, and a two-tier arrangement for licensable/licensed bodies.

31. However we also recognise that the Tribunal system provides for a general right of appeal to the Upper-tier Tribunal and that the proposal will have to accommodate this in light of the right of appeal to the High Court in respect of s.96/Schedule 13 appeals.
32. Given that the Tribunal is also being utilised for first-tier appeals, the BSB agrees that use of the Upper-tier may be a quicker and cheaper route than an onward appeal to the High Court. However, as per paragraph 48 of the consultation, it is important that appropriate amendments are made so that the right of appeal under part 1 of the Tribunals, Courts and Enforcement Act 2007 can be exercised in relation to s.96 and Schedule 13.
33. The BSB would, however like to seek further clarification as to how the LSB proposes this onward appeal procedure would work alongside the appeal arrangements of approved regulators in respect of individuals and non-ABS entities.

**Q10: Do you have any comments on the draft order at Annex E to be made under s.80?**

34. We have no specific comments at this stage, however we will maintain dialogue with the LSB in the event that comments arise in future.

**Q11: 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?**

35. The BSB has some concerns about basing the apportionment of operating costs on the number of licensed bodies. There are likely to be a number of factors that determine the operational costs, including the nature and complexity of the appeal for example appeals from bodies in which there are a large number of managers/owners may involve a greater number of decisions in relation to fitness to practise matters etc.
36. In addition to this, the costs would be passed on to the licensing authority who in turn would have to pass the costs onto the licensed bodies. It would be disproportionate if there were two regulators who licensed the same number of licensed bodies, but where one is a regulator of large scale ABSs (bodies of 100 or more members) and another a regulator of predominantly smaller firms as the cost per body would be the same regardless of size. It would appear more proportionate to base the costs on the

number of persons within the licensable/licensed bodies, and the regulatory risks they present.

**Q12: Do you agree with our proposal about the time period for appeals? Do you have any comments on the draft rules at Annex F?**

37. The BSB agrees that the appeal period is appropriate.

**Q13: Do you have any comments on the draft impact assessment?**

38. We believe it is desirable to define the costs and benefits in terms of the costs and benefits that using of the Tribunal will bring over individual appellate bodies and note the data presented in the Evidence Base section. We question why the header information for summary analysis and evidence is not used to highlight the net impact.

39. Given the proposal to apportion operating costs by number of licensable/licensed bodies, we question why there appears to be no consideration as to the impact on smaller bodies, nor the risks represented by bodies of differing size and nature.

40. The impact assessment draws its evidence base from the known costs of the SDT and DAC. However, it would be helpful to know the impact in the event that other approved regulators are designated as licensing authorities, how this affects the costs of the Tribunal and how it would impact the balance of apportionment of costs across all licensing authorities.