



**ALTERNATIVE BUSINESS STRUCTURES:
APPEAL ARRANGEMENTS**

**A RESPONSE BY ILEX PROFESSIONAL
STANDARDS LIMITED**

**CONSULTATION BY THE LEGAL SERVICES
BOARD ON ARRANGEMENTS FOR APPEALS
AGAINST DECISIONS OF LICENSING
AUTHORITIES (INCLUDING A DRAFT ORDER TO
BE MADE UNDER SECTION 80 OF THE LEGAL
SERVICES ACT 2007)**

DATE: 10 NOVEMBER 2010

ILEX Professional Standards

This response represents the views of ILEX Professional Standards (IPS), the regulatory body for Legal Executives. Legal Executives are members of the Institute of Legal Executives (ILEX). ILEX is the professional body representing 22,000 qualified and trainee Legal Executives and is an Approved Regulator under the Legal Services Act 2007 (LSA 07).

ILEX and IPS are committed to regulating Legal Executive businesses and businesses in which Legal Executives are partners and directors by 2012. IPS will be responsible for establishing regulatory arrangements that not only comply with the requirements of the Act and with any regulations made by the Legal Services Board (LSB) under the Act but that also provide public protection. The consultation paper is wide ranging and IPS does not propose to respond in detail to all of the questions posed, but hopes the general observations below may be of value.

Answers are set out below, to the questions in the consultations, where IPS are able to offer a view.

1. Do you have any comments on the draft proposed recommendation to the Lord Chancellor at Annex B?

IPS' comments on the draft proposed recommendation stem from the comments raised in the rest of this consultation response. In particular our comments on the proposed composition of panels in our response to question 5 also reflect our opinion on paragraph 6 of the draft recommendation which states that the First-tier Tribunal is the most appropriate appellate body with considerable expertise in regulatory matters.

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 comments on the draft supplementary guidance at Annex D?

The Act provides an explicit right of appeal in relation to decisions made about financial penalties under section 96 and ownership of licensable/licensed bodies under schedule 13 of the Act. As the Act also allows for a right of appeal against other decisions to be included in the licensing rules made by licensing authorities (LAs), the LSB has proposed that some decisions should have a right of appeal to ensure a fair and proper determination of an appellant's civil rights under Article 6(1).

IPS agree with the list of decisions which should be appealable and that the list should be based on decisions that affect a person's civil rights. On the

other hand IPS has reservations that the rules do not adequately address grounds on which the decisions can be appealed. The LSB's proposal that LAs licensing rules should include within their licensing rules decisions that affect an appellant's civil rights is a suitably wide basis for deciding on the decisions that could be appealed. Such a wide criteria should not be combined with wide grounds of appeal. A general right of appeal wherever an individual/ABS entity is aggrieved by a decision appears is an extremely wide ground.

An appeal system should be consistent with the right to fair trial and the right of access to justice. Both of these rights are satisfied by the provision of an adequate internal review by individuals who were not involved in the original decision. IPS agrees that licensing rules should require that appellants seek internal review before an appeal can be made to the Tribunal. However, the wide grounds for appeal proposed and the LSB's proposal that a substantive rehearing should take place means that almost every licensable body will have two to three opportunities to persuade the LA and Tribunal that the decision made was wrong. It is also noted that where there is an explicit right of appeal under the Act, the licensing rules may provide an optional right to seek internal review. This means that in some cases substantive re-hearings will take place in the first instance. Consideration needs to be given to the costs implications and the maze of appeal/review rights.

The consultation also states that in some cases there is no right of appeal but only a right of internal review. There needs to be clear guidance as to what those circumstances are, as this course of action could possibly involve decisions which have a greater impact upon an appellant's civil rights.

Finally, given the fact that in some cases there will only be a right of appeal, for argument sake, if an internal review has taken place thought needs to be given to whether a substantive re-hearing of the case is always necessary. LAs should have the right people placed to make the right decisions on the right criteria at first instance. If this is performed a substantive re-hearing should not be necessary.

IPS has no comments on the draft supplementary guidance at Annex D.

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?

A general right of appeal wherever an individual/ABS entity is aggrieved by a decision is a wide ground. Any decision that does not favour the individual/ABS entity will result in the individual/entity being aggrieved and as a result they will appeal.

Such wide grounds open LAs up to countless appeals. The appellant will have nothing to lose if they brought fruitless appeals, other than their own costs in doing so, which would be minimal if they present their own case, as they are lawyers. Their risk is that the LA may file a wasted costs order. On the other hand costs for a LA can be greater in dealing with groundless appeals.

The financial risks are not even the real issue. The real issue is that this ground does not require the appellant to prove anything other than the fact that they are aggrieved by a decision. Defined grounds of appeal will enable appellants to think more seriously about whether they can and should appeal.

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

IPS agrees with the proposed powers of the Tribunal. We wish to highlight that the power of the Tribunal to substitute the whole or part of a LA's decision with a new decision of a kind the LA could make will lead to an LA being forced to license an entity that was previously refused. This can be a serious order especially where a LA may have rejected an application made by a licensable body if the risks it posed to consumer interests could not be addressed.

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?

The LSB propose that appeals will be heard by members drawn from the immigration services panel. It is hard to see how the judges deciding on immigration appeals are best suited to hearing appeals against decisions of a LA. IPS welcome a decision by the GRC President that other members of the First-tier Tribunal should be 'cross-ticketed' to supplement the existing membership of the immigration services panel and to make the use of experts when necessary.

The LSB also propose that appeals will be heard by a panel of two members – a legally qualified chairperson and a lay member. The LSB state that such composition will be cost effective and provide an appropriate balance of skill. More information on the basis of this proposal will be helpful given that it is customary for panels to have a minimum of three members usually with a lay majority. Approved Regulators are moving to implementing lay majority panels with majority vote decision processes, therefore it is hard to see how balance is achieved with two members and the casting vote being exercised by the professional member. The lay persons vote could effectively be discounted as it could always be usurped by the professional chair.

Furthermore, the proposed system will hinder public confidence that members of a profession have majority control in the decisions of regulatory bodies.

- 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.**

In our opinion, the GRC Rules do not require any particular additions in order to accommodate ABS appeals.

- 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?**

The GRC Rules do not require any amendments in order to accommodate ABS appeals.

- 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?**

The GRC rules in relation to awarding costs will apply in appeals against decisions of LAs, whereby each party bears their own costs unless a party has acted unreasonably in bringing or defending proceedings, or where there is a wasted costs order.

IPS agrees that First-tier Tribunal should not have the power to award costs against the losing party in the same way as the SDT. Furthermore, if the Tribunal had the power to award costs against the losing party it is unclear how a LA will enforce costs against an applicant that they refused to license as there will be no membership or contractual relationship.

- 9. Do you agree that onward appeals from decisions of the First-tier Tribunal in relation to ABS appeals should go to the Upper Tribunal rather than the High Court?**

See our response to question 10.

- 10. Do you agree that the Act should be amended to remove the right of appeal to the High Court, excluding the possibility of appeals against the decisions of licensing authorities being heard by a body other than the First-tier Tribunal?**

In the consultation paper the LSB highlights that the right of appeal to the High Court (as specified in the Act) will duplicate the onward appeal right

under the existing Tribunals framework, where onward appeals go to the Upper Tribunal and subsequently the Court of Appeal.

The LSB proposes that the Order amend the Act and remove the right of appeal to the High Court. The LSB also proposes a single onward appeal route to the Upper Tribunal (to avoid creating two bodies of case law).

IPS disagrees with the LSB's proposal to amend the Legal Services Act 2007 by removing the right of appeal to the High Court. It is recognised that the proposal is an attempt to avoid duplication of onward appeal rights, however, the LSB has not provided sufficient detail to evidence that a change to the legislation is required and that the existing mechanism will not work.

It would be beneficial to have more details of the differences between using the Upper Tribunal as opposed to the High Court. In the case of R.(C) v Upper Tribunal [2010] EWCA Civ 859, it was brought to light that the Upper Tribunal is not the 'alter ego' of the High Court. Despite the Upper Tribunal having wide powers conferred on it by statute, the jurisdiction of the Upper Tribunal is limited and susceptible to judicial review by the High Court. Judicial review of the Upper Tribunal is only available where the Upper Tribunal decides a case it had no authority to decide or where the right to a fair hearing had been denied. Those circumstances may be rare occasions but nevertheless there is a possibility that a decision of the Upper Tribunal could be open to judicial review whereas decisions of the High Court would not.

11. Do you have any comments on the draft order at Annex E to be under s.80?

IPS has no comments on the draft order at Annex E.

12. 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?

In the consultation, in order to estimate the cost of using the Tribunal, the LSB has used a working assumption that there will be 20 appeals per year, with each appeal lasting an average of two days. Set up costs have been estimated to be approximately £16,000 and annual operating costs around £50,000.

IPS agrees with appeal costs being recovered from LAs who in turn recover costs through the licensing fee. It is however, difficult to comment on the set up and operating costs of the Tribunal as the information provided in the consultation is broad based. A more detailed budget is needed in order to

make substantive comments. A more detailed budget will also provide a clear basis for forecasting increases or decreases in costs, especially when it is also proposed that operating costs will be reviewed at the end of the financial year and the Tribunal Service will repay the difference or recover the shortfall of any overpayment or underpayment by LAs.

IPS would prefer a system whereby the setup costs are paid upfront with running costs paid retrospectively at the end of each financial year. Furthermore it would be appropriate that the actual costs of the appeals are allocated to the appropriate LA.

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

IPS agrees with the time period of 28 days for making appeals against decisions of a LA in relation to financial penalties. 28 days is a fair and proportionate amount of time.

The draft rules at Annex F are clear and effective. IPS has no further comments on the draft rules.

14. Do you have any comments on the draft impact assessment?

IPS has no comments on the draft impact assessment.

IPS/10.11.10