

# The Solicitors Disciplinary Tribunal

Constituted under the Solicitors Act 1974

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## "Alternative Business Structures: Appeal Arrangements"

### Legal Services Board Consultation Paper 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)

#### Response Of The Solicitors Disciplinary Tribunal

##### Introduction And Comment

1. The Solicitors Disciplinary Tribunal ("SDT") is pleased to have this opportunity to respond to the Legal Services Board ("LSB") Consultation Paper on the proposed Alternative Business Structures: Appeal Arrangements. Alternative Business Structures are described as "ABS" in this response.
  2. The SDT notes the statement in paragraph 2 of the Executive Summary of the Consultation Paper that there was broad support for the LSB's proposal in the November 2009 Consultation "Alternative Business Structures: Approaches To Licensing" that appeals against decisions made by Licensing Authorities should be heard by the General Regulatory Chamber of the First-tier Tribunal ("GRC"). For the avoidance of doubt, the SDT did not express support for that proposal, which in any event formed only a very small part of the November 2009 consultation paper. The SDT opposed and still opposes that proposal.
  3. The SDT attaches to this response as Annex 1 its response to the November 2009 consultation paper. All the points raised in Annex 1 remain pertinent to the current Consultation Paper.
  4. The current Consultation Paper is not in effect a consultation on the LSB's proposal that the GRC should determine ABS appeals. The Consultation Paper assumes that the LSB's proposal has already been accepted by all stakeholders and adopted as the way forward. The contents of the Consultation Paper concentrate on the detail of how appeals to the GRC are to be managed in practice. The SDT maintains its firm view that the proposal to use the GRC for appeals is seriously flawed and potentially damaging to the efficient and effective regulation of the solicitors' profession.
  5. The SDT's place in the existing regulatory framework is established by the Solicitors Act 1974 as amended. It is an entirely neutral, independent body with its own premises and staff managed by a not-for-profit independent company limited by guarantee. It is not linked in any way to the Law Society, the Solicitors Regulation Authority or the Legal Services Board. Details of its core business are set out in Annex 1.
  6. It cannot be consistent, fair or sensible for an issue concerning fitness to practice to be determined by the GRC if the individual works in an ABS and by the SDT if the individual works in a law firm. This issue does not appear to have been addressed at any point in the Consultation Paper.
  7. In answer to the specific questions raised, the Tribunal responds as follows:
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## Question 1 – “Do You Have Any Comments On The Draft Proposed Recommendation To The Lord Chancellor At Annex B?”

8. The SDT opposes the draft proposed recommendation to the Lord Chancellor that appeals against decisions of Licensing Authorities should be to the First-tier Tribunal, and within that Tribunal to the GRC. The SDT does not propose to make negative comments on the expertise, capacity and cost of using the GRC for such appeals. It prefers to concentrate on making a positive case for using the SDT.
  9. The SDT has unrivalled and unique expertise in relation to all disciplinary matters arising from the regulation of the solicitors' profession. That experience should not be lightly written off. The Tribunal is made up of 40 members from the profession and 20 lay members from a wide range of diverse backgrounds. The SDT's current jurisdiction includes recognized bodies, companies and limited liability partnerships. Members are carefully appointed by the Master of the Rolls following a transparent selection process. There is much competition for appointment to the Tribunal. The SDT therefore has no doubt that its Members are currently capable of determining appeals arising out of the decisions of Licensing Authorities with little additional training. The issues which are likely to come before the SDT will not be any more difficult to determine than the many and varied areas of law which are already within the wide knowledge and expertise of its Members.
  10. The SDT has a well-established infrastructure and experienced administrative support in place. It operates out of custom-designed premises, including three court rooms with the capacity to sit 5 days a week. It employs highly experienced clerks to support hearings. The SDT's core business can very easily absorb the relatively small quantity of appeals envisaged by the LSB.
  11. The SDT disputes any suggestion by the LSB that use of the GRC will be more cost-effective than using the SDT. The LSB has provided insufficient information in the Consultation Paper and in particular on pages 7 and 8 of Annex G "Draft Impact Assessment" for a true comparison of costs to be made. In particular there is no detailed breakdown of how the estimated cost incurred at the GRC for managing 20 appeals per annum at £50,000 per annum has been calculated. The SDT believes that it can provide the service required without any significant increase in budget. Greater economies of scale will in fact be achieved by using the SDT: the tried and tested expertise, infrastructure and administrative support are already in place. It makes no logical sense to start afresh with a new Tribunal service provider.
  12. The SDT strongly believes that use of the SDT will ensure consistency of decision-making. Any other proposal runs the risk of undermining consistency. This is particularly the case if the GRC is to apply the lower civil standard of proof to appeals.
  13. Expertise will be developed no matter which body determines appeals. The SDT already has substantial expertise on which to build. The GRC is starting from scratch in this area.
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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 At Annex D?”

14. It is noted that the LSB has already had detailed discussions with the Tribunals Service and that the proposals referred to above follow on from those discussions. The SDT was not invited to engage with the LSB in detailed discussions of this nature, although it has always expressed its willingness to do so (see Annex 1, final paragraph). This confirms the view of the SDT that the LSB had closed its mind to the option of using the SDT to provide the appeals process some time ago.

15. The SDT makes no further comment in answer to Question 2.

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?”

16. The SDT makes no comment.

Question 4 – “Do You Agree With The Proposed Powers Of The Tribunal In Relation To Matters Appealable Under The Licensing Rules?”

17. The SDT makes no comment.

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?”

18. The SDT’s Members are already sufficiently experienced to determine ABS appeals with only the minimum of additional training. The SDT makes no comment on the expertise of the GRC members.

19. Pursuant to the Solicitors Act 1974 (as amended), SDT Tribunals (called Divisions) are made up of 3 members: a solicitor member Chair, and one solicitor member and one lay member. Solicitor members must be practising solicitors. The SDT queries whether a 2 member panel as proposed by the LSB will provide sufficient balance and diversity of opinion to ensure a rigorous decision-making process. A 3-member panel avoids difficulties that will arise in the event of a split vote. How does the LSB suggest that that issue will be addressed?

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?”

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20. The SDT makes no comment.

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.”

21. The SDT makes no comment.

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?”

22. The SDT makes no comment.

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?”

23. Appeals from decisions of the SDT are to the High Court. We see no reason why ABS Appeals should be treated any differently.

Question 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?”

24. The SDT makes no comment, save to refer to its answer to question 9 above.

Question 11 – “Do You Have Any Comments On The Draft Order At Annex E To Be Made Under S.80?”

25. The SDT repeats that it opposes the LSB's proposal to use the First-tier Tribunal to determine ABS appeals. It makes no further comment.

Question 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?”

26. The SDT makes no comment.

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## Question 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?”

27. The SDT makes no comment.

## Question 14 – “Do You Have Any Comments On The Draft Impact Assessment?”

28. The SDT disputes the LSB’s conclusion that the First-tier Tribunal should be the preferred option and its justification for reaching that conclusion. The SDT has demonstrated that it has the expertise and capability to determine ABS appeals effectively and efficiently. There is very little difference in financial cost between the SDT and the First-tier Tribunal. There is no evidence in the Draft Impact Assessment that any significant cost savings will be achieved by using the First-tier Tribunal.

29. The SDT repeats that it is able and willing to take on ABS appeals. It believes that it is the most appropriate body to do so

Dated: 12 November 2010

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## ANNEX 1

### **ALTERNATIVE BUSINESS STRUCTURES; APPROACHES TO LICENSING RESPONSE BY THE SOLICITORS DISCIPLINARY TRIBUNAL TO THE CONSULTATION PAPER ISSUED BY THE LEGAL SERVICES BOARD**

1. This response is limited to that part of the Consultation Paper which deals with appellate bodies because this topic directly affects the tribunal. As a statutory tribunal, the SDT does not intend to comment on the other licensing issues raised in the Paper.
  2. As the constitution and role of the Tribunal are not fully described in the Paper it may be helpful if this is briefly set out in this response.
  3. The Tribunal's place in the existing regulatory framework is established by the Solicitors Act 1974 as amended. It is an independent body with its own premises and administrative staff. It has no links with the Law Society or the Solicitors Regulation Authority.
  4. Members of the Tribunal are appointed by the Master of The Rolls for a three year term which can be renewed. There are currently 40 solicitor members and 20 lay members. The President is a solicitor. There are solicitor and lay Vice-Presidents who are elected by the members.
  5. The main business of the Tribunal is to hear and determine applications by the SRA and occasionally other parties alleging misconduct by solicitors and others, to include registered foreign lawyers and recognised bodies, and their unadmitted employees. The task of the Tribunal is to determine whether the allegation is proved and if so to decide on penalty which may be to remove a solicitor's right to practice either permanently or temporarily or to impose a financial penalty or a reprimand. Solicitors may be prevented from employing in the future those employees whose misconduct has been found to be proved. This work cannot be categorised as appellate.
  6. Parliament has increased the powers of the Tribunal in the Legal Services Act 2007 by providing that it may impose an unlimited financial penalty on solicitors or former solicitors. Further it is now empowered to hear appeals against disciplinary action taken by the SRA. This latter is clearly appellate work.
  7. Appeals from decisions of the Tribunal are to the High Court and from there to the Court of Appeal. It is the decisions of these courts on matters of principle which provide the body of jurisprudence informing the work of the Tribunal.
  8. Given appropriate resources, the SDT considers that it has the ability, infrastructure, experience and expertise to conduct the appellate work referred to in this consultation paper. The expansion of the work currently carried out by the SDT would result in a substantial saving of public expense over any other option.
  9. The SDT considers that there would be a danger in creating a second limb of appellate jurisdiction which might give rise to uncertainty, overlap and risks of double jeopardy.
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10. The SDT is not at present, as is suggested in paragraph 223, primarily an appellate body. It considers applications against solicitors and their unadmitted employees and others at first instance, although it also has an appellate jurisdiction.

11. The SDT has had a number of difficulties in responding to this consultation paper which fails to consider exactly what work is likely to fall to be dealt with by a “new” tribunal, how much work that will entail and what should be the appropriate level of tribunal. Whilst there are references to “all these appeals” being “heard by a single body”, there is no estimate provided as to the type, number or nature of such appeals. The paper also fails to define “all ABS related appeals” although it refers to the preferred outcome of having a single appellate body to hear all such appeals.

12. The paper also fails to define “all non-ABS matters” or “all legal service appeals”. Is it proposed that the tribunal hearing such matters should take on all the work currently dealt with by the SDT? If so, what future role is proposed for the SDT, given, in particular, the intention to give authorised regulators the power to impose unlimited fines?

13. Concern is felt at the matrix on page 63 which has little value in the absence of definitions of what it is describing. It is not understood why it is considered that there is a “Low” ability to attract and train high quality members if each licensing authority has its own separate appeals body. This does not apply to the SDT which not only has high quality members but also attracts them in abundance, over 1,200 applicants having recently applied for a small number of vacant positions.

14. A number of other criticisms of this matrix arise although, because this response is intended to be positive and helpful, those criticisms will not be paraded here but can be supplied.

15. Responding as best possible to the question which relates primarily to the work of the SDT, the SDT responds as follows:

Question 7 – What is your view of our preference for a single appeals body?

(a) Should, in the future, a single body hear all legal services appeals?

As previously stated, there is some doubt as to what is included in the term “all legal services appeals”. Subject to this comment, the SDT considers that with some limited expansion of its membership, it could take on ABS related appeals thereby achieving a significant saving in public expense. Were it to do so, this would be by far the most economical and efficient outcome, given the many years experience and expertise of its members and of the tribunal. The SDT’s results are of the highest standard and the tribunal has recently received the seal of approval of both Sir David Clementi and Lord Hunt. The Tribunal has been sitting, in its present format, for 36 years and prior to that sat for many years as a disciplinary committee. That knowledge and experience should not be lightly thrown away.

Question 7 (b), (c) and (d) – Not applicable.

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16. Members of the SDT would be very willing to meet with members of the Board should the Board consider that a further discussion of the topic discussed above would be of assistance

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