Legal Services Board consultation:

'Alternative business structures: appeal arrangements'

Response from the Solicitors Regulation Authority

November 2010

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Introduction

1. The Solicitors Regulation Authority (SRA) is the independent regulatory arm of the Law Society for England and Wales. We regulate individual solicitors, other lawyers and non lawyers with whom they practise, solicitors' firms and their staff. During 2011 we hope to become a Licesning Authority for alternative business structures (ABS). We are subject to overall regulatory supervision by the Legal Services Board (LSB).

2. We welcome the opportunity to take part in this consultation, and have set out our comments below.

SRA comments

Question 1: Do you have any comments on the draft proposed recommendation to the Lord Chancellor at annex B?

3. In this current consultation paper the LSB proposes, having taken into account all the responses it has received previously, that appeals against all decisions made by Licensing Authorities should be to the First- tier Tribunal of the General Regulatory Chamber (GRC). We are concerned that due to the existence of the 2 parallel regimes for traditional law firms and ABSs, any of the possible options for hearing appeals (with the exception of a single body hearing all legal services appeals) have some fundamental drawbacks.

4. In the LSB's initial consultation on this topic ("Approaches to Licensing") in November 2009, the LSB set out its view that there should be a single appellate body to hear all ABS-related appeals. It explored a number of options and suggested that discussions should continue with the GRC about whether the GRC would be the appropriate body to fulfil this role. The paper also asked for active consideration to be given as to whether there should be a single appellate body for all non-ABS as well as ABS related matters. In its conclusion, the LSB set out its view that the preferred option in the longer term would be for a single unified body to hear all legal services appeals.

5. As we set out in our response[1] of 22 February 2010, in view of the overriding need for consistency between traditional firms and ABS, we believe that there are extremely strong arguments for all legal service appeals to be transferred to a single body. We note the LSB's current view that this would present too great a change in the present circumstances as it will require thorough investigation and consultation. In our submission we concluded that this should be one of the LSB's priorities moving forward.

6. In our response to that initial consultation, we agreed that if the new Tribunal were to deal with all ABS appeals, this would facilitate consistency and assist the Tribunal in developing a uniform and reliable approach. However, we also

[1] Please see: http://www.sra.org.uk/sra/consultations/consultation-responses/Response-to-LSB-s-paper-on-Alternative-Business-Structures.page

commented that in disciplinary or conduct matters, where there is perhaps the greatest need for consistency between traditional firms and ABSs, there was a strong argument for continuation of existing disciplinary tribunals (in the SRA's case, the Solicitors Disciplinary Tribunal (SDT)), until all such matters could be transferred to a single body. We recognised that such an interim solution may not have been envisaged by the Legal Services Act 2007 (the Act) but considered that the benefits of such an interim approach warranted careful consideration.

7. Having considered the matter further, we accept that hiving off some but not all appeal rights under the Act, eg against fines imposed on ABSs to existing disciplinary tribunals, could be regarded as too complex and confusing. For example, a decision to fine an ABS regulated by the SRA would be appealable to the SDT, but a decision to impose a condition on the ABS would be appealable to the GRC. Both decisions might have arisen from the same facts and parallel rights would be potentially confusing, duplicative and more costly. It would also be difficult to say with certainty which decisions are disciplinary and which are not – decisions to impose a restriction on an ABS's licence may be mistakenly regarded by some as disciplinary.

8. We are also aware of the arguments in favour of designating the SDT to hear all appeals in relation to ABSs; this would ensure a higher degree of consistency between appeals against decisions to impose fines on traditional law firms and fines on ABSs based on similar breaches or misconduct. However, there are anomalies between the regimes; for example, on appeal against a fine imposed on an ABS, the SDT would not have the power to increase the fine but for law firms it would. In any event, we note the LSB's view that as the LSB may in certain circumstances act as a Licensing Authority and given the statutory oversight that the LSB has in relation to the SDT's rules and budget, it does not consider that designation of the SDT would be appropriate. We therefore have assumed that designating the SDT either in its entirety or to hear a limited class of appeals on "disciplinary decisions" is not a feasible option.

9. Taking into account all of the above, the SRA therefore does not object to the proposal that the Lord Chancellor designates the GRC as the body to hear appeals against decisions of Licensing Authorities. However, for the reasons referred to above, we believe this should be regarded as an interim measure pending the appointment of a single body to hear all legal services appeals.

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?

10. In light of the conclusion above, we agree with the LSB's approach to the decisions that should be appealable to the Appellate Body as set out in paragraph 23 of the consultation paper and in the draft supplementary guidance. We agree that, for clarity and to avoid any doubt between the Licensing Authorities, the list of appealable decisions should be set out in the guidance. It will be important that the guidance is applied consistently by all the Licensing Authorities. The rights of appeal identified by the LSB are

already reflected in our draft Authorisation Rules[2] and the SRA Practising Regulations[3], which form part of our current consultation "*the Architecture of Change Part 2*".

11. The SRA is firmly of the view that where appropriate licensing rules should require the applicant to exhaust any internal rights of appeal and again, the SRA's draft rules reflect this.

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?

12. In general, the SRA would prefer the rules to specify in advance the type of grounds in respect of which appeals can be made. However, practically and in view of the range of the decisions that are appealable, we accept that it may be necessary to allow a general right of appeal rather than seeking to set out in advance the detailed circumstances in respect of which such appeals may be made. If adopted, we suggest that this is kept under review by the GRC, the LSB and Licensing Authorities in light of their practical experience.

13. In addition, paragraph 29 suggests that decisions which determine a person's civil rights merit a "substantive rehearing" rather than simply a procedural review of the original decision. We consider that a substantive rehearing of all decisions made by the Licensing Authorities may be disproportionate; there is a strong argument that, for example, a decision to impose conditions on a licence, if appealed may only merit a review of the original decision rather than a complete rehearing. A rehearing would allow challenges on findings of fact and would run the risk of turning the GRC into a quasi Tribunal of first instance, for those appellants who would like (at no risk on costs) a full and lengthy hearing with oral evidence .

14. If the LSB's approach is adopted and appeals dealt with as re-hearings, then the SRA 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.

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

15. The proposed powers in relation to decisions (apart from financial penalties which at present the Act does not allow to be increased on appeal) are sensible and the SRA has no substantive comment upon them.

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?

16. Appeals on ABS decisions could be potentially very complex, raising legal, structural and financial issues. The SRA considers it important that the GRC President ensures that appeals are heard by individual members with sufficient expertise. We agree with the suggestion in paragraph 36, namely that the new jurisdiction should be renamed to take into account its extended

[2] Please see: http://www.sra.org.uk/documents/SRA/consultations/handbook/annex-f2-tracked.pdf
[3] Pleases see: http://www.sra.org.uk/documents/SRA/consultations/handbook/annex-f2-tracked.pdf

remit. It will also increase public confidence as appeals dealt with by an Immigration Tribunal might be perceived not to have the necessary experience to determine the issues under consideration. We have no comment on the composition of the panel.

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*: A*re 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.

17. Generally, the SRA considers that the rules are adequate to deal with the extent and breadth of appeals that are likely to be determined although inevitably this will have to be kept under review and informed by practical experience. The SRA welcomes the detailed case management provisions in the rules and would expect them to be used robustly by the GRC to ensure that matters are dealt with promptly and expeditiously. The SRA welcomes the GRC's powers to give appropriate directions and to strike out appeals should an appellant fail to comply with the rules and/or directions given. There are, however, 2 areas where changes or clarification may be desirable.

18 The SRA uses Regulatory Settlement Agreements in relation to both first instance investigations and appeals to reflect agreed outcomes. Sometimes it reaches agreements with the regulated person or entity on the underlying facts leaving only the outcome to be determined independently. It is envisaged that in appropriate cases appeals to the GRC may be dealt with in a similar way and it is noted that the rules provide for withdrawal of an appeal with the GRC's consent (rule 17) and for consent orders disposing of the proceedings to be made if the GRC considers it appropriate (rule 37). The SRA would anticipate that the GRC's consent would usually be forthcoming where the parties have agreed the terms of a consent order which may include a provision as to payment of costs. The SRA would, however, wish Rule 17 (2) to include an express provision that the consent to withdrawal may be given on such terms as to the GRC sees fit including payment of costs to the respondent.; we are mindful that some ABSs will be very well resourced corporate entities which may cause the SRA to incur substantial legal fees before withdrawing their appeal; the SRA is funded by contributions from the profession and it would be inequitable if significant resources were to be utilised in dealing with appeals from ABSs that are withdrawn, without the prospect of being able to recover all or some of the costs.

19. It is not clear to the SRA whether the GRC would have the power to order a stay of any decisions made by Licensing Authorities, pending the hearing of any appeal from the order made. Rule 19A, for example, specifically provides for stays of the Gambling Commission's and OISC's decisions but Rule 20 (procedure for applying for a stay of a decision pending an appeal) seems to suggest that other regulators' decisions can only be stayed if another enactment provides for the GRC to stay or suspend a decision which is the subject of an appeal. It would be helpful if the Rules provided that an application would have to be made by the appellant to the GRC to stay decisions made by the to Licensing Authorities - this would provide clarity and certainty to both appellants and to Licensing Authorities as to the status of their decisions made pending appeals being heard.

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?

20. The SRA's experience of regulatory and disciplinary action is that those engaged in providing legal services (perhaps unlike others under the GRC's remit) are often highly litigious. We also have experience of some individuals who are vexatious, who will have no hesitation in abusing the processes available and who may try to impede or delay regulatory controls being placed on them or postpone closure of the issue for their own ulterior purposes. We agree, of course, with the principle that those subject to our decisions have the right to have them reviewed. However, the combination of 1) the absence of any disincentive about costs, 2) the lack of any possibility of the penalty being increased and 3) the appeal being regarded as a re-hearing (rather than a review) will undoubtedly encourage those subject to Licensing Authorities' decisions to pursue unmeritorious appeals and applications for stays of decisions, as they will have nothing to lose and possibly something to gain. The SRA's firm view is that the existing provisions in the GRC rules should be amended to provide that the GRC may make such order as to costs as the Tribunal shall think fit, including:

    a) disallowing costs incurred unreasonably; and
    b) that costs be paid by any party judged to be responsible for wasted or unnecessary costs , whether arising through non compliance with time limits or otherwise.

    The above amendment would also have the advantage of equalising the position between traditional law firms and ABSs.

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?

Question 10: Do you have any comments on the draft order at Annex E to be made under s.80?

21. Certain decisions made by a Licensing Authority (to impose financial penalties and in relation to ownership issues) have express rights of appeal to the High Court. If the GRC is designated as the appellate body, under its rules, appeals on points of law against all other decisions will lie to the Upper Chamber and thereafter to the Court of Appeal.

22. The issue is whether the Act should be amended to dispense with those appeal rights and substitute a right of appeal to the Upper Chamber. The SRA notes the LSB's view that if this is not done then there is a risk that 2 sets of case law will develop with inconsistent outcomes. However, on balance the SRA does not agree that that appeals on points of law in respect of the decisions expressly referred to in the Act should be to the Upper Tribunal rather than to the High Court. The decisions that the Licensing Authorities will make will essentially be about the delivery of legal services/the legal system and we consider that the Courts should be involved in deciding points of law in relation to such matters. The High Court is very experienced in dealing with appeals or applications from decisions made by the SRA, for example in

relation to practising certificate conditions. In view of the legal nature of the decisions that the GRC will make, we consider that the High Court is a more appropriate forum than the Upper Chamber. We have also seen no evidence to support the LSB's view that appeals to the Upper Tribunal would be quicker and less expensive than appeals to the High Court. We do not therefore see any reason to interfere with the specific reference in the Act to appeals on points of law being to the High Court.

23. In relation to the consistency point, although this has not been canvassed by the LSB to date, we propose that consideration should be given instead to amending the GRC rules to provide that all appeals from the GRC decisions should be to the High Court and not to the Upper Chamber. This would ensure a greater degree of consistency between decisions made in relation to legal services generally, and would be less confusing and complex for prospective appellants than having 2 parallel systems.

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?

24. We agree that the costs of the appeal arrangements to the GRC should be borne by the Licensing Authorities and recovered as part of the licence fee. We understand that during a recent meeting of prospective Licensing Authorities and the LSB, it was clarified that in addition to the funding option set out in the consultation paper, the costs recovery options were either ;

- Option 1 - both the set up costs (in the region of £16,000) and the running costs (estimated to be around £50,000) are paid at the end of one financial year for the next financial year. Under this method the Licensing Authorities will pay contributions in proportion to the number of licensed bodies holding a current licence as at 31 January 2012. At the end of the next financial year if there is any overpayment or underpayment the Tribunals Service will either repay the difference or recover the shortfall from the Licensing Authorities.

- Option 2 - the setup costs are paid up front with running costs paid retrospectively at the end of each financial year. This would mean the set-up costs would be divided between the Licensing Authorities at the end of the 2011 / 2012 financial year. At the end of the next financial year the actual costs of the appeals can either be divided between the Licensing Authorities or be allocated to the appropriate Licensing Authorities.

25. We prefer option 2 although have no particularly strong view.

Question 12: Do you agree with our proposal about the time period for appeals? Do you have any comments on the draft rules at Annex F?

26. We have no comment to make on the draft ABS Appeal Rules.

Question 13: Do you have any comments on the draft impact assessment?

27. We have no comment to make on the draft impact assessment.

Solicitors Regulation Authority

The independent regulatory body of the Law Society of England and Wales

www.sra.org.uk

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