

## **Application made by CILEx Regulation for approval of changes to the CILEx Regulation Licensing Rules**

### **A. Introduction**

1. This is an application seeking LSB approval of changes to the CILEx Regulation Licensing Rules (known after the 'Licensing Rules').
2. CILEx Regulation makes the application to amend the Licensing Rules to accommodate interim arrangements for dealing with appeals under rule 27 of the Licensing Rules before it has access to the First-Tier Tribunal.
3. The following amendment is proposed to the Licensing Rules:
  - To allow for an appellate body to mean a Licensing Appeals Panel as determined by CILEx, until such time a body has been established under section 80(1)(a) of the Legal Services Act 2007.
  - To define a Licensing Appeals Panel as the three members of the Appeals Panel, who will not be involved in any other Appeal Panel related to a licensing decision.
4. This would allow CILEx Regulation to ring-fence three members of the Appeals Panel, which is established under rule 1(5) of the CILEx Regulation Enforcement Rules, to hear any appeals from the Appeal Panel under rule 27(1) of the Licensing Rules.
5. The proposed amendment to the rule is shown in tracked changes, attached at **Annex 1**.

### **B. Current regulatory arrangements**

6. An order was laid in Parliament on 5 February 2019 to designate the Chartered Institute of Legal Executives as a Licensing Authority and that Order came into force on 1 April 2019.
7. The LSB recommended to the Lord Chancellor that under section 80 of the Legal Services Act 2007 he should grant the Order to enable the General Regulatory Chamber of the First-Tier Tribunal to hear and

determine appeals made against the Chartered Institute of Legal Executives in its role as a licensing authority.

8. The Lord Chancellor has confirmed his intention to make the section 80 order as recommended by the Board. However due to the pressures on Parliamentary time and other Parliamentary business priorities, which is likely to continue for the foreseeable future, the Order is unlikely to be made until October 2019 or April 2020. These dates will be subject to gaining approval from Parliament. The Lord Chancellor is aware of the intention to seek interim arrangements.
9. The decision notice of the LSB dated 8 June 2018 acknowledged this issue in stating that CILEx Regulation may wish to commence licensing prior to a section 80 order coming into force. It stated that CILEx Regulation would need to put in place interim appeals arrangements that must comply with licensing rules and that the LSB would need to be assured that any interim arrangements are compliant with the relevant requirements in the licensing rules.
10. This application is designed to address this issue.

### **C. Nature and effect of the proposed changes**

11. CILEx Regulation has considered and discussed whether alternative interim appeals arrangements could be accessed through the appeals process that other regulators have in place. However, in all instances the provision of such arrangements would require both parties to seek rule changes and therefore this has not been pursued further.
12. We have discussed the alternatives with the LSB and has sought independent legal advice. The advice obtained related to the need to amend the Licensing rules and ensure any procedure complies with Article 6 of the European Convention on Human Rights.

#### *Amending Licensing Rules*

13. The Licensing Rules do not allow for any other body, other than the body established under a section 80 order, to hear appeals from the Appeals Panel.
14. If we were to use a different body to hear final appeals, any decisions that they make would be open to challenge on the basis that they are ultra vires, given that there is no statutory power for final appeals to be dealt with in this way.
15. This would be resolved by amending the Licensing rules as set out below in 21.

## *Article 6 of the European Convention on Human Rights*

16. There may be a need to ensure any alternative interim appeals arrangements complies with Article 6 of the European Convention on Human Rights (“ECHR”).
17. Article 6 of the ECHR provides that: "In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The interim arrangements would need to comply with Article 6 if a decision under rule 25 of the Licensing Rules, such as a decision not to grant a licence, is “a determination of civil rights and obligations”.
18. Our advice is that, at the very least, there is a risk that decisions under the Licensing Rules are a determination of civil rights and obligations and must comply with Article 6.
19. As it is unlikely that the interim appeals arrangements would be considered to be an independent and impartial tribunal, therefore the decisions made under the Licensing Rules could be challenged by judicial review. Our advice is that this is sufficient for a procedure to be compliant with Article 6. How we would mitigate this risk is set out in the following sections.
20. We are not aware that there have been appeals to an Appellate Body for other regulators in the sector under their licensing rules, which means the risk of an appeal progressing to this stage is very low. We therefore believe that progressing interim arrangements is proportionate given the short term that they will be in effect.

### *The nature of the proposed changes*

21. We are therefore proposing to revise the wording of rule 27 to read as follows:
  - (1) A person who is the subject of an unfavourable appeal decision under rule 26 may appeal to the appellate body
  - (2) In this rule **appellate body** means either:
    - (a) a body established under section 80(1)(a) of the Act to hear and determine appeals or
    - (b) pending the establishment of this body under section 80(1)(a) of the Act, a Licensing Appeals Panel as determined by CILEx.
  - (3) In this rule **Licensing Appeals Panel** means the three members of the Appeals Panel, which is established under rule 1(5) of the CILEx Regulation Enforcement

Rules, who are designated by CILEx (Regulation) to act as an appellate body, and who will not be involved in any other Appeal Panel related to a licensing decision.

22. We are proposing that this change only applies until a body has been established under section 80(1)(a) of the Legal Services Act 2007. Whilst the drafting will allow for the transitional arrangement to fall away, we will seek to remove rule 27(2)(b) once the section 80 order has been made by way of an exemption direction.
23. To comply with Article 6 of the European Convention on Human Rights, we need to ensure that there is a “fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. As set out above, there is a risk that a decision under the Licensing Rules not to grant or revoke a licence is a determination of civil rights and obligations and therefore must comply with Article 6. The mitigation of this would potentially be through a judicial review
24. We will therefore ring-fence three members of the Appeals Panel under the new rule 27 (3) to hear any appeals from the Appeals Panel.
25. While these interim arrangements will not allow for an appeal by an independent and impartial body, we believe that the proposed arrangements would be compliant with Article 6 because decisions by the ring-fenced three members of the Appeal Panel would be amenable to judicial review.
26. However, the risk of judicial review could be mitigated by ensuring that Appeals Panels are alive to this risk and that they exercise particular care in making their decisions and explaining the reasons for these.
27. The intention is that by ring-fencing three experienced members of the Appeal Panel then we endeavour to create an impartial and independent body until such time as appeals can be made to an appellate body.
28. Members of the Appeals Panel, both lay and professional, are selected for their experience of analysing cases, assimilating complex information and making reasoned, evidence-based decisions.
29. They are required to understand professional regulation, including being able to assess fitness to practice and fitness to own, as well as understanding professional disciplinary and misconduct issues. They are also required to understand the delivery of legal services and apply guidance appropriately to agree sanctions. Members must be committed to the ‘Nolan’ principles of public life.
30. No member of the Appeals Panel may be a member of any other governing body, Board or committee of the Chartered Institute of Legal Executives or the Board of Directors of CILEx Regulation.

31. Before the interim arrangements are put in place, we will select those members who would have the experience to take on this role and provide additional training and guidance on the role and responsibilities.
32. We have agreement to create an appellate jurisdiction for the First Tier Tribunal of the General Regulatory Chamber for certain decisions, as set out below, relating to the authorisation of ABS entities.

*The effect of the proposed changes*

33. The impact of the proposed rule change will be to applicants and persons who are affected by a decision made under rule 25 of the Licensing Rules. This will affect the following decisions:
- *To refuse to grant a licence*
  - *To impose special licence conditions upon a licence*
  - *To refuse an application for modification of the terms of a licence*
  - *To modify the terms of a licence*
  - *To suspend or revoke a licence*
  - *To refuse an application for approval as an owner, designated officer or manager of a relevant body*
  - *To revoke approval as an owner, designated officer or manager of a relevant body*
  - *To disqualify a person.*
34. The risks that have been identified can be mitigated by existing administrative arrangements that are already in place for our Enforcement procedures. These include:
- Panels/tribunals deliberate in private and refer to guidance produced by us e.g. sanctions guidance and publication policy when making decisions, which will be extended to include ABS.
  - Detailed decision notices are produced by the Clerks and sent to CILEx Regulation.
  - We send decision notices and next steps letters to members / firms promptly (and in accordance with the rules where time periods are specified). CILEx Regulation staff follow an internal procedure and use a checklist which is held on file to show each step is taken in every case.
35. Decisions could be challenged on judicial review grounds (where the decision was based on an error of law or fact, was unjust because of a serious procedural error or irregularity or was irrational).
36. We would seek to mitigate this risk by ensuring that throughout the any appeals process, all decision makers and Panels are alive to the risks

with a licensed firm and that they exercise particular care in making their decisions and explaining the reasons for these.

37. We have considered carefully the chance of the identified risks occurring and, with no evidence of appeals having been made to an Appellate Body for another regulator and based on the advice received, we consider that it is appropriate to proceed with the amendment to the rule.
38. If the rule change did not proceed, we would not be able to accept applications to become a licensed body until the section 80 order had been made in late 2019 / early 2020. This potentially would delay new entrants to the legal services sector.
39. By drafting the rule change to allow for the interim arrangements to only be in force pending a body being established under section 80(1)(a) of the Act allows for the First Tier Tribunal to be introduced immediately without further action.
40. Having considered the risks identified and advice provided, we wish to proceed with the amendment to the Licensing Rules.
41. The proposed changes to the Licensing Rules to incorporate the changes outlined in section C above can be found in red at **Annex 1**.

#### **D. Statement in respect of the regulatory objectives**

42. The impact of these proposals upon the regulatory objectives has been considered in broad terms throughout this application. We have sought to balance the regulatory objectives of promoting competition in the market and access to justice on the one hand and protecting the interests of applicants on the other.
43. In terms of increasing competition in the legal services market and promoting access to justice, we believe that by adopting these interim appeals arrangements it facilitates choice for firms of whom they seek to regulate them.
44. We will work with applicants to ensure that they are fully aware of the requirements for licensing and we have provided information on our website to assist them, including an Approach to Authorisation setting out the types of ABS that we believe fit with our regulation. That therefore enables a common approach across new methods of delivering legal services.
45. There is no impact on consumers of these changes and we consider that the proposals will have a neutral impact upon the regulatory objectives.

## **E. Statement in respect of the better regulation principles**

46. We consider that the proposal is in keeping with the better regulation principles and that our duty under section 28 of the Legal Services Act 2007 has been fulfilled.
47. We have been mindful of the need to perform regulatory functions in a manner which is proportionate. We consider that changes proposed facilitate choice for firms of whom their regulator is but maintains an appropriate interim appeals process.
48. In relation to better regulation principles, the change allows for the delay to the section 80 order to be addressed that was not anticipated by CILEx Regulation, the LSB, and the Ministry of Justice when approving designation. We have ensured that protection and promotion of the interests of consumers and the public is central to its regulatory arrangements. Delaying the implementation of the licensing rules will not aid competition and promote innovation in legal services.

## **F. Stakeholder engagement**

49. We have not consulted on these changes as the implementation of these rules, with the original appeals arrangements, were part of the licensing application to the LSB, which was consulted upon. The final designation and section 80 order have been pending owing to the on-going delays with Parliamentary business, which was identified at an early stage. We believe that the interim arrangements are a proportionate and low risk response to address the gap between authorising commencing and an appellate body being established under the section 80 order.
50. Both the LSB and the Lord Chancellor in their written decisions which are published on the LSB website recognised that CILEx Regulation would seek interim arrangements pending the final section 80 order being approved.
51. The LSB commented as follows: 'The LSB is satisfied that there will be an appropriate appeals body in place to hear and determine appeals against licensing decisions. CILEx Regulation will use the General Regulatory Chamber of the First Tier Tribunal (FTT) to hear appeals against licensing decisions it makes when acting as a licensing authority. An order under section 80 of the Act will be made to establish the FTT as the appellate body. Should CILEx Regulation wish to commence licensing prior to a section 80 order coming into force, it can put in place interim appeals arrangements that must comply with licensing rules. The LSB will need to be assured that any interim arrangements are compliant with the relevant requirements in the licensing rules.'

52. The Lord Chancellor commented ‘I understand that in the meantime the Chartered Institute of Legal Executives is developing interim appeals arrangements, to cover the period until the section 80 order can be made, and that they will seek the LSB’s approval for these arrangements in due course’.
53. The uncertainty around Parliamentary timings meant that CILEX Regulation has not consulted on the interim arrangements as they may have only needed to be in place for a short time
54. Subject to gaining Parliamentary approval, the section 80 order will either be obtained on 1 October 2019 or 1 April 2020, being the two dates to which parliament now works. Whilst CILEx Regulation would wish to be in a position to accept applications from June / July 2019, even if the order was delayed until the 2020 date, the possibility of an appeal reaching the interim appellate body is unlikely given the timescales for a declined applicant to pass through the licensing appeals process. Even if circumstances meant it did, then the interim appellate body will only be in force for a couple of months.
55. In view of this we are not proposing to carry out a consultation on this rule change.

#### **G. Statement in relation to the impact upon other approved regulators**

56. We do not consider that these changes will impact directly upon areas regulated by other approved regulators.

#### **H. Timetable for implementation**

JUNE 2019	Implement new wording
JULY 2019	Commence accepting ABS applications
OCTOBER 2019/ APRIL 2020	S80 Order approved by Parliament and interim arrangements no longer required.

#### **I. Contact details**

57. The contact details for this application are as follows:

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