



LSB consultation
Alternative Business Structures:
Appeals Arrangements
The CLC's response
November 2010

The CLC's response to the LSB consultation Alternative Business Structures: Appeal Arrangements

Introduction

1. The Council for Licensed Conveyancers ("the CLC") was established under the provisions of the Administration of Justice Act 1985 (AJA) as the Regulatory Body for the profession of Licensed Conveyancers. As set out at section 28 Legal Services Act 2007 (LSA) the CLC must, so far as is reasonably practicable, act in a way—
 - (a) which is compatible with the regulatory objectives (set out at s.1 LSA), and
 - (b) which it considers most appropriate for the purpose of meeting those objectives.
2. Further, the CLC must have regard to-
 - (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
 - (b) any other principle appearing to it to represent the best regulatory practice.

The purpose of the CLC

3. To set entry standards and regulate the profession of Licensed Conveyancers effectively in order to:
 - secure adequate consumer protection and redress;
 - promote effective competition in the legal services market, and;
 - provide choice for consumers
4. The CLC welcomes the opportunity to respond to the LSB's consultation on Alternative Business Structures: Appeal Arrangements.

Responses to the list of questions raised in the Consultation Paper

Question 1

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

No.

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?

Yes. The CLC agrees the proposals made by the LSB and has no further comments to make.

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?

Yes.

Question 4

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

Yes.

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?

In keeping with the current arrangements for hearings of the CLC's Discipline and Appeals Committee, we believe that the pool of membership from which panels are selected should comprise licensed conveyancers and/or those (whether or not they are legally qualified) regulated by a particular LA as owners, managers or employees. This will ensure that the Tribunal is able to take advantage of the specific knowledge of individuals regulated by the CLC about the sector. We believe that the Tribunal should sit as a panel of three comprising a legally qualified chairman, a lay member and an individual who is either a licensed conveyancer and/or is engaged with a licensed body as an owner, manager or employee.

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.

Aside from the proposal we have made in response to Question 8, we do not believe any amendments need to be made to the GRC Rules.

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.

Aside from the proposal we have made in response to Question 8, we do not believe any amendments need to be made to the GRC Rules.

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?

No. The costs incurred by the LA in responding to an appeal made against a regulatory decision made by it are, in the absence of a specific direction that the costs should be met by the appellant, paid by the LA and, since the LA is funded by its licence holders, ultimately by its licensed community. The LSB guidance requires LA to have "a published, comprehensive and quick internal review system"¹. Equally,

¹ Para 63 page 14 Alternative Business Structures: approaches to licensing

there will be no requirement for an appellant to obtain permission to appeal against a determination of a LA. There is therefore the risk that an appellant will make an appeal which is without merit or substantially without merit. Whilst the GRC Procedure Rules permits the Tribunal to strike out the whole or part of proceedings which it considers have no reasonable prospect of succeeding (rule 8(3)(c)), in addition to other case management powers (rules 5 and 7), we consider that there should be a general power to award costs, since the absence of merit may not become evident until the LA has incurred costs (which may be substantial) in responding to the appeal.

The power to award costs will therefore act as a disincentive to unmeritorious appeals, and may be exercised by the Tribunal where it considers it fit to do so. We accept that the Tribunal should have power in appropriate cases to direct the LA to pay the appellant's costs.

This proposal follows amendments recently made by the LSA to the CLC's statutory framework acting as an Approved Regulator which entitle the Discipline and Appeals Committee (in addition to existing powers in particular applications to direct either party to pay costs at s.29(3) and paragraph 8(2) schedule 6 to the AJA) not only to make awards of costs by the regulated individual or entity, but also by the CLC. One example is at s.26 AJA.

- (2A) In relation to proceedings before the Discipline and Appeals Committee under this section, the Committee may make such order as they consider fit as to the payment of costs by—
 - (a) the Council;
 - (b) the licensed conveyancer against whom the proceedings were brought;
 - (c) if the person on whose allegation the proceedings were brought was heard (in person, or through a representative) by the Committee in the course of the proceedings, that person.
- (2B) In subsection (2A), for the purposes of paragraph (a) or (b) of that subsection, the reference to costs includes costs incurred in connection with a preliminary investigation of the allegation under section 24(1A).

Similar provisions relating to the award of costs are at s.24(10), s.24A(7), s.27(3), s.28(5) and at paragraphs 3A(8), 4(2D), 5(4) and 7(3) schedule 6 to the AJA.

Further, we believe that the absence of the power to award costs where individuals and entities are regulated by the CLC as a LA in circumstances where (as set out above) costs may be awarded in similar circumstances where the CLC is acting as an Approved Regulator creates an unsatisfactory imbalance and unfairness. This is inconsistent with the LSB's general desire to see a level playing field and the CLC's policy to ensure that as far as possible the CLC's regulatory requirements as a LA and as an Approved Regulator are the same.

We suggest that the GRC Rules should be amended by inserting at 10(1) a new clause:

- “(d) Where a Licensing Authority is the respondent and a decision, direction or order of a Licensing Authority is the subject of the proceedings, the Tribunal may make such order as it considers fit as to the payment of costs by one or more of the parties.”

It may be considered appropriate for the avoidance of doubt to insert a definition of a Licensing Authority, either “as defined at section 73(1) Legal Services Act 2007” or to repeat verbatim the definition set out at section 73(1) Legal Services Act 2007.

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?

Yes.

Question 10

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

We have no comments.

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?

We agree that the costs of the appeal arrangements should be borne by licensing authorities and recovered as part of the licence fee on ABS and have no comments to make on the proposed approach set out in the consultation paper to apportioning the costs between LAs. We note and agree the proposal subsequently made by the LSB that setup costs are paid up front with running costs paid retrospectively at the end of each financial year. We understand that the set-up costs would then be divided between the LAs at the end of the 2011/2012 financial year; and at the end of the next financial year (2012/2013) the actual costs of the appeals would either be divided between the LAs or allocated to the appropriate LA.

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?

We agree the proposal about the time period and have no comments on the draft rules at Annex F.

Question 13

Do you have any comments on the draft impact assessment?

No.

Summary

5. The CLC supports the proposals made by the LSB in the Consultation Paper which it considers are proportionate and fair. For the reasons set out above, it considers that the Tribunal should comprise a panel of three to include an individual from an entity regulated by the CLC and should also have power to award costs in relation to appeals against decisions made by a LA.