

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	29 April 2015	<b>Item:</b> Paper (15) 19

<b>Title:</b>	The transitional protections from ABS licensing: commercial law firms	
<b>Workstream(s):</b>	Breaking down regulatory barriers	
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<b>Status:</b>	Unclassified	

### Summary:

This complements a Board paper and discussion in November 2014 on transitional protection under the Legal Services Act 2007 (LSA) for some bodies from the need to be licensed as alternative business structures (ABS). While focus last time was on special bodies, this paper looks at commercial firms. It is brought now with a view to updating stakeholders on next steps, as per a commitment given to them in December 2014.

Progressing work to end transitional protection for commercial firms does not represent best use of resources at this time. Our work has confirmed that:

- there is limited evidence of risk associated with these firms
- there is no legal requirement on the LSB to end the transitional protections
- the issue is not solely our responsibility, as direction is also needed from the Ministry of Justice. There is no evidence that the Ministry of Justice has appetite for this currently
- our effort is better focussed on special bodies (with work scheduled in our 2015/16 business plan), which are more numerous and likely to serve more vulnerable consumer groups
- against the wider context of deregulation, ending transitional protection would send out a confusing message for some parts of the market
- many of these firms can already apply to be an ABS should they wish to do so. No new firms can gain transitional status.

### Recommendation

The Board is invited to agree that further work on transitional protection associated with commercial firms is deferred (subject to the periodic monitoring of indicators) until Q3/Q4 2017/18.

<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	Challenge of our decision either way (i.e. to defer work on ending transitional protections or otherwise) seems unlikely, as does stakeholders (including the Ministry of Justice) advocating taking work forward. We will maintain a watch on views and issues. NG
<b>Reputational:</b>	Both possible courses of action could potentially attract criticism, i.e. for failing to give full effect to the LSA (which would also be a change to our previous position) or disproportionate use of resources by taking work forward. Given the wider deregulatory agenda, the second seems more likely. We would, in any event, prepare stakeholder communications setting out our rationale
<b>Resource:</b>	Work to end transitional protections would require a relatively significant call on resources, including legal input into preparing a recommendation(s) to the Lord Chancellor and related order(s). This is not proposed for Schedule 5, but if needed would be factored into future plans and stakeholder communications

<b>Consultation</b>	<b>Yes</b>	<b>No</b>	<b>Who / why?</b>
<b>Board Members:</b>		<b>X</b>	
<b>Consumer Panel:</b>		<b>X</b>	
<b>Others:</b>	No		

<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
Para 5	Section 44: restricted information obtained by the Board in the exercise of its functions [and therefore] must not be disclosed (s167 LSA)	N/A

## LEGAL SERVICES BOARD

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### **The transitional protections from ABS licensing: commercial law firms**

#### **Recommendation**

1. The Board is invited to agree that further work on transitional protection associated with commercial firms is deferred (subject to the periodic monitoring of indicators) until Q3/Q4 2017/18.

#### **Background**

2. The Legal Services Act 2007 (LSA) provides transitional protection for bodies with non-lawyer managers and/or owners that provide reserved legal activities from the need to be licensed as alternative business structures (ABS). This is set out in different areas of the LSA:
  - section 23 – for non-commercial/special bodies
  - Schedule 5 – for some types of commercial law firm.
3. There is no legal requirement on the LSB to bring any of the transitional protections to an end. Doing so requires an order(s) by the Lord Chancellor, on the recommendation of the LSB. Our recommendation(s) could refer to specific paragraphs/transitional protections provided by Schedule 5,<sup>1</sup> and to different end dates for each of them. This means that the work requires the support of the Ministry of Justice. However, it has not made reference to this issue for some time now, and gaining its backing might prove challenging given budgetary pressures.
4. The Board decided in November 2014 to defer work on licensing non-commercial/special bodies until autumn 2016. A corresponding update was issued to stakeholders in December 2014.<sup>2</sup>
5. The limited response to the stakeholder update was positive, although it highlighted the limited understanding of the LSA among some bodies. [REDACTED]  
[REDACTED] In the meantime, bodies may be able to apply to become ABS now if they wish. We have seen the University of Law licensed by the SRA and Nottingham Law School announce that it has made an application, both of which might otherwise fall under the heading of non-commercial/special body.
6. The November 2014 Board paper said that further work was needed to understand current transitional arrangements for commercial law firms. Our

<sup>1</sup>paragraph 3(2) of Schedule 5 to the LSA

<sup>2</sup>[http://www.legalservicesboard.org.uk/Projects/alternative\\_business\\_structures\\_and\\_special\\_bodies/index.htm](http://www.legalservicesboard.org.uk/Projects/alternative_business_structures_and_special_bodies/index.htm)

stakeholder update indicated we would issue information on next steps in due course.

## Schedule 5 – commercial law firms

7. Schedule 5 (part 2) to the LSA gave transitional protection to the different professional titles. In terms of ABS licensing, the following are still in place:<sup>3</sup>
  - solicitors (paragraph 7(1)(c) and Schedule 16 to the LSA) – bodies with up to 25% non-lawyer managers/owners
  - licensed conveyancers (paragraph 11(1)(c) and Schedule 17 to the LSA) – bodies where at least one manager is a licensed conveyancer
  - notaries (paragraph 13) – employers exempt from the need to get an ABS licence
  - patent attorneys (paragraph 14(7)(c)) and trade mark attorneys (paragraph 16(7)(c)) – enabled rules allowing for non-lawyer involvement in patent/trade mark bodies
  - law costs draftsmen (paragraph 18) - employers exempt from the need to get an ABS licence.
8. This meant that the LSA effectively allowed differing early limited forms of commercial ABS. The result of part 5 (alternative business structures) of the LSA coming into effect was to end this entry route to market, as new firms with non-lawyer involvement then had to apply to become an ABS. Those firms that were benefitting from transitional protection have preserved rights, and so continue to do so for as long as respective conditions are met.
9. In the case of solicitors, patent attorneys and trade mark attorneys, firms will already be regulated by approved regulators. This was also the position for licensed conveyancers, but its firms have since migrated to ABS status meaning the transitional protection is no longer applicable. For notaries and law costs draftsmen the situation is different, in that exempt employers are not presumed to be regulated (although individual authorised persons will be).
10. Many, but not all, firms/employers can already apply to become an ABS. At that point the licensing authority could apply greater scrutiny to individuals involved in the business (although in some cases there would already be familiarity).
11. Numbers given by the SRA and the Intellectual Property Regulation Board (IPReg) (the regulatory arm of both the Chartered Institute of Patent Attorneys and the Institute of Trade Mark Attorneys) suggest around **200** solicitor and patent attorney/trade mark attorney firms at an upper estimate, with numbers diminishing slowly over time. It seems unlikely, though, that this will reach zero without the LSB taking action. In contrast, totals of employers of notaries and law costs draftsmen are unclear. This reflects that the exemption from authorisation has meant such firms have not fallen within the focus of the approved regulators.

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<sup>3</sup>Not all rights granted during transitional protection directly overlap or match the reserved legal activities in section 12 of the LSA. For example, paragraph 11(3) provides deemed authorisation for conveyancing services, which appears to be wider than reserved instruments. However, this does not appear to present practical issues.

12. A prerequisite for ending the transitional protections is that there is a suitable licensing authority in place. The diagrams at **Annex A** consider the activities permitted by the remaining transitional protections (which are not necessarily the same as those now regulated by the relevant approved regulator) against current licensing authorities. In the case of solicitors, patent and trade mark attorneys, and law costs draftsmen, there is at least one licensing authority to which a body could make an ABS application (albeit a licensing authority's ability to regulate in terms of competence and suitable regulatory arrangements, is not a given). An exception is notarial activities, for which there is no licensing authority.
13. For firms already regulated by it, the SRA believes the process for transfer to ABS is relatively straightforward, with no application fees or changes in annual fees. As our monitoring of its ABS authorisation shows, the position for other firms is generally improving. That said, it has indicated it would need plenty of notice if transitional protection were to end and would want to ensure this didn't coincide with other major initiatives.

#### Risks posed by not ending Schedule 5 transitional protections

14. In the case of employers of notaries and law costs draftsmen, consumers will not have the benefit of regulatory oversight of the firm providing services to them, or the ability to complain about it to the Legal Ombudsman. However, a complaint can be made about an individual authorised person (under section 131 of the LSA). When compared to those of non-commercial/special bodies, consumers seem less likely to have characteristics of vulnerability.
15. If a body no longer meets the conditions for transitional protection it must either obtain an ABS licence or cease carrying out reserved legal activities.<sup>4</sup> As section 18(3) of the LSA only provides for continued authorisation for a limited period (a maximum of 90 days), there is a risk that unauthorised practice could occur resulting in harm to consumers. The SRA has said it will consider options for highlighting this issue, but noted that no actual instances were identified. It did not consider transitional protection to be a significant concern otherwise.
16. As the body set up to implement the LSA, the LSB might face some criticism for failing to give effect to it as intended. Taking into account the wider deregulatory agenda this risk seems low in practice.

#### Risks posed by seeking to end Schedule 5 transitional protections now

17. Taking forward work to end the transitional protections introduced by Schedule 5 would involve a fairly heavy call on our resources when we want to be delivering the Board's 2015/16 business plan. It would also be a fairly large call on the resources of our stakeholders (including the Ministry of Justice, regulators and relevant firms). This would be more so if the Costs Lawyer Standards Board sought to become a licensing authority.<sup>5</sup> Without the Ministry of Justice's support, this could ultimately prove to be wasted.
18. Ending the protections would also be at odds with the wider agenda for deregulation. Although the LSA may envisage this happening, in light of the

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<sup>4</sup> As is also the case for other authorised firms

<sup>5</sup> Transitional protection has been discussed as part of a wider conversation, our preference at this time is that CLSB focusses on developing its approach as an approved regulator

limited risks posed by around 200 firms (at most) work could be regarded as disproportionate.

## **Conclusion**

19. It is obviously desirable to give effect to the LSA as intended on Schedule 5. In the case of notarial activities, however, this is not currently possible (because there is no suitable licensing authority). For the remainder of Schedule 5, there is limited evidence of risks to the regulatory objectives, or of actual harm. As such, at this stage there is no clear and pressing case for ending the transitional protections. To do so would be somewhat at odds with wider effort on deregulatory work, and could also put at risk the focus and resources of stakeholders. For example, ending protections could send out a confusing message to parts of the market by increasing regulation for certain groups that until now have been exempt.
20. Together, these points suggest that this is not the best use of our resources for the time being. Although this would mean bodies with non-lawyer input continuing to provide reserved legal activities without being licensed as ABS, it would not preclude some of those wishing to become ABS from doing so. No new firms can gain transitional status.
21. At this point, it is right that the LSB's focus is instead on non-commercial/special bodies (given that they are likely to be more numerous, facing challenging operating conditions, and quite likely serving vulnerable consumers) and on deregulation.
22. This would therefore suggest periodic monitoring of key markers. These might, for example, include:
  - the impact of IPReg becoming a licensing authority
  - annual checks on numbers of relevant firms regulated by IPReg and SRA
  - evidence on risks and harms associated with firms with Schedule 5 rights
  - the opportunity to collaborate with the Ministry of Justice on the issue.
23. Work would of course need to be reopened earlier if there was evidence of increased risks or of harm, and that the Ministry of Justice would be prepared to progress it.

## Annex A – licensing authorities for firms with Schedule 5 rights

These tables reflect the activities permitted by remaining transitional protections against existing licensing authorities. For solicitors, patent and trade mark attorneys, and law costs draftsmen, there is at least one licensing authority to which a body could make an ABS application. An exception (and so not covered below) is notarial activities, for which there is no licensing authority.

<b>Solicitors</b>	<b>Available licensing authorities<sup>6</sup></b>					
<b>Exempted activity</b>	SRA	CLC <sup>7</sup>	IPReg	ICAEW <sup>8</sup>	CLSB <sup>9</sup>	MoF
Rights of audience	■		■			
Conduct of litigation	■		■			
Reserved instruments	■		■			
Probate	■			■		
Administration of oaths	■		■			

<b>Patent/trade mark attorney</b>	<b>Available licensing authorities</b>					
<b>Exempted activity</b>	SRA	CLC	IPReg	ICAEW	CLSB	MoF
Rights of audience	■		■			
Conduct of litigation	■		■			
Reserved instruments	■		■			
Administration of oaths	■		■			

<b>Law costs draftsmen</b>	<b>Available licensing authorities</b>					
<b>Exempted activity</b>	SRA	CLC	IPReg	ICAEW	CLSB	MoF
Rights of audience	■		■			
Conduct of litigation	■		■			
Administration of oaths	■		■			

<sup>6</sup>in practice IPReg rules limit the scope of what it regulates (i.e. it doesn't cover criminal law, family or matrimonial law, conveyancing other than IP rights, real estate, probate and drafting of wills, immigration, personal injury/medical negligence, or administrative law other than relating to IP), meaning it may not represent a viable alternative LA. Equally ICAEW regulatory arrangements limit its scope to non-contentious probate

<sup>7</sup>Council for Licensed Conveyancers

<sup>8</sup>Institute of Chartered Accountants in England and Wales

<sup>9</sup>Costs Lawyer Standards Board