Review of Regulatory Arrangements: proposals for change

Consultation paper

16 December 2021

This consultation closes at 5pm on 17 March 2022

Section One - Introduction and background to the review

About this consultation

1. IPReg is consulting on proposed changes to our regulatory arrangements and therefore seeking views on both the proposed regulatory arrangements and the key policy change proposals (including our draft Impact Assessment at **Annex D**).
2. Our regulatory arrangements cover the full range of activities undertaken by regulated individuals and firms – from the requirements to qualify as a patent or trade mark attorney, the process for admission, conduct and other requirements, complaints and disciplinary matters and removal or retirement from the register.
3. Education and training requirements will be looked at as part of the review but we are not proposing changes at this time. We await the interesting debate and discussions following the Mercer Review[1]. The only exception is the matter of basic litigation skills where we are seeking views on the principle of moving the acquisition of basic litigation skills into the pre-admission phase (and therefore amending the current requirement to obtain a basic litigation certificate prior to admission or within three years of admission to the register). We are also seeking views on proposed changes relating to our Continuing Professional Development (CPD) requirements.
4. In advance of this consultation we issued a Call for Evidence, which closed in February 2021. The responses to our Call for Evidence provided a comprehensive range of views which have informed the development of this consultation. A summary is available here.
5. We subsequently engaged in a series of discussions with a range of stakeholders to help us to understand the impacts of our proposals in practice. We are grateful to all those who took time to respond to the Call for Evidence and to speak to us; their views and ideas have been invaluable in developing these proposals. This consultation is an opportunity to test our proposals further and we are keen to hear from as wide a range of people as possible to help build our evidence base.
6. This consultation document itself sets out:
    - our approach including proposals for the overarching Principles and Code of Conduct that all regulated persons will be subject to (see **section 2** of the consultation document and **Annex A**);
    - our proposals for key policy changes (**section 3** of the consultation document) including our requirements relating to client money, CPD,

[1] The Mercer Review was commissioned by CIPA Council to examine the education, training and assessment arrangements for entry as a Registered Patent Attorney (RPA) onto the UK Register of Patent Attorneys maintained by IPReg and for election as a Fellow and Chartered Patent Attorney (CPA) of CIPA https://www.cipa.org.uk/news/review-aims-to-modernise-and-improve-patent-attorney-training-in-the-uk/

litigation skills, transparency and proposed changes to our disciplinary policy and process;

- some wider issues relating to competition and innovation that have arisen through the review process (see **section 4** of the consultation document) including our proposals for practising categories, Professional Indemnity Insurance (PII) and to enable multi-disciplinary practices.

7. We appreciate it is a long document and there is no need to respond to all the topics it covers. We welcome thoughts and observations on individual areas that specifically interest or impact you.

8. We also welcome comments on the draft regulatory arrangements (see **Annexes A and B)** and our draft Impact Assessment **(Annex D)**.

9. The consultation closes at 5pm on 17 March 2022.

10. Please send your response to: info@ipreg.org.uk. If your response is confidential, please make that clear.

11. If you would prefer to speak to us about any aspect of the consultation, we positively welcome those discussions so please do get in touch through info@ipreg.org.uk.

Why we are doing this

12. As a regulator, it is best practice to periodically review regulatory arrangements to assess how they are working and refine in light of the evidence available. The current regulatory arrangements have been in place for a number of years and we have identified, from our experience of applying them as well as feedback from those we regulate, that there are some areas that would benefit from amendment, clarification or modernisation. In reviewing them we have paid particular attention to the eight regulatory objectives set out in the Legal Services Act 2007 (the "Act")[2]. Our aim is to ensure that our regulatory arrangements are fit for purpose and so far as possible compatible with the regulatory objectives. A full analysis in relation to the regulatory objectives is included in the draft Impact Assessment that accompanies this consultation.

13. In 2019, the IPReg Board set out its strategic priorities. The Board wants to be more externally focused to ensure that its regulatory arrangements encourage and

[2] Under section 28 of the Legal Services Act, IPReg is under a duty to promote the regulatory objectives. The regulatory objectives are: (1) protecting and promoting the public interest; (2) supporting the constitutional principle of the rule of law; (3) improving access to justice; (4) protecting and promoting the interests of consumers; (5) promoting competition in the provision of services; (6) encouraging an independent, strong, diverse and effective legal profession; (7) increasing public understanding of the citizen's legal rights and duties; and (8) promoting and maintaining adherence to the professional principles.

support innovation. We therefore noted with interest the Competition and Markets Authority (CMA) report on Competition and Regulation (the "CMA Report")[3]. In particular, the recommendation that regulation should support innovation and disruption and that it is critical that regulators "understand and take into account how regulatory measures affect new entrants and innovation".

14. Responses to the Call for Evidence highlighted a number of key themes affecting the IP professions including:

    - Market changes brought about through the impact of Brexit
    - Globalisation, and increasing competition from the unregulated sector
    - Importance of maintaining standards and meaningful regulation to ensure the "badge" of IPReg regulation continues to help regulated attorneys differentiate themselves from the unregulated sector.

15. We heard that for many attorneys, regulation was a conscious choice (as most of their work constitutes activities that do not need to be regulated). This must also be balanced against the need to provide flexibility where we can to ensure that regulation helps and supports businesses to compete.

Our aims and objectives

16. With this in mind we have set out the following key principles for the review:

    - **Reduce the burden of regulation** by ensuring that we do not inadvertently add costs through unnecessary regulatory requirements. For example we have proposed amending the requirement to complete the Basic Litigation Skills Course and obtain a Litigation Certificate (prior to admission or within three years of admission to the register). Instead we have proposed exploring how the core skills and knowledge needed in relation to litigation could be integrated into the pre-admission phase, potentially at a lower cost and removing the administrative step of having to apply for the litigation certificate at a key point in an attorney's career.
    - **Focus on the issues that really matter** by setting reasonable standards and not gold plating them. For example we have proposed a new approach to CPD whereby attorneys will be required to reflect on their own competence and identify the areas where they need to focus their professional development. This has the potential to increase the regulatory burden at the outset as attorneys become used to the new approach but this is likely to be outweighed by the potential benefits in terms of assuring the competence of attorneys and maintaining high standards.

[3] CMA 2016 market study https://www.gov.uk/cma-cases/legal-services-market-study and subsequent review of progress https://www.gov.uk/government/news/cma-publishes-review-of-progress-in-legal-services-sector

- **Maintain proportionate consumer protection** by striking the right balance. For example, we have introduced mandatory requirements for transparency of costs information as a lack of information about this remains the most common reason for first-tier complaints. Our aim is for consumers and small businesses to have the information they need to make informed choices about which provider to use (including full transparency about any uplifts to prices, administrative fees or reciprocal referral arrangements) and are given sufficient information about changes to price/services as their work progresses.

- **Principles not detailed rules (unless evidence demonstrates rules are necessary).** For example, we have proposed introducing an alternative option for keeping client money safe by allowing attorneys and firms to use a Third Party Managed Account - a form of escrow account which allows client money to be held by a third party with the added protections of FCA regulation thereby removing the need for firms to operate a client account.

- **Facilitate innovation**. For example we are consulting on allowing a broader range of non-legal services to be provided by IPReg regulated firms (beyond IP affiliated work) and have put forward proposals for a regulatory "sandbox" to facilitate the testing of alternative PII arrangements. The regulatory sandbox concept has been used extensively in financial services and other regulated sectors. Regulatory sandboxes are a 'safe space' in which to test innovation amid enhanced scrutiny without the usual regulatory penalties for technical breaches. They can also be a helpful way of gathering evidence.

- **Streamlined and consistent framework**. We have restructured the regulatory arrangements and redrafted to ensure consistency.

- **Resilient to change**. For example we have proposed a simplification of the current practising categories so that the register is clear, meaningful and able to adapt to changes in models of practice.

Impact Assessment

17. A key part of this consultation is our Impact Assessment (IA) which provides an initial analysis for consultation. The IA addresses the potential impact (positive and negative) of the proposed changes on:

    - the regulatory objectives, which includes the impact on competition and consumers; and
    - equality and diversity.

18. One of the regulatory objectives in the Legal Services Act 2007 is "encouraging an independent, strong, diverse and effective legal profession". In early 2021, IPReg ran

a survey to gather information about the diversity of the trade mark and patent attorneys that we regulate. We have drawn on the findings of the survey to assist in the development of the IA. We will continue to work with a wide range of stakeholders to improve diversity and inclusion in the IP sector.

19. In addition to diversity data, the IA draws on a range of sources of information including:
    - responses to IPReg's Call for Evidence;
    - feedback from discussions with attorneys and firms and other stakeholders;
    - registrant data - e.g., number of attorneys and firms, fee categories, etc.;
    - complaints information;
    - data on IPReg's disciplinary activities;
    - PII claims information;
    - applications data - we receive a certain amount about how firms intend to operate from their applications, their corporate structure etc.; and
    - information received from H M Treasury relating to the prevention of money laundering and terrorist financing.
20. This consultation is also an opportunity to gather further evidence and as such we have included some specific questions relating to client money and the client base of those we regulate.
21. The IA will be finalised following consultation and prior to the Board's final decision on changes to the regulatory arrangements.

Consultation question 1: What are your views on our Impact Assessment and specifically the impact of our proposals in relation to equality, diversity and inclusion?

Section two - Our approach to the new regulatory arrangements

22. The proposed new regulatory arrangements are provided at **Annex A**[4]. This document is to be IPReg's Core Regulatory Framework (CRF) as it contains in one place all the regulatory arrangements that are relevant to IPReg regulated attorneys and firms in terms of their ongoing duties and responsibilities.

23. We have tried to keep the drafting simple and clear, removing prescriptive requirements where unjustified and relying on broadly stated principles wherever possible. We have adopted a plain English, gender neutral approach throughout. The regulatory arrangements will be underpinned by guidance to give context to the higher level principles where appropriate. In the case of the procedural rules (such as those concerning admission and disciplinary), we will publish our Standard Operating Procedure (SOP) which will set out the more procedural aspects of the arrangements. We have provided an example at **Annex C**.

24. We consider that this approach will ensure the new regulatory arrangements are clear, accessible and better able to withstand the test of time. This is especially important in light of the market changes outlined in the Call for Evidence responses, as well as any unforeseen changes such as those brought about over the last 20 months as a result of the pandemic and subsequent changes in ways of working.

25. All of the defined terms are set out in the glossary provided at **Annex B**. We have sought to ensure that defined terms match the statutory terms where applicable to ensure the new arrangements are as clear and consistent as possible.

Principles and Code of Conduct

26. At the core of our new regulatory arrangements are the overarching Principles and Code of Conduct.

27. The Principles set out the ethical behaviours that IPReg expects all regulated persons to uphold in all aspects of their life, be this within professional practice or private life. Should any of these Principles come into conflict with one another, those which safeguard the wider public interest (such as upholding the rule of law and upholding public confidence) will take precedence.

28. Supporting the Principles is the new Code of Conduct. These provisions set out the standards of professionalism that IPReg expects of all regulated persons in whatever context they are working, such as private practice or in-house. This includes registered patent attorneys and registered trade mark attorneys, IPReg registered and licensed bodies, authorised role holders such as a body's Head of Legal Practice (HoLP), Head of Finance and Administration (HoFA), managers and owners and –

[4] IPReg Rules for the Examination and Admission of Individuals 2011, Compensation Arrangements Rules 2021 and Practice Fee Regulations will continue to stand alone.

where the context applies - employees. The Code also makes clear that regulated persons are responsible for the work of those they employ or sub-contract with.

29. The Code goes into more detail with specific provisions targeted to the risks posed but remains principles based in approach. For example 3.8 requires that *Workforce diversity data is monitored, reported and published as determined by IPReg.* We expect to develop supporting guidance to help attorneys make decisions as to how these obligations apply in practice based scenarios – for example guidance on the conflict of interest requirements and the diversity monitoring example

Consultation question 2: What are your views on the eight Principles we have set out?

Consultation question 3: What are your views on the Code of Conduct – does it capture the right requirements or is there anything missing?

Consultation question 4: We would be interested in your views on where guidance is required to support attorneys and firms with compliance? Are there any specific examples or particularly difficult issues?

Procedural rules – admissions and disciplinary

30. These sections set core aspects of our regulatory processes including admission to the register and our powers in relation to disciplinary policy and process.

31. Supporting these rules will be our Standard Operating Procedures. We consider that uncoupling detailed IPReg processes from our rules will be more user friendly in terms of presenting the information than expecting attorneys or prospective attorneys to refer to detailed rules. This will also support a consistent approach with some flexibility to respond to individual circumstances. We have provided an example at **Annex C**.

32. Chapter 3 of the new regulatory arrangements concerns our admissions and authorisation requirements. For the most part the provisions reflect our updated style only.

33. One change that we would like to highlight relates to overseas qualifications where we are proposing to recognise an applicant's overseas qualification or may direct an applicant to undertake additional steps where there are substantial differences between the skills, knowledge and training they have received (see 1.3 of Chapter 3 – admission and authorisation requirements). The applicant must provide detailed evidence that they meet the minimum standards of competence set out in the relevant Competency Framework. Advanced level competency is not required in all areas, but the applicant must demonstrate they have the breadth and depth of knowledge and experience required of a newly qualified attorney who trained in the

UK. This process is set out in more detail in the draft Standard Operating Procedure (see paragraphs 20-26).

34. The proposed changes to our disciplinary policy and process are set out later in this consultation paper at section three. These changes are reflected in the new regulatory arrangements at chapter 4 - investigation and disciplinary requirements

Waivers

35. Our new regulatory arrangements include a broad but not unfettered waiver power that can be applied to any of the provisions. An exception is the qualification requirements where exemptions to examinations or specific modules are a matter for education providers and not for IPReg. Nor can we waive any statutory requirements.

36. Decisions relating to waivers are to be made by the Chief Executive and a summary of those decisions will be published. There is no appeal route as we consider the application for a waiver is in effect a request for IPReg to review its policy in light of particular circumstances. However as with any decision made by IPReg an applicant has the right to seek a Judicial Review.

Section three – key policy changes

Client money

Background

37. Our rules around client money were identified in a number of the responses to our Call for Evidence as an area where we could potentially reduce the burden of regulation. Several respondents commented that the majority of client money held by attorneys relates to advance fees and disbursements. The risks therefore tend to be quite different to many other types of legal services provider – for instance those handling 'transactional money' such as funds for conveyancing or probate. The only exception is litigation where attorneys may on occasion receive settlement monies on their client's behalf.

38. The 'business to business' nature of IP services also presents a very different risk profile. We have heard from several stakeholders that the nature of IP work (which moves to a fixed timetable) means that advance payments for disbursements do not tend to sit in client account for long and that often liability for payment (such as foreign filing fees) generally rests with the attorney. We have also received some evidence that our current guidance relating to the £250k limit is unnecessarily restrictive and should be reviewed.

39. More fundamentally, what has become clear is the need for clarity and a well understood definition of client money.

Proposed approach

40. Our proposed rules for client money are included in the draft Code of Conduct. The definition of client money is included in the Glossary.

41. We are proposing a definition of 'client money' that will not include payments for services or fees where the attorney/firm have agreed the scope and cost of the work to be carried out, i.e. it is only money that rightfully belongs to the client. Payment for disbursements where the liability for payment rests with the attorney (for example foreign filing fees) will not be considered client money. Payment on account would still be considered client money but advance payment for work agreed and not yet completed would be treated as the firm's money as is the case with many other services. We understand that this will remove a lot of the current administrative burden involved with moving money between accounts which has the potential to bring real benefits for attorneys and firms. Importantly, all money that belongs to the client will continue to be held in client account. This will include, for example, settlement monies.

42. Where IPReg regulated attorneys and firms hold client money, they will be under a duty to keep this money safe by keeping it separate from money belonging to the

attorney/firm and returning it promptly to the client as soon as it can be. The underlying principle in our approach is that it should always be clear who the money belongs to – the client or the attorney/firm.

43. Clients must also be made aware of where their money is being held - including where this is held on trust – the reasons for this and the regulatory protections afforded to them.

44. Under our proposals, attorneys and firms will have the option to use a Third Party Managed Account (TPMA) which provides the additional safeguard of being held by a third party. A TPMA must be regulated by the Financial Conduct Authority (FCA)[5] and reasonable steps must be taken to ensure the client is informed and aware of the contractual arrangements in place. This includes clients understanding whether any fees are payable for the account, who is responsible for paying them and their right to terminate the arrangement.

45. To help us build our evidence base and understand the risks involved, we are also proposing to introduce a new requirement to notify IPReg if attorneys or firms are holding client money and an indication of how much. We are likely to suggest bandings, for example less than £100k, £100-500k and over £500k.

46. Where residual balances in client account remain and a client is unable to be located (despite all reasonable efforts), we are proposing to allow this money to be donated to a registered charity subject to IPReg being notified and it being less than £500. This is an area where we expect to issue further guidance on how the notification process will work and our expectations in terms of reasonable efforts to locate the client.

Risks to consumers

47. Keeping client money in a client account offers protection in the event of insolvency as the money is separate from the firm's money. A requirement to keep client money separate from the firm's money therefore remains an important consumer protection.

48. In allowing firms to use a TPMA, we are making it easier for those firms that do not wish to hold client money or who only handle client money very occasionally. This also provides a potential alternative option for consumers. TPMAs must be authorised by the FCA and therefore would be covered by the Financial Services Compensation Fund in the event of loss (up to £85k)[6].

49. Keeping client money in a separate client account does not mitigate the risk of dishonesty (e.g. theft). In these circumstances we would expect the client to

---

[5] You can check the authorisation status of a potential provider by searching the Financial Services Register.

[6] https://www.fscs.org.uk/

complain to IPReg which would prompt an investigation and potentially further regulatory action. Financial redress for the loss might be available from LeO or a claim on the IPReg compensation fund.

50. If money for disbursements does not need to be held in client account, there is some risk that the money is used for another purpose and the disbursement is then not paid and/or delayed. We understand that with most disbursements, e.g. foreign filing fees, liability rests with the attorney in which case the risk becomes more one of negligence and in such cases the client may have recourse to compensation from a claim on PII. We would also expect that firms have in place systems and processes to mitigate the risk of this happening in the first place.

Summary analysis of the Regulatory Objectives impacted (see draft Impact Assessment for our full assessment)

51. RO4 – Protecting and promoting the interests of consumers by ensuring that money belonging to clients is protected.
52. RO5 – Promoting competition in the provision of services by providing greater flexibility for where client money can be held and allowing for different business models.
53. RO1 - Protecting and promoting the public interest by maintaining public confidence in regulated attorneys.

Consultation question 5: What are your views on the proposed approach to the definition of client money and the requirements included within the Code? Do you think we have missed any benefits or risks in our analysis?

Consultation question 6: For regulated attorneys and firms, please tell us in confidence how much client money you hold and how that would change under the proposed definition?

Continuing Professional Development

Background

54. Best practice for Continuing Professional Development (CPD) has moved on in the last few years towards a more modern approach based on outputs, i.e. what you have learned and what impact it has on how you do your job, rather than inputs (hours completed irrespective of outcome).
55. Our discussions with stakeholders and the responses to our Call for Evidence have revealed some misunderstanding about CPD - for example that it should be based on an understanding of the regulatory requirements. We are therefore keen to clarify

that the purpose of CPD is to help maintain professional knowledge and skills and therefore provide some assurance of competence beyond the point of admission to the register. Training and development should not stop when an attorney qualifies.

56. The Legal Services Board has been looking at the issues around Continuing Competence[7] and at the time of this consultation will be consulting on its proposed approach. We await the outcome of that consultation with interest.

Proposed approach

57. We are proposing to introduce a new requirement for Continuing Professional Development that is:

- Based on reflection - How can I do things better in the future?
- Output not input – avoid 'box-ticking'
- Relevant to practice
- Flexible
- Mix of formal and informal
- Led by individual attorneys

58. Attorneys will be expected to maintain an individual log where they record all CPD activity and relate it back to their particular learning needs. The options for CPD activity will be broad and might include, for example:

    - Writing up a case study
    - A report of a discussion with a peer regarding a particular topic
    - Work shadowing
    - Coaching/mentoring
    - Research of a legal topic in a specialist area
    - Attending a training course
    - Presenting an in-house training or information seminar for colleagues or clients

59. What might be appropriate for one attorney might not be for another. For example your level of seniority will be relevant, as will practice area, whether you are in-house or in private practice and any significant changes to the scope of your practice or role. Each year may be slightly different with some years needing more in terms of reflective practice than others. For instance changes in key legislation or the

[7] https://legalservicesboard.org.uk/our-work/ongoing-work/ongoing-competence0

development of case law may make the need for CPD in one year much more significant than in others.

60. As is the case now, attorneys will be required to confirm on an annual basis, that they have carried out CPD relevant to their identified training needs. We are developing a proposal that we might call in a random sample of records as a means of monitoring compliance and providing some general feedback to attorneys to help support them with the new approach. Areas of good practice can be shared with the wider regulated community and it will allow IPReg to address any widespread misconceptions about the CPD framework and its purpose.

61. Where an attorney fails to make their annual declaration in respect of CPD they will not be able to renew their registration for the following practice year, so non-compliance with the CPD framework will therefore be resolved administratively rather than through disciplinary action. However, if IPReg has evidence to suggest that an attorney has falsely declared they have complied with the CPD requirements, we may consider disciplinary action.

Risks to consumers

62. CPD requirements are a key regulatory tool in ensuring the competence of those we regulate beyond the point of admission and reinforce the notion that registered attorneys maintain a minimum threshold of skill and knowledge throughout their developing careers, not merely at the point of registration.

63. We consider our current requirements can be significantly improved by putting more of an emphasis on targeted and meaningful CPD activity as opposed to completion of a certain number of hours.

64. For consumers we hope this will help to mitigate the risk of poor quality advice and service.

Summary analysis of the Regulatory Objectives impacted (see draft Impact Assessment for our full assessment)

65. RO6 – Encouraging an independent, strong, diverse and effective legal profession by ensuring attorneys maintain their professional knowledge and skills throughout their career. The new system will also provide flexibility which is likely to have a positive impact in relation to diversity.

66. RO4 – Protecting and promoting the interests of consumers by ensuring our ongoing competency requirements for attorneys are sufficiently robust.

Consultation question 7: What are your views on our proposals in relation to CPD?

Consultation question 8: For regulated attorneys and firms, what would be helpful in terms of guidance and resources for the proposed new CPD requirements?

Litigation skills

Background

67. One of the issues raised in the responses to our Call for Evidence was whether or not the requirement to complete the Basic Litigation Skills Course and obtain a Litigation Certificate (prior to admission or within three years of admission to the register) was justifiable when many attorneys do not conduct litigation.[8] A small number of respondents commented that if litigation skills remain a requirement, these skills should be assessed before the point of registration (as is the case for trade mark attorneys).
68. At present, the Basic Litigation Skills Course does not form part of the training for patent attorneys (unless undertaken independently in addition to their training), and it is IPReg's policy that patent attorneys should take the course and obtain the Litigation Certificate within 3 years of the end of their first year of registration.
69. Early stakeholder engagement has confirmed our view that basic litigation skills are essential to all attorneys as it is necessary to understand the implications of any advice should a matter become contentious. Many stakeholders have also gone further and suggested that it is necessary to have these skills at the point of registration.
70. This is important even where attorneys do not intend to conduct any litigation and reflects the commercial realities of practice. For example, trade mark attorneys advise brand owners on whether their use of the brand is authorised and how those brand owners may prevent third parties from stopping unauthorised use. Essentially, understanding and awareness are the foundations of what is important.
71. We have also received feedback that the timing of the current requirement where the course is completed post admission has the potential to impact negatively in terms of diversity and inclusion due to the timing (and associated costs) of the Basic Litigation Skills Course often coinciding with the point at which attorneys may have family or other responsibilities.

8 Under the current arrangements attorneys must hold an Intellectual Property Litigation Certificate (LC), a Higher Courts Litigation Certificate (HCLC) or a Higher Courts Advocacy Certificate (HCAC), in order to litigate or act as an advocate before the Intellectual Property Enterprise Court or a County Court, or to appeal from the Intellectual Property Office to the High Court. An LC can be granted where an attorney has completed a Basic Litigation Skills Course or where they had previously held (but have now ceased to hold) a LC.

Proposed approach

72. We are keen to explore the principle that all attorneys complete some sort of litigation training before they are admitted. In practice this could be achieved through alterations to the existing training for patent attorneys or through the development of an additional course. Our intention would be to then remove the post-admission requirements for basic litigation skills.
73. We are particularly interested to hear from education providers how this might work in practice. We would also like to hear from employers and those who have completed the course as to the impact of the current requirement for patent attorneys to take time away from work to complete the Basic Litigation Skills Course within the first three years of admission.
74. We are not proposing to make changes to the advanced requirements at this stage.

Risks to consumers

75. Those we have engaged with so far consider it is important from the consumer perspective that an attorney has a basic understanding of the implications of their advice if the matter becomes contentious. This is only likely to improve the quality of the advice provided and result in a better outcome for consumers.

Summary analysis of the Regulatory Objectives impacted (see draft Impact Assessment for our full assessment)

76. RO5 – Promoting competition in the provision of services through better targeting of our regulatory arrangements.

77. RO6 – Encouraging an independent, strong, diverse and effective legal profession by ensuring attorneys have the necessary skills at the point of admission.

Consultation question 9: What are your views on the principle that all attorneys should obtain basic litigation skills before the point of admission? How do you think this could work in practice?

Consultation question 10: Do you think that any changes are needed in respect of advanced litigation skills?

Transparency requirements

Background

78. In May 2019, following the CMA Report, we issued guidance in relation to transparency[9]. The guidance sets out two outcomes:

    - consumers and small businesses that may need IP advice make informed choices about which provider to use, based on clear and accurate pre-engagement information that is prominently displayed on providers' websites and in their client-facing communications; and
    - as their matter progresses, clients are provided with information about changes to prices and/or services.

79. The guidance suggests that those we regulate consider making information on price and service available to consumers before the point of instruction (such as on their website). This includes information on referral arrangements and fees as well as information on the nature of disbursements including any additional "administration" charges. The guidance also covers the types of information that should be made available in relation to regulatory status.
80. Since this review started, we have received reports from stakeholders about various practices that occur in the IP sector including additional margins on foreign exchange fees, reciprocal arrangements, uplifts etc. We have therefore reconsidered whether the current guidance should become mandatory.
81. As we set out in the guidance, there is a substantial amount of research which shows that providing better information about price and services is likely to have commercial advantages for regulated firms.

Proposed approach

82. We propose to make the requirements in our existing guidance mandatory for all attorneys and firms providing services to the public.
83. We are therefore consulting on the following provisions in our proposed Code of Conduct:

> *Clients* receive sufficient and clear information about your work and *costs*, both at the time of engagement and, when the context applies, as work progresses. This is so that *clients* can make informed decisions about the services they need, how their work will be handled and the options available to them.[10]

[9] https://ipreg.org.uk/new-ipreg-guidance-%E2%80%93-improving-information-for-consumers-and-small-businesses

[10] 1.1 of Code of Conduct, Chapter 2, IPReg Core Regulatory Framework

Information about any referral arrangements in place, including the payment of a referral fee and fee sharing arrangements is provided to the *client*.[11]

Clients receive an account of any financial benefits, including but not limited to any commission, disguised *disbursements*, foreign exchange uplifts, discount or rebate received as a result of their instructions.[12]

84. We do not intend to prescribe how you must do this. Rather, our aim is for consumers and small businesses to have the information they need to make informed choices about which provider to use (including full transparency about additional margins on foreign exchange transactions, any uplifts to prices, administrative fees or reciprocal referral arrangements) and are given sufficient information about changes to price/services throughout.

85. We acknowledge that for many attorneys the work they carry out for a client may be portfolio work and not one-off transactional matters. We would therefore take a pragmatic approach in relation to keeping clients informed on costs, changes etc.

86. We are therefore particularly interested in feedback on how these requirements might work in practice.

Risks to consumers

87. A lack of transparency leads to a number of negative impacts for consumers which have been widely discussed in the CMA report. These include inability to make an informed choice and to compare between different providers of legal services. This is especially important given the reported rise in unregulated providers as consumers need to understand the regulatory protections available to them. Moreover, costs information remains the most common reason for complaints.

88. Lack of information and transparency can also mean that consumers are not sufficiently informed of the costs involved with their matter and there is a risk they are misled (particularly in relation to foreign exchange fees, uplifts or administrative charges).

Summary analysis of the Regulatory Objectives impacted (see draft Impact Assessment for our full assessment)

89. RO5 – Promoting competition in the provision of services by providing information to assist consumers in choosing their provider (including price and regulatory status).

[11] 1.3 of Code of Conduct, Chapter 2, IPReg Core Regulatory Framework
[12] 4.3 of Code of Conduct, Chapter 2, IPReg Core Regulatory Framework

90. RO8 – Promoting and maintaining adherence (by authorised persons) to the professional principles by ensuring high standards of professionalism are adhered to in relation to charging practices.

91. RO1 - Protecting and promoting the public interest by ensuring confidence is not undermined through a lack of transparency.

Consultation question 11: What are your views on how the proposed transparency requirements might work in practice for both regulated attorneys and consumers of IP legal services? Are there any particular elements of it that might be costly or difficult to implement?

Disciplinary policy and process

Background

92. A key part of the Review has been to look at our disciplinary policy and process. Having a transparent, robust and fair disciplinary process is one of our core regulatory functions. We have therefore looked at how we can streamline and improve the process end to end in line with best regulatory practice.

93. In reviewing our processes, we have identified the following two outcomes which we seek to achieve:

    - Protection of the public; and
    - Increasing and maintaining confidence in the professions by demonstrating that we have the systems and processes to identify any misconduct and impose sanctions where necessary.

Our proposed approach

94. In making changes to our disciplinary policy and process our objectives are to have processes which are:

    - Agile
    - Transparent
    - Timely
    - Fair
    - Efficient

95. The new process has four stages which are set out in the diagram below: Internal Assessment, Case Examiner Consideration, Disciplinary Hearing and Appeal. Whilst the existing disciplinary process also has four key stages, the new framework makes clearer the transition between the internal assessment and preliminary decision-making (case examiner consideration) stages, provides for independent (from IPReg) decision makers at the preliminary investigation stage, and introduces broader powers for cases to be resolved earlier without the need for a full disciplinary hearing. We have also included a proposed change to the disciplinary panel appointment process which would widen the pool of legal professionals that we are able to appoint. This change is set out in more detail at paragraph 90.

96. The full disciplinary process is set out in the Core Regulatory Framework at Chapters 4 and 5 and is supported by the draft Standard Operating Procedure.

97. We are also consulting on new powers to apply for an interim order as part of the disciplinary process. An interim order, if obtained, will suspend, or limit the registration of an attorney or firm where evidence is obtained that demonstrates there is an immediate and a serious risk of harm to clients or their money. An interim order may be sought at any stage during the disciplinary process, either at the outset when a complaint is first referred to IPReg for investigation, or at any point during the investigation when evidence is received which suggests that such an order is necessary and is a proportionate response to the risks identified.

98. The decision as to whether an interim order should be imposed will be a matter for an Interim Orders Panel who would in most cases, convene remotely to consider any evidence or submissions submitted by IPReg and, where provided, the regulated individual.

99. For many larger regulators an Interim Orders Panel would consist of different members to the disciplinary panel. However, recruitment and training of such a panel is likely to be costly and resource intensive. Given the relatively low numbers of disciplinary cases handled by IPReg, and the low likelihood of us requiring an interim order, we consider a more proportionate approach would be to establish a single Tribunal, the "Disciplinary and Interim Orders Tribunal", from which panel members will be drawn to service both the Interim Orders Panels and the Disciplinary Panels, as required. IPReg will ensure that in cases where both an Interim Order Panel and Disciplinary Panel are utilised, the members of each panel are constituted differently.

100. Members of the Tribunal and panels would include both lay and professional members. Under our proposals, professional members must be regulated legal professionals but will not necessarily need to be a registered attorney. A wider pool such as this would offer significant benefits over our current system (in which professional members for disciplinary panels have to be either registered or former registered attorneys). We have found recruitment to be challenging due to the size of the professions, conflicts of interest and a broader reticence of attorneys to sit in

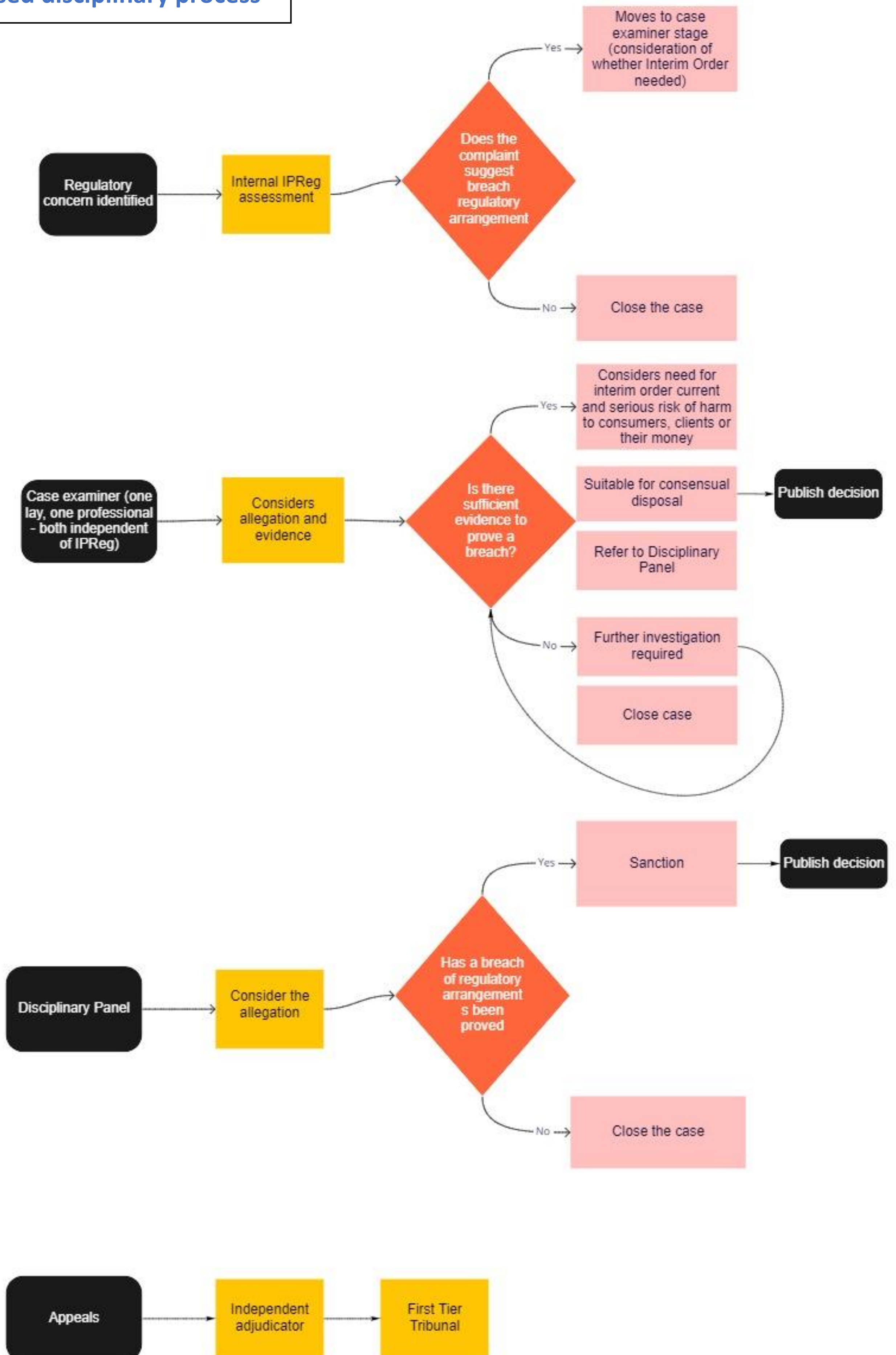
judgement on their peers. The proposed approach also allows us to potentially develop a pool of individuals with wider experience of sitting in different tribunals, for example for another regulator. Where the case deals with the competency of an attorney or otherwise requires technical knowledge in order to understand and adjudicate on the issues, a specialist technical adviser, either a currently or previously registered attorney, could be appointed to advise the panel on technical issues in the same way that a legal adviser is appointed to assist the panel with legal issues.

101. We are also interested in exploring the potential to pool lay members with other regulators.

102. All panellists would require training on both interim orders and disciplinary hearings. This training would need to be refreshed on a regular basis.

103. To support the new disciplinary process we will be issuing updated decision making guidance, indicative sanctions guidance and an updated publications policy.

Proposed disciplinary process



Risks to consumers

104. An effective disciplinary process is one of our core functions and essential to protection of the public. The proposed changes will enable us to continue to discharge this function in a more effective way.

Summary analysis of the Regulatory Objectives impacted (see draft Impact Assessment for our full assessment)

105. RO1 - Protecting and promoting the public interest by ensuring public confidence in our regulation through an efficient and effective disciplinary process.

106. RO4 – Protecting and promoting the interests of consumers by ensuring that regulatory issues are addressed swiftly and effectively.

107. RO6 – Encouraging an independent, strong, diverse and effective legal profession by allowing sufficient flexibility to respond to the needs of those subject to our disciplinary process.

Consultation question 12: What are your views on our proposal to introduce independent case examiners to our disciplinary process?

Consultation question 13: What are your views on our proposal to widen the range of consensual disposal options and therefore increase the option to dispose of a case at an early stage in order to reduce the cost and burden of regulation? Are there any sanctions which should be reserved to the disciplinary tribunal only?

Consultation question 14: What are you views on our proposal to widen the pool of professional panel members to include non-attorneys?

Consultation question 15: What are your views on our proposal to introduce new powers for interim orders?

Section four – Competition and innovation

108. In considering how our regulation affects new entrants and innovation, we have identified some specific issues that we wish to address through the Review. These include:

- current restrictions on legal and non-legal activities that are not IP ancillary services
- our PII requirements and the interaction with PAMIA's membership requirements, particularly where specific ownership models are ineligible for PAMIA membership

Multidisciplinary practices

109. IRPeg currently restricts the non-legal services of the firms which it regulates in the following ways[13]:

- the non-legal services offered by the firm/sole practitioner must be ancillary to the legal services; and
- no firm/sole practitioner may conduct certain types of legal service including a) criminal law; (b) family or matrimonial law; (c) conveyancing other than conveyancing of intellectual property rights; (d) real estate related legal services; (e) probate and the drafting of wills; (f) immigration law; (g) personal injury litigation, including medical negligence; and (h) administrative law, except in so far as it relates to intellectual property; or any related services.

110. For the avoidance of doubt, we are proposing to retain the existing prohibition on the types of legal services set out in the second bullet point above. These restrictions were intended to limit the types of services provided by the entity to those which IPReg had the expertise to regulate and also reflected the PII available at the time.

111. The first restriction creates a barrier to entry for an existing entity which provides other non-legal services which are not ancillary to its proposed legal services, although it is not a complete prohibition on other non-legal services.

112. IPReg proposes to remove the limitation on non-legal services, i.e., that they be limited to those ancillary to the legal services. This would enable those we regulate (or new entrants looking to be regulated by IPReg) to provide a wider range of services, including non-legal services. However, IP legal services would need to continue to be one of the main legal services provided.

[13] See Annex A of the IPReg Registered Bodies Regulations 2015.

Consultation question 16: We are interested in views on this proposal including the potential practical implications of an IPReg regulated businesses broadening its range of services. For instance, is this likely to present particular issues in respect of conflicts, confidentiality or PII?

Professional Indemnity Insurance

113. IPReg-regulated firms and individuals can only take out a PII policy with "participating insurers" that have agreed to provide cover that meets our minimum terms and conditions (MTCs). This is to ensure that there is a basic standard of consumer protection in place across all regulated firms and attorneys. We currently have in place two participating insurers – PAMIA Limited (who cover the majority of IPReg regulated attorneys and firms) and Allianz Global Corporate and Specialty SE. We are aware that in some cases attorneys may not be eligible for PAMIA insurance because they do not meet the criteria for PAMIA membership.

114. Through the Review, we have considered the issues around PII and the options for attracting more insurers so that there are more options available to those we regulate. We have reviewed the MTCs and sought expert advice. Our conclusion has been that the current market conditions for PII and the emergence of a "hardening" market make it very difficult to have an impact on the number or range of participating insurers.

115. Our preliminary analysis of PII models in other markets has led us to query whether a mutual with a large market share and a qualifying insurer regime with MTCs is a viable model in the IP market. The proposals for a regulatory sandbox that are set out below may help us to build up an evidence base that will test this theory.

116. In terms of our regulatory requirements we remain of the view that PII continues to be an important regulatory protection. As such as we have included a requirement in the draft Code of Conduct that where attorneys provide services to the public, PII must be in place that is commensurate with the risks presented by the business and which meets the MTCs. We have also retained the existing requirement to take out run-off cover in the event that an attorney ceases to practise (unless there is a successor practice).

117. The main change in relation to PII is that attorneys who exclusively act as consultants will no longer be required to have their own PII if they are not providing services directly to the public. They will however be subject to the requirement to have PII if they are providing services to the public, e.g. through the business to which they provide consultancy services. For example by inclusion of their name on the MTC PII policy held by their client firm if their ultimate client is a member of the public. The broader principle here is that PII is in place to protect the consumer and that it does not matter whether that insurance is held by the consultant themselves

or the firm with which they are contracting. The exact nature of the arrangement is likely to depend on the contractual arrangement in place and it will be up the attorney to satisfy themselves that coverage is provided.

118. We are also proposing to create a regulatory sandbox through which attorneys and firms could apply to IPReg for approval of alternative insurance arrangements which we would then monitor closely.

119. The regulatory sandbox concept has been used extensively in financial services and other regulated sectors. A sandbox provides a 'safe space' in which to test innovation amid enhanced scrutiny but without the usual regulatory penalties for technical breaches. They can also be a helpful way of gathering evidence, so in this case evidence of how the market might respond were the regulatory requirements for PII to be less stringent.

120. Our working assumption is that these arrangements would not replicate the MTCs – but would be focused on the specific risks posed. We would expect applicants to demonstrate to us how they had satisfied themselves that the PII arrangements were appropriate. Information to be provided to IPReg might include:

- Details of the policy and coverage
- An assessment of how this meets the risks posed, for instance a firm may decide not to hold client money to reduce their risk profile
- Evidence of advice obtained from a broker or PII expert

121. We would then use our own expert (whose costs will be charged to the applicant) to assess the information and determine whether any conditions of practice are needed.

122. We anticipate that the sandbox may appeal to those ineligible for PAMIA membership due to:

- Firm structure (including those with more than 50% non-attorney ownership)
- Services provided (i.e. they provide a broader range of non-legal services), and who are unable to get PII with a participating insurer
- Working for a firm that is not regulated for IPReg, e.g. attorneys working in private practice for non-UK regulated firms (perhaps because the head office is based overseas)

123. It is our understanding that those who have allowed their PII to lapse will be unlikely to get insurance anywhere else.

Consultation question 17: What are your views on the proposal to introduce a regulatory sandbox for PII?

Practising categories including sole traders

Background

124. The current practising categories or fee categories for individual attorneys are:

- Attorney solely undertaking corporate work
- Attorney in private practice
- Attorney not in active practice
- Sole trader attorney employing other attorneys or other professionals
- Sole trader not employing other attorneys or other professionals

125. These categories have been in place since 2010 and working practices have changed significantly during this time. We have also gained experience of regulating attorneys and firms, and as a result have a better understanding of the issues that arise. Further, we consider that some of the current fee categories simply do not make sense (e.g. "sole trader employing others" where the "others" are also registered attorneys or other legal professionals).

126. Responses to our Call for Evidence highlighted the need for simplicity and clarity of which requirements apply to different models of practice, for example PII.

Our proposed approach

127. Our aim in relation to changes to the practice categories is to maintain the integrity of the register whilst simplifying it and providing clarity as to how the regulatory requirements apply to each category.

128. We would like for the categories to align as closely as possible to the real world however we recognise that not all practice models will fit neatly. We also intend to future proof as much as possible.

129. The key distinction in our proposed model is whether you are providing services to the public or not as clearly the regulatory risks are very different in each scenario. We have then sought to differentiate within those categories, based on risk (see table below for the proposed categories).

130. Where an attorney has a portfolio practice that cuts across different risk groups (e.g. consultant to firms but also services the public directly), for fee calculation and PII purposes they will be placed in the highest risk group so will be required hold PII and pay a higher practice fee.

131. As there is no statutory definition of "the public" we have considered a number of options. The first option is to treat "the public" as anyone who can complain to the Legal Ombudsman[14]. That is:

[14] Who can complain is defined at Rule 2.1 of the Legal Ombudsman Scheme Rules, April 2019

a) an individual;

b) a business or enterprise that was a micro-enterprise (European Union definition);

c) a charity that has an annual income net of tax of less than £1 million;

d) a club/association/organisation, the affairs of which are managed by its members/a committee/a committee of its members, that had an annual income net of tax of less than £1 million; or

e) a trustee of a trust that has an asset value of less than £1 million.

132. We consider this has the advantage of being an established definition. However, it would mean that certain regulatory protections that we are proposing are only required if providing services to the public (such as PII) would not be in place for all clients – for example charities or businesses with an income over £1m.

133. The second option would be a broader definition, i.e. "the public" is anyone that is not your employer. This would have potential consumer protection benefits but is unlikely to be a proportionate solution. It may also present potential issues for consultants.

Table 2- Proposed categories

Attorneys providing services to the public	Fee risk rating 1	Attorneys providing services to the public without the infrastructure of a firm – sole traders and single attorney firms	MTC level PII required or Sandbox exemption
	Fee risk rating 2	Attorneys in private practice providing services through a registered entityand registered entities with more than 1 attorney director or manager or a licensed entity. Overseas attorneys providing services to UK clients/consumers of UK legal services[15] (whether or not through an IPReg registered firm)	MTC level PII required or Sandbox exemption

[15] This is deliberately wider than just UK clients - we have had complaints before from non-UK clients who engaged an attorney to advise on the UK part of a transaction/patent portfolio etc.

Attorneys not providing services to the public	Fee risk rating 3	In-house attorneys Attorneys not in active practice Attorneys providing consultancy services other than to the public Attorneys based overseas and providing services to non-UK clients or in relation to non-UK patent/TM services	No PII requirements

134. We have removed the category of "sole trader employing others" as we consider this is an artificial characterisation which is potentially confusing to consumers. This will mean that those currently within this category will become registered firms paying the cost-neutral associated fees.

135. We are also proposing that attorneys consulting to one or more third parties, and who are not providing services directly to the public, will no longer be required to have PII.

136. Attorneys based overseas are categorised based on whether they are providing services to the public and if so, the nature of the services they are providing (e.g. UK or non-UK patent and trademark services) and where the clients are located.

137. If we proceed with these changes there will be impacts on the fee categories and as such the amount we charge to be entered on and remain on the register. These changes will be modelled once the final categories have been decided and will be the subject of consultation as is the case with any of our fee changes. We do not anticipate that these changes would take effect until 2024 at the very earliest.

Risks to consumers

138. Categorising attorneys based on whether they are providing services to the public or not will ensure that regulatory requirements are targeted at the risks posed. Simpler and more meaningful categories will also make things clearer for consumers that choose to look at our register to help them find an attorney.

Summary analysis of the Regulatory Objectives impacted (see draft Impact Assessment for our full assessment)

139. RO1 - Protecting and promoting the public interest by ensuring the register has integrity.

140. RO4 – Protecting and promoting the interests of consumers by providing greater clarity as to the capacity in which an attorney is practising.

141. RO6 – Encouraging an independent, strong, diverse and effective legal profession by allowing sufficient flexibility as to how attorneys can practise.

142. RO5 – Promoting competition in the provision of services by removing the requirement to have PII for attorneys consulting to one or more third parties, and not providing services to the public,

Consultation question 18: What are your views on the proposed changes to the practising categories?

Consultation question 19: For regulated attorneys and firms, please can you tell us whether you provide services to the public and if so, what proportion are individual clients and which are business clients?

Section five – How to respond

143. We welcome responses to the consultation from individuals as well as firms and organisations. Please make clear who you are writing on behalf of and whether some or all of your response is confidential.

144. A full list of the consultation questions is provided below. You do not need to respond to all of the questions if only certain areas are of interest or relevant.

Please provide responses by 5pm on 17 March 2022 to: info@ipreg.org.uk.

Section six – next steps

145. Once the consultation has closed we will consider all the responses received. We expect the Board to make decisions on next steps in summer 2022.

146. All changes to our regulatory arrangements are subject to approval by the Legal Services Board. At this point we do not anticipate implementing any changes until Spring 2023 at the earliest. We will keep attorneys and firms updated via the website and our usual channels.

Section seven - Consultation questions

Consultation question 1: What are your views on our Impact Assessment and specifically the impact of our proposals in relation to equality, diversity and inclusion?

Consultation question 2: What are your views on the eight Principles we have set out?

Consultation question 3: What are your views on the Code of Conduct – does it capture the right requirements or is there anything missing?

Consultation question 4: We would be interested in your views on where guidance is required to support attorneys and firms with compliance? Are there any specific examples or particularly difficult issues?

Consultation question 5: What are your views on the proposed approach to the definition of client money and the requirements included within the Code? Do you think we have missed any benefits or risks in our analysis?

Consultation question 6: For regulated attorneys and firms, please tell us in confidence how much client money you hold and how that would change under the proposed definition?

Consultation question 7: What are your views on our proposals in relation to CPD?

Consultation question 8: For regulated attorneys and firms, what would be helpful in terms of guidance and resources for the proposed new CPD requirements?

Consultation question 9: What are your views on the principle that all attorneys should obtain basic litigation skills before the point of admission? How do you think this could work in practice?

Consultation question 10: Do you think that any changes are needed in respect of advanced litigation skills?

Consultation question 11: What are your views on how the proposed transparency requirements might work in practice for both regulated attorneys and consumers of IP legal services? Are there any particular elements of it that might be costly or difficult to implement?

Consultation question 12: What are your views on our proposal to introduce independent case examiners to our disciplinary process?

Consultation question 13: What are your views on our proposal to widen the range of consensual disposal options and therefore increase the option to dispose of a case at an early stage in order to reduce the cost and burden of regulation? Are there any sanctions which should be reserved to the disciplinary tribunal only?

Consultation question 14: What are you views on our proposal to widen the pool of professional panel members to include non-attorneys?

Consultation question 15: What are your views on our proposal to introduce new powers for interim orders?

Consultation question 16: We are interested in views on this proposal including the potential practical implications of an IPReg regulated businesses broadening its range of services. For instance, is this likely to present particular issues around conflicts, confidentiality or Professional Indemnity Insurance?

Consultation question 17: What are your views on the proposal to introduce a regulatory sandbox for PII?

Consultation question 18: What are your views on the proposed changes to the practising categories?

Consultation question 19: For regulated attorneys and firms, please can you tell us whether you provide services to the public and if so, what proportion are individual clients and which are business clients?

Annexes

- Annex A: Draft regulatory arrangements
- Annex B: Draft glossary
- Annex C: Example Standard Operating Procedure
- Annex D: Draft Impact Assessment