IPReg

IPReg – Application to alter regulatory arrangements

Responses to LSB questions arising from the LSB's assessment of the application against the refusal criteria under Schedule 4 of the Legal Services Act 2007.

IPReg has reviewed the questions sent by the LSB on Tuesday 3 January 2023 and provides its responses below. The response has had input from our external legal advisors, Kingsley Napley.

1. Waiver power

a) The SOP states that IPReg may direct firms to tell their clients when a waiver is in place. Please provide an explanation for why IPReg is not proposing for it to be compulsory for firms to notify clients of any regulatory waivers.

IPReg response

IPReg will take a proportionate and targeted approach to its consideration of waiver applications. As a matter of principle, we consider it is important for regulators not to fetter their discretion as to what they direct regulated persons to do.

From a practical and client focused perspective, not all issues concerning waivers are going to be relevant to clients. For example, we do not consider that clients would need to be informed of a waiver of CPD requirements concerning personal circumstances such as where an attorney is on a career break, long term sick leave or maternity/paternity/parental leave. Another example might be waivers relating to technical ownership changes in a regulated firm which may be commercially sensitive.

There will of course be circumstances where it is important for clients to be informed of the existence of waivers. A clear example of this is the proposed PII Sandbox. In our supporting guidance for the Sandbox we have made clear that applicants must provide details of the information they propose to give to their clients about the implications of being in the Sandbox. This is therefore an area where we might expect to direct firms to tell their clients a waiver is in place.

b) The application indicates a summary of waivers will be included in the annual report. The SOP for waivers confirms at Paragraph 10 that summaries of waiver applications and decisions will normally be published. Please confirm whether IPReg intends to publish summaries of applications and decisions other than in the annual report.

IPReg response

IPReg expects to receive relatively small numbers of waiver requests. Large numbers of waivers concerning particular issues would point to us not having something right in our

regulatory arrangements and would therefore require more detailed analysis of the issue. Given the anticipated small numbers, we consider that an annual summary in an already established document such as the annual report is a proportionate and targeted approach to transparency in addition to the safeguard that we will direct firms to disclose their waiver arrangements to clients where it is appropriate to do so.

In many cases, granting waiver applications has a positive impact on equality, diversity and inclusion. For example, attorneys who are on adoption or parental leave are able to apply for CPD waivers (i.e. we do not restrict applications to those on maternity leave) and all attorneys, regardless of their sex (gender) can apply. We therefore anticipate that the annual report will include aggregated information about waivers granted for CPD so that attorneys are informed about our general approach. We will also be including updates on waivers in the CEO report which is published as part of the Board papers.

IPReg will keep this approach under review and would consider creating a standalone page on our website if it becomes necessary.

c) What consideration has IPReg given to how compensation arrangements will work if a firm has been granted a waiver and the waiver results in detriment/loss for a client?

IPReg response

IPReg sought clarification from the LSB on this question. In response the LSB stated that the question should not have used the phrase "compensation arrangements" as the question related to what would happen in unforeseen circumstances resulting in detriment or loss.

In making waiver decisions, as when exercising all regulatory functions, IPReg must – so far as is reasonably practicable - act in a way that is compatible with the regulatory objectives set out in the Legal Services Act 2007. A decision which causes detriment to clients is unlikely to be compatible with our statutory duties.

IPReg would not grant a waiver if, on consideration of the application, we considered there was a significant risk of detriment to clients. This is reflected in our drafting at paragraph 11.1 of the Waivers SOP where we state that "*IPReg will take into account the following non-exhaustive factors as are relevant to the individual application: The impact on the regulatory objectives*". Protecting and promoting the interests of consumers is of course one of the regulatory objectives.

Should a waiver inadvertently lead to client dissatisfaction, a complaint could be made in the usual way. A complaint about the firm's use of the waiver would be treated as a complaint about the firm. A complaint about IPReg's decision to grant a waiver would be treated as a complaint about IPReg. If on review we felt that the waiver should not have been given or had led to unintended consequences, we would have the ability to

withdraw the waiver, having first made sure that there were appropriate arrangements in place to ensure continuing service to clients.

d) How will IPReg ensure that its Board has sufficient oversight over the use of waiver powers?

IPReg response

The CEO report which goes to each Board meeting will contain a summary of all waiver applications received and decisions made since the previous meeting. The CEO report is published in the Board papers on the IPReg website, so will be in the public domain. Applications which are particularly novel or complex are likely to be discussed with the Board before a decision is made whether to grant the waiver.

2. Sandbox

a) The application states that the sandbox is not intended to remain in place indefinitely. We understand that an assessment will be made in 2024 of how the sandbox is working and whether it is achieving its objectives. Is IPReg expecting that assessment to set a timeframe for any further review or closure date for the sandbox as appropriate?

IPReg response

We anticipate that the Sandbox will provide evidence about whether it would be appropriate for IPReg to consult on changes to its regulatory arrangements for PII. We therefore expect that the review in 2024 will consider that evidence and what it means for our policy on PII. If the review indicates that more time is needed to gather further evidence then it is likely that the Sandbox would be kept in place. If the evidence shows that a change in policy may be appropriate then it seems likely that the Sandbox would remain in place until those changes had been put into effect by consultation and the rule change process. Any decision to close the Sandbox without a change in policy would need to take into account the impact of doing so on firms and clients involved.

b) How will IPReg ensure that its Board has sufficient oversight over the use of the sandbox?

IPReg response

The Board will be kept informed by the regular CEO report which will provide information on all applications to the Sandbox. The CEO report is published in the Board papers on the IPReg website. We do not anticipate many applications, at least initially, and the Board will have full oversight of applications and be able to advise on the risk assessment process and decision-making.

The approach to the planned review of the Sandbox in 2024 will also be taken to the Board for consideration, input and approval ahead of publication.

3. Client money

a) Please set out IPReg's rationale for implementing a narrower definition of client money than is seen elsewhere in the sector.

IPReg response

In the IPReg Board's judgement, the new definition is not out of step with the sector and the wider move towards liberalisation. IPReg's proposal excludes fees and disbursements where terms are agreed. The SRA definition (for example) excludes fees and disbursements where a bill is issued. Our drafting reflects the commercial approach taken in the IP sector and the type of consumers using IP legal services – mainly business to business where evidence from the LSB's small business survey indicates a more confident consumer base. However, the effect for the client and the potential risks are likely to be the same, or similar, compared to the SRA's approach.

b) What consideration has IPReg given to risks associated with significant advance payments (which could include counsel's fees) where the terms have been agreed in advance not being considered to be client money?

IPReg response

The risks associated with advance payments where the terms have been agreed have been a key focus in our development of the definition of client money. As stated in our consultation, the response to consultation and impact assessment, the risks from fraud and failure to account are significantly lower than in other areas of the legal market such as probate and conveyancing. The business-to-business nature of IP legal services and commercial practice as to when money passes from client to attorney are also different.

The extract below from our response to consultation[1] (published July 2022) provides a summary of why risks are lower in the IP legal services sector:

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 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

[1] https://ipreg.org.uk/sites/default/files/RAR%20-%20Consultation%20with%20annexes.pdf

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.

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.

The change to a much clearer definition of client money should reduce the risk that client money is held in the wrong account and will provide consistent protection across the regulated IP sector. It will also reduce the administrative burden on firms which, in turn, should help to reduce costs and promote competition.

We have also included in the draft guidance provided as part of the application what is meant by "terms being agreed" and consideration of the potential risks to clients, emphasising the role of an attorney in assessing these risks. We have made clear in the guidance that where an attorney may be unsure as to the status of a sum of money, i.e. whether or not it is client money under our rules, then it should be treated as client money. This guidance will be made prominent on IPReg's website. We anticipate the new approach to client money to be a key focus of our communications activity both in advance and after the changes go-live.

c) Is it IPReg's expectation that withdrawals from a TPMA would only be possible with the permission of both the firm and the client? If so does IPReg expect to add some content to its draft guidance to provide additional clarity on this point?

IPReg response

IPReg considers the approach to withdrawals will depend on the TPMA rules and commercial agreements between clients and firms. There may be clients that do not want to sign off on every transaction, for instance large corporate clients with a vast IP portfolio that choose to delegate their renewals process to their attorney. Other clients may want to take a different approach and authorise each payment. Some clients may want a more tailored approach where some payments are authorised in advance and others require specific approval.

Our requirement that TPMAs must be regulated by the Financial Conduct Authority means that the mechanism for withdrawals is regulated. Our approach is focused on the importance of the client knowing what regulatory protections are afforded to them[2] along with the attorney's wider ethical duties such as the duty to act in the best

[2] Rule 4.2 in the Code of Conduct imposes a requirement to *ensure clients are aware of where their money is held - including where this is held on trust - the reasons for this and the regulatory protections afforded to them*

interests of each client, being honest and acting with integrity. To reinforce this, the proposed guidance on client money states:

If you choose to use a TPMA, you must make sure that your client is informed of, and made aware of, the contractual arrangements. This includes prior to engagement or if the TPMA is suggested during the course of your engagement, then at that point and as the work progresses.

d) The application explains that in the absence of a maximum amount of client money that can be held at any one time, the intention is to ask regulated persons to confirm whether they have held any client money during the preceding 12 months. How will IPReg monitor whether the amounts of client money held increase as a result of the removal of the maximum?

IPReg response

IPReg plans to seek information on the amounts of client money held, probably during the annual return process. This is a key part of updating our risk model. We plan to explore with stakeholders what is practical in terms of providing this information to us (e.g. average balance, maximum amount held, etc.). We will analyse this information in the context of the information we gathered during the consultation about the amount of client money held in order to assess the impact of the change.

4. CPD

a) What consideration has IPReg given to how its proposals take account of the LSB policy statement on ongoing competence?

IPReg response

Our proposals in the application were not intended to address all the requirements in the LSB policy statement. The review of regulatory arrangements predated the publication of the LSB policy statement in July 2022 and was driven largely by the information gathered in our own Call for Evidence. Our full assessment against the outcomes in the LSB policy statement was considered by our Board at its meeting on 12 January 2023 and we will respond fully on this matter in our progress update which the LSB has requested by 31 January 2023. However, the IPReg Board has been mindful of the LSB's work in this area throughout the review and has taken account of the LSB's emerging approach in making decisions on our approach to CPD. In summary we consider that the changes to continuing competence proposed in our application align well with the direction of travel in the LSB's policy statement. There are a few key areas we wish to highlight in this response in terms of the LSB's outcomes.

Outcome A: Set the standards of competence that authorised persons should meet at the point of authorisation and throughout their careers.

Competency at point of authorisation

IPReg has developed competency frameworks for patent attorneys and for trade mark attorneys. These set out the general and technical skill sets which provide a framework within which a trainee attorney is expected to work when undertaking IP legal services.

Competency throughout career

IPReg's new regulatory arrangements include a requirement that attorneys maintain continuing competence in accordance with IPReg's requirements and guidance. The requirements in the guidance document make it clear that we will require attorneys to assess, bearing in mind their existing skills and the nature of their practice, how they will maintain their competence. This means that they regularly: 1) reflect on their professional knowledge and skills and identify any development needs; 2) plan how these needs can be addressed through appropriate activities, training and other learning; and 3) record the assessments and evaluate the activities they have undertaken in light of those assessments.

Outcome B: Regularly determine the levels of competence within the profession(s) they regulate and identify areas where competence may need to be improved.

Our new regulatory arrangements require attorneys to confirm to us annually that they have met the requirements set out in relation to continuing competence and when requested, provide their records to us.

We have not set a number of hours because we were concerned that this drives a tick box attitude towards continuing competence with an unnecessarily constrained and narrow approach. The guidance provided in the application explains why continuing competence is important and that it should properly take account of the individual attorney's seniority, role and areas of practice. We have explained that ensuring continuing competence could therefore include training and development in areas such as professional ethics, dealing appropriately with clients and third parties and EDI issues. The guidance also gives some examples of the sorts of learning that may be undertaken to meet such training needs but emphasises that we are not prescriptive about this as this would potentially undermine the benefits of reflective practice.

In addition to the publication of the requirements and supporting guidance, we propose to develop a template which will assist attorneys in planning and recording their learning and development activities. Use of this template will not be mandatory and we

will emphasise that attorneys should record their CPD in whatever manner suits them best. This approach recognises that firms may well have in place their own training templates or online portals where CPD can be recorded and development needs reflected upon. We also plan to develop a new webpage which will explain how the requirements will be implemented and our approach to enforcement of them.

Outcome C: Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.

We will continue to check that attorneys are meeting our requirements by asking them to complete a self-declaration on renewal of their registration each year. We understand that some attorneys may take some time to adapt to the new approach and we will provide an appropriate level of support to them in the early period of its introduction. We will make it clear that, at least initially, this is not a matter for enforcement action, providing the attorney is doing their best to meet our new requirements. Effective communication and engagement with the professions is a key focus of this work to ensure the changes are well understood and become embedded.

Once the new arrangements have bedded in, we plan to conduct a random sample of training records to monitor compliance which we can then use to provide general feedback to all attorneys. Again, this will be a key communications opportunity for us to engage with attorneys.

We will also review the introduction of the new approach once it has been in place for a reasonable length of time to make sure that it is meeting its objective and in doing so will, we take into account the LSB's Statement of Policy on ongoing competence.

Outcome D: Take suitable remedial action when standards of competence are not met by individual authorised persons.

We have set out in our application the range of sanctions that can be imposed on individuals for breach of regulatory requirements including CPD. This includes the imposition of conditions on practising and it may be that this would be appropriate in particular cases where there is evidence that an individual's competence has raised sufficiently serious concerns.

The imposition of sanctions/remedial action must be done on a case by case basis based on the evidence in the particular case. Current draft guidance on sanctions refers to the need to consider aggravating and mitigating factors and the merits on a case by case basis.

b) Please can IPReg share further detail on how it will determine the efficacy of an individual's CPD, and what it will do if it considers the recorded CPD activity is not effective?

IPReg response

Any decisions as to the efficacy of an individual's CPD approach will be made with reference to both the guidance on Continuing Competence and our broad Decision Making guidance. Areas of good practice will also be shared with the wider regulated community.

In the first instance, our approach will be to work with attorneys to achieve an appropriate level of competence. Overall, we see this as a communications and training exercise rather than a disciplinary one. However, the sanctions are there should we need to use them in the circumstances of a particular case. We should add that since around 76% of attorneys work in private practice and a further 17% in industry, we would anticipate close liaison with their employer as part of our work in the case of an employed attorney.

5. Transparency

a) What consideration has IPReg given to how its proposed arrangements take account of the LSB policy statement on consumer empowerment? In particular, the expectations around information on quality and service?

IPReg response

In July 2022, the IPReg Board agreed the action plan for how IPReg will take into account the LSB's statement of policy on consumer empowerment. An update was provided to the IPReg Board on 12 January 2023.

Our approach includes a number of significant consumer benefits resulting from our review of regulatory arrangements. The new provision (Standard 1.1 in the Code of Conduct) imposes an obligation on firms and attorneys to provide the best available information to clients and prospective clients and to keep this information updated as the work progresses. We have explained in more detail in our guidance what this means in practice, making it clear that it is context and client specific.

In relation to financial benefits, the new provision (Standard 1.2 in the Code of Conduct) introduces significant improvements in transparency. The firm must provide an explanation of any financial benefits, including but not limited to any commission, foreign exchange uplifts, discount or rebate received as a result of their client's instructions.

In relation to any referral arrangements that are in place, the new provision (Standard 1.3 of the Code of Conduct) requires firms to provide information about these, including

any referral fees and fee sharing arrangements. In the supporting guidance, attorneys are reminded of their duty to act impartially in their client's best interests and to provide a proper standard of work. For instance, clients may choose to instruct a different overseas agent to that with which the firm has an existing relationship.

IPReg recognises the importance of consumers getting clear information on price and quality. We intend to issue new updated guidance on providing transparent information to clients which continues the current approach whereby we encourage firms proactively to publish information on their website to help prospective users make informed choices. The following extract is from paragraph 10 of that guidance:

> *Although we have not made it a mandatory requirement in our rules, we also encourage you to publish proactively such information on your website to help all potential clients understand the services you offer and their price. There are benefits for your business and consumers in providing more information and a significant number of our regulated firms already choose to do this. We know that consumers, including small businesses, often assume that legal services are expensive and unaffordable. This results in them deciding not to engage a lawyer to carry out necessary legal work. Being clear about the services that you can provide and their cost may encourage such prospective clients to approach your firm. Your website can also explain that your firm has the right experience and skills to help them with their specific legal problem. Research has also consistently found that the most important factor people consider when choosing a legal service provider is quality, closely followed by price. You may therefore wish to consider, to attract new or individual/ small consumers, using an online review service that can showcase the quality of your work.*

Our decision to introduce mandatory provision of information about what are often hidden charges (e.g. foreign exchange uplifts) and opaque practices (e.g. referral arrangements) results from us identifying these as the key issues of potential consumer detriment in the IP sector which justify regulatory intervention. In the IP sector generally, our evidence from analysis of the LSB's small business survey shows that 35% of respondents with an IP legal need had internal legal expertise, compared to 6% of the 2021 total survey. In addition, only 2% in the IP sector had low legal confidence compared to 20% in the survey total. That information, together with the evidence from our consultations about the likelihood of consumer detriment from hidden charges and opaque practices, informed the IPReg Board's judgement that the evidence we have does not currently indicate the need for regulatory intervention requiring compulsory provision of information about price and quality. We will keep this under review and will also review the emerging findings of the research currently being conducted by the SRA, CLC and CILEx Regulation into quality indicators when it is published in early 2023 to see if there are any relevant findings for the IP sector.

b) Please set out IPReg's rationale for limiting mandatory transparency information to the point of engagement (rather than requirements for websites etc).

IPReg's decision to limit mandatory transparency information to the point of engagement is a proportionate and targeted response to the evidence gathered through our review. This is a significant new requirement for attorneys which needs to be introduced in a proportionate way to facilitate compliance. Over time, we may consider requirements in relation to websites if the evidence suggests this is necessary. In the meantime, firms may identify a commercial advantage in voluntarily publishing this information on their websites.

c) How does IPReg plan to monitor and enforce its proposed transparency requirements?

IPReg intends to carry out a thematic review to assess how well the new requirements have been implemented. We intend to report on our findings in the final quarter of 2024/first quarter of 2025. From there we will work with attorneys to try to address any issues we identify. As set out above in relation to CPD, our new regulatory arrangements contain disciplinary and enforcement powers should we need to use them in the future.

6. Financial Penalties

a) Are the maximum levels for fines set out anywhere within the Core Regulatory Framework or SOP?

IPReg response

The current maximum level of financial penalties is set out in Rule 16(g) of IPReg's Disciplinary Procedure Rules 2015. We are not proposing any change to the maxima set out in those Rules.

Chapter 4 of our Core Regulatory Framework includes the power to impose a financial penalty where we state (in Chapter 4 at 3.4) "Taking account of any Sanctions Guidance prepared and published by *IPReg,* the *Disciplinary Panel* may order that no further action is taken, or do any one or more of the following: 3.4.4 impose a financial penalty." We have included the maximum levels for financial penalties in the Disciplinary Sanctions guidance. This is similar to the approach taken by other regulators, but primarily reflects our overall approach to drafting. On reflection, as a result of the LSB's query, we consider that it would be more transparent to amend the draft guidance to give greater prominence to the maximum levels by including them in the main body of the guidance (rather than in a footnote as now). We have discussed this approach with our external legal advisors Kingsley Napley and will consider revised drafting to reflect this. We welcome the LSB's view on whether the limits on financial penalties need to be included in the Core Regulatory Framework itself.

b) Please explain IPReg's rationale for the upper limits proposed for financial penalties.

IPReg response

The upper limits remain unchanged from IPReg's current regulatory arrangements and we are not seeking approval for any change to them as part of this application. The upper limit for financial penalties for licensed bodies is set by Statutory Instrument. We welcome the LSB's view on whether the limits on financial penalties need to be included in the Core Regulatory Framework itself.

If IPReg proposed in future to make changes to the upper limits to financial penalties not included in the Statutory Instrument, this would need to be the subject of consultation and the normal rule change process.

c) IPReg's draft sanctions guidance doesn't contain criteria for how the level of a financial penalty would be set. Please explain how the level of penalty would be set and what factors would be taken into account (for example, firm turnover or financial means of an individual).

IPReg response

As the Core Regulatory Framework states (at 3.4 of Chapter 4), when determining the level of financial penalty to be imposed, the decision maker will take into account what is set out in the Sanctions Guidance. This guidance provides details about the general principles and gives examples of the aggravating and mitigating factors which could be considered in the assessment of seriousness of the misconduct in order to determine an appropriate sanction.

Decisions on sanctions (including the amount of any financial penalty and the methodology for determining it) under the new regulatory arrangements will be made independently of IPReg, although the decision makers will take into account our guidance and relevant case law. It may be appropriate to take turnover and/or financial means into account, but IPReg cannot fetter the independent decision makers' discretion in terms of what are appropriate factors to consider in the particular circumstances of a case.

Decision makers will always need to provide written reasons for their decisions and Disciplinary Panels are supported by an independent legal advisor in doing so. The Core Regulatory Framework (at 3.3.5 of Chapter 4) supports this. If the level of penalty is considered inappropriate there is a right of appeal to an independent adjudicator with an onward right of appeal to the First Tier Tribunal.

7. Counter Inclusive Behaviour

a) The sanctions guidance seeks to reflect IPReg's commitment to tacking counter-inclusive behaviour through the disciplinary process. What are IPReg's considerations about how its proposed regulatory arrangements help tackle counter- inclusive behaviour. For example, within firms between employees where the behaviour is not in a public forum?

IPReg response

IPReg's new regulatory arrangements include for the first time eight Overarching Principles which set out the ethical behaviours that IPReg expects all regulated persons to uphold. This includes not only in their professional life but also their private life where it is relevant to their practice as a regulated person. IPReg considers the following Overarching Principles to be of particular relevance in relation to counter-inclusive behaviour:

- act in a way that upholds public confidence in the regulated profession (Overarching Principle 2)
- act with integrity (Overarching Principle 5)
- act in a way that encourages equality, diversity and inclusion in and by the profession (Overarching Principle 6)

This much clearer and stronger commitment to tackling counter-inclusive behaviour should provide a significant deterrent effect to inappropriate behaviour within firms and in private life. We also expect that our ongoing wider work on equality, diversity and inclusion will encourage firms that do not yet have their own policies in place to develop them for issues that may arise between individuals at work.

IPReg 13 January 2023