



LEGAL SERVICES
BOARD

Summary of decision

The purpose of this summary sheet is to provide a high-level summary of the Legal Services Board's ("the LSB") decision. Readers are recommended to read the formal decision notice below for further detail. **This summary is not and should not be taken as a formal part of the LSB's decision notice under the Legal Services Act 2007 ("the Act").**

The LSB's decision is to grant in full the application from the Intellectual Property Regulation Board ("IPReg"), to change its regulatory arrangements to introduce a requirement;

- any attorney or firm regulated by IPReg that closes without a successor in place that is regulated by a legal services regulator must apply for and, if offered terms, take out PII cover for at least 6 years
- that once run-off cover has been obtained, the information about the insurer must be shared with current and former clients and IPReg no later than a month after the policy has been taken out
- for attorneys and firms to provide information about their primary layer PII insurer (an insurer that is the first to deal with any insured loss) within 5 working days of receiving a request
- that information about a registered person's PII (including run-off cover) must be provided to IPReg within a timescale specified by IPReg.

The LSB has assessed IPReg's application and approved it.

Decision notice

The Intellectual Property Regulation Board’s application for approval of changes to arrangements to make an explicit requirement for Professional Indemnity Insurance (“PII”) run-off cover when a firm closes without a successor taking possession of its liabilities.

The Legal Services Board (“**LSB**”) has granted an application from the Intellectual Property Regulation Board (“**IPReg**”) for approval of changes to its regulatory arrangements to make an explicit requirement for PII run-off cover to be taken out by firms when they cease to operate. The requirement is conditional upon the firm being offered PII run-off cover and will only apply in circumstances where there is no successor practice regulated under the Legal Services Act (the “**Act**”) that can assume the firm’s PII liabilities.

1. The LSB is required by Part 3 of Schedule 4 to the Act to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements.
2. This application has been made by IPReg. The Chartered Institute of Patent Attorneys (CIPA) and the Chartered Institute of Trade Mark Attorneys (CITMA) are the joint approved regulators for Patent and Trade Mark Attorneys and have delegated their regulatory functions to IPReg.
3. This notice sets out the decision taken, including a description of the changes. The notes at page 8 of this notice explain the statutory basis for the decision.
4. The chronology for the LSB’s handling of this application is also set out below.

Chronology

- The LSB confirmed receipt of an application from IPReg on 4 December 2019.
- The 28-day initial decision period for considering the application ended on 31 December 2019.
- On 18 December 2019 an extension notice¹ was issued that extended the decision period to 2 March 2020.
- This decision notice is effective from 2 March 2020.
- The decision notice will be published on the LSB’s website by 4 March 2020.

Background

5. On 4 December 2019, IPReg submitted an application to the LSB for the approval of changes to its regulatory arrangements to introduce a new rule concerning the

¹ <https://www.legalservicesboard.org.uk/extension-notice-ipreg>

provision of PII run-off cover when a firm ceases to operate, and where there is no successor practice regulated under the Act, that has assumed all its PII liabilities.

6. IPReg also applied for approval of new regulatory arrangements concerning the information that attorneys are to supply to IPReg and consumers concerning their PII arrangements.
7. In accordance with section 21(1)(g) of the Legal Services Act 2007 (“LSA”), the indemnification arrangements of an approved regulator form part of the approved regulator’s regulatory arrangements.
8. Section 275A(2)(j) of the Copyright, Designs and Patents Act 1988 (“CDP Act”), also allows for the regulation of patent attorneys to include provision as to the indemnification of registered or regulated persons against losses arising from claims in respect of civil liability incurred by them.²
9. Section 83A(2)(j) of the Trade Marks Act 1994 (“TM Act”) makes the same provision with respect to trade mark attorneys.³

Summary of proposed changes

Run-off cover

10. All attorneys that are regulated by IPReg are required to take out and maintain PII while they are operating. IPReg’s Minimum Terms and Conditions (MTCs) for PII set out the scope of PII for a minimum level of cover to be in place to protect consumers. In addition, IPReg’s Rules of Conduct require attorneys to have PII in place that corresponds to the risks that reflect the size and the activity of the practice.⁴
11. Run-off cover extends the consumer protection that PII provides, as it covers claims that arise after an attorney has ceased to operate. Attorneys therefore purchase run-off cover from an insurer when they have made the decision to exit the market. If a claim arises once an attorney has exited the market and the attorney does not have a run-off cover policy, no insurance is in place if a former consumer makes a claim. Instead the former consumer must pursue the matter through the courts, or where an attorney is deceased, they must make a claim against the attorney’s estate.

IPReg’s proposal for run-off cover to become compulsory for those offered terms

12. The requirement to take out run-off cover is currently not explicitly set out within IPReg’s Rules of Conduct although IPReg has stated that, in practice, most attorneys and firms do take out this type of insurance. IPReg’s proposal is for attorneys to be

² Copyright, Designs and Patents Act 1988, 275A: Regulation of patent attorneys, <http://www.legislation.gov.uk/ukpga/1988/48/section/275A>

³ Trade Marks Act 1994, 83A: Regulation of trade mark attorneys, <http://www.legislation.gov.uk/ukpga/1994/26/section/83A>

⁴ IPReg’s Rules of Conduct, Rule 17 and Rule 4.

required to take out and maintain run-off cover with a participating insurer for a minimum period of 6 years, where such cover is offered by an insurer.

13. As soon as run-off cover is in place, IPReg further proposes that current and former consumers of the attorney or firm should be informed about the insurer and their contact details no later than one month after the run-off cover policy has been taken out

IPReg's proposal for new requirements on the provision of information to consumers

14. IPReg also proposes to amend its Rules of Conduct so that attorneys and firms are required to provide IPReg with PII information within a timeframe specified by IPReg.
15. Finally, it seeks approval of a new requirement for attorneys to provide information to consumers about the identity of their primary layer PII insurer (the insurer that is first required to deal with any insured loss) within 5 working days of receiving a request.

Key issues considered in the assessment

Why the run-off cover is to be compulsory only if it is offered

16. The proposed rule sets out that run-off cover must be applied for and, if it is offered, it must be taken out and maintained for at least 6 years. The LSB was concerned that such an arrangement would leave a gap in consumer protection in the event that attorneys or firms were not offered run-off cover.
17. IPReg consulted on its proposal for run-off cover to become compulsory and, among its responses, it received only one from an insurer, PAMIA. PAMIA is a mutual insurer and its website indicates that it insures around 95% of the PII market for patent and trademark attorneys within the UK and Ireland⁵. Overall the number of insurers that offer PII and run-off cover within the patent and trademark attorney market is extremely small.
18. IPReg informed the LSB that, in practice, PAMIA is generally able to offer run-off cover to attorneys and firms already insured by it for PII. However, there are circumstances, e.g. where an attorney or firm has allowed the PII cover to lapse, when PAMIA may not be able to make an accurate assessment of risk in order to offer insurance. IPReg explained that if PAMIA perceives that a risk is acceptable, it could still offer insurance but, for commercial reasons, it must be able to exercise its own discretion as to whether or not it is prepared to do so.
19. PAMIA also indicated to IPReg that if it had to provide compulsory run off cover it would have to increase PII premia across all of its regulated attorneys and firms to account for the additional exposure the insurer would face by insuring high risk attorneys and/or firms.

⁵ www.pamia.co.uk

20. IPReg stated that only a very small number of attorneys or firms may not be offered run-off cover and in its view, it would not be proportionate to take an approach that increases premia for a large portion of the market. The LSB further notes IPReg's view that an increase in insurance premia may have a detrimental effect on sole traders and small firms.

Why run off cover is not required within the minimum terms and conditions (MTCs)

21. IPReg confirmed that it cannot include run-off cover within the MTCs if insurers require an ongoing discretion as to whether they wish to offer the cover or not (see paragraph 20 above). IPReg understands that if it did propose to include compulsory run-off cover in its MTCs, there is a significant risk that the relatively small number of participating PII and run-off cover insurers for patent and trademark attorneys could decide to withdraw from the market.
22. To determine whether it is proportionate for run-off cover to be made compulsory at the point of offer only, and for the requirement to be excluded from IPReg's MTCs, the LSB sought further information on what alternative measures IPReg intended to take to address the gap in consumer protection identified in paragraph 16 above.
23. IPReg identified the following alternative measures:
- a. IPReg works closely with firms that are preparing to leave the market. When run-off cover cannot be obtained, IPReg works with the firm to seek to transfer its former consumers to another firm.
 - b. IPReg has also developed a new CRM system which includes a verification process, whereby attorneys will be required to provide information about their up-to-date PII policies as a compulsory field within their electronic annual returns to IPReg. Attorneys will not be able to practice unless they complete their annual returns in full.
 - c. The CRM system accordingly enables IPReg to identify attorneys or firms that do not renew their PII (thereby giving rise to a risk of being unable to obtain run-off cover at a later date). IPReg further emphasised that allowing PII to lapse without a replacement policy would also cause the practitioner to breach IPReg's regulatory arrangements, which would provide a clear path for IPReg to take enforcement action against the practitioner. IPReg would work with practitioners on a case-by-case basis to ascertain the cause of the failure to renew PII and reach a sensible solution to protect consumers. The increased proactivity at the point of PII lapse would greatly reduce the likelihood of run-off cover being unavailable in the future.
 - d. IPReg may refuse to remove attorneys from its register if it considers that the removal poses a potential risk to consumers, their client money or to any

investigative process⁶. This means that IPReg is able to ensure attorneys cannot simply remove themselves from the register to avoid regulatory action.

- e. IPReg also states that it maintains an insurance policy under which discretionary grants of up to £25k may be made to compensate for losses or hardship suffered by consumers, however the terms of this scheme are more limited than a run-off cover policy.

- 24. In addition to the considerations for alternative measures above, the LSB notes that IPReg's CRM system is able to collect diversity data which will enable IPReg to track the characteristics of individuals entering and exiting the market. Through this, IPReg will be able to monitor the equality impact of its policies.
- 25. We note there are just four participating insurers in the market and the fact that one of the insurers inhabits a dominant position. We strongly recommend IPReg facilitate or commission work to understand the nature and scale of the risks associated with having such a small number of providers and one dominant provider in the PII market for its regulated attorneys and firms.
- 26. While we support the overall direction of the changes, they risk the introduction of a "reward for non-compliance", in that it is likely that the main reason for a firm not being offered terms for run-off cover under the new arrangements will be its having previously allowed cover to lapse in contravention of IPReg's rules. During the LSB's consideration of its application IPReg has confirmed that it will monitor and review information it receives through the voluntary removal process. It has further confirmed that use of its new CRM system will ensure relevant data is captured that will allow it to report on all requests for voluntary removal. IPReg has also stated that it will be able to identify non-compliance through this process. If disciplinary action is taken it will also be reported to the IPReg board. Whilst IPReg has never had cause to make use of its compensation insurance policy it would be able to record and report if a claim were made.
- 27. Additionally, IPReg has confirmed that it will share data with the LSB and will review these changes and their impact in its full review of regulatory arrangements set out in its business plan. The review is expected to be completed in 2021.
- 28. In summary, the LSB considers that IPReg's proposals facilitate a partial closure of a pre-existing gap in consumer protection by making run-off cover compulsory for attorneys and firms at the point it is offered. The LSB expects IPReg to carefully monitor the ongoing consumer protection risks and equality impact associated with the proposed changes, and, if necessary, take prompt action to make further protective regulatory arrangements.
- 29. We will expect IPReg to report on the following data during the first year of implementation through the regulatory performance framework:

⁶ On 3 December 2018, the LSB approved a rule change that gave IPReg the power to refuse to remove an attorney from the register if it considers that the removal poses a potential risk to clients, to the protection of client money or to any investigative process.

- the extent of non-compliance with PII arrangements
- any interventions made by IPReg to secure compliance and the outcome of such interventions
- any use of the compensation insurance policy and any identified consumer impact (such as a financial loss due to the absence of run off cover).

Decision

30. The LSB has considered IPReg's application against the grounds for refusal in paragraph 25(3) of Schedule 4 to the Act and considers that no such grounds are triggered by this application. It accordingly grants the application in full.

31. **Annex A** to this decision notice contains the amended section of IPReg's Handbook that is approved by the LSB.

Matthew Hill, Chief Executive. Acting under delegated authority granted by the Board of the Legal Services Board

Notes:

1. The LSB is required by Part 3 of Schedule 4 to the Act to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements.
2. Paragraph 25(3) of Schedule 4 to the Act explains that the LSB may refuse an application setting out a proposed change to the regulatory arrangements only if it is satisfied that:
 - (a) granting the application would be prejudicial to the regulatory objectives
 - (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator
 - (c) granting the application would be contrary to the public interest
 - (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator
 - (e) the alteration would enable the approved regulator to license persons under Part 5 [of the Act] to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or
 - (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.
3. The designation requirements referred to in paragraph 2(b) above are set out in paragraph 25(4) of Schedule 4 to the Act and are:
 - (a) a requirement that the approved regulator has appropriate internal governance arrangements in place
 - (b) a requirement that the applicant is competent, and has sufficient resources to perform the role of approved regulator in relation to the reserved legal activities in respect of which it is designated, and
 - (c) the requirements set out in paragraphs 13(2)(c) to (e) of Schedule 4, namely that the regulatory arrangements are appropriate, comply with the requirements in respect of resolution of regulatory conflict (imposed by sections 52 and 54 of the Act) and comply with the requirements in relation to the handling of complaints (imposed by sections 112 and 145 of the Act).
4. In accordance with paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules⁷ about the manner and form in which applications to alter regulatory arrangements must be made. Amongst other things, the rules highlight the applicant's obligations under section 28 of the Act to have regard to the Better Regulation Principles. They also require applicants to provide information about each proposed change and details of the consultation undertaken.
5. If the LSB is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.

⁷ LSB's Rules for applications to alter regulatory arrangements – Version 2 April 2018
[https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/New%20folder%20\(2\)/FINAL_Rules_for_applications_to_alter_regulatory_arrangements.pdf](https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/New%20folder%20(2)/FINAL_Rules_for_applications_to_alter_regulatory_arrangements.pdf)

Annex A – Proposed changes to Rules of Conduct

Rule 17 – Professional Indemnity

Without prejudice to any obligation contained in the Special Rules of Professional Conduct applicable to Litigation Practitioners, each registered person must ensure that its Professional Indemnity Insurance (PII) is commensurate with the risks at large arising from the extent and size of their practice, with due regard to Rule 4 (Competence).

In relation to that PII, each registered person in private practice (including, for the avoidance of doubt, sole traders) must take out and maintain a policy with a participating insurer.

Each registered person in private practice (including, for the avoidance of doubt, sole traders) must apply for and, if offered terms, take out and maintain for at least 6 years, a PII run-off policy with a participating insurer in the event that their practice closes without all its liabilities concerning PII being acquired by another provider regulated by a legal services regulator.

When a registered person has taken out a PII run-off policy, information about the insurer (including their contact details) must be provided in writing to current and former clients as soon as possible and no later than one month after the policy has been taken out.

Information about the identity of an attorney or firm's primary layer PII (including any run-off cover) must be provided within 5 working days of a request from a prospective, current or former client. Any limitation of liability for negligence must be clearly drawn to the attention of a client and be understood and accepted by him.

Information about a registered person's PII (including run-off cover) must be provided to IPReg within 5 working days of request.

Every registered person in private practice must ensure that all monies held by them for or on behalf of their clients and other persons are at all times protected by compensation arrangements to compensate for losses or hardship suffered by such persons in consequence of fraud or dishonesty or fraudulent or dishonest failure to account.