Response to LSB consultation on IGRs

We welcome the opportunity to respond to the LSB's consultation on the Internal Governance Rules ("**IGRs**").

Introduction

IPReg's structure and relationship to the AARs

1. IPReg Limited ("**IPReg**") is a company limited by guarantee; it was set up by CIPA and CITMA (the two statutory AARs) to give effect to the IGRs. The relationship between IPReg and the statutory AARs is set out in a Delegation Agreement that was originally signed in 2009; the current version dates from May 2012. The Delegation Agreement established the Trade Mark Regulation Board ("**TRB**") and the Patent Attorney Regulation Board ("**PRB**"). The TRB has 3 members who are registered trade mark attorneys, three lay members and a lay Chair (currently acting). The PRB has 3 members who are registered patent attorneys and the same three lay members and lay Chair (currently acting) as the TRB. Each Board therefore has a lay majority, but overall IPReg Limited has more professional members than lay members.

2. The Delegation Agreement sets out, amongst other things:

    - The regulatory functions of the PRB and the TRB;
    - The regulatory obligations of CITMA and CIPA;
    - Procedures of the PRB and TRB;
    - Constitution of the TRB and PRB.

3. The current Delegation Agreement has not been amended since it was signed in 2012 and needs to be reviewed to ensure that it reflects best regulatory practice and the changes that have subsequently been made to the IGRs.

IPReg's experience of the IGRs

4. There are several factors that IPReg has found helpful in being able to operate relatively independently of the AARs in the current regulatory framework (albeit that these are not necessarily required by the current IGRs). These are:

    - We have found that being a limited company provides a significant degree of autonomy from the AARs;
    - Since 2014 we have collected all the PCF ourselves; none of it is payable to the AARs for permitted purposes.[1] This removes any opportunity for disagreement about what proportion of the PCF should go to the AAR;

[1] These are defined in the Legal Services Act ("**LSA**") section 51(4)

- We have very few shared services. We manage all our own finances (e.g. payroll, audit, bank accounts), draw up our own terms and conditions for staff, negotiate our own contracts with suppliers, and have our own IT system. Although we are a sub-tenant of CITMA, our offices are separate.

5. On the other hand, we have experienced similar issues to those identified by the LSB in the way the IGRs operate in practice. These are:

    - That problematic issues most frequently concern the lack of clarity about what the residual roles of the AARs are and what information they can legitimately request from IPReg;

    - How that residual role and information requirements fit with the LSB's oversight role and its regulatory performance framework;

    - Whether the AARs have sufficient regulatory capacity/experience to fulfil their residual role. This issue is compounded by the regular change of leadership within the AAR. This can, in turn, exacerbate any personality-driven differences of opinion about the appropriate approach to regulatory matters.

Summary

6. In addition to the above, the main points that we have made in this response are:

    - New and clearer, outcomes focused IGRs are needed. The obligation in the LSA[2] is a strict one – the IGRs must set out requirements *to be met* […] for the purpose of *ensuring* […] (emphasis added). We do not consider that amending the existing IGRs will deliver the improvements that are needed;

    - Rather than try to draft what will inevitably be very complex IGRs, the LSB should keep the new IGRs at as high a level and as outcomes focused as possible and supplement them with a Statement of Policy.[3] The Statement of Policy would explain the LSB's approach to ensuring that the requirements for regulatory independence are met. It could also set out the LSB's expectations on specific matters and give examples of best practice across a range of issues concerning regulatory independence. The LSB would have to have regard to its Statement of Policy in deciding whether to exercise its functions in relation to regulatory independence;[4]

    - We recognise that drafting a Statement of Policy is not an easy task, but consider that this approach would have the advantage of clarifying the LSB's approach and how it would consider certain specific issues. So, for example:

        - The IGRs would require a lay Chair and a lay majority (this is relatively easy to draft) and the Statement of Policy would expand on the approach that the LSB would expect AARs and front-line regulators to take in the recruitment process for those positions (this may be easier to draft than trying to put it into IGRs);

[2] LSA section 30(1)
[3] Made under LSA section 49(2)
[4] LSA section 49(8))

- The IGRs would specify the minimum amount of information that a front-line regulator must publish; the Statement of Policy could give examples of what further information the LSB would consider it best practice to provide.

- Going forward, duplication of oversight (by the LSB and an AAR) must be avoided as this introduces costs for all parties. However, it is important to recognise that the governance arrangements that should ensure regulatory independence work three ways: LSB to the front-line regulators; LSB to the AARs; AAR(s) to the front-line regulator. Clarity on the responsibilities of all three parties is therefore required;

- There should be a requirement that AARs designate named staff/Board members with the residual oversight responsibilities set out in the (new) IGRs. This would help to provide greater transparency about whether the AAR is acting in its representative or residual oversight capacity. It could also help to provide continuity over time within the AAR about its position on regulatory matters.

Question 1: We welcome evidence on (i) the general nature, frequency and impact of disagreements on regulatory independence matters, and (ii) how the IGR are used and their effectiveness in moderating such disagreements.

7. In our experience, the most frequent disagreements concern the AARs' residual oversight role, the extent to which it can (or cannot) take action when it considers that the front-line regulator is acting in a way that is inconsistent with the regulatory objectives (or some other concern) and what action it can actually take.

8. Unlike the LSB, the AARs do not have a clear statutory framework within which they can take action against the front-line regulator. This puts them in a difficult position. For example, if an AAR considers that certain actions of its front-line regulator are likely to have an adverse impact on one or more of the regulatory objectives, there are no clear tests or parameters for deciding whether an AAR's residual oversight role has been triggered and it should "do something". However, unless it does "do something", it runs the risk of an investigation and potential enforcement action by the LSB.

9. We have not found the IGRs to be particularly useful in moderating any disagreements that have occurred. Our experience is that once an issue is at the point where each side is reaching for its copy of the IGRs, they are bound to have a different interpretation of what they mean. This then results in one or other or both parties contacting the LSB.

Question 2: What are the benefits and costs to stakeholders of operating under the existing IGR framework?

10. The benefits are that there is a framework in place which has operated successfully in some respects (such as the requirement for open recruitment and for lay majorities and lay Chairs).

11. In addition, as set out above, there are several factors that IPReg has found helpful in being able to operate relatively independently of the AARs in the current regulatory framework (albeit that these are not necessarily required by the current IGRs). These are:

    - We have found that being a limited company provides a significant degree of autonomy from the AARs;

- Since 2014 we have collected all the PCF ourselves; none of it is payable to the AARs for permitted purposes.[5] This removes any opportunity for disagreement about what proportion of PCF should go to the AAR;

- We have very few shared services and consider that this supports our independence. We manage all our own finances (e.g. payroll, audit, bank accounts), draw up our own terms and conditions for staff, negotiate our own contracts with suppliers, and have our own IT system. Although we are a sub-tenant of CITMA, our offices are completely separate.

12. We have not undertaken an exercise to quantify the actual cost of operating under the existing framework but our experience is that when things go wrong, it takes an enormous amount (often weeks or months) of senior management and Board time to resolve. This has an obvious day to day cost, but also the knock-on cost of other core regulatory activities being delayed.

Question 3: Do you agree with option 1: no change to the IGR? Why or why not?

13. We consider that the IGRs need to be changed. We do not consider the proposal that the LSB should be more "high profile" (e.g. acting as mediator, increasing frequency of assurance, or reminders as to its role) will resolve what we see as the core difficulty of the current provisions – the lack of clarity about an AAR's residual role. We are particularly opposed to the suggestion that the LSB should introduce a levy to enable it to provide additional resources for these activities.

    Please also see our answer to Question 22 on regulatory performance assessments.

Question 4: What information do AARs need to receive from their regulatory body, and why? To what extent can these needs be met through transparency (and vice versa), thereby removing the need for further engagement?

14. Given the extensive nature of the LSB's performance assessment framework and the emphasis in it of the need for good governance within the front-line regulator, we do not consider that an AAR needs very much more additional information.

15. The only additional information that *might* need to be provided is: reports about progress on specific activities such as the annual PCF collection process (to give assurance that regulatory activities can be financed); quarterly financial reports; and, possibly, the auditor's report (in order to give assurance about financial propriety). These could be provided for the most part by the front-line regulator publishing the information. However, it is important to bear in mind that the information should be provided in a format that the front-line regulator's Board (and its accountants/auditors) considers sufficient to ensure that the organisation runs effectively; additional costs must not be incurred in amending the format or content to suit the preference of the AAR.

16. However, the fundamental question as to what information the AAR needs cannot be resolved until there is clarity about its oversight role and how that fits with the LSB's oversight role.

[5] These are defined in LSA section 51

Question 5: Do you want more intervention by the LSB in disputes between AARs and regulatory bodies? If so, what form should this intervention take?

17. The current IGRs do not currently deliver the clarity that either the front-line regulator or the AAR needs. Increased LSB activity around unchanged IGRs therefore seems to be unlikely to be able to provide that clarity. This is particularly the case given the very different structures that are currently in place in the different regulators. In addition, experience has shown that the LSB's investigations take a considerable time to conduct and are likely to be costly for all parties. Investigations are also, of necessity, regulator and situation-specific and so drawing generic lessons learned from them may not always be possible. However, going forward under new IGRs, it would be better for AARs to report concerns to the LSB and to have the LSB exercise its oversight role in considering them.

Question 6: Do you agree with option 2a: making incremental changes to the IGR? Why or why not?

18. No – for broadly the same reasons as above – we consider that the LSB needs to start again in the light of all the experience of applying the current and previous IGRs.

19. We do agree that the current tabular format of the IGRs is unhelpful. We also agree that the four principles relating to governance, appointments, strategy and resources are likely to be appropriate for any new IGRs.

Question 7: What incremental changes should the LSB prioritise, and why?

20. We do not consider that incremental changes are appropriate. It is likely that trying to draft them will introduce more complexity – with the very real risk that further disagreements on interpretation will follow.

Question 8: What do you anticipate the impact of your proposed change(s) would be, and why?

21. Not applicable.

Question 9: Do you agree with option 2b: making more extensive changes to the IGR? Why or why not?

22. No – for broadly the same reasons that incremental changes will not work. In addition, the more rules there are (whether in a Schedule or elsewhere), the more potential there is for disagreement about what they mean in practice.

Question 10: What new obligations would you recommend the LSB prioritises, and why? Question 11: What do you anticipate the impact of those proposed new obligations would be, and why?

23. See table below**.**

Q10	**Q11**
A requirement for the AAR to designate named staff/Board members with the residual oversight responsibilities set out in the (new) IGRs.	Help to provide greater transparency about whether the AAR is acting in its representative or residual oversight capacity. Provide continuity over time within the AAR about regulatory matters.
Complete separation of the PCF needed for the front-line regulator (which must be collected by the front-line regulator) and money that the AAR needs to fund its activities (which must be collected by the AAR).	Provide greater transparency (and therefore accountability) about the cost of regulation and the cost of representation.
Front-line regulators must be able to decide for themselves how they contract for the various services they need, including whether to tender for goods and services. (We think it is likely that the suggestion (in paragraph 62 of the LSB's consultation) that the AAR would have to give "reasonable consideration" to a request to commission services that are currently shared is, in practice, likely to lead to disagreements about what "reasonable consideration" means.	Enable those front-line regulators that are currently obliged to share services with an AAR to assess whether they are receiving good value for money.
Removing any direct involvement by the AAR in recruitment to the regulatory Board and Chair.	Provide confidence that representative bodies are not prejudicing the way in which regulatory Boards are appointed and function.
Increasing lay majorities on Boards.	To provide an increased lay perspective and help to avoid problems with meetings being inquorate.
Explicit recognition that AARs cannot attend non-public parts of Board meetings unless invited.	Underline the important principle that regulatory Boards must operate independently.
Requirements for front-line regulators to publish Board papers and minutes (suitably redacted, perhaps following Freedom of Information Act ("**FoIA**") requirements even if the regulator is not subject to the FoIA).	Provide transparency and consistency about the way in which regulatory Boards operate and an opportunity to identify and learn from best practice.

Question 12: Do you agree that the definition of AAR should be revised? Why or why not? If so, how do you think the definition should be revised, and why?

24. We do not consider that the current definition causes any issues for IPReg. However, the suggestion that there might be "tailored agreements" between the LSB and each AAR seems inappropriate given

that the LSB is the AAR's regulator. The discussion in paragraphs 64 - 69 of the LSB's consultation document indicates the degree of complexity (and drafting difficulty) that could arise if the LSB decides to revise the AAR/AR definition.

25. A preferable (and outcomes focused) approach would be for the LSB to adopt our suggestion of having high level and clear rules in new IGRs which are supplemented by a Statement of Policy on its approach to regulatory independence. This would allow it to set out/clarify the different approach/expectations it might have to, say, bodies like the ICAEW and ACCA compared to, say, The Bar Council and The Law Society.

Question 13: What do you anticipate the impact of revising the AAR definition would be, and why?

26. There is a risk of introducing more complexity and such a change may not be targeted at the root cause of the current and historic problems.

Question 14: Do you agree that the definition of regulatory independence should be revised? Why or why not? If so, how do you think the definition should be revised, and why?

27. It might be simpler to revert to the requirements in LSA section 30(1) and to structure the IGRs around the two limbs of that. We note that the purpose of the IGRs is to *ensure* that the objectives set out in LSA section 30(1)(a) and (b) are achieved; it is therefore questionable whether any further definitions are necessary.

28. In that context, it would be helpful for the LSB to set out (e.g. in a Statement of Policy) what actions it might regard as "reasonably practicable".[6] For example, with the benefit of experience, there might be some structures that have been put in place in order to comply with the IGRs that could be regarded as overly complex (especially if they are not particularly effective in achieving the required policy outcome). On the other hand, although our (relatively straightforward) Delegation Agreement needs to be revised, it has worked quite well over the past 6 years in terms of enabling IPReg to regulate independently without undue influence from either AAR (but note that there have, nevertheless, been very strong disagreements over some issues).

Question 15: Do you agree with option 2c: a new 'gateways' approach to the IGR? Why, or why not?

29. We agree that this option has the potential to give greater clarity on the residual role of an AAR. However, there is a significant risk that so much complexity will be built into the new "gateways" that they will result in the same type of disagreements as now about what they mean in practice.

Question 16: What gateways (i.e. permissible channels for information and assurance to flow between regulatory bodies and their AARs in the normal course of events) do you think would be needed, and why?

30. The over-riding principle in terms of information provision must be that responsibility for monitoring and oversight of the front-line regulator's performance of its regulatory functions (including whether the required standards of governance are met) rests with the LSB.

[6] LSA section 30(1)(b)

31. There may be some information that the AAR legitimately needs over and above that provided to the LSB by the front-line regulator as part of the performance management assessment process. However, this must only be information that will enable the AAR to manage the risks to the regulatory objectives of the front-line regulator acting in a way that incompatible with them and which are outside the LSB's oversight role. It is essential to recognise that the risks arising from the day to day running of the front-line regulator are the responsibility of its Board and that there is, therefore, no requirement to provide access (for example) to its risk register or other internal governance/risk documents.

Question 17: Do you think independent standards or benchmarks could be used to indicate when AARs are able to seek additional assurance? If so, what are these, and why?

32. One approach might be to set parameters that, if breached, could trigger a requirement for the front-line regulator to notify the AAR (and the LSB) what has happened and the steps it proposes to take to remedy the issue. In our view such parameters are likely to be limited to issues that appear likely to cause a direct financial loss to the AAR.

33. A preferable approach would be for the LSB to set out the standards or benchmarks (to the extent that they differ at all from its performance management framework), perhaps in the form of a template (e.g. for financial information).

Question 18: What action do you think an AAR should be entitled to take when seeking additional assurance in the circumstances described above, and why?

34. Apart from actions that the AAR can take as a matter of law (e.g. as guarantor or shareholder of a limited company) they might be entitled to:

    - Request a meeting with the front-line regulator's Chair to discuss the issue;

    - Refer the matter to the LSB for a possible investigation (with a full explanation as to why it would be an appropriate use of the LSB's powers to consider the matter and why it has not been possible for it to be resolved between the AAR and the front-line regulator).

35. However, we consider that certain safeguards would be needed in setting out the circumstances in which an AAR is entitled to seek additional assurance including:

    - A requirement to identify how/why the front-line regulator's action are incompatible with the regulatory objectives;

    - A presumption that, in the first instance, it is the front-line regulator's responsibility to rectify the situation (even if this has to be done in a short timescale);

    - If the issue concerns regulatory arrangements, then the LSB must always be involved;

    - A requirement to take account of the desirability of resolving informally matters that arise between the AAR and the front-line regulator (i.e. mirroring LSA section 49(4)(a)).

36. We consider that a preferable approach is for the AAR to make representations to the LSB if it considers that the front-line regulator is not carrying out the delegated regulatory functions

effectively such that one or more of the regulatory objectives are threatened and for the LSB to decide whether to investigate or not.

Question 19: What do you anticipate the impact of the 'gateways' approach would be, and why?

37. We consider that there is a real risk that such an approach would result in:

- A process that is overly bureaucratic/over-engineered;
- Untargeted, burdensome and irrelevant requests for information (notwithstanding the fact that the better regulation principles should apply);
- The root cause of a problem not being identified if there is a very prescriptive process; but repeated abuse of the process in the absence of some level of prescription and oversight by the LSB of requests that are made.

Question 20: What, if any, alternative approach to reviewing the IGR do you suggest the LSB should consider, and why? What impact do you think that would have, and why?

38. As set out above, we consider that the LSB should keep the new IGRs as high level and as outcomes focused as possible and supplement them with a Statement of Policy.[7]

Question 21: Do you agree with reintroduction of Dual Self-Certification ("DSC") to assure compliance with the IGR? If so, what form should this take and why? What do you anticipate the impact of DSC would be, and why?

39. We agree with the LSB's perception that there is often limited agreement between an AAR and the front-line regulator on whether they are compliant. Our experience has been that the requirement to provide a DSC merely led to disagreements between the AARs and IPReg about whether there had or had not been compliance. Resolving these issues took considerable senior management and Board time.

40. Our view is that incidents of non-compliance should be identified (and resolved) throughout the year and be brought to the LSB's attention. Risks of non-compliance should be considered regularly at the respective Boards of the front-line regulator and the AAR (e.g. as part of their individual risk management processes).

Question 22: Do you agree with IGR compliance becoming part of regulatory performance assessments? If so, why? What do you anticipate would be the impact of IGR compliance becoming part of regulatory performance assessments, and why?

41. We consider that IGR compliance should be kept separate from the performance assessment framework for a variety of reasons including:

[7] We also consider that it may be necessary for the LSB to revisit its Statement of Policy on enforcement once the IGR framework is in place to ensure that they are consistent.

- A new framework for IGRs needs to be put in place sooner rather than later. Despite recent revisions, the actual approach that the LSB intends to take in applying the new performance assessment framework is unclear and appears to be reliant on the outcome of the "transitional assessments" that it will undertake over the course of the next 18 months. New IGRs need to be in place well before that;

- We consider that there remains a clear risk that the performance assessment process will continue to be a significant drain on our resources. To add another layer of complexity (and standards) would only serve to increase this;

- The focus of the performance assessment framework is on the activities of the front-line regulator, not on the AAR. To introduce an element of assessment of the AAR into the process (i.e. on IGR compliance) confuses the purpose of the performance assessment framework.

Question 23: Do you agree with the existing option for proactive reporting of non-compliance? If so, why? What do you anticipate the impact of this would be, and why?

42. We consider that proactive reporting (by either body) of non-compliance is a proportionate and targeted approach. However, our view is that the LSB should (perhaps in a Statement of Policy) set requirements as to what is required in such a report. This could include a requirement for evidence about the impact of the issue on the regulatory objectives and what steps are proposed (or have already been taken) to resolve the issue that has been identified. This approach could provide assurance to the LSB that compliance was, in effect, being monitored appropriately by the front-line regulator and the AAR without the need for burdensome DSCs or LSA section 55 requests for information. There is, however, no guarantee that this approach will remove the risk of continuing disagreement between the front-line regulator and the AAR.

Question 24: Do you agree with third party assurance? If so, why? What do you anticipate the impact of this would be, and why?

43. We do not agree with this approach. We consider that this will introduce cost and is likely to be ineffective: there is a significant risk that the AAR and front-line regulator will disagree with the third party's findings (even if they could agree who to appoint) – and, unlike an LSB investigation, there would be no statutory basis for enforcing them. It would also require the third party to have an in-depth knowledge of the regulatory framework and IGR issues – it is likely that this would be expensive, even if it were possible to find a body with such skills.

Question 25: What, if any, alternative approaches to assuring compliance with the IGR do you suggest the LSB should consider, and why? What do you anticipate the impact of these would be, and why?

44. See answers above on simplified IGRs supplemented with a Statement of Policy on regulatory independence.

We would be very happy to discuss this response in more detail with the LSB as it develops its approach.

Fran Gillon, Chief Executive

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