

# LAW SOCIETY SUBMISSION

---



**Legal Services Regulation Act 2015**

**Draft Professional Indemnity Insurance Regulations**

Legal Services Regulatory Authority

14 December 2018

---

#### ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

## Contents

1. Introduction .....	5
2. Executive Summary .....	6
3. Overview of solicitors' professional indemnity insurance requirements.....	8
Special Purpose Fund .....	8
Run-off Fund .....	9
4. Definitions and operative clauses in the draft Regulations.....	11
Definition of 'insurance' .....	11
Definition of 'insured' .....	11
Definition of 'insurer' .....	12
Definition of 'authorised insurer' .....	12
Definition of 'participating insurer' .....	13
Definition of 'Participating Insurers Agreement' .....	14
Definition of 'qualified insurer' .....	14
Definition of 'minimum financial strength rating' .....	15
Definition of 'former insured' .....	16
Definition of 'qualifying insurance policy' .....	16
Definition of 'period of cover' .....	17
Definition of 'legal services' .....	18
Definition of 'legal practices' .....	19
Definition of 'insolvency event' .....	19
Definition of 'run-off cover' .....	20
Definition of 'defaulting firm' .....	21
Definition of 'defaulting run-off firm' .....	21
Definition of 'succeeding practice' .....	22
Definition of 'coverage period' and 'specified indemnity period' .....	22
5. Matters arising from the draft Regulations .....	24
Legal practices containing solicitors .....	24
PII responsibilities of the Society and the Authority.....	24
Confirmation of PII cover .....	25
Run-off cover.....	25
Evidence of run-off cover.....	26
Insolvency of insurer and other events in relation to barristers .....	26
Insolvency of insurers and other events in relation to legal practices .....	27

Run-off cover for insolvency or non-performance event .....	28
Obligation to effect and maintain a Qualifying Insurance Policy.....	28
Deadline for confirming cover .....	29
Responsibility of principals for maintaining qualifying insurance .....	29
Notification of cessation .....	30
Minimum level of cover .....	30
Mandatory provisions .....	31
Law Society Minimum Terms and Conditions.....	33
<b>6. Matters arising not addressed by the draft Regulations .....</b>	<b>34</b>
Assigned Risks Pool .....	34
Arbitration and dispute resolution .....	34
Defaulting firms.....	35
Failure to comply with PII regulations .....	35

## **1. Introduction**

- 1.1 The purpose of this submission from the Law Society of Ireland (“the Society”) is to give the views of the Society to the Legal Services Regulatory Authority (“the Authority”) on draft regulations on professional indemnity insurance (“draft Regulations”) under section 47(2) of the Legal Services Regulation Act 2015 (“the Act”).
- 1.2 It is noted that these regulations deal with regulation of professional indemnity insurance (“PII”) for practising barristers, and legal practices, excluding multi-disciplinary practices. For the purposes of this submission, where the Society refers to legal practices, unless otherwise advised, it does so in the context of legal partnerships and limited liability partnerships comprising of only practising barristers. Legal partnerships, multi-disciplinary practices and limited liability partnerships that contain solicitors will continue to come under the regulatory remit of the Society for the purposes of PII matters.
- 1.3 The Society makes this submission with a view to pointing out potential risks to the legal profession, clients and the public under the current drafting, on the basis of the Society’s extensive experience with regulating PII for solicitors.
- 1.4 The Society has concerns regarding the lack of detail in the draft regulations, in comparison with the solicitors’ PII regime, and PII industry standards.
- 1.5 Given the short time frame and limitations on the Society’s resources, the Society does not propose to provide an exhaustive review of the Authority’s draft Regulations. However, the Society would be happy to engage further with the Authority on this matter.

## 2. Executive Summary

- 2.1 This submission sets out the Society's views in relation to the draft Regulations provided by the Authority in relation to practising barristers and legal practices.
- 2.2 The Society has a number of concerns regarding the draft Regulations based on the Society's experience of regulating PII for solicitors, and is of the view that the draft Regulations, as currently drafted, would not be sufficient for the Authority to properly regulate insurance for barristers and legal practices for the protection of the legal profession and the public.
- 2.3 The Society notes that the draft Regulations are not clear that any legal practice (legal partnership, multi-disciplinary practice or limited liability partnership) that comprises one or more solicitors is required to comply with the Society's PII regulations and falls under the Society's regulatory remit. The clear lines between the Authority's and the Society's PII responsibilities should be more clearly defined in the draft Regulations.
- 2.4 There are no proper minimum terms and conditions provided for in the draft Regulations. The minimum terms set out in Part C of the draft Regulations are insufficiently drafted and do not meet industry standard wording. Minimum terms and conditions will ensure a minimum standard applies to each and every policy even if the express terms of the policy do not meet that standard.
- 2.5 The minimum level of cover fails to confirm whether claims made are on an 'each and every claim' or aggregate basis. 'Each and every claim' cover means that the limit is payable in respect of each claim made during the policy period. Aggregate basis means that the limit is only available once, however many claims are made, during the policy period. It is important that barristers and legal practices and their clients are made aware of the limitations of any policy entered into.
- 2.6 It is noted that there are no exclusions provided for within the draft Regulations. The PII cover should provide industry standard exclusions to ensure that the barrister or legal practice is covered for claims arising from clients out of the provision of legal services only. Otherwise cover could not be excluded for matters including but not limited to fraud, dishonesty, personal debts or damage to property.
- 2.7 An Assigned Risk Pool, as exists for solicitors, is not provided for in the draft regulations. The Assigned Risks Pool acts as the insurer of last resort for firms unable to obtain cover in the market. Without the safety of an Assigned Risks Pool, barristers and legal practices will be at the mercy of the market. While it is noted that there is a prohibition on the qualifying insurance refusing claims for specific areas of work, insurers can still refuse to cover any legal practitioner engaging in a specific area of legal services thereby removing such legal practitioners from practice. The purpose of the Assigned Risks Pool is to prevent the insurance market from controlling who can and cannot practice.

- 2.8 The Society notes that there is no Participating Insurers Agreement provided for in the draft Regulations, which is an agreement between the insurers and the regulator on the terms on which the insurers are permitted to provide cover in the market. This means that the Authority will have no legal mechanism of control over the insurers providing cover in the market as there is no enforceable contract between the insurer and the Authority. Lack of an agreement also leaves the Authority with no method to bind the insurers to minimum terms and conditions.
- 2.9 The draft Regulations do not provide for a specified indemnity period nor is there a maximum coverage period. The cover provided could, in effect, be poor value to the barrister or legal practice and may not offer sufficient protection to clients.
- 2.10 The proposed provisions concerning run-off cover also lack any minimum terms and conditions including the minimum level of run-off cover which would leave both the legal profession and the public inadequately protected.
- 2.11 In this submission, the Society sets out an overview of the current professional indemnity insurance requirements for solicitor firms including the minimum terms and conditions, Assigned Risks Pool and the Run-off Fund to demonstrate the differences between the regulatory regimes being proposed.
- 2.12 The Society also reviews the definitions in the draft Regulations in this submission offering recommendations that should assist the Authority in drafting PII regulations that would meet general PII industry standards in order to protect the legal profession and the public.
- 2.13 Definitions that require expansion include 'insured', 'financial strength rating' and 'former insured'. There are definitions which the Society suggests will be required including 'insurance', 'authorised insurer' and 'participating insurer' to safeguard practising barristers from obtaining insurance from bodies that are not authorised to provide insurance in this jurisdiction in order to protect the public.
- 2.14 It should be noted that simple inclusion of definitions not provided for would be insufficient to close the gaps in the draft Regulations. Operative clauses will also be required within any updated draft regulations to make them effective for the regulation of PII matters.
- 2.15 The Society also notes some matters that have been omitted from the draft Regulations which should be considered by the Authority before issuing further draft PII regulations.
- 2.16 The Society attaches a copy of the Solicitors Professional Indemnity Insurance Regulations 2018 (S.I. No. 351 of 2018), the Minimum Terms and Conditions and Participating Insurers Agreement with this submission in order to assist the Authority.

### **3. Overview of solicitors' professional indemnity insurance requirements**

- 3.1 It became compulsory for solicitors to have PII in place on 1 December 1995 under The Solicitors Acts, 1954 To 1994 (Professional Indemnity Insurance) Regulations, 1995 (S.I. No. 312 of 1995).
- 3.2 A solicitor firm cannot provide legal services of any kind, either reserved or unreserved, without a valid PII policy in place. The annual indemnity period for PII runs from 1 December to 30 November and the coverage period cannot be for more than 24 months. Solicitor's PII cover is on a per-firm basis rather than on an individual solicitor basis.
- 3.3 The current solicitors' PII regulations, the Solicitors Professional Indemnity Insurance Regulations 2018, require a solicitor firm to arrange for their broker to provide confirmation that they maintain qualifying insurance within three working days of the commencement of the coverage period to which the insurance relates.
- 3.4 The Society has minimum terms and conditions for PII providing that the minimum level of cover is €1.5m each and every claim. The minimum terms and conditions must prevail over the terms of any policy of insurance. This is to ensure that a minimum standard applies, even if the express terms of the policy do not meet that standard.
- 3.5 The Society also has a Participating Insurers Agreement in place to bind participating insurers directly to those minimum terms and conditions. In order to participate in the market, each participating insurer is required to sign the Participating Insurers Agreement on an annual basis.
- 3.6 There is no cancellation of cover allowed, unless succeeding practice or replacement cover is put in place. The terms of the insurance must provide that any cancellation cannot prejudice the accrued rights and obligations of the parties thereto as at the effective date of cancellation.

#### **Special Purpose Fund**

- 3.7 The Special Purpose Fund Manager manages both the Assigned Risks Pool ("ARP") and the Run-off Fund ("ROF"). The Special Purpose Fund Manager is appointed by the Society but acts on behalf of, and is paid for by, the participating insurers. The current Special Purpose Fund Manager is DWF Claims (Ireland) Limited.
- 3.8 When a solicitor firm cannot obtain insurance in the market from a participating insurer, the ARP is the insurer of last resort. A firm may only enter the ARP for one



year and the level of cover is on an aggregate basis with cover of €1.5m which does not cover claims by financial institutions.

## Run-off Fund

- 3.9 Prior to 1 December 2011, the Irish solicitors' PII market had run-off cover that had to be purchased by the ceasing firm from their last insurer. Depending on the year, the firm was required to pay 2 to 6 years' premium for run-off cover. This led to sole practitioners being unable to afford to retire due to the cost of run-off cover. This created a risk for the profession and their clients who could be left uncovered.
- 3.10 The ROF was established in December 2011 and is run in a similar fashion to the ARP, with the fund being paid for in its entirety by the participating insurers in accordance to their market share by premium. The ROF mimics the run-off available through master policies insofar as run-off cover is provided for an indefinite period (for so long as the ROF exists) and it is free at point of entry (no premium). The run-off cover will have the same minimum terms and conditions, and the same self-insured excesses, as the firm had in its last year in practice. The cost of the ROF is collected by the participating insurers as part of the annual premiums for live firms.
- 3.11 Anti-abuse provisions are in place to prevent firms from dropping their claims into the ROF and re-establishing. The Society has an expansive definition of succeeding practice which, broadly speaking, declares the following firms to be succeeding practices:
- 1) Any firm that holds themselves out as a successor to the run-off firm
  - 2) Any firm that takes over the liabilities of the run-off firm
  - 3) Any new firm that is established by the principal(s) of a run-off firm
  - 4) Any established firm where the principal(s) of a run-off firm joins as a principal.
- 3.12 A firm is not eligible to join or no longer eligible to remain in the ROF if it has a succeeding practice. There is no time limit on succeeding practices. For example, if a sole practitioner firm enters the ROF, and the sole practitioner joins a firm 10 years after the fact as a principal, that firm automatically becomes a succeeding practice. The succeeding practices are required to confirm to the Society that their PII covers claims against the run-off firm, and that the run-off firm has exited the ROF. If they fail, or refuse, to do so, they are declared to be a 'phoenix firm' and the Society can make an application to the High Court to have the firm closed down.
- 3.13 Once in the ROF, there are also compliance requirements which were introduced on 1 December 2017 to increase the level of compliance by firms with the

requirements of the ROF. Three levels of run-off cover were introduced depending on the compliance of the run-off firms:

- 1) Compliant run-off firms have run-off cover with the same minimum terms and conditions as those that exist in the market as at the date of entry
- 2) Non-compliant run-off firms have reduced cover in the ROF with the same minimum terms and conditions as those that exist in the market as at the date of entry, with the exception that there is no cover for claims by financial institutions
- 3) ARP run-off firms (firms that close while being covered by the ARP) have cover at the same level as exists in the ARP, with aggregate cover (rather than each and every claim) and no cover for claims by financial institutions.

3.14 Run-off cover is not subject to cancellation on any basis whatsoever, unless the firm has obtained replacement qualifying insurance such as by a succeeding practice.

## 4. Definitions and operative clauses in the draft Regulations

- 4.1 There are a number of issues that arise from the draft Regulations which the Society would recommend require further consideration. Some of these matters include definitions which should be more tightly drawn, expressions used that are not defined, and missing definitions which should be included in the Regulations.
- 4.2 Each definition that is not in the draft Regulations should also have a corresponding operative clause in order to give effect to the draft Regulations.

### Definition of 'insurance'

- 4.3 The draft Regulations do not specifically define 'insurance' and it is recommended that such a definition be included.
- 4.4 The Solicitors Professional Indemnity Insurance Regulations 2018 defines 'insurance' in the following terms:
- "insurance" means the professional indemnity insurance or coverage required by each firm pursuant to the Regulations;*
- 4.5 The definition of 'insurance' should also have a corresponding operative clause within the draft Regulations.

#### **Recommendation 1 – Definition of insurance**

It is the recommendation of the Society that the draft Regulations specifically set out a definition of 'insurance'. The definition of 'insurance' should also have an operative clause within the draft Regulations.

### Definition of 'insured'

- 4.6 The definition of 'insured' under the draft Regulations is quite limited and requires further consideration. The definition could be widened by providing for current and former partners as well as employees or former employees of a legal practice for the purposes of certainty.
- 4.7 The Solicitors Professional Indemnity Insurance Regulations 2018 defines insured in the following terms:
- "insured" means, in respect of a firm:—*
- (i) the firm, or*

(ii) each trustee, nominee, service or administration company owned by the firm and/or the principals of the firm from time to time, or

(iii) each director, officer or employee of any such company as is referred to in paragraph (ii) above from time to time, or

(iv) each principal or former principal of the firm from time to time, or

(v) each employee or former employee of the firm from time to time, or

(vi) the estate or legal personal representatives of any deceased former principal or employee of the firm;

#### **Recommendation 2 – Definition of insured**

It is the recommendation of the Society that the draft Regulations widen the definition of insured to include current and former partners of a legal practice as well as employees or former employees of a legal practice for the purposes of certainty.

#### **Definition of ‘insurer’**

4.8 The Society suggests that the definition of insurer should be revised as it calls the insurer “an undertaking” rather than the more correct term of “an underwriter”.

#### **Recommendation 3 – Definition of insurer**

It is the recommendation of the Society that the definition of insurer be amended to correctly call the insurer “an underwriter”.

#### **Definition of ‘authorised insurer’**

4.9 There is no definition in the draft Regulations of ‘authorised insurer’ or corresponding operative clause. The Society recommends that such a provision is included in the draft Regulations so that the insurers providing cover to barristers and legal practices are authorised to provide insurance cover in this jurisdiction by the Central Bank of Ireland. This is required to protect legal practitioners, their clients and the public as it sets the minimum requirements for insurers in the market and guards against rogue unauthorised insurers.

- 4.10 The Solicitors Professional Indemnity Insurance Regulations 2018 defines ‘authorised insurer’ in the following terms:

*“authorised insurer” means an insurer that holds an authorisation to carry on insurance business for the purposes of Directive 73/239/EEC or that is otherwise entitled to carry on non-life insurance business in the State;*

- 4.11 The definition of ‘authorised insurer’ should also have a corresponding operative clause within the draft Regulations.

**Recommendation 4 – Definition of authorised insurer**

It is the recommendation of the Society that the draft Regulations include a definition of ‘authorised insurer’ to ensure that the insurer is authorised to provide insurance cover in the State by the Central Bank of Ireland. The definition of ‘authorised insurer’ should also have an operative clause within the draft Regulations.

**Definition of ‘participating insurer’**

- 4.12 It is noted that there is no definition or operative clause under the draft Regulations for ‘participating insurer’. The Society recommends for the purposes of regulatory control over insurers that a definition of participating insurer be included in the draft Regulations with corresponding operative clause. This will provide the Authority with some level of control over who can provide insurance in the market. Without this term, there are no safeguards that the insurance provided will meet the defined minimum terms and conditions.

- 4.13 The Solicitors Professional Indemnity Insurance Regulations 2018 defines ‘participating insurer’ as follows:

*“participating insurer” means, in respect of an indemnity period,*

*(i) an authorised insurer which has entered into and duly executed a participating insurers agreement with the Law Society on or before 1 November immediately prior to the commencement of that indemnity period and which is effective to permit such insurer to underwrite qualifying insurance; or*

*(ii) an authorised insurer which has entered into and duly executed a participating insurers agreement with the Law Society in accordance with Regulation 17(e) and which is effective to permit such insurer to underwrite qualifying insurance.*

#### **Recommendation 5 – Definition of participating insurer**

It is the recommendation of the Society that the draft Regulations insert a definition of 'participating insurer' in order to provide the Authority with regulatory control over who can provide insurance in the market. The definition of 'participating insurer' should also have an operative clause within the draft Regulations.

#### **Definition of 'Participating Insurers Agreement'**

- 4.14 The Society also recommends that the Authority include a requirement for a 'Participating Insurers Agreement' in the draft Regulations to be signed between the Authority and the participating insurers in the market on an annual basis.
- 4.15 The Society would emphasise the importance of having such an agreement in place in order to have regulatory control over insurers providing for minimum terms and conditions, and to set the rules under which the insurer participates in the market. This can include issues such as arbitration requirements for disputes relating to claims, and minimum financial strength rating requirements.
- 4.16 It would not be possible for the Authority to bind any insurer to the regulations without a Participating Insurers Agreement or an equivalent in place. Without a Participating Insurers Agreement in place there is a risk to clients and the legal profession.
- 4.17 The definition of 'Participating Insurers Agreement' should also have a corresponding operative clause within the draft Regulations.

#### **Recommendation 6 – Participating Insurers Agreement**

It is the recommendation of the Society that the Authority define and set out a 'Participating Insurers Agreement' in order to exercise control over insurers which provides for minimum terms and conditions. The definition of 'Participating Insurers Agreement' should also have an operative clause within the draft Regulations.

#### **Definition of 'qualified insurer'**

- 4.18 Draft regulation 14(d) states that where a legal practice ceases where they are unable to obtain alternative cover in the event of an insolvency or non-performance event, they are required to put run-off cover in place with a qualified insurer from the date of the insolvency or non-performance event. The Society notes that there is no definition of 'qualified insurer' in the draft Regulations.
- 4.19 It should be noted that if a legal practice is unable to obtain alternative cover, it is unlikely that they would be in a position to obtain and pay for run-off cover.

- 4.20 The definition of 'qualified insurer' should also have a corresponding operative clause within the draft Regulations.

**Recommendation 7 – Definition of qualified insurer**

It is the recommendation of the Society that the Authority define a 'qualified insurer' in the draft Regulations. The definition of 'qualified insurer' should also have an operative clause within the draft Regulations.

**Definition of 'minimum financial strength rating'**

- 4.21 The Society notes the criterion for insurers under draft regulation 15. It is suggested this is made clearer by including a list of the ratings agencies that are accepted. There is no explanation or definition provided in the draft Regulations for 'S&P' or 'AmBest'.

- 4.22 In the Society's Participating Insurers Agreement there is a definition of 'minimum financial strength rating' for insurers. It is defined as follows:

*"Minimum Financial Strength Rating" means, in respect of each Approved Ratings Agency, the long term insurer financial strength rating specified below:*

- (a) in respect of A.M. Best, a rating of A-;*
- (b) in the case of Fitch, a rating of A;*
- (c) in the case of Moody's, a rating of A3;*
- (d) in the case of S&P, a rating of A; and*

*in respect of any additional Approved Credit Rating Agency as may be approved by the PII Committee, at its sole discretion, from time to time, such other long term insurer financial strength rating as the PII Committee may determine, at its sole discretion, from time to time;*

- 4.23 The Society recommends that the Authority provides a definition of 'minimum financial strength rating' for insurers into a Participating Insurers Agreement to ensure that insurers who are at higher risk of insolvency do not enter the market. This is to reduce risks to the profession and the public.

- 4.24 The definition of 'minimum financial strength rating' should also have a corresponding operative clause within the draft Regulations.

### **Recommendation 8 – Definition of minimum financial strength rating**

It is the recommendation of the Society that the Participating Insurers Agreement provide a definition for ‘minimum financial strength rating’ to ensure that insurers who are at higher risk of insolvency do not enter the market. The definition of ‘minimum financial strength rating’ should also have an operative clause within the draft Regulations.

### **Definition of ‘former insured’**

- 4.25 The Society notes that the definition of a ‘former insured’ in the draft Regulations means *“a person who has previously been an insured but who is no longer a practising barrister or legal partnership”*.
- 4.26 The Society notes that a legal partnership cannot be considered a person. As such, the section should be more clearly worded as *“a person who is no longer a practising barrister or a principal in, or employed by, a legal partnership or a limited liability partnership”*.

### **Recommendation 9 – Definition of ‘former insured’**

It is the recommendation of the Society that the definition of ‘former insured’ be more clearly worded as follows:

*“a person who is no longer a practising barrister or a principal in, or employed by, a legal partnership or a limited liability partnership”*.

### **Definition of ‘qualifying insurance policy’**

- 4.27 The draft Regulations set out a definition for ‘qualifying insurance policy’ but do not set out minimum terms and conditions for that qualifying insurance policy.
- 4.28 The purpose of minimum terms and conditions is to set a minimum standard that all insurance policies must comply with, so as to safeguard the legal profession, their clients, and the public.
- 4.29 The Society notes Part C of the draft Regulations addresses a minimum level of cover but does not specify minimum terms and conditions.
- 4.30 If there are no minimum terms and conditions, the PII cover could provide so many exclusions that few matters would be left covered, rendering the insurance effectively worthless.



- 4.31 With minimum terms and conditions, the Authority can clearly set out what must be covered, and equally what exclusions are permitted. This both provides protection through a minimum level of cover, but also provides requirements for the insured to cooperate with the insurer.
- 4.32 It is recommended that minimum terms and conditions are provided for in the draft Regulations to ensure that practising barristers and legal practices, and their clients, are provided with appropriate cover under conditions set by the Authority as regulator.
- 4.33 The Society has set out the current solicitors' minimum terms and conditions in the appendix to this submission as an example of the types of provisions usually provided for.
- 4.34 The definition of 'minimum terms and conditions' should also have a corresponding operative clause within the draft Regulations.

**Recommendation 10 – Minimum terms and conditions**

It is the recommendation of the Society that the Authority issue minimum terms and conditions to be provided for qualifying insurance policies to ensure that practising barristers and legal practices meet a set minimum level of cover. The definition of 'minimum terms and conditions' should also have an operative clause within the draft Regulations.

**Definition of 'period of cover'**

- 4.35 The draft Regulations define the 'period of cover' as "*the period for which the insurer provides insurance to the insured*". The Society notes that there is a definition in the draft Regulations for 'qualifying insurance' and suggests that this should be included in this definition.

**Recommendation 11 – Definition of period of cover**

It is the recommendation of the Society that the definition of 'period of cover' in the draft Regulations be amended to include 'qualifying insurance' for certainty.

## Definition of 'legal services'

4.36 The definition of 'legal services' in the draft Regulations is brief and should be expanded to encompass matters including a practising barrister acting as an arbitrator or mediator, acting on a pro-bono basis or acting as an expert witness. This is to provide for any avoidance of doubt and to ensure that all forms of legal services provided are covered by the draft Regulations.

4.37 The Solicitors Professional Indemnity Insurance Regulations 2018 defines 'legal services' in the following terms:

*"legal services" means services of a legal or financial nature and includes any part of such services, and for the avoidance of doubt, includes (without limitation):—*

*(i) any investment business services or investment advice provided by a firm, and*

*(ii) acting as personal representative or trustee, and*

*(iii) acting as notary public, and*

*(iv) acting as a commissioner for oaths, and*

*(v) acting as liquidator or receiver, and*

*(vi) acting as company secretary, and*

*(vii) acting as director of any body corporate owned by the principals of a firm that provides trustee, nominee, administration or other services, and*

*(viii) acting as arbitrator or mediator, and*

*(ix) acting on a pro bono basis, and*

*(x) acting as personal insolvency practitioner, and*

*(xi) acting as an expert witness and/or providing opinions as a professional expert; and*

*(xii) acting as a patent agent; and*

*(xiii) acting as a registered trade mark agent; and*

*(xiv) acting as a European trademark & design attorney;*

4.38 While the Society is aware that not all of the above terms will apply to practising barristers, the draft Regulations should clearly set out the range of legal services that are covered by the insurance.

4.39 The definition of 'legal services' should also have a corresponding operative clause within the draft Regulations.

### **Recommendation 12 – Definition of legal services**

It is the recommendation of the Society that the definition of ‘legal services’ in the draft Regulations be expanded to cover matters including a practising barrister acting as an arbitrator or mediator, acting on a pro-bono basis or acting as an expert witness. The definition of ‘legal services’ should also have an operative clause within the draft Regulations.

### **Definition of ‘legal practices’**

- 4.40 The Society suggests that for the purposes of the draft Regulations, the definition of ‘legal practices’ be limited as follows *“For the purposes of these regulations, legal practices refer to legal partnerships and limited liability partnerships that do not have solicitors either as partners and/or employees”*.
- 4.41 The Society notes that the Authority has power to make PII regulations under section 47 of the Act for legal partnerships, other than in relation to practising solicitors in such partnerships. As solicitors’ PII cover is provided by solicitor firm, rather than by individual solicitor, the Society’s PII requirements would extend to the entire solicitor-barrister legal partnership.

### **Recommendation 13 – Definition of legal practices**

It is the recommendation of the Society that the definition of ‘legal practices’ be amended to provide as follows:

*“For the purposes of these regulations, legal practices refer to legal partnerships and limited liability partnerships that do not have solicitors either as partners and/or employees”*.

### **Definition of ‘insolvency event’**

- 4.42 In the draft Regulations, there is an error in the definition of ‘insolvency event’. Part (ii) of the definition states *“The passing by the members of an insurer of a resolution for the voluntary winding up of the insurer (or an analogous appointment being made in respect of the insurer in any jurisdiction outside the State)”*. The Society submits that the words in brackets should be redrafted to state *“(or an analogous step being taken in relation to a participating insurer in any jurisdiction outside the State)...”*
- 4.43 The Society also suggests that in part (iii) of the definition the words *“an analogous appointment”* be more correctly expressed as *“an analogous order”*.

- 4.44 Likewise, in part (iv) the words “*analogous appointment*” should be replaced with “*analogous event*”.

**Recommendation 14 – Definition of insolvency event**

It is the recommendation of the Society that part (ii) of the definition of ‘insolvency event’ be amended as follows:

*“the passing by the members of an insurer of a resolution for the voluntary winding up of the insurer (or an analogous step being taken in relation to a participating insurer in any jurisdiction outside the State)”*

It is the recommendation of the Society that part (iii) of the definition of ‘insolvency event’ be amended as follows:

*“the making of a winding up order in relation to a participating insurer (or an analogous order being made in relation to a participating insurer in any jurisdiction outside the State)”*

It is the recommendation of the Society that part (iv) of the definition of ‘insolvency event’ be amended as follows:

*“the approval of a voluntary arrangement or similar form of composition with creditors in respect of a participating insurer (or an analogous event occurring in relation to a participating insurer in any jurisdiction outside the State)”*

**Definition of ‘run-off cover’**

- 4.45 As noted in paragraph 4.25, the Society’s has concerns with the definition of ‘former insured’. This may impact the definition of run-off cover in the draft Regulations as legal practices may not be included. It is recommended that the definitions of ‘run-off cover’ be harmonised with the definition of ‘former insured’ to ensure ceasing legal practices are adequately provided for.

**Recommendation 15 – Run-off Cover**

It is the recommendation of the Society that the definition of ‘run-off cover’ be harmonised with the definition of ‘former insured’ to ensure ceasing legal practices are adequately provided for.

## Definition of 'defaulting firm'

- 4.46 There is no definition in the draft Regulations of 'defaulting firm' or corresponding operative clause. This raises concerns as the draft Regulations do not take into account what happens if a practising barrister or legal practice defaults on their requirement to obtain a valid policy of qualifying insurance. This could represent a possible danger to the public by weakening the Authority's regulatory response in the event of default.
- 4.47 Solicitor firms have 3 working days from 1 December annually to provide confirmation of PII cover to the Society in the required online format. Failure to do so will result in the firm being designated a defaulting firm, and the Society makes an application to the High Court for the firm to be closed.
- 4.48 The definition of 'defaulting firm' should also have a corresponding operative clause within the draft Regulations.

### **Recommendation 16 – Definition of defaulting firm**

It is the recommendation of the Society that the draft Regulations insert a definition for 'defaulting firm' as the draft Regulations do not take into account what happens if a practising barrister or legal practice default on their requirement to obtain a valid policy of qualifying insurance. The definition of 'defaulting firm' should also have an operative clause within the draft Regulations.

## Definition of 'defaulting run-off firm'

- 4.49 The draft Regulations provide no definition for 'defaulting run-off firm' or corresponding operative clause. This suggests that the draft Regulations do not take into account what happens if a practising barrister or legal practice fails to obtain run-off cover. This could also represent a possible danger to the public.

### **Recommendation 17 – Definition of defaulting run-off firm**

It is the recommendation of the Society that the draft Regulations insert a definition for 'defaulting firm' as the draft Regulations do not take into account what happens if a practising barrister or legal practice default on their requirement to obtain run-off cover. The definition of 'defaulting run-off firm' should also have an operative clause within the draft Regulations.

## Definition of 'succeeding practice'

- 4.50 As noted in paragraph 3.11 the Society provides an extensive definition of what is a succeeding practice. This is to ensure that client files are subject to cover at all times. It is also to prevent solicitor firms from entering the ROF and re-establishing a new firm leaving claims against the ceased firm with the ROF. The Society has in place anti-abuse measures to ensure firms do not take inappropriate advantage of the ROF.
- 4.51 While the concept of succeeding practices may not be relevant to practising barristers, they may be required for legal practices as there may be circumstances arising where run-off cover is not required if there is a succeeding practice. This may be particularly important for mergers and take-overs of legal practices.
- 4.52 The definition of 'succeeding practice' should also have a corresponding operative clause within the draft Regulations.

### **Recommendation 18 – Definition of succeeding practice**

It is the recommendation of the Society that the Authority define a succeeding practice for legal practices which will be important for mergers and take-overs of legal practices. The definition of 'succeeding practice' should also have an operative clause within the draft Regulations.

## Definition of 'coverage period' and 'specified indemnity period'

- 4.53 The draft Regulations provide for no set period of cover. The Society recommends that a definition of 'coverage period' be included in the draft Regulations for the purposes of clarity including a maximum period for cover. The usual maximum period of cover is a period of 24 months.
- 4.54 The definition of 'coverage period' should also have an operative clause within the draft Regulations.

### **Recommendation 19 – Coverage period**

It is the recommendation of the Society that the draft Regulations include a definition of 'coverage period' for the purposes of clarity to include a maximum period for cover of 24 months. The definition of 'coverage period' should also have an operative clause within the draft Regulations.

- 4.55 The Society observes that the draft Regulations provide for no specified indemnity period nor maximum coverage period provided for. An indemnity and coverage period are normally provided for to set out the parameters of the policies.
- 4.56 As noted in paragraph 3.2 the indemnity period for solicitors runs on an annual basis from 1 December to 30 November. The maximum coverage period for solicitors is 24 months.
- 4.57 Lack of an indemnity period or set coverage period in the draft regulations would mean that both periods would be unregulated and would result in issues reducing protection of the profession and public.
- 4.58 For example, insurers could provide for a coverage period of 5 years. If the minimum level of cover is €1.5 million in the aggregate, rather than each and every claim, this would mean that the €1.5 million limit of cover is available only once however many claims are paid over the 5 year coverage period.
- 4.59 Alternatively, barristers or legal practices could get cover for a month at a time, significantly increasing the regulatory burden on the Society to ensure that cover is in place.
- 4.60 The definition of 'specified indemnity period' should also have a corresponding operative clause within the draft Regulations.

**Recommendation 20 – Definition of specified indemnity period**

It is the recommendation of the Society that the draft Regulations include a definition of 'specified indemnity period'. The definition of 'specified indemnity period' should also have an operative clause within the draft Regulations.

## 5. Matters arising from the draft Regulations

- 5.1 There are a number of further matters that the Society recommends the Authority take into account to bring the draft Regulations up to industry standard and in order to protect the public.

### Legal practices containing solicitors

- 5.2 Draft Regulation 5 states that “*These regulations do not apply to practising solicitors in legal practices*”. The draft Regulations do not make it clear that any legal partnership, multi-disciplinary practice or limited liability partnership that contains even one solicitor, either as a principal or employee, comes under the regulatory remit of the Society and is required to comply with regulations made under section 26 of the Solicitors (Amendment) Act 1994.
- 5.3 It should be made clear in the draft Regulations that practising barristers, legal partnerships and limited liability partnerships that contain practising barristers only fall under the Authority’s remit and the draft Regulations. A legal practice that comprises solicitors must, as a practice, meet the Society’s PII requirements. The draft Regulations should be clear that any legal partnership, multi-disciplinary practice or limited liability partnership that comprises one or more solicitors comes under the remit of the Society and is required to comply with regulations made under section 26 of the Solicitors (Amendment) Act 1994.

#### **Recommendation 21 – Legal practices containing solicitors**

It is the recommendation of the Society that the draft Regulations make it clear that any legal partnership, multi-disciplinary practice or limited liability partnership that comprises one or more solicitors comes under the remit of the Society and is required to comply with regulations made under section 26 of the Solicitors (Amendment) Act 1994.

### PII responsibilities of the Society and the Authority

- 5.4 Draft regulation 6(b) may also lead to confusion between the PII responsibilities of the Society and the Authority. The Society would reiterate that it should be made clear that if a legal practice contains any solicitors, the Society’s PII regulations will apply.



### **Recommendation 22 – PII responsibilities of the Society and the Authority**

It is the recommendation of the Society that the draft Regulations make it clear where there is a legal practice that contains any solicitors, the Society's PII regulations will apply.

#### **Confirmation of PII cover**

- 5.5 Draft regulation 6(f) requires practising barristers to provide evidence to the Authority that they have effected and are maintaining qualifying insurance in accordance with the regulations as the Authority may require from time to time.
- 5.6 As mentioned previously, solicitor firms are required to provide confirmation of PII cover on an annual basis in a prescribed form (by their broker through the Society's online PII portal) within 3 working days of 1 December. Practising certificates will not issue to any solicitor in a firm that has not confirmed cover. This is done to ensure that PII cover is in place at all times for the protection of the solicitors, the clients and the public. It is recommended that a similar requirement be put in place for barristers and legal practices.

### **Recommendation 23 – Annual renewal date**

It is the recommendation of the Society that the Authority implement a specified annual renewal date for barristers and legal practices to confirm cover to ensure efficient regulation and that PII cover is in place at all times for the protection of the profession and public.

#### **Run-off cover**

- 5.7 The Society notes draft Regulation 8(a) provides that the run-off period is for 6 years.
- 5.8 The Society had a similar structure in place until 2011 where run-off cover had to be provided by the firm's last insurer regardless of whether a premium was paid. The insurer had right to recover the premium against the insured.
- 5.9 Given that there is no ROF for practising barristers or legal practices, there is an appreciable risk to clients where practising barristers or legal practices upon cessation of practice where they cannot afford or refuse to pay for run-off cover.

**Recommendation 24 – Run-off cover**

It is the recommendation of the Society that consideration is given by the Authority to the establishment of a Run-off Fund for practising barristers and legal practices to prevent risks to clients where practising barristers or legal practices upon cessation cannot afford to or refuse to pay for run-off cover.

**Evidence of run-off cover**

- 5.10 Draft regulation 8(b) provides that a barrister ceasing practice is required to provide the Authority with evidence of establishing and maintaining run-off cover as the Authority may require from time to time. The Society would submit that evidence of run-off cover should be required immediately upon the cessation from practice of a barrister to prevent periods arising where clients are left without cover and the Authority is unaware of this position.

**Recommendation 25 – Notification of run-off cover**

It is the recommendation of the Society that the draft Regulations make it mandatory for barristers ceasing practice to provide evidence of run-off cover to the Authority immediately upon cessation for the protection of clients.

**Insolvency of insurer and other events in relation to barristers**

- 5.11 Draft regulation 9(a) refers to when an insolvency or non-performance event occurs in relation to an insurer, the barristers covered by that insurer are required to immediately take steps to get alternative cover within 30 days of the event, but does not mention a requirement to backdate cover to the date of the insolvency or non-performance event.
- 5.12 The Society finds the wording of this section concerning as it may lead to a situation where a barrister is not insured for a period of 30 days. The Authority should consider allowing a barrister to whom this section applies to obtain alternative cover within 30 days and provide that the alternative cover must be backdated to the date of the insolvency or non-performance event.

**Recommendation 26 – Obtaining alternative cover in insolvency or non-performance event for a barrister**

It is the recommendation of the Society that draft regulation 9(a) provides for where an insolvency or non-performance event occurs that a barrister to whom this section applies to obtain alternative cover within 30 days and provide that the alternative cover must be backdated to the date of the insolvency or non-performance event.

- 5.13 Draft regulation 9(b) states that a barrister to whom draft regulation 9(a) applies is required to provide the Authority with evidence of replacing cover as the Authority may from time to time require. The Society suggests that provision of alternative cover should be provided to the Authority immediately upon the alternative cover being put in place to ensure there are no risks to clients.

**Recommendation 27 – Replacing cover for barristers**

It is the recommendation of the Society that a barrister to whom draft regulation 9(a) applies should provide evidence of alternative cover immediately upon the alternative cover being put in place to ensure there are no risks to clients.

**Insolvency of insurers and other events in relation to legal practices**

- 5.14 Draft regulation 14(a) states that where an insolvency or non-performance event occurs, legal practices covered by the insurer are required to immediately take steps to obtain alternative cover within 30 days of the date of the insolvency event. The Society has similar concerns about the wording of this section as noted in paragraph 5.12 as a possible 30 day gap in cover by the legal practice may arise. The cover should also be backdated to the date of the insolvency or non-performance event.

**Recommendation 28 – Obtaining alternative cover in insolvency or non-performance event for legal practices**

It is the recommendation of the Society that draft regulation 14(a) provide for the requirement for a legal practice to obtain alternative cover where an insolvency or non-performance event occurs but to ensure that the cover is backdated to the date of the insolvency or non-performance event.

- 5.15 Draft regulation 14(b) should require a legal practice to which draft regulation 14(a) applies to provide immediate notification to the Authority.

**Recommendation 29 – Replacing cover for legal practices**

It is the recommendation of the Society that a legal practice to whom draft regulation 14(a) applies should provide evidence of alternative cover immediately upon the alternative cover being put in place to ensure there are no risks to clients.

**Run-off cover for insolvency or non-performance event**

- 5.16 Draft regulation 9(d) provides that a barrister who is impacted by an insolvency or non-performance event and is unable to obtain alternative cover is required to immediately put in place run-off cover from the date of the insolvency event. The Society recommends that this section should include a mandatory immediate notice to the Authority by the barrister affected.

**Recommendation 30 – Notice of run-off cover for insolvency or non-performance event**

It is the recommendation of the Society that a barrister who is impacted by an insolvency or non-performance event and is unable to obtain alternative cover is required to put in place run-off cover and should immediately notify the Authority of this.

**Obligation to effect and maintain a Qualifying Insurance Policy**

- 5.17 Draft regulation 10(a) sets out that different PII requirements may pertain to legal practices that contain both barristers and solicitors. The Society notes that this could lead to a situation where the differing regulations could come into conflict. The Society maintains that any legal practice which contains solicitors will be required to meet the Society's PII obligations under section 26 of the Solicitors (Amendment) Act 1994 and will not be subject to the Authority's PII regulations.

**Recommendation 31 – PII in solicitor-barrister legal partnerships**

It is the recommendation of the Society that solicitor-barrister legal partnerships be required to meet the Society's PII requirements only, including minimum level of cover and minimum terms and conditions, as exist for solicitor firms

## Deadline for confirming cover

- 5.18 Draft regulation 10(b) states that legal practices are required to provide the Authority with evidence of their insurance in accordance with the regulations as the Authority may require from time to time. The Society recommends that it is in the interests of protecting clients that a set deadline for confirmation of cover is put in place. Without a set deadline for confirming cover, barristers and legal practices may be providing legal services for periods of time where there is no cover in place and the Authority would be unaware of this. There is also a lack of detail about how cover should be confirmed to the Authority.
- 5.19 Solicitor firms are required to provide the Society with confirmation of cover through the Society's online portal. The confirmation is provided by their broker and contains information such as the commencement and cessation date of cover, the insurer, and the policy number. There is a statutory obligation for confirmation of cover to be provided to the Society within 3 working days of 1 December annually.

### **Recommendation 32 – Deadline for confirming cover**

It is the recommendation of the Society that the draft Regulations provide for a specified deadline for confirmation of cover in the interests of protecting clients.

## Responsibility of principals for maintaining qualifying insurance

- 5.20 Every principal of a solicitor firm is responsible for ensuring that the firm has established and maintains qualifying insurance in place during any indemnity period (or part thereof) that the firm carries on practice, and that the firm provides the evidence of cover to the Society in a timely manner.
- 5.21 Although draft regulation 10(c) purports to address this matter, it may be considered loosely worded as the responsibility for maintaining qualifying insurance should be on all principals in the practice, not just one. Similar provisions should be considered for the principals/partners of a legal practice that falls under the Authority's remit.

### **Recommendation 33 – Responsibility of principals for maintaining qualifying insurance**

It is the recommendation of the Society that every principal / partner of a legal practice is responsible for ensuring that the legal practice has established and maintains qualifying insurance in place during any indemnity period (or part thereof).

## Notification of cessation

- 5.22 Draft regulation 12(a) requires a legal practice to immediately cease on the date of expiry of their existing cover if they cannot obtain qualifying insurance. It is suggested that such legal practices should be required to provide immediate notification to the Authority upon cessation if they cannot obtain qualifying insurance.

### **Recommendation 34 – Notification of cessation**

It is the recommendation of the Society that in the event a legal practice cannot obtain qualifying insurance that they are required to provide immediate notification to the Authority upon cessation.

## Minimum level of cover

- 5.23 The minimum level of cover set out under draft regulation 16(a) does not confirm whether the minimum level of indemnity cover of €1.5m is on an each and every claim or an aggregate basis.
- 5.24 It is important that the basis of insurance cover is clarified and connected to a specific coverage period in order to ensure that adequate cover is in place to protect clients, and each barrister (or legal practice) has the same level of cover as their colleagues.
- 5.25 Insurance cover of €1.5 million each and every claim would provide that coverage of €1.5 million is available for every claim made against the barrister or legal practice in that coverage period, regardless of the number of claims.
- 5.26 Insurance cover of €1.5 million in the aggregate means that the insurance will only pay out a maximum of €1.5 million in the coverage period, and any claims made in the coverage period after the maximum has been reached will not have cover.
- 5.27 Solicitors have a minimum level of cover of €1.5 million each and every claim, and a coverage period not exceeding 24 months.

### **Recommendation 35 – Minimum level of cover for barristers**

It is the recommendation of the Society that draft regulation 16(a) define the specifics of the minimum level of indemnity cover for barristers and whether that cover is on an each and every claim or aggregate basis.

- 5.28 Draft regulation 16(b) sets out a minimum cover for a legal practice of €3m which also does not indicate whether it is on an each and every claim or an aggregate basis. It should be noted that under the Society's PII regulations solicitor firms and any legal practice which contains solicitors are required to have PII cover of €1.5m each and every claim. If the confusion between which regulations apply where there is a firm containing barristers and solicitors is not addressed, there will be a conflict between the Society's PII regulations and the Authority's PII regulations.

**Recommendation 36 – Minimum level of cover for legal practices**

It is the recommendation of the Society that draft regulation 16(b) define the specifics of the minimum level of indemnity cover for legal practices and whether that cover is on an each and every claim or aggregate basis.

**Mandatory provisions**

- 5.29 Draft regulation 17 sets out mandatory provisions for an insurance policy held by a barrister or legal practice. The Society would state that without a Participating Insurers Agreement in place, the Authority cannot hold the insurers to these provisions. It should be borne in mind that the draft regulations apply to barristers and legal practices, not to insurers. The Authority has no regulatory power over insurers without a Participating Insurers Agreement in place.
- 5.30 Draft regulation 17(a) states that a qualifying policy of insurance must indemnify the insured against all claims made during the period of cover. It is acknowledged that insurance should provide cover for valid claims, and to defend against invalid claims. However, the wording in the draft Regulations could be understood to require the insurer to pay out on all claims, whether valid or invalid. Consideration should be given to broadening the wording to make this clearer.
- 5.31 There are no specified exclusions set out in the draft Regulations which insurers are likely to be hesitant about. The Society's regulations and minimum terms and conditions set out a long list of industry standard exclusions to ensure that PII cover is not extended past its purpose, namely third party civil liability cover for legal practitioners arising out of the provision of legal services.
- 5.32 It is also observed that there is no mention of circumstances that may give rise to a claim which are included in the Society's PII regulations.
- 5.33 It is the view of the Society that the Authority should provide a comprehensive set of minimum terms and conditions rather than the current mandatory provisions set out in the draft Regulations.

**Recommendation 37 – Indemnification of the insured**

It is the recommendation of the Society that draft regulation 17(a) is broadened to clearly state that the insurance will provide cover for valid claims and to defend against invalid claims. Circumstances that may give rise to a claim should also be included.

**Recommendation 38 – Exclusion clauses**

It is recommended that the industry standard exclusions are included in the draft Regulations to ensure the PII cover is not extended past its purpose, namely third party civil liability cover for legal practitioners arising out of the provision of legal services.

- 5.34 Draft regulation 17(b) states that a qualifying policy of insurance must be fully retroactive and must cover any claims made during the period of cover regardless of when the work was undertaken. The Society would suggest that this is not industry standard wording and should be revised. PII is normally issued on a 'claims made' basis (whatever insurer is in place when the claim is made) or a 'claims made and notified' basis (which requires all claims to be notified to the insurer during the indemnity period in place the time the claim was made).
- 5.35 It is more attractive to insurers to allow for a 'claims made and notified' basis as this requires the insured to notify claims to their insurer in the same indemnity period in which the claim was made. This ensures that claims are notified in a timely manner to the insurers for the benefit of the insured, the insurer and the claimants. Insurers are less interested in a 'claims made' policies as this never allows them to close their books. It can make it very difficult to get insurers into the market or keep insurers in the market. It may also lead to the insured waiting years before making the claim.

**Recommendation 39 – Claims made**

It is the recommendation of the Society that draft regulation 17(b) be revised with industry standard wording and specify whether the insurance is issued on a 'claims made' basis or a 'claims made and notified' basis.

- 5.36 Draft regulation 17(d) raises a number of issues for consideration. It is unclear whether the barrister or legal practice is required to obtain run-off cover from their last insurer or whether they may seek run-off cover from another insurer. If they are required to obtain run-off cover from their last insurer, the insurer may set an unaffordable high run-off premium. Consideration should also be given to circumstances arising such as an insurer leaving the market or going insolvent during the run-off period.



- 5.37 The Society submits that as there are no minimum terms and conditions in place for run-off cover this will allow insurers to provide very restricted policies which may, in effect, be detrimental to barristers, legal practices and to clients. The Society would suggest providing for minimum terms and conditions for run-off cover which are on no less favourable terms than the minimum terms and conditions for a policy for a practising barrister to ensure clients are not put at a disadvantage. It should be noted that the Society publishes run-off minimum terms and conditions on an annual basis.

**Recommendation 40 – Minimum terms and conditions for run-off cover**

It is the recommendation of the Society that there are minimum terms and conditions put in place for run-off cover that are on no less favourable terms than the minimum terms and conditions for a barrister to ensure clients are not put at a disadvantage.

**Law Society Minimum Terms and Conditions**

- 5.38 Draft regulation 20 is ambiguous and may lead to confusion in its current drafting. It suggests that an insurance policy which meets the Society's minimum terms and conditions will be a qualifying insurance policy for the purpose of the draft Regulations. This is likely to cause conflict between the Society's and the Authority's PII regulations as it suggests the Society's minimum terms and conditions could override the Authority's PII regulations. It is also unclear which minimum terms and conditions are being referred to as the Society's minimum terms and conditions are updated on an annual basis.

**Recommendation 41 – Law Society minimum terms and conditions**

It is the recommendation of the Society that draft regulation 20 be reconsidered to prevent any ambiguity or conflict between the Society's and the Authority's PII regulations. It should be made clear the specific minimum terms and conditions that are being referred to as the Society's minimum terms and conditions are updated on an annual basis.

## 6. Matters arising not addressed by the draft Regulations

- 6.1 The Society notes that there are a number of matters not addressed in the draft Regulations which should be considered by the Authority in publishing a future draft.

### Assigned Risks Pool

- 6.2 The Society notes that there is no ARP available to practising barristers which leaves them at the mercy of the market. Under the draft Regulations there is a prohibition on qualifying insurance refusing claims for specific areas of work. However, insurers can still refuse to cover any practising barrister engaging in that area of legal work which would remove these practising barristers from the market. An ARP would prevent the insurance market controlling who can and cannot practice.
- 6.3 If a practising barrister or legal practice fails to be offered cover in the market, there will be no method for that practising barrister to provide legal services. With this model the insurance industry controls the market, the type of practising barrister or legal practice that can practice and the type of practice they can engage in. The danger for clients with this model is that the practising barrister or legal practice may be required to cease practice at short notice due to an inability to obtain cover.

#### **Recommendation 42 – Assigned Risks Pool**

It is the recommendation of the Society that consideration is given by the Authority to establish and maintain an Assigned Risks Pool to prevent the market from controlling who can practice and the type of practice they may engage in.

### Arbitration and dispute resolution

- 6.4 There are no provisions in the draft Regulations dispute resolution. The Society recommends including provisions for arbitration and dispute resolution where there is a dispute in respect of claims and confirmation of cover between the insurer and the insured.

#### **Recommendation 43 – Arbitration and dispute resolution**

It is the recommendation of the Society that the draft Regulations provide for dispute resolution and / or arbitration where there is a dispute in respect of claims and confirmation of cover between the insurer and the insured.

## Defaulting firms

- 6.5 Solicitor firms that default in confirming cover are automatically provided with defaulting firm cover from the ARP until such time as the firm establishes qualifying insurance or ceases to operate. This is to protect the public during any period in which a firm does not have cover in place. The Authority may wish to consider imposing a similar scheme to prevent situations where a practising barrister or legal practice fails to confirm cover to protect clients and the public.

## Failure to comply with PII regulations

- 6.6 The Society's regulations provide for powers in the event that a firm fails to comply with its obligations and responsibilities under the PII regulations including the following:
- ) Application by the Society to the High Court for suspension of the practising certificates of the solicitors in the firm;
  - ) Direction to the Registrar of Solicitors to refuse to issue a practising certificate to any solicitor in the firm;
  - ) Application to the Solicitors Disciplinary Tribunal for an inquiry into the conduct of any principal of the firm on the grounds of professional misconduct;
  - ) Application to the High Court for an order prohibiting any principal of the firm from contravening any provision of the regulations.

The Authority should consider the types of powers it will require in order to regulate barristers and legal practices who fail to comply with the Authority's PII regulations.

### **Recommendation 44 – Failure to comply with PII regulations**

It is the recommendation of the Society that the Authority consider the types of powers it will require in order to regulate barristers and legal practices who fail to comply with the Authority's PII regulations.