

## **Call for evidence: Review of IPReg's regulatory arrangements**

The Chartered Institute of Trade Mark Attorneys (CITMA) is responding to the call for evidence by IPReg in its capacity as an Approved Regulator, as defined in the Legal Services Act 2007 (the Act) and as the representative body for Registered Trade Mark Attorneys and the wider trade mark and design profession. The review of the consultation and preparation of this response has been conducted by the Executive committee of CITMA on behalf of the CITMA Council.

In responding to the call for evidence, we are providing a high-level overview of some of the key areas where we feel IPReg should focus its review rather than, at this stage, offering substantive information. We would be happy to discuss any of these in more detail and look forward to engaging further as the review develops.

### Horizon scanning

#### **1. What external factors are likely to impact on the way the intellectual property legal services market(s) (both regulated and unregulated) evolve over the next 5-10 years?**

As a result of Brexit, the way in which the UK profession services clients who rely on EU rights protection and enforcement has changed. There are a variety of new business structures and business relationships which have developed and are now in place.

In altering any regulatory arrangements IPReg need to be mindful of the new landscape and ensure that there are no pitfalls or unintended barriers created in any new arrangements. The arrangements need to support the growing diversity in the way in which IP practices operate.

With the commoditisation of services, particularly with filing of trade mark applications and renewal of IP rights, there is a growing unregulated sector.

Without an attractive and beneficial regulatory regime in place, growth of the unregulated sector will continue.

There is a risk that regulation becomes less attractive which is neither good for the profession nor for the consumer.

We welcome competition, but there needs to be a level playing field to allow open and fair competition. The regulatory arrangements need to help facilitate this.

#### **2. What are the potential sources of innovative disruption (either internal or external)?**

Artificial Intelligence and other technological advances are likely to disrupt the legal services sector and this will feed into the IP sector.

Any regulatory arrangements need to take account of these and ensure that regulation is consistent across all disciplines no matter how they are delivered, e.g. via technology or in person.

It is likely that technology will continue to advance and reduce administrative tasks. Regulation needs to continue to support these changes and, as far as possible, future-proof further developments.

**3. How should IPReg take into account increasingly flexible working patterns in deciding how to categorise attorneys and the regulatory arrangements that apply to them?**

It is clear that because of the pandemic the sector has had to adapt to different ways of working depending on personal circumstances and capabilities of firms to adapt. We do not envisage that there will be a complete return to how things were before the pandemic.

It is highly likely that many individuals will want to continue to work in a more flexible way.

Any regulatory arrangements need to support this and not inadvertently create any barriers or discriminate against different groups. In this regard we would support the submissions made by IP Inclusive<sup>1</sup>.

Law tech

**4. How is law tech likely to impact the intellectual property legal advice sector? What factors should IPReg consider when deciding its approach to law tech?**

As mentioned, core elements of the work of a trade mark attorney are becoming increasingly commoditised and where this is delivered by unregulated providers, it creates a risk for the consumer.

This is especially prevalent where activities such as filing trade mark applications occur without commercial and strategic advice. This can lead to future problems which is to the detriment of the consumer.

Technology will continue to advance and the regulatory arrangements need to support this.

Small businesses

**5. What aspects of IPReg's regulation are likely to have an adverse impact on small law firms and sole traders? How can these impacts be mitigated whilst ensuring appropriate levels of consumer protection?**

We are unaware of any particular aspects of the current regulatory arrangements which have a significant adverse impact on small law firms and sole traders.

Any new arrangements should be mindful of the different ways in which firms operate and especially the diversity of sole-practitioners / small firms. Consistency is important so that appropriate protection is in place for the consumer.

Barriers to entry

**6. The CMA Report suggests that policymakers should pro-actively identify and reduce/remove regulatory barriers to entry where possible. What barriers to entry should IPReg reduce/remove? We are particularly interested in whether there are any aspects of the application process for firms that could be removed/reduced?**

We would support alternative ways for individuals to enter the profession, but the standards of qualification need to be maintained.

One area where we recommend a review of the arrangements is the process by which a firm seeks to become a licensed body.

---

<sup>1</sup> <https://ipinclusive.org.uk/wp-content/uploads/2021/02/210201-ipreg-regulatory-review-ip-inclusive-response.pdf>

We have heard notionally that the process can be quite complex and involved. We would therefore encourage IPReg to consider if there are ways to expedite the process which may at the same time bring about efficiency savings within IPReg.

There may also be a need to build in greater flexibility in the arrangements to recognise the growing variety of business structures operating within the sector.

### **7. Where are new entrant firms likely to come from? What are the barriers to new entrant firms?**

Historically many new entrant firms are established by individuals who have decided to leave their current employment, likely to be at a firm of patent and trade mark attorneys, and set up their own practice.

Those who may be thinking about going down this road may, in part, be put off by the regulatory requirements and complexities in applying for and registering as a licensable body, although we do not have any strong evidence that this is the case.

We would encourage IPReg to look at this area and develop more guidance and information about the process, what information is needed and why. This would assist those who may be thinking about setting up their own practice. It would provide a good basis for an informed decision to be taken and help simplify the process.

We would encourage for the requirements to be regulated as an entity to be robust but at the same time not overly bureaucratic and complicated.

In setting up a new firm there are many complexities and registering the entity with IPReg is just one aspect, therefore an easy-to-understand system would be beneficial.

### **8. Are the current qualification requirements for individual attorneys the right ones? If not, how should they be changed?**

We would support a review of the competency framework for trade mark attorneys and for this to be cross-referenced with the syllabus for the courses accredited by IPReg to ensure that the courses and the framework are aligned. It is also an opportunity to bring the important document up-to-date with current practices and skill sets required.

This would help to ensure that firms and individuals have a clearer understanding of the level of knowledge obtained and the skills gained as a result of trainees and individuals undertaking the qualification courses and becoming qualified.

We would encourage IPReg to look at the qualification requirements in other parts of the legal services sector and ensure that qualification as a registered trade mark attorney is consistent and not less attractive to other qualifications, especially where other qualifications may allow an individual to still carry out the majority of work of a trade mark attorney.

For example, the new Solicitors Qualification Examinations may be cheaper and firms may choose to encourage and fund trainees to obtain this qualification instead of qualification as a trade mark attorney. This is particularly relevant given the nature of work of the profession may move towards more contentious proceedings than the traditional filing of applications given the commoditisation of services and growing 'self-filing' activities.

We would encourage IPReg to look at the examinations provided by the different course providers and build into the regulatory arrangements a standard to ensure that examinations are equal, and one route is not considered to be easier than another.

Regulatory arrangements should ensure that there is equal access to all, and this may mean course providers offering alternative methods of teaching and assessment.

In addition, we would support a more robust and regular review of any course provider / examination agency. There has previously been little in the way of review between initial accreditation and the re-accreditation point. We are aware IPReg have already made substantial changes and advancements in this area and this is welcomed. These changes should, as a minimum, be built into any new regulatory arrangements.

### **9. How can additional education providers be encouraged to enter the market?**

A clear set of requirements / syllabus would be really helpful to enable potential course providers to use in developing an outline course and considering its own business case.

Competition is certainly required. We note that for the practical part of the route to qualification as a trade mark attorney there is only one provider and therefore there is an inherent risk here. However, we also appreciate that it is difficult to encourage competition and new providers to enter the market when the footfall is low on a year-to-year basis.

The cost of putting an employee through the qualification system is not insignificant, therefore it is likely firms will be careful about how many trainees will be put through the qualification system at any one time.

It may be that a different model of delivery of teaching and assessment are considered by IPReg and encouraged. As mentioned previously, a study of the legal services landscape and other professional services might offer IPReg some alternative options to consider.

#### Reducing regulation

### **10. What aspects of regulation should be reduced, removed or undertaken differently in order to reduce compliance costs?**

#### Disciplinary process

The disciplinary process appears to be disproportionate in time and cost and overly bureaucratic.

Whilst it is pleasing that there are a limited number of disciplinary cases occurring and most potential disputes are resolved by the internal complaints procedures firms have in place, we have observed that those cases which become formal disciplinary matters take a long time to resolve and are costly to IPReg and potentially to the individual / firm if the complaint is upheld.

We also question whether, in some cases, the outcome of the complaint (not just the direct decision) is in line with the severity of the allegations and manner of indiscretion by the registrant.

We do not wish to comment on the individual cases, but we would observe that disciplinary action has led to those involved, both directly and indirectly, almost leaving the profession and destroying livelihoods. This cannot be the intention behind the disciplinary process.

We are fully supportive of disciplinary action and a right of redress by consumers, but the outcomes from recent cases seems to be disproportionate. We have witnessed substantial difficulties for those trying hard to make things right, coming up against numerous barriers and as a result are inadvertently being pushed out of the profession.

IPReg should look at both the process and the regulations to ensure there is fairness and it is reasonable in providing appropriate sanctions or action, whilst being judicially robust. Flexibility/discretion may need to be built into the disciplinary arrangements.

IPReg may wish to consider if there is an opportunity for a fast-track process for those cases which merit it.

**11. We want to remove (or at the very least reduce) the current restrictions on providing non-legal services so that firms have more freedom to provide a wider range of services to their clients. Would doing this encourage innovation and competition? What (if any) consumer protection measures would need to be in place if this happened?**

We would be interested in understanding what particular restrictions IPReg are thinking about reducing or removing in this area and whether it is considering non-legal services which are completely outside of the legal services market and not ancillary to IP legal services.

We would be interested to understand whether there is a market demand for changes and evidence of it stifling competition. We are not aware of existing firms looking to diversify services beyond the realms of IP.

Some firms have brought in solicitors to bolster their in-house litigation services and to create a one-stop shop. We are not aware of any particular complications that this has caused or any detriment to consumer protection.

Removing or restricting current restrictions on providing non-legal services may result in an increase in complaints, which could then lead to an increase in insurance premiums.

Careful thought needs to be given to the burden this could put on all firms and not just those offering the non-legal services. If firms are to be entitled to offer non-legal services IPReg should consider whether there needs to be a requirement that those services themselves are regulated.

**12. What, if any, issues do you consider require detailed, prescriptive rules?**

We would support prescriptive rules accompanied by clear guidance as it is important to avoid complication and confusion.

We would suggest the areas where prescriptive rules are helpful include insurance, CPD, disciplinary proceedings and qualification provisions.

**13. What issues do you consider should be included in a principles-based Code of Practice?**

We have no objection to an overarching principles-based Code of Practice, but it is important for it to be supported by clear guidance so that individuals and firms can be sure that any practice is compliant and there is a common standard being maintained.

As with any prescriptive rules, clarity and simplicity are key.

Continuing competence to practise

**14. What approach should IPReg take to ensuring that attorneys on the register remain competent to practise (e.g. CPD)? In particular would you like to see a move away from a set number of hours of CPD a year and, if so, what approach would you prefer?**

We are aware that other legal service regulators have moved from a points/hours based CPD system to a reflective based system, whereby an individual looks at the quality of their practice and undertakes regular learning and development training based on areas identified.

We are not aware of any evidence that this system is more robust than an hours-based system or that the current CPD arrangement is not fit for purpose.

A system which includes hours or points enables individuals to be easily held to account. We would therefore encourage IPReg to keep some form of measurement in place, even if there is greater encouragement and emphasis on reflection. A hybrid solution may be suitable and we would welcome IPReg looking at this area in more detail.

We believe one of the important factors in any arrangement is to educate those regulated to understand the benefits of CPD. That alongside a system which is easy to understand will result in the outcomes and reassurances of continuing competence being achieved.

Whatever system there is in place, thought needs to be given to compliance checks. We are aware that under the current CPD system there are little or no checks that compliance declarations are legitimate. Whilst we are confident that those regulated are compliant, it presents a risk of the system being undermined if there is little or no checks carried out. Any process for checking does not have to be time consuming and detailed, but enough for IPReg to be satisfied that ongoing competence and CPD requirements are being fulfilled.

A modern day trade mark attorney will require a range of skills, some more relevant to the core legal work undertaken and others towards softer skills. Any CPD scheme should recognise and support this.

Whatever the policy and process put in place, clear guidance will help individuals to know whether an activity or a course is suitable for CPD. This is an area where we receive several enquiries from members.

#### Other matters

#### **15. Are there any other matters that you would like to bring to our attention or discuss with us?**

##### Professional indemnity insurance (PII)

There are currently only three participating insurers listed on the IPReg website. The lack of competition and continually decreasing number of providers of PII is of growing concern.

We are aware that insurance across the legal sector is a problem and it is not limited to the IP sector, but we would encourage IPReg to investigate this in some detail as they work through their review of regulatory arrangements.

The requirements IPReg have in place for a provider to become a participating insurer could be putting potential providers off and we wonder if the requirements have been set at the appropriate level.

Aside from PAMIA, the other two participating insurers appear to be less interested in the entire market and have certain conditions and restrictions for offering insurance, for example, certain minimum turnover requirements. This means that choice for firms is severely restricted and competition is lacking.

A situation is developing whereby if PAMIA, the predominant provider, refuse to provide insurance, for whatever reason, it is almost impossible for insurance to be obtained elsewhere. The result being an individual or firm may be forced to operate outside of the regulatory regime or leave the profession. Neither of these outcomes are positive, and whilst insurance is clearly important to protect the consumer, it should not become the ultimate determiner for being regulated and potentially entry controlled by a body outside of IPReg.

This has been highlighted in recent disciplinary cases. We understand that IPReg are aware of the issues identified through these cases therefore we will not go into detail here. We would take the opportunity to reaffirm that the structure of the regulatory regime needs to be reviewed to make sure that it is enabling those, who may have been the subject of disciplinary proceedings, to put matters right without forcing individuals to be non-compliant with the code of conduct and exposed to further disciplinary action.

For and on behalf of the Chartered Institute of Trade Mark Attorneys



Keven Bader  
**Chief Executive**

10<sup>th</sup> February 2021