

LSB Consultation – Proposed Internal Governance Rules (IGRs)

The Chartered Institute of Trade Mark Attorneys (CITMA) is responding to the consultation by the Legal Services Board (LSB) in its capacity as an Approved Regulator (AR), as defined in the Legal Services Act 2007 (the Act) and as the representative body for Chartered Trade Mark Attorneys and the wider trade mark and design profession.

In broad terms we support the objectives outlined in the consultation document. The IGRs are an important tool in facilitating effective governance for the benefit of consumers, delivering against the objectives of the Act.

CITMA, as an AR is committed to making the Act work and in the formulation and constitution of IPReg we have developed independent arrangements and separation of our regulatory responsibilities from our representational responsibilities. We are committed to independence and working well with our regulator to fulfil our responsibilities.

Whilst we support the principles of the IGRs we do have some concerns which we believe will impact on the effectiveness of the IGRs, as set out below.

1. Language

1.1 We think some of the language used in the IGRs and guidance could be improved or the context explained for the avoidance of any doubt and misinterpretation.

1.2 The use of the word “influence” in the guidance and rules appears to be negative in context. ARs and representative bodies should be influencing the regulated body in all aspects of its regulatory functions and it is a legitimate activity to be undertaken. Any influence by an AR should be done in an appropriate way, i.e. not forcing any action to be taken, but it is fundamental and is a key responsibility of the AR in ensuring good regulation. Often influence will be positive, providing evidence and insight to the regulated body, from which appropriate action can be taken, such as a change in policy or procedure.

1.3 Regulated bodies should welcome and support influence and use it as a positive mechanism for continual improvements and a way to address known and unknown issues. Under the current drafting of the IGRs and guidance the use of ‘influence’ is perceived more as a tool to prevent appropriate interaction between the AR and the regulated body, which could potentially be used as a ‘blocking’ mechanism by a regulated body, without good reason.

1.4 In reality the AR and the regulated body need to work closely together and in the right spirit. A good, close and open relationship provides for effective regulation which will result in the objectives of the Act being delivered. The IGRs should underpin this and at times, the tone in the IGRs and guidance does not encourage this close, but separate working.

1.5 As a practical example, Rule 8(2) indicates that the AR must not influence the determinations or procedures set out in Rule 8(1). There could be legitimate reasons why the views of the AR would benefit the regulated body, for example, the performance of Board members (including the Chair) which may affect re-appointments or provide valuable input into any appraisal.

1.6 There are some inconsistencies in definitions and terminology used between the Act and the IGRs/guidance. We would recommend before any IGRs and guidance are finalised and approved that a thorough cross-reference exercise is carried out to check each provision and definition. The Act should be the document with which definitions are aligned and the LSB should ensure that they are not inadvertently imposing additional duties on regulated bodies or ARs.

2. Clarity

2.1 We have advocated at various meetings and in previous correspondence the need for clarity in any new IGRs and supporting guidance. One area we believe requires greater clarity is the residual role of the AR and the associated role of the LSB, in relation to the role of the regulated body. Having a clear understanding of the boundaries would limit the number of disputes.

2.2 As a practical example, it would be particularly helpful to have, in the guidance under provisions for assurance, a list or further information, setting out examples of what the LSB determines is appropriate information for an AR to receive from the regulatory body to be assured of the discharge of regulatory functions, i.e. financial information in the form of quarterly reports; number of complaints and their outcome. This list would not have to be exhaustive but would help avoid inevitable disagreements between AR and regulated body, or duplication of information with that required by the LSB. This will reduce the potential burdens, particularly on the regulated body.

2.3 In general we feel that some of the proposed rules are still too open to interpretation and that some of the wording is too subjective. This may lead to a continuation of disputes and referrals to the LSB which detracts regulators and ARs from focussing on their core regulatory responsibilities.

2.4 Clarity is particularly essential given the different operational models adopted by ARs and regulatory bodies.

2.5 Whilst the LSB have given verbal assurances about the meaning of certain rules it does not provide safeguards for the future. Changes in personnel can often lead to a different interpretation of subjective rules / guidance. To avoid this, absolute clarity should be provided on the interpretation, or the subjective terms should be reviewed and, where possible, definitive requirements included instead.

2.6 We understand there is a need for flexibility to allow for the different regulatory models adopted by the ARs, however, avoiding misinterpretation must be a key objective.

3. Implementation

3.1 In our opinion the proposed 6 months transition period is too short. Whilst significant progress to work towards full compliance should be made within this timeframe many regulatory bodies and ARs will have other committed work programmes already underway. We would suggest 12 months would be more appropriate and reasonable.

3.2 Based on the drafting of the IGRs and supporting guidance we believe that CITMA and our regulated body will be largely compliant. However, we have held off re-drafting our existing Delegation Agreement, which is out of date, pending the completion of the new IGR exercise. In the past, misunderstandings have arisen due to confusion between the interpretation of the IGRs and the Delegation Agreement and it is important that time is taken to ensure the new Delegation Agreement is fit for purpose. Whilst six months should be sufficient time within which to complete this work it does not allow any room for slippage.

4. Disputes & Referrals for clarification

4.1 We are pleased to see provisions included in Rule 14 setting out the roles and responsibilities of the AR, the regulatory body and the LSB in resolving any disputes. We believe the LSB should be able to adjudicate and provide a determination where there is an impasse between AR and regulatory body. In the past the LSB has not sought to provide any determination which has led to matters continuing for inordinate lengths of time which could have been avoided. We would therefore encourage the LSB to utilise this provision to ensure quick resolution of matters.

4.2 We would also request that in the case where the LSB chooses not to make a determination, it provides an explanation as to why it had decided not to.

5. Specific comments on Rules

5.1 Rule 4(3) (Regulated Autonomy) indicates that the AR must not influence determinations unless there is a consultation by the regulated body. We object to this rule and believe it is important for the AR to be able to provide comments on areas highlighted in the rule without consultation, in particular on priorities and strategy. The rule as currently drafted is too restrictive and limits the ability for the AR to undertake its residual role and ensure that regulation is being delivered in an effective and appropriate way.

5.2 Rule 14 (Disputes & referrals for clarification) does not explicitly state that the regulated body can refer disputes to the LSB. We believe it appropriate for both the AR and the regulated body to have the power to do so.

6. Answers to specific questions in the consultation

Question 1

6.1 We agree that the proposed rules could enhance the independence of regulatory functions, but we would suggest some amendments are required to improve them further and provide greater clarity, as outlined in our comments above.

Question 2

6.2 Covered in our comments above.

Question 3

6.3 We believe we could comply with the 6 month period, but see comments above (section 4).

Question 4(a)

6.4 No extra resource required.

Question 4(b)

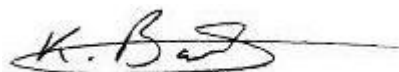
6.5 Initial costs in developing a new delegation agreement, but no ongoing costs.

Question 5

6.6 No equality issues identified.

We are grateful for the opportunity to respond to this consultation and we would be happy to discuss any of these points further with representatives from the LSB, if it would be of assistance.

For and on behalf of The Chartered Institute of Trade Mark Attorneys.

A handwritten signature in black ink, appearing to read 'K. Bader', with a long horizontal flourish extending to the right.

Keven Bader
Chief Executive
21st January 2019