



The Institute of
Trade Mark
Attorneys

Legal Services Board – consultation on Regulatory Independence

A formal response by the Institute of Trade Mark Attorneys

The Institute of Trade Mark Attorneys (ITMA) welcomes the opportunity to comment on this important consultation. To assist the LSB, we have simply provided answers to the individual questions posed in the consultation document. These are set out below.

Internal Governance

Q1. *How might an independent regulatory arm best be “ring-fenced” from a representative-controlled approved regulator (i.e. requiring a delegation of the power to regulate processes and procedures; and the power to determine strategic direction)?*

There may not be a “best way” to ring fence the regulatory arm from the representational functions, given the distinct nature of the various Approved Regulators. We agree that the rules should require this separation, but it must be for each Approved Regulator to determine how it will be done in order to satisfy the LSB.

ITMA believes that (in conjunction with CIPA) this has been achieved in the set up of the Intellectual Property Regulation Board (IPReg), which will be a company limited by guarantee. ITMA are making amendments to our constitution (our Memorandum & Articles of Association) to delegate our regulatory powers to IPReg. Any amendment to our constitution requires an Annual General Meeting or an Extraordinary General Meeting for it to be democratically approved. The formulation of a legally binding “Delegation Document” will ensure the regulatory work and policy aspects of regulation are handled and deliberated over separately to the representational function.

Q2. *What do you think of our proposals relating to regulatory board appointees?*

ITMA agrees that there is a need to ensure that appointments to the regulatory arm are done fairly

The proposals for the appointment of all Board Members on the basis of Nolan principles is something which ITMA can support. In our initial appointments of Trade Mark Attorney Board members we used an open competition arrangement and a selection process to identify the best applicants.

Now that IPReg is up and running we would be content for it to run the process of selection and appointment of both professional and Lay members on the basis set out in paragraph 3.15 as and when current appointments expire. We would however, wish to stress that this is based on the basis that representative bodies, like ITMA and CIPA, can and will be part of the process. Given the position of Patent and Trade Mark Attorneys in the scheme of things and their ability to practice outside the regulated regime it is important that they are content that the regulators are aware of



The Institute of
Trade Mark
Attorneys

their interests. One way of doing that is to have ITMA involved in the selection process for Board members.

The proposal for a majority of non professionals on Boards is, in our view, not necessary for the achievement of any of the regulatory objectives. IPReg, which will regulate the Trade Mark Attorney and Patent Attorney professions, under current arrangements, is made up of a Trade Mark Attorney Regulation Board and a Patent Attorney Regulation Board to reflect the position of ITMA and CIPA as individual approved regulators. Overall, there will be three Trade Mark Attorneys and three Patent Attorneys on the respective boards along with two nominated Lay members of IPReg to sit on each of the two boards, all under the Lay Chair of IPReg. Whilst that doesn't ensure a Lay majority, should the Rules require, we can appoint a third to the board to ensure Lay members can "block" any proposal which emanates from the professional members and which the former consider not to be in the interests of the users of the IP or legal systems. However, we do not think this necessarily has to be a requirement.

There are provisions in the Code of Conduct for Board members of IPReg and/or in their Contracts for re-appointment and for the appraisal of the board members, which ITMA would support. It must be recognised that any appraisal system is likely to be expensive to administer and burdensome to implement. This would provide an onerous, time consuming (and therefore expensive) burden for the Chairman of IPReg to take on. In the circumstances of a proportionate regulation arrangement we would not want to see the LSB insist on such an arrangement at this stage of the implementation, but rely on examples of best practice in due course.

Q3. *Is it necessary to go further than our proposals, for example, by making it an explicit requirement for the chairs of independent regulatory boards/equivalents to be non-lawyers?*

There is no need to be prescriptive in relation to the Chairman of Boards. We think that it might be appropriate to say that a Chairman may not be a member of the profession which his/her Board is regulating. But that should not mean that, for example, a non practicing barrister should not Chair the Board regulating Legal Executives, or indeed our own Board. In the interests of proportionality there is no need to go any further than the proposals set out in 3.15.

Q4. *Do you agree with our proposals in respect of the management of resources, including those covering 'shared services' models that approved regulators may adopt?*

ITMA believes that is essential for shared services to be allowed and indeed encouraged, especially for the smaller approved regulators. The need to keep costs minimised is crucial for ITMA and we would strongly support the proposals provided the added bureaucracy is minimised. We fully accept that such arrangements should not impinge on the independence of the regulatory arm and we believe that this is possible to achieve.



The Institute of
Trade Mark
Attorneys

The proposals set out appear to reflect what should be the right balance to ensure that possible undue influence by the representational organisation is negated and that conflict situations don't develop. However, again these are areas where prescription is to be avoided and as long as there are systems in place for problems to be aired and resolved – with the possibility of involving the LSB as a last resort – then the good sense of those directly involved can be relied on to respect the regulatory objectives. The Service Level Agreements that we will have in place will ensure that mechanisms for solving problems are covered.

Q5. *Is our proposed balance between formal rules and less formal (non-enforceable) guidance right? In what ways would further or different guidance be helpful?*

ITMA is content with the balance between formal rules and less formal (non-enforceable) guidance.

The draft rules are sufficiently principle based to ensure, in the view of ITMA, a common sense and practical approach to regulation. The guidance, though informal and not enforceable, will be important in setting the tone and in particular should ensure that the regulatory function is allowed to be undertaken in a way which respects the need for transparent independence and reflects the need for user confidence, but in a practical way, which reflects the relevant sector of Legal Services. For example, Trade Mark Attorneys provide specialist legal advice and services and their users tend not to be the man in the street. The processes and means by which we with IPReg maintain the confidence of users of the IP systems should be allowed to be different from other mainstream providers of legal services.

Q6. *What are your views on our suggested permitted oversight role for representative-controlled approved regulators over their regulatory arms?*

We agree that to make the changes work, the “spirit of the Act” will need to be observed by the approved regulators. IPReg will be required to produce an Annual Report for the two Institutes and we are of the opinion that this should be considered as the basis for monitoring how it is discharging the Institutes’ responsibilities as Approved regulators. ITMA has set up a committee, which in the first instance will primarily be looking at consultation from the LSB and IPReg, but we believe that this Committee would have the responsibility for examining the annual report and taking a view, along with CIPA as to what if any points need to be discussed with IPReg.

There are questions to be thought about and answered in relation to the timing of any further reviews and whilst it would be an advantage to have an independent review of IPReg’s operations and responsibilities, this must not be overly burdensome and flexibility is key. We would suggest a review two years after IPReg has formally taken over the regulatory responsibilities would suffice. Thereafter, a review every five years would seem appropriate.



The Institute of
Trade Mark
Attorneys

Q7. *In principle, what do you think about the concept of dual self-certification?*

We, in principle, support the idea of dual self-certification. We believe it would potentially provide a cost effective solution to the regulatory burden placed on the LSB and therefore reduce the overall costs to the regulated profession. Furthermore, we do believe that the costs to self certify for the representational arm will be significantly high; however, we would welcome a process that is quick and simple to go through to ensure costs are minimised.

Q8. *If a dual self-certification model were adopted, how should it work in practice?*

As indicated in our response to question 6, one possibility for ITMA is to use our newly appointed IPReg Committee to conduct the necessary monitoring with IPReg. This committee could then advise our Council and put forward a view as to whether or not certification should go ahead. [DN: This would need to be discussed with CIPA]

As indicated the need for the system to be simple is fundamental to ensure that we do not drive up the cost of the regulatory and representational arm on registrants and members. The administration attached to the process needs to be minimal.



The Institute of
Trade Mark
Attorneys

Practising Fees

Q9. *Do you agree with the mandatory permitted purposes currently listed in statute should be widened to include explicit provision for regulatory objective (g), i.e. “increasing public understanding of the citizen’s legal rights and duties”?*

ITMA agrees with the mandatory permitted purposes currently listed in statute, which can be used to formulate and assess budgets required for the regulatory arm and to hold them to account accordingly.

ITMA is less inclined to agree with the proposal to widen the list to include explicit provision for regulatory objective (g), i.e. “increasing public understanding of the citizen’s legal rights and duties” as this is not necessarily an important point for ITMA and IPReg. We can understand from the point of view of the LSB that is a laudable objective and one for which they are responsible, however, it must be recognised that this proposed provision is not necessarily applicable to all the approved regulators and we believe there should not be any “invitation” to budget for such expenditure by specifically indicating that it is an acceptable purpose.

Q10. *Should any other (general or specific) purpose be permitted under our section 51 rules?*

We could support a general provision which provided for expenditure which was in the interests of regulatory objectives of the Act, but there should be some indication that this would need the approval of the Approved Regulator and the LSB. It could not, in our case, be permissible for IPReg to seek funds for a PR exercise under this banner, for example, where ITMA objected but LSB did not.

Q11. *What do you think about our proposal to seek evidence that links to the regulatory objectives of the act?*

We believe that the proposals are sensible and provided that the process and level of analysis required is not set at a significantly detailed level (thus driving up costs) the proposals should work.

Q12. *What criteria should the Board use to assess applications submitted to it?*

No comment

Q13. *If they are adopted, what should Memoranda of Understanding between the Board and approved regulators contain? For approved regulators, are there any particular implications for your organisations?*

In order to ensure that budgetary cycles can be managed and to enable payment/renewal cycles to run effectively, we would urge that the MoU have certain timing requirements set out to ensure that applications are not unduly “sat on” and quick responses are received from the LSB as to whether the proposed change in fee is acceptable.



The Institute of
Trade Mark
Attorneys

Q14. *Should there be a requirement on approved regulators to consult prior to the submission of their application each year – and if so, who should be consulted, and on what?*

ITMA do not think that there is a need to consult prior to the submission of an application. Before the introduction of the Legal Services Act and the separation of the regulatory function from the representational function, no consultation took place with the profession. We could only see the need to consult if the change to the fee was of a significant level, for example, 100% increase, however, we do not think that this would be likely.

Q15. *What degree of detail would be most appropriate to require when seeking to maximise transparency but be proportionate in terms of bureaucracy?*

We agree there is a need for transparency and discussions with IPReg have already resulted in an agreement that it will need to be made clear to registrants what the fee imposed actually covers. For example, the cost of maintaining the registers which will be “sub-contracted” from IPReg to ITMA will be included in the breakdown.

Q16. *Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?*

No comment

Draft Rules

Q17. *Please comment on our draft proposed Rules, both in terms of the broad framework and the detailed substance.*

No comments at this point in time.

Next steps

Q18. *Are there any comments that you wish to make in relation to our draft impact assessment?*

No comments at this point in time.

Q19. *Are there any other issues that you would like to raise in respect of our consultation that has not been covered by previous questions?*

No

**Keven Bader – Chief Executive
for and on behalf of ITMA**

26 June 2009