

IPReg Call for Evidence: Summary of responses

We received a total of 31 written responses to our Call for Evidence which closed in February 2021 and the CEO had discussions with two firms. Responses came from a cross section of attorneys, firms and other stakeholders. The quality of the responses was very high and we appreciate all of the input provided.

Below we set out a summary of responses to each question.

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?

The majority of respondents pointed to the impact of Brexit as one of the most significant factors affecting the intellectual property market. Concerns expressed included a reduction in demand due to the potential reduction in UK manufacturing or as a result of overseas clients opting to use a European firm to handle their European intellectual property matters. Many firms have opened new European offices in response or put in place collaborative arrangements which will enable them to continue to appear in front of the European Union Intellectual Property Office and therefore retain clients. It was however noted by some respondents that this would also create complexity and the potential for regulatory conflicts across different jurisdictions. Several respondents also pointed to the IP aspects of trade deals and the potential opening of the Unified Patent Court (of which the UK is no longer part) as factors likely to impact the IP market.

The impact of domestic market changes was another significant theme in the responses. Several respondents pointed to consolidation in the market with smaller firms potentially being edged out and larger firms focusing on higher value clients. Others saw opportunities for smaller firms that are able to offer a personalised client service. Respondents also pointed to increasing competition from outside the traditional IP sector (from large full service law firms or accountancy firms) and from the growing unregulated sector, both within the UK and abroad through the increase in online delivery models in response to the relatively liberal regime in the UK and the ability to file and appear in front of the IPO without professional representation. In particular, CITMA noted that IPReg needs to be mindful of the risk of driving people out of regulation. In order to compete, a small number of respondents felt that IP firms should broaden their service offering to a full service model. Many respondents commented that the regulatory regime needs to be flexible enough to support people to compete while also ensuring that quality standards remain high.

IP Inclusive emphasised the importance of Diversity and Inclusion, both in terms of the regulatory and commercial factors (with clients increasingly demanding more of their professional advisors in this area) as well as what they consider to be a clear moral case for action in this area.

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

Many respondents pointed to the developments in Artificial Intelligence as a primary source of disruption. The use of machine learning for patent and trademark searches is increasing and while some respondents commented on the inferior quality of these services (as compared to human

search), other respondents noted the extent to which they are improving and have the capacity to expand beyond search to advice provision.

Other trends referenced included the increase in digital translation services, commoditisation and offshoring.

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?

The majority view was that the regulatory arrangements should support flexible working but did not need to necessarily characterise attorneys based on their working pattern. Respondents generally considered that such an approach would risk driving too much complexity in the regulatory arrangements and the majority felt consistency of regulatory standards irrespective of working pattern to be critical. One respondent noted that the key questions to be considered in relation to flexible working are the type of work you are doing and whether PII is required. This respondent also urged IPReg to mirror the SRA's approach in terms of permitting solicitors to provide non-reserved legal services to the public from outside a SRA regulated firm.

Other specifics raised in the responses included the practical matter of supervision in light of increased remote working and the need for IPReg to provide as many of its own services online as possible.

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?

Respondents highlighted a number of areas in which law tech is likely to be used in the sector: use of AI in searching, watching and filing of IP rights, legal document drafting automation, case management systems, knowledge and research tools. One respondent noted that technology would increasingly be used to predict case outcomes to determine which has the most likelihood of success and where.

Several respondents felt that IPReg should keep itself updated on developments in law tech in order to monitor risks but it was not the role of the regulator to prescribe the use of certain technologies. The majority view from respondents was that service providers should be clear with clients where they are using AI and machine learning and that regulated persons should be held accountable.

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?

Around a third of respondents commented on this question and a range of different issues were raised. These included:

- Cost of regulation – those that commented on the fee structure felt that it was fair. One respondent felt the current costs were “tolerable” while another felt that IPReg’s costs could be reduced by moving to a lower cost operating model
- More visibility needed of the disciplinary procedure and case details could be anonymised and retained to provide guidance to the regulated community
- PII – alternatives to PAMIA needed for those with small businesses as the current alternative providers focus on PII for larger firms
- Need for checklists and guidance to assist sole traders with compliance. Sample policies and procedures in areas such as AML would be helpful

CIPA reported that some firms find the initial registration as a licensed body “overly complex and burdensome”. They commented that the process is tailored for larger entities (with requirements for a Head of Legal Practice and Head of Finance and Administration) and does not recognise that smaller firms operate very differently from their larger counterparts, with one or two people fulfilling a number of roles. CIPA offered to set up a focus group of small firms to help IPReg understand how the application process can be improved.

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?

Many of the responses cited commercial rather than regulatory barriers as the dominant factor. However several respondents provided examples of regulatory barriers that might be removed, including:

- Client money rules – are they necessary given that client money held largely related to fees and disbursements? One respondent queried the impact they may have on ability to compete with European firms as they were not aware of similar rules applying to for example German attorney firms
- Requirement for IPReg regulated firms to have a UK registered attorney – could the regime be opened up to European and foreign attorneys providing services in the UK?
- PII – an attorney should be allowed to carry out unreserved services to the public (and retain their individual registration) without PII so long as the client is aware of the position

A firm raised the matter of mutual recognition of qualifications attained in jurisdictions outside the UK, where these are of an equivalent standard to those required in the UK. Another respondent noted the alignment of our rules with other regulatory regimes to support the development of mixed practices.

The IP Federation also called for clarity on the need for registration as an individual and a practice when acting as a consultant or sole practitioner.

CITMA expressed support for alternative routes to enter the profession so long as standards are maintained. It also called for a review of the process to become a licensed body, including a look at whether the process could be expedited and costs reduced.

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

Of those that answered this question, the majority commented that new firms are most likely to come from attorneys leaving existing (most likely larger) firms. A smaller proportion of respondents considered that new entrants are most likely to be law firms expanding their offering to include intellectual property services.

The majority of respondents felt that the key barriers were commercial in nature (client demand, advertising costs etc) and not regulatory. A small number of respondents stated that access to good quality attorneys was an issue in setting up a new firm. One respondent pointed to the challenging PII environment but would not want to see a change in the MTCs. A small number of respondents called on IPReg to do more to support new firms, with IP Inclusive stating the importance of ensuring that no unfair barriers are imposed.

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

Over half of respondents commented on this question, with several providing detailed comments on how the existing system and courses could be improved mainly in regard to the relevance of the content and some specific issues with the FD4. CIPA stated that the qualification requirements for patent attorneys are currently under consideration as part of the Mercer Review which is due to report soon. CITMA expressed support for 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 they are aligned. CITMA also raised the need to look at consistency across the wider legal services sector and establish whether there is any risk that individuals are attracted to other routes.

One of the common issues raised was the litigation skills certificate, including whether or not it is a necessary requirement when many attorneys do not conduct litigation. A small number of respondents commented that if litigation skills remain a requirement, they should be assessed before the point of registration. One training provider submitted that the current requirement to undertake the Basic Litigation Skills Course within 3 years should be retained on the basis that many of the skills learned and practised are of general application. The response concluded that the requirement to complete an Advanced Litigation course before attending a further course to obtain Higher Rights of Audience is an “unnecessary impediment to practising as a Higher Courts advocate, particularly in IP cases.”

Another training provider agreed that the 3 tier litigation certificate system (Basic Litigation, Higher Courts Litigation and Higher Courts Advocacy) is unfit for purpose, albeit on a different basis. This provider suggested that there is a case for having a system of the Higher Litigation and Advocacy Certificates only.

Several respondents commented on the importance of maintaining high standards and the need to quality assure education providers. IP Inclusive commented that education providers should carry

out EDI assessments on relevant aspects of their processes - in particular to ensure that individuals are not discouraged from seeking reasonable adjustments.

A small number of respondents suggested IPReg considers an apprenticeship route.

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

The majority of those that responded to this question did not consider that additional providers were needed. Some felt that there was already sufficient choice while others were concerned about the impact increasing the numbers – both in terms of standards and also the risk of creating a “bottle neck” at the point of qualification.

Of those that supported increasing the number of education providers, the IP Federation felt that a broader availability of academic courses (including outside London) was important to address the perception of a ‘closed shop’ in relation to existing providers. The response also commented that distance learning should be embraced and assessment should involve practical coursework. One individual suggested that a review of LLM courses could be useful with a view to developing a separate module which could sit alongside LLM courses.

IP Inclusive welcomed the notion of increasing choice as way of improving accessibility – particularly in relation to socio-economic status, disability and neurodiversity.

The CITMA response stated that more competition is needed and it may be that different routes are required, with a clear set of requirements set by IPReg.

CIPA confirmed in its response that the Mercer Review will also include evidence relating to the education and training market and how this might evolve in the future.

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

A number of specific suggestions were made by respondents, including:

- Client money requirements are disproportionate and create unnecessary costs as well as increasing the risk that money is paid into the wrong account (due to the complexity of operating a client and office account). One firm’s response expressed support for a review of client money regulations on the basis that the majority of client money held is in relation to fees paid in advance and amounts to the low thousands. It suggested a de minimis of between £5-10k where the client money rules do not apply in order to reduce the admin burden while providing appropriate consumer protection. CIPA took the view that the rules and guidance could be rewritten so that the “payment of an invoice in respect of fixed fees and/or disbursements in advance” is not considered client money. They consider this to be an area where a principles based approach is suitable.
- Two other respondents commented on the client money rules in response to this question, with one suggesting that firms be allowed to have insurance cover for client money rather than be required to hold the money in a separate account. One respondent also highlighted the related issue of balances on client accounts and whether there could be a change to

allow small balances to be donated to charity if all reasonable efforts to return the funds to the client had been exhausted.

- The current requirement to obtain an Intellectual Property (Basic) Litigation Certificate should be made optional. One firm's response suggests that if this remains a requirement - the rules need to be clarified, including the legal basis.

The IP Federation noted that employees doing only corporate work are largely overlooked in the current arrangements – including insurance for pro bono work as PAMIA will not cover corporate work.

A small number of respondents made suggestions in relation to fees including the removal of an additional fee for attorneys appearing on both registers and introducing a single fee for all attorneys (rather than the current differential between private practice and corporate).

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?

Many respondents queried whether this change is necessary with most respondents expressing concern about extending the range of services beyond IP affiliated services due to the potential competition impacts. CIPA in particular commented that it would not want to see the permission of activities outside the scope of the Legal Services Act. The IP Federation suggested that the impacts on Legal Professional Privilege need to be considered. CITMA as with several other respondents expressed concern about the potential impact on PII premia and queried evidence that such a change is necessary including evidence of demand.

One firm's response noted that "a wider range of services that provide a bespoke business packages to clients and consumers are good, as long as it is clear what is being offered". The response suggested IPReg carefully consider the associated issues including regulatory overlap and PII – and that further consultation is needed with the profession. Similarly, another firm's response noted that "freedom to offer non-legal services may, with appropriate safeguards, promote innovation and competition" but also cautioned against the risks to the small IP profession which may be absorbed by a larger regulated profession – for example, general law firms, or large accountancy or consulting firms. To guard against this, it was suggested that it may be necessary to stipulate that only a certain percentage of a firm's activities may relate to non-legal IP services.

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

A small number of respondents made specific suggestions for what should be included in rules and suggestions were varied. They included:

- Education and training

- CPD
- PII
- Conduct and disciplinary
- Supervision of trainees
- Disbursements and hidden fees
- Use of titles
- Behaviour in Court/generally
- Client money

The vast majority of respondents did not make any suggestions and a small number expressed support for a Principles based approach. One firm commented that as few issues as possible should be subject to detailed rules and while guidance can be helpful, it should recognise there is more than one way to comply.

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

Of those respondents that commented, most thought that the issues covered by the current Code were the right ones: integrity and standards of behaviour towards other professionals, clients and the court. One respondent noted the business to business nature of IP work made it particularly suitable for a principles based regime. Many respondents noted the need for guidance and support for the profession.

The IP Federation suggested something based upon the code for solicitors but modified to keep matters in proportion dependent upon our different types of practice. IP Inclusive commented that in reviewing its regulatory arrangements, IPReg should seek out opportunities to lead by example and encourage the development of a truly diverse profession.

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?

Responses to this question were mixed, with some respondents favouring retention of the current system and others supportive of a more flexible or hybrid approach.

Both CIPA and CITMA expressed support in their responses for retaining an hours based system while also noting the need to consider whether there could be a greater role for reflection/assessing the impact of learning on practice.

Reasons provided by respondents for retaining the current system included simplicity and ease of evidencing compliance with some respondents commenting that even within a more flexible system (as adopted by the SRA), many practitioners choose to continue to follow the previous hours based

requirement. Concerns were expressed by some respondents as to the perceived additional burden of a more reflective approach and queried the evidence of the effectiveness of such schemes.

Many respondents also felt that the hours requirement could be applied consistently to all – with appropriate reductions being made for parental leave (but not part time working). CIPA commented that the issue of Continuing Competence was far wider than CPD and had been included in the Mercer review on which it would soon be reporting. Some suggestions were provided by respondents for how an hours based system might be improved including a requirement that a certain proportion was completed externally and a wider range of fields are covered (to avoid ‘box ticking’).

Those that favoured a more flexible system consider it to be a more modern approach and one that could be tailored to an individual’s practice and needs. Several respondents referred to the SRA approach and the importance of consistency given the number of attorneys employed in SRA firms. Another respondent pointed to other sectors such as accountancy where CIMA has never had an hours based system. IP Inclusive, as in its submission from 2017, urged IPReg to maintain a self-certifying CPD scheme, in which it is up to individuals to decide what constitutes valid CPD in the context of their own working arrangements and that any detailed requirements should only be introduced after careful impact assessment. IP Inclusive also urged IPReg to encourage take up of D&I training as part of CPD - including unconscious bias, leadership and management and safeguarding mental wellbeing.

One additional suggestion in relation to competence was to ensure that attorneys report poor practice to IPReg.

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

A number of additional issues were raised:

- Recruitment costs and insufficient movement of attorneys within the profession
- Query around the IPO’s new address for service requirements and the impact of requiring a UK only address
- Issue of German/foreign lawyers – Registered Foreign Lawyers (RFL)
- IPReg visibility - should notify registrants of any rule changes by email and more focus should be given to regular communications with the regulated community, e.g. newsletters
- Streamlining of the disciplinary process with CIPA emphasising the need to reduce costs at each stage and increase transparency and others focusing on the need to share disciplinary process/personnel with other regulators
- Need for clarity on the position regarding corporate attorneys and pro bono (IP Federation)

The IP Federation noted the LSB’s comments regarding the lack of an evidence base and offered to work with IPReg to build one.

IP Inclusive emphasised the importance of Equalities Impact Assessments in the review and offered to continue to work with IPReg to assist with these issues.