



Fran Gillon  
Intellectual Property Regulation Board (IPReg)  
20 Little Britain  
London  
EC1A 7DH

Sent by email only to [info@ipreg.org.uk](mailto:info@ipreg.org.uk)

22 March 2022

Dear Fran,

### **Consultation: Regulatory Arrangements Review**

The Legal Services Consumer Panel (Panel) welcomes the opportunity to comment on IPReg's regulatory arrangements review. We have tried to answer the consultation questions which address areas where the Panel has specific information or expertise below.

#### **Consultation question 1: What are your views on our Impact Assessment and specifically the impact of our proposals in relation to equality, diversity and inclusion?**

The Panel is pleased that IPReg has considered the impact of its proposals on the applicable regulatory objectives as well as on different stakeholders. While it does not appear there is targeted data covering areas that may be affected by each proposal, it is important to consider the impacts carefully based on any information that is available.

While we appreciate that individuals are not the "average" consumers in this area of law, the Consumer Panel's annual Tracker Survey has consistently shown that individuals from ethnic minorities are more likely to shop around for legal services (40% of ethnic minority consumers did as compared to 27% of White British consumers in 2021)<sup>1</sup>. In addition, ethnic minority consumers placed more importance on price (75% versus 69%) and on whether a provider had a quality mark (65% versus 50%) than White British consumers when choosing legal services providers. Therefore, minority ethnic legal services users would benefit from the increased transparency that IPReg's mandatory directive should bring about.

#### **Consultation question 2: What are your views on the eight Principles we have set out?**

It appears that many of the principles set out reference the statutory objectives for regulation contained in the Legal Services Act, 2007. The Panel has concerns about the use of the word client with no reference to the consumer. While the glossary helps clarify this slightly by defining a client as including "the principal on whose behalf a regulated person acts as agent and includes any person for whom the regulated person is address [sic] for service for

---

<sup>1</sup> LSCP, 2021 Tracker Survey, <<https://www.legalservicesconsumerpanel.org.uk/what-we-do/research-and-reports>>.

any right regardless of the nature of any current relationship”<sup>2</sup>, this wording is lacking. It leaves out any reference to attorneys enabling legal services consumers to be treated fairly in the market before they are considered “a client”, including how their actions may affect competition and access to justice. A principle that encompasses these ideas would reinforce the reasoning behind the mandatory transparency directive.

**Consultation question 3: What are your views on the Code of Conduct – does it capture the right requirements or is there anything missing?**

Generally, the Panel would like to see a commitment to increased transparency for the consumer prior to engagement explicitly spelled out. It is important that IPReg has chosen to have the Client Care section of the Code of Conduct include the obligations to ensure publicity is “accurate, fair and not misleading” and that “[c]lients receive sufficient and clear information about ... work and costs, both at the time of engagement and, when the context applies, as work progresses”. However, it would be useful for this obligation to start prior to engagement so that consumers can rely on the information they are provided with when shopping around. This is especially true as this type of information is different from advertising or publicity. Again, this obligation would also tie in with the mandatory transparency directive and is underscored by the ideas that were highlighted as missing from the Principles section in question 1.

In addition, while it is a positive development to clearly state obligations to report referral arrangements with other firms, this information is really only meaningful if it is provided when consumers are making decisions about which service provider to engage. Users of intellectual property legal services are often more sophisticated than the generality of legal service users, which would mean that full disclosure of referral arrangements prior to engagement is more likely to provide useful information than cause confusion or information overload. If this information is only provided after a decision to engage has been made, it is enlightening but less useful in empowering the consumer to make the best decisions.

**Consultation question 5: What are your views on the proposed approach to the definition of client money and the requirements included within the Code? Do you think we have missed any benefits or risks in our analysis?**

The Panel is pleased that patent attorneys and trade mark attorneys, and consequently their consumers, will now have the option of using a third party managed account for client money as this offers the greatest amount of protection for consumers’ money. We do, however, have concerns about shrinking the definition of client money and the effects this might have on consumers.

Though there does seem to be some evidence that claims of negligence or wrongdoing in this area of law are rare, the question of proportionality must also take into account the nature of legal services where a consumer may not know whether a lawyer has performed the work agreed upon or whether it was completed to the appropriate standard. While it may impose an administrative burden to attorneys and firms, this must be balanced against the protection provided to the consumers of intellectual property legal services. Specifically, the consultation states that consumers can still make claims through professional indemnity insurance or the compensation fund but does not note that bringing a claim regarding professional negligence is a much larger effort involving requiring more money and time than a simple monetary claim. In addition, we note that claims made to IPReg’s Compensation Fund are made on a discretionary basis and claims made to the Legal Ombudsman are subject to a significant delay. Finally, agreeing to pay money in advance based on an agreed upon work schedule is not the same as paying for work already done. There is always the risk that the work does not get done due to unforeseen circumstances or does not get done on time or to an adequate standard. If the money paid in advance for

---

<sup>2</sup> IPReg Regulatory Arrangements Review Glossary of Terms (Annex B) at p. 1.

these services is no longer considered client money, there is little to protect the consumer's interest. Furthermore, if a business becomes insolvent, money paid in advance might not be protected at all. Even if the risk is reduced if a work schedule is agreed, the consumer is still subject to risk.

Even for money paid in advance for disbursements that are to be used according to an agreed and strict timetable, it may be useful to consider whether strict reporting requirements should accompany any change in how funds paid by clients in advance are treated. If this disbursement money is considered to be firm money rather than client money, the client must be notified as these payments are made.

The Panel is pleased to see that IPReg is attempting to grow its evidence base regarding the amount of money held by its authorised professionals and firms as well as the levels of money that is unclaimed by clients.

### **Consultation question 7: What are your views on our proposals in relation to CPD?**

The Panel would like to see continuing professional development move beyond purely subjective self-analysis into some more objective criteria where feedback from others is incorporated into continuing professional development through appropriate engagement with consumers, colleagues and peers representing other parties. Consumer feedback is particularly important in improving the service they provide to their clients. By relying on self-evaluation alone, attorneys who are most in need of additional knowledge and upskilling may be least likely to identify their needs. In addition, further guidance on what should be considered in a self-assessment is needed to ensure that interactions with consumers and the importance of recognising vulnerability are viewed as key parts of a competent attorney's skillset. This links to one of the Panel's current areas of interest, on establishing objective quality indicators for all legal services to aid consumers in selecting and using them.

By limiting proactive checks to the completion of a training record, IPReg may be missing an opportunity to ensure a high standard of work from its regulated legal professionals. Formally making the fulfilment of continuing professional development requirements a pre-requisite for a practising certificate could be an effective enforcement mechanism, yet it cannot ensure competence unless the requirements are strong enough to ensure competence on their own. The Panel would also like to see IPReg review its plans on CPD once the LSB releases its final policy statement on ongoing competence.

Building flexibility into any continuing professional development program is important but we must disagree that flexibility in the way a patent attorney or trademark attorney complies with continuing professional development requirements alone is likely to have any significant effect on diversity.

### **Consultation question 9: What are your views on the principle that all attorneys should obtain basic litigation skills before the point of admission? How do you think this could work in practice?**

The Panel feels strongly that newly qualified patent or trademark attorneys should be equipped with the knowledge and skills needed to serve their clients in a professional capacity from day one. Stakeholder engagement has appropriately informed the view that basic litigation skills are essential to all attorneys in order to be able to provide complete and high quality advice, therefore IPReg is obliged to ensure that this requirement is put into place at the most appropriate time. Enforcing this requirement is easier and more effective at the time of registration and will allow attorneys to meet or exceed consumer expectations of professional legal advice, as opposed to having consumers bear the risk of receiving poor or incomplete advice. A plan to monitor and evaluate the results of this policy change should consider information from attorneys as well as consumers.

**Consultation question 11: What are your views on how the proposed transparency requirements might work in practice for both regulated attorneys and consumers of IP legal services? Are there any particular elements of it that might be costly or difficult to implement?**

The Panel has advocated for mandatory transparency guidelines on both price and quality indicators for many years. Consumers cannot make an informed choice of providers without having this information prior to engagement. Intellectual property legal services consumers are in general more likely to be relatively sophisticated in their understanding of the service they are seeking, and more likely to be repeat customers. They are in general able to make use of this information to make better choices about their service providers. While individuals are not the average consumers in this area of law, it is also important to note that consumers who use the services of a patent or trademark attorney are more likely to shop around (44% for patent attorney clients and 50% for trademark attorney clients compared to 29% of solicitor clients, according to our latest Tracker Survey).<sup>3</sup>

In addition, given that IPReg has identified a real risk to consumers in the way foreign exchange fees, uplifts or administrative charges are dealt with, it may be worth collecting some data to investigate if there is any consumer detriment occurring and whether a stronger approach such as strict guidance or rules are needed in this area. Additional evidence from intellectual property legal services consumers may be needed as firms are providing evidence in response to this consultation even after the call to evidence and their perspectives are being considered. In order to respond proportionally, there must also be a detailed understanding of the views of consumers of attorney's services.

Although there is some mention of it in the guidance, we are surprised that there is so little reference to the importance of information about quality in this part of the document. Information on price alone, however carefully put together, is not sufficient to give consumers enough information with which to compare different providers and to make their choice based on measurements of quality as well as the price of the service. We believe that more work needs to be put into this part of the policy.

**Consultation question 12: What are your views on our proposal to introduce independent case examiners to our disciplinary process?**

Independent case examiners being used at the second stage of the disciplinary process could help to give appropriate emphasis to the significance of the disciplinary matter. These independent case examiners should also have expertise in investigating these types of cases.

**Consultation question 13: What are your views on our proposal to widen the range of consensual disposal options and therefore increase the option to dispose of a case at an early stage in order to reduce the cost and burden of regulation? Are there any sanctions which should be reserved to the disciplinary tribunal only?**

It is the Panel's understanding that the disciplinary process does not provide any kind of restitution for the consumer's loss. Given this assumption, providing increased opportunities to resolve a disciplinary action may still be beneficial if cases are resolved more quickly so that the consequences of bad behaviour are not delayed. Having said that, it is important that avenues for early disposition of a case do not allow an attorney who is being disciplined to get off with a lighter penalty if they admit to some misconduct. It is also important that re-entry to the register following removal or suspension is subject to careful consideration of the attorney's continuing good character and suitability to practice.

---

<sup>3</sup> LSCP, 2021 Tracker Survey, <<https://www.legalservicesconsumerpanel.org.uk/what-we-do/research-and-reports>>.

The Panel views discrimination or taking advantage of a vulnerable client to be very serious misconduct which should be treated accordingly to ensure that the gravity of such behaviour is clearly communicated.

**Consultation question 14: What are your views on our proposal to widen the pool of professional panel members to include non-attorneys?**

The Panel appreciates the practical challenges that IPReg is facing in ensuring the smooth and efficient running of a disciplinary scheme. Using professional panel members who are legally qualified, but not attorneys, does seem appropriate given the difficulty in recruiting attorney panel members. The Panel would like to suggest that if a technical adviser is available, these professionals may not even need to be lawyers.

The Panel does see a synergy in pooling lay panel members with other regulators. Some experience with consumer affairs would help ensure these people have relevant expertise to judge a larger proportion of cases.

**Consultation question 15: What are your views on our proposal to introduce new powers for interim orders?**

The Panel is pleased to see the introduction of powers for interim orders which could suspend or limit the registration of an attorney or firm that is shown to be an immediate and serious risk of harm to clients or their money. Such a process may allow for quick action to protect consumers from further harm because it can be sought at any stage during the disciplinary process. Beyond being of assistance to the clients of an attorney subject to an interim order, such orders would also prevent the attorney from taking on new clients and provide an additional deterrent against unethical or unprofessional behaviour.

Finally, the Panel would like to note that it is important to publish all disciplinary decisions in an accessible way so that consumers have access to this information directly or through intermediaries such as digital comparison tools.

**Consultation question 17: What are your views on the proposal to introduce a regulatory sandbox for PII?**

The Panel agrees that PII is an important regulatory protection for consumers and that where an attorney is providing services to the public, that attorney must carry PII that is commensurate with the risk profile of their work. We understand that attorneys obtain PII that meets IPReg's MTCs via only two firms, one of which is a mutual fund insurance provider who will not offer insurance to ABSs. Given that ABSs only have one option for obtaining PII and the current hard insurance market, the Panel is pleased to see IPReg exploring alternative options via a PII regulatory sandbox for these firms or sole practitioners that cannot secure PII. These may include less coverage than the MTCs or an adjustment to how the firm or attorney works that could affect the risk profile.

We understand from our meeting with you that you expect insurance companies to carry out risk assessments to see if they can provide a PII policy (even if it does not conform to the MTCs), which must then be subjected to approval by IPReg. The aim is to explore different ways of ensuring that all firms and attorneys can obtain PII which will allow consumers access to compensation. The hope is that specific solutions can be tried and inform a review of the MTCs and how to focus on implementing targeted insurance solutions for those who are currently unable to obtain it.

We welcome this innovative approach to a tricky problem. The Panel would encourage IPReg to publish the results of this sandbox widely as it could be an important resource for the sector, as all legal professionals are being challenged by the hard market in PII.

**Consultation question 18: What are your views on the proposed changes to the practising categories?**

The Panel would like to see more evidence on what the effects of changing IPReg's practising categories would be. Limiting the requirement to carry PII just to attorneys who serve the public makes it critical to have the right definition of "public". The two possible suggested definitions would produce very different results and the effects appear to be largely unknown.

How the public is defined could have huge consequences, whether the public is defined as anyone other than an attorney's employer or according to the following definition:

- a) an individual;
- b) a business or enterprise that is a micro-enterprise (European Union definition);
- c) a charity with an annual income net of tax of less than £1 million;
- d) a club/association/organisation, the affairs of which are managed by its members/a committee/a committee of its members, with an annual income net of tax of less than £1 million; or
- e) a trustee of a trust that has an asset value of less than £1 million.

Reducing PII coverage could impose consumer detriment and should therefore be only done where the benefits outweigh this serious consequence, which in our view would be a difficult standard to meet.

In conclusion, it is important for IPReg to continue building its evidence base on the types of consumers that are served by attorneys. It may also be helpful to investigate how many of the business clients are small or micro businesses as their resources and needs also often differ significantly from other larger businesses. Given the importance of this information, it may be worth considering collecting some basic data annually from attorneys when they submit the required documentation to renew their registration.

Finally, the Panel welcomes the stepped approach to these changes to regulatory arrangements by having a call for evidence followed by this consultation on proposals. The Panel believes that it is crucial that there should be a clear cycle of research, consultation and post implementation research and evaluation. This ensures that the impact of change on consumers in particular is known and fulfils the objectives of the change, and that any unintended consequences are identified and addressed.

We hope you find these comments helpful. Please contact Heidi Evelyn, Consumer Panel Associate, should you have any enquiries.

Yours sincerely,



Sarah Chambers  
Chair  
Legal Services Consumer Panel