

LSB Consultation

Draft statement of policy on ongoing competence

The Chartered Institute of Trade Mark Attorneys (CITMA) is responding to the consultation by the Legal Services Board in its capacity as an Approved Regulator, 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.

The review of the consultation and preparation of this response has been conducted by the Education, Qualification and Standards committee of CITMA on behalf of the CITMA Council.

Q1. Do you agree with the proposed outcomes?

We understand that the specific proposed outcomes of the consultation are to have the regulator carry out the following:

- Set the standards of competence that those they regulate should meet at the point of authorisation and throughout their careers.
- Regularly assess and understand the levels of competence within the profession(s) they regulate and identify areas where competence may need to be improved.
- Make appropriate interventions to ensure standards of competence are maintained across the profession(s) they regulate.
- Take suitable remedial action when standards of competence are not met by individual authorised persons.

Our understanding is that our regulator, the Intellectual Property Regulation Board (IPReg), already carries out these duties and we do not object to them continuing to do so.

Q2. Do you agree with our proposed expectation that regulators will demonstrate that evidence-based decisions have been taken about which measures are appropriate to implement for those they regulate?

We anticipate that the regulator will provide evidence to support its decisions where available and, where it is not possible to provide evidence, by virtue of the nature of the matter itself, we hope that the LSB takes into account reasoned responses.

It is necessary to approach this whilst considering what is appropriate and proportionate. We would not want a bar or threshold to be set so high in respect of evidence gathering that achieving compliance would be overly time consuming and/or costly.

Q3. Do you agree with the LSB proposal that each regulator sets the standards of competence in their own competence framework (or equivalent document(s))?

Our preferred position would be to have the regulators for each specialism create their own competency framework. As identified in the policy document, IPReg already has a competency framework in place for those it regulates.

Further, many in the profession are dual qualified (solicitors and Chartered Trade Mark Attorneys) and already have two separate regulators so are used to specific regulations and standards of competence for different parts of their work.

Q4. If not, would you support the development of a set of shared core competencies for all authorised persons?

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Q5. Do you agree with the areas we have identified that regulators should consider (core skills, knowledge, attributes and behaviours; ethic, conduct and professionalism; specialist skills, knowledge, attributes and behaviours; and recognition that competence varies according to different circumstances)?

Yes.

Q6. Do you agree with the LSB proposal that regulators adopt approaches to routinely collect information to inform their assessment and understanding of levels of competence?

Our understanding is that IPReg already does so. Further information is provided on this below.

Q7. Do you agree with the types of information we have identified that regulators should consider (information from regulatory activities; supervisory activities; third party sources; feedback)?

Information from regulatory activities

IPReg collects a variety of information on both entities within the profession and on individuals. This information falls within the parameters mentioned in the consultation document (regulatory returns, first-tier complaints and thematic reviews). These activities also include random auditing of CPD to ensure compliance and failure to comply can lead to suspension from the Register for up to 3 months. The analysis of this data is summarised in the Annual Reports issued by IPReg.

Supervisory activities

Paragraph 62 of the consultation document notes as follows: “[The panel] said that spot checks should be adopted in areas of law where consumers face increased risks” in reference to ‘supervisory activities’.

As has been noted elsewhere in this document, trade mark law does not fall within the ‘high risk’ categories of law set out in the consultation document. As such, supervisory activities of the type described in the consultation document would not seem to be appropriate or proportionate for Chartered Trade Mark Attorneys.

Feedback from various sources

We have concerns regarding the implementation of peer reviews. The profession is very small and so truly independent peer review would be challenging. Further, peer review between firms comes with potential confidentiality and also potential future conflict issues.

In terms of feedback from clients there is concern regarding the likely level of response from clients. Most firms already gather client feedback for industry review boards such as IPStars, Marques, etc., and significant effort and time is spent in obtaining this.

Realistically, an increase in these requests may not result in much of an increase in feedback being provided or increase the quality of the feedback being provided. There is also concern that persistent requests may disrupt previously good client relationships (given that clients are already approached for feedback).

Obtaining further compulsory feedback would require a significant and potentially disproportionate amount of time and cost.

Where a client has a bad experience, we find that this is usually fed back quickly, either internally, using the complaints provisions in place within firms, or to the regulator.

We would support greater publicity of the recourses open to clients by IPReg and would support campaigns designed to encourage feedback, good or bad.

It should be noted that, in terms of peer review and client feedback, we have focused primarily on private practice. In terms of those members of the profession operating in other types of roles, particularly those with in-house positions, requiring peer review or providing compulsory client feedback would, in many cases, not be feasible.

Information from third parties

Information from sources such as the Legal Ombudsman is considered as part of the Annual Reports collated and published by IPReg.

In terms of the comments made under paragraph 66 of the consultation document, we would note again the generally low risk nature of trade mark law.

Q8. Are there other types of information or approaches we should consider?

At present the nature of CPD required by an individual is understood to develop over time depending on your level and on your area of specialism. Previously a training diary of sorts was kept and submitted with the declaration. If what is required of the profession is greater granularity on the self-learning taking place, then perhaps re-instating a similar diary system may be an option.

We are aware that this type of scheme has already been suggested as part of the Regulatory Arrangements Review Consultation being conducted at present by IPReg.

Q9. Do you agree with the LSB proposal that regulators should be alert to particular risks (to users in vulnerable circumstances; when the consequences of competence issues would be severe; when the likelihood of harm to consumers from competence issues is high)?

Yes. We would also note that the area of law in which Chartered Trade Mark Attorneys are entitled to act is comparatively low risk. This area of law is not commonly involved in personal liberty, criminal, immigration, family law, mental health advocacy, or other areas of law that may be considered 'high risk'. Further, it is involved in public policy matters only so far as they relate to commerce and trade.

Direct UK clients are most commonly businesses and not individuals. Further, it is not routine (inherently part of the services provided) for Chartered Trade Mark Attorneys to work with vulnerable clients.

Nevertheless, consideration for potentially vulnerable clients is already written into the Code of Conduct set out by IPReg under Rule 6.1.: “*Extra care should be taken when dealing with potentially vulnerable clients such as private individuals and in particular where there may be risk factors related to a person’s circumstances (e.g., bereavement, illness or disability, etc.) which increase the likelihood of the client being at a disadvantage or suffering detriment.*”

Q10. Do you agree with the LSB proposal that regulators adopt interventions to ensure standards of competence are maintained in their profession(s)?

Our understanding is that our regulator already does so. General information on recent interventions are summarised in the Annual Reports issued by IPReg. More detailed reports of interventions for individual instances are published on IPReg’s website under ‘Disciplinary Findings.’

Q11. Do you agree with the types of measures we have identified that regulators could consider (engagement with the profession; supporting reflective practice; mandatory training requirements; competence assessments; reaccreditation)?

We would agree with engagement with the profession and continuing to use a self-reflective practice approach. IPReg already have random auditing in place for the CPD declarations. As such, this practice is well established in the profession.

We believe there are some potential issues with mandatory training as this would differ significantly depending on the level, role and situation of an individual practitioner and would be difficult to regulate.

Competence assessments and Reaccreditation

We would not agree that reaccreditation as standard across the profession is necessary or proportionate. The rationale behind using a reaccreditation model in other professions, such as in the medical profession, has been, as is referenced in the consultancy document, based on the potential risks posed to the public.

As has been noted above, the potential risks posed to the public by Chartered Trade Mark Attorneys falls significantly below those posed by medical professionals. They also fall well below some of the risks posed by other areas of law. Reaccreditation would cause significant disruption and cost to firms (and ultimately to clients) which would be disproportionate to the risk profile of the profession.

For example, a formal reaccreditation system may require taking external courses, preparing for exams and external interviews, etc. It would likely be necessary to incur not insignificant costs in order to complete these different elements. Further, in order to prepare for and complete these different processes, individuals may be required to take significant time away from practice, which could impact the running of firms, increase costs and impact clients.

The resources of firms are not unlimited both in terms of income and in terms of personnel. Chartered Trade Mark Attorneys most commonly take their qualification courses and exams whilst in full time employment, rather than studying in full time education and then completing their qualifying work experience separately, as is

usually the case for solicitors and barristers. It is, therefore, already necessary for those in training to be absent from work for a certain amount of time in the years when they are attending the qualification courses.

The cost of this in course fees and loss of hours is usually borne by the firm or business in which an individual is training. To also have senior staff taking absences from work may put undue burden on firms; it is possible that some firms would have to take on additional staff in order to ensure that there is no drop in quality or consistency of services to clients.

In terms of those in in-house positions re-accreditation could have an even greater effect as those in IP roles often work in small legal teams and may be the only IP professional within a group.

Q12. Are there other types of measure we should consider?

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Q13. Do you agree with the LSB proposal that regulators develop an approach for appropriate remedial action to address competence concerns?

Our understanding is that our regulator already does so.

Q14. Do you agree that regulators should consider the seriousness of the competence issue and any aggravating or mitigating factors to determine if remedial action is appropriate?

Our understanding is that our regulator already does so.

Q15. Are there other factors that regulators should consider when deciding whether remedial action is appropriate?

None that we are aware of.

Q16. Do you agree that regulators should identify ways to prevent competence issues from recurring following remedial action?

Our understanding is that our regulator already does so.

Q17. Do you agree with our proposed plan for implementation?

Please see our answer to Q18 below.

Q18. Is there any reason why a regulator would not be able to meet the statement of policy expectations within 18 months? Please explain your reasons.

This depends on the extent of the changes made to the pre-existing system. If these are minimal, the 18 months would seem ample. If these are significant, then 18 months may not be sufficient.

The LSB is aware that IPReg is conducting a separate consultation in regard to its Regulatory Arrangements and any outcomes of that consultation will need to be aligned with the outcomes of this consultation.

This is a matter between the LSB and IPReg and so we cannot provide further comments on this.

Q19. Do you have any comments regarding equality impact and issues which, in your view, may arise from our proposed statement of policy? Are there any wider equality issues and interventions that you want to make us aware of?

No.

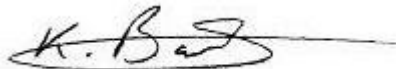
Q20. Do you have any comments on the potential impact of the draft statement of policy, including the likely costs and anticipated benefits?

This is a concern. As has been outlined above for some of the suggested options the cost both in a real sense and in loss of hours may be significant and may not provide the quality of result that is perhaps expected.
As has been noted any changes should be proportionate.

Q21. Do you have any further comments?

No.

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



Keven Bader
Chief Executive

7th March 2022