

Review of IPReg’s regulatory arrangements 2020-2021: IP Inclusive response to call for evidence



Working for diversity and inclusion in IP

1 Introduction

These submissions are made by the IP Inclusive initiative, in response to IPReg’s 15 October 2020 call for evidence in a review of its regulatory arrangements.

They are made on behalf of the UK-based IP professionals – including many registered patent and trade mark attorneys – who support IP Inclusive in its efforts to improve equality, diversity and inclusion across the UK’s IP sector.

2 General comments

We welcome the call for evidence and the opportunity to contribute to IPReg’s review of its regulatory arrangements. We also applaud the sentiments behind the review, as set out in the call for evidence – in particular IPReg’s intention to adopt high-level, broadly-stated regulatory principles where possible and to require evidence to justify prescriptive rules. The more flexibility available to professionals and their employers, in determining how they comply with the high-level principles, the more likely they are to be able to accommodate and nurture a diverse and inclusive workforce.

In line with IP Inclusive’s objectives¹, we especially support the removal of unnecessary barriers to entry into, or progression within, the UK’s patent and trade mark professions.

3 The importance of diversity and inclusion (D&I)

The call for evidence includes a section on “horizon scanning”, addressing the factors that are likely to impact on the way the legal services markets evolve over the next 5-10 years. We believe that diversity and inclusion (D&I) are such factors. Globalisation has caused professional advisers’ clients to become more diverse. We know from our Charter signatories (who include both private sector organisations and in-house teams) that clients want their suppliers to be more diverse too: increasingly we see them using D&I credentials in the evaluation and selection of business partners. Meanwhile in the world around us, an awareness of, and desire for, equality and inclusivity is growing rapidly, in particular among future generations of clients and professionals.

¹ See <https://ipinclusive.org.uk/about/our-mission-statement/>

Our input to this review is based on the premise that diversity and inclusivity are good for the patent and trade mark professions, and that a significant proportion of IPReg’s regulated community is of a similar mind. There is evidence², for example, that more diverse and inclusive organisations perform better; that their teams are more innovative and productive; and that they are more representative of, and thus better able to engage with, their client base. Greater cognitive diversity within a group – for example an organisation or profession – can help it to overcome impediments such as groupthink and confirmation bias, and thereby enhance its resilience in the face of changing commercial, political and social circumstances.

Inclusivity and respect within individual businesses, and within the professions as a whole, also help us to recruit and retain talented people and to get the best out of them. Diversity at the point of entry is vital to the professions’ long-term future: something that represents a barrier for certain groups of people could deprive us of excellent patent or trade mark attorneys who could contribute much to the sector. This would stifle our ability to develop, to the detriment of both the professions and their clients.

The regulatory objectives that underpin IPReg’s activities include the encouragement of “an independent, strong, *diverse* and effective legal profession” (emphasis added)³. This already provides an incentive to embed diversity and inclusion in all regulatory arrangements. Moreover, those objectives also include improving access to justice; protecting and promoting the interests of consumers; and promoting competition in the provision of legal services. Since a more diverse workforce tends to bring a wider range of perspectives and approaches, we believe it can help to achieve such objectives by nurturing diversity in the services available to clients and the business models through which those services are delivered.

Aside from these legal and commercial incentives, we also believe that it is the right thing, morally speaking, to work for greater diversity and inclusion in our sector.

It is for these reasons that we make the suggestions that follow.

4 The impact of the regulatory arrangements

The drive to improve D&I is relatively new to the patent and trade mark professions. Many of the sector’s embedded practices, including some to do with its regulation, were established at a time of limited awareness of the importance of D&I. Above all else, then, we believe it is vital at this point to review the effects of the existing regulatory arrangements on D&I, and to develop a better understanding of the impact of any proposed changes. This should involve gathering better evidence and also seeking independent expert advice where appropriate.

² See Annex

³ Legal Services Act 2007, Section 1(1)

We therefore urge IPReg, when reviewing and potentially updating any aspect of the regulatory arrangements, to take due account of its impact on diversity and inclusivity within, and the accessibility of, the patent and trade mark professions, including the diversity of business models and consumer choices within the IP sector.

We recommend that IPReg commission independent EDI (Equality, Diversity and Inclusion) impact assessments for this purpose, to ensure that its regulatory arrangements do not disadvantage, discourage, or present a disproportionate barrier to entry or progression for, any particular group of people.

5 Barriers to entry

5.1 General

Diversity, inclusion and access are particularly important in the processes by which people and their businesses qualify to be regulated by IPReg. These are the points at which downstream diversity, within the two professions, can easily be constrained.

With regard to the registration of individual patent and trade mark attorneys, it is important that assessment and qualifications systems do not disadvantage or discourage any particular person or group of people compared to others. IPReg has the power – and we believe the responsibility – to ensure that this is the case, by requiring the systems provided by accredited assessment authorities to be fair, inclusive and accessible.

In the interests of diversity and inclusivity in the patent and trade mark professions, we would therefore urge IPReg to commission independent EDI impact assessments when reviewing and if applicable updating these aspects of its regulatory arrangements.

5.2 The litigation skills qualification

We believe those impact assessments should embrace the litigation skills qualification that patent and trade mark attorneys are required to complete within three years of being entered onto the register.

In our February 2020 reply to the call for evidence as part of CIPA’s Mercer Review of the Education, Training and Assessment of UK Chartered Patent Attorneys⁴, we questioned whether the additional barrier imposed by this qualification is warranted, bearing in mind that many UK patent and trade mark attorneys will not subsequently conduct litigation in the tribunals to which the training is directed. An EDI impact assessment would help IPReg to understand whether such additional requirements disadvantage some individuals or businesses more than others, or compromise

⁴ See <https://ipinclusive.org.uk/wp-content/uploads/2020/02/2019-12-06-Mercer-Review-Call-For-Evidence.pdf> and <https://ipinclusive.org.uk/newsandfeatures/our-mercer-review-submissions/>

registered attorneys' freedom to select career paths and business models that are appropriately tailored to their interests, skills, and personal and professional circumstances. If they do, then IPReg should seek evidence with which to satisfy itself that the requirements are necessary in order to achieve the regulatory objectives, that they are proportionate, and that they work to the benefit of the regulated professions and their clients.

5.3 Regulation of entities

IPReg's regulatory arrangements also have the potential to impact on patent and trade mark attorneys' ability to put their professional skills into practice in a business context.

An EDI impact assessment of the arrangements for registering individual professionals should also extend to those for registering and regulating entities. IPReg should ensure that the arrangements for entities do not erect unfair hurdles for those seeking more flexible or less conventional working practices or business structures. As discussed at 3 above, we believe that the regulatory objectives of improving access to justice, protecting and promoting consumer interests and promoting competition are best served by increasing the diversity of business models and service offerings in the sector.

5.4 Other suggestions

We would also urge IPReg to:

- Actively seek out new schemes for improving diversity, inclusion and access for its regulated community, where necessary by consulting outside of the patent and trade mark professions to understand best practices elsewhere.
 - We are pleased to hear that IPReg is looking to encourage new education and qualification providers to enter the market: we hope that this will lead to wider accessibility.
 - We recommend that new qualification schemes be focused on ensuring that entry into the patent and trade mark professions is not unfairly restricted (a) by a person's socio-economic or educational background and (b) for disabled or neurodiverse candidates.
- Require the training and assessment bodies that it accredits to undertake EDI impact assessments on relevant aspects of their procedures.
 - In particular, ensure that candidates are not discouraged from requesting adjustments to allow them fair access to training or assessment procedures, or unnecessarily hindered (including financially) or distressed in the process.

6 Barriers to progression and continuing competence to practise

6.1 General

IPReg's regulatory arrangements can also affect patent and trade mark attorneys' ability to progress through their careers and develop their professional skills. Again, then, we believe it would be sensible to conduct EDI impact assessments into IPReg's compulsory professional development (CPD) regulations, and based on those assessments to eradicate any barriers to career progression that impact disproportionately on some groups of people.

We would urge IPReg to adopt CPD regulations that are as flexible as possible, and that can accommodate and support individual professionals' circumstances, including disabilities and caring responsibilities. Those regulations should ensure that no individual or group is disadvantaged because of the size, structure or geographical location of their place of work. They should also take account of the accessibility of different forms of training and professional development, and allow the professions to take advantage of opportunities arising from new, more inclusive, learning methods and platforms.

In September 2017 we offered submissions to IPReg about its CPD arrangements and their impact on diversity⁵. As then, we urge 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. Such a scheme is, we submit, the best way to ensure that individual attorneys undertake appropriate types and amounts of training. Detailed restrictions should only be imposed if there is clear evidence of both need and efficacy, and again should be subjected to EDI impact assessments.

6.2 D&I-focused CPD

We appreciate IPReg's recognition of IP Inclusive training events as potentially valid sources of CPD. Within the remit of a suitably flexible and proportionate CPD scheme, we would urge the regulator to encourage registrants to undertake training that will help them improve D&I in their own working environments. This in turn will be in the public interest, allowing the patent and trade mark professions to offer a more inclusive and respectful service to their clients.

In particular such training could include:

- Recognising and mitigating unconscious bias.
 - Biases can arise in relations with clients, suppliers and tribunals, not just among colleagues or in recruitment processes; if left unchecked, they can significantly erode diversity and inclusivity throughout a professional's work.
- For those in more senior positions, inclusive leadership and management.

⁵ See <https://ipinclusive.org.uk/newsandfeatures/submissions-to-ipreg-on-cpd-requirements/>

- The basics about safeguarding mental wellbeing – both one’s own and that of colleagues – as this can engender a better understanding of working relationships and thus greater inclusivity.

These types of training are ideally begun early in a professional career rather than post-qualification. We would therefore urge IPReg to encourage their incorporation into any early-career training that it accredits (including the litigation skills courses).

7 Encouraging and supporting best practices

Whilst we understand IPReg’s desire to reduce prescriptive regulation, nevertheless we believe the regulator is well placed, through its codes of conduct and associated guidelines, to disseminate, encourage and support best practices in its regulated community. This aligns with the Legal Services Board’s 2017 “Guidance for legal services regulators on encouraging a diverse workforce”⁶, in which the Board expects legal regulators to collaborate with others to encourage a diverse workforce, including by “sharing good practice”.

We therefore ask IPReg, when reviewing its regulatory arrangements, to seek out opportunities to lead by example in developing a profession that is truly diverse and inclusive. We suggest for example:

- Making clear that the standards it requires of its regulated attorneys and entities include fairness, equal opportunities and a strong stance against discrimination and harassment.
- Encouraging regulated attorneys and entities to adopt best practices for fair recruitment, selection and career development.
- Encouraging patent and trade mark attorneys to consider D&I-related training, of the types referred to at 6.2 above, as valuable ways of developing their professional practices.
- Encouraging regulated entities to make such training available to their staff, ideally from early-career training onwards.
- Educating regulated attorneys about, and promoting, the business case for D&I.
- Working with CIPA, CITMA and IP Inclusive to improve access to D&I-related training, resources and support for the regulated community.

8 D&I data gathering

We believe that IPReg’s regulatory arrangements, and the framework within which it interacts with the regulated community, should incorporate mechanisms for gathering data about D&I levels in the patent and trade mark professions. This will be vital to IPReg’s understanding of the regulated

⁶ See

https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/S162_Guidance_For_Regulators_On_Encouraging_A_Diverse_Profession.pdf

community. It will also help in monitoring the impact of the regulatory arrangements and changes to them, and in targeting future regulatory activities towards the areas in need of improvement.

This also aligns with the Legal Services Board’s 2017 guidance⁶, by which all legal regulators are expected to:

- a. Build a clear and thorough understanding of the diversity profile of their regulated community (beginning at entry), how this changes over time and where greater diversity in the workforce needs to be encouraged; and
- b. Use data, evidence and intelligence about the diversity of the workforce to inform development of, and evaluate the effectiveness of, their regulatory arrangements, operational processes and other activities.

We approve of IPReg’s intention, as currently stated on its website⁷, to improve the breadth and quality of reporting of the diversity profile of attorneys on its register. We applaud its ambition, in future annual return rounds, to ask regulated attorneys to provide diversity information on their accounts, and also its recently launched initial survey. It is important that this data be gathered not just at the point of entry onto the register but on an ongoing basis, to provide information about career progression opportunities for different groups and the variation of diversity levels with seniority. The latter point is one over which IP Inclusive has concerns, in view of the results of our 2019 benchmarking survey⁸, and we believe it would be useful to understand how the regulatory environment could be part of the solution.

Thus, we urge IPReg to pursue its plans to gather diversity data from all parts of its regulated community and on a regular basis. We suggest it should encourage regulated entities to do likewise, for their own personnel, wherever feasible; as per 7 above, IPReg could work with CIPA, CITMA and IP Inclusive to provide those entities with training, resources and support for their D&I data gathering efforts.

In addition to gathering quantitative diversity data, we would encourage IPReg to consult with the regulated community in order better to understand the inclusivity levels experienced by individual attorneys.

9 Offer of help

As mentioned at 7 above, legal regulators are expected (by the Legal Services Board) to collaborate with others to encourage a diverse workforce, including by “sharing good practice, data collection, and other relevant activities”⁶.

⁷ See <https://ipreg.org.uk/about-us/equality-diversity-and-inclusion-%E2%80%93-working-together-to-encourage-diverse-profession>

⁸ See <https://ipinclusive.org.uk/wp-content/uploads/2020/01/ipi-2019-benchmarking-survey-report.pdf>

Over the last few years, we have very much appreciated IPReg’s support for the work being done by IP Inclusive. This support has included financial donations, for instance towards our operating costs and 2018-2019 website upgrade, and also practical contributions such as participation in our events, signing our Equality, Diversity and Inclusion Charter, the sharing of relevant resources, help with raising awareness of the initiative, and a general willingness to collaborate on relevant projects. We believe this benefits the UK’s IP system and all of its users, both professionals and clients. As such we are proud to have been able to work with IPReg in pursuit of one of its key regulatory objectives.

IP Inclusive remains at IPReg’s disposal and will continue to value opportunities to work together for the benefit of equality, diversity and inclusion within the UK’s patent and trade mark professions. We would be happy to contribute to future discussions on the regulatory arrangements and their influence on D&I, although again would stress the importance of obtaining independent expert advice and impact assessments.

In this context we particularly urge IPReg to consult and where possible collaborate with:

- IP Inclusive’s communities⁹ and regional networks¹⁰.
- Its Careers in Ideas outreach campaign¹¹, which has contacts among social mobility and outreach charities and also educational establishments from which potential patent and trade mark recruits might come.
 - These organisations could provide valuable insight into current barriers to entry, their impact on D&I, and how to improve access.
- The IP-focused mental health charity Jonathan’s Voice¹², which is well informed about the challenges faced by patent and trade mark professionals.
- The people (including HR professionals) who are involved in the recruitment, training and management of patent and trade mark attorneys, about the barriers they encounter to recruiting and developing a diverse workforce, and the extent to which those are affected by the regulatory environment.

All of these, alongside the data gathering referred to at 8 above and the EDI impact assessments we are recommending, will help IPReg to build a deeper understanding of the composition and needs of its regulated community; of the barriers to entry and progression within that community, and how best to mitigate them; and of any differential impact on people with “protected characteristics” as a result of its regulatory arrangements.

⁹ See <https://ipinclusive.org.uk/community/>

¹⁰ See <https://ipinclusive.org.uk/our-regional-edi-charter-networks/>

¹¹ See <https://ipinclusive.org.uk/careers-in-ideas/>

¹² See <https://jonathansvoice.org.uk/>

10 Summary

To summarise, we urge IPReg, when reviewing and potentially updating any aspect of the regulatory arrangements, to:

- Take due account of its impact on diversity and inclusivity within, and the accessibility of, the patent and trade mark professions.
- Consider its impact not only on diversity among patent and trade mark professionals, but also on the diversity of business models and consumer choices within the IP sector.
- Commission independent EDI (Equality, Diversity and Inclusion) impact assessments for this purpose, to ensure that the regulatory arrangements do not disadvantage, discourage, or present a disproportionate barrier to entry or progression for, any particular group of people.
- Ensure those impact assessments cover:
 - The processes by which people and their businesses qualify to be regulated by IPReg.
 - The litigation skills qualification that patent and trade mark attorneys are required to complete within three years of being entered onto the register.
 - IPReg’s arrangements for registering and regulating entities.
 - Its compulsory professional development (CPD) regulations.
- Require the training and assessment bodies that it accredits to undertake EDI impact assessments on relevant aspects of their procedures, and encourage them to incorporate basic D&I-related modules into their training courses.
- Actively seek out new schemes for improving diversity, inclusion and access for its regulated community, where necessary by consulting outside of the patent and trade mark professions to understand best practices elsewhere.
- Adopt CPD regulations that are as flexible as possible; that can accommodate and support individual professionals’ circumstances; that do not disadvantage any particular individual or group because of the size, structure or geographical location of their place of work; and that take account of the accessibility of different forms of training and professional development.
- Lead by example in developing a profession that is truly diverse and inclusive, by:
 - Making clear that the standards it requires of its regulated attorneys and entities include fairness, equal opportunities and a strong stance against discrimination and harassment.
 - Encouraging regulated attorneys and entities to adopt best practices for fair recruitment, selection and career development.
 - Encouraging patent and trade mark attorneys to undertake training that will help them improve D&I in their own working environments.
 - Encouraging regulated entities to make such training available to their staff, ideally from early-career training onwards.
 - Educating regulated attorneys about, and promoting, the business case for D&I.

- Working with CIPA, CITMA and IP Inclusive to improve access to D&I-related training, resources and support for the regulated community.
- Pursue its current plans to gather diversity data from all parts of its regulated community and on a regular basis.
- Consult, and where possible collaborate with, IP Inclusive and the other bodies referred to at 9 above, to help with its work towards a diverse, inclusive and accessible regulated community.

About IP Inclusive

IP Inclusive is an association of individuals and organisations who share a commitment to improving diversity and inclusivity throughout the IP professions. Its founding organisations were the Chartered Institute of Patent Attorneys (CIPA), the Chartered Institute of Trade Mark Attorneys (CITMA, formerly ITMA), the IP Federation and The UK Association of the International Federation of Intellectual Property Attorneys (FICPI-UK), with active support and involvement from the UK Intellectual Property Office. Our supporters now span the IP-related professions, and include patent and trade mark attorneys, IP solicitors and barristers, and many other professionals who work in or with intellectual property. Many CIPA and CITMA members are actively involved in the initiative.

Our work, which is overseen by the governing body IP Inclusive Management, includes:

- A voluntary best practice Equality, Diversity and Inclusion Charter¹³, which now has over 150 signatories from across the IP professions.
- The “Careers in Ideas” initiative¹¹, which raises awareness of IP-related careers in order to widen the pool from which the professions recruit.
- Networking and support “communities” for under-represented groups¹⁴, currently including our Women in IP community; IP & ME for BAME professionals and their allies; IP Ability for disabled people, carers and their allies; IP Futures for early-career IP professionals; and IP Out for LGBTQ+ professionals and allies.
- Diversity-related resources¹⁵, training, news¹⁶ and information, which we disseminate through our website, events¹⁷ and regular updates to our supporters.

Our Lead Executive Officer Andrea Brewster is a Chartered Patent Attorney, European Patent Attorney, and former CIPA Council member and President. In the past she has served on the Institute’s Education and Business Practice Committees. She is regulated by IPReg.

¹³ See <https://ipinclusive.org.uk/about/our-charter/>

¹⁴ See <https://ipinclusive.org.uk/community/>

¹⁵ See <https://ipinclusive.org.uk/resources/>

¹⁶ See <https://ipinclusive.org.uk/newsandfeatures/>

¹⁷ See <https://ipinclusive.org.uk/events/>



For more information about IP Inclusive, please visit our website at www.ipinclusive.org.uk, or email contactipinclusive@gmail.com.

Annex:

Evidence of the business benefits of D&I

(This is only a selection of many publications – including both expert opinion and supporting data – that relate to the benefits of increased D&I in a commercial context.)

- McKinsey report *Why diversity matters*, 2015: <https://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>
- McKinsey report *Delivering through diversity*, 2017: <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity>
- McKinsey report *Diversity wins: How inclusion matters*, 2020: <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>¹⁸
- Lu Hong and Scott E Page, *Groups of diverse problem solvers can outperform groups of high-ability problem solvers*, PNAS November 16, 2004 101 (46) 16385-16389: <https://doi.org/10.1073/pnas.0403723101>
- Research by Massachusetts-based Tufts University in 2006, demonstrating that diverse groups perform better than homogeneous groups when making decisions:
 - See *Racial Diversity Improves Group Decision Making In Unexpected Ways, According To Tufts University Research*: <https://www.sciencedaily.com/releases/2006/04/060410162259.htm>
- Roy Y J Chua, Harvard Business School working paper, *Innovating at the World's Crossroads: How Multicultural Networks Promote Creativity*, 2011: <https://www.hbs.edu/faculty/Publication%20Files/11-085.pdf>
- Forbes Insights report, *Fostering Innovation Through a Diverse Workforce*, 2011: https://www.forbes.com/forbesinsights/StudyPDFs/Innovation_Through_Diversity.pdf
- Research by Boston-based trading platform Quantopian into the performance of female-led companies compared to those run predominantly by men; see eg:
 - Kozłowska, Hanna; Antunes, Xana (2015), *Companies run by women perform better*: <https://qz.com/361602/companies-run-by-women-perform-better/>
 - Wechsler, Pat (2015), *Women-led companies perform three times better than the S&P 500*, Fortune magazine: <https://fortune.com/2015/03/03/women-led-companies-perform-three-times-better-than-the-sp-500/>
 - Rubin, Karen; Dunn, Dan (2015), *How Women are Conquering the S&P 500*: <https://www.youtube.com/watch?v=pJWLi7GHWgs>
- Study by BCG Henderson Institute, *How diverse leadership teams boost innovation*, 2018: <https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation>

¹⁸ See also <https://www.mckinsey.com/featured-insights/diversity-and-inclusion>

- Study by the Center for Talent Innovation and Hewlett Consulting Partners LLC, *Diversity's Positive Impact on Innovation and Outcomes*: see Chapter 4 of The Global Talent Competitiveness Index 2018 at <https://www.talentinnovation.org/Diversity%C3%A2%E2%82%AC%E2%84%A2s-Positive-Impact-on-Innovation-and-Outcomes-CTI-Chapter.pdf>
- Other research by the Center for Talent Innovation (now Coqual): <https://coqual.org/our-research/>
- Harvard Business Review articles such as *How and Where Diversity Drives Financial Performance*: <https://hbr.org/2018/01/how-and-where-diversity-drives-financial-performance>