Proposals for changes to IPReg's regulatory arrangements: IP Inclusive consultation response

1 Introduction

These submissions are made by the IP Inclusive initiative[1], in response to IPReg's 16 December 2021 consultation paper concerning proposals for its new 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, inclusion and wellbeing across the UK's IP sector.

Our response is not confidential; it will be published on the "News and Features" page of the IP Inclusive website[2].

2 General comments

We welcome the opportunity to contribute again to IPReg's review of its regulatory arrangements. We thank IPReg for taking account of our February 2021 response to the October 2020 Call for Evidence[3] and for involving IP Inclusive, alongside other stakeholders, in associated discussions. We believe the proposals that have emerged from that process are – in the respects relevant to IP Inclusive's work – generally fair, proportionate and soundly-based.

We applaud the proposed reliance on high-level regulatory principles wherever possible, in preference to prescriptive rules. We believe the new arrangements provide a flexibility that will help patent and trade mark professionals, and their businesses, to innovate and adapt in response to changes in the commercial landscape. This will encourage a greater diversity of business models and allow the two professions to serve a wider range of clients. This in turn will increase the resilience of individual businesses and of the professions as a whole. Above all, it will help regulated businesses not only to accommodate, but also to nurture, a diverse and inclusive workforce.

We are pleased to see this approach extended to the proposed arrangements for continuing professional development (CPD) and for the acquisition of litigation skills. We believe such changes

[1] See https://ipinclusive.org.uk/
[2] See https://ipinclusive.org.uk/newsandfeatures/
[3] See https://ipinclusive.org.uk/wp-content/uploads/2021/02/210201-ipreg-regulatory-review-ip-inclusive-response.pdf

will help remove barriers to entry into, and in particular to progression within, the UK's patent and trade mark professions, again helping diversity and inclusivity to flourish.

IPReg's openness to future changes, and to exploring new business models through for example the proposed "regulatory sandboxes", will we believe encourage inclusivity for a wider range of views and approaches. This too will help nurture diversity in the professions, as will allowing more flexibility in the constitution of multidisciplinary practices (MDPs).

We are encouraged to see that a detailed impact assessment underlies and informs the proposed regulatory changes, and in particular that the assessment takes account of effects on equality, diversity and inclusion (EDI) in the regulated sector.

We are also encouraged by the use of clear and inclusive – in particular gender-neutral – language throughout the consultation paper and proposed regulatory arrangements. This contributes to the accessibility and inclusivity of the patent and trade mark professions, which in turn makes it possible to achieve, and sustain, greater diversity. As the IP-specific regulator, IPReg's communications reflect the type of sector we want to belong to and can positively influence the attitudes and behaviours of those working in it.

We welcome IPReg's commitment (in section 18 of the consultation paper) to "continue to work with a wide range of stakeholders to improve diversity and inclusion in the IP sector". IP Inclusive stands ready to help.

3 The Impact Assessment (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?

We welcome the consideration, in the Impact Assessment, of the proposals' impact on equality and diversity. We believe this type of analysis should accompany any significant change to the regulatory environment.

Broadly, we agree with the conclusions that IPReg has reached in this context. Subject to the issues discussed below, we agree that the proposed changes are not likely to have a negative impact on equality, diversity and inclusion in the regulated community – and indeed that in most cases they have potential benefits.

We have provided our more detailed comments on the Impact Assessment in Annex I.

4 The Overarching Principles (consultation question 2)

What are your views on the eight Principles we have set out?

Our comments here relate to proposed Overarching Principle 6: the requirement for regulated persons, in all aspects of their life, to "act in a way that encourages equality, diversity and inclusion".

In many respects we welcome the inclusion of EDI in the highest-level ethical principles required of patent and trade mark professionals. The legal sector as a whole has decided that EDI are important pillars of a well-run and trustworthy profession, a view that IP Inclusive fully supports. Moreover, as stated in our February 2021 response to IPReg's 2020 Call for Evidence[3], we believe the regulator is well placed, through its codes of conduct and associated guidelines, to promulgate best practices among its registrants. In the context of EDI it has a role in setting workplace standards, providing guidance and support to regulated professionals and their businesses, and maintaining conversations.

However, whilst this regulatory function is important in a person's professional activities, we query whether it should extend into the personal sphere.

The proposed regulatory arrangements emphasise that the Overarching Principles are intended to be upheld "in all aspects of [a regulated person's] life, be this within professional practice or private life". When it comes to encouraging EDI, this is no small ask. Refraining from criminal activities, being honest: these are clear-cut issues. Encouraging EDI is less so. Not everyone shares the same views about how it should be done. Not everyone agrees with all aspects of what is currently thought of as good EDI practice, perhaps because of their personal beliefs, faith or politics.

We are concerned that by attempting to regulate a person's approach to EDI in their private lives, IPReg might alienate some of its registrants (or indeed potential registrants). A related concern is that if such a requirement is not universally supported, or not well understood, that may ultimately undermine the regulated community's support for the EDI agenda, both outside and within the workplace. It might thus, we believe, be counter-productive in the context of its intended effects.

We understand, from IPReg's presentation during its 3 March 2022 webinar with CIPA and CITMA, that compliance with the Overarching Principles is intended to be a contextual matter and to depend on the extent to which a regulated person's behaviour impacts on their professional practice. This is not, however, clear from the Regulatory Framework as currently drafted.

We recommend that IPReg consider removing the words "in all aspects of their life, be this within professional practice or private life" from the Overarching Principles, and instead adopting a model similar to that used by the Solicitors Regulation Authority (SRA). The SRA has a separate Enforcement Strategy[4], in which a section headed "Private life" clarifies the extent to which actions outside of work might be held to fall foul of its Regulatory Principles[5].

We similarly recommend that the Overarching Principles should relate only to aspects of a regulated person's life that impact on, or are likely to impact on, their own work or the regulated professions

[4] See https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/
[5] See https://www.sra.org.uk/solicitors/standards-regulations/principles/

as a whole. As in the SRA's Enforcement Strategy, it should be clearly stated that such considerations will be context-dependent. IPReg may also wish to clarify that Principle 6 relates to the encouragement of EDI *within the regulated professions*: this better aligns the scope of the Principle with the regulator's remit, and will also be easier both for registrants to uphold and for IPReg to enforce.

We wish to stress that we still very much support the inclusion of some form of EDI-related provision in the regulatory framework. Whether it is ultimately included in the Overarching Principles or the Code of Conduct, and whatever its final form, we urge IPReg to provide accompanying guidance on its interpretation, as discussed at 6.1 below.

5 The Code of Conduct (consultation question 3)

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

Our responses to later consultation questions cover aspects of the proposed Code of Conduct relating to CPD, litigation skills, disciplinary procedures, business arrangements and practising categories.

We also wish to make the following points.

5.1 Diversity data monitoring

We welcome the proposed requirement (at 3.8 of the Code of Conduct) to monitor, report and publish diversity data. In principle the gathering of data can both incentivise and inform workplace changes to improve EDI.

However, it is vital that the rules IPReg establishes in this regard are proportionate and feasible for organisations of different sizes and structures. For many businesses in the patent and trade mark sector, the size of the workforce means that the publication of diversity data risks compromising individuals' privacy; it also reduces the statistical significance and evidential value of the data collected. This is particularly the case since individual professionals cannot and should not be obliged to provide personal diversity data if they prefer not to. Evidence gathered centrally from regulated attorneys, through IPReg, is thus likely to be more useful than that from individual organisations in the sector.

IP Inclusive encourages its supporters to gather diversity and inclusion (D&I) data for use in their D&I-improving efforts. One of the six commitments entered into by our EDI Charter signatories is to monitor and report internally on their progress. This is, however, qualified by the phrase "using measures and at intervals that are appropriate to their size and nature". We would urge IPReg to take a similar line in its rules under this part of the Code of Conduct. See also 6.2 below.

5.2 Admission and authorisation requirements

5.2.1 Character and suitability

Chapter 3 of the proposed new Core Regulatory Framework, "Admission and authorisation requirements", refers at 1.1.4 (actually labelled 1.1.5) and at 1.2.4 to the need for applicants to "meet IPReg's character and suitability requirements" before admission to the relevant register.

We recognise that this is a reasonable condition in view of the regulatory principles with which registrants will need to comply. However, we understand that the details of such requirements have yet to be decided. It is vital, in order to encourage EDI in the regulated professions, that those requirements be fair and proportionate, and in particular that they do not discriminate against people having a protected characteristic or indeed represent a higher barrier to entry for some groups of people than for others. Character and suitability are potentially subjective terms: we urge IPReg to issue, as soon as possible, a set of clear and objective criteria that it proposes to apply in this context, and to subject those criteria to an EDI impact assessment before finalising.

5.2.2 Overseas qualifications

We welcome IPReg's proposal to recognise relevant qualifications obtained outside the UK, subject to the intended safeguards regarding skills, knowledge and training levels. We believe this will have a beneficial impact on EDI in the patent and trade mark professions, and lead to a more open-minded and innovative sector for the reasons discussed in connection with multidisciplinary practices at 11.2 below. The ability to enter the UK Register from another country may have a particularly beneficial effect on ethnic, racial and cultural diversity.

5.2.3 Accreditation of education and training providers

We understand that this is a separate issue that IPReg does not propose to address as part of the present review. We wish merely to emphasise some of the points made in our February 2021 response to IPReg's 2020 Call for Evidence[3], and urge that they be taken into consideration when formulating standard operating procedures (SOPs) under Chapter 3, section 10 of the proposed Core Regulatory Framework:

- The education and training providers that IPReg accredits should be required to undertake EDI impact assessments on relevant aspects of their procedures, including their admission and assessment systems.
- The impact assessments should take account of the accessibility of their education and training, for example to 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.
- Accredited bodies should be encouraged to incorporate, into their education and training provisions, an appropriate level of training on recognising and mitigating unconscious bias, communicating inclusively, and safeguarding mental wellbeing.
- Their teaching and training staff should be required to undertake similar training on a regular basis.

These measures will, we believe, have a significant positive impact on the strength and diversity of the patent and trade mark professions of the future.

5.2.4 Annex C (example SOP)

We note that in the example SOP presented in Annex C to the consultation paper, there is a requirement (section 10) for people who apply for admission a considerable time after being awarded relevant qualifications, they must submit information on various issues such as the reason for the delay, their professional activities during that period and their future practising intentions. There does not, however, appear to be any detail about how this information will be used: for example, who will decide whether the applicant can be admitted, on what criteria, and in what way will the outcome depend on the submitted information?

5.3 Waivers

We welcome the inclusion, in Chapter 6 section 2 of the proposed Core Regulatory Framework, of broader powers for IPReg to grant waivers in relation to its regulatory requirements. If properly and proportionately administered, this will yield a system that is better able to support individual attorneys through periods of hardship or other unusual circumstances. The greater flexibility and adaptability in the regulatory requirements should help sustain a more diverse and inclusive profession.

We understand that decisions relating to such waivers will be made by the Chief Executive, although this is not spelled out in the Framework itself. We urge IPReg to ensure that the Chief Executive exercises their discretion in this context through, or with the assistance of, other appropriately trained and briefed IPReg personnel. We would caution against allowing this type of decision – which could significantly affect an individual registrant's practice, as well as the public's and the regulated community's trust in IPReg – to be made by just one person, however senior. This is particularly the case since (a) there will be no right of appeal and (b) the issues concerned may be too sensitive to subject to wider public scrutiny.

6 Guidance on compliance (consultation question 4)

We would be interested in your views on where guidance is required to support attorneys and firms with compliance? Are there any specific examples or particularly difficult issues?

As discussed individually above, we believe the following proposed changes warrant the provision of guidance to assist the regulated community with compliance.

6.1 Proposed Overarching Principle 6

In its current form, we believe significant, preferably exemplified, guidance will be needed on the interpretation of this requirement. For example:

- What efforts might be required of a regulated person in order to uphold the Principle?

- Is it merely a requirement to behave in a fair and non-discriminatory manner, and/or not to act in a way that could discriminate against, offend or otherwise harm a particular group of people?
- Does it extend beyond the protected characteristics in the Equality Act 2010, and if so in what manner?
- How active does the "encouragement" of EDI need to be and what forms might it take?

- What types of behaviour might be deemed to have breached the Principle? Do any of these extend beyond those prohibited under current UK legislation and/or by Overarching Principles 1 and 2?
- To what extent, exactly, do these requirements apply outside a regulated person's work?
- How might regulated persons resolve potential conflict between Principle 6 and Principles 3 to 5 – the latter requiring a regulated person to act with independence and integrity and to be honest – in a situation where their personal views on EDI do not align with those of the regulator?

We believe this represents a valuable opportunity for IPReg to actively encourage and support – in line with its own regulatory objectives – the development of a diverse and inclusive profession. As suggested in our February 2021 response to IPReg's 2020 Call for Evidence[3], the guidance should for example:

- Make clear that the standards IPReg requires of its regulated attorneys and entities include fairness, equal opportunities and a strong stance against discrimination and harassment.
- Encourage those regulated persons to adopt best practices for fair recruitment, selection and career development in their organisations.
- Require them to provide reasonable adjustments where appropriate to ensure the people they interact with (including colleagues and clients) are not unfairly disadvantaged.
- Encourage regulated persons to undertake, encourage and facilitate EDI-related training and CPD activities.
- Ensure that regulated persons understand and respond to both the business and the ethical case for EDI, as well as their responsibilities under the relevant regulatory objectives in the Legal Services Act 2007.

We note that the SRA Code of Conduct[6], in the section headed "Maintaining trust and acting fairly", spells out that regulated persons must "not unfairly discriminate by allowing your personal views to affect your professional relationships and the way in which you provide your services." We believe this type of requirement should be included in IPReg's guidance under Overarching Principle 6, if not also in its new Code of Conduct.

As a general point, there are a number of areas in which the consultation paper refers to certain groups – for example disabled people and carers – being more likely to work in smaller or less

[6] See https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/

conventionally-structured organisations. IPReg's 2021 diversity survey provides some evidence of this in relation to disabled people. It raises the possibility, we submit, that certain groups are not currently well supported in larger and/or conventionally-structured organisations. IPReg's expectations of its registrants, in the context of encouraging EDI, should therefore aim to redress such imbalances, ensuring that all regulated organisations provide an appropriately supportive and accommodating environment for their staff and do not unfairly discriminate against particular groups. This too would have a positive impact on EDI levels throughout the regulated professions.

IP Inclusive would be happy to assist with the preparation of suitable guidance and to help IPReg consult with the regulated community on this through our Charter signatories, volunteers and other stakeholders.

6.2 Diversity data monitoring

We appreciate that IPReg may not envisage immediately formulating prescriptive requirements under Chapter 2, 3.8 of the Code of Conduct, and that the proposal merely facilitates such a development if considered appropriate in future. In that instance, we believe guidance and support will be necessary to help regulated businesses comply.

As discussed at 5.1 above, diversity data monitoring requirements need to be practical and proportionate. We recommend consultation with the regulated community (even if only informally) and a further impact assessment before bringing them into force.

We believe the associated guidance should cover:

- The type of data that needs to be gathered and/or published, and how often, and in what way that depends on the size and structure of the business.
- Whether the data should track changes in diversity at different career levels, and/or between the application and appointment stages of recruitment.
    - (We believe this is important and useful data, but we also recognise that it can be difficult to collect.)
- The extent to which diversity data should be accompanied by information about the inclusivity levels experienced by individual attorneys within the business.
    - (This can provide a better understanding of how well the working environment accommodates, supports and nurtures diversity in the longer-term – but again its acquisition and analysis can be onerous).
- How IPReg will use the data gathered by the businesses it regulates.

We believe that in this context, the regulated community would benefit from general support, training and guidance, for example template survey questions and advice on compliance with data protection and employment laws. We suggest IPReg could work with CIPA, CITMA and IP Inclusive to provide such resources, and we stand ready to help.

7 CPD (consultation question 7)

What are your views on our proposals in relation to CPD?

We very much welcome the proposed move to a more outcomes-focused and individually-tailored CPD framework. We believe this will give greater flexibility for attorneys to select CPD activities that not only better suit their individual practices but can also accommodate any constraints they may be working under, for example due to their location, the size and nature of their business, their caring responsibilities, or their accessibility requirements.

We therefore believe the proposed new CPD arrangements will have a positive impact on diversity and inclusion in the regulated community. The flexibility they bring will also allow professionals to take advantage of opportunities arising from new, more inclusive, learning methods and platforms. This will carry the additional benefit of allowing the patent and trade mark professions to adapt, improve and evolve, whilst "future-proofing" the CPD arrangements themselves.

We also welcome the recognition that CPD needs may vary from year to year, depending on the individual attorney's work as well as changes in the wider IP landscape. Again, we believe this is a more inclusive approach, which in the longer term will help improve and sustain diversity in the sector.

8 CPD guidance (consultation question 8)

For regulated attorneys and firms, what would be helpful in terms of guidance and resources for the proposed new CPD requirements?

Generally we approve of the suggested broader, non-exclusive list of potential CPD activities.

We also think it important that the requirements IPReg introduces under section 2.2 of the proposed Code of Conduct, and the associated guidance, make clear that CPD in so-called "non-core" areas can also be of value to an attorney's competence in practice. We would like to see specific mention of areas relevant to encouraging a diverse workforce (in line with the Regulatory Objectives) and EDI more generally. These types of CPD will not only improve the patent and trade mark professions themselves, but also their ability to offer an inclusive and respectful service to members of the public.

IP Inclusive and its supporters – including many from the wider IP sector – have experience of different forms of EDI-related CPD, their uses and their efficacy. We would be happy to work with IPReg to establish suggested topics and training formats that could be of value in this context. Potential topics might for instance include unconscious bias; allyship; inclusive leadership, management and general communication skills; and the business case for EDI. Potential training formats should include workshops, discussions and reverse mentoring.

We would also like the guidance to recognise the value of CPD relating to mental and physical wellbeing, both one's own and that of one's colleagues. These issues affect not only inclusivity (and thus also diversity) in the workplace, but also attorneys' productivity, resilience and general fitness to practise. Again, we would be happy to work with IPReg and relevant experts to extend the CPD guidance to this area.

As a general point, we believe the regulator has a vital role to play in encouraging patent and trade mark attorneys not only to undertake training to help them improve EDI in their own working environments, but also where applicable to make such training available to their staff. We urge IPReg to work alongside CIPA, CITMA and IP Inclusive to improve access to EDI-related training, resources and support for the regulated community.

9 Litigation skills (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?

9.1 The requirement for basic litigation skills pre-admission

We support this principle. As discussed in our February 2021 response to IPReg's 2020 Call for Evidence[3], we have doubts as to whether the current post-qualification litigation certificate is warranted – bearing in mind that many UK patent and trade mark attorneys will not subsequently conduct litigation in the tribunals to which that qualification is directed. However, training in *basic* litigation skills is important for all patent and trade mark attorneys. Many aspects of their core work involve elements of both written and spoken advocacy. Perhaps more importantly, they are better placed to secure and protect their clients' IP rights – as well as to advise on the impact of third party IP rights – if they understand the contexts in which those rights might subsequently be challenged.

On the basis that training in basic litigation skills is therefore desirable for qualified patent and trade mark attorneys, we agree that it is more appropriately acquired before candidates are assessed for fitness to practise and admitted to the Register.

9.2 The impact on EDI

We also believe there will be EDI benefits to separating pre-admission training in basic litigation skills from post-admission qualifications for higher court practising rights. Individual attorneys will have greater freedom to select career paths that are appropriately tailored to their interests, skills, and personal and professional circumstances. Those with personal commitments, for instance as parents and carers, will be able to complete their training whenever best suits them and their employers, but will not be constrained by the current additional time limit for completing the Litigation Skills Certificate. For some people, personal commitments may increase as their career develops, as may their professional workload, making it harder to undertake significant amounts of additional training and qualifications after admission to the Register. In any event, the regulated professions will be more accessible and inclusive if individuals are generally able to balance their training with their

personal commitments, whatever the timings of their career and wider life plans. We are grateful to IPReg for recognising these issues in its consultation paper and Impact Assessment.

9.3 Summary

Overall we believe that the changes proposed in this context:

- Will streamline the qualification and admission process for all regulated patent and trade mark attorneys.
- Will encourage and support EDI in the regulated sector, providing greater flexibility for both individual attorneys and the organisations in which they work.
- Have the potential to remove barriers to entry for certain groups such as parents and carers (thus also, depending on the current demographic in the sector, on people of a particular gender), disabled people, older entrants, and those for whom additional training might pose financial and/or travel difficulties.

10 The disciplinary process (consultation questions 12, 13 & 14)

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

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?

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

On the whole these proposals appear likely to benefit EDI in the regulated community. We offer certain cautions regarding their implementation.

10.1 Independent case examiners

We agree that the involvement of independent case examiners improves the likelihood of fair and objective disciplinary decisions. As such it has the potential to increase confidence in the disciplinary system among registrants, their clients and the wider public.

To ensure that this change yields the desired effects, however, we urge IPReg to incorporate measures to safeguard fair and non-discriminatory decision-making, in particular:

- Requiring decision-makers to undertake unconscious bias training with regular follow-up and refresher training.
- Ensuring they are well briefed on accessibility issues that could affect a regulated individual's ability to participate in disciplinary proceedings.

- Applying consistent and objective decision-making criteria and requiring decisions to be justified against those criteria.
- As currently proposed, requiring decisions to be made by panels of at least two people.
- Seeking, wherever feasible:
    - To diversify decision-making panels, in particular for higher level and/or more serious proceedings; and
    - Where the attorney concerned is a member of an under-represented group, to include in the decision-making panel an individual from the same group.

10.2 Consensual disposal options

We welcome the proposal to allow cases to be resolved early without the need for a full disciplinary hearing. We believe this will allow IPReg to respond more fairly, proportionately and effectively to each situation and to tailor the outcomes for individual registrants and complainants. We see as a positive step the inclusion, among the response options at the case examiner stage, more remediation-focussed outcomes: these will often be more effective and proportionate, and as such will contribute not only to consumer confidence but also to the strength and integrity of the regulated professions, allowing mistakes to yield learning and improvement in a way that punitive measures might not.

In particular we believe the new provisions should enable IPReg to respond fairly to attorneys whose personal situations may have contributed to a disciplinary issue. An individual's actions may result from a complex set of circumstances in which they find themselves, and those may in turn be affected by some aspect of their identity which, for example, they have felt the need to keep hidden or as a result of which they have suffered discrimination, abuse or harassment. We welcome a disciplinary system that has the capacity to take such issues into account in formulating an appropriate response, and believe this will have a positive impact on inclusivity in the regulated community.

10.3 Professional panel membership

We appreciate IPReg's reasons for no longer requiring "professional" members of disciplinary panels to be recruited from the regulated professions. We understand that it will nevertheless be possible for IPReg to appoint a technical adviser to assist the proposed Interim Orders Panel where a case "deals with the competency of an attorney, or otherwise requires technical knowledge in order to understand and adjudicate on the issues".

We would urge IPReg to allow such specialists to be appointed, not just when issues of competence or technical knowledge are involved, but more generally when it is felt that experience in the regulated professions would assist in understanding the circumstances surrounding the alleged breach. The patent and trade mark professions bring their own unique, often nuanced, pressures and constraints, which could lead to actions that would be less easy to explain in the context of a different profession. These issues might particularly affect individuals who are more vulnerable for other reasons – for instance, through being disabled or neurodivergent – and thus need to be taken into account to safeguard equality and inclusivity.

11 Business models and practising categories (consultation questions 16, 17 & 18)

Consultation question 16: We are interested in views on this proposal including the potential practical implications of an IPReg regulated businesses broadening its range of services. For instance, is this likely to present particular issues around conflicts, confidentiality or Professional Indemnity Insurance?

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

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

11.1 General

We support changes to the regulatory arrangements that:

- Accommodate and support a wider range of business structures and working practices
- Reduce the regulatory burden, in particular by removing disproportionate or unnecessary constraints
- Simplify registration and compliance
- Are shaped by evidence of current risk levels rather than historical precedent

We believe such changes can improve and promote EDI in the regulated professions. Increased flexibility will allow a wider range of professionals to establish working practices to suit their individual circumstances; this might be of particular benefit to, for example, disabled people and carers, part-time workers, people in smaller or less centrally-located practices, and people in the later stages of their career. In view of the currently high proportion of people who identify as women in some of these categories, the changes could also have a positive impact, at least in the short term, on gender diversity.

It is worth noting that if the professions can offer a wider range of working environments, they can also potentially attract a more diverse pool of recruits. This means that the short-term positive impact on EDI within the professions will lead to longer-term benefits in its pipeline, creating a "virtuous circle" that sustains and amplifies EDI improvements.

We further believe that improving the feasibility of a wider range of business models and working practices will allow the patent and trade mark professions to serve a more diverse range of clients and to do so more effectively. This must surely be of value to the professions' success and sustainability, promoting competition and innovation whilst also protecting and promoting consumer interests and (in the wider public interest) improving access to justice. It is also likely that a more diverse client base will incentivise a more diverse workforce, as businesses recruit and train in order to support a wider range of clients.

For these reasons, and insofar as they impact on EDI in the regulated sector, we support IPReg's proposed changes to the regulation of multidisciplinary practices, to its requirements for professional indemnity insurance (PII), and to practising categories. This includes the proposal to introduce a regulatory sandbox for PII. Naturally all these measures will need to be accompanied by appropriate safeguards for both clients and regulated professionals, and should not carry unnecessary barriers to entry for specific groups of people.

11.2 Multidisciplinary practices (MDPs)

We believe that widening the range of admissible MDPs, by removing the limitation on ancillary services, will provide EDI benefits additional to those discussed above. When professionals from different sectors work together, they can learn from one another: this includes about best practices for encouraging EDI, which may be more advanced in other professions. In general these forms of collaboration can help foster a more open-minded and inclusive working environment. They can encourage innovation and mitigate the unconscious biases (for example groupthink, false consensus and affinity bias) that can otherwise hamper a business's ability to respond to consumer needs. We applaud any change that facilitates such evolution.

A further advantage to these more diverse and inclusive teams is the opportunities they can provide for individual patent and trade mark attorneys to broaden their skills and develop their careers. This again could make the regulated professions more attractive, and to a wider range of potential recruits, with the EDI benefits referred to at 11.1 above.

12 The importance of accessibility

The following comments are not a direct response to the consultation questions but we hope that IPReg will nevertheless take them into account when finalising its proposals.

The revision of the regulatory arrangements provides a valuable opportunity to incorporate accessibility by design into all the regulatory systems and procedures. We urge IPReg to take advantage of that opportunity, where necessary consulting with relevant disability support groups such as IP Inclusive's IP Ability community[7], the Law Society's Lawyers with Disabilities Division[8] and the research team at *Legally Disabled?*[9] to ensure that new policies and procedures are accessible to anyone who has an interest in or is affected by IPReg's work. This may be particularly relevant to the proposed new SOPs.

We believe it should be made clear that if individuals (whether regulated attorneys or members of the public) need IPReg to make reasonable adjustments to enable them to access and complete a particular procedure, they may ask at any time and IPReg will do its best to accommodate their

[7] See https://ipinclusive.org.uk/community/ip-ability/
[8] See https://www.lawsociety.org.uk/topics/lawyers-with-disabilities/about-the-lawyers-with-disabilities-division
[9] See http://legallydisabled.com/

needs. Adjustments might for instance relate to the format in which information is provided, communication methods, the location or timing of meetings, and/or allowing people to work alongside somebody else who can help or support them through a specific procedure.

Online communications should be admitted but there should also be an option to communicate on paper or in person where necessary. (We note with approval, for example, that this is mentioned in a footnote to the example SOP provided in Annex C.) It should be possible to attend meetings either online or in person depending on the individual's needs. Disabled and neurodivergent people, for example, may find one or other of these formats difficult depending on their particular circumstances.

In order to encourage EDI in the regulated professions, IPReg's new systems and procedures (for example its admission, authorisation and disciplinary procedures) should be designed to accommodate such adjustments. To facilitate that, we urge the regulator:

- To create and publish a formal accessibility policy that underlies its interactions with both regulated persons and the public; and
- To include accessibility in its impact assessments, in particular for disabled and neurodivergent people but also for carers, older people, and people from less privileged socio-economic or educational backgrounds.

We believe the same requirements should be made of the education and training providers that IPReg accredits: see our comments at 5.2.3 above.

13 Offer of help

Legal regulators are expected to collaborate with others to encourage a diverse workforce, including by "sharing good practice, data collection, and other relevant activities" (see the Legal Services Board's 2017 Guidance for Regulators on Encouraging a Diverse Profession[10]).

Over the last few years, IPReg and IP Inclusive have worked together to promote and improve EDI within the regulated community, wherever appropriate sharing resources and ideas. We have very much appreciated IPReg's support, including both financial donations and practical contributions, which we believe has benefitted the UK's IP system and its users. We remain ready to work with IPReg in the continued pursuit of this important regulatory objective. We would also be happy to contribute to future discussions on the regulatory arrangements and their influence on EDI.

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

[10] See https://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/S162_Guidance_For_Regulators_On_Encouraging_A_Diverse_Profession.pdf

- IP Inclusive's communities[11] and regional networks[12].
- Its Careers in Ideas outreach campaign[13], which works to improve awareness of, and access to, the UK's IP professions and thus diversify the recruitment pool.
- The IP-focused mental health charity Jonathan's Voice[14], 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 and inclusive workforce, and how those are affected by the regulatory environment.

Through these interactions, IPReg will be able to build a deeper understanding of the composition and needs of its regulated community; of the barriers to entry and progression in that community, and how best to mitigate them; and of any differential impact on certain people as a result of its regulatory arrangements.

14 About IP Inclusive

IP Inclusive is an association of individuals and organisations who share a commitment to improving equality, diversity, inclusion and wellbeing throughout the IP professions. Its founding organisations were the Chartered Institute of Patent Attorneys (CIPA), the Chartered Institute of Trade Mark Attorneys (CITMA), 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. CIPA and CITMA do not have any organisational ownership or control of IP Inclusive.

Our supporters span the IP-related professions and include patent and trade mark attorneys, IP solicitors and barristers, and 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[15], includes:

- A voluntary best practice Equality, Diversity and Inclusion Charter[16], which now has over 150 signatories from across the IP professions, and an associated "Senior Leaders' Pledge"[17].

[11] See https://ipinclusive.org.uk/community/
[12] See https://ipinclusive.org.uk/our-regional-edi-charter-networks/
[13] See https://ipinclusive.org.uk/careers-in-ideas/
[14] See https://jonathansvoice.org.uk/
[15] See https://ipinclusive.org.uk/ip-inclusive-management/
[16] See https://ipinclusive.org.uk/about/our-charter/
[17] See https://ipinclusive.org.uk/the-ip-inclusive-senior-leaders-pledge/

- The "Careers in Ideas"[13] initiative, which raises awareness of IP-related careers in order to diversify the pool from which the professions recruit.
- Networking and support "communities"[11] for under-represented groups and their allies, currently including our Women in IP community; IP & ME for BAME professionals; IP Ability for disabled (including neurodivergent) people and carers; IP Futures for early-career IP professionals; the IP Non-traditional Family Network for professionals in non-traditional families (including solo parents and "blended" family members); and IP Out for LGBT+ professionals.
- Diversity-related resources[18], training, news[2] and information, which we disseminate through our website, events[19] 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 but not currently in active practice.

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

11 March 2022

[18] See https://ipinclusive.org.uk/resources/
[19] See https://ipinclusive.org.uk/events/

Annex I:
Comments on the Impact Assessment (IA)

The numbering below corresponds to that in IPReg's draft IA, included as Annex D to the consultation paper.

1.4 Approach to impact assessment

21-22 We welcome the extension of the IA to the effects of proposed changes on equality and diversity. We note, however, that there is ambiguity as to whether inclusion has also been taken into account (as in paragraph 22).

We would prefer these issues to be assessed more widely than for the "protected characteristics" in the Equality Act 2010 – for example, to embrace (a) parents of all genders, (b) carers and (c) people from different socio-economic and/or educational backgrounds. Items (b) and (c) at least are intended by the Legal Services Board as areas on which legal regulators should focus (see its 2017 Guidance for Regulators on Encouraging a Diverse Profession[10]). A more inclusive alternative might therefore be for IPReg to assess impact *in particular* with reference to the protected characteristics, taking account of others where evidence is available.

In several sections of the IA, equality, diversity and inclusion (EDI) are evaluated separately under the "Regulatory objectives" heading and the "Equality and diversity" heading. This causes related points to be distanced from one another when they might provide a clearer and more compelling case if handled together under "Equality and diversity".

24 Among the groups of people in relation to whom IPReg has assessed impact, we would urge the inclusion of potential as well as existing registrants. It is important to evaluate whether changes might represent a barrier to entry onto the Register for certain groups of people.

2.3 Regulatory objectives

49, 55, 56 We agree that the overall impact of the proposed new regulatory arrangements, as regards EDI, will be positive. We believe they will allow the patent and trade mark professions to accommodate a more diverse cohort of regulated professionals and to serve a more diverse range of clients, thus also improving access to justice. See our general comments, at 2 above, on the benefits of a principles-based approach and increased flexibility.

58, 59 Whilst we welcome IPReg's proposed stance on admitting professionals qualified in other countries (see 5.2.2 above), we do not believe language difficulties should be equated with the protected characteristic of race: this is likely to offend people who identify as minority

ethnic and yet for whom English is a first or certainly a fluent language. Nor is having English as a second language a disability in the context of the Equality Act 2010. To the extent that the new arrangements might be of benefit to people whose first language is not English, we suggest that would be better mentioned under a more general heading.

In view of the importance of language and communication in the core work of patent and trade mark attorneys, it may indeed be inappropriate to consider the impact of the regulatory arrangements on people who might struggle to understand them.

58, 59 We applaud the rewriting of the regulatory arrangements in clearer, more inclusive and more accessible language. We urge IPReg to take advantage of the current revision process to incorporate accessibility by design into all its regulatory systems and procedures: see our comments at 12 above.

60 We agree. This is particularly the case in view of the proposed inclusion of EDI within the highest-level regulatory principles, but would also apply were it to be moved into the Code of Conduct or otherwise limited to regulated persons' professional activities: see our comments at 4 above.

3 Impact of specific proposals

As a general point we agree that (a) reductions in the regulatory burden carried by regulated professionals and their businesses, (b) the simplification of regulatory frameworks and procedures, and (c) the provision of greater flexibility in terms of compliance, are likely to have a positive impact on EDI both within the regulated community and in its interactions with consumers. See our comments at 11.1 above.

We believe the practical benefits may be particularly significant for those in smaller businesses or in businesses with non-traditional structures or working practices. IPReg notes (at paragraph 76) that it has "some evidence that people with disabilities are more likely to be in smaller firms". Anecdotally, we believe that smaller, less traditional business structures – which can facilitate more individually-tailored working arrangements – may be more suitable not only for disabled people but also for parents and other carers, for people at a later stage of their career and for people who live further from city and town centres. To the extent that the proposed new regulatory arrangements will benefit smaller and less traditional businesses, therefore, they are also likely to have a positive impact on inclusivity for these typically less well-represented groups of people, and in turn on the diversity of the regulated professions. We appreciate that these effects do not all relate to "protected characteristics" within the meaning of the Equality Act 2010, but believe they are nonetheless relevant to a thorough EDI impact assessment of this nature.

3.1 Client money

76, 77 See the comments above regarding the impact on smaller and "non-traditional" businesses.

3.2 Continuing professional development (CPD)

95 We strongly agree that a more flexible CPD system, which encompasses a broader range of activities and allows individuals to tailor CPD to their own personal requirements, is likely to have a positive impact on EDI throughout the regulated community. See our comments at 7 above. We believe this could be emphasised as a more general point in section 3.2 of the IA.

96 Whilst we understand the intention behind this paragraph, the links between gender, caring responsibilities and part-time working are based on the 2021 demographic and not inevitably correlated. We would prefer this to be made clear in the main text rather than just a footnote. The current wording risks normalising, or at worst reinforcing, stereotypes.

97 We do not believe it is appropriate to include references to socio-economic and educational background in a section about disability. We suggest the text be limited to mobility impairments, progressive conditions and neurodiversity, and that people with learning difficulties be mentioned as well.

99 Again we do not believe language difficulties should be linked with the protected characteristic of race: see our comments on paragraphs 58 and 59.

3.3 Litigation skills

107 The point about childcare responsibilities is not the only way in which removing the requirement for post-admission litigation training could impact on EDI. There are significant benefits to such a move, as discussed at 9 above. We believe this point would be better made in the section on "Equality and diversity", and others added to do with improved flexibility in the route and timing to qualification as well as in post-qualification CPD and training.

113, 114 We do not believe that requiring patent attorneys to undertake basic litigation skills training pre-admission would constitute an unjustified barrier to admission. These skills are arguably important to the core regulated activities, whether or not an attorney conducts litigation in the UK courts: see our comments at 9.1 above.

115 We suggest the link between gender and part-time working be clarified here, taking account of our comments on paragraph 96. Similar links are likely to exist for disabled people and carers, whatever their gender; these too could be mentioned in this section of the IA.

116 We are uncomfortable with the term "those who struggle to meet time-based requests" in this document. The work of a patent or trade mark attorney relies on the ability to meet legal, procedural and commercial deadlines and it would be inappropriate to imply that any regulated attorney – whatever their personal circumstances – were not able to do this. We suggest that alternative wording be used that highlights the general benefits of having greater flexibility to tailor training, both pre- and post-qualification, around individual circumstances and constraints.

3.4 Transparency requirements

133 We agree that the imposition of mandatory transparency requirements should bring EDI benefits. Clearer, more straightforward, more readily comparable communications – for example about the nature and cost of services provided – will inevitably be more inclusive communications. They are likely to be useful to a wider range of consumers, including for example people with learning difficulties, neurodivergent people, some disabled people, and generally those who (whether through their socio-economic or educational background or for other reasons) are less familiar with the UK's legal professions and their methods of working. Diversifying the client base, in this as in any other way, could bring a number of benefits to the patent and trade mark professions as well as to the wider public: see our comments at 11.1 above.

We urge IPReg to require that (a) the relevant information be accessible, and (b) regulated businesses assist people who need adjustments in order to make use of it. Such adjustments might include, for example, providing spoken instead of written information, hard copies instead of online information or vice versa, or documents in a particular font or on a particular background.

3.5 Practising categories (including sole traders)

146 We believe that these changes, which will accommodate and support a wider range of business structures, will bring EDI benefits both to the regulated professions and to the clients they serve. See our comments at 11.1 above.

153 We agree that the changes – including but not limited to the removal of unnecessary PII requirements – may facilitate more flexible and/or less conventional working practices and business structures. This may have a positive impact on disabled people and carers, part-time workers, people in smaller or less centrally-located practices, and people in the later stages of their career who wish to tailor their working arrangements. We believe this section of the IA could be expanded to include all such groups. However, as in our discussion of paragraph 96, we believe the IA should clarify the link between gender and flexibility of working arrangements.

3.6 Disciplinary policy and process

165, 166 We agree that the proposed new disciplinary provisions have the potential to allow a more flexible and proportionate approach to investigating and responding to disciplinary problems, and that this in turn could have a positive impact on EDI. See our comments at 10 above. We recognise, however, that there are many details of the provisions that have yet to be decided, for example the associated SOPs and guidance on decision-making, sanctions and publications. In this important area, we urge IPReg to continue to consult with the regulated community, and to re-assess impact, not only as the details are confirmed but also during the early stages of their implementation.

175 We agree the involvement of external decision-makers may help reduce unconscious bias in the disciplinary process, although we question whether it would go so far as to *prevent* bias. In order to ensure such benefits, we urge IPReg to incorporate, into the relevant SOPs, the measures outlined at 10.1 above to safeguard fair and non-discriminatory decision-making.

176 We agree that the proposed new provisions should enable IPReg to respond fairly and proportionately to attorneys whose personal circumstances may have contributed to a disciplinary situation. See our comments at 10.2 above. We believe this has the potential to affect any attorney who might have been disadvantaged by aspects of their identity or circumstances. As such, we suggest the IA could refer here to the full range of protected characteristics, and also to carers.

177 The "additional guidance" referred to here could be of benefit, so long as it is suitably inclusive and accessible: see our comments at 12 above.

3.7 Multidisciplinary practices (MDPs)

196 We believe this part of the IA could refer to the potential benefits of MDPs to general EDI levels in the patent and trade mark professions, as discussed at 11.2 above.

3.8 Professional indemnity insurance (PII)

The IA does not refer specifically to EDI in this section. It is possible that parts of paragraph 153 could be moved here. We believe the proposed reduction in the regulatory burden, and the flexibility to trial new approaches to PII, will have an overall positive impact on EDI: see our comments at 11.1 above.

Additional comments

A1 Recognition of overseas qualifications

We believe the IA should also refer to the proposed new provisions on recognising non-UK qualifications. If administered fairly and proportionately, we believe these could have a beneficial effect on ethnic, racial and cultural diversity in the regulated professions: see 5.2.2 above.

A2 Building on the current IA

We urge IPReg to:

- Update the IA at regular intervals as the proposed changes come into effect.
- Consult (at least informally) with those affected by the changes to assess how their actual impact compares with the currently predicted impact, and respond promptly to unexpected negative impacts.
- Continue to gather benchmarking EDI data from the regulated community, preferably annually: this will help it monitor the impact of the current proposals as they come into force, and also inform future changes to the regulatory arrangements.