THE CHARTERED INSTITUTE OF PATENT ATTORNEYS

LSB CONSULTATION PAPER ON REGULATORY INDEPENDENCE

General.

CIPA welcome statements in the consultation document indicating that given the different sizes and structures of the various Approved Regulators a "one size fits all" regime is not appropriate and that there is thus a need for flexibility for the smaller regulators who do not have large resources, either financial or human.

Question 1. *How might an independent regulatory arm best be "ring-fenced" from a representative-controlled approved regulator in the way we describe (i.e. requiring a delegation of the power to regulate processes and procedures; and the power to determine strategic direction)?*

The regulations must have the flexibility to deal with the different types of organisational structure of the Approved Regulators (AR). Some, like CIPA, are Chartered, some are companies, etc., so that different arrangements will be necessary.

In the case of CIPA, we have already amended our Charter to permit the delegation of regulatory functions which have previously been the responsibility of the Council to the Patent Regulation Board (PRB), which will generally act in concert with the Trade Mark Regulation Board (TRB), which is the regulatory arm of the Institute of Trade Mark Attorneys, the two bodies sitting jointly as the IP Regulation Board (IPReg).

We believe that the powers in the revised Charter to delegate regulatory functions to IPReg provides the necessary independence from the Council of CIPA, subject to appropriate Service Level Agreements being put into place for the provision of various common services.

The delegation of regulatory functions is already taking place and there is a Memorandum of Understanding between CIPA/ITMA/IPReg which has been agreed. There is also a draft Delegation Document, formally setting out the arrangements, although both of these documents will need reviewing when the LSB regulations are in place following the present consultation.

Question 2. *What do you think of our proposals relating to regulatory board appointees, set out under paragraph 3.15?*

We strongly agree with the need for open and fair competition in the appointment of members of the regulatory boards.

However, we strongly disagree with several of the suggestions in the consultation paper, since we see these as moving away from the principles of flexibility referred to earlier.

Firstly, we do not agree with the proposal that the Approved Regulators should be required to set up a cumbersome and costly arrangement for the selection of the members of the Regulatory Board. We accept that some Approved Regulators may wish to go down this route, but we believe that for the appointment of professional members of the Regulatory Board, an election process involving all of the registrants should be a perfectly acceptable way of selecting the best people for appointment and would provide as good a result as using a selection panel. Such an election would, of course, be independent of the representative arm of the Approved Regulator.

We also disagree with the need for a non-lawyer majority on any regulatory board. Each profession is different and some, such as the IP professions, act in a very specialised area of the law, so that it is unlikely that the lay members will have any knowledge of the specific drivers for a particular profession.

Consequently, we believe that there should be rough parity in the numbers of lay and professional appointees, but that a built-in majority is not appropriate.

We believe that any requirements for formal appraisal of Board members would be costly and unlikely to be justifiable. In our case, there is a Code of Conduct for Board members which should ensure appropriate behaviour, and there will be provisions for dismissing unsatisfactory Board members, but these provisions will be transparent and would only be used as a last resort.

Question 3. *Is it necessary to go further than our proposals under paragraph 3.15, for example, by making it an explicit requirement for the chairs of independent regulatory boards/equivalents to be non-lawyers?*

We agree that the Chairman should be the best person for the job and that this means that the appointee should not necessarily be a non-lawyer. In the case of the patent and trade mark professions, we have decided that because we have put in place special arrangements with the Patent Regulation Board and the Trade Mark Regulation Board sitting together as IPReg, we have appointed a lay Chairman of the Boards. He is a non-voting Chairman and hopes to act by consensus, in order to obtain public and professional confidence in the Board. Such confidence is particularly important for our professions, since it is not necessary for practitioners to submit themselves to regulation by IPReg, as they may instead rely on the European qualification which covers the great majority of their professional activities. However, it should be noted that the lay Chairman of IPReg has previously been a practising lawyer.

Question 4. *Do you agree with our proposals in respect of the management of resources, including those covering 'shared services' models that approved regulators may adopt? What issues might stand outside such arrangements as suggested in paragraph 3.22?*

As the Legal Services Act designated the existing professional bodies as the Approved Regulators, while requiring the separation of the regulatory decision-making functions from the representative functions and the provision of adequate resources to enable the regulatory Boards to perform their functions, Parliament clearly anticipated the need for co-operation between the two sides of the Approved Regulators. It is thus important that in setting out the internal regulatory arrangements, the LSB must have regard to this aspect of the Act and not go beyond what is specified in the Act and what is proportionate for any particular profession.

We agree that the budget should be set by the Board after consultation with the Approved Regulator.

It is imperative that there must be power for the Approved Regulator to have the budget reviewed and if appropriate amended before it is agreed, since if the Board acts unreasonably, or misjudges the income/expenditure, any shortfall could bankrupt the Approved Regulator, or at best require the unregulated members of the Approved Regulator to compensate for the failings of the regulator over whom they have no control. Hence, practice fees must be set to cover all expenditure of the regulator.

We welcome the recognition that common services will be acceptable, particularly for the smaller regulators, to ensure cost-effective and proportionate regulation.

We believe that the shared services model is appropriate for CIPA/ITMA as all the systems are already in place.

However, we see the line-management of staff as an issue for at least the smaller regulators. No member of staff of CIPA, nor of ITMA, deals solely with regulatory functions and the Board will not want to become employers and have to deal with employment issues. We believe that a Service Level Agreement to cover reporting lines for staff doing regulatory work will provide the necessary safeguards.

We do not see the need for an independent forum for the resolution of disputes, which we see as both costly and overly bureaucratic. Both the regulatory arm and the representative body have an interest in

making the arrangements succeed; also, the provisions of the Act allowing a regulatory board to raise issues with the LSB if it believes that it is being denied the resources necessary for it to perform its functions is sufficient and the SLAs which are being put in place will cover the resolution of any disagreements between the parties.

Question 5. *Is our proposed balance between formal rules and less formal (non-enforceable) guidance right? In what ways would further or different guidance be helpful?*

Yes, provided that our comments on Q4 are heeded. We believe that the rules to be set out by LSB must be principles-based and proportionate and that generally the approach proposed by LSB is proportionate.

Question 6. *What are your views on our suggested permitted oversight role for representative-controlled approved regulators over their regulatory arms?*

As the consultation paper sets out, this is one of the most difficult issues for the LSB to deal with in a manner which is proportionate, but which ensures compliance with the requirements of the Act for the Approved Regulator to act in accordance with the regulatory objectives and the principles of better regulation. The Approved Regulator is the responsible body, but must delegate functions to the independent regulator, while still retaining its oversight duties without compromising the independence of the regulatory arm. Implementing these potentially conflicting requirements will inevitably be difficult.

There will be a need for flexibility to deal with issues as they arise and we agree that there is a need for regular communication between Approved Regulator and regulatory arm and that there will be the need from time to time to review the processes and operations of the regulatory board.

Regarding monitoring, the regular dialogue and annual reports which IPReg will be making to the two Institutes should provide the basis for appropriate monitoring of the activities of IPReg. However, setting up a further tier of oversight as suggested in paragraph 3.37 would be costly and bureaucratic and the SLAs being set up should be sufficient to guarantee that the Institutes are overseeing and not controlling the activities of the regulatory board.

Question 7. In *principle, what do you think about the concept of dual self-certification?*

We agree in principle with self-certificate, as this will reduce the burden on LSB and thus the costs to be passed on to the professions. However, if the process is not to be oppressive, what is being certified must be quite clear. It is important that LSB should set out guidelines for the Approved Regulators and the regulatory boards, so that confirming the compliance with the requirements of the Act will be as simple as practicable, while ensuring public confidence in the system. It is important that the processes of self-certification for the smaller regulators should not be over-burdensome and costly.

Question 8. *If a dual self-certification model were adopted, how should it work in practice? Or would alternative arrangements be more appropriate, either in the short or longer term?*

As noted in the previous answer, we think that dual self-certification will be the least costly and most proportionate system, but the regulations for it must be clear and simple to operate. We would also encourage the LSB to prepare guidelines for both certifying parties setting out a check list that could assist them to complete the formal documentation, thereby simplifying the administrative aspects of the task. We believe that the regular discussions and the annual report to be provided by IPReg to the Institutes will provide an adequate basis for the two Institutes and IPReg each to be able to provide their side of the certification.

Question 9. *Do you agree with the mandatory permitted purposes currently listed in statute should be widened to include explicit provision for regulatory objective (g), i.e. "increasing public understanding of the citizen's legal rights and duties"?*

No. We believe that this is not a job for the regulator. It is a job for government and should be paid for by central government and not by the legal professions, or ultimately their clients. We note that this section has been written from the perspective of the solicitors profession and we would point out that for the IP professions, there is very little interface with the public and citizen's rights and duties, since the very great majority of the clients of the profession is formed of industrial companies.

Question 10. *Should any other (general or specific) purpose be permitted under our section 51 rules?*

We believe that there must be a provision that where a regulatory board wishes to spend money for any purpose, this expenditure must be directed towards the regulatory objectives and should be flagged up in the budget of the regulatory board, so that it can be discussed and agreed with the Approved Regulator before seeking approval of the LSB.

Question 11. *What do you think about our proposal to seek evidence that links to the regulatory objectives of the Act?*

Clearly, the budget must cover the proposed expenditure on matters relating to the permitting purposes in meeting the regulatory objectives. We have some concerns that the regulations for making applications must not be overly prescriptive and that the level of evidence required by the LSB before allowing applications for fee levels must not be too onerous and thus expensive for the smaller regulators.

Question 12. *What criteria should the Board use to assess applications submitted to it?*

The needs of each regulator will be different, so that each application must be considered individually in terms of the requirements for meeting and advising the regulatory objectives. We believe that if the regulatory boards are required to set out in the application the context within which it operates, this should be sufficient for the LSB to ensure that the fees requested are proportionate for that profession.

Question 13. *If they are adopted, what should Memoranda of Understanding between the Board and approved regulators contain? For approved regulators, are there any particular implications for your organisations?*

As most practice fees for individual registrants, as well as those for the entities to be entered in the new part of the Registers which are to be set up under the Act, are paid by firms or industrial companies which have their own budgetary processes, there will need to be provisions on the timing of applications and the speed with which they will be granted, in order that those paying the fees will be able to factor the costs into their own processes.

Question 14. *Should there be a requirement on approved regulators to consult prior to the submission of their application each year – and if so, who should be consulted, ad on what? Should there be a distinction drawn between approved regulators with elected representative councils or boards; and those which have no such elected body?*

The level of the practising fees will need to balance the expenditure and will thus form part of the discussions on the overall budget of a regulatory board. We do not see a need to consult beyond the representative arm of the AR.

Question 15. *What degree of detail would be most appropriate to require when seeking to maximise transparency but be proportionate in terms of bureaucracy? Have we got the balance right?*

While we agree that transparency and accountability are vital, we have concerns that the proposals should

not impose processes which are too burdensome or contain so much detail that practitioners will be discouraged from reading it. Publication of the budget and subsequent financial reporting in the annual report of the regulatory board should suffice. As noted above, the Act introduces a new section of the Register for entities, in addition to the existing section for individuals and IPReg is consulting on the balance of fees between individuals and entities, thus helping to ensure the necessary transparency of operation.

Question 16. *Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?*

We have no suggestions here.

Question 17. *Please comment on our draft proposed Rules, both in terms of the broad framework and the detailed substance.*

We believe that the Rules should be principles-based and should not contain excessive detail, since that would lead to them being inflexible to meet the needs of each individual regulator and would thus not be proportionate. We believe that the suggested draft rules strike the appropriate balance.

Question 18. Are *there any comments that you wish to make in relation to our draft impact assessment?*

We are pleased to note in paragraph 23 the acceptance that the imposition of requirements for independent persons to be involved will cause additional costs; and that in paragraphs 24 & 25 there is acceptance that over-regulation may drive people out of our regulatory net and thwart the intentions of the Act. Consequently, this reinforces our concerns that the regulations drawn up by LSB should be the minimum required for compliance with the Act and should be proportionate and not overly-burdensome for the smaller regulators.

We do not follow the logic in paragraph 27 which indicates that there will be increased costs, but suggests that practice fees will not have to rise.

In paragraph 29 it is stated that the regulation will be seen as profession-led, but this does not square with the proposal that the regulatory boards should have a majority of lay people.

With respect to paragraphs 31 and 32, we have been pleased to note the concern that practitioners should not be driven out of regulation because of overly-prescriptive or too costly regulations, and we believe that the public interest would not be served by having practitioners offering services outside the regulatory net.

Question 19. *Are there any other issues that you would like to raise in respect of our consultation that has not been covered by previous questions?*

We have no additional comment.