

CLEMENTI REVIEW –WHITE PAPER ON THE FUTURE OF LEGAL SERVICES

BRIEFING NOTE FOR INSTITUTE MEMBERS

The UK Government has recently published a White Paper entitled ‘The Future of Legal Services: Putting Consumers First’. This document seeks to implement the outcome of the 2003-4 Clementi Review and in particular sets out the Government’s proposal for reform of the regulatory framework for legal services in England and Wales. Its aim is to further the interests of consumers by replacing what the Government sees as a maze of current regulation with a single system which is both user friendly and accountable.

The purpose of this briefing note, is to summarise the main features of the proposal with a view to eliciting the views of the CIPA membership. It can usefully be read in conjunction with the Secretary’s background note on CIPA’s current regulatory role (Appendix A).

A. Main Features of the White Paper Proposal

1. Structure

The Government proposes a regulatory framework made up of four elements:

- A **Legal Services Board (LSB)** which will have oversight of the whole framework.
- **Front Line Regulators (FLRs)**, authorised by the LSB, which will have day to day responsibility for regulating practitioners who are either currently regulated or wish to submit to regulation.
- A **Consumer Panel** maintained by the LSB and which will ensure that the views of consumers are heard.
- An **Office of Legal Complaints (OLC)** which will deal with all consumer complaints where a firm’s internal complaints procedure has failed to give satisfaction. An award limit of £20,000 will be applied. The OLC will have the power to refer misconduct and disciplinary complaints to the relevant FLR for investigation and possible sanctions.

Under the proposal, FLRs will, before being approved, need to agree with the LSB (1) exactly what entities they will regulate, (2) detailed rules of procedure and (3) whether or not a compensation fund is required [for FLRs regulating Alternative Business Structures (see 3. below) a compensation fund appears to be mandatory]. The LSB will have so-called ‘stop now’ powers enabling it, in exceptional circumstances, to require firms and individuals to cease carrying out legal services where activities have breached legislation or harms the collective interest of consumers. Finally, FLRs must be organised so that their regulatory and representational activities are kept completely separate.

2. Scope of Regulation

The exact scope of the legal services which will be covered by the proposal remains unclear. Currently the Government is working with the following broad definition:

- ‘Advice, assistance and representation in relation to the operation or exercise of legal rights and the performance of legal obligations and
- Advice, assistance and representation in relation to all forms of resolution of legal disputes’

with the following activities being excluded:

- ‘Any form of judicial or quasi-judicial function (including mediation)
- Academic work or writing of books on legal issues and
- Advice which is
 - not given in the course of a business
 - on which individuals are not intended to rely.’

On the face of this definition, it would appear that at least a substantial part of a patent attorney’s day-to-day business would be covered. This would definitely be so for the litigation rights enjoyed by all RPAs. CIPA also understands that it is the Government’s intention that the CIPA membership should be regulated because of its existing regulatory activities in administering entry on to the Register.

3. Alternative Business Structures (ABS)

An objective of the White Paper proposal is to enable Alternative Business Structures (ABSs) to be established thereby introducing new approaches and further competition into the UK market for legal services. To facilitate this, an FLR may specifically seek the power to regulate defined categories of ASBs where either the services provided or the titles used are reserved. ABSs which might be of interest to the CIPA membership could include mixed practices of Patent Attorneys with any of the following groups: Trade Mark Agents/Attorneys, European Patent Attorneys, Solicitors, Accountants and Venture Capitalists.

Currently the Government is uncertain whether mixed practices of Patent Attorneys and Trade Mark Attorneys will be regarded as an ABS as these are already allowed.

FLRs may be required to impose additional charges on ABSs to cope with the different regulatory load.

ABSs may be required to appoint a Head of Legal Practice (HOLP), a lawyer ensuring adherence to rules of the FLR, and a Head of Finance and Administration (HOFA) responsible for appropriate accounting and ensuring client funds are managed separately. The HOLP and HOFA may be one and the same person.

4. Cost of Regulation

Inevitably there will be costs associated with the new framework and the White Paper is clear that these costs will be borne by the legal services sector. However the White Paper indicates that any cost should be proportionate and risk based in the sense that they are related to the number of complaints a regulator will likely receive. The Government regards the area in which the CIPA membership practises as being low risk with relatively few complaints.

If CIPA elects to be authorised as an FLR, thereby submitting its membership to regulation under this framework, there will be two types of associated cost; (1) those associated with CIPA acting as or participating in an FLR and (2) CIPA's share of the costs associated with running the LSB and the OLC because the proposal envisages that these costs will be borne by the FLRs.

CIPA is already regulating its membership and, whilst costs will increase because of the need to clearly separate the representational and regulatory functions, it may be possible to argue that the CIPA's current activities are broadly speaking fit for purpose. This would mean that any associated fee increase ought to be fairly small. On the other hand, if the Government sought to impose something more extensive (say as practiced by the Law Society) then increases could be more significant at least in percentage terms. The Secretary is currently investigating this further.

As regards LSB funding, the White Paper envisages that this will be divided up between the FLRs in proportion to the effort involved in oversight. It is far from clear what this would mean in practice. If it means apportionment on the basis of the number of complaints or the number of people being regulated then this would perhaps not have a significant impact on CIPA. The risk is however that costs will simply be divided up between the FLRs equally or nearly equally. This would work significantly to the disadvantage of small professional bodies such as CIPA. Preliminary estimates suggest that the practice fee increase will be likely to be somewhere in the range of £40 to £600 per annum with a best guess of around £200 per annum.

Although the details are likewise unclear, it is envisaged that the OLC will be funded in part by a general levy and in part on basis of "polluter pays" (30% general levy – 70% polluter pays). Whilst the 'polluter pays' approach seems reasonable, there could still be a significant effect depending upon whether the general levy is based on a flat charge uniform for all legal professionals or whether it is risk weighted.

Based on the last Office of Legal Services Ombudsman report, (indicating that solicitors are 25 times as likely to receive a complaint as patent attorneys), the cost estimated for running the OLC, and assuming the 30% split, the cost per annum per patent attorney could range between £80 if no risk element is applied and £4 if strict proportionality to the number of complaints is considered.

Overall, the cost to the CIPA membership of participating in the regulatory framework could be in £200-300 per annum range incremental upon existing practice fees.

At a recent preliminary meeting with the Department of Constitutional Affairs, members of CIPA Council voiced concerns about the potential costs of the White Paper proposal for small professional bodies. It believed that the DCA is sympathetic to our concerns because it clearly does not want to establish a regime which for economic reasons drives a significant number of people to work outside a regulated environment - a possibility where a particular legal services is not 'reserved'. However the DCA is firm that any final decision on the funding mechanism will be for the LSB which is yet to be established.

5. Joint Regulation with ITMA

One possible option may be the creation of a joint regulator with ITMA. In addition to optimising cost-effectiveness this might in any event be desirable, since mixed practices of patent agents and trademark agents are not exactly uncommon and dealing with one regulator may help keep down the level of administration for such firms.

Irrespective of whether CIPA ultimately supports a joint FLR, Council believes that CIPA's best interests are served by CIPA and ITMA making joint representations to Government where their concerns and interests are the same.

B. The Views of the CIPA Membership

In view of the above, it is clear that CIPA needs to feedback its views and intentions to the Government. Given its past and current activities in the area of patent attorney regulation, CIPA would seem well placed to take on an FLR role in the new framework. Indeed there may be an argument that not to do so would be to the possible detriment of CIPA's standing and influence in the outside world. If CIPA were to choose not to be an FLR then the membership would essentially be unregulated although the Government will require some regulation (possibly through the Law Society) for those members wishing to stay on the Patent Office register. However, before settling on any response or course of action, Council would like to hear from the membership as to the benefits and concerns that it perceives in seeking to participate in this framework.

For this reason and due to the short time for responding (early January 2006), we are sending this note directly to everyone by e-mail and asking that you let us have your views as soon as possible. All feedback is welcome, but given the time constraints it would be helpful if you could respond by e-mail to the Secretary by early December so that that the matter can be properly considered by Council at its meeting on the 7th. In addition there will be a number of open meetings in December where it will be possible to further exchange views. We would encourage you to review the full text of the White Paper which can be obtained from the Secretary or can be found on the Internet.

**CURRENT REGULATORY PROVISIONS
FOR PATENT AND TRADE MARK ATTORNEYS**

There are two elements to regulation as considered in the White Paper and in the Clementi Report on which the White Paper is based. These are pre-qualification requirements and post-qualification procedures.

Within post-qualification regulation of patent or trade mark attorneys there are two separate, but intertwined aspects: matters relating to registration and matters relating to membership of the Institutes.

Until the 1998 CDP Act was introduced, the only reserved IP service was patent agency, with anyone offering patent agent services for gain being required to be entered on the Register of Patent Agents. There was no equivalent Register of Trade Mark Agents, so that anyone could offer services in trade marks, whether or not they had a qualification or experience in trade marks.

Following a Report from the Office of Fair Trading in 1986, in which it was recommended that the patent agency profession should be completely de-regulated and the Register abolished, the government concluded that anyone should be able to offer patent agency services, but that the public interest required that there should continue to be a Register of qualified professionals. It was also decided that this situation should be reflected in trade marks, so that a new Register of trade mark agents was set up in the CDP Act.

Thus, there have been from that time Registers of qualified professionals in both patents and trade marks, but anyone may practise in those areas provided that they do not use the titles which are reserved to those on the Registers, ie “patent agent”, “patent attorney”, registered trade mark agent” and “trade mark attorney” (subject to various exceptions too complex to discuss here.

Secondary legislation gives to the respective Institute the maintenance of the Registers, including responsibility for the examinations for entry on the Registers, this being in the hands of the Joint Examination Board.

However, under this legislation, responsibility for erasing a name from either Register lies with the Patent Office acting on behalf of the Secretary of State at the DTI. The only criterion for erasing a name from either Register is “misconduct, that is to say conduct discreditable to a patent agent/registered trade mark agent”. Cases where erasure from the Register would be the appropriate sanction are extremely rare and are taken before the Patent Office. Complaints in general normally commence with and are dealt with by the relevant Institute under their own disciplinary procedures.

As well as maintaining the Registers as above, both CIPA and ITMA act as representative bodies for those members of the IP profession who choose to join either or both Institute. For both Institutes, the criterion for election as a Fellow (CIPA) or an Ordinary Member (ITMA) is entry on the relevant Register. Both CIPA and ITMA have their own Code of Conduct and a Regulatory & Disciplinary Procedure to deal with complaints of breaches of the Codes. If a breach of the Rules is found, the ultimate sanction is exclusion from the Institute, with a range

of lesser penalties down to a reprimand. If the matter is considered serious enough for erasure from the Register to be considered, the matter would be referred to the Patent Office for consideration as above.

Thus, an attorney on the Register is subject to disciplinary procedures of the Institute(s) to which he belongs, but also to a Patent Office procedure for erasure from the Register. If the attorney is not a member of either Institute, the only recourse for a complainant is the Patent Office procedure.

It should be noted that an unregistered IP adviser is not regulated by anyone, but the Patent Office has power to refuse to recognise an unregistered person whose conduct is such that he would be erased from a Register if he were on one.

A recent development is that both Institutes are able to accredit appropriately qualified and experienced members as “Patent Attorney Litigators” or “Trade Mark and Design Litigators”. These members are bound to observe a separate Code of Conduct, but this Code also applies to any member exercising a right to litigate in the Courts. Of course, all patent attorneys, whether or not they are members of CIPA, have such rights before the Patents County Court, but are only subject to a code of conduct if they are members of CIPA..

In addition to the disciplinary aspects referred to above, there are issues relating to the organisations in which members practise. The CDP Act has provisions for allowing use of the restricted titles by mixed practice firms which satisfy any secondary legislation in force. At present the only such statutory Rules are the Patent Agents (Mixed Partnerships and Bodies Corporate) Rules 1994 and the equivalent rules for trade mark agents. Thus, mixed practices of patent and trade mark attorneys are permitted to use the restricted titles (subject to having a minimum proportion of persons entitled to use the relevant title), but mixed practices of (UK) patent attorneys and EPAs are not permitted to use the title “patent attorneys”.

Mixed practices involving patent or trade mark attorneys with solicitors or barristers are permitted, but may not use the restricted titles and under the regulations of the Law Society and the Bar Council the solicitors and barristers may not practise as such.

As things stand at present, both CIPA and ITMA can only regulate individual members and not the firms in which they practise.

The present position thus gives a very confusing picture, both to the public and to others, of the types of person who engage in giving advice and services in the IP field and the bodies by which they and their firms are regulated. The first table below seeks to show this situation.

As is set out elsewhere in this document, the proposals in the White Paper seek to simplify the position, so that all complaints of poor service would be dealt with by the Office for Legal Complaints (OLC), with the OLC referring down to the regulatory bodies any professional misconduct aspects of the complaint. Also, front line regulators, or in the last resort the OLC, will regulate firms of practitioners, this being seen to be particularly important for Alternative Business Structures (ABS) where not all the members are from the same legal profession. The second table below sets out how the system might work, if CIPA and ITMA set up a joint body to regulate IP service providers.

Current Regulatory Structure

Practitioner	Membership Affiliations	Regulatory Body	
RPA	CIPA and ITMA	CIPA and/or ITMA	Patent Office for Register
	CIPA but not ITMA	CIPA	Patent Office for Register
	Neither CIPA nor ITMA		Patent Office for Register
RTMA	ITMA and CIPA	ITMA and/or CIPA	Patent Office for Register
	ITMA but not CIPA	ITMA	Patent Office for Register
	CIPA but not ITMA	CIPA	Patent Office for Register
	Neither ITMA nor CIPA		Patent Office for Register
EPA	epi and CIPA	epi and/or CIPA	Patent Office if on Register
	epi not CIPA	epi	Patent Office if on Register
ETMA	CIPA or ITMA if member	CIPA or ITMA if member	Patent Office if on Register
Patent Attorney Litigator	CIPA and ITMA	CIPA for PAL rights otherwise CIPA and/or ITMA	Patent Office for Register
	CIPA alone	CIPA for PAL rights otherwise CIPA	Patent Office for Register
Trade Mark & Design Litigator	ITMA and CIPA	ITMA for litigator rights Otherwise ITMA and/or CIPA	Patent Office for Register
	ITMA	ITMA for litigator rights Otherwise ITMA	Patent Office for Register
Person on neither Register		unregulated	PO can refuse to recognise
Firm of Patent or TM Attorneys	None	None, but the individual members regulated by CIPA/ITMA	
Mixed Practice of Patent & TM Attorneys satisfying the statutory mixed partnership rule	None	None, but the individual members regulated by CIPA/ITMA	
Firm of Solicitors employing Patent or TM Attorneys	Law Society	Law Society	
Other firm employing patent or tm attorneys	None	None, but the individual members regulated by CIPA/ITMA	
Any firm not including a patent or tm attorney offering unreserved IP services	None	None	

Potential Regulatory Framework Under White Paper Proposed Structure

Practitioner	Membership Affiliations	Regulatory Body
RPA	CIPA and ITMA	Joint CIPA/ITMA Regulatory Body (for entry to and removal from both Registers and for removal from Membership of the Institutes)
	CIPA but not ITMA	
	Neither CIPA nor ITMA	
RTMA	ITMA and CIPA	CIPA and/or ITMA (for admission to membership of the relevant Institute)
	ITMA but not CIPA	
	CIPA but not ITMA	
	Neither ITMA nor CIPA	
EPA	epi and CIPA	epi and CIPA or Joint CIPA/ITMA Regulatory Body (as above)
	epi not CIPA	epi and Joint CIPA/ITMA Regulatory Body (if on Register)
ETMA	CIPA or ITMA if member	Joint CIPA/ITMA Regulatory Body (for both Registers and Memberships)
Patent Attorney Litigator	CIPA and ITMA	Joint CIPA/ITMA Regulatory Body (for entry to and removal from both Registers and for removal from Membership of the Institutes and Litigator Rights)
	CIPA alone	
Trade Mark & Design Litigator	ITMA and CIPA	CIPA and/or ITMA (for admission to membership)
	ITMA	
Person on neither Register	unregulated	PO can refuse to recognise
Firm of Patent or TM Attorneys		Joint CIPA/ITMA Regulatory Body
Mixed Practice of Patent & TM Attorneys satisfying the statutory mixed partnership rule		Joint CIPA/ITMA Regulatory Body or other FLR authorised to regulate the types of legal services offered by the firm (present mixed partnership rules probably superseded by ABS rules)
Firm of Solicitors employing Patent or TM Attorneys (this is an ABS)		Law Society or other FLR authorised to regulate the types of legal services offered by the firm (CIPA or Joint CIPA/ITMA Regulatory Body could in theory seek this authorisation)
ABS including patent and trade mark attorneys and solicitors or barristers		Joint CIPA/ITMA Regulatory Body or Law Society at choice of the ABS
Any firm not including a patent or tm attorney offering unreserved IP services		None, unless the profession is closed such that all firms undertaking IP work must have qualified IP practitioners, in which case it is ABS, so is regulated by Joint CIPA/ITMA Regulatory Body or Law Society at choice of the ABS