Observations on the Legal Services Regulation Bill 2011

February 2012

IHRC

AN COIMISIÚN UM CHEARTA AN DUINE
IRISH HUMAN RIGHTS COMMISSION

Introduction

The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution, established pursuant to the Human Rights Commission Acts 2000 and 2001. The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in law and practice. Its functions include keeping under review the adequacy and effectiveness of the law and practice in the State by reference to Constitutional and international human rights standards.[1]

The IHRC is pleased to present its observations on the Legal Services Regulation Bill 2011 to the Minister for Justice, Equality and Defence. The present observations relate to the content of the Bill as published. The IHRC is aware that discussions have taken place subsequent to the publication of the Bill and would welcome the opportunity to comment on any published amendments in due course.[2]

Under the Human Rights Commission Act 2000, the statutory remit of the IHRC includes *inter alia*:

- keeping under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights,

- examining (on request) any legislative proposals and reporting its views thereon and making such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights in the State.[3]

Under section 2 of the Human Rights Commission Act 2000, "human rights" is defined as "(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and (b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party".

In giving effect to its key functions the Commission has offered observations on over forty Bills, appeared as *amicus curiae* on fourteen occasions before the Superior Courts, addressed by way of communications a myriad of fundamental rights issues and has delivered research papers and key speeches on a number of matters touching upon human rights as well as working with government agencies and non governmental organisations on human rights issues. The IHRC has addressed matters including the economic crisis, immigration, policing, racism, minority rights, education and of course the criminal justice system.

The importance of legal representation and particularly the availability of legal aid for those

[1] Sections 8(a), (b) and (d) of the Human Rights Commission Act 2000.
[2] See, for example, The Journal.ie: '*Legal reform is a chance to finally do the right thing for consumers',* 2 February 2012 available at *http://www.thejournal.ie/readme/column-legal-reform-is-a-chance-to-finally-do-the-right-thing-for-consumers/*
[3] Sections 8(a), (b) and (d) of the Human Rights Commission Act 2000.

who have not the financial means to provide for legal representation and are facing criminal charges resides in the first place in the Constitution[4] and accordingly relies not alone on statute law or statutory interpretation or construction.[5]

The importance of having an independent legal profession is outlined in a number of international standards including;

- The European Convention on Human Rights;
- UN Basic Principles on the Role of the Lawyer (UN Basic Principles)[6];
- Recommendations of the Committee of Ministers including Recommendation No. R(2000) 21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyers.[7]

(a) European Convention on Human Rights standards

The standards under the European Convention on Human Rights stress the importance of an independent judiciary acting to impartially hold to account agents of the State and non-State actors where their acts or omissions affect individual rights and to afford redress to the individual concerned in the case of their violation. These principles are reflected in Bunreacht na hÉireann and the doctrine of the separation of powers.

Human rights principles also recognise the importance of independent lawyers being available to all citizens and individuals in the State to fearlessly bring a case against the State before the Courts. This is an additional aspect to the traditional separation of powers doctrine of the organs of State where the Executive, Legislature and Judiciary each act as a check and balance on the powers of the other. Human rights principles act as a fourth dimension in promoting the rule of law, access to justice and the rights of individuals – particularly those in vulnerable situations and the disadvantaged. Lawyers are seen as an essential bulwark against the power of the State and also act as an essential conduit in fearlessly bringing cases before the Judiciary, an essential ingredient in the Judiciary's ability to exercise its constitutionally independent function.

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[4] The importance of legal representation for an impecunious defendant in a criminal case was articulated in the seminal decision of the Supreme Court in *State (Healy) v. Donoghue* [1976] I.R. 325. The importance of civil legal aid is addressed in *O'Donoghue v The Legal Aid Board, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2004] IEHC 413; see fn 32.

[5] *Joyce v. DJ Brady and Others* [2011] IESC 36 (O'Donnell J. with Murray J. and McKechnie J.).

[6] UN Basic Principles on the Role of the Lawyer, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at *http://www2.ohchr.org/english/law/lawyers.htm*

[7] Recommendation No. R(2000) 21 of the Committee of Ministers to Member States on the Freedom of Exercise of the Profession of Lawyers, adopted at 727th Ministers' Deputy meeting, 25 October 2000, available at *https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=533749&SecMode=1&DocId=370286&Usage=2* Other Committee of Ministers Recommendations are set out below. See also the International Commission of Jurists: *International Principles on The Independence and Accountability of Judges, Lawyers and Prosecutors, A Practitioner's Guide*, 2004, available at *http://www.mafhoum.com/press7/230S24.pdf*

Thus independent lawyers play a pivotal role in challenging legislation (the Legislature) and administrative action (the Executive) and indeed the decisions of courts of local and limited jurisdiction. In order for this role to be effective the legal profession must be independent of the legislature, the judiciary and the government.

The jurisprudence of the European Court of Human Rights has noted the importance of the independence of the legal profession when it has considered Article 6 and access to justice through legal aid.[8]

In *Staroszczyk v. Poland* [9] the Court described the lawyer's function thus:

> *A lawyer's function therefore lays on him or her a variety of legal and moral obligations, sometimes appearing to be in conflict with each other, towards the client, the courts and other authorities before whom the lawyer pleads his or her client's case or acts on his or her behalf; the legal profession in general and each fellow member of it in particular; the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society*.[10]

In *Sialkowska v. Poland,*[11] the Court stressed the importance of lawyers taking cases on behalf of individuals to vindicate their human rights. This is known as the right of access to the Court under Article 6 of the ECHR:

> *…The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings (Golder v the United Kingdom, judgment of 21 February 1975, Series A no. 18, § 31-39). The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). A restrictive interpretation of the right of access to a court guaranteed by Article 6 § 1 would not be consonant with the object and purpose of the provision (De Cubber v. Belgium, judgment of 26 October 1984, Series A no. 86, § 30).*
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> *However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State (Edificaciones March Gallego S.A. v. Spain, judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, § 34; Garcia Manibardo v. Spain, no. 38695/97, § 36). In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is*

[8] *Sialkowska v. Poland* (App No. 8932/05), 23 March 2007 and *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007.
[9] *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007.
[10] *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007 at para 67.
[11] *Sialkowska v. Poland* (App No. 8932/05), 23 March 2007.

impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[12]

The jurisprudence of the Court regarding independence of the legal profession has mainly focused on the issue of the independent relationship between a legal practitioner and her/ his client even when they have been appointed under a scheme of legal aid. The Court has upheld the importance of the discretion of a lawyer to refuse to take a legal case or apply to a court based on their professional judgement.[13] As noted above, a lawyer's primary concern should thus be the interests of the client and the rule of law (access to court). Even if the State is remunerating a lawyer for legal aid, the independence of the lawyer to make decisions based on their professional opinion must be maintained in order to ensure access to effective legal representation which in turn provides access to the court system. The reasoning of the Court for upholding this discretion is stated to be the independence of the legal profession, with the Court adopting and quoting extensively from Recommendation No. R(2000) 21 of the Council of Europe.[14] This is clear in the following concluding passage in *Sialkowska:*

[T]he Court emphasises that the independence of the legal profession is crucial for an effective functioning of the fair administration of justice. When analysing the scope of the responsibility of the State for acts of lawyers appointed under legal aid scheme, the Court must have due regard to the guarantees of such independence.[15]

In the same case, the Court further held that the State should have no role in relation to how a lawyer approaches a case, which should be a matter between the lawyer and her/his client:

[T]he Court considers that it is not the role of the State to oblige a lawyer, whether appointed under legal scheme or not, to institute any legal proceedings or lodge any legal remedy contrary to his or her opinion regarding the prospects of success of such an action or remedy. It is in the nature of things that such powers of the State would be detrimental to the essential role of an independent legal profession in a democratic society which is founded on trust between lawyers and their clients. The Court emphasises that it is the responsibility of the State to ensure a requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other.[16]

The State's only responsibility is to take action where it is clear that "the legal representation may [not] be regarded as "practical and effective".[17] Since the "right of access [to the court]

[12] *Sialkowska v. Poland* (App No. 8932/05), 23 March 2007 at paras 101-102.
[13] *Staroszczyk v Poland* (App. no. 59519/00), 9 July 2007.
[14] *Staroszczyk v Poland* (App. no. 59519/00), 9 July 2007 and *Sialkowska v. Poland* (App No. 8932/05), 23 March 2007. *Artico v. Italy*, 30 May 1980, Series A no. 37, p. 18, *Daud v. Portugal*, 21 April 1998, *Reports of Judgments and Decisions* 1998-II, p. 749, § 38.
[15] At para 111.
[16] At para 112.
[17] *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007 at para 122. The Court held that "there may be occasions when the State should act and not remain passive when problems of legal representation are

by its very nature calls for regulation by the State", where the State decides to regulate access to the court, "it must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."[18]

Thus the Court held that the role of the State in legal aid schemes provided by it would be to ensure that a replacement lawyer could be found for a client within a reasonable time if the first lawyer, believing there to be little prospect of success in instituting proceedings, decides to no longer act for the individual. Thus the responsibility of the State is to ensure the requisite balance between the competing interests of access to justice and the independence of the legal profession.[19]

(b) Other standards

Recommendations of the Council of Europe's Committee of Ministers are a further source of international law referred to in the jurisprudence of the Court. Thus in *Staroszczyk v Poland,*[20] the Court quoted the following standards:

- Recommendation No. R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice
- Recommendation No. R (93) 1 of the Committee of Ministers to Member States on effective access to the law and to justice for the very poor
- Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer.

1. Recommendation No. R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice

In *Staroszczyk v Poland* the Court recalled that this Recommendation, insofar as most relevant, reads:

> 4. No litigant should be prevented from being assisted by a lawyer. The compulsory recourse of a party to the services of an unnecessary plurality of lawyers for the need of a particular case is to be avoided. Where, having regard to the nature of the matter involved, it would be desirable, in order to facilitate access to justice, for an

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brought to the attention of the competent authorities. It will depend on the circumstances of the case whether the relevant authorities should take action (see the above-mentioned *Daud* judgment, p. 750, §§ 40-42) and whether, taking the proceedings as a whole, the legal representation may be regarded as "practical and effective" (see, *mutatis mutandis*, *Artico v. Italy*, cited above, § 33; *Goddi v. Italy* judgment of 9 April 1984, Series A no. 76, p. 11, § 27; *Rutkowski v. Poland,* cited above*).* Assigning counsel to represent a party to the proceedings does not in itself ensure the effectiveness of the assistance *(Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, § *38,* at para 122).

[18] *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007 at para 124.

[19] *Sialkowska v. Poland* (App No. 8932/05), 23 March 2007 at paras 112-118.

[20] *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007.

individual to put his own case before the courts, then representation by a lawyer should not be compulsory.[21]

2. Recommendation No. R (93) 1 of the Committee of Ministers to Member States on effective access to the law and to justice for the very poor

Again, in *Staroszczyk* the Court recalled how this Recommendation, in its most relevant parts, provides:

> Recalling that in addition to the right of access to the law and to justice provided for in Article 6 of the European Convention on Human Rights, the other provisions of the Convention and particularly Articles 2, 3 and 8 are equally applicable to the very poor, as are the other legal instruments of the Council of Europe such as the European Social Charter;
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> Considering that this recommendation is intended to improve, especially with regard to the very poor, existing legal advice and legal aid systems, and therefore to complement existing machinery with regard to the other categories of people for which the systems were designed.
>
> Recommends that the governments of member states:
> 1. Facilitate access to the law for the very poor ("the right to the protection of the law") by:
> [...]
> b. promoting legal advice services for the very poor;
> [...]
> 3. Facilitate effective access to the courts for the very poor, especially by the following means:
> [...]
> c. recognising the right to be assisted by an appropriate counsel, as far as possible of one's choice, who will receive adequate remuneration;
> [...]
> e. simplifying the procedure for granting legal aid to the very poor, [...][22]

3. Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer

In *Staroszczyk* the Court also noted that this Recommendation provides, *inter alia*:

> The Committee of Ministers, under the terms of Article 15.b of the Statue of the Council of Europe, [...]

[21] Adopted by the Committee of Ministers on 14 May 1981 at its 68th Session; cited in *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007 at para 70.
[22] Adopted by the Committee of Ministers on 8 January 1993 at the 484th meeting of the Ministers' Deputies; cited in *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007 at para 71.

> Underlining the fundamental role that lawyers and professional associations of lawyers also play in ensuring the protection of human rights and fundamental freedoms; [...]
>
> Considering that access to justice may require persons in an economically weak position to obtain the services of lawyers,
>
> Recommends the governments of member States to take or reinforce, as the case may be, all measures they consider necessary with a view to the implementation of the principles contained in this Recommendation.
> [...]
> 1. All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.
> [...]
> 1. All necessary measures should be taken to ensure that all persons have effective access to legal services provided by independent lawyers,
> 2. Lawyers should be encouraged to provide legal services to persons in an economically weak position.
> 3. Governments of member States should, where appropriate to ensure effective access to justice, ensure that effective legal services are available to persons in an economically weak position, in particular to persons deprived of their liberty.
> 4. Lawyers' duties towards their clients should not be affected by the fact that fees are paid wholly or in part from the public funds.[23]

In addition, it is noted how Principle V of Recommendation No. R(2000) 21 provides that lawyers should be able to establish associations either alone or with other bodies and under Principle V(2) that the role of "Bar Associations or other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public".

Principle V(4) states that lawyers should be encouraged to "promote and uphold the cause of justice, without fear" including through the participation in schemes to ensure "the access to justice of persons in an economically weak situation, in particular the provision of legal aid and advice."

Principle VI meanwhile, provides that lawyers associations should conduct or at least participate in disciplinary proceedings against lawyers.

Similarly the UN Basic Principles on the Role of the Lawyer provides under the title "Guarantees for the functioning of lawyers" that:

> Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within

[23]Adopted by the Committee of Ministers on 25 October 2000 at the 747th meeting of the Ministers' Deputies; cited in *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007 at para 72.

their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.[24]

Similarly the emphasis on self-regulation is emphasised in Principles 24 and 25:

> 24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
>
> 25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics. [25]

Principles which are important for the independence of the legal profession thus include:

- Avoiding improper interference from the State (European Court of Human Rights, Committee of Ministers Recommendation No.R (2000) 21),
- The ability of lawyers to form independent professional associations (Principle V Recommendation No.R (2000) 21 and Principle 23, 24 and 25 UN Basic Principles),
- Self-regulation[26] and self-government of professional associations (Principle V Recommendation No.R (2000) 21 and 24 and 26 UN Basic Principles),
- Participation of professional associations in disciplinary proceedings (Principle VI Recommendation No.R(2000) 21 and Principles 26, 27 and 28 UN Basic Principles),
- The State's responsibility to take action where it is clear that legal representation may [not] be regarded as "practical and effective".

The Legislative Proposals

The Explanatory Memorandum for the Bill sets out the purposes of the Bill as being in furtherance of the Programme for Government: "to establish independent regulation of the legal profession, to improve access and competition, make legal costs more transparent and ensure adequate procedures for addressing consumer complaints." The Bill is also stated to meet a number of the State's key commitments in the EU/IMF Programme of Financial Support for Ireland aimed at structural reform. The rationale for the regulatory regime to be

[24] UN Basic Principles on the Role of the Lawyer, Principle 16.

[25] UN Basic Principles on the Role of the Lawyer. See also Principle 23.

[26] The Venice Commission has recently noted that self-regulation within the legal profession is preferable and necessary for the independence of the legal profession in a report regarding a proposed regulation bill in the Ukraine. See European Commission for Democracy Through Law (The Venice Commission), Joint Opinion on the Draft law on the Bar and Practice of Law of Ukraine, 18 October 2011, available at *http://www.venice.coe.int/docs/2011/CDL-AD(2011)039-e.pdf*

introduced is thus to a) improve competition, b) make legal costs more transparent and c) ensure adequate complaints procedures.

The Bill proposes the establishment of three bodies: a new regulatory authority known as the Legal Services Regulatory Authority ("LSRA"), the Office of the Legal Cost Adjudicator and the Legal Profession Disciplinary Tribunal.[27] The Bill is part of the Government's initiatives to provide for greater standard setting and regulation of professional associations in the State. Thus in recent years the Government has introduced such reforms in areas where the actions (or omissions) of frontline professionals may engage with the human rights of citizens.[28] Following the economic downturn, it is increasingly recognised that independent regulation is vital to ensure that proper oversight of various aspects of governmental economic and social policy and practice occurs. This Bill, however, concerns not government policy, but the regulation of legal professionals. **The IHRC considers that robust independent oversight of Government policy and private bodies is particularly important in ensuring protection and promotion of human rights in Ireland.**

In relation to the regulation of the legal profession, this has traditionally been the responsibility of the Law Society of Ireland (in the case of solicitors) and the Bar Council (in the case of barristers). The reasons for this self-regulation will be discussed below. However, for present purposes it suffices to note that statutory provisions already regulate aspects of the legal profession in relation to issues such as financial procedures and disciplinary matters.[29] The Legal Services Ombudsman Act 2009, provided for enhanced regulation, but has not been commenced. The 2009 Act provided under Part IV for limited oversight of disciplinary matters by a new Legal Services Ombudsman, with most complaints continuing to be handled by the Law Society of Ireland and the Bar Council's Barristers' Professional Conduct Tribunal. The Legal Services Ombudsman was entitled to investigate complaints concerning how a complaint to either body was handled.

The current Legal Services Regulation Bill 2011 goes further insofar as it proposes the establishment of a new authority which would, significantly, assume the regulatory function heretofore operated by the two professional legal bodies, including in relation to complaints made against solicitors or barristers.

[27] Note that much of the impetus for reform of the legal professions lies in the report of The Competition Authority, 'Competition in Professional Services: Solicitors and Barristers', December 2006, available at *http://www.tca.ie/images/uploaded/documents/Solicitors%20and%20barristers%20full%20report.pdf* and referenced in the Explanatory Memorandum to the Bill.

[28] For example, in the Health and Social Care Professionals Act 2005, the Government provided for the establishment of a system of statutory registration for certain health and social care professionals. Under that Act twelve professions were designated for registration, including how the registration of those professionals would be conducted under the auspices of a Health and Social Care Professionals Council which has overall responsibility for the regulatory system with provision for a Registration Board for each of the professions to be registered.

[29] See for example in relation to solicitors, Solicitors (Ireland) Act 1898, Amendment Act, Number 10/1923 Solicitors Act 1943, Solicitors (Amendment) Act 1947, Solicitors Act 1954, Solicitors (Amendment) Act 1960, Solicitors (Amendment) Act 1994, Solicitors (Amendment) Act 2002.

Access to Justice

It is noted that there is almost universal support for the objective of reducing legal costs and it is hoped that this Bill will mark the beginning of a process where – even in times of economic austerity - the vindication of human rights is not correlative with an ability to pay.

It is evident from the above that the independence of the legal professional is of paramount importance in a democratic State, but allied with this is an obligation on the State to intervene in the provision of legal services where this is required to secure equality of access to such services for those who cannot pay for them in the open market. In Ireland, there has been a fine history of both solicitors and barristers taking cases with or without the prospect of their fees being paid.[30] Under the Voluntary Assistance Scheme, lawyers may provide advice and assistance in non-contentious issues to non-governmental bodies directly.

However the *pro bono* work of solicitors and barristers arises on a largely *ad hoc* basis. As a response to legal imperatives the State has put in place a comprehensive system of criminal legal aid, and a partial civil legal aid scheme,[31] However, the functions and resources of the Legal Aid Board do not provide universal access to justice as would appear to be required by the relevant Committee of Ministers recommendations set out above.[32] Thus in the context of the present Bill, there is significant scope for considering other measures, possibly through amending the Civil Legal Aid Act 1995, that will ensure access to an independent legal profession, not just for those who can afford it from their own means, but also for those who cannot. Under Principle 25 of the UN Basic Principles on the Role of the Lawyer, professional associations of lawyers are required to "cooperate with Governments" to ensure that everyone has effective and equal access to legal services.

The Bill should ensure the vindication of human rights through making lawyers more accessible. While the Bill envisages a reduction in the costs of legal services, a positive and welcome proposal in its own right, it is noted that there is no specific objective to address equality of access to justice as a basic human right. The IHRC recalls that access to justice is a fundamental right under the European Convention on Human Rights. The IHRC considers that if properly regulated legal services are the objective of the Bill, then human rights standards in relation to access to justice for vulnerable and marginalised members of society should be explicitly addressed in the context of the overall reform of such services. The IHRC suggests that, notwithstanding the severe economic constraints, the Minister would take the

[30] Thus in recent years, the IHRC (being itself an emanation of the State) has availed of the *pro bono* services of a number of lawyers in its *amicus curiae* litigation before the Courts and also to enable it to provide legal assistance to persons whose human rights have been breached. Without *pro bono* support this important work of the IHRC would not have been undertaken.

[31] In *the State (Healy) v Donoghue*, [1976] I.R. 325, it was found that there was a constitutional right to criminal legal aid, where the right to liberty was at stake. In *Airey v Ireland*, [1979] 2 EHRR 305, the European Court of Human Rights recognised that Article 6 may require a State to provide legal aid to a litigant where this was necessary for them to vindicate their rights under the Convention, and where the matter is of such complexity it could not be expected that they could represent themselves.

[32] See for example *Civil Legal Aid in Ireland: Forty Years On*, Free Legal Advice Centres, April 2009. Many Law Centres are presently experiencing a sharp increase in applications to them for legal aid, and so waiting lists are beginning to grow accordingly, a practice found to be constitutionally unsound by Kelly J in *O'Donoghue v The Legal Aid Board, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2004] IEHC 413.

opportunity to address the issue of the provision of civil legal aid to the most vulnerable in society and thus importantly recognising that human rights extend beyond the criminal justice system.

The independence of the Legal Services Regulatory Authority ("LSRA")

Under the Bill, the functions of the LSRA include preparing codes of practice, regulating accounts, monitoring admission policies in respect of the legal profession, to accredit education or training services of would-be lawyers, to review the structure of the legal profession and how legal services are provided, to provide information on the legal-services market, to conduct research into important issues relating to legal services, to assist with the coordination and development of policy in relation to legal services and to inspect legal practices and independently supervise the accounts of legal practitioners.[33]

Independence of the LSRA

Subject to the observations above in relation to legal aid, the main human rights issue arising from the Bill is the independence from Government of the body which regulates the legal profession. It will be recalled that at present two non-statutory bodies – the Law Society of Ireland and the Bar Council - provide the regulation, while under the Legal Services Ombudsman Act 2009, a statutory body would have provided some of the regulation. Under the current Bill, a statutory body (the LRSA) would provide most of the regulation. In adopting a regulatory approach which seeks to increase State control over the legal profession, the Government's model would have much to recommend itself in other fields where State control is arguably insufficient: for example, in the provision of education to children (currently predominantly in the hands of patron bodies) and the provision of health services in child, disability and older person homes (which may be in the hands of private not for profit or for profit organisations or companies). This is so because in such fields, the State has assumed human rights obligations under a number of international conventions and must ensure that there is sufficient State control of the services which underpin the human rights in those fields.

It is accepted that there has rightly been public concerns expressed about self-regulation for a number of years in relation to legal services. However, what has not been highlighted in the public debate is the articulation of the public good in self-regulation, insofar as self-regulation guarantees the independence of the profession. On the other hand, self-regulation by itself may also violate individual rights if an individual cannot seek and obtain redress before an independent complaints body and/ or the courts where their rights are engaged.[34] Moreover, the courts may not be the ideal forum for an aggrieved individual to have a complaint against a solicitor heard (an individual cannot bring a complaint against a barrister as they are not a client).

[33] See Section 9 of the Bill.

[34] Such as being "determined" under Article 6 of the ECHR or their right to a good name impugned under Article 40.3 of the Constitution.

It is notoriously difficult for a plaintiff to successfully sue a solicitor or barrister in negligence as the standard of proof required under the law of tort is peer-review based and of a high threshold. Each year complaints are made against solicitors (such as handling of client monies) which are considered first by the Law Society and subsequently by an independent adjudicator or the Solicitors' Disciplinary Tribunal. Similarly, disciplinary proceedings against barristers, (which are rare) take place under the auspices of the Barristers' Professional Conduct Tribunal of the Bar Council and ultimately the King's Inns. Identified, above, however, is the counter argument where legal regulation is involved, namely that the State should play a minimal role in the oversight of the legal profession in order to ensure its independence and its ability to take unpopular cases against the State to the Courts. Thus, in human rights terms, it is less the fact of statutory regulation which is at issue (which is currently the situation in a reduced role under the Solicitor Acts 1954-2002) rather it is the form of that statutory regulation and crucially, who it is that will regulate lawyers. Otherwise stated; lawyers should not be directly regulated by Government, noting that the independence of the legal profession is also a crucial element in ensuring an independent judiciary, which is solely drawn from that profession.

Under the current Bill, the power proposed to be conferred on the LSRA to amend or reject Codes of Conduct drawn up by professional bodies would appear to be directly in conflict with the Judgment of the European Court of Human Rights in *Staroszczyk v. Poland*.[35] More generally, the powers proposed to be conferred on the LSRA would also appear to be in conflict with Principle V (2) of Recommendation No. R(2000)21, which provides that associations of lawyers should be self-governing bodies and independent of the authorities and the public.

Composition of the LSRA

Section 8 of the Bill provides for the composition of the authority and the method of its appointment.

The manner in which the LSRA is appointed and the nature of its composition raises concerns given the wide nature of the regulatory powers with which it is charged, as set out below. If the LSRA's functions were limited to addressing competition law and policy, business and commercial matters or the needs of consumers, such concerns would be minimised, but they are not so limited.

Out of 11 members only 4 are representatives of the legal profession, but more importantly, they are to be appointed by Government. As an initial point, there should be a more balanced composition between legal representatives and lay persons on the LSRA. Under the Bill the LSRA must be 'independent in the performance of its functions' while the Chief Executive will be appointed by open competition (Section 19).[36] The power which the Bill proposes to confer on the Government, which effectively means the Minister, to appoint the members of the LSRA is objectionable, insofar as it means that where a Minister does not

[35] *Staroszczyk v Poland* (App. No. 59519/00), 9 July 2007.
[36] Irish Times, 'Fears new legal authority will lack autonomy are unfounded', 21 November 2011 available at *http://www.irishtimes.com/newspaper/opinion/2011/1121/1224307908239.html*

wish to appoint a certain person for whatever reason, she or he can simply refuse to appoint them.

Given the range of functions of the LSRA the level of Governmental control in the appointment, accountability and dismissal of members[37] (most members of the authority are to be appointed and remunerated by the Minister), the structural components of the Act do not appear to conform to the international standards outlined above insofar as they could reasonably be viewed as affecting the independence of the LSRA.

The IHRC recommends that the independence of the LSRA be strengthened. This could be done by borrowing the concept of "independence" from the UN Principles Relating to the Status of National Institutions (Paris Principles)[38] upon which the IHRC has been established, and which Principles are increasingly recognised as the international standards for the creation of independent State institutions.

Paris Principles

The Paris Principles set out the criteria under which the independence of National Human Rights Institutions (NHRI) is to be ensured and may be useful in the context of the current Bill.

The following standards must be observed under the Paris Principles:

- No interference from the State in the operations of the NHRI or in carrying out its mandate. This includes the need for separate control over Human Resources, Payroll, Finance and IT etc.
- Adequate human and financial resources to fully carry out its mandate.
- No administrative links with Government, but rather accountability to the National Parliament, in this instance the Oireachtas.
- Not only should it *be* independent, but it should be *seen to be* independent in structure and practice by the public.

NHRI independence can be guaranteed through:

- Independent, transparent, public appointments procedure for the Board;
- Independently appointed Board representing different segments of Irish society (pluralistic), gender balanced with no government/civil servant representation;
- Independently recruited and appointed Chief Executive Officer;
- Budgetary independence;

[37] Section 8(12) provides that "The Government may at any time, for stated reasons, remove a member of the Authority from office if, in the opinion of the Government—
(a) the member has become incapable through ill health of effectively performing the functions of the office,
(b) the member has committed stated misbehaviour,
(c) the member has a conflict of interest of such significance that he or she should cease to hold the office, or
(d) the member's removal appears to be necessary for the effective performance of the functions of the Authority."

[38] General Assembly resolution 48/134 of 20 December 1993, accessible at *www2.ohchr.org/english/law/parisprinciples.htm*

- Selection and appointment of its own (non civil-servant) staff;
- Transparent working processes;
- Adequate powers and functions.

To these could be added a clear mandate for a body such as the LSRA; that is, a clear rationale for its regulatory role which should include reference to how its regulatory role would interact with the respective roles of the Bar Council and Law Society of Ireland.

Functions of the LSRA

Admission Requirements, Education and Training

The legislation provides a lengthy description of issues that the LSRA should keep under review in regard to education, training, accreditation and codes of practice. The elements of the Bill relating to education and training seem to satisfy international standards which allow for government input into those areas; but less so for accreditation and codes of practice which may be seen to encroach on the independent practice of the profession on behalf of clients.

Strategic Plans

Section 16 provides for the Authority's Strategic Plans.

Section 16(2) thus empowers the Minister to give directions to the Authority on policy. Section 16 reflects the general duty of the LSRA to report to the Minister. As noted above, it is recommended that this relationship should change to the LSRA submitting reports to Government of its own volition and making such reports generally available; that is, to a regulatory model based more on "independence" than one based on "partnership" with Government.

Throughout the legislation the LSRA is required to report to the Minister for approval (see sections 17, 29 and 30 on reports to the Minister). **The IHRC recommends that all such references should be removed to ensure its independence.**

Professional Codes of Practice

Section 18 of the Bill provides the authority with the power to set codes of professional practice. Under international standards,[39] codes of practice are intended to be established by professional associations. The above section allows for the professional bodies concerned to apply to the LSRA to have professional codes approved or for the LSRA to consult with the legal profession on proposed codes of practice. However, ultimately the decision to approve codes of practice remains under the functions of the LSRA, subject to the consent of the Minister. As noted above, the Judgment of the European Court of Human Rights in

[39] See Principle VI 1 of Recommendation R (2000) 21,:"Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by bar associations or other associations of lawyers or by legislation, appropriate measures should be taken including disciplinary proceedings."

Staroszczyk v. Poland suggests that this is objectionable, the more so given the requirement for the Minister's consent under Section 18(2)(b).

In a recent Joint Opinion, the Council of Europe's Venice Commission criticised a draft law proposed by Ukraine on the legal profession.[40] The Venice Commission discussed the role of self-regulation in the legal profession and how it had almost become "part of the professions unwritten constitution" and that self-regulation could be seen to be necessary to "preserve the independence of the bar, the independence of the judiciary and the rule of law."[41]

The Venice Commission did note that the concept of self-regulation varied in different countries and that sometimes self-regulation co-existed with legislation. The question is thus whether regulation in consultation with the legal professional associations in Ireland would be considered self-regulation. The Competition Authority in its 2006 report[42] recommended that a new regulatory authority would not set the codes of practice but have the power to repeal rules or veto them and preferred a move from total self-regulation to 'independent over-sight regulation'.[43] **In this regard the IHRC recommends that the references to the consent of the Minister in section 18 be removed.**

Complaints and Inspections

Under the Bill, the LSRA is the first port of call for inspecting complaints. The LSRA has the power to appoint inspectors under section 27 and under section 28 an inspector will have powers to compel documentation. Under section 28, an inspector may attend with or without prior notice at the place or places of business of a lawyer and inspect "such specified documents or categories of documents in the possession or under the control or within the procurement of the legal practitioner as the inspector deems necessary to fulfil that purpose". It is an offence not to comply with any requirement of an inspector. An inspection may occur on foot of a complaint received by the LSRA, or for the purpose of performing any of the functions of the LSRA under the Act. Obviously this provision puts considerable power and discretion in the hands of the LSRA, albeit that if a practitioner objects an application must be made to the High Court for an Order to inspect the documents in question.

More importantly this is also a considerable encroachment into solicitor-client confidentiality, as client files may become the subject of the inspection.[44] **The IHRC recommends that sufficient safeguards are built into the legislation to ensure that any encroachment into solicitor-client confidentiality is minimal and directly proportionate to**

[40] The law was entitled *Bar of Ukraine and Practice of Law* (CDL-REF(2011)040): see the European Commission for Democracy Through Law (The Venice Commission), Joint Opinion on the Draft law on the Bar and Practice of Law of Ukraine, 18 October 2011, Opinion No. 632 / 2011, available at *http://www.venice.coe.int/docs/2011/CDL-AD(2011)039-e.pdf*

[41] *Ibid* at paras. 10 and 11.

[42] The Competition Authority, 'Competition in Professional Services: Solicitors and Barristers', December 2006, available at *http://www.tca.ie/images/uploaded/documents/Solicitors%20and%20barristers%20full%20report.pdf*

[43] *Ibid* at 3.91.

[44] It is noted that under Recommendation No. R (2000) 21, professional lawyers associations have a specific role in relation to the seizure of documents or materials in a lawyers' possession and any search of lawyers themselves or their property (at para. 5), which implies that this form of incursion into lawyers' independence, must be accompanied by robust safeguards.

the purpose of the investigation. The legislation should recognise that a solicitor may invoke solicitor-client privilege to refuse to hand over client files unless a client has explicitly waived such privilege. The legislation should also explicitly stipulate the precise categories of record that may be sought. It should also set out those considerations which would justify a legal professional in refusing access to the records in question, without risking criminal sanction. The safeguards should further stipulate the limited number of persons to whom such information or documentation may be disseminated and should provide that all copies of the records be returned to the solicitor once the investigation is terminated, and that no copies may be retained by the Authority. This part of the Bill should be kept under review by Government with reference to whether its use has in any way restricted access to the legal profession, or is causing an impediment to the proper functioning of the lawyer-client relationship.

Under section 49, the LSRA shall have a Complaints Committee. The proposed scheme will mean that the Law Society of Ireland and Bar Council are no longer the first port of call when a complaint is made. A hierarchy is formed whereby when a complaint is made, it is dealt with within the LSRA by an appointed inspector or the Complaints Committee, and depending on the seriousness of the complaint, the complaint may be referred to a separate body called the Legal Practitioners Disciplinary Tribunal to be established under section 53. The cost of the LSRA and the mooted complaints system is to be borne by the legal profession (sections 69 and 70).

Similarly to the Complaints Committee, the composition of the Tribunal (comprising 16 members) requires that there be both laypersons and experienced solicitors or barristers. The Tribunal is broken down into divisions and each division must have a solicitor or barrister depending on the complaint. The composition of the Tribunal may not seem problematic insofar as it seems to strike a good balance between involving laypersons and members of the legal profession, however their appointment by the Minister may be problematic, and the terms and conditions and the status of their tenure/ dismissal should be clarified. The proposed legislation provides a range of different sanctions under section 59 including a reprimand, a warning, a caution and/ or directions.

The Disciplinary Tribunal, in discharging its functions, is vested with certain powers of the High Court and can compel evidence and enforce witness attendance (section 57). The legislation also includes a right of appeal to the High Court which is consistent with the recommendations of the Competition Authority (section 56(6)). If there is an oral hearing regarding the complaint, the complainant and legal practitioner in question can be represented by a legal practitioner (section 58(6)). The Bill also defines misconduct in section 45. The IHRC has no particular observations to make on these provisions.

Conclusions and Recommendations

The IHRC welcomes those aspects of the Bill that will have a positive outcome for the users of legal services. Greater transparency and accountability in relation to legal costs should increase access to justice for the individual. The explicit objective of encouraging an "independent, strong and efficient legal profession", coupled with greater accountability to their clients is equally positive.[45]

The IHRC is of the view that statutory regulation of the legal profession is not contrary to human rights standards *per se*. However, noting those positive aspects of the Bill referred to above, the current text of the Legal Services Regulation Bill 2011, would need to be amended in a number of significant respects to ensure the legislation does not encroach too far into the legal profession's independence, recalling that the freedom and independence of lawyers to act without fear or favour on behalf of their clients is one of the cornerstones of a properly functioning democratic State. Inherent in this principle is a requirement that there would be equality of access to justice for all members of society, not just those who can afford to pay for legal services. The current Bill might beneficially reduce the costs of legal services overall, but does not directly address the availability of legal services, particularly through the medium of the civil legal aid scheme to those who cannot otherwise afford to pay for such services privately.

In summary the IHRC therefore recommends as follows:

1. The LSRA should be independent in discharging its statutory functions and be expressly independent of Government or any Government Minister. In this regard, the IHRC commends adoption of the UN Paris Principles as a model for the establishment and functioning of the proposed LSRA.

2. Those matters that the UN Basic Principles on the Role of the Lawyer identify as inappropriate for self regulation should be removed from the remit of the Bill.

3. The IHRC recommends in conjunction with the LSRA Bill, that the Civil Legal Aid Act 1995, and any regulations made thereunder, be reviewed to remove any unnecessary exclusions under the Act. In line with *O'Donoghue v The Legal Aid Board & Ors*,[46] funding of the Legal Aid Board should also be at a sufficient level to ensure there are no significant waiting lists for legal aid.

[45] Section 9(4) Legal Services Regulation Bill 2011.
[46] See *supra* fn 32.