



International view
The *Legal Services Regulation Bill* sends a dangerous message



US perspective
Time for Ireland's lawyers to speak out to save the rule of law



European vista
The principle of the separation of powers is under attack

LAW SOCIETY

GAZETTE

SPECIAL ISSUE December 2011

RULE OF LAW UNDER THREAT

Legal independence and
the public interest



A CALL TO ACTION

On 5 December 2011, the Law Society hosted a major conference on the subject 'Why the independence of the legal profession must be defended in the public interest'. The purpose of the conference was to raise awareness within the profession of the threat posed by the *Legal Services Regulation Bill 2011* to the independence of the legal profession – and to explain why that is contrary to the public interest.

I am fully aware, of course, that most practitioners are simply struggling to survive at the moment. You may well find it difficult to make the time to engage with an issue like the independence of the legal profession, and how it is likely to be undermined by the enactment (in anything resembling its current form) of the *Legal Services Regulation Bill*. Nevertheless, I urge you to do so.

In addition, in the public interest, I urge you to do whatever you can to make sure that this bill is not passed in its present form. Please write to your local TDs, as soon as possible, to apprise them of the dangers that this bill poses to the rule of law in Ireland, citing the following reasons:

- The unacceptable level of control that the Government would exercise over the legal profession if the proposed bill were to proceed in its current form – making Ireland unique in Europe.
- The unacceptable control that the proposed Government-controlled Legal Services Regulatory Authority would have over all aspects of legal professional practice, including training, entry and discipline.
- The subservience of the authority to Government. A majority of its members, and those of a separate disciplinary body, will be appointed by the Government on the recommendation of the Minister for Justice.
- The lack of security of tenure for the Government's nominees to this body, who could be removed at any time if this appeared to the Government to be "necessary for the effective performance of the functions of the authority".
- A sophisticated, developed and democratic state like Ireland is proposing to enact a law that resembles those in many countries with only a fragile attachment to democracy. What message will this convey internationally?
- The proposed bill would have a significant negative impact on the rule of law in Ireland and the independence of its legal profession. Lawyers must be allowed to function without external interference. This is indispensable to the administration of justice and the rule of law, as recognised by no less a body than the United Nations.
- Such a law could have a chilling effect on international corporations prepared to invest in Ireland, who need

assurance that they would have access to legal representation free from any hint of Government supervision or interference.


Outside the norms

A remarkable group of world leaders of the legal profession attended and spoke at the conference, including Mark Ellis (Executive Director of the International Bar Association), Bill Robinson (President of the American Bar Association) and Marcella Prunbauer (incoming President of the Council of Bars and Law Societies of Europe).

As the speakers made clear, the independence of the legal profession is viewed in democracies throughout the world as a necessary buttress for the independence of the judiciary, for the maintenance of the separation of powers, for access to justice and for the rule of law. As Dr Mark Ellis of the IBA said forcefully, the Irish legal system will be comparable to that of countries like China, Iran, Gambia or Vietnam if the *Legal Services Regulation Bill* is passed unchanged. Ireland will be placed outside the norms of developed democratic states.

The Law Society is seeking a meeting with the Minister for Justice to explain in detail our concerns about this bill – concerns that are clearly shared by a great many people beyond the legal profession in Ireland.

Is all of this too late? Far from it. In a speech in Ballina, Co Mayo, on 3 December 2011, Taoiseach Enda Kenny said publicly that plenty of time would be provided for this bill, saying specifically that "it will not be bulldozed through". He stated that the policy of the bill was not finally decided. As he put it: "The only decision taken by the Government in relation to this bill was to publish it."

In the meantime, now is the time for everyone to act in order to prevent an unnecessary and dreadful international downgrading of Ireland as a country devoted to the rule of law. I urge you to act now. 



"The Irish legal system will be comparable to that of countries like China, Iran, Gambia or Vietnam if the Legal Services Regulation Bill is passed unchanged"

Donald Binchy
President



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ALL PICS: SIOBHAN BYRNE

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Editor: Mark McDermott FIIC

Deputy editor: Dr Garrett O'Boyle

Designer: Nuala Redmond

Editorial secretaries: Catherine Kearney,
Valerie Farrell

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tel: 01 672 4828, **fax:** 01 672 4877.

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Editorial board: Michael Kealey (chairman),
Mark McDermott (secretary), Mairéad Cashman,
Paul Egan, Richard Hammond, Mary Keane,
Aisling Kelly, Tracy Lyne, Patrick J McGonagle,
Ken Murphy, Andrew Sheridan

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PRESERVING THE CORNERSTONE OF OUR DEMOCRACY

Introductory comments by the President of the High Court, Mr Justice Nicholas Kearns

I am very happy and honoured to have been invited to chair this conference. As you know, my work with the Law Society is part of my statutory remit and, in the two years during which I have been President of the High Court, I have always been anxious to ensure that this relationship works effectively – a process that depends in no small part on continued good consultation and good relations between us. I particularly want to congratulate Donald Binchy on entering office as President of the Law Society and wish him every success in these difficult times for us all.

Today is all about independence in the context of the legal profession and, implicitly, the judiciary also. To be concerned about independence is not to lose sight of the need for accountability or the truly frightful financial and economic position in which Ireland and its people find themselves at present. It must be clear that our discussions take place against the worst economic crisis this country has ever faced. That is a task Government must grapple with.

Sharing the burden

The legal profession, too, must shoulder its share of the burden and avoid creating any impression that it is here today to defend a sectional or selfish interest. In that regard, I have been most impressed by the many ways in which the legal profession – both solicitors and barristers – have come forward on a completely voluntary basis to assist people whose lives have been blighted by the current difficulties, notably in the areas of home repossession applications, and to assist those in mortgage and other difficulties with lending institutions. The extent to which the professions contribute to the weakest in our society will be the ultimate denominator of its strength.

As delegates will know, we have a new bridge just outside the Convention Centre



designed by Calatrava, which is the Samuel Beckett Bridge. In coming down here today from the Four Courts, I could not help but think of one of Beckett's great lines, which is as follows: "Nothing I would say would be enough and anything I would say would be too much."

Thus, let me say at the outset, I am not here as a supporter or proponent of the *Legal Services Regulation Bill*, nor am I here as its critic. As a serving judge, it would be quite wrong for me to espouse either position. What I can say, however, is that I am firmly wedded to the concept of independence in the legal sphere, be it the judiciary, the Bar or the solicitors' profession. It is a cornerstone of our democracy – something precious, which every civilised society should strive to preserve. Does the *Legal Services Regulation Bill* serve that cause? That is what today's debate is all about. ©

A DANGEROUS MESSAGE TO WEAKER JURISDICTIONS

The *Legal Services Regulation Bill* merely replaces the traditional self-regulatory model with a Government regulatory model. This is plain, it is apparent and it is dangerous, says **IBA Executive Director Dr Mark Ellis**

Dr Mark Ellis is the Executive Director of the International Bar Association, which comprises 203 national bar associations and 40,000 individual members from around the world

In my memory, having been the executive director of the IBA for the last 11 years, we have never been engaged with speaking out on an issue of this importance.

We are focusing on the independence of the legal profession in a developed country, in a country based on democratic principles. It does not surprise you that we do so in assisting countries that are coming out of a post-conflict environment and are not yet fully democratic. We experience these situations where governments attempt to take control of the legal profession, as in this case, or, as is often the case, the judiciary.

It was quite striking when this particular bill was brought to our attention. I do not want to exaggerate, however. The bill, as it stands now, represents, in my opinion, one of the most extensive and far-reaching attempts of a government to control the legal profession. It has been described here as impacting on

almost every area: this could be on the practice itself; dealing with disciplinary matters; and dealing with training and education. This bill touches on these issues. It does so through very strong interference from the Government, and particularly from one ministry. There is very little difference, if any, between the proposed authority and the Government.

In the end, in our opinion, you are facing a situation in which the Law Society and the Bar will find themselves no longer truly independent. Yet they will be connected to the Government, with the Government having substantial control. The IBA focuses on these issues based on our own principles – the IBA principles on the conduct of the legal profession.

Also, because we are the IBA, we look at international principles, particularly the UN

basic principles on the role of the lawyer.

Independence is fundamental

Regarding the IBA's principles, when one looks at the very first principle, we address the independence of lawyers. It is indispensable to the administration of justice and the operation of the rule of law.

A lawyer must act in a professional capacity, free from direction, control or interference. The guarantee of a lawyer's independence is an essential requirement for the protection of citizens' rights in a democratic society.

From our perspective, these are not issues that deal with certain minor points about remuneration, or even education. This gets to the

fundamental role of the legal profession.

It addresses a greater concern for the IBA, which is the role that the government has in directing the legal profession.

In one of our provisions, we note that independence requires admission to the Bar; discipline; and professional supervision. All points that are addressed by this

bill must be addressed in such a way that the administration of the legal profession is free from undue or improper influence, specifically from government. We anticipate a scenario where the Government attempts to take control of the legal profession. However, I have to admit that, when these principles were written up, we certainly did not think of Ireland.

“The bill, as it stands now, represents, in my opinion, one of the most extensive and far-reaching attempts of a government to control the legal profession”

Dr Mark Ellis, IBA Executive Director (left): ‘You are facing a situation in which the Law Society and the Bar will find themselves no longer truly independent’



INTERNATIONAL SIMILARITIES

"I want to discuss these four countries very briefly, because I think it will give you some insight to what we have always considered to be the major issues with government control.

China – vulnerable to interference
Chinese lawyers have also become very vulnerable to interference from the government. The All-China Lawyers' Association is essentially the Law Society and the Bar Association. Their entire structure is directed by, and influenced by, the government, through the Ministry of Justice. That association now answers to the Ministry of Justice. The Ministry of Justice requires that the guidance and supervision of the government, through the ministry, on the body of the Law Society in China, is paramount. The Ministry of Justice issues instruction on any aspect of the profession. It is dealing with training and education and discipline, similar to this bill's focus. The All-China Lawyers' Association must comply.

Iran – erosion of legal independence

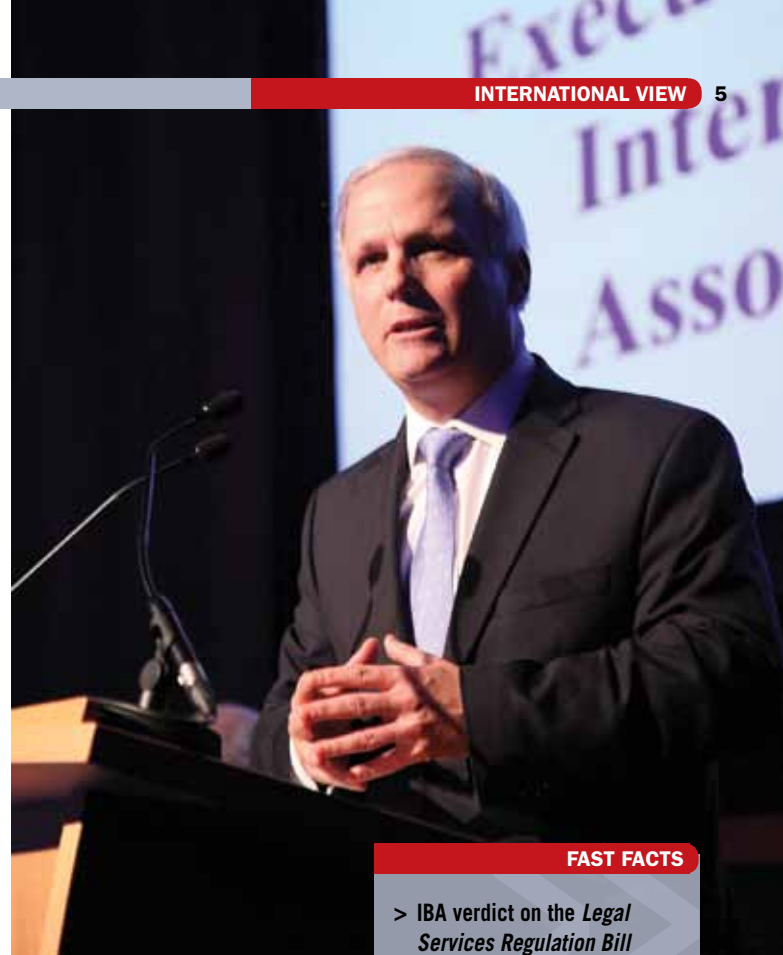
In Iran, surprisingly, the legal profession was quite independent. However, it is no surprise that, over the years, and more recently, the government has come in and taken hold of the legal profession. Here, the grip of the government through the Ministry of Intelligence

gradually encroaches on this bar association. The ministry has now moved it to a point where this bar association in Iran is simply a passive player. It has lost its voice because of the control of government.

Gambia – General Legal Council
Interestingly, a *Legal Practitioners' Act* has been adopted in Gambia that provides for the regulation and administration of lawyers. The act does not establish an authority, like here, but simply a General Legal Council. This General Legal Council is created by government, and its members are appointed by the government. The bar association now yields its power to the various provisions of this General Legal Council.

Vietnam – reversal of independence

For a long time, the Vietnamese legal profession had been under the direct control of the Minister for Justice. This changed and we started seeing quite an independent bar association in Vietnam. That has now been reversed. It has been reversed because the Ministry of Justice has come in, with the support of the prime minister. The Bar is to be responsible for 'coordinating' with the Ministry of Justice, on issues relating to disciplinary rules, inspection, training and education."



FAST FACTS

- > IBA verdict on the *Legal Services Regulation Bill*
- > Particular concerns regarding the Irish bill
- > Independence foremost among IBA principles
- > No guarantee of independence in the bill
- > UN principles – how the bill fails
- > International comparisons
- > Negative signal to other jurisdictions

traditional self-regulatory model with a government regulatory model. This is plain, it is apparent and it is dangerous.

There is the codification of practice and guidelines. The minister can request the authority to prepare and approve a code of practice for professional conduct. In essence, the Government will now have the power to mould the professional conduct and the ethics standards of an independent profession.

The levy of fees is quite striking, considering that it is leveraging the financial burden onto you – the legal profession. This is to fund an authority that really lacks the justification to represent the legal profession – and yet you will be paying for it. The disciplinary system is quite flawed, according to the IBA, concerning the issue of misconduct that has expanded within the bill.

Negative signal

What we are facing, and particularly what you are facing, is, unfortunately, an example that could have an impact on other jurisdictions. This is particularly

important for the IBA. If Ireland moves in this direction and this bill is passed, what sign does that give? What message does that give to other jurisdictions that are really struggling to create a truly independent legal profession?

We take this quite seriously in the IBA and we will stand very firmly with the Law Society, with the Bar, and with you as members. I hope that, together, we can create pressure for a change in the direction of this bill. It needs to happen, it needs to happen for you – but most importantly from our perspective, it needs to happen for the international community. This is because of the voice that your profession has worldwide.

We were thinking more of the developing countries, countries that are really wrestling with these issues.

In the UN principles, there are a number of articles. The one I always refer to is article 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." These associations must function "without external interference".

IBA concerns about the Irish bill

One can look at the provisions dealing with the Legal Services Regulatory Authority and how other issues are dealt with.

In essence, the bill does not establish a regulatory entity that is independent of the Government. The bill merely replaces the

AN INDEPENDENT LEGAL PROFESSION BENEFITS CITIZENS AND BUSINESS

Having lawyers totally independent of Government interference is not only good for Ireland's citizens – but also good for companies looking to invest here, argues **ABA President Bill Robinson**

Bill Robinson is president of the American Bar Association, the largest voluntary-membership professional association in the world. It has almost 400,000 members, over 900 staff and 3,500 separate operating units, with offices in Chicago and Washington

I would like to have a conversation with you, as a fellow lawyer, about us as lawyers – and, more importantly, about the public that we are dedicated to and responsible for serving. These are comments from the heart. These are comments that go back to the oath we were privileged to take at the inception of our careers. That oath that we took is why we see ourselves as having a vocation.

In America, when we carry out national polling, on an international basis or on an at-large basis, the legal profession ranks very low in the scoring of what the public generally thinks about lawyers. Thinking about that, it should not be surprising. However, when we carry out national polling and ask people about their opinion of their own lawyers, we are consistently gratified to receive a very high rating from the vast majority of the public. I truly believe that this is because these clients know that we – as lawyers – are, first and foremost, dedicated to them.

I respectfully suggest that, unless we as a profession, we as a calling, can

educate the public at large that this proposed legislation is more about them than about us, we have very little chance of success in ensuring this bill is modified or even defeated.

We have the education; we know the truth. We understand that this is in the best interests of the public. Only we can go out there, stand up and speak for the constitutional freedoms that citizens can only enjoy if they have access to an independent lawyer who is totally and only loyal to them. This lawyer can grant them access to an independent judiciary that can ensure for them the rights to which they are entitled in a constitutional democracy.

Former US Supreme Court Justice

“Every business, like every citizen, needs independent counsel. I cannot imagine that this bill will not have a negative impact on corporate investment in this country at a time when it is so direly needed”

Warren Burger made an observation: “The very independence of the lawyer from the government on the one hand and the client on the other hand is what makes law a profession. It is as critical to our system of justice as

the independence of judges themselves.” If we think about it – and we do – there is no meaningful access to justice without the representation of a lawyer, to stand up and speak out for our rights under the Constitution, under the law. These rights are meaningless and ineffective if they cannot be enforced. They can only be enforced by an independent judiciary.

Exclusive authority

As I read and re-read this proposed bill, I am disappointed and shocked to see the unilateral and arbitrary, exclusive, discretionary authority that the Minister for Justice has identified for himself and himself alone. He has no accountability to any other, and no answerability to any other.

As to matters of governance in this bill, it is based on what he decides, for whatever reason he decides it. His approval and consent is needed for every aspect of the governance provided for in this bill. This is the antithesis of the checks and balances that have characterised constitutional democracy in every country that has been blessed to have constitutional

IMPACT ON THE IRISH ECONOMY

“In addition to what it means to individual citizens and what it means to individual businesses, small and large, what does it mean to the economy of Ireland, which is in such distress? I was here in early October, when I was privileged to attend the Irish Global Economic Forum, before this bill came out. All of it focused on bringing more international investment to Ireland and creating needed jobs.

I ask: what general counsel of what corporation internationally will be comfortable with a proposed corporate investment in Ireland? Apparently, there

will be no lawyer operating under this proposed bill with real independence from the Government. From the outside looking in, who would be comfortable with that? Every business, the best corporation in the world that comes in, will have tax issues, export and import issues, employment law issues and so on. They will have immigration issues. Every business, like every citizen, needs independent counsel. I cannot imagine that this bill will not have a negative impact on corporate investment in this country at a time when it is so direly needed.”

democracy throughout history.

Checks and balances: where are they in this legislation? They do not exist. How will this not have a chilling effect on lawyers? How will it not? The minister will control education, licensing, the rules of conduct and even something called “inadequate practice of law”, whatever that means.

It is very chilling to think about it in all its potential dimensions. We are talking about a country where I read that 50% of the courts’ disputes are about the Government, in one way or another. In this arrangement that is proposed, how does a lawyer dare to take on the Government?

We know government; we know government bureaucracy. It is like an amoeba in the lab. It never has enough when it comes to power. It never has quite enough when it comes to regulation. It is always reaching out to take on more. Who is going to stand up? Who can afford to stand up to the intense pressure of bureaucracy? It is truly a frightening consideration, because it ultimately has an impact on the freedom of our citizens. Therefore, we must be concerned.

In point of fact, it is not an exaggeration to say that, if this bill passes, there will really only be one independent lawyer in

Ireland – and that will be the Minister for Justice. How ironic, is it not? How ironic that a man can potentially persuade his Government to create a law to make him the only independent lawyer in a country that has a great constitutional democratic history. This is a democratic history for which so many in this country fought and died; they sacrificed so much. One man in contemporary

society can accomplish this? It is unthinkable.

I respectfully share with you, as fellow lawyers, the reminder – to me and to all of us – that only we can stand up against this.

Only we have the benefit of our education, of our skill and of our vocational privileges and responsibilities to stand up and speak out. As President Donald Binchy has said so eloquently, that is what we all need to do. ©

“As I read and re-read this proposed bill, I am disappointed and shocked to read about the unilateral and arbitrary, exclusive, discretionary authority that the Minister for Justice has identified for himself and himself alone. He has no accountability to any other, and no answerability to any other”

FAST FACTS

- > The vocation and responsibilities of being a lawyer
- > The proposed bill – more about the public’s rights than about lawyers
- > Lawyers must speak out for the current rights enjoyed by Ireland’s citizens in its constitutional democracy
- > Anti-democratic nature of the bill
- > Negative impact on corporate investment



THE GOOD, THE BAD, THE UGLY

The *Legal Services Regulation Bill* will, to a substantial degree, enable the Minister for Justice to control the legal profession and the way it represents clients, says **Law Society President Donald Binchy**

Donald Binchy is President of the Law Society of Ireland

In December 2006, after five-and-a-half years of deliberation, the Competition Authority delivered its study on solicitors and barristers in Ireland. Of the authority's 29 recommendations, just four were addressed to the Law Society – all of which were quickly implemented. The study failed to unearth any anti-competitive practices, or to establish that the practice of law in Ireland was conducted in anything other than a competitive environment.

When the *Legal Services Regulation Bill* was published in September of this year, we were – to put it mildly – surprised by its contents. The model proposed by the Minister for Justice is fundamentally different from that contended for by the Competition Authority. It recommends a model of implementation that was considered, but rejected, by the Clementi Commission in England. It was rejected by Clementi for a series of good reasons. Perhaps the most fundamental of these was the risk it represented to the actual and perceived independence of the legal profession from government.

Considerable powers

The model proposed by the Minister for Justice has the effect of giving the minister significant powers. It would, to a substantial degree, enable him to control the profession, and the way

“The minister has stated that the bill is necessary to give effect to the legal obligations of the State under the EU/IMF agreement. It is quite clear that the bill goes a great deal further than this – and does so in such a way as to constitute a significant threat to the independence of the profession in the future”



it represents its clients. It is clear to the Law Society that it would be the minister, not the authority, who would be the ultimate decision-maker on all issues. The minister disagrees, but his arguments to the contrary appear to be based upon statements in the bill regarding the independence of the profession.

This is as opposed to any consideration of the powers conferred upon the minister. It is almost as though the minister cannot contemplate or imagine an abuse of power by a Minister for Justice.

To put this in context, the following are some of the powers conferred on the minister by the bill. The Government appoints, and may remove, members of the proposed Legal Services Regulatory Authority. The Government determines the term of office, remuneration and expenses of

members of the authority.

The minister is to be kept informed by the authority of developments in relation to the provision of legal services by lawyers. The minister approves the appointment of consultants or advisors to the authority. With the consent of the Minister for Public Expenditure and Reform, the minister approves fees to be paid to committee members, consultants and advisors.

The authority's three-year strategic plan must be approved by the minister and must comply with any directions, from time to time, by the minister. The minister can direct the content and form of the annual report by the authority. The minister can request the authority to prepare or approve a code of practice or a professional code, and the authority shall do so.

The authority shall submit the draft code of practice – a professional code – to the minister, for consent to its publication or approval, with or without modifications. The minister's consent is required for the authority to amend, revoke or withdraw approval for a code of practice or professional code. The minister appoints the CEO of the authority on the recommendation of the Public Appointments Service, for a period of office not exceeding five years, as specified by the minister. The minister appoints the staff of the authority and determines their grades, remuneration, terms and conditions.

Financial provisions

All estimates, financial information and accounts of the authority are subject to the approval of the minister. The minister can appoint any person to examine the accounts of the authority. The CEO of the authority is accountable to the Public Accounts Committee and the Oireachtas Committee on Justice. In giving



President Donald Binchy: "The Law Society is not against everything proposed by the bill"

FAST FACTS

- > The model proposed by the Minister for Justice is fundamentally different from that contended for by the Competition Authority
- > This model was rejected by the Clementi Commission in England
- > It has the effect of giving the minister significant powers
- > There are also implications for the management of the compensation fund

evidence to the committee, the CEO is specifically proscribed from questioning or expressing opinion on the merits of any policy of Government, or on the objectives of such a policy.

The minister can require reports on specified and other matters, including interim reports. The minister works with the consent of the Minister for Public Expenditure and Reform. He determines the amount of operating costs and administrative expenses of the authority and the disciplinary tribunal. The minister raises the annual levy-assessment notice against the Law Society and the Bar Council. Interest is payable if the levy is not paid on time. The minister can issue proceedings against either professional body if the levy is not paid. Regulations relating to the levy are made by the minister.

Significant threat

The minister has stated that the bill is necessary to give effect to the legal obligations of the State under the EU/IMF agreement. It is quite clear that the bill goes a great deal further than this – and does so in such a way as to constitute a significant threat to the independence of the

profession in the future.

However, it is important to say that the Law Society is not against everything proposed by the bill; nor is the Society opposed to all change of the current system. The Society recognises the need for greater transparency in relation to the manner in which costs are agreed between solicitor and client, or determined in the absence of agreement. The Society commends the manner in

which the minister has dealt with this important issue in the bill.

The Society also recognises that there is a public demand for a complaints process that is even more independent of the Society than the current system. However, that is a very different concept altogether to removing from the profession (and conferring on the minister) the ability to make its own rules and set its own standards. This includes

COMPENSATION FUND

"There is another point worth remembering. For many years, perhaps as a *quid pro quo* for its role as regulator, the Society has been obliged to maintain a fund. This is to compensate clients for losses they have suffered by reason of the dishonesty of a solicitor.

It is now proposed by the minister that the Society has to cede its control over the regulation of the profession to a new Legal Services Regulatory Authority. Is it fair that the Society should be expected to continue to maintain that fund and to make payments out of it on the basis of findings made by the authority? What if the authority is not as efficient at enforcing the rules applicable to the maintenance of solicitors' accounts as is the Law Society? Is it fair that the members of the profession would have to pick up the cost of such inefficiencies?

A further dimension to this issue is that insurance companies may be unwilling to insure the compensation fund, as has been done heretofore. This aspect of the regulatory function of the Society may be transferred to the Legal Services Regulatory Authority. This will remove a very substantial benefit that accrues for the benefit of the public under the current system."

educational standards and, for that matter, powers in relation to professional indemnity insurance, other than the setting of the minimum amount of cover.

Interference with independence

Why should we be concerned about this interference with our independence? The concept of the independence of the legal profession is a somewhat lofty notion to which we do not give much thought in everyday practice. No doubt, this is because we have taken it for granted for so long. However, when it comes under threat, it behoves us to respond vigorously, to defend the independence of our profession. If the principle is compromised in any way, it is not unfeasible to suggest that, at some stage in the future, it may impair our ability to act without fear or favour on behalf of our clients. It may also undermine the independence of the judiciary and it may undermine Ireland's reputation abroad. **G**

THE WEAKENING OF THE LEGAL PROFESSION

The *Legal Services Regulation Bill* goes against the core principles of the European legal profession and other international norms. Incoming CCBE president Dr Marcella Prunbauer-Glaser explains

Dr Marcella Prunbauer-Glaser is incoming President of the Council of Bars and Law Societies of Europe (CCBE) and is a legal practitioner in Vienna

It is always a pleasure to come to Ireland and, in particular, to come to Dublin. However, I must admit that my joy in returning to Dublin this time would be unlimited were it not for the grave concerns in respect of the proposed *Legal Services Regulation Bill*. Today, this unites the voices of the local, the European and the global members of the profession. It touches on the very heart of our profession and the heart of the interests of our clients, the interests of the citizens and the public at large. This cannot be stressed and repeated enough.

The CCBE is the representative organisation for approximately one million lawyers in Europe. Since its foundation in 1960, the CCBE has been at the forefront of advancing the views of the lawyers in Europe and defending the core principles of the profession. These are the principles upon which democracy and the rule of law are based.

The lawyers of Europe are aware that we are facing very difficult times and, also, that there might be need for changes and continuing updated reflection on our regulatory environment. The lawyers of Europe have always followed economic changes very closely, and we evaluate our profession and are ready to discuss necessary steps and changes.

However, in our view, the current developments in Ireland just go too far beyond the necessary reform. They go beyond what we consider to be the fundamental principles of regulation.

A free society

The independence of lawyers from the state, in all its pervasive manifestations, is one of the hallmarks of a free and democratic society. It is also a fundamental right of those who seek legal advice. Individual

lawyers can comply with their role as a guarantor of the rule of law only if they are truly independent of the state and can therefore be fearless in their representation of interests.

Consequently, regulation of the members of the legal profession must equally be free from state interference. The independence and authority of the Bars and law societies is the corollary to secure the crucial role of lawyers in

the proper administration of justice. Accordingly, it is crucial for the maintenance of the rule of law. The independent regulatory powers of the Bars and law societies are, so to speak, the collective insurance of the individual lawyer's independence.

Lawyers' regulation must be independent of the executive branch of the state. This is a core

and fundamental principle of the profession all over Europe. It is recognised at European and international level and is reflected, first and foremost, by the UN basic principles on the role of lawyers, adopted in 1990, and by quite a number of judgments of the European Court of Justice.

European principles

At the European level, we have the Council of Europe recommendation of October 2000 on the freedom of exercise of the profession and lawyers. This states that bar associations and other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public.

The Council of Europe's Committee of Ministers' recommendation recognises that bar associations should draw up professional standards and codes of conduct. Such associations have the task of strengthening professional standards and safeguarding the independence and interests of lawyers.

Insofar as disciplinary proceedings are concerned, there is another provision in the recommendation. It recognises that bar associations should be responsible for, or entitled to participate in, the conduct of disciplinary proceedings concerning lawyers. There is a provision with regard to disciplinary proceedings. The explanatory memorandum of the Committee of Ministers records the need for bar associations to establish and freely implement a code of conduct for lawyers.

Let me draw your attention to CCBE's own charter of core principles of the European legal profession. This was passed in the plenary session of

"This will be a breach of what we consider to be the core principles of the profession. It will be a breach from the perspective of the constitutional principle of the separation of powers. The executive is encroaching on the independence of the third pillar"

Dr Marcella Prunbauer-Glaser: 'The CCBE's position paper on the bill is being passed to the appropriate authorities'



"Lawyers' regulation must be independent of the executive branch of the state.

This is a core and fundamental principle of the profession all over Europe"

2006 and, again, underlines the importance of the independence and self-regulation of the profession. The CCBE is convinced that only a strong element of self-regulation can guarantee lawyers' professional independence vis-à-vis the state. Without the guarantee of independence, it is impossible for

Thus, once again, independence in self-regulation is a characteristic and a core principle for the profession in Europe. Even though not every country has total and unrestricted self-regulation,


lawyers to fulfil their professional and legal role.

there is an element that cannot be surpassed. Now, the CCBE had the chance to discuss the proposed Irish *Legal Services Regulation Bill* at its recent meeting in Antwerp. This was together with the Bars and law societies from all over Europe. The bill provides for far-reaching changes that are unprecedented in Europe. This is also why the CCBE has already taken up this issue in a personal meeting with Commissioner Reding on 5 October.

We have a view on the proposed establishment of an independent regulator. This would consist of 11 members, seven non-lawyers and two representatives from the Bar Council and two from the Law Society – all appointed by the Minister for Justice. This will be a breach of what we consider to be the core principles of the profession. It will be a breach from the perspective of the constitutional principle of the

separation of powers. The executive is encroaching on the independence of the third pillar.

We are seriously worried that, if Ireland goes down this road and the bill passes in this form, it would erode the administration of justice. It would not just affect the structure of the legal profession and the lawyer's role in society; more importantly, it would be to the detriment of the people who are in need of a lawyer.

The CCBE has produced a position paper, working together with the dual professions of Ireland on this proposed *Legal Services Regulation Bill*, which is in the process of being passed on to the appropriate authorities. We feel that what is proposed here has relatively little to do with the competition aspects. The proposals confer an unknown and unprecedented authority on one single person, with the risk that this one single person cannot be controlled – there are no means of control. 

FAST FACTS

- > The CCBE is the representative organisation for approximately one million lawyers in Europe
- > The independence of lawyers from the state is one of the hallmarks of a free and democratic society
- > Regulation of the members of the legal profession must equally be free from state interference

WEAKENING OF THE PROFESSION

"May I draw your attention to another further thread that is of concern to the delegations in the CCBE? We are seeing the budgets for ministries of justice being cut regularly, which also includes the budget that is available for legal aid. If you have systematically weakened and reduced the justice budget, this leads to an understaffed judiciary. We have seen this already in some member states. This greatly reduces access to justice.

You can take these two developments together: a weakened judiciary and a profession whose independence has been undermined because its independence is being encroached upon. In my personal view, this could be a development that is a really clear red-light warning regarding the continuing of our constitutional, democratic principles."

THREAT TO INDEPENDENCE IS SUBTLE, BUT REAL

There are aspects of the proposed legislation that are welcome, but the real question is whether this bill is the right way of tackling the regulatory issues, says **former Chief Justice Ronan Keane**

Ronan Keane is a former Chief Justice of Ireland and a former Supreme and High Court judge

It is entirely right that the provision of legal services, like medical and other professional services, should, to some degree, be regulated in the public interest. As we all know, there are undoubtedly unsatisfactory features in the provision of legal services today. Principally, this relates to the costs of such services to citizens and the delays that those citizens experience, particularly in the litigation sphere.

These are matters regarding which it is in the public interest that they are dealt with and attended to in areas where the professional bodies are perhaps limited in what they achieve. I have no doubt that there will, and should be, a role for the State as far as the provision of legal services is concerned.

The Minister for Justice is to be commended for having an obvious concern for bringing forward proposals for reform of the provision of legal services. There are aspects of this legislation that I think are welcome. The legislation does seek to deal with the very difficult areas of costs. For example, there is the abolition of contingency fees. The deleterious effect of that is obvious. Somebody providing a legal service allows their judgement to inevitably be affected – their fees may not simply depend on the result of the case, but on the amount of any award. That must clearly present some conflict of interest for the practitioner concerned.

Similarly, I can see that there is every reason to abolish a measure that

the Bar Council has not succeeded in abolishing. This is the requirement that junior counsel be paid two-thirds of senior counsels' fees. And I would certainly welcome some steps to ensure that, in areas where it is appropriate, the client should have direct access to a barrister. A barrister should be able to appear in court in certain circumstances, without necessarily being instructed by a solicitor, where that is for the benefit of the client.

“The sort of threat that this represents to independence does not necessarily exist at the overt level. It exists in a more subtle way”

The right way?

These are all features of the bill that I think one could welcome, in general.

The fact that the bill proposes to establish a Legal Services Regulatory Authority is not, of itself, something that one should reject or see as necessarily wrong in principle. Ministers, governments and the legislature are clearly entitled to take a view regarding the regulation of a profession as major and as important as the legal profession.

The real question is whether this bill is the right way of tackling it. Having studied it with some care, there are features of it that certainly give rise to deep misgivings. There is the importance, in that context, of ensuring that the supervision of the legal profession is wholly independent of the executive.

While there must be regulation,





Former Chief Justice Ronan Keane: 'There are features of the bill that certainly give rise to deep misgivings'

it should not take a form that seriously damages the profession and is seriously damaging to the ultimate interests of the people who depend on legal services. This, in fact, becomes of acute importance regarding this bill when one considers the wide range of functions that this authority will undertake when it is established.

When you are considering whether the proposed authority will be truly independent in the discharge of its functions, it is necessary to, first of all, look at how it will be appointed. The Government is to be solely responsible for the appointment of the majority of the 11 members of the authority. At least seven of them will be by Government appointment. Only four are to be nominated by the Bar Council or the Law Society. Then, in addition, there has to be a legal costs accountant and an officer of the minister.

There are no specific

qualifications indicated for the seven lay members – the majority of lay members of the board. As far as I can see, it will be sufficient if, for example, they have expertise in business and commercial matters. All seven of them may simply have that degree of expertise, whatever it means. Similarly, it may be sufficient if they are experts in the needs of consumers of legal services. Again, there is quite an extraordinary vagueness about that, but that is the manner in which it is envisaged that the members of the authority will be appointed.

Terms of appointment

They are to be paid whatever remuneration the minister determines, with the consent of the Minister for Public Expenditure and Reform. They are to be appointed for four years. Not only are they to be appointed for four years, but they can be reappointed for a further

term of four years. That is the method of appointment. One then turns to the circumstances in which they can be dismissed, and one finds that they can be removed by the Government for stated reasons. This is if, in the opinion of the Government, that removal is necessary for the “effective performance of the functions of the authority”.

That particular expression is remarkably wide-ranging and subjective. Therefore, it is almost impossible to see a court being able to exercise its judicial-review powers, with the best will in the world. A member of a body like this can be subject to dismissal because the Government says they have formed a particular opinion. The member realises that his only way of avoiding that is to go down the expensive, difficult and – in this case – particularly uncertain road of judicial rule. I think this casts a huge shadow over the possible independence of such a body.

You must remember that the sort of threat that this represents to independence does not necessarily exist at the overt level. It exists in a more subtle way. People, because they are human beings, are conscious of this. They should not be conscious of this if they are

FAST FACTS

- > It is right that the provision of legal services should, to some degree, be regulated in the public interest
- > The proposal to establish a Legal Services Regulatory Authority is not, of itself, necessarily wrong in principle
- > However, none of the features that necessarily support and buttress the independence of the legal profession seem to be present in this bill

supposed to be discharging a totally independent function.

It is not enough for the bill to say that they *should* be independent in the discharge of their functions. It must offer assurance through the method of appointment, the manner in which they are remunerated, and the manner of their dismissal or removal from office. It must also offer assurance through the length of their terms of office. In relation to all those matters, these must be consistent with them being an independent body.

It is very hard to see that those conditions, as laid down in this bill, are truly consistent with independence. None of the features that necessarily support and buttress our independence seem to me to be present in this bill, and I think that must be a matter for considerable disquiet. ©

PACKING THE JURY?

The *Legal Services Regulation Bill* is immensely important, says **Bar Council Chairman Paul O'Higgins**, and an immensely grave threat to 'CIA' – cost, independence and access

*Paul O'Higgins
is Chairman of
the Bar Council*

If one looks at the details of this bill, every one of them interacts in a way that has potentially disastrous consequences for the profession. This bill does not come quite in isolation. It is part of a change in the policy of governments – not just in Ireland, but elsewhere – against the notion of independence and against the notion of an association of an independent judiciary.

I am quite disturbed by some aspects of this bill – in fact, by very many of them. However, there is a provision that does not sound very important, but I suggest to you that it is. The Legal Services Regulatory Authority will have to contain one person who shall be an officer of the minister. That is very significant, because it means that nothing can ever be said at meetings of the authority without the ears of the minister being present in the room.

The State, in one form or another, is a participant in perhaps 50% of the cases that come before the courts, and it is a worrying thing that no policy can be discussed, nor any disagreement expressed, without the minister's servant being present to report back on what happened. And this is in the context of a body to which a member may or may not be reappointed.

There is no independent authority

even to that extent. The authority is being appointed to decide on a number of issues, and it is the Government that will decide who will decide those issues. It does not take a genius to see that you may choose people who are well known for taking a particular view on the given issues. If so, it would be considered a wholly simple thing to 'pack the jury', as it were. This was something that was very familiar in Irish parlance in the 19th century and was fortunately abandoned in the 20th century. However, despite the fact that the profession is meant to be 'dragged into the 21st century', it seems to be reverting to some aspects of the 19th.

The minister and the Government can, in fact, choose those known to be supporters of the outcome that the minister would prefer. That does not imply any badness on the part of those appointed to the authority; they merely need to do what they first expressed a belief in anyway. But the lack of independence of the authority is an extreme worry. We are truly worried about the lack of independent governance of the legal

profession and the effect that that may have on the welfare of the public generally – and litigants in particular.

Major financial costs

Our disciplinary systems, I suspect, will cost astronomical amounts of money to run from here on.

This, in turn, will increase the

cost of law to the consumer. This is truly ironic with regard to circumstances where we are seeking to encourage independent lawyers, giving better access to the public in the supply of legal services.

A tremendously cumbersome structure is being proposed.

However, what is most striking is that this bill was produced in circumstances of extraordinary obscurity, without any substantial degree of public discussion. It was also produced without any examination of either the cost of running the various authorities or the cost to the consumer resulting from the changes proposed.

Now and forever

This is a bad bill now, and it is a bad bill for all time. Who knows who the Minister for Justice will be in the future, but any minister may choose to allow the authority to decide the issues. What is more, the minister may specify any measure into which the authority is to enquire, and may specify the time after which the authority is to report.

In effect, the minister can decide to give, or not to give, the authority the resources to act. In effect, for as long as he likes, he can obstruct the authority's capacity to act on almost

"This is a bad bill now, and it is a bad bill for all time. Who knows who the Minister for Justice will be in the future?"

REFERRAL STATUS OF THE BAR

"The abolition of the independent referral Bar would have dramatic effects, in a country as small as Ireland, on the availability of expert legal services. What is proposed represents an absolutely radical change in the ways in which legal services are to be both governed and offered.

In effect, the introduction of multi-disciplinary practices would undermine the cornerstone of the Bar as a referral profession. The Bar has repeatedly

made the point to the Competition Authority and other bodies that the Bar as a referral profession makes it possible for solicitors' firms of any size, in any location, to compete with the largest solicitors' firms anywhere else. To the Bar, that is a matter of fundamental importance in the Irish context.

In 2006, the Competition Authority expressed serious reservations about the regulatory desirability of multi-disciplinary practices."

FAST FACTS

- > The State is a participant in perhaps 50% of the cases that come before the courts
- > The proposed new regulatory authority will have to contain one person who shall be an officer of the minister
- > The cost of regulation will become enormous, which will increase the cost of law to the consumer
- > The abolition of the independent referral Bar would have dramatic effects on the availability of expert legal services

anything. I am not suggesting that *this* minister will do that, but the fact that any minister *could* do it is an issue that the legal profession should be very, very concerned about.

The main arguments for self-regulation of the legal profession are that it is necessary to preserve the independence of the Bar, the independence of the judiciary, and the rule of law. It ensures protection from State interference. Advocates are best placed to assess their peers. Self-regulation is both the most efficient and most

rigorous means of regulating the profession. Self-regulation has been part of legal tradition since at least the 15th century. It has become part of the profession's unwritten constitution. That is an unwritten constitution, not in the interests of the profession, but in the interests of the administration of impartial justice in the enhancement of the rule of law.

There is no excuse for abandoning the principle of legal professional independence. It is not helpful to discuss issues as serious as these in terms of catch



cries. However, the catch cry of the minister seems to be to 'bring the legal profession from the 19th to the 21st century'. But there is

a significant danger that in his efforts to effect this progress, we will revert to some aspects of the 15th century. Ⓢ



At the conference on 'Why the independence of the legal profession must be defended in the public interest' were (from l to r): Ken Murphy (Director General, Law Society of Ireland), Ronan Keane (former Chief Justice), Paul O'Higgins (Chairman of the Bar Council of Ireland), Donald Binchy (President of the Law Society of Ireland), Dr Marcella Prunbauer-Glaser (incoming President of the Council of Bars and Law Societies of Europe), Mr Justice Nicholas Kearns (President of the High Court), Bill Robinson (President of the American Bar Association) and Dr Mark Ellis (Executive Director of the International Bar Association)



THE LAW SOCIETY OF IRELAND

**Why the Independence of the
Legal Profession must be
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International Convention Centre
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