



BAR COUNCIL OF IRELAND

Initial Submission on
The Legal Services Regulation Bill, 2011

December 2011

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BAR COUNCIL OF IRELAND

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Part 1

Introduction: The Position of the Bar Council

PART 1 INTRODUCTION: THE POSITION OF THE BAR COUNCIL

1. The Bar Council supports reforms which have as their objective the modernization of the legal professions and the better and fairer delivery of legal services to the citizens of Ireland. The Bar Council welcomes any opportunity to engage meaningfully and constructively in the process of reform of the system of regulation of the legal professions and the delivery of legal services in the State. The Bar Council makes these submissions with that objective. The Bar Council understands that the Minister intends to table a number of amendments to the Bill. Those amendments have not been published or communicated to us and we are not in a position to comment on them. However, we feel that it would be helpful to make these submissions at this stage in light of the imminent second reading of the Bill later this week. This submission should, therefore, be treated as a first submission. When we hear the Minister's proposed amendments and his and others' contributions at the second stage we will supplement this submission. We would also be happy to appear before and make submission to the Justice Committee on the Bill.
2. At the outset the Bar Council would like to make it clear that it does welcome as being generally in the public interest the provisions of the Bill dealing with costs. The Bar Council fully supports and agrees with the provisions of the Bill in so far as they seek to require transparency of legal costs. It is notable in that regard that since June 2007 the Bar Council has required barristers to provide fee estimates (among the only users of barristers services who expressly do not require fee estimates from barristers is the State). This has enabled solicitors and clients to "shop around" for the barrister offering the most competitive estimate for any particular piece of legal work. With more than 2,300 barristers in practice in the State (half of whom are qualified 10 years or less, with more than a third qualified 5 years or less) combined with the straightened economic conditions in the State, the market for barristers' services has never been as competitive as it is now. This has led to very considerable reductions in fees paid to most barristers by public and private clients.
3. This Bill seeks to fundamentally alter the regulation of the legal professions and the manner in which legal services are delivered in the State. There was however no proper consultation with any stakeholders or interested parties, including the Bar Council, prior to the publication of the Bill in October 2011. Despite the fundamental nature of the reforms proposed in the Bill, which will have a radical effect on the cost and delivery of legal services and access to justice, it is striking that no evidence based assessment was carried out by the Minister or his Department prior to the publication of the Bill which has been presented, in effect, as though it were the product of a studied process.
4. The delivery of legal services bears not only the economic well-being of the State but also upon fundamental values in our constitutional democracy such as the administration of justice, the separation of powers and the balance between the rights of the individual and the State. Given the central importance of the matters which the Bill seeks to regulate it is, therefore, essential that notwithstanding the apparent urgency with which the Bill was required to be published, fundamental and far reaching reforms of the kind proposed should be properly evaluated and shown to be in the public interest prior to enactment.

5. This Bill, without any prior proper consultation or economic assessment, proposes to establish a Legal Services Regulatory Authority which will not be independent of the Executive and which will directly regulate the legal professions and regulate the delivery of legal services in the State. This is not only the view of the Bar Council and the Law Society of Ireland but also an impressive group of international organizations and many media commentators.¹
6. Uniquely in the developed world, the proposed regulation will result in a level of government control over the body regulating the legal professions which will run directly contrary to the core value of independence in the administration of justice. The Bill has been widely criticized by various international groups including the CCBE (the federation of European Bar Associations and Law Societies), the International Bar Association and the American Bar Association. According to the Executive Director of the International Bar Association, the form of regulation is more comparable to the systems of regulation found in some other developing countries and has never been identified by that organization in any other developed country. There are obvious alternatives to the type of regulation proposed in the Bill which would comply with the requirements of the Troika, the intention and aims of the Fine Gael – Labour Programme for Government and the understandable desire for reform. The Bar Council suggests some of these alternatives in the final part of the Submission. The Bar Council would be very happy to develop these suggestions further and to engage constructively in their consideration and implementation. It is not correct to say that the Bar Council has not been prepared to engage constructively in this regard.
7. The Bar Council considers that the business structures for the delivery of legal services proposed in the Bill such as Multi-Disciplinary Practices (MDPs) and Legal Partnerships will damage rather than enhance competition in the delivery of legal services. Contrary to what has been asserted by the Minister for Justice the business structures proposed at Part 5 of the Bill, namely legal partnerships and multidisciplinary practices, were not recommended by the Competition Authority or the Legal Costs Working Group or indeed by the Programme for Government. No independent economic assessment of this or other models of business structure for the delivery of legal services has been undertaken prior to the publication of the Bill. The Bill simply imposes new business structures without any analysis of whether they are in the public interest and without any regulatory impact assessment having been carried out into how such structures will operate.
8. The effects on access to justice for consumers, competition, the ethical provision of legal services and the sound administration of justice have not been gauged before these new business models are to be introduced in legislation. The Bar Council believes that the public consultation process will inevitably be ineffective and inadequate in that regard as the Bill assumes that such models are to be introduced without permitting the new regulatory authority to assess whether, in the first instance, these new business structures should be permitted for the delivery of legal services. The Bill, therefore, presupposes and pre-determines that these new structures or models will be permitted without doing what the Competition Authority recommended in its 2006 Report should be done, namely, that a proper study should be conducted by the new regulatory body which considers all of the

¹ A selection of media articles is contained in Appendix 4.

issues thrown up by these new structures including the very real access to justice issues identified by the Competition Authority itself.

9. The Bill will, if enacted in its current form, lead to the establishment of an un-costed regulatory structure with no incentive for control on costs. The Bill proposes the establishment of five new regulatory bodies with no limit on the establishment or day to day costs of the same. Three of them – the Legal Service Regulatory Authority, the Complaints Committee and the Legal Practitioners’ Disciplinary Tribunal will consist of 43 appointed members with the Regulatory Authority having a Chief Executive and a substantial staff to perform the function of the Authority. The establishment of this series of quangos without any prior assessment of the costs and economic case for the same runs directly counter to good governance, common sense and to the policy commitments contained in the Programme for Government 2011². It also runs counter to the Government’s understandable desire and intentions in almost all other areas to abolish or merge quangos.
10. It has been wrongly stated that the Bar Council does not offer any suggested alternatives for reform. On the contrary the proposals for reform in the regulation of the legal professions and the delivery of legal services proposed by the Bar Council are largely consistent with the Recommendations of the Competition Authority in its report on the legal professions in 2006 and the report of the Legal Costs Working Group.
11. The Bar Council suggests a form of independent regulation of the legal professions by an independent regulator of the nature and type recommended by the Competition Authority in its 2006 Report³. Consistent with its recommendations the Bar Council also suggests that the Authority would carry out research into business structures for the delivery of legal services in the State. This would enable the Oireachtas to be provided with a comprehensive assessment about the types of business structures that should be enabled to operate for the delivery of legal services in the State in the interests of the public, not the legal profession. The Authority would not be prescribed or limited in how it carries out that assessment, which should ensure that it can undertake a wide-ranging analysis, including an assessment of any business models in operation in other jurisdictions and empirical research on the impact of the introduction of new or changed business structures in such jurisdictions.
12. The circumstances in which the current Bill was drafted and presented should be contrasted with the in depth consultation process and economic research which preceded the radical reforms of the delivery of legal services in the United Kingdom introduced under the Legal Services Act, 2007. The following are the key steps taken prior to the introduction of these the 2007 Act:-
 - (i) The UK Office of Fair Trading published a report on ‘Competition in Professions’ in 2001;
 - (ii) The Government thereupon engaged in a wide ranging public consultation exercise. This resulted in a 2003 report from the Department of Constitutional

² Page 28 of Programme for Government 2011

³ Recommendation No. 1 of the 2006 Report

- Affairs which concluded that a thorough and independent investigation of the legal regulatory framework without reservation was required;
- (iii) Sir David Clementi was appointed to carry out this review and, following extensive consultation and examination of various regulatory and business practice models, his report (the Clementi Report) was published in December 2004;
 - (iv) Following further consultation the Government published a draft Legal Services Bill for Parliamentary pre-legislative scrutiny in May 2006. Published with this Bill was an 86 page Regulatory Impact Assessment which relied upon an independent report of PWC which carried out a financial assessment of legal services reform. This report provided detailed estimates of the implementation and running costs of the options considered for regulatory reform and complaints handling;
 - (v) In 2007 a Supplement to this Regulatory Impact Assessment was published outlining the increased implementation and running costs of the reforms. There was considerable engagement with the legal profession during the passage of the legislation.
13. While the Bar Council accepts that there was pressure from the Troika to publish the Bill in October this year, it does not accept that there is such overriding pressure to enact the Bill in its current form without a proper consideration and study of the public interests involved – and without any solid information on costs and other impacts the Bill would have if enacted in that form.
14. The Bar Council supports the reform of the regulation of the legal professions and the delivery of legal services. The Bar Council does, however, strongly believe that such reforms, which touch not only upon the economic wellbeing but also the fundamental rights of the citizen, should follow an informed debate following upon an evidence based examination of the current model of regulation and delivery, such models in other modern democratic states and the particular economic and social needs of the citizens of this State.
15. The Bill should not have the effect of destroying the independence of the legal profession, in general and of barristers in particular, in their ability and freedom properly to represent their clients in many cases against the State or State bodies and to represent those who would otherwise have no representation. Nor should it lead to a situation where costs will increase rather than decrease due to the bureaucratic regulatory superstructure and the business models and structures provided for in it. Enactment of the Bill in its current form will have all of these negative consequences. It should, therefore, be substantially revised and amended. The Bar Council offer some suggested alternatives in the final part of this Submission.



Part 2
Executive Summary

PART 2 EXECUTIVE SUMMARY

A. BACKGROUND TO THE BILL:

16. Before considering the principal significant and fundamental structural changes proposed under the Bill, it is important to consider the context in which these proposals have been advanced by the Government and the Minister in particular.
- (i) First, notwithstanding the far-reaching structural changes proposed in the Bill regarding regulation of the legal professions and the provision of legal services, there has been extremely limited consultation with the Bar Council, the professional body responsible to date for regulation of the profession of the 2,300 barristers practising in the State; although the Bar Council repeatedly requested meetings with the Minister following his appointment, only two meetings have been afforded to the Bar Council (on 11 July 2011 and 24 November 2011), with the Bar Council also forwarding written submissions to the Minister on 9 August 2011 regarding direct access to barristers for advice, the benefits to the public interest and the proper administration of justice of the sole trader rule and the unsoundness of partnerships.
- (ii) Secondly, such communications with the Minister as have been afforded to members of the Bar Council have not provided any opportunity for meaningful discussion of the proposed reforms; indeed, at the meeting on 11 July 2011, the Minister sought to understate the nature and extent of the reforms which would be included in the Bill and indicated that he had not made up his mind on any of the issues and that nothing was set in stone. He gave no indication, for example, that he was considering legislating for multi-disciplinary practices, (something expressly not recommended by the Competition Authority), for direct access to barristers for *contentious* matters (as opposed to for advice, which was something recommended by the Authority) or for the possible unification of the two branches of the profession. A copy of the note of the meeting of 11 July 2011 is attached at Appendix 1. The Bill, approved by Cabinet on 4 October 2011 and published on 12 October 2011 contains provision for all of these; until the publication of the Bill, the Bar Council was required to rely principally on the Minister's press release of 4 October 2011 for an indication as to the contents of the Bill. Furthermore, whereas at the first meeting granted to the Bar Council, the Minister suggested that the submissions of the Bar Council regarding the form of regulation of the legal profession and the structural changes were 'premature', it was suggested to the Bar Council at the second meeting on 24 November 2011 (granted following requests for meetings with the Minister following publication of the Bill) that the form of regulation of the legal profession and the new structures for the provision of legal services proposed in the Bill represented decided Government policy by that stage and that, in effect, the submissions of the Bar Council on those fundamental issues were 'too late'. A copy of a note of the meeting on 24 November 2011 is attached at Appendix 2.
- (iii) Thirdly, notwithstanding representations or suggestions made to the contrary, in the case of many of the proposed reforms, it is quite apparent that the measures introduced by the Bill are either entirely absent from or, in some cases, directly at variance with the terms of the 2006 Report of the Competition Authority, the EU / IMF Programme of Financial Support for Ireland and the Report of the Legal Costs

Working Group. In this regard, representatives from the Bar Council met with the EU Commission and IMF representatives in Dublin on 3 October 2011 (having sought such a meeting over the preceding several months), in order to ascertain what the EU / IMF were requiring the State to do under the terms of the EU/ECB/IMF (the “Troika”) Programme for Support. The Bar Council representatives were clearly informed that the Troika required only what was in the Memorandum of Understanding, but that the State could legislate over and above those requirements as it is a sovereign state. Members of the Bar were informed of the meeting and what was discussed by way of circular. The Minister responded by accusing the Bar Council representatives in *The Irish Times* of “*briefing against the State*”, but also significantly conceded that not all measures in the Bill were required by the Troika.

(iv) Fourthly, to the extent that it is now suggested that the form of regulation of the legal profession and the new structures for the provision of legal services proposed in the Bill represent Government policy, the Fine Gael/Labour Programme for Government does not support this assertion. While referring to independent regulation and other issues such as transparency in costs and the provision of information to consumers, the Programme for Government does not specify, require or commit the Government to any form of independent regulation or structural changes, still less the form of regulation or structural changes provided for in the Bill. Moreover, it would be extraordinary that Government policy should be formed:

- without first conducting a Regulatory Impact Assessment;
- in the teeth of the recommendations of the Competition Authority;
- without regard to the recommendations of the Council of Europe, the United Nations, the relevant decisions of the European Court of Justice and the European Court of Human Rights; and
- and where there is no known comparator in the developed world.

B. SCOPE AND EXTENT OF 2011 BILL BEYOND REQUIREMENTS OF TROIKA/PROGRAMME FOR GOVERNMENT

17. The Bill proposes to fundamentally change the regulation of the legal professions and the manner in which legal services are provided in the State. It purports to be drafted to give effect inter alia to commitments owed by the State under the Memorandum of Understanding between Ireland and the Troika..

- (i) The Troika however only require that the State give effect to the outstanding recommendations of the Competition Authority to reduce costs and the report of the Legal Costs Working Group.
- (ii) Many of the key proposals in the Bill (e.g. the direct regulation of the legal professions, the unification of the professions of solicitor and barrister or permitting the establishment of multidisciplinary practices) are absent from these independent reports and are not, therefore, required by the Troika.

C. CORE GENERAL CONCERNS OF THE BAR COUNCIL RE 2011 BILL

18. The proposed radical changes in the regulation of the legal profession and the provision of legal services give rise to many concerns. The proposals undermine the core values necessary for the provision of legal services in a free and democratic society in the public interest and in the interest of the proper administration of justice, including:

- (i) the absence of independence (from Executive / Ministerial control, dominance or interference) in the regulation of the legal profession and the provision of legal services;
- (ii) the undermining of an independent referral Bar and an independent legal profession contrary to the public interest, the proper administration of justice and the protection and vindication of the rights of citizens;
- (iii) the introduction of restrictions on access to justice and a person's freedom to engage a barrister of his / her choice; and
- (iv) the increase in costs (both for the individual barrister and for consumers of legal services) and the bureaucracy attendant on the establishment and operation of the five new regulatory bodies (together with their staff, committees, consultants, advisers and inspectors) proposed under the Bill.⁴

D. LEGAL SERVICES REGULATORY AUTHORITY ('THE LSRA'):

BAR COUNCIL CONCERNS REGARDING LSRA

19. The Legal Services Regulatory Authority ['the LSRA'] is the key regulatory body provided for in the Bill. The functions, powers and obligations of the LSRA are extraordinarily widely drawn in the Bill and empower this body to regulate each and every aspect and stage of a Barrister and Solicitor's professional life. The concerns in relation to the Authority established under Part 2 of the Bill may be summarised under the following headings:

- (i) Executive / Ministerial control over the Authority in the exercise of its functions, powers and obligations in the regulation of the profession and the provision of legal services;
- (ii) direct regulation of the legal profession; and

⁴ Those bodies are: (i) the Legal Services Regulatory Authority (Part 2, 3, 4 and 6 of the Bill); (ii) the Complaints Committee of the Authority (Part 5 of the Bill); (iii) the Legal Practitioners' Disciplinary Tribunal (Part 5 of the Bill); (iv) Office of the Legal Costs Adjudicator (Part 9 of the Bill); and (v) Advisory Committee on the grant of Patents of Precedence (Part 11 of the Bill). In addition to having its own staff and a Chief Executive, as noted above, the Authority is empowered: (i) under s. 12 to establish further committees to assist and advise it in relation to the performance of all / any of its functions; (ii) under s. 13, with the approval of the Minister and the Minister for Public Expenditure and Reform, to appoint consultants or advisers to assist in the performance of its functions; and (iii) under s. 27, to appoint members of its staff as inspectors and, with the approval of the Minister and consent of the Minister for Public Expenditure and Reform, to appoint other persons as inspectors to exercise the powers set out in s. 28 of the Bill.

- (iii) the costs involved in the establishment and operation of the Authority, including its staff, committees, consultants, advisers and inspectors.

20. The proposed form of direct regulation of the legal professions by a body which is not independent of the Executive is not only contrary to the recommendations of the Competition Authority and unknown to any other comparable modern democratic State but also runs directly contrary to European and International norms which emphasise the central importance of an independent legal profession in a society which is governed by the rule of law.

21. The Council of Bars and Law Societies of Europe (CCBE), an independent representative organisation representing Bar Associations and Law Societies in 42 European States, has expressed grave concern about the proposed manner of regulation of the legal professions in the Legal Services Regulation Bill and has called on the Minister to revise the provisions of the Bill in order to reflect the principles ensuring the independence of the legal professions enshrined in both European Union and International Law and in the CCBE's Charter of Core Principles of the European Legal Profession and the Code of Conduct for European Lawyers. In a paper presented at a recent conference the CCBE concluded its remarks with the following comment:-

“At present the CCBE considers the Bill to constitute a grave threat to the independence of the legal professions in Ireland and consequently a threat to the rule of law.”

22. The matters of concern to the CCBE identified in that paper include the following:-

- (i) The Bill contains provisions involving an encroachment on the independence of the legal professions in Ireland which have not been adopted in any other European Union jurisdiction;
- (ii) A similar model for regulation was considered in the United Kingdom but was rejected on the grounds that the continued existence of independent legal professions was incompatible with such a degree of governmental control;
- (iii) The Bill proposes a LSRA which will have an unacceptable degree of control over the professions;
- (iv) The manner of appointment of members to the Authority, the vague qualifications for membership and the lack of real security of tenure of such members are criticised;
- (v) The Bill proposes giving the executive absolute power over standards of professional practice, training and entry;
- (vi) No complaints of professional misconduct, no matter how minor, will be determined by the professional bodies yet a complex disciplinary structure is to be established with limited representation for the professions and yet funded by the legal professions.

23. The proposed model of regulation is unknown in the developed world. In a recent address to a Conference on the Independence of the Legal Profession, the Executive Director of the International Bar Association (IBA) said that it was more comparable to the systems in some developing countries. According to the American Bar Association (ABA) it could also prove a risk to inward investment. Furthermore in all states of the Council of Europe it is lawyers associations who have primary responsibility for the regulation of legal professions. Across the common law world, in countries such as Canada, New Zealand and South Africa,

professional authorities have both representative and self-regulatory functions. In the United States the legal profession is largely self-regulatory with the Courts in certain instances playing a supervisory role similar to the High Court at present.

LACK OF INDEPENDENCE OF LSRA

24. It is stated in the Bill that the LSRA is required to act independently in the performance of its functions (see: s. 9(3)) '*subject to this Act*'. There are however significant structural and operational obstacles to such independence in the current draft of the Bill.
- (i) The independence of the legal profession is recognised as essential in a democratic society which is subject to the rule of law. The importance of an independent legal profession is recognised in the 2006 Report of the Competition Authority. The Competition Authority report emphasised the importance of the body which is responsible for regulating the legal profession being 'independent of both the Government and the profession'. At present more than 50% of cases before the Courts concern a dispute involving the State or one of its agencies. It is therefore important to the proper administration of justice that legal professions are independent of the State, and are seen to be independent of the State, in the provision of legal services. It is equally important that any regulatory body, which seeks to control and monitor the delivery of such services, is also independent and seen to be independent from the State. Independence in regulation must be real and transparent.
 - (ii) The independent nature of the LSRA is first undermined by the manner of appointment of the 11 members of the Authority provided for in the Bill. All 11 members, including even the two members 'nominated for appointment' by the Bar Council and Law Society respectively, are appointed by Government. The Government then appoints one of the lay members it has appointed to the Authority as the Chairperson.
 - (iii) The duration and terms and conditions of membership of the LSRA are also determined by Government. The criteria for membership of the LSRA are widely drafted and leave wide discretion to the Government in appointing members.
 - (iv) In addition to the usual grounds for removal of a person from this type of body (e.g. ill health, bankruptcy, criminal conduct etc.) the lack of independence of the LSRA is again underscored by the provision at s. 9(12) that a member may be removed where "in the opinion of the Government" the removal of a member is "*necessary for the effective performance of the functions of the Authority*".
 - (v) The proposed composition of the LSRA in s. 9 of the Bill stands in stark contrast to the manner in which legislation provides for the make-up of other professional regulatory bodies such as the Medical Council, the Council of the Pharmaceutical Society of Ireland, the Dental Council and the Veterinary Council.
 - (vi) Each of these bodies not only contains a majority of non-professionals on their governing boards but also contain a substantial majority of members who are appointed independently of the relevant responsible Minister. So for example while the Minister for Health appoints the 25 members of the Medical Council, the

independence of the Council from the Minister is guaranteed by the mandatory nomination process in the Medical Practitioners Act, 2007. Five members of the Medical Council are lay persons appointed by the Minister for Health and one member is appointed by the Minister for Education following consultation with the Higher Education Authority. All other 19 members are nominated by professional bodies, the HSE, HIQWA or elected and the Minister may not refuse to appoint any of the 19 persons so nominated or elected.

- (vii) Once again no justification has been advanced for departing from previous legislative models for the regulation of other professions which seek to ensure that the relevant regulatory bodies are independent not only of the professions they regulate but also of the State.
- (viii) The independence of the LSRA in the exercise of its functions and obligations is also called into question by the degree of control which the Minister retains over various matters as outlined in the above summary. An example of Executive interference with the independence of the LSRA is the power given to the Minister in relation to professional codes of practice under Section 18 of the Bill. Although the LSRA is given the primary responsibility for preparing or approving such a code, the Minister must consent to the publication of any modifications to the Code or any new Code. And although there is provision for a consultation process, the Minister can reject or change the revised code after this process. Similarly the Minister can order the LSRA to publish a code or revised code.

DIRECT REGULATION OF LEGAL PROFESSIONS

25. In the Bill, the LSRA, a body which is not demonstrably independent of government, is given direct responsibility for the regulation of the legal professions rather than the responsibility for overseeing regulation of the professions by the professional bodies such as the Bar Council and the Law Society. Such a model of direct governmental regulation of the legal profession is unknown in any other common law jurisdiction or other EU State. Indeed no indication has been given as to the basis or source of this form of proposed direct regulation.

- (i) It is contrary to the form of regulation recommended by the Competition Authority (and therefore required by the Troika) in its 2006 Report on the legal profession. In the 2006 Report the Competition Authority recommended the establishment of an independent statutory body with responsibility for the regulation of the legal profession but recommended that, subject to oversight by this body, the day to day regulation of the professions should be delegated to the Bar Council and Law Society who were to be required to separate their representative and regulatory roles.
- (ii) This model of regulation, described by the Competition Authority as “*independent oversight regulation*”, was recommended by the Competition Authority as being consistent with the regulation of other professions and sectors in the State and also consistent with international trends in the regulation of legal services. The Authority emphasised the importance of the independence of such an oversight regulator from both the legal profession and government departments/interference.

- (iii) The regulation of the legal profession and the provision of legal services in other modern democratic states is generally by way of oversight regulation by an independent statutorily appointed regulator with the day to day regulation of the profession left to Front Line Regulators like the Bar Council and Law Society. This is the model for example recently adopted in the United Kingdom under the Legal Services Act, 2007.

COSTS OF LSRA AND OTHER BODIES PROVIDED FOR IN BILL

26. Five new regulatory bodies are proposed under the Bill – the LSRA (Parts 2, 3, 4 & 6), (consisting of 11 appointed members), the Complaints Committee of the LSRA (Part 5) (consisting of up to 16 additional appointed members), the Legal Practitioners Disciplinary Tribunal (Part 5) (consisting of up to a further 16 appointed members), the Office of the Legal Costs Adjudicator (Part 9) and the Advisory Committee on the grant of Patents of Precedence (Part 11). It can be seen, therefore, that the first three of these new regulatory bodies, the LSRA, the Complaints Committee and the Legal Practitioners Disciplinary Tribunal will have up to 43 appointed members in addition to the Chief Executive and a significant staff which the LSRA will also require. In addition the LSRA is empowered (i) under s. 12 to establish further committees to assist and advise it in relation to some or all of its functions, (ii) under s. 13, with approval of the Minister for Public Expenditure and Reform, to appoint advisers and consultants and (iii) under ss. 27 and 28 to appoint inspectors. In addition there is provision for the appointment by the Minister, after consultation with the LSRA and the approval of the Minister for Public Expenditure and Reform, of an unlimited number of staff to the LSRA.
27. The establishment of this enormous and unnecessary superstructure surrounding the regulation of the legal profession and the provision of legal services would seem to run counter to the government's express commitment to public service reform and in particular to its commitment to the rationalisation, reduction and abolition of quangos, to continuous assessment of the business case for state bodies or agencies and to the requirement that such bodies be fit for purpose and subject to a 'sunset clause'. (See: Department of Public Expenditure and Reform, Public Service Reform, 17 November 2011, Appendix II Rationalisation of State Agencies). There is no ceiling in the Bill on costs incurred by the LSRA, the number of staff or consultants to be engaged by the LSRA and there is no incentive to control costs.
28. The absence of any Regulatory Impact Assessment (RIA) is consistent with the failure of the Minister to have any meaningful engagement prior to the publication of the Bill. Given the far reaching and significant effect and potential costs of the reforms proposed in the Bill, an evidence based approach involving the systematic assessment of the benefits and costs of these (and other alternative) proposed regulatory changes to the economy and society, ought to have been carried out. The need for an RIA, followed by further consultation upon publication of the results of such an assessment, is consistent with international and European best practice and indeed the Programme for Better Regulation itself. The necessity for an RIA when contemplating far reaching and significant regulatory reform has been accepted and adopted in most OECD States.
29. The approach of the United Kingdom Government in this regard contrasts with the failure of the Minister to follow best practice and carry out an RIA followed by meaningful debate

based on the evidence disclosed by such a report. In the United Kingdom a lengthy RIA (86 pages) was published with the Bill preceding the 2007 Act and this included estimates by PWC of the economic and social costs of the various regulatory options and the estimated costs of the proposed Legal Services Board. Similar exercises and reports were carried out and prepared in a number of Australian States prior to consideration of various reforms to the legal professions.

30. Again the failure to do such an RIA contrasts with the acceptance of the need for such a report prior to the introduction of other significant regulatory reforms including the Veterinary Practice (Amendment) Bill, 2011 the Property Services (Regulation) Bill and the Climate Change Response Bill 2010.
31. The failure to carry out an RIA in advance of publication of the Bill incomprehensibly runs counter to the Programme for Government itself. At page 28 of the Programme for Government 2011, under the heading 'open government' and dealing with waste, extravagance etc., it is stated:-

“Open Government

Where there is secrecy and unaccountability, there is waste and extravagance. We will pin down accountability for results at every level of the public service – from Ministers down – with clear consequences for success and failure. Ministers will be responsible for policy and procurement and public service managers for delivery.

- ...
- *We will require Departments to carry out and publish Regulatory Impact Assessments (RIAs) before Government decisions are taken.*
- ...

Waste

We will cut back the waste and political cronyism built up over the last decade by paring back the expensive, fragmented structures of public administration....”

No reason is given for not following this Government commitment prior to making a decision to establish an LSRA along the lines set out in the Bill. The Bill has in effect been prepared secretly and without any evidence based research or contribution from stakeholders.

32. The substantial, but unquantified, additional costs which will result from the above raises the following issues:-
 - (i) The levy imposed on Members of the Bar to fund the proposed regulatory superstructure will increase very considerably the costs of practising at the Bar and will therefore amount to an obstacle to entry to and continued practice at the Bar;
 - (ii) The costs of such a levy will, to a considerable degree, fall on the consumers of legal services and inevitably increase the costs of the provision of legal services for clients;
 - (iii) No effort has been made to quantify the costs of the three new quangos (the LSRA, the Complaints Committee and the Legal Practitioners Disciplinary Tribunal) or of the

other bodies to be established under the Bill and there is no provision in the Bill which might lead to the control of costs by these bodies; and

- (iv) The failure of the Minister to carry out an RIA in relation to regulatory reform of the professions means that there is quite simply no evidence to inform the debate as to the cost of the proposed regulation, the likely benefit of the proposed regulatory system and whether alternative regulatory models might achieve the stated objectives of the Bill at the same or a lesser cost.

33. The recent suggestion that the contents of the Bill are required by the Programme for Government is again not correct. At page 50 of the Programme it was stated in this regard:-

“We will establish independent regulation of the legal professions to improve access and competition, make legal costs more transparent and ensure adequate procedures for addressing consumer complaints.”

No specific form of regulation was specified in the Programme. The form of regulation recommended by the Competition Authority and put in place, for example, in the United Kingdom following an extensive consultation and reporting process, fully complies with the requirements of the Troika in the Memorandum of Understanding, the commitments of the Government in the Programme for Government and the understandable desire for reform of the legal profession.

E. THE DISCIPLINARY PROCESS FOR LEGAL PRACTITIONERS UNDER THE BILL:

CORE OBJECTIONS TO PROPOSALS RE DISCIPLINARY PROCESS IN BILL

34. As already noted above, the CCBE have forcefully criticised the control given by the Bill to the executive in relation to the legal profession. It noted that no matters of misconduct, no matter how trivial, were to be determined by the professions and yet the disciplinary structure proposed under the Bill has limited representation for these bodies who are nonetheless expected to fund this new structure.
35. The Competition Authority did not recommend a disciplinary structure of this kind and welcomed the intention of the then Government to establish a Legal Services Ombudsman to supervise the handling of complaints by the Bar Council and Law Society. In the view of the Competition Authority, the establishment of such an Ombudsman would complement the establishment of a Legal Services Commission. Such a form of independent supervision of the disciplinary structures of the legal professions is to be found following the radical reforms introduced in the United Kingdom by the Legal Services Act 2007.
36. Under Part 5 of the Bill, the independence of the two bodies to be established (the Complaints Committee and the Legal Practitioners’ Disciplinary Tribunal), is compromised by the manner of appointment of their members. The Minister approves the persons to be nominated to the Complaints Committee by the LSRA and the Government appoints the members of the Legal Practitioners’ Disciplinary Tribunal. In effect the Minister appoints the investigator together with the judge and jury in all disciplinary matters and will exercise near total control over the disciplinary practice with the presence of the professions reduced to a spectre. In addition, the criteria for appointment of lay members of these committees are vague and lacking in clarity. There is a pronounced imbalance, not found in any other

statutorily regulated profession, in the composition of these bodies given the heavy inbuilt lay majority.

37. Further concerns in relation to disciplinary process provided for under the Bill are as follows:-

- (i) The powers conferred on inspectors appointed under s. 27 of the Bill to enter (under s. 28) without the safeguard of a warrant issued by a Court, the business premises of a barrister (which could include his or her home) is draconian and without precedent in respect of any other profession. No justification has been made for such power being granted.
- (ii) There is no appeal against a finding of misconduct made by a Complaints Committee under s. 51 of the Act.
- (iii) The inclusion in the definition of misconduct of an act which consists of “issuing a bill of costs which is excessive” is unnecessary and too vague. No definition is given for “excessive”. Furthermore there is a detailed mechanism in the Bill for resolving disputes as to costs.

F. NEW STRUCTURES FOR THE PROVISION OF LEGAL SERVICES UNDER THE BILL:

CORE OBJECTIONS TO PROPOSALS ON BUSINESS STRUCTURES

38. The provisions of the Bill introducing new business structures for the provision of legal services have been introduced without first engaging in a comprehensive assessment as to whether such business structures are in the public interest and in the interests of the proper administration of justice. Such systematic evaluation would require research regarding the benefits, disadvantages and costs of such changes, including the practical effects, side effects and hidden costs of such proposals. It should also involve meaningful engagement and consultation with the public and with stakeholders. Such assessment and consultation ought to have taken place before a decision was made (and in order to inform any decision made) by the Oireachtas as to whether to alter the existing structures for the provision of legal services.

- (i) At present, the Bill proposes a number of significant structural changes to the manner in which legal services are provided to a consumer, which changes will be introduced with no further recourse to the Oireachtas in relation to their operation and in circumstances where there is no report or evidence recommending their introduction in the first instance.
- (ii) The public consultation process envisaged by s. 75 of the Bill fails to provide for an objective, comprehensive and overarching assessment of the business structures that should operate for the delivery of legal services in the State, notwithstanding that the Competition Authority expressly recommended that such research would be undertaken: Recommendation No. 12. Instead, s. 75 provides for the LSRA to prepare reports and make recommendations to the Minister into how legal partnerships and multi-disciplinary practices “should” be established

and operated, thus presuming that these business structures should be established and in the form contemplated in the Bill, in the absence of any prior report recommending their creation.

- (iii) This should be contrasted with the careful evidence-based approach in the United Kingdom where, unlike here, extensive and wide ranging consultation and research were undertaken prior to determining whether to introduce reforms and the form and content of such reforms.
- (iv) The approach adopted in the Bill with regard to the introduction of the proposed changes to the business structures for the provision of legal services is also inconsistent with the approach adopted in s. 30 of the Bill, which requires the LSRA to research and report on the possible unification of the solicitors' and barristers' professions. In so doing, the LSRA is required to have regard to the "*public interest*", the need for competition in legal services in the State, the proper administration of justice and the interests of consumers of legal services, including access by such consumers to experienced legal practitioners.
- (v) The Bar Council would welcome any proper, fair, transparent and comprehensive research and report (including a thorough and open consultation process) which involves a careful evaluation of the business structures that should operate for the delivery of legal services in the State in the public interest and in the proper administration of justice. The Bar Council would look forward to engaging in such a process with a regulator that is made suitably independent from political / Executive control, involvement and interference, including in the ways outlined in this submission.

39. The public consultation process that is envisaged in Part 7 of the Bill is limited and ineffective. Section 75 of the Bill requires the LSRA to consult with the public but, bizarrely, simply enables it to consult with the legal professional bodies if it deems it appropriate to do so. Thus, it is conceivable that both legal partnerships and multi-disciplinary practices could be introduced without any input being sought from the legal professional bodies.

40. The proposals in relation to new business structures for the provision of legal services undermine core values for the delivery of legal services by the Bar in the public interest – Integrity and Independence:

- (i) As proposed in the Bill, partnerships, multi-disciplinary practices and the employed barrister provision (s.116) will undermine two core values for the delivery of legal services by the independent sole-trader Irish Bar, namely integrity and independence. Under the current structure for the Irish Bar, those values are protected by the manner in which the balance as between two duties owed by barristers, the public duty to the sound administration of justice and the private duty of the barrister to his/her client, are maintained in the conduct of legal services. In the event of a conflict/difficulty arising for a barrister between those two duties during the conduct of a case it is clear that the public duty to the court must prevail.

- (ii) Ethically problematic situations will be created for barristers working in partnerships or multi-disciplinary practices or as employed barristers where the interposing of the duty owed to their partners or, especially, to their employer will destabilise and dilute the existing clear ethical framework for the conduct of legal services by barristers where conflict of duties/interests arise. This poses a real and substantial risk to the vital public interest and the barrister's primary duty, that barristers conduct themselves with utmost good faith in court.
- (iii) The proposal to enable employed barristers to provide legal services to their employer in court raises serious concerns. The Bar Council remains opposed to its introduction because the introduction of in-house advocates poses a real risk that the barrister's primary duty to the court will be compromised or undermined, thus consequently damaging the integrity and independence in the delivery of legal services.
- (iv) With regard to the provisions concerning direct access, the Bill fails to provide a clear definition of a "contentious matter", with the result that the conditions in which a barrister can provide such services is uncertain. It also directly impacts on the 'cab rank' rule, thus damaging a core principle in the delivery of legal services by barristers on behalf of their clients. In broad terms the 'cab rank rule' means that barristers are bound to accept instructions to take on a case in the field in which they practice subject to payment of a proper professional fee.

41. The business structures envisaged under the Bill will damage rather than enhance competition in the delivery of legal services:

- (i) The Bill does not follow through on the Competition Authority report and contradicts its recommendations about some of the proposed business structures for the delivery of legal services. Any suggestion that the introduction of legal partnerships and multi-disciplinary practices in the form set out in Part 7 of the Bill is required by the EU/IMF Programme or, indeed, by the Reports of the Competition Authority or the Legal Costs Working Group upon which that programmes is based, is a fallacy.
- (ii) The Report of the Legal Costs Working Group (LCWG Report) made no reference whatsoever to the introduction of partnerships or multidisciplinary practices. The Competition Authority recommended that barristers would be allowed to enter partnerships with each other. However, it did not recommend legal-disciplinary partnerships and in fact considered that if such were to be permitted "it could result in a reduction in the supply and quality of advocacy services for smaller buyers". Thus, access to quality advocacy services for consumers of legal services could be restricted by the introduction of the business structures contemplated in the Bill's proposals.
- (iii) Indeed, there is no evidence advanced from any source about the experiences that have resulted from the introduction of partnerships and/or multi disciplinary practices in other common law systems such that they should be used as business structures for the delivery of legal services here. Rather, the evidence is to the effect that the introduction of partnerships will reduce competition and act

as a barrier to entry to the profession. As evidenced by the experience of the chambers system in England and Wales, the partnership system there does not result in universal access to the Bar and instead acts as a barrier to entry, with just 17.5% of graduates likely to secure a position in chambers (on the basis of figures from 2006)..

- (iv) There is also the significant risk that the introduction of legal partnerships and multi-disciplinary practices in the form proposed in the Bill, which have not been examined or recommended in any reports, will reduce competition by ensuring that the most capable practitioners are concentrated in a small number of well-resourced practices, thus diminishing competition and choice for the consumer contrary to the public interest. That can only have a negative impact on competition within the legal sector. The recent Banco Espirito Santo Report in the UK predicts that the effect of the introduction of multi-disciplinary practices in that jurisdiction will be to shrink the number of competitors in the market. It is difficult to fathom how the decision to legislate for such business models, which have not been researched or recommended and which the Competition Authority did not recommend but recommended further investigation enhances rather than damages competition.

42. There is a real risk that the quality of legal services will be damaged by the new business structures. There is a significant risk that the introduction of multi-disciplinary practices in the form proposed will lead to a considerable diminution of the standards of legal services being provided within the State. There is no prohibition in the Bill on non-legal members or employees of such multi-disciplinary practices from performing legal services or providing legal advices as part of his work of that practice. Section 74 of the Bill is exceptionally broad in its provisions and fails to provide any guiding principles on issues of this nature. Furthermore, challenging and complex issues surrounding the regulation of such multi-disciplinary practices have not been considered, including the responsibility of regulatory bodies to investigate complaints of misconduct where there are multiple professions involved in the multi-disciplinary practice.

G. PROVISIONS REGARDING LEGAL COSTS:

BAR COUNCIL OBSERVATIONS ON PROVISIONS REGARDING LEGAL COSTS

43. The Bar Council supports transparency of legal costs and recognises that many of the provisions in Part 9 of the Bill directed specifically at the question of legal costs are in the public interest. Those provisions are, therefore, to be welcomed by and large. It is important to state that a number of the matters for which provision is made in the Bill in relation to costs have in fact already been implemented by the Bar Council on foot of the recommendations of the Competition Authority and the Legal Costs Working Group, including the prohibition of the 2/3 rule for fees charged by Junior Counsel, which took effect in March 2007 (s. 89) and the requirement to provide fee estimates which took effect in June, 2007 (s. 90).
44. Section 83 of the Bill provides that the Chief Legal Costs adjudicator may prepare for the guidance of legal costs adjudicators, legal practitioners and the public, legal costs guidelines indicating the manner in which the functions of the legal costs adjudicators are to be

performed. Although the section specifies that the Chief Legal Costs Adjudicator shall consult with the Minister and ‘any other person or body that the Chief Legal Costs Adjudicator considers to be an appropriate person’, it does not specify that he/she should consult with practitioners and/or representative bodies of the legal profession in relation to the preparation of the guidelines. It is suggested that the section should expressly provide for such consultation prior to the making of the guidelines.

45. Sections 89 to 93 of the Bill inclusive provide for legal practitioners’ duties in relation to legal costs. In particular, section 90 requires a legal practitioner to provide notice, containing certain specified information in relation to the estimated costs, to the client and provides for a ‘cooling off’ period. The Bar Council agrees with that provision. It is already a requirement of the Bar Code of Conduct that barristers provide fee estimates. This has enabled solicitors and clients to ‘shop around’ for the barrister offering the most competitive estimate for any particular piece of legal work. Section 91 provides for the making of a written agreement in relation to legal costs. Section 91 does not provide for the enforcement of such an agreement. There is no provision addressing the enforceability of a written agreement as provided for in s. 91. A question arises as to whether this might have an impact on the recovery of fees by legal practitioners. It is suggested that the Bill should expressly provide, in the event that such an agreement is disputed, for the referral of such an agreement to Court by a legal costs adjudicator and that the Court could then determine whether the agreement is valid and enforceable. Sections 94 to 100 of the Bill provide for the adjudication of legal costs and subject to the point made below, in relation to Section 97, would appear generally to be in the public interest.
46. One surprising aspect of the Bill on costs is the provision in section 97(1) providing that the hearings of an adjudication by a Legal Costs Adjudicator shall be in private. At present the hearings of the Taxing Master on costs are in public. This provision seems contrary to the general thrust of the Bill on the issue of costs. There does not appear to be any good reason why costs adjudications should not continue to be heard in public.
47. Another somewhat surprising provision is section 82 of the Bill which although somewhat obscure appears to exclude or can be interpreted as excluding from publication by the Chief Legal Costs Adjudicator the identity of the legal representatives involved in a costs adjudication in family law and other ‘in camera’ proceedings. Provided confidential detail about the proceedings is not revealed there does not appear to be any good reason why the identity of the lawyers acting for the clients should be protected from disclosure. If it is the case that the Bill does not intend to prohibit the disclosure of this information, the Bar Council believes that the section should be amended clearly to reflect this fact.
48. Schedule 1, part 2 of the Bill provides for the matters which a legal costs adjudicator shall have regard to in determining whether the costs are reasonable in amount. There appear to be some peculiarities in terms of certain items. For example, items (l) and (m) of Schedule 2, para. 2, provide that a solicitor’s overheads can include amounts “associated with the provision of legal services generally” whereas a barrister’s overheads can only be the “costs associated with the provision of legal services by barristers generally”. Accordingly this definition may not cover the overheads of barristers in the types of partnership envisaged by the Bill.

49. It is important to emphasise that in addition to those provisions of the Bill specifically directed towards legal costs (Part 9), the Bill as drafted will have a very significant impact on legal costs for the reasons already set out in the commentary above in relation to the Bill in general and the various parts thereof. As previously noted, the system of direct regulation of the legal profession and the provisions of legal services proposed and the alternative business structures provided for in the Bill will significantly increase legal costs contrary to the public interest.

H. SPECIFIC PROVISIONS REGARDING BARRISTERS AND SOLICITORS:

BAR COUNCIL COMMENTS ON PATENTS OF PRECEDENCE

50. Part 11 of the Bill contains provisions in relation to the granting of Patents of Precedence. The Bill provides for the first time that solicitors may apply for a Patent. The Bill provides for the establishment of an Advisory Committee to make recommendations to the Government as to whom a Patent should be granted (s. 111). The Bill further provides that the Committee shall establish criteria based on specified objectives to be met by a legal practitioner in order for a recommendation to be made by it to the Government that a Patent be granted to him or her (s. 112). The objectives are listed in s. 112(2)(a) of the Bill. The Competition Authority had recommended that objective criteria should be established for awarding title of Senior Counsel. It is suggested by way of alternative to the current draft of the provisions, having regard to the specialised nature of the services required of Senior Counsel, that one of the objectives should be that the person have substantial advocacy experience in higher and appellate courts. At present, s. 112(2)(a) requires that the person have, in his or her practice, displayed “a capacity for advocacy” however that criteria is uncertain in its scope in that it does not require particular expertise or specialisation in advocacy.

BAR COUNCIL COMMENTS ON MISCELLANEOUS PROVISIONS

51. Part 12 of the Bill contains various miscellaneous provisions. Some of the provisions in this Part provide for matters which already exist including: solicitors’ rights of audiences (s. 115) (solicitors already enjoy full rights of audiences); the regulation of movement between professions of barristers and solicitor (s. 122) (the recommendations of the Competition Authority in relation to the removal of barristers between the professions were largely implemented and there is no longer any remaining substantive obstacles to free movement between the professions); and the ability of barristers to advertise (s. 123) (the Bar Council made provision for advertisement by barristers in 2007).
52. Section 115 of the Bill, in addition to re-affirming full rights of audiences of solicitors, provides that where a solicitor and barrister are instructed it will be a matter for agreement between them as to who shall exercise the right of audience and that in the event of a disagreement as to who should take the lead in a case, the client shall determine whether the barrister or solicitor shall take the lead. As noted, solicitors already enjoy full rights of audience. The remainder of the provision seems to be an unnecessary legislative provision, since it is already a matter of free contract between the parties as to what roles are discharged by whom.

53. Section 116 of the Bill allows a barrister to take up employment and to provide legal services to his employer 'including appearances in court'. The Competition Authority had issued a recommendation to "allow employed barristers to represent their employers in court". This section of the Bill raises a serious issue from the perspective of the independence of the barrister because it raises an obvious conflict of interest issue between a barrister's primary duty to the Court and the duty to his or her employer. At present an organisation/employer must engage barristers that are independent of its interests, whose primary duty is to the Court. In those circumstances, the Court knows that the primary duty of the barrister is owed to it and not to another entity such as the employer. It is not difficult to envisage situations where the employed barrister may be placed in a difficult position by virtue of his or her conflicting duties to the employer and to the Court. The primary duty could be undermined, even unintentionally, in circumstances where a person's livelihood or professional advancement might be impeded by it. The Bill does not address the conflict of interest issue.
54. A further issue which arises in relation to in-house barristers (as provided for in s. 116) is that the Bar Council, under the current draft of the Bill, are responsible for practitioners in disparate modes and forms of practice. Will the Bar Council, for example, have a duty or responsibility in respect of employed barristers and will it have a duty or obligation to collect from those employed barristers any portion of the levy imposed upon by the Bar Council to fund the activities of the LSRA and the other bodies provided for in the Bill ? There would appear to be no reason why the Bar Council should have any duty or obligation in that regard and this should be made clear in the Bill.

PART 3 DETAILED SUBMISSIONS ON THE BILL

A. BACKGROUND TO THE BILL:

55. Before considering the principal significant and fundamental structural changes proposed under the Bill, it is important to consider the context in which these proposals have been advanced by the Government and the Minister in particular.

- (i) First, notwithstanding the far-reaching structural changes proposed in the Bill regarding regulation of the legal professions and the provision of legal services, there has been extremely limited consultation with the Bar Council, the professional body responsible to date for regulation of the profession of the 2,300 barristers practising in the State; although the Bar Council repeatedly requested meetings with the Minister following his appointment, only two meetings have been afforded to the Bar Council (on 11 July 2011 and 24 November 2011), with the Bar Council also forwarding written submissions to the Minister on 9 August 2011 regarding direct access to barristers for advice, the benefits to the public interest and the proper administration of justice of the sole trader rule and the unsoundness of partnerships.
- (ii) Secondly, such communications with the Minister as have been afforded to members of the Bar Council have not provided any opportunity for meaningful discussion of the proposed reforms; indeed, at the meeting on 11 July 2011, the Minister sought to understate the nature and extent of the reforms which would be included in the Bill and indicated that he had not made up his mind on any of the issues and that nothing was set in stone. He gave no indication, for example, that he was considering legislating for multi-disciplinary practices, (something expressly not recommended by the Competition Authority), for direct access to barristers for *contentious* matters (as opposed to for advice, which was something recommended by the Authority) or for the possible unification of the two branches of the profession. A copy of the note of the meeting of 11 July 2011 is attached at Appendix 1. The Bill, approved by Cabinet on 4 October 2011 and published on 12 October 2011 contains provision for all of these; until the publication of the Bill, the Bar Council was required to rely principally on the Minister's press release of 4 October 2011 for an indication as to the contents of the Bill. Furthermore, whereas at the first meeting granted to the Bar Council, the Minister suggested that the submissions of the Bar Council regarding the form of regulation of the legal profession and the structural changes were 'premature', it was suggested to the Bar Council at the second meeting on 24 November 2011 (granted following requests for meetings with the Minister following publication of the Bill) that the form of regulation of the legal profession and the new structures for the provision of legal services proposed in the Bill represented decided Government policy by that stage and that, in effect, the submissions of the Bar Council on those fundamental issues were 'too late'. A copy of a note of the meeting on 24 November 2011 is attached at Appendix 1.
- (iii) Thirdly, notwithstanding representations or suggestions made to the contrary, in the case of many of the proposed reforms, it is quite apparent that the measures introduced by the Bill are either entirely absent from or, in some cases, directly at

variance with the terms of the 2006 Report of the Competition Authority, the EU / IMF Programme of Financial Support for Ireland and the Report of the Legal Costs Working Group. In this regard, representatives from the Bar Council met with the EU Commission and IMF representatives in Dublin on 3 October 2011 (having sought such a meeting over the preceding several months), in order to ascertain what the EU / IMF were requiring the State to do under the terms of the EU/ECB/IMF (the “Troika”) Programme for Support. The Bar Council representatives were clearly informed that the Troika required only what was in the Memorandum of Understanding, but that the State could legislate over and above those requirements as it is a sovereign state. Members of the Bar were informed of the meeting and what was discussed by way of circular. The Minister responded by accusing the Bar Council representatives in *The Irish Times* of “*briefing against the State*”, but also significantly conceded that not all measures in the Bill were required by the Troika.

- (iv) Fourthly, to the extent that it is now suggested that the form of regulation of the legal profession and the new structures for the provision of legal services proposed in the Bill represent Government policy, the Fine Gael/Labour Programme for Government does not support this assertion. While referring to independent regulation and other issues such as transparency in costs and the provision of information to consumers, the Programme for Government does not specify, require or commit the Government to any form of independent regulation or structural changes, still less the form of regulation or structural changes provided for in the Bill. Moreover, it would be extraordinary that Government policy should be formed:
- without first conducting a Regulatory Impact Assessment;
 - in the teeth of the recommendations of the Competition Authority;
 - without regard to the recommendations of the Council of Europe, the United Nations, the relevant decisions of the European Court of Justice and the European Court of Human Rights; and

and where there is no known comparator in the developed world.

B. PURPOSE OF THE BILL:

56. The Long Title of the Bill, as published, suggests that its purpose is to provide for:

- (i) the regulation of the provision of legal services;
- (ii) the establishment of the Legal Services Regulatory Authority;
- (iii) the establishment of the Legal Practitioners’ Disciplinary Tribunal to make determinations as to misconduct by legal practitioners;
- (iv) new structures in which legal practitioners may provide services together with others;
- (v) the establishment of a roll of practising barristers;
- (vi) reform of the law relating to the charging of costs by legal practitioners and the system of the assessment of costs relating to the provision of legal services;

- (vii) the manner of appointment of persons to be senior counsel and;
- (viii) related matters.

C. THE LEGAL SERVICES REGULATORY AUTHORITY ('THE LSRA'):

EXECUTIVE / MINISTERIAL CONTROL OVER THE LSRA:

57. Although the LSRA is stated to be required by the Bill to act independently in the performance of its functions (s. 9(3)) "*subject to this Act*", there are significant structural and operational obstacles to such independence clearly evident in the provisions of the Bill. Furthermore, the nature and extent of the powers and obligations conferred on the LSRA (and the extent to which their exercise is controlled by the Executive / Minister) give rise to serious concern. The form of regulation and the regulatory superstructure provided for in the Bill lead to an unprecedented level of control by the Government and Minister in the regulation of the legal profession and the provision of legal services; it is important to emphasise that there is no comparable regulatory system in respect of other professions in this jurisdiction or in respect of the legal profession in any other European jurisdiction or, indeed, in any other developed country.
58. Concerns also arise from the nature and extent of Executive / Ministerial control of the regulation of the legal profession and the provision of legal services. The independence of the LSRA is called into question *inter alia* by reason of its constitution and membership and, in particular, the control exercised over the establishment and operation of the LSRA by the Government and/or the Minister. The following features of the LSRA are noteworthy:
- (i) Each of the 11 members of the LSRA (of whom a majority and the chairperson are lay persons) is appointed by the Government. Only 4 of the members shall be nominated for appointment by the Bar Council (2 members) and Law Society (2 members). The Bill also expressly provides that one of the 11 members "*shall be an officer of the Minister*": section 8(4)(e). As a member of the LSRA, the officer of the Minister is entitled to partake of every discussion, meeting and decision taken by the LSRA ensuring that the 'eyes and ears' of the Minister are present at every such discussion, meeting and decision of the body directly responsible for the regulation of the legal profession and the provision of legal services in the State. Accordingly, by its express provisions, the Bill stipulates a marriage of the Minister and the LSRA which ensures that the LSRA can never be independent of Government in the day-to-day exercise of its functions, powers and responsibilities.
 - (ii) The duration, terms and conditions of office are determined by the Government and the Minister determines the remuneration and allowances for expenses (if any) of members. As former Chief Justice Ronan Keane pointed out (see below) both the appointment of members to the LSRA by the Government (which also determines the duration, terms and conditions of membership) and the determination by the Minister of the remuneration and allowances for expenses (if any) of the members, once appointed, calls into serious question the purported independence of the LSRA. The Bill also contains a prohibition in s. 24(2)

preventing the Chief Executive when giving evidence to a Committee of Dáil Eireann from questioning or expressing an opinion on the merits of any policy of Government or a Minister of Government or the merits of the objectives of any policy.

- (iii) The only guidance provided in the Bill regarding the appointment of persons to the LSRA is that the Government must ensure that “*among those members there are persons who have knowledge of, and expertise in relation to, one or more of*” a list of factors including the nebulous criteria of “*dealing with complaints against members of professions regulated by a statutory body*”, “*business and commercial matters*” and “*the needs of consumers of legal services*”. The wording is vague but on a strict reading would admit persons to membership of the LSRA who do not even satisfy any of these criteria provided that, among the membership, other members satisfy at least one of these vague factors. This is in contrast to the criteria for appointment to most other professional regulatory bodies (see further details below).
- (iv) The tenure of a member is also controlled by the Government. In particular, a member of the LSRA shall hold office for such period, not exceeding 4 years from the date of appointment (or 8 years in aggregate if re-appointed) as the Government shall determine. The terms of office stated in the Bill are therefore maximum terms and it is conceivable that a member could be appointed by the Government for a much shorter period than 4 years, which is particularly important for the minority members of the LSRA (the 2 representatives of the Bar Council and the 2 representatives of the Law Society). A member may be removed from office by the Government at any time, for stated reasons, if, in the opinion of the Government, *inter alia* his / her “*removal appears to be necessary for the effective performance of the functions of the Authority*”. This final ground for removal is premised on the subjective assessment by the Government of apparent necessity and is also very vague. Why might a member be removed on the grounds that his or her removal is ‘*necessary for the effective performance*’ of the Authority’s functions? In what circumstances could a member be removed? Could it be because the member decides in fact to act independently of the Minister? This uncertainty is compounded by the reference in section 9(2) to the functions of the LSRA including “*any other functions conferred on it by this Act or by regulations made under it*”. It is extremely difficult to see how a Court could exercise its jurisdiction to judicially review a decision of the Government to remove a member in the exercise of this vague discretion and thereby defend and vindicate the rights of a member wrongly removed from office. Former Chief Justice Ronan Keane expressed grave concern regarding this frailty in the Bill and noted that: “*It is not enough to say it [the LSRA] is independent. You must ensure that by the method of appointment, the level of remuneration and the method of dismissal*”.⁵ The importance of the availability of a remedy by way of judicial review by an independent and impartial judicial authority in respect of the decisions of a regulatory authority in respect of the legal profession is also

⁵ Address delivered by the former Chief Justice Ronan Keane at the conference ‘*Why the Independence of the Legal Profession must be Defended in the Public Interest*’ hosted by the Law Society of Ireland, 5 December 2011.

emphasised in Principle I of the Recommendation of the Council of Europe on the freedom of exercise of the profession of lawyer.⁶

59. To the extent that any reliance may be placed by supporters of the Bill upon the appointment of judges by Government in order to argue that the independence, impartiality and fairness of judges is not thereby compromised and to suggest that, by analogy, the independence, impartiality and fairness of members of the Authority should not be compromised is fallacious and misleading. Whilst the lack of security of tenure and the short term of office of members of the LSRA stipulated in the Bill would be sufficient without more to fundamentally undermine any such analogy, a further significant difference entirely destroys it. The members of the LSRA are appointed by Government at the nomination of the Minister and by reference to extremely vague criteria to determine and report to the Minister in respect of a small number of known “cases”, including (i) whether the number of persons admitted to practice as barristers and solicitors each year is consistent with the public interest in ensuring the availability of such services at a reasonable cost (s. 29); (ii) recommendations regarding the existing arrangements relating to the education and training of legal practitioners in Ireland (s. 30); (iii) recommendations as to whether the solicitors’ profession and the barristers’ profession should be unified (s. 30); (iv) recommendations regarding the creation of a new profession of conveyancer (s. 30); (v) recommendations as to the manner in which legal partnerships and multi-disciplinary practices “*should be established and operated*”, the retention or removal of restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor and the reforms (administrative, legislative or to existing professional codes) required to facilitate same (s. 75). The Bill expressly provides that each of these “cases” are to be determined by the LSRA and a report provided to the Minister within periods ranging from 12 – 24 months from the date of establishment of the LSRA, save for the recommendation regarding the profession of conveyancer which shall be provided within such time as may be specified by the Minister. Accordingly, it is not necessary for a member to act with bad faith when determining any of the known cases; he/she may fail to act independently, of the Government by simply determining one or more of these known cases during his/her term of office by reference to previously held and/or expressed views regarding these known cases known to the Government at the time of appointment.
60. If the question of appointment to and membership of the regulatory body responsible for the profession is examined as an illustrative example, it is clear that there are significant differences between the regulatory schemes for other professions in this jurisdiction (and the extent of Executive / Ministerial control in respect of same) and that proposed in respect of the legal profession under this Bill. As noted above, the control exercised over the establishment and operation of the LSRA by the Government and the Minister fundamentally undermines the independence of the LSRA. In contrast, with regard to the medical profession, while the Minister for Health appoints the 25 members of the Medical Council, only 5 of these are lay persons nominated by the Minister with a further lay member being nominated by the Minister for Education, following consultation with the Higher Education Authority; the remaining 19 members are nominated by professional bodies, the

⁶ Recommendation of the Council of Europe’s Committee of Ministers, *Recommendation No R(2000)21 to Member States on the freedom of exercise of the profession of lawyer* (adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers’ Deputies and addressed to the governments of the 47 member countries of the Council).

Health Service Executive (HSE), the Health Information and Quality Authority, or elected to membership. Moreover, s. 17(9) of the Medical Practitioners Act, 2007 expressly provides that the Minister may not refuse to appoint any of the 19 members so nominated or elected. Similarly, pursuant to s. 10 of the Pharmacy Act, 2007, the Council of the Pharmaceutical Society of Ireland consists of 21 persons and although such persons are appointed by the Minister for Health, only 4 of these persons are nominated and appointed directly by the Minister; the remaining 17 persons are nominated by the Irish Medicines Board, the HSE, 10 are members of the Society registered as pharmacists and 11 are lay persons who are not and never have been registered as pharmacists (including those nominated by the Minister, the Irish Medicines Board and the HSE). Pursuant to s. 10 (7), the Minister may not refuse to appoint to the Council a person nominated by the Irish Medicines Board, the HSE or those persons who are members of the Society and are registered as pharmacists. With regard to the regulatory scheme applicable to dentists, while there are 19 members of the Dental Council, pursuant to the Dentists Act, 1985, only four of these members are appointed by the Minister for Health, with one further member appointed by the Minister for Education; the other 14 members are appointed by educational bodies or universities, the Medical Council or are fully registered dentists appointed by election by other fully registered dentists.

61. No justification has been advanced for departing from previous legislative models for the regulation of other professions which seek to ensure that the relevant regulatory bodies are independent not only of the professions they regulate but also of the State. differences (and their fundamental effect on the independence of the regulatory body) are even more significant when the nature of the profession regulated, the services provided and the importance of independence for that profession and the provision of that service to consumers are examined. In particular, it is important to emphasise that having regard to the nature of the services provided, independence issues arise for the legal profession (and consumers of legal services) which do not arise for other professions such as doctors, pharmacists, dentists or veterinarians; more than 50% of cases before the courts concern disputes involving the State in one of its guises. It is, therefore, essential to the proper administration of justice and for the proper representation of clients in the public interest that legal professionals are truly independent in the provision of legal services and that such independence includes independence from the Government and the Minister. The Bar Council suggests a means of addressing this issue in the final part of this Submission.
62. The current model for the provision of legal services (the independent referral Bar) provides an essential bulwark against injustice for those in our society who need to 'take on the system' and seek redress against unlawful acts or omissions by the State or any of its entities, by providing a network of collegiate but independent minds who are free to advance the public interest and ensure access to justice by taking unpopular, pro bono or financially unrewarding cases. A number of features of the present model (including the 'cab rank' rule, the minimising of overheads through shared resources and the sharing of expertise in the Law Library) facilitate an equality of arms in the provision of advocacy services ensuring that the best barrister for any individual case is available to the smallest solicitors' firms and the most vulnerable members of society.
63. As noted above, the form of regulation and the regulatory superstructure provided for in the Bill lead to a level of control by the Government and Minister in the regulation of the legal profession and the provision of legal services which is unknown in any other European

jurisdiction or, indeed, in any other developed country. Dr Mark Ellis, the Executive Director of the IBA, described the Bill as one of the most extensive and far-reaching attempts in the world by the executive to control the legal profession, observing that; “There is very little light between the Government and the profession”. Dr. Ellis noted that in his 11 years in the IBA, he could not recall proposed legislation like this in a democratic and developed society and emphasized that lawyers must function without external interference (including interference by the executive) as this is “indispensable to the administration of justice and the rule of law”. Those views were also echoed by Bill Robinson, the President of the American Bar Association (ABA). Similarly, the incoming President of the CCBE expressed grave concern regarding what she termed as the “unprecedented encroachment on the independence of the Bar”⁷ inherent in the provisions of the Bill which will place Ireland outside the norms of developed democratic states. The CCBE has called on the Minister to revise the provisions of the Bill in order to reflect the principles ensuring the independence of the legal professions enshrined in both European Union and International Law and in the CCBE’s Charter of Core Principles of the European Legal Profession and the Code of Conduct for European Lawyers.

64. The CCBE’s view that the provisions of the Bill (and the changes which it introduces) constitute a grave threat to the independence of the legal professions in Ireland contrary to the public interest and consequently a threat to the rule of law is informed by the many instruments adopted at international level concerning the crucial role of lawyers and legal professions in ensuring the proper administration of justice and the maintenance of the rule of law. In particular, the CCBE places reliance on the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (Cuba, 27 August to 7 September 1990), the Recommendation of the Committee of Ministers of the Council of Europe to Member States on the freedom of exercise of the profession of lawyer, dated 25 October 2000, the European Union Charter of Fundamental Rights which came into force on 1 December 2009 and the European Parliament Resolution on the legal professions and the general interest in the functioning of legal systems, 23 March 2006. These instruments, together with the relevant jurisprudence of the European Court of Justice and the European Court of Human Rights emphasise that the adequate protection of human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession and that professional associations of lawyers have a vital role to play in upholding professional standards of ethics.
65. The Recommendation of the Council of Europe⁸ emphasises the “*need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason*” and provides in Principle I that “[a]ll necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without

⁷ Paper delivered by the incoming President of the CCBE, Marcella Prunbauer-Glaser, at the conference ‘*Why the Independence of the Legal Profession must be Defended in the Public Interest*’ hosted by the Law Society of Ireland, 5 December 2011.

⁸ Recommendation of the Council of Europe’s Committee of Ministers, *Recommendation No R(2000)21 to Member States on the freedom of exercise of the profession of lawyer* (adopted by the Committee of Ministers on 25 October 2000 at the 727th meeting of the Ministers’ Deputies and addressed to the governments of the 47 member countries of the Council).

improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights". The Principles underline the importance of independence from the State in the regulation of the legal profession since "*lawyers can only fully play their role in a State based on the Rule of Law, if Bar associations are independent, in particular from the State and economic pressure group*".⁹ The Explanatory Memorandum to the Recommendation (prepared by the Committee of Ministers) states that a fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms "*depend both on the independence and impartiality of the judiciary and on the independence of lawyers*" both of which were regarded as "*essential elements of any system of justice*". The Commentary on these Principles further stresses that "*an adequate protection of human rights and fundamental freedoms, economic, social and cultural, as well as civil and political rights to which all persons are entitled, requires that all persons have effective access to legal services provided by an independent legal profession*".¹⁰

66. Similarly, the United Nations *Basic Principles on the Role of Lawyers*¹¹ contain uniform provisions for the practice of the legal profession at an international level and operate to assist the 193 UN member states in their task of promoting and ensuring the proper role of lawyers in society. The Principles enunciate an overarching requirement that "*adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent profession*". The CCBE's own Charter of Core Principles of the European Legal Profession, adopted by its Plenary Session in Brussels on 24 November 2006 contains a list of ten core principles common to the national and international rules regulating the legal profession, including the independence of the lawyer and the freedom of the lawyer to pursue the client's case as well as the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy.
67. The European Court of Human Rights (ECHR) has also affirmed the crucial role of lawyers and lawyers' professions in ensuring the proper administration of justice and accordingly the maintenance of the rule of law. The ECHR has approved legislation regarding the legal profession which it found brought about a significant improvement "*without thereby threatening the independence of the Bar*".¹² The ECHR has on a number of occasions expressly affirmed the "*special status*" of the legal profession and the responsibilities and obligations that attach to this status. In particular, the Court has laid considerable emphasis on what it terms the "*special nature of the profession practised by members of the Bar*".¹³ This "*special status*" is intrinsically linked to the independence of the profession and the proper administration of justice; the Court has held that commercial undertakings "*cannot be compared to members of the Bar in independent practice, whose special status gives them a central position in the administration of justice as intermediaries between the public and the courts*". The ECHR has concluded that this "*special status*" explains the traditional restrictions on the conduct of members of the Bar and the monitoring and supervisory

⁹ *Ibid.*, Principle V.2.

¹⁰ *Ibid.*, para. 21.

¹¹ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (Cuba, 27 August to 7 September 1990) *Basic Principles on the Role of Lawyers*.

¹² *Van der Musselle v Belgium* 23 November 1983, Series A no. 70, pp. 14-15, para. 29. Emphasis added.

¹³ *Cosado Coca v Spain* (1994) 18 EHRR 1.

powers vested in Bar councils. With regard to regulation of the Bar (and, in particular, the issue of advertising by members), the Court regarded such Bar councils as particularly well placed (by reason of their “*direct, continuous contact with their members*”) to “*determine how, at a given time, the right balance can be struck between the various interests involved, namely the requirements of the proper administration of justice, the dignity of the profession, the right of everyone to receive information about legal assistance and affording members of the Bar the possibility of advertising their practices*”. The ECHR has also found that having regard to the “*key role of lawyers*” in the administration of justice and the public confidence which the courts must enjoy as guarantors of justice (“*whose role is fundamental in a State based on the rule of law*”), “*it is legitimate to expect [lawyers] to contribute to the proper administration of justice and thus to maintain public confidence therein*”.¹⁴ In order for the public to have confidence in the administration of justice, “*they must have confidence in the ability of the legal profession to provide effective representation*”.¹⁵

68. The President of the American Bar Association (ABA), Mr. Bill Robinson, has also expressed deep concern regarding the extent of Ministerial / Executive interference and control over the regulation of the legal profession proposed under the Bill stating that “[w]hat is really at stake here for the people of Ireland is constitutional democracy” and that “[h]istory has taught us that the independence of the legal profession is the key to an independent judiciary, which is the key to freedom”.¹⁶ Mr. Robinson also cautioned that the Bill will “*compromise the fiduciary relationship between the lawyer and his or her client*” and could have a chilling effect on foreign investment.

69. The principal stated function of the LSRA is to “*regulate the provision of legal services by legal practitioners and shall ensure the maintenance and improvement of standards in the provision of such services in the State*”. The functions, powers and obligations outlined under the Bill empower the LSRA to control every aspect and stage of a barrister’s professional life, including:

- (i) his / her education and training both in university schools of law (including the curriculum) and for the barrister profession (including ongoing training);
- (ii) the policies of the Bar Council in relation to the admission of barristers to practice including professional codes and the organisation of the provision of legal services;
- (iii) the code of practice (either prepared and published by the LSRA or prepared by a professional body and approved), following public consultation, with the consent or approval of the Minister and subject to his/her modifications;
- (iv) the nature and minimum levels of professional indemnity insurance which he / she is obliged to hold;
- (v) where he / she belongs to a class of legal practitioners prescribed by the Minister or where he / she receives and holds the monies of clients, the LSRA has responsibility for the supervision of his / her accounts;

¹⁴ *Nikula v Finland* [2004] 38 EHRR 45, at para. 45; *Schöpfer v Switzerland*, 20 May 1998, 1998-III, pp. 1052-53, paras. 29-30; and *Amihalachioaie v Moldova*, no. 60115/00, ECHR 2004-III, para. 27.

¹⁵ *Schmidt v Austria* [2008] ECHR 628.

¹⁶ Address delivered on behalf of the ABA by its President, Mr. Bill Robinson, at the conference ‘*Why the Independence of the Legal Profession must be Defended in the Public Interest*’ hosted by the Law Society of Ireland, 5 December 2011.

- (vi) the types of accounts which a legal practitioner is obliged to open and maintain, the banks in which these accounts may be held and the records which must be kept in respect of same;
- (vii) investigations into the practice of a legal practitioner initiated by the LSRA at any time for the purpose of establishing whether or not the legal practitioner concerned is in compliance with the provisions of the Bill and regulations made thereunder;
- (viii) where a complaint is made that he / she has, by act or omission, been guilty of misconduct as defined, he / she will be subject to the complaints and disciplinary processes before the Complaints Committee, Legal Practitioners' Disciplinary Tribunal and the High Court, as provided under Part 5 of the Bill;
- (ix) an inspector appointed by the LSRA may carry out an inspection of the barrister and exercise the extremely broad powers provided for this purpose in the Bill where an admissible complaint has been made against him / her and there is a *prima facie* case for investigation or, as required for the purposes of performing a function or ensuring compliance with the Bill and its regulations.

70. In fact, an examination of the provisions of the Bill reveals up to 27 instances of Ministerial or Executive involvement or interference in respect of the membership, functions, powers and responsibilities of the LSRA in the regulation of the legal profession and the provision of legal services, the most significant of which are outlined below:

- (i) The Minister's powers under s. 18 of the Bill diminish the value of the consultation process outlined in respect of the power of the LSRA to prepare or approve and publish a professional code of conduct, since the code cannot be published without the Minister's consent and the Minister can modify the code *after* the consultation process and request the LSRA to publish the modified code. Where the Minister requests the LSRA to publish a code, the language in the Bill is mandatory; the LSRA *shall* publish the code. In the event that the LSRA reviews and proposes to amend existing codes of conduct, there is no procedure specified. Should codes of conduct be drawn up by the LSRA, the Bill fails to address the method for co-existence between new and existing codes of conduct for the professions. The LSRA requires the consent of the Minister to amend or revoke a code of practice under s. 18(4) or to withdraw its approval of any code of practice approved which calls into question the independence of the functioning of the LSRA. It is submitted that these provisions fundamentally undermine the independence of the functioning of the LSRA and its regulation of the legal profession. Principles III and V.1 of the Recommendation of the Council of Europe¹⁷ specifically provides that *bar associations* should draw up professional standards and codes of conduct and that such associations have the task of strengthening professional standards and safeguarding the independence and interests of lawyers. Principle V.1 further emphasises the need for lawyers to establish an independent and self-governing association, recognised by law and *free from external interference*, which is able to represent their interests, promote their continuing education and training and protect their professional integrity.

¹⁷ Recommendation of the Council of Europe's Committee of Ministers, *Recommendation No R(2000)21 to Member States on the freedom of exercise of the profession of lawyer* (25 October 2000).

- (ii) The LSRA is authorised under s. 27 to appoint such members of its staff and, with the approval of the Minister and consent of the Minister for Public Expenditure and Reform, such other persons as it thinks fit to be inspectors for such period and subject to such terms as the LSRA may determine and to carry out an inspection of a legal practitioner. There is insufficient clarity in the Bill regarding the circumstances in which an inspector (entrusted with very significant powers under s. 28 of the Bill) may be appointed by the LSRA; in particular, the provisions of s. 27(2)(b) are very vague. An inspector is empowered under s. 28 to attend with or without notice at the barrister's place(s) of business and require him / her to make available for inspection specified documents or categories of documents, to furnish copies of same and to give written authority to the inspector to allow inspection of any bank accounts opened by the barrister and to obtain records from the bank relating to such accounts. As a matter of fundamental fairness, it is important that a legal practitioner would know in what precise circumstances he / she is at risk of an inspector being appointed by the LSRA to exercise the powers conferred under the Bill, particularly as the Bill creates an indictable offence of non-compliance with the investigation of the inspector and a fine not exceeding €30,000: s. 28(4). Nor is there any apparent protection for documents which are the subject of a client's claim to legal professional privilege. It appears that such documents can be taken by the inspectors without the client's permission and without any entitlement on the part of the barrister to refuse to produce them.
- (iii) The LSRA is obliged by s. 37 of the Bill to establish and maintain a system for the supervision of accounts of legal practitioners who have been prescribed by the Minister and may, with the consent of the Minister, make regulations providing for: (i) the applicable category of practitioners; (ii) the type of accounts at authorised banks that may be opened and held and the opening and keeping of such accounts; (iii) the rights, duties and responsibilities of a relevant legal practitioner in relation to monies received, held, controlled or paid by him / her arising from his / her practice; (iv) the accounting records to be maintained by a relevant legal practitioner; and (v) the enforcement by the LSRA of compliance with the regulations. This provision also creates a number of indictable offences in respect of non-compliance with a fine not exceeding €30,000.
- (iv) Section 42 obliges the LSRA to make regulations, with the consent of the Minister, to require a legal practitioner in specified circumstances either to: (a) open and maintain a separate deposit account at a bank for the benefit of the client for the holding of money received for or on account of the client; or (b) to pay to such client a sum equivalent to the interest which would have accrued if the money so received had been held on deposit by that legal practitioner. Those regulations can also authorise a client of a relevant practitioner to require that any question arising in relation to the client's money be referred to and determined by the LSRA.
- (v) Section 42 does not distinguish between solicitors and barristers. It will, at an absolute minimum, impose a substantial administrative burden on individual barristers to maintain a bank account, or a number of bank accounts for the retention of client's monies. Leaving aside the administrative burden it raises a

whole series of more profound questions over the appropriateness of advocates making tactical decisions while in charge of their client's assets. It also raises an involved question of how to introduce, from scratch, a viable regulatory structure to govern this new relationship. Apart from stating that such accounts shall be maintained the Bill is entirely silent on how this should work in practice. Furthermore, if the experience of the Law Society is at all instructive, it seems inevitable that insurance premiums for all practitioners will rise in order to ensure that the associated risks are absorbed, with possible concomitant cost implications for clients.

- (vi) Section 43 (which allows the LSRA to make regulations, with the consent of the Minister and following consultation with the Bar Council, requiring barristers to maintain professional indemnity insurance) fragments the current approach to professional indemnity where each practitioner receives generalised cover for relatively modest sums. Instead the LSRA may determine the level of cover required for each type of: (i) practice; or (ii) practitioner; or (iii) for each class of action; or (iv) type of claim; or (v) by reference to some or none of these factors. Section 43 stipulates that if a barrister does not have the requisite insurance for the class of action in which he / she appears, the Bar Council must, without any obvious means for the advocate in question to appeal, remove that person's name from the Roll. There is no reasonable objection to the idea of professional indemnity insurance for all practitioners, however, this scheme poses a number of clear dangers. First, if the LSRA uses its power to fragment all classes of litigation by reference to the inherent risk factors the ability of the general practitioner to cover themselves for all conceivable briefs it will be a matter of, at the least, great expense. Secondly, the implications for the 'cab rank' rule seem clear; barristers will have to turn down work because a brief lies strictly outside those areas for which they have managed to secure the professional indemnity cover. Thirdly, there may be cost implications for clients as barristers are forced to hand over briefs to colleagues during proceedings if the claim or jurisdiction transpires to be outside those for which they are insured, or for which they can readily and speedily get insurance. Fourthly, by abolishing the current approach it may be that certain classes of action may incur such punitive insurance premiums that they become essentially impossible for advocates to cover themselves. The Bar Council believes that no good reason has been advanced to change the current system in which the Bar Council requires that all barristers have in place professional indemnity insurance.

71. The LSRA also has significant reporting powers and obligations under the Bill which oblige the LSRA (following "*appropriate*" consultation) to prepare for and submit to the Minister reports concerning issues such as:

- (i) whether the number of persons admitted to practice as barristers and solicitors each year is consistent with the public interest in ensuring the availability of such services at a reasonable cost (s. 29);
- (ii) the arrangements for education and training of legal practitioners in Ireland (within 12 months from the date of establishment) (s. 30);
- (iii) the unification of the solicitors' profession with the barristers' profession (within 24 months from the date of establishment) (s. 30);

- (iv) the creation of a new profession of conveyancer (within such time as may be specified by the Minister) (s. 30);
 - (v) the manner in which legal partnerships and multi-disciplinary practices “*should be established and operated*”, the retention or removal of restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor and the reforms (administrative, legislative or to existing professional codes) required to facilitate same (within 18 months from the date of establishment) (s. 75); and
 - (vi) any other matters requested by the Minister (within such time as may be specified by the Minister) (s. 30).
72. The Bill is silent as to how it is proposed that the LSRA will assess and what factors it will take into account in determining whether or not the number of persons admitted to practice as barristers and solicitors in a year is consistent with the public interest in ensuring the availability of such services at a reasonable cost. Moreover, it is not clear how the demand for such services or the adequacy of the standard of education and training for persons admitted to practice will be accurately and fairly measured.
73. The report generated in relation to the education and training of legal practitioners in Ireland, pursuant to s. 30 of the Bill, appears to be premised on the subjective assessment of the LSRA of the existing arrangements relating to the education and training of legal practitioners; the Bill is silent as to the factors to be taken into account by the LSRA in making this assessment and recommendations to the Minister in relation to the arrangements that in the opinion of LSRA should be in place for the provision of the education and training referred to in that subsection, including the accreditation of bodies to provide such education and training, and the reforms or amendments, whether administrative or legislative, that are required to facilitate those arrangements. Further, the role of educational establishments in this review process is not clear.
74. The report which the LSRA is obliged to produce regarding unification of the solicitors’ profession with the barristers’ profession must contain details of arrangements in operation in other jurisdictions in which the professions have been unified and shall contain recommendations as to:
- (i) whether the solicitors’ and barristers’ professions should be unified having regard to, among other things to: the public interest, the need for competition in the provision of legal services in the State, the proper administration of justice, the interest of consumers of legal services including access by such consumers to experienced legal practitioners and any other matters that the LSRA considers appropriate or necessary;
 - (ii) if the recommendation is in favour of unification: how the professions can be unified and the reforms or amendments, whether administrative, legislative or to existing professional codes, that are required to facilitate such unification; and
 - (iii) any other matters that the LSRA considers appropriate or necessary.

Although the LSRA is obliged to include in its report details of arrangements in operation in other jurisdictions in which the professions have been unified, it is not similarly obliged

to review the arrangements in jurisdictions in which unification has not taken place or has been considered and rejected.

75. The wording of s. 75(1) underscores the in-built partiality in the consultation and reporting processes; the crafting of the consultation and reporting process is designed to favour the result desired by the wording of the provision of the Bill, that is, the establishment of legal partnerships and multi-disciplinary practices. As noted below, there is no obligation (only a statutory discretion) on the LSRA to consult with professional bodies such as the Bar Council when preparing its report for the Minister containing its recommendations regarding such partnerships and practices. Both solicitors and barristers will, of course, have the option of contributing to the consultation process in their capacity as members of the general public, but it is conceivable under the terms of the Bill that both partnerships and multi-disciplinary practices could be introduced without any further reference to representative organisations. The power of the Minister to oblige the LSRA to investigate and prepare interim reports regarding the progress of the consultation process and such matters as the Minister requests in effect allows the Minister both to anticipate and to shape the recommendations of the LSRA. The role of the Minister following receipt of the report of the LSRA is also unclear, in particular if the Minister disagrees with any of the recommendations contained in the report.
76. The LSRA is also required to submit to the Minister for approval a strategic plan for the ensuing 3 year period (s. 16), an annual report including information in respect of such matters as the Minister may direct and is obliged to give to the Minister such information as the Minister may require in respect of the performance of its functions and its policies in respect of such performance (s. 17 of the Bill).

DIRECT REGULATION OF THE LEGAL PROFESSION:

77. Under the provisions of the Bill, the LSRA is entrusted with direct responsibility for regulating the professions, rather than independent oversight of regulation. Thus, the Bill brings the legal professions under the direct supervision (and control) of the Executive.
- (i) No indication is given for the basis of this proposal. Furthermore, such a proposal is not in line with the recommendations of the Competition Authority (and, by extension the EU / IMF Programme for Support which required implementation of the outstanding Competition Authority's recommendations to reduce costs) or the regulation of legal services in other civil or common law jurisdictions of developed countries.
 - (ii) In its 2006 Report, the Competition Authority recommended the establishment of an independent statutory body with overall responsibility for regulating the legal profession and the market for legal services but also recommended that, subject to this oversight, the day-to-day regulation of the profession would be delegated to "*existing front line regulators*"¹⁸ (the Bar Council and Law Society) who would be required to separate their representative and regulatory functions. The Report stated that this model "*retains the advantages of the current regulatory model,*

¹⁸ Competition Authority, '*Competition in Professional Services: Solicitors and Barristers*', published on 11 December 2006, paras. 3.4 and 3.91.

*whereby experienced practitioners play an important role, while removing the negative aspects with minimal disruption” and was “consistent with the regulation of other professions and sectors in Ireland, as well as trends internationally in the regulation of legal services”.*¹⁹ The form of regulation proposed by the Competition Authority was described as “*independent oversight regulation*”.²⁰

- (iii) The Report recommended that the statutory body would have explicit authority to: (i) make new regulations and to veto or repeal (or direct the repeal of) rule(s) of the front line regulatory bodies; (ii) undertake an analysis of the market for legal services to identify priority areas for reform; (iii) set guidelines for the assessment of costs in contentious matters; (iv) sanction the front line regulatory bodies if they failed to meet certain standards laid out by the independent oversight body; and (v) have a majority membership and chairperson who were not practising members of the legal profession.
- (iv) Not only does the Competition Authority Report not provide any support for the direct form of regulation (or the denuding of the Bar Council of its regulatory functions) proposed in the Bill, the report emphasised the importance of the independence of the statutory body responsible for oversight regulation which encompassed both independence from the legal profession and independence from “*Government departments*” and “*Government interference*”; that is a body “*independent of both the Government and the profession*”.²¹ . The importance of an independent legal profession is recognised in the Competition Authority’s Report. It is equally important that any regulatory body, which seeks to control and monitor the delivery of such services, is also independent and seen to be independent from the State. Independence in regulation must be real and transparent.
- (v) The recent suggestion that the proposed changes contained in the Bill are required by the Programme for Government is also not correct. The Programme for Government does not specify, require or commit the Government to any form of independent regulation or structural changes, still less the form of regulation or structural changes provided for in the Bill. At page 50 of the Programme it is stated that:
- “We will 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.”*
- (vi) Contrary to the proposals in this Bill, the regulation of the legal profession and the provision of legal services in other jurisdictions (in particular in the UK) in general is by way of oversight regulation by an independent statutorily appointed regulator, with the day to day regulation left to front line regulators (FLRs) like the Bar Council or Law Society.

¹⁹ *Ibid.*, para. 3.94.

²⁰ *Ibid.*, para. 3.91.

²¹ *Ibid.*, para. 3.55.

- (vii) A similar model was considered and rejected in the UK in the report published by Sir David Clementi, *Report on the Review of the Regulatory Framework for Legal Services in England and Wales* as part of the process of review of the regulatory framework for the legal profession and the provision of legal services which involved extensive consultation with the public and existing front line regulators and culminated in the Legal Services Act, 2007. The incoming President of the Council of Bars and Law Societies of Europe (CCBE),²² Marcella Prunbauer-Glaser has warned²³ that a model of regulation such as that proposed by the Minister under the Bill was rejected in the UK *inter alia* on grounds that the continued existence of independent legal professions was incompatible with such a degree of governmental control. The Clementi report also found that the form of independent regulation recommended by the Competition Authority in this jurisdiction (which involved “*leaving day-to-day regulatory rule-making and oversight as far as possible at the practitioner level*”) was “*more likely to increase the commitment of practitioners to high standards*” which was particularly important in the area of professional conduct rules, “*where rules of behaviour and ethical standards should be seen as an aid to raise standards, not as a constraint to be circumvented*”.²⁴
- (viii) The form of direct regulation proposed in the Bill also fails to have any regard for the Council of Europe Recommendation on the freedom of exercise of the profession of lawyer²⁵ which provides that lawyers should be allowed and encouraged to form and join professional, local, national and international associations which, either alone or with other bodies, have the task of strengthening professional standards and safeguarding the independence and interests of lawyers. In this regard, it stipulates that “[*b*]ar associations or other professional lawyers’ associations should be self-governing bodies, independent of the authorities and the public” and that the “*role of Bar associations or other professional lawyers’ associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected*”.²⁶ Similarly, Article 24 of the UN *Basic Principles on the Role of Lawyers* provides that lawyers should be entitled to form self-governing professional associations to represent their interests, promote their continuing education and training, and protect their professional integrity.²⁷ The Executive Director of the International Bar Association (IBA), Dr. Mark Ellis, has noted that,

²² The CCBE is the representative organisation of approximately 1 million European lawyers through its member Bar and Law Societies from the 31 full Member States and the 11 further associate and observer countries. It is an international non-profit making association founded in 1960 and incorporated in Belgium.

²³ Paper delivered on behalf of the CCBE by its incoming President, Marcella Prunbauer-Glaser, at the conference ‘*Why the Independence of the Legal Profession must be Defended in the Public Interest*’ hosted by the Law Society of Ireland, 5 December 2011.

²⁴ Sir David Clementi, *Report of the Review of the Regulatory Framework for Legal Services in England and Wales* (December 2006) para. 29, at p. 35.

²⁵ Council of Europe Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer.

²⁶ *Ibid.*, Principles V.2 and V.3.

²⁷ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, (Cuba, 27 August to 7 September 1990), *Basic Principles on the Role of Lawyers*, Article 24.

under the Bill, these functions would be taken over by a body dominated by Government nominees.²⁸

THE COSTS INVOLVED IN THE ESTABLISHMENT AND OPERATION OF THE LSRA:

78. The Bill provides for an enormous superstructure surrounding the regulation of the legal profession and the provision of legal services. The Bill stipulates that the LSRA shall be comprised of 11 members and a chief executive officer and staff and provides for the appointment of an unlimited number of consultants, advisers²⁹ and inspectors,³⁰ the establishment of an unlimited number of committees and the appointment by the Minister of an unlimited number of staff,³¹ subject only to the approval of the Minister for Public Expenditure and Reform. In addition to the LSRA, its staff, committees, consultants, advisers and inspectors, there are 4 further bodies established under the Bill, two of which³² (the Complaints Committee and the Legal Practitioners' Disciplinary Tribunal respectively) provide for a further 16 members each, or 32 members in total.³³ Under the Bill, the Minister, with the consent of the Minister for Public Expenditure and Reform: (i) determines the remuneration and allowances to be paid to the members of the LSRA; (ii) approves the fees or allowances for expenses of members of committees of the LSRA; (iii) approves the fees or allowances for expenses of persons, bodies, consultants or advisers referred to in s. 13; (iv) determines the grades and numbers of staff of the LSRA, their terms and conditions (including remuneration); (iv) approves the scheme made by the LSRA for the granting of superannuation benefits to or in respect of the chief executive and such of its staff as the LSRA thinks fit; and (v) advances to the LSRA out of monies provided by the Oireachtas such amount as the Minister may determine for the purpose of expenditure by the LSRA in the performance of its functions.

79. The establishment of such a large superstructure together with the introduction of these new quangos with extensive membership, committees, staff, advisers, consultants and inspectors also appears to run directly counter to the government's expressed commitment to public service reform, in particular, its commitment to the rationalisation, reduction and

²⁸ Address delivered on behalf of the IBA by Executive Director, Dr. Mark Ellis, at the conference '*Why the Independence of the Legal Profession must be Defended in the Public Interest*' hosted by the Law Society of Ireland, 5 December 2011.

²⁹ Section 13 of the Bill provides that the LSRA may, with the approval of the Minister and the Minister for Public Expenditure and Reform, from time to time and as it may consider necessary to assist it in the performance of its functions, appoint consultants or advisers.

³⁰ In addition to the appointment of members of its staff as inspectors, the LSRA is authorized by s. 27 of the Bill to appoint "*such other persons*" as it thinks fit to be inspectors for such period and subject to such terms (including terms as to remuneration and allowances for expenses) as the LSRA, with the approval of the Minister for Public Expenditure and Reform may determine.

³¹ Section 20 of the Bill provides that the Minister may, after consultation with the LSRA, appoint such number of persons to be members of the staff of the LSRA as may be approved by the Minister for Public Expenditure and Reform.

³² The other two bodies established under the Bill are the Office of the Legal Costs Adjudicator (Part 9) and the Advisory Committee on the grant of Patents of Precedence (Part 11). Pursuant to s. 81, the Minister may appoint a Chief Legal Costs Adjudicator and "*such number of Legal Costs Adjudicators as the Minister, with the consent of the Minister for Public Expenditure and Reform determines necessary to ensure the work of the Office is carried out effectively and efficiently*".

³³ Section 50(3) of the Bill expressly provides that a person who is not a member of the Authority may be appointed to be a member of the Complaints Committee. Section 53 provides for the appointment by the Government, on the nomination of the Minister, of 16 members of the Legal Practitioners' Disciplinary Tribunal.

abolition of quangos, to continuous assessment of the business case for state bodies and to the requirement that all such bodies be fit for purpose and subject to a statutory ‘sunset clause’ ensuring that the body will cease to exist after a pre-determined date unless the body’s mandate is specifically renewed.³⁴

80. The risk of creating a massive superstructure or quango was specifically identified and weighed in the Clementi report in the UK when rejecting a model of regulation of the legal profession similar to that proposed in the Bill in favour of independent regulation by a statutory body and delegation of the day-to-day regulation (characterised as “*much of the work*”) to front line regulators such as the Bar Council. In particular, the Clementi report found that “*putting all regulatory functions into one body guarantees that it would become a large organisation; it runs the risk that it might become a large and unwieldy organisation*”.³⁵
81. The mechanism for payment of the remuneration of the members, staff and inspectors of the LSRA, superannuation benefits, fees due to consultants and advisers and the cost of office premises must all be borne by the Bar Council and the Law Society together with the approved operating costs and administrative expenses of the Legal Practitioners’ Disciplinary Tribunal, by way of payment of a levy to the Minister in each financial year, in an amount to be determined in accordance with the formula outlined in Part 6 of the Bill.
- (i) There are very real concerns about the cost of the LSRA and the system of regulation provided for under the Bill to the profession and, ultimately, for clients. It would be financed by a levy on the professions (Bar Council and Law Society). This is likely to be substantial (10% of the cost would be levied on the Bar Council with a similar percentage being levied on the Law Society with the balance being levied depending on the proportion of complaints and number of members of each profession).
 - (ii) Since it will be levied on the Bar Council this will have very severe consequences for the Council’s finances, the maintenance of the Law Library as a “centre of excellence” and for the funding of its other buildings.
 - (iii) There is no ceiling provided in the Bill on the costs incurred by the LSRA or limits on the number of staff who will be employed or, indeed, any incentive to contain costs. The Minister is empowered to approve the expenses after the expenses have been incurred. There is no detail regarding how the Minister (or the LSRA or Tribunal) will allocate costs to investigations of barristers and solicitors. There is no provision in the Bill which might lead to control of costs by these bodies.
 - (iv) The levy provided for under Part 6 is likely to increase very considerably the costs of practising at the Bar, will amount to an obstacle to entry to and continued practice within the profession and ultimately, as individual members will have to pay it, an increase in costs for consumers.

³⁴ Department of Public Expenditure and Reform, *Public Service Reform*, published on 17 November, 2011, Appendix II: *Rationalisation of State Agencies*.

³⁵ Sir David Clementi, *Report of the Review of the Regulatory Framework for Legal Services in England and Wales* (December 2006) para. 29, at p. 35.

- (v) A further concern arises in relation to the disproportionate nature of the levy. The introduction of the expensive and costly quango that is the LSRA and its various committees, will add to costs without any corresponding benefit, particularly in light of the small number of complaints annually concerning barristers. It should also be remembered that the number of barristers in practice is roughly one quarter the number of solicitors.
 - (vi) There are also likely to be considerable costs associated with new Legal Practitioners' Disciplinary Tribunal, in circumstances where there is already in existence an independent, cheap, accessible, effective and fair disciplinary process for barristers which is presided over by a lay member majority.
 - (vii) Pursuant to s. 25, the LSRA is empowered (and, if directed by the Minister, obligated) to charge and recover fees in respect of certain of its functions, services and activities with the consent of the Minister. Section 25(5) provides that the power to charge and recover fees in s. 25 shall not apply in respect of a function, service or activity "*where the cost to the Authority of performing that function, providing that service or carrying out that activity is included in the approved expenses of the Authority referred to in section 69*". No guidance is provided in the Bill as to when and on whom such charges or fees may be levied by the LSRA. However, it is conceivable that the levy imposed on the Bar Council under s. 69 may be augmented by additional fees and charges imposed by the LSRA pursuant to regulations under s. 25 of the Bill.
82. No Regulatory Impact Assessment (RIA) has been carried out in respect of the proposed new system of regulation which would allow an evidence-based approach to policy making and implementation involving the systematic assessment of the benefits, disadvantages and costs of the proposed regulatory changes to the economy and society, including both its practical effects and any side effects or hidden costs associated with the proposed form of regulation. An RIA would facilitate the adoption of the most efficient, effective, proportionate, transparent and accountable policy approach and ultimately improve the quality of any resulting legislation by enabling a clear identification of the objectives and detailed consideration of the likely impacts of the proposed reforms, together with comprehensive and structured consultation with stakeholders and citizens in order to test the assumptions upon which the recommendations are made (including any asserted necessity for the proposed reforms), full evaluation of the options available and the alternatives to the form of regulation proposed and of downstream compliance and enforcement issues, including the costs involved. The likely extensive and significant impact of the proposed regulatory reforms require an RIA involving a proportionate level of analysis which may then be used as the basis for further consultation in accordance with European and international best practice and the Programme for Better Regulation. If such an assessment has been carried out, it has not been publicly disclosed.
83. The failure to carry out an RIA in advance of publication of the Bill incomprehensively runs counter to the Programme for Government itself. At page 28 of the Programme, under the headings 'Open Government' and 'Waste', it is stated that:

“Where there is secrecy and unaccountability, there is waste and extravagance. We will pin down accountability for results at every level of the public service – from Ministers down – with clear consequences for success and failure. Ministers will be responsible for policy and procurement and public service managers for delivery.... We will require Departments to carry out and publish Regulatory Impact Assessments (RIAs) before Government decisions are taken. We will cut back the waste and political cronyism built up over the last decade by paring back the expensive, fragmented structures of public administration....”

84. The failure by the Government to carry out an RIA in relation to the proposed significant regulatory and structural changes means that no evidence has been provided by Government to inform the debate as to the costs (including hidden costs) of the proposed changes, the likely benefits and disadvantages of the proposed regulatory and structural changes or to enable an evaluation of whether alternative regulatory models might better achieve the stated objectives of the Bill and at the same or a lesser cost. No reason has been given for the failure to follow this Government commitment prior to making the decision to advance the proposals contained in the Bill (including the establishment of an LSRA along the lines described in Part 2 of the Bill). The Bill has, in effect, been prepared without any evidence-based research or any meaningful engagement with or contribution from stakeholders.
85. The need for an RIA in respect of such far-reaching and significant regulatory reform has been emphasised in other jurisdictions³⁶ and was an important feature of the debate in relation to the system of regulation provided for under the Legal Services Act, 2007 in the United Kingdom (which provides for oversight regulation by an independent statutorily appointed regulator, with the day to day regulation left to Front Line Regulators (FLRs) like the Bar Council, similar to that recommended by the Competition Authority in this jurisdiction). A lengthy RIA (86 pages) was published with the preceding Bill in November 2006 and included estimates from Price Waterhouse Cooper (PWC) who had been engaged to provide a report on the economic and social costs of the proposed regulatory options, including estimates for the implementation and running costs of options for regulatory reform and reform of the complaints handling system, which estimates *“were used in the RIA to inform the [British] Government’s evaluation of the different policy options for reform”*.³⁷ PWC also assessed the running costs of the proposed Legal Services Board. The RIA outlined the extensive consultation process carried out and assessed the proposed reform of the regulatory framework, proposed alternative business structures and the complaints system. In respect of each proposed reform, the costs and the economic and social benefit of each were considered in detail with reference to the PWC report together with an assessment of competition issues, legal aid and the effect on small firms. Similarly, in the state of Victoria, Australia, the results of an RIA regarding admission to the legal profession

³⁶ RIA has been adopted in most OECD countries (including the USA, Canada, Australia, New Zealand, Denmark, France, Germany, the United Kingdom and the Netherlands) to improve regulatory decision making. Consistent with EU guidelines, the USA model states that an analysis of a proposed regulation should include: (a) a statement of need, establishing the case for the proposed action; (b) an examination of alternative approaches that could be adopted to meet the need, including a justification for the option chosen; (c) an analysis of the benefits and costs of each alternative against a no action alternative, wherever possible expressed in discounted constant dollars; and (d) an analysis of distributional effects and equity. OMB (Office of Management and Budget) *Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribe Entities*, (2001, Washington DC: Office of Information and Regulatory Affairs, OMB).

³⁷ Supplement to Regulatory Impact Assessment, para. 3.

were published in 2007³⁸ and in May 2010, a consultation paper³⁹ was published on legal professional reform in Australia which was initiated by the Council of Australian Governments. The National Legal Profession Reform Project analyses the creation of a uniform national legal profession. The draft legislation aims to provide national consistency within the legal profession in response to the current divergences between the Australian states. An RIA was carried out to consider both longer-term outcomes and shorter-term transitional costs. The detailed statement considers legal costs, admission to the Australian legal profession and business structures. Draft legislation was published in September 2011 following extensive consultation.⁴⁰ The legislation proposes a National Legal Services Board and a National Legal Services Commissioner but provides that many of the Board and Commissioners powers be exercised locally by State and Territory regulators. On 20 October 2011 it was announced that NSW will represent the host State for the National Legal Profession Reform.

86. The need for an RIA was also accepted in this jurisdiction prior to the introduction of other significant legislative or regulatory reforms including the Veterinary Practice (Amendment) Bill, 2011,⁴¹ the Criminal Justice Bill, 2011, the Criminal Justice (Community Service)(Amendment) Bill, 2011, Immigration, Residence and Protection Bill, 2010, Criminal Law (Insanity) Bill, 2010, Criminal Procedure Bill, 2009, Property Services (Regulation) Bill, Mental Capacity Bill⁴² and the Climate Change Response Bill, 2010.⁴³
87. If, as has been stated recently by the Minister, it is now intended to carry out an RIA in respect of the proposed new system of regulation, it is submitted that, in order to constitute a fair and proper RIA, it should be conducted without any constraints by reference to the proposals advanced in the Bill; that is, the RIA and the requisite attendant extensive consultation and cost analysis should not be confined to those regulatory and structural proposals contained in the Bill, since European and international best practice dictate that the RIA should inform Government policy and the provisions of the resulting proposals and draft legislation regarding regulatory and structural changes and not vice versa. Any RIA now conducted (commencing, as it will, *subsequent* to the publication of the Bill) which is restricted by reference to what is now being presented as decided Government policy (regarding the form of regulation and structural changes contained in the Bill) will run directly counter to the State's European and international obligations. The Bar Council would welcome any proper, fair, transparent and comprehensive RIA (including a thorough and open consultation process) which involves a full evaluation of all of the options available and the alternatives to the form of regulation proposed, including their benefits and costs and the importance in the public interest and the necessity in a democratic society of preserving and maintaining the independence of the legal professions. It is very difficult to see how this can be effectively done after the Bill has been published.

D. THE DISCIPLINARY PROCESS FOR LEGAL PRACTITIONERS UNDER THE BILL:

³⁸[http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/LegalProfession%28Admission%29Rules2008RIS/\\$File/Legal%20Profession%20%28Admission%29%20Rules%202008%20RIS.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/LegalProfession%28Admission%29Rules2008RIS/$File/Legal%20Profession%20%28Admission%29%20Rules%202008%20RIS.pdf)

³⁹http://www.lawsocietysa.asn.au/PDF/Regulation_Impact_Statement%28including+Attachments+AC%.pdf

⁴⁰<http://www.ag.gov.au/legalprofession>

⁴¹<http://www.agriculture.gov.ie/press/pressreleases/2011/september/title,57828,en.html>

⁴²<http://www.justice.ie/en/JELR/Pages/WP09000025>

⁴³<http://www.welfare.ie/EN/Policy/Legislation/Regulatory%20Impact%20Analysis/Documents/RIASWPBill08.pdf>

88. Part 5 of the Bill completely alters the disciplinary procedures as currently run by the Bar Council and the Law Society. As already noted, the CCBE have forcefully criticised the control given by the Bill to the Executive in respect of the legal profession and the provision of legal services. It noted that the Bill provides that all disciplinary issues, regardless of triviality or seriousness will be dealt with by a statutory body, rather than, as now, by the Barristers' Professional Conduct Tribunal and the Barristers' Professional Conduct Appeals Board, both of which have a lay majority. The Bill also provides limited representation for the professional bodies who are nonetheless expected to fund the operation of the new disciplinary structures.
89. It is important to emphasise that the Competition Authority did not recommend a disciplinary structure of the kind proposed in the Bill; rather, it welcomed the intention of the then Government to establish a Legal Services Ombudsman to supervise the handling of complaints by the Bar Council and Law Society. In the view of the Competition Authority, the establishment of such an Ombudsman would complement the establishment of a Legal Services Commission. Such a form of independent supervision of the disciplinary structures of the legal professions has also been adopted in the UK in the Legal Services Act, 2007.
90. Section 49 of the Bill establishes a Complaints Committee which is to operate under the control of the LSRA. The breadth of the Complaints Committee's functions cover investigation of complaints of matters ranging from falling short of reasonable standards expected of a legal practitioner to supplying an excessive bill of costs. Seven such categories of misconduct are set out in Section 45. It is noteworthy that the LSRA may instigate complaints of its own volition. Any such complaints are to be heard by the Complaints Committee, which is effectively a sub-committee of the LSRA. There is a clear conflict in having a sub-committee of a complainant determine the outcome of any complaint.
91. The inclusion in the definition of misconduct of an act which consists of "*issuing a bill of costs which is excessive*" is unnecessary and too vague. No definition is given for "excessive" and furthermore there is a detailed mechanism in the Bill for resolving disputes as to costs.
92. Complaints of misconduct are received by the LSRA (s. 46) who is empowered to initiate an investigation into the practice of the legal practitioner at any time (s. 47). The LSRA may make regulations governing the making of complaints, the procedures to be followed and the manner of resolution of same. The functions of the LSRA concerning complaints are to be performed by the Complaints Committee (s. 49). The 16 members of the Complaints Committee are to be appointed by the LSRA, with the approval of the Minister. Not less than 3 members are to be nominated by the Law Society and by the Bar Council respectively and the remaining majority are to be lay members.
93. A serious concern arises in relation to the criteria of appointment of lay members of the Complaints Committee. The appointment of lay persons to the Complaints Committee is not governed by any clear criteria or guidance (s. 50). The wording of the areas in which the lay member must have "*knowledge of and expertise*" is vague and the five criteria that are expressly set are themselves nebulous (*i.e.*, (i) the provision of legal services, (ii) the

maintenance of standards in professions regulated by a statutory body, (iii) “*dealing with complaints*”, (iv) “*commercial matters*” and (v) the needs of consumers of legal services). On a strict reading of these provisions lay members who do not meet these criteria could still be part of the Complaints Committee where other members satisfy at least one of these factors. In light of the fact that the majority of the Complaints Committee and Divisional Committees are to be lay persons and having regard to the sanctions that may be imposed following a finding of misconduct, the criteria governing the appointment of lay persons are extremely important. The lack of clarity surrounding these criteria is a serious concern.

94. The heavily inbuilt lay majority is also a cause for serious concern. Barristers may have findings of misconduct proved against them, potentially, by panels containing ten lay persons and one barrister or by a divisional panel of not less than 3 members of whom a majority are lay members. The guarantee that lay members will be suitably appointed is debatable, given the lack of precise criteria for appointment. No other statutorily regulated profession allows for such a pronounced imbalance.
95. After hearing the complaint, the Complaints Committee may then determine: (i) no misconduct has taken place; (ii) misconduct has taken place but, on consent, the mischief is curable by ordering the legal practitioner to either perform the legal service or waive the fee or part thereof; or (iii) where it appears that serious misconduct may have taken place, to transmit that complaint to the Legal Practitioners’ Disciplinary Tribunal. There does not appear to be any right of appeal from the second or third determination of the Complaints Committee (s. 52). Divisional Committees of the Complaints Committee (of not less than 3 members with a lay majority) may impose wide-ranging sanctions following a finding of misconduct and the Divisional Committee may also recommend to the LSRA, (who is bound by such a recommendation), that the Legal Practitioners’ Disciplinary Tribunal (established by s. 52) hold an inquiry into the alleged misconduct.
96. The Complaints Committee may use an inspector appointed under s. 27, who may exercise the extensive powers conferred by s. 28 in its investigations. It appears that this inspector has the power to enter, without notice and without the safeguard of a warrant issued by a Court, a barrister’s place of business (which could in many cases be the barrister’s dwelling), seize hard copy files, hard drives and access bank accounts. The Bill also creates an indictable offence of non-compliance with such inspector, with a maximum fine of €30,000. These powers are draconian and without precedent in respect of any other profession. No justification has been advanced in respect of the granting of these proposed powers.
97. A further regulatory body is also envisaged by the Bill: the Legal Practitioners’ Disciplinary Tribunal (“*the Tribunal*”).
- (i) The appointment of the members of the Tribunal mirrors that of the Complaints Committee and the criticisms that apply to the criteria for appointing lay members are therefore also valid in relation to the Tribunal.
 - (ii) It is envisaged that the LSRA will present evidence grounding an allegation of misconduct to the Tribunal and the Tribunal has the powers, rights and privileges vested in the High Court in respect of compelling witnesses to attend and compelling document production and discovery (s. 57). The sanctions available to

the Tribunal following a finding of misconduct are wide-ranging and significant and include the power to recommend to the High Court that the name of a barrister or solicitor be struck off the roll or that the legal practitioner be prohibited from practising otherwise than as an employee. The concerns regarding the independence of the Tribunal are heightened by the significance of the sanctions available to the Tribunal (both of its own initiative and those recommended to the High Court) following a finding of misconduct by the legal practitioner.

- (iii) There appears to be an inconsistency in the provisions of the Bill as drafted regarding the availability of an appeal to the High Court. Section 61(3) provides that a legal practitioner may appeal to the High Court from a determination of misconduct by the Tribunal, dealt with by the Tribunal under s. 60 and makes no reference to such a right of appeal on the part of the LSRA or complainant against the sanction imposed. However s. 62(4) states that sanctions may be appealed by the LSRA or the complainant where the Tribunal deals with the matter under section 60.
- (iv) The costs of the disciplinary machinery are to be borne by the two professions. This will inevitably place a substantial financial burden on practitioners. The current direct cost of operating the Barristers' Professional Conduct Tribunal and the Barristers' Professional Conduct Appeals Board (which deal with approximately 40 complaints per annum) is approximately €130,000 per annum.
- (v) Serious concerns arise over the extent of the Minister's overarching powers throughout the disciplinary process. The Minister: (i) appoints the members of the Authority; (ii) appoints the members of the Complaints Committee; and (iii) appoints the members of the Disciplinary Tribunal. These members are appointed by reference to the vaguest of criteria. Given the severity of the sanctions, heightened concerns arise regarding the independence of these bodies. In effect, the Minister appoints both judge and jury in all disciplinary matters and will exercise near total control over the disciplinary practice, with the presence of the professions reduced to a spectre. The Recommendation of the Council of Europe⁴⁴ provides that bar associations should be responsible for, or be entitled to participate in, the conduct of disciplinary proceedings concerning lawyers.⁴⁵ The Recommendation emphasises the need for bar associations to establish and freely implement a code of profession conduct for lawyers. With regard to the failure by lawyers to respect their professional standards, disciplinary proceedings can be adopted and applied by bar associations or "*other bodies which act independently of State bodies*". Furthermore, it provides that bar associations should be entitled to be represented at disciplinary hearings if a separate and independent body is established.

E. NEW STRUCTURES FOR THE PROVISION OF LEGAL SERVICES UNDER THE BILL:

⁴⁴ Recommendation of the Council of Europe's Committee of Ministers, *Recommendation No R(2000)21 to Member States on the freedom of exercise of the profession of lawyer* (25 October 2000).

⁴⁵ *Ibid.*, Principle VI.

98. The provisions of the Bill introducing new business structures for the provision of legal services have been introduced without first engaging in a comprehensive assessment as to whether such business structures are in the public interest and in the interests of the proper administration of justice. Such systematic evaluation would require research regarding the benefits, disadvantages and costs of such changes, including the practical effects, side effects and hidden costs of such proposals. It should also involve meaningful engagement and consultation with the public and with stakeholders. Such assessment and consultation ought to have taken place before a decision was made (and in order to inform any decision made) by the Oireachtas as to whether to alter the existing structures for the provision of legal services.
99. At present, the Bill proposes a number of significant structural changes to the manner in which legal services are provided to a consumer, which changes will be introduced with no further recourse to the Oireachtas in relation to their operation and in circumstances where there is no report or evidence recommending their introduction in the first instance.
100. The public consultation process envisaged by s. 75 of the Bill fails to provide for an objective, comprehensive and overarching assessment of the business structures that should operate for the delivery of legal services in the State, notwithstanding that the Competition Authority expressly recommended that such research would be undertaken: Recommendation No. 12. Instead, s. 75 provides for the LSRA to prepare reports and make recommendations to the Minister into how legal partnerships and multi-disciplinary practices "should" be established and operated, thus presuming that these business structures should be established and in the form contemplated in the Bill, in the absence of any prior report recommending their creation.
101. This should be contrasted with the careful evidence-based approach in the United Kingdom where, unlike here, extensive and wide ranging consultation and research were undertaken prior to determining whether to introduce reforms and the form and content of such reforms.
102. The approach adopted in the Bill with regard to the introduction of the proposed changes to the business structures for the provision of legal services is also inconsistent with the approach adopted in s. 30 of the Bill, which requires the LSRA to research and report on the possible unification of the solicitors' and barristers' professions. In so doing, the LSRA is required to have regard to the "public interest", the need for competition in legal services in the State, the proper administration of justice and the interests of consumers of legal services, including access by such consumers to experienced legal practitioners.
103. The Bar Council would welcome any proper, fair, transparent and comprehensive research and report (including a thorough and open consultation process) which involves a careful evaluation of the business structures that should operate for the delivery of legal services in the State in the public interest and in the proper administration of justice. The Bar Council would look forward to engaging in such a process with a regulator that is made suitably independent from political / Executive control, involvement and interference, including in the ways outlined in this submission.
104. The Bill, and in particular Part 7 thereof, envisages new structures for the provision of legal services which raise particular concerns for the independent referral Bar, the public

interest and proper administration of justice. Sections 72, 73, 74 and 116 of the Bill operate to remove any prohibition in a professional code which prevents a legal practitioner from providing legal services:

- (i) as a partner or employee of a legal partnership (s. 72);
- (ii) where he / she is directly instructed by a person who is not a solicitor in relation to a matter other than a contentious matter (s. 73); or
- (iii) as a partner or employee of a multi-disciplinary practice (s. 74); or
- (iv) to his / her employer, including appearance on the employer's behalf in Court (s. 116).

(i) LEGAL PARTNERSHIPS:

105. The definition of "*legal partnership*" includes only barrister/barrister partnerships or barrister/solicitor partnerships but excludes solicitor/solicitor partnerships.

106. Insofar as s. 72 provides for legal partnerships, it is contrary to the recommendations of the Competition Authority and not required by the Programme agreed with the EU / IMF. This is the Minister's unilateral proposal which is contrary to the advice of the Competition Authority. The proposals will undermine the pro-consumer / pro-competitive benefits recognised by the Competition Authority which arise from the independent referral Bar, including in particular client access to justice (to small firms of solicitors around the country and to the expert barrister of their choice) and competition in the market. The Competition Authority did not recommend the establishment of legal partnerships (which it termed 'Legal Disciplinary Practices') noting that they raised "*possible issues surrounding access to justice and regulation*" which merited further research and examination.⁴⁶ The Competition Authority expressed concern that such practices could result in concentration of market power and reduction in competition and present obstacles to or restrictions on access to justice. In particular, it was noted that if such practices were permitted "*it is possible that a large number of the most capable advocate would be enticed to work for the larger city-based firms*" and "*highly unlikely that barristers would form partnerships with small rural firms*" with the result that "*smaller rural and urban clients would no longer be able to access these advocates*" and a consequent "*reduction in the supply and quality of advocacy services for smaller buyers*".⁴⁷ The Competition Authority further cautioned of a potential diminution of competition in specialist areas if such practices were to be introduced noting that in some specialist areas of the law (such as defamation), there are only a small number of highly experienced and expert barristers and "*[i]f even one of these were to join a large city firm this could have a negative effect on access to justice and competition by allowing lower quality barristers charge a higher rate and/or allowing the existing expert barristers charge a higher rate*".⁴⁸ The proposals relating to "*legal partnerships*" in the Bill bear no relation to legal fees and will not lower legal costs.

107. The proposals relating to partnerships and multi-disciplinary practices will reduce competition and will act as a barrier to entry to the profession. One of the arguments

⁴⁶ Competition Authority, '*Competition in Professional Services: Solicitors and Barristers*', published on 11 December 2006, para. 5.134.

⁴⁷ Competition Authority, '*Competition in Professional Services: Solicitors and Barristers*', published on 11 December 2006, paras. 5.127 and 5.128.

⁴⁸ *Ibid.*, para. 5.129.

advanced in support of the introduction of partnerships and multi-disciplinary practices is that it would remove the financial barrier to entry of the profession. In fact, however, these structures may have the effect of creating an obstacle to entry. Indeed, no evidence has been advanced from any source regarding experiences resulting from the introduction of partnerships and/or multi-disciplinary practices in other common law jurisdictions which might provide support for their use as business structures for the delivery of legal services in this jurisdiction. The figures from England and Wales, where the chambers system operates, provide a telling illustration of the proposition that a partnership system does not result in universal access to the Bar. A study commissioned by the General Council of the Bar of England and Wales in late 2006 revealed that a mere 17.5% of Bar Vocational Course graduates are likely to secure a position in chambers. Furthermore, there is the potential that the introduction of legal partnerships and multi-disciplinary practices will have the effect of reducing competition, by ensuring that the most capable legal graduates are concentrated within a small number of large, well-resourced practices with smaller firms, or those adopting a more traditional business model, being severely disadvantaged. Such an eventuality can only have a negative impact on competition within the legal services sector.

DIRECT ACCESS:

108. Section 73 operates to remove any prohibition in a professional code which prevents a legal practitioner from providing legal services where he / she is directly instructed by a person who is not a solicitor in relation to a matter other than a contentious matter. “*Legal services*” is defined to include services of a legal nature or any part thereof provided by a legal practitioner and financial services to the extent that the practitioner is authorized to provide such services. The definition of legal services is accordingly, far broader than the recommendation of the Competition Authority which referred only to access for ‘advice’.
109. There are problems with the definition of “*contentious matter*” which provides that for a matter to be contentious, the matter must have arisen in proceedings. Specific issues arise therefore where litigation is contemplated or likely, but not yet in being. The barrister may be prohibited by his / her professional code from providing legal services where directly instructed by a person other than a solicitor.
110. Removing a prohibition on direct access to a barrister by a person other than a solicitor directly impacts on the ‘cab rank’ rule. In England and Wales, the ‘cab rank’ rule does not apply to direct access. This is a significant erosion of a vital principle conducive to the administration of justice, which obliges an advocate to accept instructions irrespective of personal feeling and professional convenience. A number of important and instructive restrictions on direct access in the UK remain: (i) barristers may not instruct expert witnesses; (ii) they may not take responsibility for the handling of clients’ affairs, or the handling of clients’ money; and (iii) a barrister remains under a continuing obligation to consider whether given work would be better served by the instruction of a solicitor.

MULTI-DISCIPLINARY PRACTICES:

111. Section 74 removes any prohibition in a professional code which prevents a legal practitioner from providing legal services as a partner or employee of a multi-disciplinary practice. This provision is exceptionally broad and fails to provide any guiding principles or

give any consideration to the challenging and complex issues raised by the regulation of such multi-disciplinary practices.

112. The most striking feature of the definition of multi-disciplinary practice is its breadth – effectively any barrister or solicitor is entitled to enter into partnership with any other person, to provide any array of services, provided at least some indeterminate portion of those services is of a legal nature. A serious concern is that there is no prohibition under the terms of the Bill preventing a partner or employee of a multi-disciplinary practice, who has no formal legal education or training, performing legal services or dispensing legal advice as part of his / her work for that practice.
113. Section 74(2) provides that such practices should appoint a “*managing legal practitioner*” to hold responsibility for the provision of legal services by the practice. The managing legal practitioner is responsible for ensuring that a number of principles set out in section 9(5) of the Bill are adhered to by legal practitioners in the partnership and must take appropriate remedial action in respect of breaches that occur. However, the managing legal practitioner has no responsibility to ensure that the principles set forward are adhered to by employees or partners of the multi-disciplinary practice who are *not* legal practitioners.
114. The assertion that the introduction of legal partnerships and multi-disciplinary partnerships in the form provided for in the Bill is required by the EU / IMF Programme and/or the Competition Authority Report is simply wrong. Insofar as the EU / IMF Programme purports to recommend any structural changes at all, those changes are entirely referable to the Report of the Legal Costs Working Group and the Competition Authority Report. The Report of the Legal Costs Working Group (LCWG Report) made no reference whatsoever to the introduction of partnerships or multidisciplinary practices.
115. The Competition Authority did not recommend that barristers would be allowed to enter into legal-disciplinary partnerships and in fact considered that if such were to be permitted “*it could result in a reduction in the supply and quality of advocacy services for smaller buyers*”. As a result of its concerns relating to the introduction of legal disciplinary partnerships, the Competition Authority expressly avoided any consideration of whether barristers should be permitted to join multi-disciplinary practices. The suggestion therefore that the introduction of legal partnerships and multi-disciplinary practices in the form defined by s. 71 of the Bill was required by the LCWG Report, the Competition Authority Report or the EU / IMF Programme is wrong.
116. The proposal to introduce multi-disciplinary partnerships also directly conflicts with the tenor and substance of the seminal decision of the European Court of Justice in Wouters wherein the Court affirmed the crucial role of lawyers and lawyers’ professions in ensuring the proper administration of justice and maintenance of the rule of law and acknowledged that the existence of multi-disciplinary partnerships could constitute a threat to the independence of the legal profession.⁴⁹ The Court recognized that the formation of multi-disciplinary partnerships is injurious to the independence of the legal profession (which is an essential guarantee for the individual and the judiciary) and may be inimical to the provision of the necessary guarantees of integrity and experience to the ultimate consumers of legal services and to the sound administration of justice. At issue in this case was a regulation

⁴⁹ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

adopted by the Netherlands Bar Association prohibiting lawyers practising in the Netherlands from entering into multi-disciplinary partnerships with accountants. The ECJ found that a rule prohibiting multi-disciplinary partnerships did not have as its object the restriction of competition, despite the fact that that rule was found to be liable to limit production and technical development within the meaning of Article 81(1)(b) EC.⁵⁰ The reasoning of the ECJ is instructive. First, it held that “*the existence of multi-disciplinary structures including lawyers and accountants is liable to constitute a threat to the independence of the lawyers*”. The Court noted that independence requires lawyers to carry out their duties of advice, assistance and representation in the client’s exclusive interest and that independence must be demonstrated “*vis-à-vis the public authorities, other operators and third parties, by whom they may never be influenced*” and “*vis-à-vis the client who may not become his lawyer’s employer*”; since independence is “*an essential guarantee for the individual and for the judiciary*”, lawyers are “*obliged not to get involved in business or joint activities which threaten to compromise it*”. Secondly, the Court held that the existence of multi-disciplinary partnerships between lawyers and accountants “*is such as to constitute a major obstacle to observance of lawyers’ professional secrecy*” which forms the basis of the relationship of trust between lawyer and client and also constitutes “*an essential guarantee of the freedom of the individual and of the proper working of justice, so that in most Member States it is a matter of public policy*”. Thirdly, the Court found that lawyers owe a duty of loyalty to their clients which requires them to avoid conflicts of interest which, in turn, means that “*a lawyer may not advise, assist or represent parties whose interests are, or in the past were, opposed*” and prevents lawyers from using to the benefit of one client information concerning, or obtained from, another client. Having regard to the foregoing, the Court concluded that it did not appear that the effects restrictive of competition in the prohibition on partnership laid down in the contested regulation “*go beyond what is necessary in order to ensure the proper practice of the legal profession*”.⁵¹

117. The principal argument against partnerships and to an even greater extent, multi-disciplinary practices is that if they are introduced it will undermine two core values of the Irish Bar: integrity and independence. The maintenance of these core values is manifestly in the public interest. As matters stand under the current regulatory model, a barrister owes duties to his / her client and above all he / she owes a primary duty to the court. In the event of tension between the public duty owed by each individual barrister to the sound administration of justice and the private duty of each individual barrister to his / her client, the public duty must prevail. A barrister in partnership will owe a third duty – to his / her partners. This has the clear potential to place barristers in ethically problematic situations and to upset the balance between the duties owed, to the detriment of the public interest. In particular, the interposing of a duty owed by the barrister to his / her partners or his / her employer will destabilize and dilute the existing clear ethical framework for the conduct of legal services by barristers where conflict of duties / interests arise. It is essential in the public interest that a barrister should be in a position to conduct himself / herself with the utmost good faith before the court without considering any unwelcome implications that the truth may have for his / her partners in practice.

118. There is considerable evidence, supported by foreign experience, to suggest that the introduction of partnerships and multi-disciplinary practices will reduce rather than increase

⁵⁰ *Ibid.* paras. 86 – 90.

competition at the Bar in particular by concentrating market power and creating barriers to entry, thus diminishing competition and choice for the consumer contrary to the public interest. A recent report prepared following the commencement of the Legal Services Act 2007 in the United Kingdom on 6 October 2011 predicts that the effect of the introduction of multi-disciplinary practices will be to shrink the number of competitors in the market to five to ten commercial firms with a turnover of more than one billion pounds per annum.⁵²

119. There is a real and substantial risk that the introduction of multi-disciplinary practices in the form contemplated by the Bill will lead to a significant diminution in the standards of legal services being provided within the State. The notion that a group of individuals with no legal training or professional qualifications could enter into partnership with one barrister or solicitor, and thereafter provide legal services to the public is contrary to the high standards to which the legal profession has for centuries aspired. As noted there is no prohibition under the terms of the Bill to a partner or employee of a multi-disciplinary practice who has no formal legal education or training, performing legal services or dispensing legal advice as part of his/her work for that practice. This raises a further number of serious and also practical concerns. For example, would legal professional privilege apply to communications between a client and such a person? What professional standard of care would such a person be held to in a claim for negligence? Although s. 9 of the Bill provides that the LSRA shall “*regulate the provision of legal services by legal practitioners and shall ensure the maintenance and improvement of standards in the provision of such services in the State*”, the publicity surrounding the Bill has focused on increases in competition and transparency and no formal guarantee or safeguard have been provided to the effect that the quality of service will not be sacrificed in pursuit of those objectives.
120. Furthermore, the introduction of multi-disciplinary practices has the potential to give rise to circumstances which are challenging and complex from a regulatory perspective. For example, in a multi-disciplinary practice comprising of barristers, solicitors, accountants and tax consultants, who would be responsible for carrying out an investigation into allegations of serious misconduct? Will several parallel investigations result at great expense to the public exchequer?
121. There is no evidence to suggest that the Department of Justice and Equality has undertaken any independent empirical research of the experiences which have resulted from the introduction of partnerships and/or multidisciplinary practices in other common law systems.
122. The Bar Council suggests an alternative to the way in which this issue is dealt with in the Bill. The new regulatory authority should be asked to carry out a proper study and investigation into whether or not legal partnerships and multi disciplinary practices should be permitted in this jurisdiction. The Competition Authority noted that the introduction of those structures raised considerations beyond competition issues and included access to justice concerns. No reason has been given for not following the recommendation made by the Competition Authority that a proper study should be carried out into all of these issues before a decision is taken on whether or not to permit them. The Bar Council suggests an alternative manner of dealing with this in the final part of this Submission.

⁵² A report prepared by Banco Espirito Santo, published on 10 October 2011.

BARRISTERS IN EMPLOYMENT:

123. Section 116 of the Bill provides that no professional code may prevent barristers taking up employment and providing legal services (normally provided by barristers) to that employer including appearance on the employer's behalf in Court.
124. This provision raises serious concerns from the perspective of an independent Bar. In particular it raises an obvious conflict of interest issue. Currently an organisation must engage solicitors / barrister independent of it to represent its interests, whose primary duties are owed to the Court. The introduction of in-house advocates poses a real risk that a barrister's primary duty to the Court will be undermined and could damage the integrity and independence in the delivery of legal services by barristers. This primary duty could be undermined, even unintentionally, in circumstances where a person's livelihood or professional advancement might be impeded by it. The Bill does not address this critical conflict of interest issue.
125. A further issue which arises in relation to in-house barristers (as provided for in s. 116) is that the Bar Council, under the current draft of the Bill, is responsible for practitioners in disparate modes and forms of practice. Will the Bar Council, for example, have to contribute fees in relation to disciplinary proceedings against barristers in in-house practice? This raises important issues as regards the standing of the Bar Council.
126. The European Court of Justice has recently examined the obstacles to and diminution of independence inherent in the in-house lawyer or barrister in direct employment by a company. In *Akzo Nobel Chemicals Ltd. v Commission*.⁵³ The Court held that notwithstanding enrolment with a bar or law society of a Member State and the fact that a lawyer was subject to professional ethical obligations, it followed from an in-house lawyer's economic dependence and close ties with his employer that he did not enjoy the level of professional independence comparable to that of an external lawyer. Accordingly, the Court found that in-house lawyers were not independent for the purposes of the pre-requisite for legal professional privilege laid down in the jurisprudence of the Court of Justice. The Court held that an in-house lawyer cannot be treated in the same way as an external lawyer "because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence". The Court in *Akzo* found that it followed "both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer". The Court regarded an in-house lawyer or a lawyer directly employed by a company as "structurally, hierarchically and functionally" dependent on his / her employer, whereas this is not true of an external lawyer in relation to his / her clients.

PUBLIC CONSULTATION PROCESS AND REPORT TO MINISTER:

127. As noted above, the LSRA is obliged to prepare a report for the Minister setting out its recommendations and is obliged pursuant to s. 75 to engage in a somewhat vague public consultation process regarding:

⁵³ Case C-550/07P, *Akzo Nobel Chemical Limited v Commission* [2010] All ER (D) 72 (Sep).

- (i) the manner in which legal partnerships and multi-disciplinary practices “*should be established and operated*”;
- (ii) the retention or removal of restrictions on a barrister receiving instructions in a contentious matter from a person who is not a solicitor; and
- (iii) the reforms (administrative, legislative or to existing professional codes) required to facilitate same.

128. The LSRA is obliged to engage in consultation with members of the public but is simply empowered “*where it considers it appropriate to do so*” to consult with professional bodies before preparing a report for the Minister setting out its recommendations. The effect is that the LSRA is under no obligation to consult the relevant professional bodies - the Law Society or Bar Council. It is conceivable under the terms of the Bill as drafted, that both partnerships and multi-disciplinary practices could be introduced without any further reference to representative organisations of the legal profession. It is extraordinary that any consultation with professional bodies should be optional in nature, having regard to the fact that those bodies represent the individuals most directly affected by the terms of the Bill and the fact that those bodies are undoubtedly best placed to evaluate its contents.

129. The Bill is vague regarding the form and extent of consultation proposed under s. 75 but, having regard to the nature of the structural changes concerned, any such consultation should involve an RIA allowing a detailed evidence-based approach to policy making, a systematic assessment of the benefits, disadvantages, practical effects and costs (including side effects and hidden costs) of the proposed changes, full evaluation of the options available and the alternatives to the proposed changes, downstream compliance and enforcement issues and comprehensive and structured consultation with stakeholders and citizens in order to test the assumptions grounding the proposed changes.

130. The Minister has power to oblige the LSRA to investigate and prepare interim reports regarding the progress of the consultation process and such matters as the Minister requests. This structure in effect allows the Minister both to anticipate and to shape the recommendations of the LSRA. The role of the Minister following receipt of the report of the LSRA is also unclear, in particular if the Minister disagrees with any of the recommendations contained in the report.

F. PROVISIONS REGARDING LEGAL COSTS:

131. While there are some unusual provisions in the Bill regarding the issue of legal costs (including what may be recoverable by barristers compared to solicitors), many of the costs provisions in the Bill appear, by and large, to be in the public interest. The Bar Council supports provisions requiring transparency of legal costs; indeed the Bill contains provisions for matters which have already been implemented by the Bar Council on foot of the recommendations of the Competition Authority and the Legal Costs Group. These include: (i) regulations governing switching between the professions which took place in 2006 (s. 122); (ii) allowing barristers to advertise, which took place in 2007 (s. 123); (iii) prohibition of the $\frac{2}{3}$ rule for fees charged by junior counsel, which took place in March, 2007 (s. 89); and (iv) the provision of fee estimates, which took place in June, 2007 (s. 90).

132. One surprising aspect of the Bill on costs is the provision in section 97(1) providing that the hearings of an adjudication by a Legal Costs Adjudicator shall be in private. At present the hearings of the Taxing Master on costs are in public. This provision seems contrary to the general thrust of the Bill on the issue of costs. There does not appear to be any good reason why costs adjudications should not continue to be heard in public.
133. Another somewhat surprising provision is section 82 of the Bill which although somewhat obscure appears to exclude or can be interpreted as excluding from publication by the Chief Legal Costs Adjudicator the identity of the legal representatives involved in a costs adjudication in family law and other ‘in camera’ proceedings. Provided confidential detail about the proceedings is not revealed there does not appear to be any good reason why the identity of the lawyers acting for the clients should be protected from disclosure. If it is the case that the Bill does not intend to prohibit the disclosure of this information, the Bar Council believes that the section should be amended clearly to reflect this fact.
134. Pursuant to s. 90 of the Bill, a legal practitioner must provide a notice to a client (a costs’ notice) disclosing costs or the basis on which costs will be calculated as soon as instructions are received. If the legal practitioner becomes aware of a factor which will increase costs significantly, the notice should be provided as soon as possible thereafter. Section 90(2) sets out the particulars which must be included in the notice, including particulars of the amount of legal costs and the basis on which the costs will be calculated, explained by reference to paragraph 2 of Schedule 1. Section 90(3) provides that the notice should specify a ‘cooling off period’ within which a client can decide whether to engage the legal practitioner on the terms therein, during which period the legal practitioner should not incur any costs unless not to do so would be a contravention of the rules of court or prejudice the client’s interests. Section 97(5) confirms that a Legal Costs Adjudicator shall not confirm a charge, as between practitioner and own client, which is not included in a costs’ notice or a costs’ agreement unless of the opinion that it would create an injustice to disallow the matter or item.
135. The Bill appears to envisage the possibility of time based billing (see further sections 92(3)(d) and 95(5)(c), Sched. 1, para. 2. There also appear to be some peculiarities in terms of certain items. For example, items (l) and (m) of Sched. 2, para. 2 provide that a solicitor’s overheads can include amounts “*associated with the provision of legal services generally*” whereas a barrister’s overheads can only be the “*costs associated with the provision of legal services by barristers generally*”. Accordingly, this definition may not cover the overheads of barristers in the types of partnerships envisaged by the Bill.
136. Chapter 4 of Part 9 provides for the adjudication of legal costs by the Chief Legal Costs Adjudicator and the Chief Legal Costs Adjudicator may refer a question of law arising in an adjudication application to the High Court. A party may also appeal a determination of the Chief Legal Costs Adjudicator to the High Court.
137. Pursuant to Part 9, the Chief Legal Costs Adjudicator may prepare guidelines indicating the manner in which the functions of the Legal Costs Adjudicators are to be performed. These are referred to as “*legal costs guidelines*” but seem unlikely to bring about any transparency and have nothing to do with the types of guidelines recommended by the Legal Costs Working Group. These guidelines are also subject to consultation with the Minister and to any person the Chief Legal Costs Adjudicator considers appropriate.

However, there is no reference to consultation with legal practitioners or the professional bodies. The Bar Council believes that there should be.

138. It is important to emphasise that in addition to those provisions of the Bill specifically directed towards legal costs (Part 9), the Bill as drafted will have a very significant impact on costs. In particular, the system of regulation of the legal profession and the provision of legal services proposed and the alternative business structures provided for in the Bill will significantly increase legal costs contrary to the public interest.
139. As noted above, the enormous regulatory superstructure and the scale of the LSRA (including 11 members and a chief executive together with an unlimited number of consultants, advisers, inspectors, committees and staff), the Complaints Committee (16 members) and the Tribunal (16 further members) proposed under the Bill will have profound cost implications for the legal profession and ultimately for consumers of legal services. In particular, the Bill provides for a levy to be imposed on the Bar Council and the Law Society (pursuant to a formula outlined in the Bill) in order to finance the approved operating costs and administrative expenses of the LSRA (including the remuneration of the members, staff and inspectors, superannuation benefits, fees due to consultants and advisers and the cost of office premises) and of the Tribunal. The levy itself is likely to be substantial and to increase very considerably the costs of practising at the Bar, will amount to an obstacle to entry to the profession, will likely force people to leave the profession and, ultimately (as individual members will be required to discharge it), will lead to an increase in costs for consumers of legal services. Equally, since the levy will be imposed on the Bar Council, this will have very severe consequences for the Council's finances, the maintenance of the Law Library as a centre of excellence and for the funding of its other buildings. The operating costs and administrative expenses of the Tribunal are also likely to be considerable, in circumstances where there already exists an independent, inexpensive, accessible, effective and fair disciplinary process in respect of members of the Bar which is presided over by a lay member majority. Moreover, as noted above, the Bill fails to establish any ceiling on the costs of either the LSRA or the Disciplinary Tribunal and imposes the levy by reference to costs and expenses after they have occurred.
140. The alternative business structures for the provision of legal services proposed in the Bill are also likely to lead to an increase in costs. The partnerships (of barristers and of solicitors and barristers and multi-disciplinary practices) provided for under the Bill will destroy the independent referral Bar, contrary to the public interest, the administration of and access to justice and competition and, with regard to multi-disciplinary practices in particular, were considered but expressly not recommended by the Competition Authority. These proposed partnerships are likely to amount to a significant barrier to entry to the profession, lead to a concentration of specialisation in smaller groups, an increase in conflicts of interest and costs to the consumer and to adversely affect disadvantaged clients' ability to access the counsel of their choice (which is unrestricted under the current system). In particular, the 'cab rank' rule and the ability of counsel to take on cases at no cost to those clients who cannot afford to pay for legal services will be seriously eroded, thereby damaging access to justice. Moreover, any suggestion that partnerships would lead to a reduction in costs (e.g. by reason of shared facilities) is demonstrably false in circumstances where, under the current scheme, barristers are already permitted to share facilities, albeit as sole traders and members of the Bar. The present model (the independent referral Bar) provides significant economic efficiencies and benefits to the consumer of advocacy

services; the direct competition between barristers maximizes consumer choice and incentivizes high standards and competitive prices while the Law Library itself provides significant economies of scale by allowing sharing of resources, services and insurance costs, while the costs of entry and set up to the profession are minimised and established barristers subsidise the overheads of newer entrants.

141. The Bill provides that direct access for contentious matters is to be the subject of a study and report by the LSRA. Direct access to barristers for contentious business (which was not recommended by the Competition Authority). would destroy the independent referral bar and the ‘cab rank’ rule, the retention of which is in the public interest and best promotes access to justice. Direct access would undermine the provision of specialist advocacy services and the Law Library as a “centre of excellence”, something advocated as a good thing in other areas. It would enable barristers to hold client monies and would lead to increased overheads. It would also lead to an increase in insurance premiums and the cost of practice and, ultimately, legal costs, without any real or established corresponding benefit to the consumer or provider of legal services. Such a proposal would also be contrary to the position in other jurisdictions (where direct access to barristers in contentious matters is not permitted) such as Northern Ireland, Scotland, England and Wales, Australia and New Zealand.
142. The provisions in the Bill which require the Authority to prepare a report regarding whether or not the two branches of the profession should be unified (and, if so, how such unification could be achieved) were not recommended by the Competition Authority and are not required by the Troika. The Bill fails to demonstrate any regard for the clear merits of maintaining a specialist advocacy branch of the legal profession to provide specialised advocacy services.

G. ROLE OF BAR COUNCIL UNDER THE BILL:

143. The Bar Council is required under the Bill to set up and maintain a roll of practising barristers and to have entered on this roll, the name of and additional information in relation to every person practising as a barrister. The Minister may prescribe the information to be contained on the roll. A person cannot provide legal services as a practising barrister unless his / her name is entered on the roll. The Bar Council is also empowered to remove the name of a person from the roll *inter alia* where the High Court orders that his / her name be struck off the roll for misconduct or where it is obliged to do so following his / her failure to deliver the requisite accountant’s certificate or to comply with the obligation to maintain the standard of insurance required by the regulations under s. 43 of the Bill. Aside from payment of the levy (imposed by s. 69 of the Bill) and making an application to the Authority pursuant to s. 18 for approval of a professional code prepared by it, consultation with and the provision of information reasonably required of it by the Authority for the purposes of preparing a report for the Minister each financial year specifying the numbers of persons admitted to practice as a barrister (s. 29), this is the principal function imposed on and role envisaged for the Bar Council under the Bill.
144. A further issue which arises in relation to in-house barristers (as provided for in s. 116) is that the Bar Council, under the current draft of the Bill, is responsible for practitioners in disparate modes and forms of practice. Will the Bar Council, for example, have a duty or

responsibility in respect of employed barristers and will it have a duty or obligation to collect from those employed barristers any portion of the levy imposed upon by the Bar Council to fund the activities of the LSRA and the other bodies provided for in the Bill ? There would appear to be no reason why the Bar Council should have any duty or obligation in that regard and this should be made clear in the Bill.

I. SPECIFIC PROVISIONS REGARDING BARRISTERS AND SOLICITORS:

Appointment / Revocation of Senior Counsel:

145. Solicitors will be permitted to be appointed as Senior Counsel for the first time. The Bill is silent as to the precise criteria to be met by a legal practitioner before a recommendation will be made by the Advisory Committee on the grant of Patents of Precedence ('the Committee') to the Government that a patent be granted to a legal practitioner.⁵⁴ However, s. 112 provides that such criteria shall be based on specified but unnecessarily vague objectives including: (i) that the legal practitioner has, in his / her practice, displayed "a capacity for advocacy" (which, although very uncertain in its scope or application appears to fall well short of a particular expertise or specialty in advocacy); and (ii) the further nebulous requirement that he / she "is suitable on grounds of character and temperament" and "is otherwise suitable to be granted a Patent" (without any guidance as to how such suitability is to be determined or the character or temperament of the legal practitioner is to be fairly or properly assessed). Section 113(5) further provides for the Minister to prescribe, *inter alia*, "any other matters that the Minister considers necessary for the purposes of this section" and the receipt and determination by the Committee of an application by a legal practitioner for the grant of a patent.

146. The Competition Authority had recommended that objective criteria should be established for awarding the title of Senior Counsel. It is suggested by way of alternative to these provisions of the Bill, having regard to the specialised nature of the services required of Senior Counsel, that one of the objectives should be that the person have substantial advocacy experience in higher and appellate courts.

Rights of Audience:

147. Section 115 of the Bill re-affirms solicitors' rights of audience, which they in any event enjoy at present and since the enactment of section 17 of the Courts Act, 1971. It further provides that the right of audience will continue notwithstanding instruction of a barrister in relation to an action. It provides that it will be a matter for agreement between solicitor and barrister with the consent of the client as to who shall exercise the right of audience. In the event of disagreement the client will determine who will take the lead. This appears to be an unnecessary provision. Solicitors have enjoyed full rights of audience in this jurisdiction for more than 3 decades and once they engage a barrister it is a matter of free contract as to what roles are discharged by whom. It is already common for solicitors to exercise rights of audience in relation to interlocutory matters and solely retain counsel for the full hearing. If a

⁵⁴ Section 112(1) of the Bill provides that the Advisory Committee shall establish the criteria to be met by the legal practitioner, based on the objectives specified in section 112(2).

client wishes a barrister to advise as to a discrete aspect of a case and not instruct them with the full brief, they are currently free to do so.

Movement between the Professions:

148. Section 122(1) provides that the LSRA may, with the consent of the Minister, provide regulations regarding exemptions from admission requirements for the transfer of barristers and solicitors between the professions. This provision is not necessary as there are no remaining substantive obstacles to free movement between the professions. The Bar Council introduced further reforms in 2006 facilitating free transfer between the professions. The Solicitors (Amendment) Act, 1994 already exempts practising barristers from having to undertake the solicitors' professional training requirement.



Part 4
Alternative Solutions

PART 4 ALTERNATIVE SOLUTIONS

A. ALTERNATIVE MODEL OF REGULATION WHICH COMPLIES WITH COMPETITION AUTHORITY REPORT, REQUIREMENTS OF TROIKA AND WHICH FOLLOWS THE SYSTEM OF REGULATION IN OTHER DEMOCRATIC STATES

149. Set out below are the principal features of a suggested alternative form of independent regulation of the legal professions and the provision of legal services which more fully complies with the outstanding recommendations of the Competition Authority to reduced costs and the requirements of the Troika as set out in the Memorandum of Understanding. It is also fully consistent with the commitment contained in the Fine Gael/Labour Programme for Government Attached to this Submission at Appendix 3 are pages XI to XVIII of the Competition Authority Report which set out the 29 Recommendations made by the Authority and the proposed action to give effect to the same.

Independent Regulator

150. As per Recommendation 1 of the Competition Authority's 2006 Report, an independent regulator (the 'Legal Services Regulatory Authority' or 'LSRA') would be established to oversee the regulation of legal services within the State.

151. Under this model the LSRA would be independent both of the legal professions and the State. To ensure the independence of the LSRA, its membership should not only have a lay majority but should also be appointed in a transparently independent manner such as by the Chief Justice or by the Government on the nomination of the Commission for Public Service Appointments or in a similarly independent fashion following nomination by a broad range of interested parties. Such an independent LSRA might comprise the following nominees:-

- (i) 2 members nominated by the Law Society;
- (ii) 2 members nominated by the Bar Council;
- (iii) 1 cost accountant nominated by the Institute of the Legal Costs Accountants of Ireland
- (iv) 1 Judge of the Superior Courts nominated by the Chief Justice;
- (v) 1 member nominated by IBEC;
- (vi) 1 member nominated by ICTU;
- (vii) 2 members nominated by institutions and bodies concerned with legal education in the State. These members would not be lawyers and would be selected by the Chief Justice from persons put forward for nomination by such institutions and bodies;
- (viii) 1 member nominated by the National Consumer Council;
- (ix) 1 member nominated by an NGO such as FLAC, Northside Community Law Centres or the ICCL; and
- (x) 1 member nominated by the Minister for Justice who is not an official of the Department of Justice.

152. One member of the LSRA should then be selected by its membership to act as chairperson.
153. The independence of the LSRA would be further strengthened by providing for a fixed term membership. Unlike the 2011 Bill, the power to remove a member of the LSRA ought to be vested in the Oireachtas and only for stated reasons. Independence of the LSRA should be further strengthened by providing that the LSRA report to the Oireachtas or the Dáil Justice Committee Justice and not, as in the current Bill, the Minister for Justice.

Regulation of Professions and Provision of Legal Services

154. Under this alternative model, the LSRA would be responsible for independently regulating and overseeing the implementation of the codes of conduct of the professions, the handling and determination of complaints in relation to the delivery of legal services, research functions and other functions as provided in the enabling legislation.
- 155.

Oversight and Regulatory Functions of LSRA

156. The LSRA in this model would be given extensive functions and powers to oversee the regulation by the Bar Council and the Law Society of the legal professions of barrister and solicitor. In carrying out this role the LSRA would (as indeed would the professional bodies in carrying out their duties) be under a statutory duty to promote the regulatory objectives of the 2011 Bill which include:- the maintenance of the constitutional rule of law and the proper administration of justice; the protection of the interests of consumers and the public generally; and the promotion of access to justice and competition in the provision of legal services.
157. The LSRA would be given the statutory function of reviewing the codes of conduct of the professions. The LSRA could require either the Law Society or the Bar Council to change their rules to facilitate various objectives including:- (a) the removal of unnecessary barriers to switching between the profession of barrister and solicitor; (b) the removal of any prohibition on direct access to barristers for legal advice; and (c) the regulation of the ability of barristers and solicitors to advertise.
158. The LSRA would also be given the power to receive and investigate complaints; see comments on this below. The LSRA would, under this alternative model, be given the power to review the codes of conduct of the professions and make appropriate recommendations to the Bar Council or Law Society for the purpose of changing rules or making new rules to comply with the principles of the Bill. Upon receipt of such a recommendation, the Bar Council or Law Society would be obliged to either implement the recommendation or inform the LSRA of the reasons for objecting to the recommendation. After considering any such response, the LSRA could issue a direction to the professional body to implement the recommendation. The recommendation could be set aside on application of the Bar Council or Law Society to the President of the High Court where it was established that the recommendation was oppressive, unreasonable, unnecessary or contrary to the interests of justice.

Research by LSRA

159. Under this model, the LSRA would be required to conduct research regarding the delivery of legal services within the State with a view to ensuring the delivery of legal services in a cost efficient manner consistent with the public interest and the proper and effective administration of justice. The LSRA would be required to undertake such research in relation to a wide range of matters (as in the 2011 Bill) including:- direct access to barristers; appropriate business structures for the delivery of legal services; the career development of barristers and solicitors; the establishment of a qualification of conveyancer; the codes of conduct of the professions; the admission policies of the professions; the education and training of barristers and solicitors; and the accreditation policies of the Law Society and Bar Council. In carrying out this research, the LSRA would be obliged to produce reports on these matters within a time frame to be prescribed by the Oireachtas. The LSRA would also be allowed, should it considers it appropriate, to for example publish preliminary working papers on a topic of research and assess the regulatory and economic impact of any of its proposals.

Cost of Proposed Alternative Regulator

160. This alternative model would undoubtedly be less costly (for the members of the professions and for clients) than the direct regulation proposed under the 2011 Bill. Consistent with the recommendations of the Competition Authority, the model of oversight regulation of the front line regulators (the Bar Council and the Law Society) with strong supervisory powers would mean that much of the day to day work would continue to be carried out by the professions without recourse to public funds. Many of the functions covered by the 2011 Bill are currently carried out by members of the professions and lay volunteers free of charge. This voluntary unpaid work would continue to be performed by members of the profession under the suggested alternative form of regulation. An example of regulatory tasks presently carried out free of charge by barristers and others is the work of the Professional Disciplinary Tribunal of the Bar Council of Ireland. This Tribunal, which has a majority of non-lawyers, investigates and determines complaints against barristers for breach of their professional obligations.

B. SUGGESTED ALTERNATIVE FORM OF REGULATION OF DISCIPLINARY PROCEDURES

161. Under the suggested alternative form of regulation, the LSRA would oversee the handling of complaints by the Law Society and the Bar Council. This would be consistent with the model of oversight regulation recommended by the Competition Authority and adopted for example in the United Kingdom, and also consistent with the separation of the representative and regulatory functions of the legal professions.

162. Under this model, a person would have the right to complain to the LSRA about the manner in which the Bar Council or the Law Society handled (or failed to handle) a complaint of misconduct against a barrister or solicitor.

163. The LSRA would be given extensive powers for this purpose, including the power to compel the attendance of witnesses and the production of documents. It would be an offence to obstruct the LSRA in carrying out its functions in this regard under the Act. Any directions or recommendations issued by the LSRA following the investigation of such a complaint would be enforceable by the High Court if not complied with.
164. Under a suggested alternative regulation, the LSRA would have the power to refer any questions of law which arose in this context to the High Court.
165. The LSRA would be given power to investigate a complaint that the Barristers Professional Conduct Tribunal, the Barristers Professional Conduct Appeals Board or the Solicitors Disciplinary Conduct Tribunal had failed to:- (i) commence an investigation or hearing into a complaint within a reasonable time; (ii) complete such an investigation or hearing within a reasonable time; or (iii) adequately investigate a complaint.
166. If such a complaint was successfully made to the LSRA, the LSRA could direct relevant Tribunal or Appeals Board to commence, complete or re-investigate the complaint.

C. SUGGESTED ALTERNATIVE REGARDING BUSINESS STRUCTURES

167. The LSRA would be required to carry out research into the most appropriate business structures for the delivery of legal services in the State. This would enable the Oireachtas to be provided with a comprehensive assessment about the types of business structures that should operate for the delivery of legal services in the State in a manner consistent with the public interest, competition, access to justice by consumers of legal services and the overarching principle of ensuring the proper administration of justice. This would be consistent with the recommendations of the Competition Authority Report.
168. The LSRA would not be proscribed or limited in how it carries out that assessment. This would ensure that it could undertake a comprehensive and wide-ranging analysis, including an assessment of any business models in operation in other jurisdictions and empirical research on the impact of the introduction of new or changed business structures in such jurisdictions.
169. The Bar Council has been and is prepared to engage constructively with the Minister and his officials in fleshing out further the necessary amendments to the Bill to give effect to the suggested alternative provisions.

Dated: December 2011.



Appendix 1
Note of Meeting of 11 July 2011



NOTE OF THE MEETING BETWEEN REPRESENTATIVES OF THE BAR COUNCIL AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, MR ALAN SHATTER TD ON 11TH JULY 2011

Paul O'Higgins SC (Chairman), Mel Christle SC (Vice Chairman), David Barniville SC and Jerry Carroll (Director) met with the Minister for Justice and Equality who was accompanied by Tom Cooney, George Trimble and Richard Fallon at the Department on 11th July 2011 about the proposed Legal Services Bill.

This is a very brief information note on the areas discussed at the meeting.

The Minister said that he was preparing a Legal Services Bill which he expects will be published by the end of September 2011 on foot of the commitment given in the EU/IMF Memorandum of Understanding.

The Minister said the legislation would be of benefit to the profession and the consumers of legal services. He was contemplating a modern statute which would encompass areas not dealt with in past but which were scattered throughout other legislation, Regulation and Court Rules. He said it was his intention that the profession would function independently of the Executive arm of Government with the latter playing an oversight role.

The Minister said he was considering aspects of the profession but as yet nothing had been set in stone. He raised the issues of advertising, discipline, direct access on advisory matters, partnership, costs and education (which the Bar representatives said was a matter for the King's Inns). The Minister was informed that the King's Inns were willing to meet with him and he agreed to make contact with them. The representatives of the Bar Council reiterated its position on each of the issues raised as set out in the Bar Council's response to the report of the Competition Authority on legal services (2005) and in subsequent submissions and representations. The Minister invited the Bar representatives to convey any further views they wish to make on the issues discussed either at the meeting or subsequently. The Minister appeared to be open to the possibility of meeting again with the Bar Council in September.

The Bar Council is considering making further submissions to the Minister in advance of publication of the Bill and will be seeking a further meeting(s) with him in September to discuss the implications of the Bill for the profession.

The Chairman raised at the meeting the issue of the proposed 10% reduction in defence counsels' fees and the break in parity. He said that the break with parity after thirty five years was of grave concern to the Bar. He said that parity was fundamental to the way in which defence counsel was perceived, practised and represented their clients. The Chairman suggested the possibility of identifying other means of achieving the savings sought. The Minister said he had responsibility to provide legal aid for those who needed it. He said the Department was already over budget and that the budget could run out later in the year unless the savings were made. He said that in such event there would be no money available to finance any shortfall and no funding to pay legal aid at all. He said that an alternative considered was the Scottish system where a single fee per case was paid regardless of the

length of time involved in the case but it was decided not to go down that route at this point in time.

Jerry Carroll
Director

12th July 2011

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Appendix 2
Note of Meeting of 24 November 2011



**NOTE OF MEETING BETWEEN REPRESENTATIVES OF THE BAR COUNCIL AND THE
MINISTER FOR JUSTICE AND EQUALITY, MR ALAN SHATTER TD ON
24th NOVEMBER 2011**

1. On 24th November 2011 Paul O’Higgins SC (Chairman), Declan Doyle SC (Vice Chairman), David Barniville SC and Jerry Carroll (Director) met with the Minister for Justice, Equality and Defence, Alan Shatter TD (the “Minister”), accompanied by the Minister’s Special Advisor, Tom Cooney and by two officials from the Department, George Trimble and Richard Fallon about the Legal Services Regulation Bill 2011. The Bar Council had written on a number of occasions to the Minister following publication of the Bill seeking a meeting with him.
2. The Bar Council had previously met the Minister and his officials on 11 July 2011 (a separate note of that meeting has previously been circulated to members).
3. Opening the meeting, the Minister said that he envisaged the meeting potentially as the first in a series of what he hoped would be “*constructive engagements*” with the profession about the Bill. In this regard, he said that there may be occasions when, due to pressure of other important work, he would not be available to meet with the Bar but that his officials would be available on such occasions. He said that he would be bringing forward amendments to the Bill (he did not specify what they were); that the Second Stage of the Bill may be taken in the week commencing 13th December 2011 (the Minister indicated that he thought that he would at least start his speech in the Second Stage on 15th December 2011) and that the Committee Stage would commence in February 2012. It is clear, therefore, that the Minister envisages that the Bill will be passed quickly (possibly by Easter 2012).
4. The Chairman said that, in circumstances where the Bill was only published on 12th October 2011, the Bar Council was still consulting with its members about a number of aspects of the Bill and that a deadline of 25th November 2011 had been set for receipt of submissions from members. The Minister said he would welcome the Bar Council’s submissions once the consultation process had been concluded.
5. The Minister was asked by representatives of the Bar Council why the Bill had provided for the type and extent of direct regulation of the professions rather than the type of independent regulation recommended by the Competition Authority in its 2006 report which was specifically referred to in the Memorandum of Understanding between Ireland and the Troika. The Minister’s attention was also directed to the fact that it was that type of regulation which was introduced in the United Kingdom after many years of investigation and a report by Clementi. The type of regulation and regulatory structure recommended by the Competition Authority and implemented in the United Kingdom in light of the Clementi report would involve independent regulation by an independent regulator but day to day or “frontline” regulation would be delegated by the regulator to the professional bodies which would be subject to oversight and review by the regulator. When reference was made by the Bar Council representatives to the Troika’s requirements, the Minister was very keen to point out that it was necessary to look not just at the Troika’s requirements but also at what was in the Programme for Government. (It might be noted in this context that the Programme for Government while referring to independent regulation and other issues such as transparency in

costs and the provision of information to consumers does not specify, require or commit the Government to any type or structure of independent regulation still less the structure provided for in the Bill).

6. The Minister stated that the provisions of the Bill reflected approved Government policy and that he had discussed the provisions of the Bill with the Troika when they were in Dublin in October 2011. He stated that Troika had approved the Bill and supported his efforts to “*bring the professions into the 21st Century*”. He also suggested that the provisions in the Bill reflected practice elsewhere and that the range of practice options proposed in the Bill would provide choice for practitioners in the way in which they carried out such practice.
7. When queried again as to why the particular model of direct regulation was selected in the Bill, the Minister made it clear that this was a Government policy decision. He indicated that while submissions could be made on the detail of the provisions in the Bill, the Government had taken a policy decision to proceed with the type of regulation contained in the Bill. The Minister said that the Bar Council and he would “*have to agree to disagree*” on that issue. The Minister expressed the view that the type of regulation referred to by the Competition Authority (and in place in the United Kingdom and elsewhere) was not independent regulation but rather “*supervised self regulation*”. That contention is and was not accepted by the Bar Council.
8. Referring to the provision in the Bill for the establishment of a Regulatory Authority, the Minister contended the Authority would be independent and involve minimum involvement of the Minister. He said he would have a role in securing the funds required by the Authority. The Bar Council’s representatives did not accept that that was correct and referred to the fact that there was extensive involvement of the Minister in the new structure.
9. The Bar Council’s representatives further pointed to the disciplinary structure provided for in the Bill. They referred to that under the Disciplinary Code of the Bar Council, an average of forty (40) complaints a year were dealt with by the Barristers’ Professional Conduct Tribunal and the Barristers Professional Conduct Appeals Board. It was also stated that the cost of operating the Tribunal and the Appeals Board was €200,000 (approx) per annum, a figure which it was pointed out had previously been furnished by the Director to the Department. Unfortunately, the Minister expressed himself to be unaware of that information. While no previous request for clarification of the information provided by the Director to the Department had been received, the Director agreed to clarify any outstanding issue in relation to that amount if it is raised by the Department. The Minister said he did not favour a separate disciplinary process for the Bar and suggested that the existing disciplinary processes within the Bar did not work. That was not accepted by the Bar Council’s representatives. The Minister also considered that the cost of the new disciplinary process provided for under the Bill may not be greater than the cost of the existing arrangements.
10. The Bar Council representatives asked the Minister whether a Regulatory Impact Assessment had been prepared in respect of the Bill (The Minister did not answer that question but it has since emerged that no such assessment was prepared before the Bill was published although it is apparently now under preparation). It was pointed out to the Minister that very considerable concern had been expressed by members of the

profession in relation to the cost of the new regulatory structure provided for in the Bill. It was pointed out that the consequence of this be either to force people out of the profession or to lead to an increase in fees (to cover the increased cost of practice in the context of the new regulatory structure) (which would have the opposite effect to what is intended by the legislation). The Minister was asked whether the Department had information available in relation to the likely costs of the new regulatory structure and, if so, whether that information would be shared with the Bar Council as considerable concern had been expressed in relation to the likely cost of the proposed new arrangements. The Minister indicated that some work had been done on figures with the Department but that he was not at liberty to release that information. He pointed out that it would be necessary to consult with both branches of the profession when the legislation is enacted in relation to the levy which would be imposed on the professions to fund the new regulatory structures.

11. The Bar Council's representatives then asked the Minister why the Bill had adopted the particular approach which it did in relation to alternative practice models such as legal partnerships and multi-disciplinary practices (MDPs). It was pointed out to the Minister that the Competition Authority had not recommended legal partnerships or MDPs and had specifically recommended that a detailed study be conducted to consider all relevant aspects of those types of structures in light of the fact that they raised not only competition issues but also other serious issues such as access to justice. The Minister was asked why the Bill did not provide for the new regulatory authority to conduct such a detailed report as had been recommended by the Competition Authority before taking the decision to introduce legal partnerships and MDPs. Instead the Bill provides that legal partnerships and MDPs will be permitted after a study is conducted by the new regulatory authority. The Minister responded by again indicating that this was a Government policy decision and that he and the Bar Council would again have to "*agree to disagree*" on that issue. The strong suggestion was that unless the Bar Council was prepared to confine its submissions to matters of detail rather than deal with some of the critical features of the Bill, the submissions would not be particularly worthwhile. That said, the Minister did state towards the end of the meeting that the Bar Council could make submissions on all aspects of the Bill if it wished.
12. Finally, it was indicated by representatives of the Bar Council that there were aspects of the Bill which were positive from the public and the client point of view. Particular reference was made to the provisions in relation to costs. It was pointed out that the Bar Council had promoted the requirement for transparency in costs for a number of years and express provision in the legislation requiring transparency was a good thing. However, the Bar Council representatives queried why the hearings before the new Legal Costs Adjudicators would be in private when compared with the current system where hearings before the Taxing Master are in public. The Minister responded by stating that he had thought that the professions wanted those hearings to be in private (which it was pointed out was not something requested by the Bar Council) and that in any event very few people in fact attended hearings before the Taxing Master or, if they did, they would not understand much of what was being said at those hearings.
13. Overall, the meeting as an exercise in consultation was unsatisfactory. In July last when the Bar representatives met with the Minister for the first time he adopted the approach that he had an open mind in relation to the contents of the Bill and that

nothing was set in stone. On this occasion, the Minister's response to some of the critical issues raised by the Bar Council's representatives was that the approaches taken in the Bill on those issues (such as the type of regulation and the manner of dealing with alternative practice models) represented decided Government policy and that the focus of the consultation process was to consider proposals for implementing the already determined provisions.

14. The meeting concluded on the note that the Minister looked forward to receipt of the Bar Council's submission on the Bill before the end of the year.
15. It is the Bar Council's intention to provide a submission dealing with all issues including those which the Minister has stated reflect decided Government policy.

7th December 2011

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Appendix 3
Competition Authority Recommendations

**REPORT OF COMPETITION AUTHORITY ON LEGAL SERVICES
DECEMBER 2006
RECOMMENDATIONS**

Recommendation 1:	Establish an independent Legal Services Commission to oversee the regulation of legal services
Details of Recommendation	Action By
<p>The Minister for Justice, Equality and Law Reform should bring forward legislation to establish a Legal Services Commission ("LSC"), an independent statutory body with responsibility for regulation of both branches of the legal profession. The Legal Services Commission would delegate many regulatory functions to existing and possibly new self-regulatory bodies.</p> <p>The Legal Services Commission would be given explicit authority to make new regulations and would have the power to veto the rules of self-regulatory bodies. The Legal Services Commission would undertake research and analysis of the market for legal services to identify priority areas for reform and also to set guidelines for the assessment of costs in contentious matters.</p> <p>The Head of the Legal Services Commission, and also a majority of its members, should not be practicing members of the legal profession.</p> <p>Self-regulatory bodies would not be permitted to exercise representative functions.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>
Recommendation 2:	Have an independent body to set standards for solicitor training and approve institutions that wish to provide such training
Details of Recommendation	Action By
<p>The Minister for Justice, Equality and Law Reform should remove the Law Society's role of setting standards for the provision of legal education. This role should instead be given to an independent body such as the Legal Services Commission.</p> <p>The Law Society and any other institution that wishes to provide training for solicitors should be required to apply to the Legal Services Commission for approval to do so.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>
Recommendation 3:	An independent body should set standards for barrister training and approve institutions that wish to provide such training
Details of Recommendation	Action By
<p>The Minister for Justice, Equality and Law Reform should give an independent body, such as the Legal Services Commission, the task of setting standards for the provision of legal education.</p> <p>The Honorable Society of King's Inns and any other institution that wishes to provide training for barristers should be required to apply to the Legal Services Commission for approval to do so.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>

Recommendation 4:	The existing basic Irish competency requirement should be abolished and replaced by a voluntary system of high level Irish language training
Details of Recommendation	Action By
The Minister for Justice, Equality and Law Reform should introduce legislation to repeal sections 3 and 4 of the Legal Practitioners Qualification Act 1929.	Minister for Justice, Equality and Law Reform June 2008
The Law Society and the Honorable Society of King's Inns should publish criteria for a voluntary system whereby solicitors and barristers who wish to represent clients in Irish, or who have a particular interest in Irish, could be trained and examined to a high and consistent standard. Institutions other than the Law Society and King's Inns should be permitted to provide such courses and examinations.	The Law Society Honorable Society of King's Inns December 2007
Recommendation 5:	The current system of reciprocity in recognition of legal training of non-EEA lawyers should be replaced by mirroring the existing provisions for EEA lawyers
Details of Recommendation	Action By
Legislation should be enacted to replace the current system of reciprocity with a system that mirrors Council Directive 98/5/EC for non-EEA lawyers who wish to practise in the State under their home title.	Minister for Justice, Equality and Law Reform June 2008
Legislation should be enacted to replace the current system of reciprocity with a system that mirrors Council Directive 89/48/EC for non-EEA lawyers who wish to practise in the State as an Irish solicitor or barrister.	Minister for Justice, Equality and Law Reform June 2008
Recommendation 6:	Remove unnecessary barriers to switching between the branches of solicitor and barrister
Details of Recommendation	Action By
The Law Society and the Bar Council should ensure that all unnecessary barriers are removed for lawyers wishing to switch from one branch of the legal profession to the other.	Law Society June 2007 Bar Council Implemented July 2006

Recommendation 7:	Allow qualified persons other than solicitors to provide conveyancing services
Details of Recommendation	Action By
<p>The Minister for Justice, Equality and Law Reform should bring forward legislation to permit qualified persons other than solicitors to provide conveyancing services.</p> <p>Persons wishing to provide conveyancing services should be required to be registered as "conveyancers" by a Conveyancers' Council of Ireland with responsibility for regulating the training, qualification and operation of conveyancers.</p> <p>Conveyancers should be required to abide by a code of ethics, to have professional indemnity insurance and to contribute to a compensation fund in order to ensure the greatest possible degree of consumer protection.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>
Recommendation 8:	Allow unlimited direct access to barristers for legal advice
Details of Recommendation	Action By
<p>Permit unlimited direct access to barristers for legal advice.</p>	<p>The Bar Council</p> <p>December 2007</p>
Recommendation 9:	The Legal Services Commission should undertake research in the area of direct access
Details of Recommendation	Action By
<p>The Legal Services Commission should be given the power to undertake research in any area of the market where reform may be beneficial for consumers or the functioning of the market.</p> <p>The Legal Services Commission should undertake research in the area of direct access to barristers for contentious issues.</p>	<p>Minister for Justice, Equality and Law Reform</p> <p>June 2008</p>

Recommendation 10:	Barristers sharing premises should be allowed to promote themselves as a group
Details of Recommendation	Action By
Barristers who share premises and costs should be permitted to hold themselves out as practicing as a group.	The Bar Council December 2007
Recommendation 11:	Barristers should be allowed to form partnerships
Details of Recommendation	Action By
Barristers should be allowed to offer their services in partnerships, subject to appropriate regulation.	The Bar Council December 2007
Recommendation 12:	The Legal Services Commission should undertake research in relation to business structures
Details of Recommendation	Action By
The Legal Services Commission should be given the power to undertake research in any area of the legal services market where reform may be beneficial for consumers or the functioning of the market. The Legal Services Commission should examine alternative business structures so that solicitors and barristers have the greatest possible freedom in choosing their preferred structure.	Minister for Justice, Equality and Law Reform June 2008
Recommendation 13:	Allow employed barristers to represent their employers in court
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland, the amending of Rules 2.6, 2.7 and 8.3 of the Code of Conduct of the Bar of Ireland to allow barristers in employment to represent their employers in court.	The Bar Council December 2007
Recommendation 14:	Establish objective criteria for awarding the title of Senior Counsel
Details of Recommendation	Action By
The Government should establish objective criteria for the awarding, monitoring and withdrawing of the title of Senior Counsel.	The Minister for Justice, Equality and Law Reform June 2007

Recommendation 15:	Remove restrictions on solicitors advocating in court
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland the amendment of Rule 11.1 of the Bar's Code of Conduct to remove the restriction on solicitors holding the title of Senior Counsel.	The Bar Council December 2007
The Bar Council should propose to the Bar of Ireland that Rule 7.4 of the Bar's Code of Conduct, which stipulates that a barrister shall only be led by a barrister, be abolished.	The Bar Council December 2007
The Government should, (where it awards the title of Senior Counsel and on the basis of transparent criteria consistent with recommendation 14) award the title to both barristers and solicitors.	The Government June 2007
Recommendation 16:	Remove unnecessary restrictions on barristers' ability to advertise
Details of Recommendation	Action By
The Bar Council should promulgate regulations permitting advertising so long as it does not: <ul style="list-style-type: none"> • Give false or misleading information; or, • Bring the administration of justice into disrepute, or otherwise be considered in bad taste 	The Bar Council December 2007
The Legal Services Commission should be given the power to monitor and analyse solicitor advertising and to identify and promote reform where this will be consistent with public policy objectives and beneficial to consumers of legal services.	Minister for Justice, Equality and Law Reform June 2008
Recommendation 17:	Remove unnecessary restrictions on solicitors' ability to advertise
Details of Recommendation	Action By
The Law Society should amend its Regulations to enable the designation of solicitors as specialists and to allow such solicitors to advertise as specialists.	The Law Society December 2007
The Legal Services Commission should be given the power to monitor and analyse solicitor advertising and to identify and promote reform where this will be consistent with public policy objectives and beneficial to consumers of legal services.	Minister for Justice, Equality and Law Reform June 2008

Recommendation 18:	Remove the unnecessary restriction on switching barrister
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland that it amend Rule 7.5 of its Code of Conduct which prevents one barrister taking over a case from another until satisfied that the first barrister has been paid.	The Bar Council Implemented March 2006
Recommendation 19:	Remove the unnecessary restriction on switching solicitor
Details of Recommendation	Action By
The Minister for Justice, Equality and Law Reform should introduce legislation to prohibit a solicitor from retaining a client's file pending payment from the client.	Minister for Justice, Equality and Law Reform June 2008
Recommendation 20:	Permit practising barristers to exercise part-time occupations
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland, amendments to Rule 2.6 of the Code of Conduct and/or new rules to enable part-time employment in other professions.	The Bar Council Implemented March 2006
Recommendation 21:	Allow new barristers to act for former employers
Details of Recommendation	Action By
The Bar Council should propose to the Bar of Ireland, amendments to Rule 2.15 of the Code of Conduct to enable barristers to be engaged by previous employers.	The Bar Council Implemented March 2006
Recommendation 22:	Advise barristers that the practice whereby junior counsel charge fees at two-thirds of senior counsel's fee is anti-competitive
Details of Recommendation	Action By
The Bar Council should formally advise barristers that the practice of junior counsel marking a fee, without reference to work done, at two-thirds of the senior counsel's fee, is anti-competitive and must cease.	The Bar Council March 2007

Recommendation 23:	Provide useful information for consumers
Details of Recommendation	Action By
(a) The Law Society should, in consultation with the National Consumer Agency, develop a Consumer Information page on its website.	The Law Society June 2007
(b) The Bar Council should, in consultation with the National Consumer Agency, develop a Consumer Information page on its website.	The Bar Council June 2007
Recommendation 24:	Require solicitors to issue meaningful fee or fee estimate letters
Details of Recommendation	Action By
The Minister for Justice, Equality and Law Reform should bring forward legislation:	Minister for Justice, Equality and Law Reform
(a) requiring solicitors to issue more detailed and accurate fee letters;	June 2008
(b) outlining a meaningful sanction for solicitors who fail to provide clients with an appropriate fee letter.	
Recommendation 25:	Require barristers to issue meaningful fee or fee estimate letters
Details of Recommendation	Action By
The Bar of Ireland should:	The Bar Council
(a) Amend Rule 12.6 of its Code of Conduct by removing the words "on request" from the second line thereof;	June 2007
(b) Amend its Code of Conduct to require that barristers' fee information letters provide the same level of information as the Section 68 letters recommended by the Legal Costs Working Group.	
Recommendation 26:	Legal costs should be assessed on the basis of work done
Details of Recommendation	Action By
Legal costs should be primarily assessed on the basis of the work undertaken by individual lawyers and not primarily on the basis of the size of the award as is currently the case.	Taxing Masters and County Registrars Immediate

Recommendation 27:	Cease the practice of taxing junior counsel fees at two-thirds of the senior counsel.
Details of Recommendation	Action By
Taxing Masters should cease the general practice of allowing junior counsel's fees at two-thirds that of senior counsel. Instead fees should be set on the basis of the work undertaken by each of senior and junior counsel.	Taxing Masters and County Registrars Immediate
Recommendation 28:	Persons other than solicitors should be eligible for appointment to the Legal Costs Assessment Office
Details of Recommendation	Action By
Appropriately qualified persons should be eligible for appointment to the proposed Legal Costs Assessment Office.	Minister for Justice, Equality and Law Reform
Recommendation 29:	Examine the possibility of introducing competitive tendering for the provision of legal services
Details of Recommendation	Action By
The Department of Justice, Equality and Law Reform should (a) identify those legal services purchased by the State where competitive tendering would be an appropriate form of procurement; and (b) examine systems of competitive tendering for the provision of legal services operating in other jurisdictions with a view to introducing such a system in Ireland.	Department of Justice, Equality and Law Reform December 2008



Appendix 4
Newspaper Extracts

Irish Independent - 6th December 2011

Shatter faces Euro court fight over legal reform bid

By Dearbhail McDonald Legal Editor

Tuesday December 06 2011

JUSTICE Minister [Alan Shatter](#)'s new Legal Services Bill to "control" the profession could be challenged in the European courts.

Mr Shatter has announced plans for a Legal Services Regulatory Authority (LSRA) and measures to increase transparency in costs. However, the moves have already led to disagreement at Cabinet.

The far-reaching powers include allowing the Justice Minister to appoint the chairperson and seven of the 11-member authority.

Critics say the bill will make the new body answerable to the Government.

Yesterday three international legal bodies together described his plans as "one of the most extensive and far-reaching attempts by a government to control the legal profession".

Marcella Prunbauer-Glaser, incoming president of the Council of Bars and Law Societies of Europe (CCBE) -- which represents one million European lawyers -- said that the independence of the legal profession is a "fundamental value" of European law.

Any breach of that principle could lead to litigation before the [European Court of Justice](#) and the [European Court of Human Rights](#), said Ms Prunbauer Glaser.

The CCBE has asked the [EU](#) commissioner for justice, [Viviane Reding](#), to raise the Bill with Commissioner Olli Rehn.

Ms Prunbauer-Glaser was speaking at a conference in Dublin which was also addressed by former Chief Justice Ronan [Keane](#) who said that the new body for regulating the legal profession will not be independent of government.

"It is not enough to say it is independent," he said. "You must ensure that by the method of appointment, the level of remuneration and the method of dismissal."

Dr [Mark Ellis](#), the executive director of the International Bar Association (IBA), said that while some measures were to be welcomed -- such as transparency in legal costs -- others were "dangerous" and had "very little to do with competition" in the legal sector.

Independence

He added that aspects of the Legal Services Bill constituted an attack on the independence of the legal profession normally associated with developing countries such as [China](#), [Iran](#) and [Vietnam](#).

[Bill Robinson](#), president of the American Bar Association (ABA) said that cross-border trade would suffer and international companies will shy away from doing business in [Ireland](#) if the legal profession was under government control.

Mr Shatter has insisted that the proposed new regulatory authority, which will be funded by levies imposed on the barrister and solicitor branches of the legal profession, will have a "vindicatory independence".

Irish Times - 6th December 2011

Warning on legal system becoming like China's

CAROL COULTER, Legal Affairs Editor

Tue, Dec 06, 2011

THE IRISH legal system will be comparable to that of countries like China, Gambia or Vietnam if the Legal Services Regulation Bill is passed unchanged, according to the director of the International Bar Association (IBA), the international representative body for lawyers.

The association was prepared to consider convening a high-profile fact-finding mission to visit Ireland and examine whether the legal profession was under attack, Dr Mark Ellis said.

He was in Dublin yesterday, along with the president of the American Bar Association (ABA), Bill Robinson, and incoming president of the Council of Bars and Law Societies of Europe, Marcella Prunbauer-Glaser, to speak at a seminar on the independence of the legal profession.

All three warned independence will be compromised if the proposed Bill, published in October, is enacted as it stands. This will place Ireland outside the norms of developed democratic states, they said.

Dr Ellis described the Bill as one of the most extensive and far-reaching attempts in the world by an executive to control the legal profession. The only other countries to have in place similar measures were the likes of China, Gambia and Vietnam, he said.

“The IBA tends to focus its attention on developing countries. In my 11 years in the IBA, I never remember something like this coming from a democratic and developed country. Lawyers must function without external interference. This is indispensable to the administration of justice and the rule of law.”

He pointed to the UN's Basic Principles on the Role of Lawyers, which state lawyers should be entitled to form self-governing professional associations to represent their interests, promote their continuing education and training, and protect their professional integrity. Under the proposed Bill these functions would be taken over by a body dominated by Government nominees, he said.

“The IBA is holding its international meeting here in October next,” he said. “It would be unfortunate if we were bringing this major event to a country that was struggling with the independence of the profession.”

Ms Prunbauer-Glaser said the council of bars was deeply concerned about the “unprecedented encroachment on the independence of the bar”, and had prepared a paper on the Bill. It had also asked EU commissioner for justice Viviane Reding to raise the matter with EU economic and monetary affairs commissioner Olli Rehn, who is responsible for the troika.

She said the proposals not only contravened the UN's basic principles but also the Council of Europe's recommendations on the freedom of lawyers, and a resolution of the European Parliament on the legal profession.

“This is important, not because of lawyers, but because of clients and society in general,” she said. “There are judgments of the European Court of Justice and the European Court of Human Rights stating that the independence of the legal profession is correlated to the independence of the judiciary.”

Mr Robinson of the ABA said: “What is really at stake here for the people of Ireland is constitutional democracy. The public should be warned against allowing one man to anoint himself with virtually exclusive authority over the legal profession. History has taught us that the independence of the legal profession is the key to an independent judiciary, which is the key to freedom. What this Bill will do is compromise the fiduciary relationship between the lawyer and his or her client.”

The new body for regulating the legal profession will not be independent of the Government, and the removal of one of its members would be difficult to judicially review, according to Mr Justice Ronan Keane. The former chief justice told the conference: "It is not enough to say it is independent. You must ensure that by the method of appointment, the level of remuneration and the method of dismissal."

He said the basis for the Government removing a member of the authority was so vague it was impossible to see how a court could exercise its judicial-review power if such a removal was challenged.

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Irish Times Editorial - 8th December 2011

Legal services Bill

Thu, Dec 08, 2011

EARLIER THIS week the leaders of the International Bar Association (IBA), the American Bar Association (ABA) and the Council of Bars and Law Societies in Europe (CCBE) took the trouble to come to Ireland to warn that, if passed, the Legal Services Regulation Bill would make the regulation of lawyers in Ireland comparable to that of countries like China, Iran or Gambia and could bring us into conflict with fundamental tenets of the UN, the EU and the Council of Europe regarding the organisation of the legal profession.

The president of the ABA suggested it could adversely impact on foreign investment.

The focus of their concern was the powers of the proposed legal services regulatory authority and its subservience to Government. A majority of its members, and of a separate disciplinary body, will be appointed by the Government on the recommendation of the Minister for Justice. The authority will have, according to the CCBE, “unacceptable control ... over all aspects of professional practice, including training, entry and discipline”.

The Government’s nominees to this body will have no security of tenure and can be removed at any time if this appears to the Government to be “necessary for the effective performance of the functions of the Authority”, the CCBE pointed out. It considers that the proposed Bill, if passed without amendment, would make Ireland unique in Europe in the level of control exercised by Government over the legal profession.

The IBA devotes much of its time to supporting the independence of the legal profession in developing countries. Its executive director was dismayed to find a sophisticated, developed and democratic state like Ireland proposing to enact a law that resembled those in many countries with only a fragile attachment to democracy, and was concerned about the message this would convey internationally. “Lawyers must function without external interference. This is indispensable to the administration of justice and the rule of law,” he said.

Of more immediate concern to the Government, perhaps, is the warning from the president of the ABA that such a law could have a chilling effect on international corporations prepared to invest in Ireland and needing assurance they would have access to legal representation free from any hint of Government supervision.

The judgment of the leaders of the international legal professions on this Bill raises issues for Ireland’s reputation and should be a wake-up call for the Government. These contentious proposals should be reconsidered.

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An independent and accessible legal system must be the goal

We publish here an excerpt from remarks by Peter Ward introducing the fifth Dave Ellis Memorial Lecture recently

AT THE present time there is an important debate taking place in this country following the publication of the Legal Services Regulation Bill 2011. This Bill sets out to transform both the profile of the legal profession and the manner of its regulation.

Let us be clear: there is no doubt but that the legal profession has within its ranks a privileged and wealthy elite, part of which represents a self-perpetuating elite within a deeply unequal society. It is unanswerable that the legal profession includes those who have a vested interest in the retention of barriers to equality in Irish society.

But there is at the present time a real danger that the understandable desire to puncture the self-importance of this profession and the understandable hope of reducing the cost of legal services will distract from a full analysis of reforms which, if introduced, would be deeply damaging to the rights and interests of the people of this country.

There are two issues which are of central importance in ensuring that the State, State bodies, the wealthy and the powerful of this country are held in some way to account: through an independent legal profession to which the people of this country have the greatest possible access.

There is no equal access to justice in this country. If there were we would not be gathered here this evening. But what the work of 650 volunteer solicitors and barristers in Flac centres demonstrates is that very many lawyers see themselves as having a social responsibility to widen access to the law and that the profession is not solely populated by those who are interested in maximising their income with every piece of legal work they do.

Secondly what the work of Flac (Free Legal Advice Centres) and of all those individual lawyers and organisations who are members of PILA (Public Interest Law Alliance) shows is that a robust and independent legal profession is prepared to challenge those in positions of authority and power and to hold them to account before an independent judiciary.

The proposal in the Bill that a Legal Services Regulatory Authority will ultimately control the legal profession, through a body whose majority are appointed directly by the Government, is an affront to the citizens of this country, who are entitled to expect access to both a legal process and a legal profession that can be absolutely fearless and independent in pursuing their interests.

The Government and the Minister for Justice cannot and ought not to have the proposed roles in the control of the legal profession. There is no such similar control of the medical profession which does not have a function of holding the authorities of the State to account.

Independence and accessibility are surely all the more important given the economic turmoil of the last number of years, when we have seen the most powerful and wealthy financial institutions in the country bailed out by ordinary people who never shared in their riches, and when the individuals who brought the country to penury through an unsustainable property bubble go largely without being held to account.

In these circumstances it is all the more important that the organisations and the individuals that are represented in this room tonight have at their disposal the independent and fearless

lawyers that they need to pursue the interests of the most disadvantaged, the poorest and the weakest

It is in the interests of those who do not wish to see the status quo changed to have a conservative and compliant legal profession. It is a frightening and anti-democratic proposition that the Minister for Justice would seek to exert the level of control over the profession which is proposed in this Bill.

The Bill also proposes to provide different business models for the delivery of legal services. It doesn't matter what the business model is for those who can afford legal services – they will simply avail of them and pay for them.

Barristers at present operate a business model that is simply each one operating as a sole trader. Many barristers have done so with success and have lucrative practices. But this model and the Law Library system does provide accessibility whereby barristers are readily available to the smallest solicitors practice and thus to the widest range of clients of the legal profession.

It also means that barristers are accessible to Flac and other organisations, through PILA and otherwise, in a manner that is difficult to see replicated if all legal practitioners operate through firms or partnerships. At the very least we need to review very carefully the impact of the current and the proposed structures on that accessibility before imposing them on those who need to avail of the services.

It would be an absolute travesty of justice if the popular and understandable desire to impose greater accountability on a privileged profession were to act as a Trojan horse for the diminution of the rights of every person in this country. There is within the current Bill every possibility that new business models for the delivery of legal services will do just that: provide new business models while ignoring completely the needs of individuals to have their rights vindicated in the face of the State, the institutions of the State and those who have assumed positions of power, money and influence within the State.

The people of this country deserve more than caricature and condescension in this discussion. The most awkward, the most troublesome and the most committed of the legal profession are those the State most often wishes to see silenced. The greatest possible freedom needs to be afforded to the legal profession to ensure those who hold power are held to the greatest account.

Peter Ward is chairman of the legal rights organisation Flac

Irish Times 12th December 2011



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