Speech

Speech of the Attorney General, Rossa Fanning S.C. at launch of the State Litigation Principles

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Introduction

Thank you all for attending. Even if today wasn't already the longest day of the year, it will probably feel like it by the time you have endured my remarks.

I have now had the privilege of holding office as Attorney General for slightly more than six months. In that capacity, I am, as Article 30 of the Constitution provides, the adviser to the government on all matters of law and legal opinion.

The offices that I oversee provide a full range of legal services to Government - we draft legislation, advise on procurement issues and draft contracts for the purchase and sale of land.

But the legal domain in which the State most obviously interfaces with citizens is litigation. The State's legal work is also most visible when we litigate, not least because it is a constitutional requirement (Article 34.1) that justice be administered in public.

If you have a sense that it has, over the years, become more common for citizens (and indeed corporations and non-citizens) to litigate against the State, you would be right.

One of the reasons for this is that the modern State is so much larger and more complex than it was in 1937.

A series of independent statutory agencies, that simply did not exist 86 years ago, are now making administrative decisions, regulating and consequently engaging in court proceedings.

It is often forgotten that it was only with the enactment of the Prosecution of Offences Act, 1974 that the office of the DPP was established as an independent prosecutor.

In similar vein, there are a plethora of other statutory bodies that today litigate autonomously from Government – the Central Bank, the DPC, An Bord Pleanála, the CCPC, the HPRA, the HSA, the FSPO, the Corporate Enforcement Authority.

It is also easy to forget that it was only in Byrne v. Ireland [1972] IR 241 that the Supreme Court decided that the State was not immune from liability in tort.

Today, the volume of tort litigation against the State is such that it is dealt with on a delegated basis by the State Claims Agency as part of the NTMA structure.

A lot of the litigation that the Office of the Attorney General is now engaged in – employment discrimination claims, social welfare appeals and immigration judicial

reviews – simply did not exist until very recently as the statutory basis upon which claims of this nature are subtended is also very modern.

Sometimes the mere fact of legal claims being brought against the State is characterised as being itself indicative of culpable failure, but such a view is based on a significant misunderstanding of the nature of litigation itself.

In Ireland, we deliberately afford citizens the opportunity to challenge government actions before an independent judiciary.

Seen in this way, litigation against the State is an intended design feature of our model of Government.

Other countries do not do this or do not do it to anything like the same extent.

This brings me to the State Litigation Principles which are directed towards the standards that the State – and by that, I mean both Government as the client and the Office of the Attorney General and Office of the Chief State Solicitor as lawyers – ought to adhere to when conducting litigation.

Why the State Litigation Principles are necessary

Potter Stewart, an Associate Justice of the Supreme Court of the United States once said that "[e]thics is knowing the difference between what you

have a right to do and what is right to do".

This statement captures the basic truth that legal rules cannot dictate all that is required of us in everyday life.

Statutes, case law and court rules will determine much of what you can and cannot do in conducting litigation, but they cannot prescribe everything.

Codes of professional ethics can take us somewhat further, but even still

they will struggle to be exhaustive in outlining all of the situations in which

they will struggle to be exhaustive in outlining all of the situations in which some forbearance will be required.

I have been reflecting on this point for the past few months in circumstances where the litigation strategy of the State has at times been the subject of some public scrutiny.

Over that time, I have observed adherence to the highest ethical standards by lawyers conducting litigation on behalf of the State.

It is very fortunate that the advisory counsel in my Office and the solicitors in the Chief State Solicitor's Office, supported by external lawyers where necessary, carry out their work with a clear sense of public service and with a keen understanding of the public interest.

However, it is not enough to simply hope that such high standards will be maintained or will always be adhered to, particularly given the acute pressures and immense responsibility with which lawyers acting on behalf of the State must work.

Although it is simply not possible to prescribe in advance how to act in every conceivable situation that will arise in complex and high stakes litigation on behalf of the State, work must still be done to define and explain these standards.

Moreover, while there are sometimes legitimate complaints about the State's conduct in litigation, there is often significant misunderstanding of the rights and obligations of the State in this sphere.

Given the high volume of litigation managed by the State, it is important therefore that we can explain the general approach and policy adopted by the State in this domain.

These Principles will, for the first time, clearly articulate standards for the the State and its lawyers in the conduct of legal proceedings.

They will set out how the State can and should behave in its capacity as a litigant, as a party to a given dispute before the courts.

Process and consultation

The drafting of these Principles has been the product of a collaborative exercise following consultation.

The Principles have been informed by the experience of the lawyers who manage litigation on the State's behalf on a daily basis.

On 30 May of this year, the government agreed to approve the Principles, disseminate them widely within government departments and publish them.

Overarching purpose

I should state at the outset that the Principles are not intended to radically change how the State conducts litigation.

Many of these Principles are already applied on a daily basis by the officials and lawyers charged with managing litigation on the State's behalf.

The Principles may best be described as a codification and public statement of existing best practice.

Further it does not appear to me that the policy imperative underpinning the Principles is, or ought to be, a controversial one.

Quite simply, the State should act in the public interest, broadly construed, in pursuing litigation and should consider this broader public interest before taking certain procedural steps in litigation.

In drafting the Principles, I have had regard for the best endeavours that the State must strive to make in fulfilling the very high standards which are expected of its conduct.

While the Principles do not seek to radically change existing practice or policy, I believe that they will serve at least three important functions.

Firstly, by clarifying and explaining existing best practice, they will assist officials in the different government departments, and the lawyers acting on their behalf, in upholding the high standards already expected of the State.

Secondly, they will assist in explaining the approach of the State to litigation and foster a better understanding of how the State serves the public interest when litigating.

Thirdly, although the government decision to approve the Principles does not, in itself, apply to litigants other than Government itself and bodies answerable to Government, one of the reasons why it is so important for Government to articulate the standards that it seeks to uphold in litigation is to set an example and to demonstrate best practice to others.

Therefore, while it is not for Government to dictate how other parties conduct themselves in court, it is my hope that the Principles will be disseminated widely, and indeed followed by statutory bodies independent of Government and indeed, other litigants, of their own volition.

I am certain that if every litigant were to seek to abide by these Principles, it would improve the efficient administration of justice by our courts.

Legal status of the principles

Before explaining in more depth what the Principles do, it may be instructive for me to explain what it is they do not do.

The Principles do not create rules of law. They do not have any binding legal effect. Nor indeed are they intended to radically change existing practice.

It is important to emphasise that the requirement to act ethically in litigation does not amount to some abrogation of the State's legal rights. In the words of one Australian judge:

"[w]hile the Commonwealth is no doubt a behemoth of sorts, it is not obliged to fight with one hand behind its back in proceedings. It has the same rights as any other litigant notwithstanding it assumes for itself, quite properly, the role of a model litigant."

The Principles therefore acknowledge that the State cannot be precluded from contesting proceedings, appealing a decision, settling proceedings (with or without admission of liability), relying on legal professional privilege or applying for the recovery

of the State's costs in an appropriate case.

Content of the principles

Most of you will have already received a copy of the State Litigation Principles - for those of you who have today attended from government departments, we stand ready to assist you with any queries you may have about them, and the Chief State Solicitor will be providing additional practical information to you with more granular information that will facilitate their implementation.

What I will seek to do in the time available is make some brief comments about their content.

Fundamentally, litigation is expensive and time-consuming for all involved, including the State.

To that end, the Principles explain that the State will take steps to avoid, prevent and limit the scope of legal proceedings, wherever this is possible, a policy that is clearly consistent with the policy intent underlying the Mediation Act, 2017.

This does mean a greater emphasis on early engagement to try and avoid unnecessary litigation.

Moreover, the State ought to take steps to resolve disputes between public bodies outside of court. This category of litigation has been the subject of express criticism by the courts.

Clear channels of communication between officials that will facilitate discussion between public bodies will likely play an important role in avoiding such disputes.

This is not to say that there will never be litigation of this type. There are many independent agencies and authorities that conduct litigation independently of central Government.

It may also be that a public body will have a statutory right to appeal against a decision of an independent authority and in some cases therefore, different considerations will apply.

Nevertheless, there will be cases where litigation between State entities should be avoided and other means of resolving the dispute should be found.

Where litigation is pursued, the range of issues in dispute should be kept as narrow as possible.

Thus, the State should not require an applicant to prove a matter which the State knows to be true or which the applicant is likely to succeed in proving at trial. This will assist the court in determining the issue at hand and will minimise the costs of the proceedings.

Further, where litigation is being pursued, the State must take steps to ensure that it is dealt with promptly, efficiently and at proportionate cost.

The State will often find itself defending multiple claims on the same or similar questions and in those circumstances, the State should seek to assist the court and other litigants by identifying appropriate lead cases in order to facilitate the efficient and effective administration of justice.

Particular care must be taken to avoid unnecessary delay and to comply with deadlines fixed by legislation, court rules or any directions or orders issued by the courts.

While this may seem an obvious point, the substantial pressures under which the State and its lawyers operate will often make this a difficult task. It is nevertheless vital to ensure that cases are able to be progressed as expeditiously as possible.

The Principles also emphasise the importance of adherence to best practice in the discovery process. Once ordered or agreed, the State ought to seek to comply with its obligations in a timely fashion, which can be challenging in cases where discovery is extensive.

Perhaps most fundamentally of all, the State must act honestly in the conduct of litigation. This means that the State must assist the court by providing full and accurate explanations of all relevant matters which the court requires to be aware when tendering evidence, in a witness statement, on affidavit, or in the witness box.

The Principles also seek to ensure that the State acts consistently in the way it handles claims. The State should respond to parties with similar claims in similar ways.

This will also mean that the State should take steps to ensure that it does not take advantage of litigants with limited access to resources.

The State must be conscious of the particular difficulties facing such litigants and will seek to assist the courts to manage such claims as fairly and as expeditiously as possible.

The Principles also contain guidelines in respect of the arguments that should be raised in litigation on the State's behalf. The State is entitled to rely on the same defences as any other litigant. However, where consideration of reliance on alternative defences arises, the State shall consider where the interests of justice lie for all parties.

This may mean that in some cases, it may not be appropriate to plead a given defence notwithstanding that it is available to the State as a matter of law. The State must therefore consider whether the public interest is served by pleading the defence. For instance, even if a case has become moot, it may be preferable for society generally that the underlying legal issue is resolved.

However, it is important to note that many defences support important policies relating to the rule of law, the administration of justice and the timely resolution of disputes. Very often, reliance on such a defence will therefore serve the public interest as crystallised by relevant legislation and the underlying policy choices of the Oireachtas.

Similarly, the Principles will also inform the State's assessment of whether to appeal a decision. The State is entitled to pursue appeals on the same basis as any other litigant. However, the State should have sound legal or policy reasons for bringing an appeal, and should not appeal, as some litigants do, simply for the purpose of delay.

This will undoubtedly be the case where the State has reasonable prospects of succeeding on appeal.

However, even if the prospects of success are less clear, it may still be entirely appropriate for the State to appeal a decision where it is otherwise in the public interest. For example, there may be an important legal point in a case that is likely to have a significant impact on other cases or government policy. It will often be in the public interest to pursue an appeal to clarify the law on such a point.

There are also guidelines on costs. Where the State agrees to pay the costs of its

opposing party or the opposing party obtains a costs order against the State, the State will seek to agree the amount of the costs to be paid without formal adjudication.

This will avoid further cost and delay involved in referring the matter to the Office of the Legal Costs Adjudicator. However, the Principles do not affect the State's entitlement to apply for the recovery of its costs and to enforce any such order.

The Principles also give guidelines on the role of apologies. There are occasions where the courts determine the State has acted unlawfully. There are also occasions where it emerges in the course of litigation, without judicial determination, that the State has acted unlawfully.

An apology wouldn't be necessary or appropriate in a technical dispute about the meaning of a section of a piece of legislation, but in an appropriate case where the circumstances demand it, an apology may be warranted as part of the appropriate response to the litigation.

Conclusion

As I indicated at the outset, it simply is not possible to enumerate all that is required of the State and its lawyers in every conceivable situation.

This is particularly true of a document that is designed to set out broad principles and guidelines.

As I have already said, further detail will be provided by the Office of the Chief State Solicitor on the practical steps which must be taken to ensure the objectives contained in the Principles are realised.

Much of what the State will endeavour to do under the Principles is already being done in many cases. That being said, the Principles are, I think, significant in marking a renewed, and public, commitment on the part of the State to upholding these values and supporting the administration of justice in the public interest.

As I have already said, it is also my hope that other litigants, in both the public and private sectors, will see merit in the Principles and will voluntarily adopt the eminently sensible guidelines that they contain.

Finally, it goes without saying that this is but the initial version of the Principles. Their content is not immutable. They will require to be reviewed and updated in the future, as we learn from this experience.

Thank you for attending and for listening to me today.

Further information on the State Litigation Principles

State_Litigation_Principles

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