

The legal profession has changed little since the 1920s and Justice Minister Alan Shatter's reforms must succeed where others withered, writes **Michael Clifford**



A LAW UNTO ITSELF

A FEW years ago, young barristers were given a great opportunity to pitch for work.

Roundhall, the publishing firm that annually produces a law directory, offered an extended entry provision for individuals for a small fee of €100.

The service allowed barristers to provide all their details, experience, cases worked on, areas of expertise. In any other business, a chance for very cheap advertising would have been jumped on immediately. The cost of the advert was chickenfeed compared to a fee of €5,000 plus to join the Law Library.

In the first year, a little more than a dozen of the estimated 2,200 practitioners took up the offer. The numbers were fewer thereafter. The fee was reduced. The take-up was even less again. In terms of showing basic initiative, the result was baffling.

Roundhall's marketing manager, Maura Smyth, confirmed the tiny response. "It just didn't appeal to barristers. Maybe they've different ways of getting out there. A lot of it is word of mouth. Maybe it would have worked in a different market, but not this one."

One recently qualified barrister put the response down to a persuasive word here and there. "It was just not the way things are done," she said. "The chance to do that was not taken up by many because of peer pressure."

The failure to live up to the market is indicative of much that afflicts the cost of obtaining legal services. Things are done differently, because it suits those who control a business that regulates itself. Instead of being regulated to protect the citizen, particularly in financial terms, it is regulated to protect the practitioners, particularly those at the top.

Other professions were once as padded out. Not any more. In recent years, pharmacists and dentists have been dragged, kicking and screaming, into the real world. The upper echelons of the medical profession remain largely a law unto themselves, but even there, change is afoot.

Now the IMF is demanding serious reform in the law business. Last week, Justice Minister Alan Shatter pledged to drag the business from the 19th into the 21st century. If he does, it will be a departure as successive governments have refused to properly regulate the law business.

According to a Public Accounts Committee report in January last, the state is the biggest purchaser of legal services, the cost of which is estimated to be €500 million. The committee is of the opinion this does not represent value for money. Any extra millions being spent to pad out the legal business is money lost to schools, social services and supporting those on the breadline at a time of great austerity.

The public has also reason to decry the current regime. An ongoing item on RTE Radio One's Drivetime programme has been examining the cost to individuals of legal services. The results, particularly in the family law area, have been shocking. Huge bills, without forewarning and little accountability for the work done, have been features of the tales of woe.

Down through the years, a number of reports have been compiled to tackle exorbitant legal costs. One of the most prominent was a Competition Authority report in 2006.

The PAC report from January noted: "Disappointingly, the committee heard that of the 15 recommendations in its report which were addressed to the Department of Justice and Law Reform in 2006, only

one recommendation so far has been implemented. The committee informed the department that it would draw its own conclusions from the inadequate response."

Perhaps the business has been fortunate enough to have in the Cabinet individuals who can feel their pain. The last justice minister drawn from outside the legal sphere was Nora Owen, who left office in 1997. The incumbent, Shatter, is a solicitor.

Attorney generals are routinely drawn from the Law Library. The current AG, Máire Whelan, addressed the Bar Council's AGM last Saturday. She was there as a constitutional officer holder, representing a government threatening major reform, yet her speech was e-mailed to all members from her Law Library address. While her integrity is not in doubt, the potential for a major conflict of interest is obvious.

The address hardly put the fear of God into barristers that a cold day was dawning. She emphasised the importance of retaining the concept of an independent Bar, and urged members to articulate why that should be so.

"A large part of that reason must be that our profession has been to the fore in serving the community, and that it has done so in a way which would have been impossible had the Bar not existed as a collection of individuals of independence and integrity who were free to follow their own lights," she said.

The chairman of the Bar Council, Paul O'Higgins repeated this point in on RTE radio last Sunday.

Pro-bono work is an admirable feature of the Bar. It involves taking cases for people who can't afford to pay, usually against the state or a large corporate entity. In reality, what is described by the Bar as pro-bono is more often than not "no-foal no-fee", in which the case is taken on the basis that the barrister will not charge if the case is lost. If it is won, the barrister charges the other side top dollar.

In any event, the notion that individual barristers are independent and therefore free of any influence from government is suspect.

"The idea of independence is fine in theory, but it simply doesn't apply in practice," says Hugh Kennedy, barrister and director of legal services company, Brief Counsel.

"They lobby hard to take silk (to be appointed senior counsel). They lobby to become judges. Many have an on-going business relationship with state bodies. So the idea that they must be self-regulated and independent in order to take cases against the state simply doesn't apply. They are wholly dependent on the state as it is."

One change the Government could make overnight is the abolition of the system that appoints senior counsel (about 20 are appointed every year), thus creating an artificial divide, which is about little more than making big bucks. Overnight, newly appointed senior counsel can nearly double their fees. Fees for junior counsel are then calculated not by how much work is done, but at a rate of two-thirds what the senior charges.

Prior to independence, senior counsels were appointed by royal prerogative. The new independent state just took over the role. That was in 1922. Little has changed since.

"The state appoints senior counsel yet in granting this distinction there is a massive cost to the state," Kennedy says.

"The difference between senior and junior counsel is opaque yet fees shoot up overnight. There are no objective, transparent criteria for doing this.



Barristers lobby to become senior counsel, which can result in their fees almost doubling overnight.

Picture: Getty

"Some who are given it are well worth it. Others might get it for long service but could actually be no good at the job. And others are given it for honorary reasons, such as former politicians who are practicing barristers. All it does is increase cost to the state."

The Bar Council, in a report on the progress it is making in light of the Competition Authority recommendations, has a different take.

"As the Competition Authority has acknowledged, the title of senior counsel operates as a quality mark and assists clients in their choice of advocates. In addition, it serves as an encouragement to junior barristers to aim for excellence, to the ultimate

benefit of the public at large." As with all vested interests, this one claims to be operating not to its own benefit, but for that of the greater good.

Access to the courts is another area requiring serious reform. In the main, a barrister can only be retained through a solicitor. Barristers employed by state agencies cannot go into court and fight a case. Independent counsel must be retained, usually through a solicitor. The system adds another layer of costs. Therein, the solicitor can also get in on the action.

If a solicitor's fee is out of proportion to that charged by the barrister, a client may raise questions. What of the solicitor who is handed a fee from a barrister which may be small

compared to the solicitor's evaluation of his own cut?

"Most barristers have had the experience of submitting a fee to a solicitor only for it to be returned with a note," Kennedy says. "More often than not, there would be a verbal communication along the lines of 'could you beef that up a little bit?'"

"The barrister then has a little option. 'Some will refuse to do it and more than likely they will never work for that solicitor again.'"

Ken Murphy, director general of the Law Society, says he has never heard of such a practice.

"The solicitor has an ethical obligation to get the best value for the client from both his own work and that of

“ If the bailout troika has its way, radical reform must take place. But central to any reform is the removal of self-regulation

the barrister. I don't believe that's a common practice. I've never heard of it."

The distinction between barristers and solicitors is another barrier to competition. Both are qualified under law to do the other's work, yet an effective gentlemen's agreement exists between the two branches. Despite being allowed to appear before the High Court since 1971, few solicitors ever do. Shatter is an exception.

Kennedy sees the distinction as artificial. "In other countries one lawyer takes a case from beginning to end. Here you often have solicitors, junior counsel and senior on a case."

Murphy says solicitors believe it is in the public interest that the distinction continue. "There is still an essential difference between what you might call standing up lawyers and sitting down lawyers."

"Under the current system, a solicitor anywhere in the country can access the specialist advocacy and advice that is offered by an independent Bar."

Shatter has pledged to publish his bill by September. If he opts to make some radical reforms, the dividend will be paid not just to the public but also to many who practice. The manner in which the system operates means some barristers can practice for years without making any money.

A group set up to represent young advocates has estimated that about half of the 1,000 barristers who have begun practice in the past seven years have still not broken even. That the business is regulated by the Bar Council, whose leading members are all at the top of the heap, speaks volumes. A more even distribution of work would ensure that real competition would replace the current smoke and mirrors regime that exists.

How far Shatter will go remains to be seen. If the bailout troika has its way, radical reform must take place. But central to any reform is the removal of self-regulation.

As the Public Accounts Committee pointed out: "The committee heard that in terms of the regime of restrictions and law over which the state presides, the self-regulation of the legal profession is a significant problem. One only needs to look at almost every other profession in this country and the split between the regulatory and representative bodies is clear."

Furthermore, the committee heard that the Bar Council of Ireland has no statutory basis and is best described as an association of undertakings under the Competition Act.

"The legal profession is one of the last professions in Ireland, and in fact may be the last, that is holding out for a self-regulatory system."