Practising matters

How to protect the title of barrister? John Gould explores the options

'When I, good friends, was called to the bar
I'd an appetite fresh and hearty.
But I was, as many young barristers are,
An impecunious party.
I'd a swallow-tail coat of a beautiful blue,
A brief which I bought off a booby,
A couple of shirts, and a collar or two,
And a ring that looked like a ruby!'

(W S Gilbert)

Things have moved on since *Trial by Jury* was first produced in 1875, but 'barrister' remains one of the few desirable titles that can only be obtained partly by eating while wearing period costume.

When chair of the Bar last year Nick Vineall KC called for the title 'barrister' to be reserved for those who have completed pupillage. The present system means that the title of barrister is conferred on people who have never practised, will never practise and are not actually entitled to practise as barristers anyway.

The former Bar chair pointed to the fact that 'for every barrister with a practising certificate there are two who have never been entitled to a practising certificate. And of all the people in the world who are entitled to tell you they are barrister called to the Bar of England and Wales, only one in four has a practising certificate'.

Can it be right, he asked, that 17,000 practising barristers contribute to the £15m cost of regulating 70,000 people when unregistered barristers account for over a quarter of cases reaching the bar tribunal? His complaint is that those who require practising certificates are likely to be cross-subsidising the status of those who are non-practising.

Although this is a perfectly fair representative point, it is just one of a number of issues relating to the way that barristers are regulated.

Effort & cost

Although their contribution to their own regulation may be modest, it is not the case that these 53,000 people have simply been able to adopt the title without effort or cost: you can't simply call yourself a barrister. Section 181 of the Legal Services Act 2007 makes it an offence for an unqualified person to pretend to be a barrister, but being qualified as a barrister is not the same as being authorised to practise as one.

Qualification to be called to the Bar requires the passing of examinations and attendance at educational and culinary sessions at an Inn of Court.

The right to wear the wig (even if only in private) does not come cheap, with the main providers charging around £17,000 (and even more for overseas students) for the academic element. Yet notwithstanding the barriers, the title remains highly sought after.

A little under half of those undertaking the academic training are overseas domiciled. The proportion of overseas students progressing to pupillage is significantly less than 10% but, even for UK students, the majority never undertake pupillage and many of those who do have to occupy themselves for several years in low-paid paralegal roles before they obtain one. It is not clear what proportion of those who don't go on to pupillage never intended to do so, but clearly the supply of pupillages is not able to meet demand and many would-be practising barristers are disappointed.

Having invested heavily to obtain the right to the title, it would seem unjust to be denied its use in careers other than practice, particularly if that were not a matter of choice. The supply of UK-trained lawyers to common law jurisdictions seems likely to be a substantial benefit to both countries. They contribute disproportionately to the cost of legal education; they may facilitate the instruction of practising barristers in foreign jurisdictions and they represent an element of 'soft power' for the UK. They may, of course, deploy their skills in ways which in the short term appear contrary to the UK's national interest. It is well known that Mahatma Gandhi was an overseas student who although called to the Bar never practised.

Value of title

Fundamentally, the issue arises from the two elements of the regulation of legal services in England and Wales: the regulation of titles such as barrister or solicitor, and the regulation of activity so that certain types of legal services are restricted to those authorised to perform them.

The value of the title barrister comes from its strength as a personal brand. It commands respect and suggests skills which are desirable in many career contexts. For practising barristers it is essential and they have no choice but to pay for its continued use, whereas for others most of its value may have been in the past.

The core concern of regulators, however, tends to be the regulation of activity because that is the area which most closely touches the interests of the users of legal services. The protection of title is not so much about the risk of public confusion but rather the maintenance of confidence in those who hold it. If those using the title without practising certificates were unregulated, the public recognition and assurance from the title would be undermined.

Regulation & protection

This dichotomy could be addressed if activity regulation for reserved legal services were licensed by a single statutory regulator, while the protection of established professional titles such a barrister or solicitor returned to the professional bodies.

The advantages of such an approach would not be confined to barristers. For solicitors, the post-2007 opening for alternative business structures to enter the market without fully reconciling their permitted identification as solicitors with their desire to provide legal services in novel (and not always successful) ways, has compounded the issues of an overcomplicated and confusing system. Looking at a whole system of regulation which is complex and difficult to understand, the possible confusion between barristers who can practise and those who cannot seems relatively minor.

Even if it were a sensible objective to try to limit those able to use the title to those who were practising in England and Wales, it is difficult to see how that could be enforced generally and would risk the Bar becoming something it has never been—parochial. **NLJ**

John Gould is chair of Russell-Cooke LLP (*Russell-cooke.co.uk*) and author of *The Law of Legal Services, Second Edition* (2019, LexisNexis). *Newlawjournal.co.uk*