



The Bar Council

QC Appointments Review, Sir Duncan Nichol CBE

Please reply c/o: Lana Locke
Secretary, Review of Queen's Counsel Appointments
Bar Council
289-293 High Holborn
London WC1V 7HZ
DX: 240 LDE

To: Tim Dutton QC, Chairman of the Bar
Paul Marsh, President of the Law Society

18 December 2008

Dear Tim and Paul

Review of Queen's Counsel Appointments

I have pleasure in enclosing my report on the QC Review. It remains broadly as presented to you earlier in the month. I do hope the Directors will press ahead with the next competition as early as possible in 2009.

Kind regards

Lana

Sir Duncan Nichol CBE

Enclosure:

1. Queen's Counsel Appointments – Review, dated December 2008.
- cc: Queen's Counsel Selection Panel
Robin Knowles CBE QC, Bar Council representative
Mark Stobbs, Law Society representative
David Watts, Head of Secretariat, Queen's Counsel Appointments

Queen's Counsel Appointments – Review

Acknowledgement

I am grateful to Robin Knowles CBE QC, Mark Stobbs and Steven Durno for providing a source of opinions and suggestions and to Lana Locke for her outstanding administrative support. I am also very grateful to all those whom I interviewed for agreeing to contribute to the Review at sometimes very short notice (Annex A).

Purpose of the Award

The purpose of the new Process for the selection and appointment of Queen's Counsel in England and Wales agreed by the Law Society and the Bar Council and approved by the Lord Chancellor was "to serve the public interest by offering a fair and transparent means of identifying excellence in advocacy in the higher courts". The competencies required of an advocate were placed at the heart of the new scheme and selection in the hands of an independent selection Panel, working without any planned cap on successful applicants. The Review was asked to reaffirm that purpose, but also invited to consider what would amount to a redefinition of the purpose, namely "whether additional forms of excellence such as both litigation and non-litigation work

for partners in law firms, or wholly advisory work by lawyers in non-judicial fora, or the work of General Counsel should and could be recognised by the same award of Silk. In short the award might be more inclusive of excellence in the legal profession”.

The Law Society is concerned that the criteria for the award for Silk are too narrow and that an award for advocacy as currently interpreted (in the higher courts) is no longer sustainable. It is argued that Silks are used for more than just advocacy. They provide advice and negotiation skills and many clients are likely to go to Silks for such advice in the first instance with the individual's advocacy skills barely being relevant to that choice. Outstanding forensic legal advisers whose excellence is grounded in the law should be eligible for the award even though they do little if any advocacy in the higher courts.

It has not proved possible to estimate with any accuracy the size of this potential pool. There are currently circa 4,000 solicitor advocates with rights of audience in the higher courts but only a handful seem to aspire to Silk. It is also the case that many leading solicitors progress into management, focusing on client relationships and governance of the firm.

There is broad support from leading employed practitioners for the 2002 “Dutton” definition¹ of the persuasive modern advocate, notwithstanding that Timothy Dutton QC in his inaugural speech to the Bar Council in 2007,

¹ The definition was produced for the Advocacy Training Council, and first set out in the report of a Working Party chaired by Timothy Dutton QC on the organisation, delivery and outcomes of advocacy training for barristers, published in October 2002.

reiterated that “the background to the identification of these requirements is an adversarial system”:-

- The ability to persuade orally;
- The ability to persuade in written argument;
- Cogent, legal and factual analysis;
- The ability to develop reasoned argument; and
- Forensic skills with evidence (both written and oral).

All the foregoing in combination and undertaken to high ethical standards.

A group of leading General Counsel has proposed that “the Selection Panel moves in the first instance to remove the ‘gating factor’ that currently operates to exclude from eligibility those whose advocacy is not conducted in court before judges,” to be accomplished by new guidance containing the following elements:

- An expression of the Panel’s desire to attract applications from leading employed practitioners.
- Confirmation of its intention to operate the Selection Process so as to ensure that advocacy practiced in a leadership context at a high level on matters of substance and complexity outside the confines of disputes brought before the higher courts will, in an appropriate case, be regarded as being on an equal footing with advocacy practised within such courts.
- Confirmation that in order to achieve the above, that part of the definition of the target group of applicants referred to in the documentation published by the Selection Panel which reads “...*excellence in the higher*

courts of England and Wales" will be modified to read "*excellence in advocacy in the higher courts of England and Wales and other comparable forums.*"

- A modification to the list of categories of acceptable assessors so that it reads "...*judge, arbitrator or person of comparable standing, practitioner and professional client, client or client proxy.*"

Such aspirations of eminent practitioners that additional fora of excellence outside the higher courts should be recognised by the same award of Silk are entirely understandable, but regrettably not reconcilable with a reaffirmation of the current purpose of the award and the definition of excellence that it has been designed to recognise, which is not excellence in general in the law or at the Bar. There is no middle ground to bridge this issue. Nor is it for this Review to opine as to whether a parallel award or 'Senior Counsel' is appropriate. This is a debate for the professions collectively with the Ministry of Justice and the Legal Services Board.

Within the terms of the current award the Chancery Bar has expressed strong concerns that less regard is paid to advocacy other than oral advocacy in contentious applications in the High Court. In separating oral and written advocacy in the application and assessment forms, the Selection Panel has sought to differentiate, but also to underline the importance of both skills. It has not sought to weight one against the other or to define a minimum level of oral advocacy. However, in order to reassure applicants with a practice which predominantly resolves disputes before they reach a judge, the Selection Panel should clarify explicitly that a particular quantity of advocacy in the High

Court is not required, provided it is sufficient to allow reliable assessment of excellence.

The Selection Panel should promote also the publication of practice and career profiles of successful solicitor applicants and barrister applicants with substantial advisory practices to show potential applicants the range of situations in which applications can be successful

The Chair of the Selection Panel should write to Senior and Managing Partners in law firms and regional Crime Prosecution Service (CPS) Heads to encourage ahead of each competition applications from any senior solicitor or CPS employee with higher rights of audience and who excels in advocacy in the higher courts.

The continued award of Queen's Counsel *honoris causa* to practising lawyers, whether in private practice, working as an employed lawyer or in public service, e.g. the CPS, as well as distinguished legal academics is strongly supported and should be promoted explicitly as available for a wide range of achievements.

Selection Process

The Selection Panel has recommended a number of useful and timely improvements since the first competition. In general these have been well received by applicants and assessors and by the Directors of Queen's Counsel Appointments:-

- Assessments have been reduced from 11 to 9 in all (4,3,2) retaining a single nominated assessor in each category, but with an alternative named at the outset.
- The list of potential judicial assessors has been broadened to include District Judges and those sitting in specified international or transnational courts and tribunals.
- The interviewing of assessors by telephone, which proved costly without the anticipated enhancement over written references, has been abolished.
- The application form has been redesigned to permit more detailed information about the applicant's Practice and the nature of cases.
- The competency framework has been simplified and Diversity made a competency in its own right.

- The Advocacy competency has been separated into Oral and Written Advocacy on the self-assessment and assessor forms.
- The Panel has improved the quality of its own record keeping, with fuller notes at the provisional grading and interview stages, in response to comments from the Complaints Committee.

Further improvements to the Selection Process are recommended:-

- The Secretariat's ability to select an appropriate range of assessors has been strengthened by greater transparency around the cases which the applicants have provided. However, there should be more systematic sampling and oversight from Panel members of assessor selection and more robust challenging by the Panel or Secretariat of inadequate assessments. This is a critical quality control issue which the Panel should pursue in advance of the provisional grading stage.
- The point has been made that applicants are able to meet the requirements of application without listing all their substantive cases for the previous two years, allowing them to be selective. This is a risk to be guarded against and the Selection Panel should be invited to develop a proportionate response to the issue.

- The recent improvements made to the Summary of Practice and case details should facilitate the opportunity to cross-reference cases across assessors. A more case-based approach to identifying assessors should be pursued systematically. The optimum choice of assessors, which risks overburdening some assessors, should be the overriding objective.
- Consideration should be given to focusing the responses of assessors on the competencies they can best address. Judicial and peer assessors are likely to be better placed to offer an assessment of the competencies of Understanding and Using the Law and Oral and Written Advocacy; and the client assessors on Working with Others and Diversity. Such an approach should not preclude any assessor from commenting on any competency, but a steer to assessors to focus in this way would recognise the current reality and perhaps improve the quality of some assessments.
- The assessor community should be reminded that it is better to decline to act as an assessor if knowledge of the candidate is too limited.
- Although not without its supporters, a return to the old system of automatically consulting the Presiding Judges, Heads of Division and others about an applicant for Silk would lack the transparency expected of modern selection procedures and would risk inviting opinion rather than case-based evidence. However, the current Integrity check which does not allow the Lord Chief Justice to share the applications list beyond Heads of Division is unsatisfactory. The list should be shared with Circuit Presiding Judges to

ascertain whether there are any Integrity issues, but for no wider purpose.

Concerns about Integrity identified in this way would be put to the candidate.

- The requirement for and purpose of the interview should be revisited by the Selection Panel. There is a case for not automatically interviewing all candidates who remain beyond the filter out stage, where there is already sufficient evidence a candidate should be recommended for Silk. Interviewing Panels should be circumspect in making significant adjustments post interview to the earlier provisional grading marks, on the basis of a short thirty minute interview, particularly against the competencies of Understanding and Using the Law and Oral and Written Advocacy. The interviewing pair should be different to the grading pair in all cases where the logistics permit it.
- The Panel should aim to adopt an approach of grouping applicants from the same speciality to be judged by the same pair or group of Panel members, as an aid to the consistent application of standards across a speciality.
- The usefulness of feedback to candidates is constrained by the requirement to preserve the confidentiality of assessors and is impaired if the record keeping of the Panel members is too succinct. However, it is a matter of concern that feedback is regarded by some candidates as anodyne and impersonal. Whilst safeguarding the principle of confidentiality there should be room for the feedback to be less risk-averse.

- The work of the Complaints Committee has settled down well and in addition to its core remit for investigating complaints its importance in identifying potential Process improvements should be recognised explicitly. The composition of the Complaints Committee chaired by a senior member of the judiciary with representatives from the barrister and solicitor professions together with an independent lay member is well balanced and should be retained.

Business Model

QC Selection is operating on a sound financial footing. It has repaid (with interest) £200,000 of start-up loans from the professions with a final payment in October 2008. At the end of the second competition there was a rolling surplus of circa £56,000 (less corporation tax due) which given there is no working capital provides a modest operating contingency. The budget for the current competition is based on an assumed 22% appointment rate which may well be exceeded and the surplus consequently increased. The current budget totals £743,000, of which 35% relates to variable costs (primarily Panel remuneration and expenses) and 48% to largely fixed costs (primarily the Secretariat and premises). Another 6% relates to the fixed costs of the competition (advertising, Panel training and communications) and 11% relates to the variable costs of the competition dependent on the number of applicants (primarily agency staff and stationary/postage). Numbers have ranged from 443 in 2006 after a three year hiatus to 333 in 2008, with percentage success rates of 39% and 29% respectively. Current competition

numbers are 247 with an early indication of a higher percentage success rate than in the two previous competitions. The Secretariat have estimated that 150-200 applicants would be the minimum for a viable annual competition. In the future, annual competitions should be completed within a maximum 12 month period. The Panel's procedures should be contained within an 8-9 month period, allowing sufficient time for the approval of its recommendations.

The budget for a biennial competition is estimated at circa £1,000,000 over a 24-month period on the assumption that the office is kept ticking over between active competitions. This budgetary figure equates on current fee levels to 406 applicants at a 20% appointment rate. Recognising that given half the applicants to date are repeat applicants, two competitions in quick succession would be likely to yield more applications than one every other year.

If a biennial competition were considered, it could be cheaper to go into serviced accommodation as required. The main risk of a biennial competition would be retaining and subsequently recruiting the expertise of staff and Panel members and is not recommended whilst applicant numbers remain viable for an annual competition. The Ministry of Justice is less likely to see a biennial competition as suitable for a long-term secondment to the Secretariat.

Panel Succession

Going forward there will be a need to recruit one new lay Chair, one barrister, one solicitor and a one or two lay members depending on whether one of the

current lay members succeeds to the Chair. This will be the first significant interruption to the continuity of the Panel and will pose a major challenge to inculcate both the values and the processes of QC selection for the new members. This will require an intensive induction and 'buddying' support from the remaining Panel members in acknowledgement that the new membership will need to be fully up and running by April 2009. Maintaining and indeed improving the consistency of decision making and reinforcing a common understanding of excellence with a 'new' Panel will be critical to the ongoing credibility of the Silk competition.

In future, changes in Panel membership should be staggered more evenly to maintain continuity but to avoid the potentially damaging risk associated with a membership recruitment 'bulge'.

The size of the Panel has been debated in the past, but disturbing the size and thereby the balance of membership would not be desirable. It should be remembered that current members are working well in excess of the days envisaged when the new Process was announced (nearer 40 than 20 days) and that the cost of Panel members is largely variable depending on the number of applicants.

A succession plan for the Head of Secretariat and supporting staff is critical to the effectiveness of the Panel. It would be very desirable for the current Head of Secretariat to be retained for at least a further two years given the likely early departure of effectively his deputy. It is also vital that the level of support

provided by the Directors and by the Law Society and Bar Council should be maintained.

Summary

The procedure and outcomes of the current Selection Process appear to enjoy the broad confidence of the interested parties. A widening of access to the current award of QC would run a serious risk of brand damage and confusion, not least amongst the international community. It is not the right moment to re-ignite the debate that was resolved between the Bar Council and the Law Society and approved by the Lord Chancellor as recently as three years ago. The new Process is still relatively immature and vulnerable. It is also capable of being refined and improved within its current purpose and to that end the Review has made a number of recommendations.

Sir Duncan Nichol CBE

December 2008

List of consultees

Roy Amlot QC, senior barrister member, QC Selection Panel
 Guy Beringer QC, former Senior Partner, Allen and Overy
 Daniel Bethlehem QC, Legal Adviser, Foreign and Commonwealth Office
 Philip Bramwell, Group General Counsel, BAE Systems
 Baroness Elizabeth Butler-Sloss GBE, Interim Chair, QC Selection Panel
 Andrew Clark, Partner / Head of Litigation, Allen and Overy
 Stephen Collier, General Counsel, General Healthcare Group
 Steven Durno, Administration of Justice, the Law Society
 Ruth Evans, lay/independent member, QC Selection Panel
 Louise Fluker, General Counsel and Company Secretary, De La Rue plc
 Professor Christopher Greenwood CMG QC, barrister, Professor of
 International Law, London School of Economics
 Charles Haddon-Cave QC, Chairman, the Advocacy Training Council
 Professor Dame Joan Higgins, lay/independent member, QC Selection Panel
 David Hobart, Chief Executive, the Bar Council
 Des Hudson, Chief Executive, the Law Society
 Lord Judge, Lord Chief Justice
 Sir Paul Kennedy, retired senior judicial member, QC Selection Panel
 Robin Knowles CBE QC, Review representative for the Bar Council
 Tim Lawson-Cruttenden, Chairman, Solicitors' Association of Higher Court
 Advocates
 Lord Justice Leveson, Senior Presiding Judge
 Helen Mahy, General Counsel, National Grid
 David McIntosh, former President of the Law Society
 Lord Justice Mummery, Chairman, Queen's Counsel Complaints Committee
 Jean Ritchie QC, senior barrister member, QC Selection Panel
 Murray Rosen QC, Head of Advocacy Unit, Partner, Herbert Smith
 Lucy Scott-Moncrieff, senior solicitor member, QC Selection Panel
 Karamjit Singh CBE, lay/independent member, QC Selection Panel
 Mark Stobbs, Review representative for the Law Society
 Lucy Theis QC, Chairman, Family Law Bar Association
 June Venters QC, Senior Partner, Venters Solicitors
 David Watts, Head of Secretariat, Queen's Counsel Appointments
 Robert Webb QC, General Counsel, British Airways
 Christopher Woolley, senior solicitor member, QC Selection Panel