



Bar Council response to the QC Appointments consultation “QC Appointment Scheme- Character, Conduct and Integrity”

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to QC Appointments consultation paper entitled “QC Appointment Scheme -Character, Conduct and Integrity”.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB.)

Overview

4. The Bar Council broadly welcomes the acknowledgement that integrity, character and conduct remain essential competencies for recommendation for appointment of Queen’s Counsel. The Bar Council would wish to rely on the representations made to the QCA in May 2017 and would wish to make the following additional representations.

¹ QC Appointment Scheme, “[Character, Conduct and Integrity](#)” (2018).

5. The Bar Council would not resist amendment to the definition of the “working with others” competency to cover a wider range of behaviours which are expected of QCs. We do however, question whether it is appropriate for the “working with others” competency to be widened to cover all the behaviours which are expected of QCs. As paragraph 25 of the consultation observes, certain behaviour might better fall under other competencies such as “diversity” or arguably “advocacy”. If various behaviours were recast to fall within other more appropriate competencies, one result could be that assessors better analyse the behaviour they are reporting and better understand the individual but interlocking nature of each of the competencies.

6. However, we are concerned that a) if alleged misconduct is included within other competencies, matters which might previously operationally have been considered separately and removed following investigation will no longer be removed and may find their way to the Selection Panel unfiltered and unchallenged. And b) that by recasting behaviours within other competencies, applicants may lose the right to respond or explain matters which previously would have been put to them and there will be a commensurate reduction in fairness to the applicant and in transparency in the process of application.

7. In paragraph 18, the consultation paper refers to ‘the ordinary definition of integrity’ and to ‘matters of true integrity’. On the issue of the definition of integrity, since the consultation last year the Court of Appeal has considered its meaning in an appeal from the Solicitors Disciplinary Tribunal. The Bar Council is of the view that this is an appropriate definition for the purposes of the QCA. In SRA v Wingate Evans and Malins [2018] EWCA Civ 366. (7th March 2018) the Court held:

- a) Integrity is a broader concept than honesty. In professional codes of conduct, the term integrity is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members. The underlying rationale is that the professions have a privileged and trusted role in society. In return, they are required to live up to their own professional standards.
- b) It is not possible to formulate an all-purpose, comprehensive definition of integrity. However, it is possible to set out the broad contours. Integrity connotes adherence to the ethical standards of one’s own profession. That involves more than mere honesty. The duty to act with integrity applies not only to what a professional person says, but also what they do.

In answer to the specific questions posed in paragraph 21:

- a) For the reasons identified in our response to your consultation of May 2017 we believe it is appropriate for the QC scheme to require applicants to demonstrate all the behaviours expected of QCs to a standard of excellence. We do not regard the absence of regulatory sanction as determinative. On the other hand, we do not invite the QCA to revert to requiring applicants to provide positive evidence of their integrity: the prima facie assumption of compliance is reasonable.
- b) We do not regard the recasting of conduct under other competencies such as “working with others”, “advocacy” or “diversity” as objectionable; indeed, there is force in the reclassification. We are concerned, however, that an applicant should be given an opportunity to respond and/or explain in appropriate cases, and that any reclassification of conduct into the competencies that are ordinarily treated as confidential does not result in unfairness to the applicant or reduced transparency in the process.
- c) We believe that it remains appropriate to seek information in relation to the integrity competency from the four sources identified in paragraph 12 of the consultation paper and note with approval the absence of ‘leaders of the profession’ as a possible source of information on the issue of integrity.

In answer to the questions posed in paragraph 31:

8. The Bar Council does not think it is possible definitively to resolve how far behaviour outside the area of advocacy should be taken into consideration. We remain of the view that the guidance already provided to every applicant by the QCA is a helpful point of reference.

9. We believe that provided full disclosure is made by the applicant of all specified and defined behaviours, thereafter matters of relevance and weight are for the selection panel. We are of the view that the QCA has specialist knowledge of the profession and of the ethical standards of the profession, and accordingly is well placed to identify and assess matters of integrity, conduct and character.

10. In relation to the existing question *“Is there anything else in your personal or professional background which could affect your suitability for appointment or bring the legal profession or Queen’s Counsel into disrepute?”* we consider this question could be a suitable vehicle to elicit information in relation to bullying and racist, sexist, or homophobic behaviour, although more detailed guidance would then be needed in order to explain the purpose of the question. Whilst we acknowledge the difficulties

with verification of the answers provided by the applicant, such guidance could particularise the level of detail and disclosure expected of all applicants.

11. We agree that a 'trip wire' trawl of social media activity by the Secretariat is not practical in relation to all applicants and represents a disproportionate draw on resources.

12. The Bar Council is aware of a range of views among the profession on whether (or the extent to which) an applicant's Head of Chambers (or other similar senior person) should be part of the selection process. This suggestion is well-intentioned- and an applicant's Head of Chambers is indeed more likely to be in a position to assist with issues relevant to 'working with others' and 'diversity' than Heads of Division and other Senior Judges- but the QCA should tread carefully and cautiously, and it should always be the case that any significant or serious matter is put to the applicant for response.

13. A general request for information about "conduct which made [an applicant] unsuitable for appointment" could lead to inconsistency due to differing standards being applied by different Heads of Chambers, and to problems with confidentiality (both client confidentiality and confidentiality within chambers, including a complainant's confidentiality). This might place Heads of Chambers in a difficult position, and could even undermine the Bar's efforts to develop a culture in which practitioners feel able to discuss ethical dilemmas within chambers as freely as client confidentiality allows.

14. Many will take the view that an award of silk is important enough to justify such a request, and that it would be unfortunate if relevant information known to Heads of Chambers (who are more likely than others to know such information) was not drawn to the Selection Panel's attention simply for want of having asked. This might include information that would not otherwise be known to the regulator (particularly if there is no obligation to report it), but which might be such as to give the Selection Panel legitimate pause for thought. It may, thus, lead to the Panel becoming aware of those who have a justified reputation for particular conduct or attitudes that would not meet the appropriate standard of excellence for a silk, but who have not been made the subject of a specific complaint, albeit that the Head of Chambers would need to be able to provide appropriate evidence.

15. Limiting the request to matters determined against an applicant through an internal process, but not seen as serious enough (where the BSB's rules apply) to require reporting to the applicant's regulator, might ameliorate some of the concerns of those opposed to this, and there is a clear argument that a determination should be

sufficient evidence for the Selection Panel, is something that an applicant should expect to be disclosed, and would justify the matter not being put to the applicant (unless the Panel considers that the applicant ought to explain his or her failure to disclose it). This approach would also provide clarity for the Head of Chambers, limit the scope for inconsistency, and at least ensure that complaints upheld against applicants through internal processes are brought to the Panel's attention.

16. However, a judgement would still need to be made as to whether the matters concerned should be reported to the Selection Panel, which may still lead to inconsistency. It would necessarily apply only to matters not thought serious enough to be reported to the BSB (otherwise they would have been reported, and thus come to the attention of the Panel through inquiries of the BSB), which may be of doubtful benefit, and not sufficient benefit to outweigh the difficulties and disadvantages. It would also exclude matters that might properly be brought to the attention of the Selection Panel but which were resolved informally and without any determination or formal process, or which just happened to be known to or believed by the Head of Chambers without a complaints process having formally been triggered. The result could thus still be inconsistency and/or Heads of Chambers being put in a difficult position. It could also lead to candidates being treated differently simply through the happenstance of whether an incident leads to a formal complaint and formal resolution, which may depend on no more than the attitudes of different complainants.

Unsatisfactory behaviour by existing Queen's Counsel

17. For the reasons given in our previous response to the Consultation of May 2017 (set out below for convenience) we would argue that the QC designation should not be removed unless the advocate's professional regulator has excluded the advocate concerned from the profession:

"The removal of the QC designation is a serious and drastic step and ought not to be undertaken lightly. Nonetheless, the Bar Council agrees that there ought to be a mechanism by which the QC designation can be removed where a serving QC has been subject to regulatory action resulting in disbarment. We do not believe it ought to be automatic, but we consider that there will seldom be cases in which the grounds for disbarment are such that removal of the designation is inappropriate.

"We do not consider that the QC designation should be removed as a result of regulatory action falling short of disbarment, although we consider that, in appropriate cases (and here the circumstances should not be prescribed, in order to retain a degree of flexibility), removal should be available. We do not, however, consider that the test for removal should be whether the misconduct would have led to a decision not to recommend appointment. Nor are we persuaded of the desirability of introducing a

provision to suspend QC designation for a period of time. If a matter is serious enough to require removal, this should be permanent, with the person having the option to reapply afresh in the future. At the point of reapplication, all relevant matters can be taken into consideration and a decision made against the criteria for appointment”

18. In light of extremely limited number of cases in which it might be appropriate to remove QC designation once it has been granted, the Bar Council does not see any justification for exploring with the Crown Office whether QC designation could be revoked more readily.

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