



Bar Council response to the Queen's Counsel Appointments System 'Dealing with Matters of Character, Conduct and Integrity' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Queen's Counsel Appointments consultation paper entitled 'Dealing with matters of 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.

Overview

4. The appointment of Queen's Counsel is rightly regarded as a badge of excellence. The Bar Council would wish to preserve that characterisation and would not support any change to the criteria for recommendation for appointment which might reduce the high expectations of Queen's Counsel by the Court, the profession and the public.

5. The importance of integrity to the conduct of all advocates cannot be overstated. Checks on integrity, character and conduct are not merely tick-box

¹ Queen's Counsel Appointments (2017) Dealing with matters of character, conduct and integrity.

preconditions for qualifications ancillary to their role as an advocate; the BSB Handbook accurately describes honesty and integrity as “fundamental”.² It is a core duty; “You must act with honesty and integrity.”³

6. The Consultation paper observes that it is essential for all advocates to demonstrate integrity, and that the system could not operate efficiently unless the courts were able to trust the advocates before them. That is true, but the Bar Council agrees with the additional observation that the courts traditionally place ‘special reliance’ on Queen’s Counsel.⁴ In our view, it is important that integrity remains one of only a handful of key competencies within the Competency Framework for applicants for silk.

7. At present, to merit recommendation for appointment as Queen’s Counsel, all competencies must be demonstrated to a standard of excellence. The competencies include: understanding of the law; written and oral advocacy; working with others and diversity. In principle, we expect all barristers to be competent in these areas, yet more is required for recommendation for the appointment of Queen’s Counsel. We consider it unnecessary to distinguish the competency of integrity from the other competencies, and see no reason why applicants should not be required to prove excellence in relation to integrity, character and conduct.

8. Although the Competency Framework particularises the competency of integrity as “is honest and straightforward in professional dealings...” and states by way of indicative behaviours the example “acts in professional life in such a way as to maintain the high reputation of advocates and Queen’s Counsel”, the Bar Council would not support limiting the checks made on applicants to matters of character, conduct and integrity solely within a professional context. We are of the view that wider issues of character, conduct and integrity are relevant to any recommendation for appointment.

9. The BSB Handbook reflects this wider approach. Core Duty 5 states: “You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession.” The Handbook also provides guidance in relation to CD3 which states: “You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3)”.⁵

² § gC14 “Your honesty, integrity and independence are fundamental. The interests of justice (CD1) and the *client’s* best interests (CD2) can only be properly served, and any conflicts between the two properly resolved, if you conduct yourself honestly and maintain your independence from external pressures, as required by CD3 and CD4...”

³ Core Duty 3

⁴ Consultation paper §2

⁵ rC8

10. The Handbook clearly envisages that matters of character, conduct and integrity in both a private and a professional capacity are relevant to Core Duties 3 and 5. Whilst rules C9 and C10 provide some specific examples which would constitute breach, the rules also make clear that the examples given are not exhaustive (“includes the following requirement...”).

11. gC25 indicates even more explicitly that wider behaviours outside of a professional setting are relevant: “Other conduct which is likely to be treated as a breach of CD3 and/or CD5 includes (but is not limited to): ...criminal conduct, other than minor criminal offences; seriously offensive or discreditable conduct towards third parties, dishonesty; unlawful victimisation or harassment, and abuse of your professional position”. Terms such as ‘discreditable’ are not defined and are left deliberately wide. Again, the category of conduct which could reasonably be seen by the public to undermine an advocate’s honesty and integrity is open-ended.

12. That being the case, we believe that, subject to the overarching issue of relevance, the fullest possible disclosure ought to be made by applicants. We are firmly of the view that QCs must be beyond reproach, and regardless of whether any regulatory action has taken place, any findings or circumstances that may be interpreted as affecting their integrity (including financial matters, complaint outcomes, and adverse findings in civil or criminal litigation) should be taken into account during the appointments process.

Responses to questions at paragraph 61

13. The Bar Council does not consider the fact that an applicant is authorised to practice as determinative of the issue of character, conduct and integrity for appointment as Queen’s Counsel. The absence of regulatory or disciplinary action is hardly a badge of excellence. Authorisation to practice is a basic requirement for all advocates and does not represent the standard of excellence expected of Queen’s Counsel. For the reasons set out above, in our view provision must be made for a wider check on the character, conduct and integrity of all applicants. Moreover, such a check would ensure that all applicants, whatever their professional background, are assessed to the same high standard of excellence, regardless of their regulatory body.

As a minimum, a check ought to be made of the applicant’s regulatory body and of the Legal Ombudsman. Those enquiries are likely to expose most matters relevant to the issues of character, conduct and integrity of the applicant. As the Consultation Paper rightly observes, the police are under a statutory obligation to inform either the

BSB or the SRA respectively of any incident involving a notifiable offence by a member of the legal profession.⁶

In light of the observation that the arrangements for receiving information are working well, there appears to be no need for the QC appointment system to conduct independent checks of the police, HMRC and others. We agree that applicants ought to be trusted to self-report and make the appropriate disclosures on their application forms.

In general terms we agree with the approach set out in the existing guidance as summarised at §§11 to 15 of the consultation paper. We do not consider it appropriate for the assessment of what weight ought to attach to matters of character, conduct and integrity to be left to the applicant. A clear requirement to make full disclosure of all relevant matters (which should be specified with precision) will obviate the need for the applicant to apply judgement or assess relevance as to what must be disclosed and will thereby safeguard the applicant from allegations of non-disclosure.

14. If a criminal finding does not result in any regulatory or disciplinary action, it is unlikely to be relevant to a recommendation for the appointment of Queen's Counsel. However, a criminal finding may nonetheless be relevant to the assessment of suitability owing to extraneous circumstances. Any individual incident may in itself be minor and irrelevant, but owing to its context, or taken in combination with other aspects of character, it may become relevant to the suitability of an applicant. A single minor matter may be irrelevant and out of character if it is a one-off, but a history or series of repeated minor offending might be regarded in a different light.

15. On the issue of pending criminal charges, the Bar Council is not convinced that either of the two suggested alternatives is satisfactory.

- a. If the appointment is made but the announcement deferred, it raises issues as to the status of the appointment during the interim and of the terminology to be used. If, owing to the serious nature of the potential criminal finding, the appointment **would** be revoked in the event of a conviction, better it had never been made. We also question whether the appointment would have to be revoked by Letters Patent.

⁶ An incident will be recorded as a crime (notifiable offence) for offences against an identified victim if, on the balance of probability a) The circumstances as reported amount to a crime defined by law (the police will determine this, based on their knowledge of the law and counting rules), and b) There is no credible evidence to the contrary.

Nonetheless, an 'in principle' appointment subject to confirmation following the resolution of the criminal matter, though unsatisfactory, is preferable to the second suggestion. The reputational damage to the QC appointment system of announcing and withdrawing the designation is highly undesirable.

16. The Bar Council is of the view that the best course of action is for the Selection panel:

- a. First, to determine the potential impact of conviction and whether in the event of conviction a recommendation for appointment would be made nonetheless. If the answer is that the applicant would be recommended for appointment irrespective of conviction, then there is no reason to delay that decision pending determination of the criminal charge.
- b. If the conviction would or could make a difference to the application, the QCA Secretariat ought to invite the applicant to defer consideration of his/her application altogether until the matter is resolved. We do not agree with the comment made at §43 that it is unfair to applicants to defer in these circumstances. If the application is deferred, the applicant's written application and (not insubstantial) initial application fee can be carried over to the next competition and the application determined on a fully grounded basis.

Additionally, the applicant could be asked to make written representations on the issue of a) the circumstances of the alleged offence and b) the issue of whether he/she would wish the application to be deferred. Those representations would allow the Selection Panel to reconsider the issue in paragraph a. above.

- c. In the event that an applicant did not wish for the application to be deferred despite the view of the Selection Panel and insisted on the application being processed, we are of the view that the application ought to be determined finally in light of those representations. Whilst the applicant is entitled to the presumption of innocence, equally the Panel must be entitled to consider:
 - i. that the CPS have properly applied the Full Code Test and found that the evidential limb had been met and, on the available evidence, there is a realistic prospect of conviction⁷, and

⁷ Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage

- ii. any written representation from the applicant.

17. On the issue of whether applicants should be asked about bankruptcy and IVAs, there were a range of views from those who responded to the consultation. Some believed that if a financial matter did not justify regulatory action, it was highly unlikely to be relevant to eligibility for silk. On the other hand, the majority (whilst agreeing that the circumstances in which bankruptcy or an IVA may be relevant will be small) were of the view that the Selection Panel ought to continue to ask about bankruptcy and IVAs for those exceptional cases where, owing to the context, the sums of money involved or the repeated nature of the applicant's behaviour, financial difficulties are symptomatic of deeper concerns regarding character, conduct and integrity. In those exceptional cases, a history of bankruptcy and IVAs would be likely to diminish the trust and confidence which the public places in the appointment of Queen's Counsel.

The fact that the Bankruptcy order or Individual Voluntary Agreement has not been discharged should not be an automatic bar to a recommendation for appointment. The Panel's policy as set out at §12 of the Consultation goes too far in respect of financial matters. We believe each case ought to be considered on its own merits. For illustration purposes only, if an applicant is in the final year of a long IVA and has repaid his creditor the vast majority of the money he owed, the fact the IVA had not been discharged should not impede a recommendation.

18. The Bar Council believes that Directors Disqualification Orders are to be distinguished from (what might be regarded as) financial difficulties, owing to the factual findings required for the making of an order. The Bar Council is of the view that the Selection Panel ought to continue to require disclosure of Directors Disqualification and take the information obtained into consideration.

19. How the Selection Panel ought to approach the evidence obtained, and the weight to be attached to matters relating to character, conduct and integrity are not susceptible to hard and fast rules. In general terms, the approach described at §46 must be the right starting point, namely to consider issues of seriousness and the length of time since any incident. However, we do not consider the competency of integrity to be removed or separate from the other competencies and regard it as an integral part

must not proceed, no matter how serious or sensitive it may be. The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

of the application taken as a whole. Thus, when considering what weight to give to regulatory findings etc., each case is likely to be unique and require individual consideration. A high degree of flexibility is desirable. The parallels or similarities between the QCA and the JAC are of limited relevance in this regard; the difference between the two appointments is fundamental as pinpointed in the final sentence of §37.

Nonetheless, just as with the Competency Framework, the Selection Panel should strive to provide as detailed guidance as possible and identify and apply clear criteria. Matters that may be included in those criteria could include honesty, relevance to the role of QC (with matters directly connected to advocacy being most relevant), seriousness (involving an assessment of harm/potential harm to clients/the administration of justice), passage of time, insight and remediation.

20. The Bar Council believes that the Selection Panel should ask applicants about Legal Ombudsman matters or negligence claims irrespective of whether they have resulted in regulatory action. We accept that the relevance of such findings may not be entirely contained within the competency of integrity, but such findings are, without doubt, relevant to the application as a whole. The Legal Ombudsman deals with complaints of poor service, which can include determinations requiring the payment of compensation; an apology; reduction of a fee and similar. There is a clear distinction between regulatory action and service failings; both are relevant to the eligibility of applicants for silk. Clearly only findings of sufficient finality would need to be disclosed. If a claim for negligence or a complaint is pending determination, the procedure set out above for pending criminal charges could be adopted.

21. The Selection Panel should not seek information from regulators about matters not upheld and the standard of proof is no justification for that course. There is an ongoing consultation about lowering the standard of proof in any event, so this point may become academic. More fundamentally, the only ways in which the Selection Panel could fairly determine whether a disputed matter of fact relevant to integrity is proved on the balance of probabilities would be to conduct its own adjudication, applying that standard of proof. In our view, this is not only undesirable; it is completely impractical.

22. Regarding the process set out at paragraph 54:

- a. **Point 1:** The requirement to report 'any other matter which might be likely to bring the QC system into disrepute' is not objectionable. It is not an uncomfortable or inappropriate enquiry into the applicant's private life, it is soundly based on Core Duty 5. Furthermore, as the BSB Handbook points out in its guidance on CD5, gC27 states in clear terms that conduct which is not

likely to be treated as a breach of CD3 or CD5, includes (but is not limited to) **conduct in your private or personal life**, unless this involves abuse of your professional position; or committing a criminal offence, other than a minor criminal offence.

- b. As such, the question is not redundant and is in fact a useful, self-reflective one, which enables openness about matters that the applicant may consider to be relevant in their individual circumstances, which may be unique, and which therefore can exceptionally be taken into account as part of standard criteria. No doubt the QCA has received a wide variety of answers to the question, and although we do not see any justification for removing it, without considering the whole gamut of responses it is difficult to assess the utility in preserving it. The fact that the question has seldom or never resulted in the Selection Panel not recommending an applicant is nothing to the point.
- c. **Point 2:** The Bar Council agrees with the point made.
- d. **Points 3 and 4:** There were a variety of responses in relation to this point. Some believe there is no benefit in continuing to ask assessors or the senior judiciary about integrity. Others disagree. The issues concerning an assessor's or judge's comments about integrity concern the process or procedure by which the Selection Panel can fairly take them into consideration without engaging in satellite correspondence. It cannot be suggested, however, that a referee's or judge's opinion is highly relevant to the application in respect of all competencies but ought to be disregarded in relation to the competency of integrity.
- e. It is important for an applicant to know in general terms what the Selection Panel has taken into consideration regarding their character, conduct and integrity. However, every applicant appreciates that they are not entitled to disclosure of the responses the Panel receives from referees. The confidentiality of the responses received from referees and assessors is vital and must be preserved.
- f. In any case where an assessor does pass comment on the character, conduct or integrity of an applicant, the Selection Panel must be guided in its reaction to that comment by issues of fairness and transparency. In the rare cases where the comment is of such significance or seriousness that the application cannot be determined without the matter being disclosed to the applicant, the Selection Panel must take that course or disregard the comment entirely. Issues of fairness and transparency must be assessed on a case-by-case basis.

- g. The fact that judges are unwilling to have their adverse comments about integrity disclosed to an applicant is unhelpful. We agree that the judiciary ought to be informed of the limitations of the Selection Panel to determine disputed matters of fact and of the difficulties the Panel will have taking such matters into account. Additionally, we agree that the judiciary should be encouraged not only to report matters to the relevant regulatory body when appropriate, but also to raise such issues contemporaneously with the advocate themselves or to their head of chambers, depending on the degree of seriousness of the matter. In this way, the applicant will not be in a position where they are unaware of the particular judge's view of their behaviour.
- h. **Point 5:** Whilst there may be an argument for sending the list of applicants to leaders of the profession, we believe that, with an evidence-based application system, the disadvantages far outweigh the advantages for the reasons identified in the Consultation Paper. There is also a real danger that seeking the views of leaders of the profession is likely to elicit elements of notoriety, anecdotal evidence and possibly hearsay. The leaders of the profession are unlikely to have evidence of the kind appropriate for consideration.

23. 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.

24. 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.

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