



## **Bar Council response to the QCA Consultation on the listing of cases and assessors**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the QCA consultation paper entitled '*QC Appointment Scheme – Listing of cases and Assessors*'.
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).
4. This Response has been prepared by the Equality, Diversity and Social Mobility (EDSM) Committee. It has been approved by the General Management Committee of the Bar Council and should therefore be taken as the official response of the Bar Council to this consultation.

### **Introduction**

5. The proposal is that in place of the current system under which applicants are asked to list the 12 most important cases they have dealt with in the past three years (and to list eight judicial, six practitioner and four client assessors who can comment on their performance in those cases), applicants should in future be asked to list all their significant cases over a particular period and to list all the judges, fellow practitioners and clients in those cases. Views are invited on:

- i. The principle of the proposed change to reduce the scope for “cherry picking” by applicants by requiring them to list all their substantial cases, and those involved in the case, over a prescribed period; and
- ii. Practical issues discussed in paragraphs 22 and 23.

### **General comments**

6. The Bar Council does not support in principle proposals to require applicants to list all cases of substance in a specified time-period to avoid ‘cherry picking’. We believe the current system is working well for applicants.

7. It is the view of the Bar Council that the key issue is encouraging more applications from women and other under-represented groups. We believe that the idea of making candidates list all recent cases of substance (potentially up to a maximum number) rather than select cases from the previous three years is likely to disadvantage primary carers (and therefore more women than men) because senior women in some types of work may turn down the best cases because they require travelling away from home, limiting the number of cases of substance they can present.

8. With respect to para 22: The Bar Council considers that it would be an improvement to extend the number of years from which substantial cases can be put forward. It is concerned though about any suggestion that changes should be made that might expose an applicant to regulatory intervention for failing to disclose a case which is said to be sub-par. Firstly, there is no doubt that this could have a chilling effect for some applicants. It is not clear whether it would do so disproportionately, but to the extent that it does, it is likely to cause a diminution in applications from groups that are currently under-represented and from which it is generally agreed that more applications would be welcome. Secondly, there is a very difficult subjective element to this point. Almost every advocate of any length of practice can mention a case that they were in or that they have some personal knowledge of in which advocacy has been criticised at one level, yet the advocate’s client has triumphed at a higher level. If the application for silk is made before a case in which the advocate has been criticised has been completed, then there would be no opportunity for the final work to be considered.

9. If the QCA is seeking to encourage Silk applications from under-represented groups the following might also be considered:

### **Guidance and any materials used to invite applications**

In any accompanying guidance/materials designed to invite applications:

- i. An indication that if a sufficient number of cases within the three-year limit can't be met, then there is an opportunity to explain why;
- ii. Advice that if a case falls just outside the time limit it can be still be relied upon if required;
- iii. Emphasising that career breaks for whatever reason, will be considered and will not be held against an applicant;

We acknowledge the above is already referenced to some extent in guidance to applications.

### **Process**

- iv. To ask the QCA to consider offering referees a sliding scale of 1-10 instead of not good/good/excellent with nothing being acceptable except a clean sheet of 'excellent' (the current system implies that to give a candidate anything less than an 'excellent' is to effectively block their appointment);
- v. To ask the QCA to consider extending the range of cases that can be included, to encompass those that involve any significant advocacy even if they are not cases of substance (this would reduce the amount of worrying and concern on the part of applicants about which cases to include and whom to approach);
- vi. That QCA should offer more open workshops including reaching out to more groups e.g. the Circuits, specialist associations – and even, perhaps, pupils/very junior barristers, to offer guidance from the earliest possible stages to encourage under-represented groups to apply.

### **Specific responses to questions raised in Para 23**

10. Please find below specific points in response to questions raised in Para 23.

- a) *Should applicants be asked to list cases over the last two years, the last three years, or some other period? Or should there be no prescribed period?*

The Bar Council considers that there should be a prescribed period from which applicants are asked to list cases as otherwise there is a risk that the QCA may be asked to review too much. It considers that a three-year period as a maximum would allow for those who take time off from practice for reasons such as child care to be able to give a representative section of their work. Allowing up to 12 cases to be considered within the last 3 years is sufficiently "recent" to allow the applicant to show sufficient consistency in excellence over a relatively 'recent' period and should mean the referee can remember the case. Bar Council also considers that applicants should be able to submit cases from a two-year period if they prefer.

*b) Should different numbers of cases be expected of practitioners in different specialisms?*

There should be no prescribed number of cases. The QCA must recognise that different areas of practice will give rise to different numbers of complex cases/cases of substance (see Para 9.v). This may also be true on a geographical basis (where less complex work may be available on the Circuits).

*c) What should be the maximum number of cases sought?*

The suggestion of a maximum of 12 cases is probably good sense to avoid the QCA getting too much information which does not really assist in its decision making. Secondly, if the number of cases was increased from the current 12 it would make it even more time-consuming and even harder to complete the form and to ensure all counsel and the judge in every case have been notified by the applicant that they are applying for Silk. Further, in our view, the reason women have a better percentage rate of being successful in securing silk (than men) is because women tend not to apply at all unless they believe they are very qualified or even over qualified for silk. Increasing the limit/removing a limit might infer that if you haven't done 12+ cases in the last three years, you ought not to be applying and risks disadvantaging those with a more limited practice (e.g. carers), if the effect is "the more cases listed the stronger the application", those with a more limited practice who are inevitably going to have fewer to list than those with a full-time practice will be discouraged from making an application.

*d) Should all judges need to be listed when a case went through several levels of the court system?*

Probably not. It should be open to the applicant to choose whether to include those in the lower level courts. However, it is suggested that at least one judge of any final appellate court should be given as a potential referee. This would ensure that the final disposition of the case is known, and the contribution appreciated by the QCA.

*e) Should all practitioners be listed in a multi-handed trial?*

The Bar Council does not think it necessary to list all practitioners in a multi-handed trial. However, applicants should be advised that if they put forward someone, or more practitioners, whose clients had a common interest with them, they should also put forward those practitioners who can give a reasonably objective assessment and that this may well mean someone who is from an opposing side.

## **Bar Council, July 2018**

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