QC Appointment Scheme – Character, Conduct and Integrity

Introduction

1. This paper is issued by QCA, on behalf of the Bar Council and the Law Society. The paper canvasses possible changes affecting the current process for dealing with issues relating to character, conduct and integrity in the appointment process.

Summary

2. The professional bodies propose that the definition of the "working with others" competency should be amended to make clear that it is intended to cover all the behaviours which are expected of QCs in relation to their professional practice, with a corresponding amendment to narrow the definition of "integrity" competency to matters of true integrity. The professional bodies also invite views on the extent (if at all) to which unsatisfactory behaviour which does not attract criminal or regulatory sanction should be taken into account in the appointment process.

Background

3. In addition to demonstrating excellence in understanding and using the law; written and oral advocacy; working with others; and diversity, the appointment process requires applicants to demonstrate excellence in integrity. Integrity is defined as "is honest and straightforward in professional dealings, including with the court and all parties", and the Competency Framework includes "always behaves so as to command the confidence of the tribunal and others involved in the case" and "acts in professional life in such a way as to maintain the high reputation of advocates and Queen's Counsel" amongst the examples of the sorts of behaviour applicants would be expected to demonstrate.

4. However, experience of the scheme has shown that there are some practical difficulties in dealing with the integrity competency. There is also some uncertainty as to how far it is appropriate for the appointment process to take into account information about unsatisfactory conduct by applicants which did not attract criminal or regulatory sanction.

5. The professional bodies consulted on possible changes to the present arrangements for dealing with integrity, character and conduct in May 2017. It has become apparent that those proposals did not command general support. Accordingly, this paper considers an alternative approach to tackling the practical difficulties in operating the current provisions.

Character, Conduct and Integrity in the Appointment Process

6. It is a commonplace that it is essential for all advocates to demonstrate integrity. An adversarial court system cannot operate efficiently unless the courts are able to trust the advocates before them. This requirement applies in principle to all advocates, but it is especially significant so far as Queen's Counsel are concerned because the courts traditionally place special reliance on Queen's Counsel.

7. The Selection Panel has established detailed guidance about the approach it takes to matters of character, conduct and integrity. This is published as part of each year's Guidance to Applicants.

8. Under the Panel's present policies, applicants are not likely to be recommended for appointment in the following circumstances:
   - They have an unspent criminal conviction of a significant nature (this would include any events of dishonesty, or of drink driving).

- They have been found guilty of significant regulatory breaches, or a series of less significant regulatory breaches, in recent years.
- They are subject to an outstanding bankruptcy order, or an Individual Voluntary Agreement which has not been discharged.

9. The Selection Panel does not at present take any account of wider notoriety, for example arising from allegations in the media about an applicant's personal life, unless such matters lead to criminal or regulatory sanctions. Nor does the Selection Panel take any account of complaints from dissatisfied clients, or from partners or ex-partners. Indeed, any such allegations (which do sometimes arise) are not forwarded to the Selection Panel at all. The QCA secretariat tells the informant that the Selection Panel considers only criminal and regulatory findings and that any complaint should thus be made to the relevant police force or regulatory body as appropriate.

10. Operationally, the Selection Panel considers issues of character, conduct and integrity separately from the other competencies. The reason for that is to ensure that a doubt expressed about whether an applicant demonstrated a lack of integrity in the way they conducted a case does not influence the Panel's conclusions about the degree to which the applicant has satisfied the other competencies.

Gathering Information about Character, Conduct and Integrity

11. Whereas applicants are required to provide evidence of the extent to which they meet the other competencies, applicants are assumed to satisfy the integrity competency unless there is evidence to the contrary.

12. Information relating to character, conduct and integrity is obtained in four ways:
    - Applicants are asked on the application form to list convictions, regulatory findings, findings of negligence, and financial matters such as bankruptcy and IVAs; and to report any other matter which might affect the applicant's standing or reputation or could affect their suitability for appointment as QC.
    - QCA carries out checks with the regulatory bodies for lawyers in England and Wales, and with the Legal Ombudsman, on the basis of the consent to such checks from the applicant which is required as part of the application process.
    - Assessors are asked whether they have any evidence suggesting that the applicant may not satisfy the integrity competency.
    - The list of applicants is sent to the Heads of Division and other senior judges asking if they or any of the judges in their specialist area are aware of any concerns relating to the integrity competency arising in respect of any applicant.

13. The QC appointment system does not include checks of criminal records (nor of HMRC). The view has been taken that any criminal matters will come to light through the requirement to self-report and the checks which are carried out with regulators (to whom any criminal matters are reported) whilst the appointment system does not seek to take account of any issues concerning compliance with obligations to pay tax which fall short of a conviction or pending prosecution.

Problems with the Present System

14. The present arrangements for receiving information from the professional regulatory bodies work well, and there is no reason to suppose that the Selection Panel is unaware of the relevant regulatory record of applicants when considering whether to recommend for appointment.

15. However, the invitation to assessors to indicate any matters of concern under the integrity competency has proved difficult to operate in practice. Partly as a result of concerns about the way in which the pre-2005 QC appointment system worked, it is a fundamental principle of the present scheme that such matters cannot be taken into account unless the applicant has been informed of the issue and given an opportunity to respond. That inevitably discloses the identity of the assessor, and it is therefore necessary to obtain the assessor's consent before the matter is put to the applicant. In practice, for entirely understandable reasons, assessors very rarely give such consent. Assessors generally prefer instead to delete the comment, or to recast it as going to

advocacy or working with others. Indeed, in the last five years, there has been only one occasion on which a matter has been put to an applicant following its inclusion in an assessment.

16. Similarly, the checks with the senior judiciary have led to the identification of only two issues in the last five years. On neither occasion had a complaint been made to the relevant professional body. Nor was there any clear evidence from the judgement of the court that the judge had made a finding that the applicant concerned had engaged in conduct which demonstrated a lack of integrity on the part of the advocate. On both occasions the applicant provided a credible response to the matter raised. Accordingly, the Selection Panel did not feel it could properly hold either allegation against the applicant concerned, and one of the applicants was subsequently appointed.

17. In the absence of a finding by (or even a reference to) a regulatory body, or a comment in a judgement of the court, it is impossible for the Selection Panel to resolve these matters. The Selection Panel and the QCA Secretariat are not equipped to deal with contested matters of fact; nor would it be appropriate for them to seek to do so. Accordingly, the Selection Panel has since last year made clear these limitations when seeking input from the senior judiciary and has suggested that reports under this process be limited to matters of true integrity as generally understood.

Possible Future Approach

18. In the professional bodies' view, the difficulty experienced at present may in part be a result of an inappropriately wide definition of integrity in the relevant competency. At present, the competency not only covers matters of dishonesty, but also of behaviour which might cause a court to lack confidence in an advocate which falls short of the ordinary definition of integrity. The special provisions for dealing with integrity established by the professional bodies when the new system was introduced – canvassing views from judges other than those listed by the applicant in their application, and enabling applicants to see and respond to comments from judges and assessors – may be appropriate for matters of true integrity, but they are less clearly appropriate for conduct which, albeit undesirable, falls short of that.

19. This is not intended to suggest that such behaviours by an applicant are irrelevant to consideration of whether they should be appointed QC. On the contrary, it is imperative that the judiciary and all involved with the court process can continue to have the fullest possible confidence in QCs. That means that behaviours which fall short of the frankness expected of advocates, or which do not demonstrate the sort of co-operation with the court and with other parties which is expected, ought properly to be taken into account when the Selection Panel is considering applications for QC, even if the behaviours concerned did not attract professional regulatory sanction. However, in the professional bodies' view, it would be preferable for such conduct to be brought within the "Working with Others" competency by appropriate amendment to the definition of that competency, rather than to be dealt with under the integrity competency. The professional bodies thus propose to amend the "Working with Others" competency to cover these matters.

20. The professional bodies also propose to make a corresponding amendment to confine the "Integrity" competency to matters of true integrity as generally understood. The professional bodies recognise that this would mean that the scope of the material on which the senior judges are asked to draw concerns to the attention of the Selection Panel will be to some extent narrowed. However, as noted above, the Selection Panel has made clear it will not hold against applicants matters raised through this process which go wider than true integrity. Accordingly, the change in definition will in practice make no difference to the value of the checks made with the senior judiciary each year.

21. Views are invited from members of the profession, members of the judiciary and others on the questions of:
    - whether it is appropriate for the QC scheme to require applicants to demonstrate all the behaviours expected of QCs, even where the applicant has not been the subject of any regulatory sanction for failure in that regard;

- if so, whether that is best dealt with by appropriate amendment to the "working with others" and "advocacy" competencies.

Unsatisfactory Behaviour which does not attract Regulatory Sanction

22. The professional bodies also wish to consider how far behaviour outside the area of advocacy should be taken into consideration in the QC appointment process. The professional bodies believe it is important to uphold high standards of conduct and behaviour in those appointed as QCs. In their view, it is clearly right for the appointment process to take into account criminal convictions, and matters which have attracted regulatory sanction, whether they arise from advocacy or not. The professional bodies also consider it appropriate for applicants to be asked about complaints to the Legal Ombudsman, negligence claims against them, bankruptcies and IVAs, and Directors Disqualification Orders. The extent to which matters of that sort should act as a bar to appointment should be determined by guidance issued from time to time by the Selection Panel, subject to any overall directions from the professional bodies.

23. The question which arises is the extent to which matters which do not fall within those categories should be taken into account. The Selection Panel cannot directly take account of cautions in criminal matters, because under the Rehabilitation of Offenders Act, cautions become spent immediately, and (in contrast to the position for judicial appointments) there is no exemption for the QC appointment process from the provisions of the Rehabilitation of Offenders Act. Accordingly, it would clearly be contrary to the policy of the Act for the QC appointment process to seek to take such matters into account indirectly.

24. The application form for Queen's Counsel already asks applicants "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?" One difficulty with this approach is identifying the sorts of matters which ought to be reported in answer to this question, and how the Panel should be expected to verify answers.

25. Racist, sexist, or homophobic behaviour would certainly fall within this category, and would be considered by the Selection Panel as being inconsistent with the need to demonstrate excellence in the diversity competency. Similarly, bullying or harassment would be considered in the context of the competency for working with others. But it is difficult to see what matters beyond that could properly be taken into account in the absence of criminal or regulatory sanctions. One of the issues, therefore, is the extent to which conduct which might render an applicant unsuitable for appointment would need to be elaborated in more detailed guidance.

26. Such guidance might also need to set out how the context of any such behaviour would be taken into account. Recent instances of sexual harassment of a junior colleague or of homophobic remarks would clearly be relevant, even if they had not attracted regulatory sanction. At the other end of the scale, youthful comments on social media which may seem offensive against current standards may be felt to be less relevant.

27. At present the process relies on self-disclosure by applicants. Perhaps not surprisingly, applicants very rarely mention matters of this sort either in answer to a question on the application form or indeed at interview. In 2017, only two of the 272 applicants in 2017 mentioned a matter – and in both cases it was a matter which did not properly come into that category at all. There is also the question of what sanction might be applied if it emerged subsequently that a successful applicant had failed to mention an issue of this type. Because the QC designation is conferred by way of Letters Patent issued by the monarch, it is difficult for it to be withdrawn. On present thinking, it can be withdrawn only in the case of behaviour which is so egregious as to attract a custodial sentence.

28. The Commissioner for Public Appointments has recently issued guidance on due diligence in making appointments. While QCs are not public appointments, the professional bodies have considered whether there are lessons from the Commissioner's approach. The Commissioner noted the difficulty in drawing up precise guidance about what is proportionate in due diligence and checking of candidates. He recommended a 'trip wire' trawl of social media activity to alert a Department to potential

problems which could then be put to the candidate at interview. While that may be practicable for the small number of candidates short-listed for a public appointment, it would be impossible for the much larger numbers of applicants for QC who are invited for interview – over 180 in the 2017 competition. The Panel and the Secretariat simply do not have the resources to do that, even if it were considered appropriate.

29. One possibility would be to introduce a stage under which Heads of Chambers or Senior Partners of firms were consulted about applicants. They would not be asked to supplement the information about the degree to which the applicant satisfied the "understanding and using the law" or "written and oral advocacy" which had been gathered through first-hand evidence provided by judicial, practitioner and client assessors. But they would be asked whether there was anything in the applicant's conduct which made him or her unsuitable for appointment. This could cover, for example, a complaint of sexual harassment which had been resolved informally without being referred to the applicant's regulatory body. However, such matters would plainly need to be put to the applicant, with an opportunity to respond. That might (as with the present integrity competency) substantially reduce the willingness of Heads of Chambers and Senior Partners to report the matter.

30. There is also a serious question as to whether it is right in principle for Heads of Chambers and Senior Partners to be invited to comment on applicants in this way. Furthermore, introducing a process of this sort would make it impossible for applicants to keep the fact of their application confidential from their Head of Chambers or Senior Partner, as some wish to do.

31. There do not appear to be any easy answers to this issue. The professional bodies invite view as to:
    - the extent to which unsatisfactory behaviour outside the field of advocacy which attracted neither criminal nor regulatory sanction should be taken into account in considering applications for Queen's Counsel;
    - how such behaviour should be defined, and what additional guidance might be needed;
    - the way in which the Selection Panel should seek to gain information about any such matters.

Unsatisfactory Behaviour by Existing Queen's Counsel

32. At present, there is only very limited provision for removing the QC designation once it has been granted. This is partly a consequence of the fact that the designation is granted by way of Letters Patent issued by the monarch, and the designation can thus only be removed by revocation of the Letters Patent. In practice, this has happened only once this century, in the case of an advocate who was sentenced to imprisonment after having been appointed QC.

33. This is not to suggest that there is a major problem of inappropriate behaviour by serving QCs – it appears that there have been only five cases over the last three years in which the Bar Standards Board took disciplinary action against a QC, in none of which was the sanction any greater than a reprimand and a modest fine. However, in none of those cases was any consideration given to the question of whether it was appropriate for the advocate to continue to hold the QC designation.

34. On the one hand, it could be argued that it is right to make a distinction between the position before and subsequent to appointment as QC, and that once the designation has been granted, it should not be removed unless and until the advocate's professional regulator has excluded the advocate concerned from the profession. On the other hand, it could be argued that QCs should be expected to maintain the high standards required for appointment throughout their careers, and that if they fail to do so, they should be at risk of the designation being revoked. The professional bodies invite views as to which approach is preferable.

35. The professional bodies have not at this stage explored with the Crown Office whether it would be possible to make arrangements under which the QC designation could be revoked more readily, but they would be grateful for views on whether or not it is desirable in principle to make such a change.

Responding to the Consultation

36. Responses to this consultation are requested by 31st July. Responses should be sent to Russell.wallman@qcappointments.org. If the professional bodies decide to go ahead with the proposed changes, they intend that they should be implemented in time for the 2019 competition.

Queen's Counsel Appointments
On behalf of the Law Society and the General Council of the Bar
April 2018