QC Appointment Scheme – Character, Conduct and Integrity

Response to April 2018 Consultation Paper

A. Introduction

Who we are

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of some 1.300 members handling the full breadth of Chancery work at all level of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. Chancery work is that which was traditionally dealt with the Chancery Division of the High Court of Justice, but from 2 October 2017 has been dealt with by the Business and Property Courts, which sit in London and in regional centres outside London. The B&PCs attract high profile, complex and, increasingly, international disputes.

3. Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial and business law. As advocates members are instructed in all courts in England and Wales, as well as abroad.

Our response to the Consultation

4. This response has been written by a working group comprising both juniors who are of a level of seniority at which they might be considering applying for silk and silks already appointed under the current appointment process[1]. The practices of the members of the working group are relatively diverse, although all fall under the Chancery umbrella, and the group included women and BAME members. Accordingly, we believe the views expressed below are likely to be representative of a substantial majority of members of the Chancery Bar Association (ChBA) as a whole.

5. By its April 2018 Consultation Paper, ('the ***Consultation Paper***'), the QCA has invited views from ChBA on the following matters:

   (1) Whether the 'Working with Others' competency should be re-defined to make clear that it is intended to cover all the behaviours that are expected of QCs in relation to

[1] Chair: Andrew Twigger QC, Amanda Tipples QC (Chairman of ChBA), Alexander Learmonth, Eason Rajah QC (Vice Chairman of ChBA), Tom Robinson, Steven Barrett, Siân Mirchandani.

their professional practice.

(2) Whether the 'Integrity' competency should be correspondingly re-defined (and narrowed) to reflect only matters of "true integrity".

(3) The extent to which (if at all) unsatisfactory behaviour which does not attract criminal or regulatory sanction should be taken into account by the QCA.

6. Our view, in summary, is that the case for changing the process in the way proposed by the Consultation Paper has not been made out.

7. The reasons for this view, in outline, are:

(1) As to (1) above, there is an irresolvable conflict between the fundamental principle[2] of the present scheme for QC selection that matters of concern relating to the 'Integrity Competency' cannot be taken into account unless the applicant is informed of the issue and given an opportunity to respond, ('the ***Fundamental Principle***'), and the absence of adequate resources or a system to equip the QCA Secretariat ('the ***QCA***'), and the Selection Panel, ('the ***Panel***'), to deal with contested matters of fact.

(2) As to (2) above, the attempt to create a sub-category of "true integrity", so as to encourage and enhance reporting of 'lesser matters' that are not truly reportable instances of 'lack of integrity' (or which amount to matters which are reportable but were not in fact reported) is unprincipled and contrary to the recently emergent case law from the Court of Appeal[3] on the definition of integrity, and which bodies are best placed to assess it.

(3) The proposals for inclusion in the QC selection process of 'unsatisfactory behaviour', falling short of behaviour that warrants criminal or regulatory sanction are not appropriate because (a) the QCA is not equipped to deal with such matters; (b) it invites a 'two tier' approach to reporting on lack of integrity which undermines the existing standard; (c) if it results in the applicant not being afforded an opportunity to respond, it offends the Fundamental Principle.

B. The Fundamental Principle

8. It is assumed that there is no intention or wish to amend or abandon the Fundamental Principle. If there was any such intention or wish, we would strongly oppose it. The fairness and

[2] The paper presented by the QCA states that this "fundamental principle" of the present QC Appointment scheme was developed in part due to concerns about the way in which the 'pre-2005' QC appointment system worked.
[3] *Wingate v SRA* [2018] EWCA Civ 366.

transparency of the QC selection process must be upheld and enhanced, for it reinforces the reliability and quality of the QC appointment as an internationally recognised mark of excellence.

9. There exist already four means by which information about an applicant's Character, Conduct and Integrity are obtained. However, it is reported that one of these means, namely the invitation to assessors to indicate any matters of concern under the Integrity competency, has proved difficult to operate because assessors have been unwilling to give consent to have the matter(s) they have raised 'put to the applicant'.

10. The reported difficulty effectively means the assessor wishes to inform the QCA of matters which might influence the Panel as to an applicant's suitability for QC appointment, but that assessor does not wish to have those matters reported to the applicant, or, crucially, responded to by the applicant. This offends the Fundamental Principle. The proposal would obviously lead to a lack of transparency and a corresponding lack of trust in the fairness of the QC appointment process.

11. If it is believed that assessors would be encouraged to report matters (which are not already 'caught' by the four means for reporting information on Character, Conduct and Integrity) because there would not follow an investigation and opportunity for the applicant to respond, then this is a powerful reason for <u>not</u> redefining the Integrity competency more narrowly, but reinforcing and clarifying the scope of the Integrity competency.

12. The proposal also cuts across the current rationale of considering issues of Character, Conduct and Integrity separately from the other competencies. If, as stated, the reason for that separation is to ensure that any questions of lack of integrity do not influence the Panel's conclusions about the applicant's ability to satisfy other competencies, the proposal for this change has to explain why this reasoning is now to be abandoned. The Consultation Paper does not provide any such explanation. The perceived wrong, to be addressed by the proposed change, has to be shown to be of sufficient scale[4] and significance to overcome this reasoning, and this has not been addressed at all by the Consultation Paper.

13. There is a danger that in seeking to address fears over the integrity of applicants, the system is changed to incorporate the problems with the old system which QCA has overcome. QCA has acknowledged[5] one of those historic problems was that "*decisions were thought too frequently to be taken on the basis of second-hand, anecdotal or inadequately evidenced*

[4] The Consultation Paper does not appear to demonstrate a problem of scale: the number of instances where assessors have indicated matters of concern is not provided, but the QCA reports only one instance where the assessor agreed to the matter being put to the applicant, in a five year period. The checks with the senior judiciary are reported to have generated only two instances in a five year period, and in both instances the applicant was able to give a credible response. Put simply, these figures do not indicate the perceived difficulty is a matter of such scale as to warrant the measures proposed to address it.

[5] See paragraph 14 QCA Consultation 'Listing of cases and Assessors' April 2018

information about applicants, rather than on solid first-hand evidence". It is important that the good work done by QCA, in removing the historic problem, is not now undone.

14. The more appropriate option appears to be to provide clear guidance to the assessors as to the breadth but also the seriousness of matters that fall within the scope of the Integrity competency. The assessors are anticipated to be able to understand the significance to the overall QC Appointment process of the Fundamental Principle; the nature of conduct that indicates actual 'lack of integrity'; the reason why such matters must be reported, but also the reason why they must be referred to the applicant. The QCA is at liberty and has the means to do this by including within its accompanying guidance documentation, reference to the critical passages of *Wingate*, (see below) and any other appropriate sources, including The Code of Conduct.

C. Meaning of 'Integrity'

15. There is no dispute that it is essential for QC applicants, as for all advocates, to be able to demonstrate integrity. The rationale for that requirement is also uncontroversial. The adversarial court system requires the courts to be able to trust the advocates before them, and the advocates owe their primary duty to the court.

16. Although not strictly a legal matter the appointment process undertaken by the QCA should be conducted with regard to the general and applicable principles derived from the case law.

17. For example, the courts know that advocates whilst owing their primary duty to the court, also owe duties to their client. It is well recognised by the courts that due to these obligations as well as the strictures imposed by privilege, the advocate is often unable to speak freely, particularly in their own defence. This is so well recognised and material a feature of advocacy that the CPR regime for wasted costs[6] allows for assumptions to be made in the barrister's favour if the client has not waived privilege.[7]

18. The QC selection process should have regard to and operate its processes in compliance with the applicable case law; it should not act contrary to that case law.

19. The QCA's proposal to attempt to define a narrower category of what is described as "true integrity" flies in the face of the case law which has recently emerged in the complex area of distinctions between dishonesty and integrity in disciplinary proceedings. In *Wingate v SRA* [2018] EWCA Civ 366, Lord Justice Jackson confirmed the breadth of matters which fall under the mantle of 'want of integrity', whilst reinforcing the need to remember the basis of

[6] CPR Part 46.8 Personal liability of legal representative for costs – wasted costs orders.
[7] *Daly v Hubner* [2002] Lloyd's Rep PN 461 (Ch), Etherton J.

integrity is how the profession provides its services to the public:

"*As a matter of common parlance and as a matter of law, integrity is a broader concept that honesty*[8] *…Integrity is a more nebulous concept than honesty. Hence it is less easy to define, as a number of judges have noted.*

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[9] *…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.*[10]

…

Integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse.

The duty to act with integrity applies not only to what professional persons say, but also what they do It is possible to give many illustrations of what constitutes acting without integrity. For example, in the case of solicitors:

i) *A sole practice giving the appearance of being a partnership and deliberately flouting the conduct rules (Emeana);*

ii) *Recklessly, but not dishonestly, allowing a court to be misled (Brett);*[11]

iii) *Subordinating the interests of the clients to the solicitors' own financial interests (Chan);*

iv) *Making improper payments out of the client account (Scott);*

v) *Allowing the firm to become involved in conveyancing transactions which bear the hallmarks of mortgage fraud (Newell-Austin);*

vi) *Making false representations on behalf of the client (Williams).*

[8] Paragraph 95
[9] Paragraphs 96-97
[10] Paragraph 97.
[11] It is worthy of note that this example given by Lord Justice Jackson suggests inadvertent or even negligently allowing the court to be misled would not amount to a want of integrity.

Obviously, neither courts nor professional tribunals must set unrealistically high standards, as was observed during argument. The duty of integrity does not require professional people to be paragons of virtue. In every instance, professional integrity is linked to the manner in which that particular profession professes to serve the public."[12]

20. *Wingate* is also relevant for Jackson LJ's comments on the bodies well placed to identify 'want of integrity':

"A professional disciplinary tribunal has specialist knowledge of the profession to which the respondent belongs and of the ethical standards of that profession. Accordingly such a body is well placed to identify want of integrity."[13]

D. Suitability of the appointment process

21. The QCA notes that the QC appointment system does not include checks of criminal records since the criminal matters will come to light by other means. The QCA also considers the Panel will be aware of the relevant regulatory record due to other reporting systems. These are instances of proper delegation of investigation of significant matters by the QCA to other suitably placed bodies.

22. The following questions arise if the QCA is proposing to take into account 'lesser matters' which nevertheless either go to the question of an applicant's lack of integrity, or unsuitability for QC appointment:

    (1) Is the QCA a 'body well placed to identify want of integrity'?

    (2) Is the assessor someone who is 'well placed to identify want of integrity'?

23. Without allowing and inviting the applicant to respond, the assessor can only give one side of the story. The significance of a QC appointment is such that the applicant should not be at risk of failure due to an incomplete investigation of a matter of concern based on a one-sided report from an assessor, who is not prepared to allow the applicant an opportunity to respond. The proposed system which invites this approach is obviously unfair and unacceptable for that reason.

24. There is a further aspect: if the assessor is aware of conduct that (in their view) indicates such a want of integrity as may influence the Panel, they are already encouraged and/or are already under an obligation to report this conduct to the Bar Standards Board, (BSB), pursuant to the

[12] Paragraphs 100 to 102.
[13] Paragraph 103.

'whistleblowing' provisions of The Code of Conduct, ('the ***Code***').[14] The Code requires a report to be made if there are 'reasonable grounds to believe that there has been serious misconduct'. The BSB is a body that is well placed to identify a want of integrity, and is well equipped to deal with reports of such matters. If the assessor did not report the matters to the BSB, the QCA should not allow itself to become a 'second tier' regulator for such reporting of 'lesser matters' which nevertheless are considered to be sufficiently serious that they may influence the Panel as to an applicant's suitability for QC appointment.

25. The proposal to adopt an imperfect means to capture what must be categorised as 'lesser matters', which nevertheless either go to the question of an applicant's lack of integrity, or unsuitability for QC appointment is very concerning. It contains no safeguards whatsoever; it means the assessor, operating with incomplete knowledge of the advocate's circumstances or instructions, can unilaterally report to the Panel on matters which fall below the legal threshold of actual 'lack of integrity' and which are based entirely on their own views, without the applicant ever being made aware. These issues, already concerning in their own right, are compounded by the QCA's self-stated lack of resources for dealing with contested matters of fact, and the QCA's reported fact that the incidence of such reports are low, leading to the conclusion, again, that the QCA is not a suitable body to deal with such matters.

26. For these reasons our views on the questions at paragraph 21 of the Consultation Paper are as follows:

    (1) No change to the current system is appropriate in this regard.

    (2) The structure and content of the current competencies appropriately addresses the need for QC applicants to demonstrate integrity, as properly understood, while at the same time complying with the Fundamental Principle. No change is appropriate.

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[14] rC66: *Subject to your duty to keep the affairs of each client confidential and also subject to Rules rC67 and rC68, you must report to the [BSB] if you have reasonable grounds to believe that there has been serious misconduct by a barrister or [others].*
rC67: *You must never make, or threaten to make, a report under Rule rC66 without a genuine and reasonably held belief that Rule rC66 applies.*
rC68: You are not under a duty to report serious misconduct by others if:
.1 you become aware of the facts giving rise to the belief that there has been serious misconduct from matters that are in the public domain and the circumstances are such that you reasonably consider it likely that the facts will have come to the attention of the [BSB]; or
.2 you are aware that the person that committed the serious misconduct has already reported the serious misconduct to the [BSB];
.3 the information or documents which led to you becoming aware of that other person's serious misconduct are subject to legal professional privilege; or
.4 you become aware of such serious misconduct as a result of your work on a Bar Council advice line.

E. Unsatisfactory behaviour which does not attract Regulatory Sanction

27. Much of what has been said above against the proposal regarding assessors' reports of 'lesser matters' which nevertheless go to the question of an applicant's unsuitability for QC appointment, can be applied equally to the proposals for Heads of Chambers or Senior Partners to make reports. We recognise and note, however, that this proposal does consider it to be "plainly" necessary for such matters to be put to the applicant. That speaks strongly against the proposal to encourage assessors' reports to the QCA which omits this fundamental stage.

28. The matters proposed to be 'captured' by this proposal are matters that do not attract criminal or regulatory sanction. This means, in effect, that the QCA would be setting itself up as an adjudicator of what amounts to 'lesser matters' which are nevertheless significant enough to influence (and prevent) a QC appointment. This amounts to a 'second tier' of professional, regulatory investigation or sanction. However, due to the matters already considered, and in particular the lack of resources, the QCA is ill-equipped to perform this task. It should not attempt to do so.

29. The same can be said relating to these matters as is stated above regarding the whistleblowing provisions of the Code. If the Head of Chambers or Senior Partner did not report to the BSB, the QCA should not allow itself to become a 'second tier' regulator for such reporting.

30. For these reasons our views on the questions at paragraph 31 of the Consultation Paper are as follows:

    (1) If "unsatisfactory" behaviour outside the field of advocacy has attracted neither criminal nor regulatory sanction then the QCA should not take account of it;

    (2) The difficulty of definition alluded to in this question is part of our reason for answer (1);

    (3) In view of our answers above, this question does not arise.

F. Unsatisfactory behaviour by Existing Queen's Counsel

31. The removal of an individual's QC designation after it has been granted would have a devastating effect. The likely impact on the individual's professional profile and standing is such that it would very probably be the end of their career at the Bar. With that grave consequence in mind, we consider it is necessary for this question to be considered only by the regulator, with the individual being afforded a full opportunity to contest matters, and reserved only for the most serious offences (criminal or regulatory).

G. Conclusion

32. The proposals to change the definition of the Integrity competency so as to only encompass matters of alleged "true integrity" (with the view to encouraging assessors to include under other competencies, their concerns relating to 'lesser matters' which nevertheless go to the question of an applicant's unsuitability for QC appointment) are unprincipled. They offend the Fundamental Principle that an applicant should be afforded the opportunity to address such concerns raised by an assessor. They most certainly should not be adopted.

33. On the question of unsatisfactory behaviour which does not attract regulatory sanction, we consider the conclusion has to be that particularly due to a self-stated lack of resources the QCA is not well placed to identify or deal with possible instances of want of integrity, and it should not attempt to deal with these 'lesser matters' in the manner proposed; nor should it allow itself to become what amounts to a 'second tier' regulator.

34. For all the above reasons, we strongly oppose the introduction of a change along the lines proposed in the Consultation Paper.

The Chancery Bar Association

27 June 2018