QC Appointment Scheme – List of cases and Assessors

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 as a whole.

5. 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. The current system is tried and tested. It is well understood by those considering applying for silk, and is widely regarded within the profession as a whole as both fair and fit for purpose. The Consultation Paper itself observes (in paragraph 12) that there is no reason to suppose that any more than a very small minority of decisions whether to appoint or not are ill-founded. We agree. That is a strong reason not to make adjustments. Furthermore, we believe there is a real risk that the adjustments

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proposed will result in *less* satisfactory outcomes, rather than being any kind of improvement.

6. As we understand it, the Consultation Paper has been prompted by essentially two concerns:

    (1) The first concern is that applicants have "too great a control over the evidence" submitted to the Selection Panel, enabling them to "cherry-pick" the assessors from whom evidence is sought and to exclude assessors who might have witnessed "sub-par performances". It is suggested that an impression is created which is not sufficiently "rounded" or is "less-well balanced" than it might be.

    (2) The second concern is that the appointments made are insufficiently diverse and, in particular, that women are under-represented. This appears to be linked with a criticism of the practice of applicants contacting assessors in advance, which is said to be something that women are more reluctant than men to do.

B. Cherry-Picking

7. The suggestion made in the Consultation Paper seems to be that applicants are able to suppress evidence which would show that they are less suitable for appointment than they otherwise appear to be. We do not believe that is right. And even if it is right, we do not believe that the proposal would satisfactorily address the issue. On the contrary, it will create serious unfairness.

8. We do not believe the current system gives any realistic opportunity to cherry-pick, at least for Chancery practitioners. The requirement to list 12 cases of substance, complexity or particular difficulty or sensitivity over the last three years of practice is one which many Chancery practitioners must already work hard to satisfy. This is certainly not because we do not have such cases, but is partly because a significant number of cases within the Chancery field never reach Court, and partly because when such cases do go to Court, they tend to occupy a very substantial amount of time, both in Court and in preparation. There is rarely any opportunity for a Chancery practitioner to leave off the application form a substantial case because the applicant might be concerned about a "sub-par performance".

9. We accept, of course, that it is not currently necessary to list every judge, opponent and client as an assessor, so there is inevitably a limited opportunity for choice. But the requirement to list, for example, eight judges out of the 12 cases does not realistically enable an applicant to pick a pool of wholly unrepresentative assessors. If there are eight judges willing to say that an applicant is excellent (a sample of two thirds of the total), there is no proper basis to suspect that the applicant is hiding something untoward by choosing not to list the other four.

10. The fact that 90% of assessors described applicants as "Very Good" or "Excellent" merely shows that the Bar continues to nurture a significant number of high quality practitioners. It does not mean that the assessments are unreliable, even less that the evidence has been manipulated and skewed by the applicants. In any case, assessors include considerably more information in their assessments than just whether they would give an overall rating of "Very Good" or "Excellent" and we doubt that these overall ratings are an indication of some

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fundamental flaw in the process.

11. We do not accept, therefore, that there is a problem which requires to be addressed. But, in any case, the proposed solution suffers from a number of serious flaws.

12. First and foremost, the Consultation Paper makes a false assumption that everyone involved in every case of substance would be an assessor on whom the Selection Panel could and should fairly rely. There are any number of reasons why this is not so. By way of example, some opponents are inexperienced, some are incompetent and some cannot bring themselves to describe others as "excellent" or "very good", even when those descriptions are merited. Even where an opponent is honourable and able, it is the nature of the job barristers do that sometimes relationships between opposing counsel are strained during a case. It is sometimes necessary, in the interests of a client, to criticise an opponent's submissions, or pleadings, or handling of witnesses. It is human nature that this can lead to hurt pride, or resentment, or a view that someone must be stupid. There is nothing unreasonable in permitting an applicant to omit such an opponent as an assessor, and it would be intolerable if an applicant could not do so, especially if the application were to be refused on the basis of assessments by those who are themselves incompetent or, worse, vindictive. The Selection Panel cannot possibly be expected to assess the reliability of the assessor, and the applicant may never have the opportunity to redress the balance (particularly if not invited to interview because of the negative assessment).

13. It is not only opponents who might be unreliable assessors, although the Consultation Paper indicates that the assessment of opponents is of considerable value (paragraph 24, final bullet). Whilst it can be expected that most judges are well able to give an impartial and balanced assessment, this is not always something about which an applicant can feel confident. Sometimes barristers know they have a terrible case, but it is their job to argue it. Judges do not always welcome such arguments and they can sometimes express disagreement in strong terms which may leave an applicant in some doubt as to whether the judge understands the predicament the barrister was in. Moreover, there are times when it is a barrister's duty to tell a judge firmly that he or she is wrong about something, or even to submit that the judge is not behaving in a properly judicial manner. Indeed, there are well-known cases in which judges have been criticised on appeal for behaving in an inappropriate way during a hearing. Such instances are fortunately rare, but judges are human beings and it cannot simply be assumed that every judge will be able to take a dispassionate approach to providing an assessment.

14. So far as client assessors are concerned, it is an unfortunate fact of life as a barrister that solicitors are full of praise when a case is won but often far more critical when it is lost. It is not uncommon for a solicitor to have unrealistic expectations of the power of advocacy and to assume that failure is the result of poor performance, rather than a fundamental problem with the case. Not every solicitor involved in a case of substance will realistically be able to give a truly impartial assessment.

15. If the proposal were to be adopted, it is impossible to see how this risk that a "rogue" assessor might be relied on by the Selection Panel can be addressed. It would obviously be invidious to ask applicants to identify potentially unfair assessors in advance and it would be impractical to ask applicants to respond to any negative comments in any assessment once received. It

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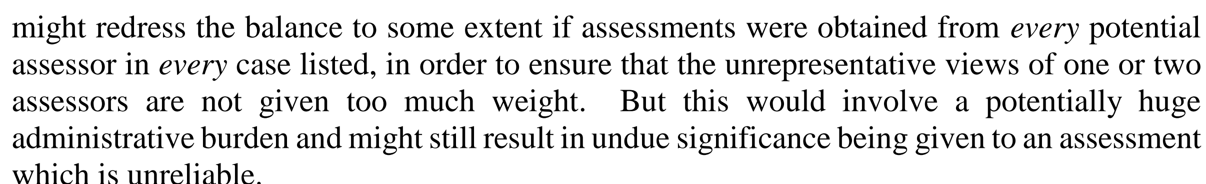

might redress the balance to some extent if assessments were obtained from *every* potential assessor in *every* case listed, in order to ensure that the unrepresentative views of one or two assessors are not given too much weight. But this would involve a potentially huge administrative burden and might still result in undue significance being given to an assessment which is unreliable.

16. It seems to us that the present requirement to list eight judicial assessors out of 12 cases, along with six practitioners and four clients, strikes an appropriate balance, ensuring that a sample can be taken from a reasonably wide range of potential assessors.

17. The second flaw in the proposal is that the requirement to list every case of substance up to a maximum of 20 will inevitably encourage a perception that those who cannot list 20 cases are less likely to be successful. As mentioned above, many Chancery practitioners must work hard to list 12 cases; it is likely to be impossible for some (and perhaps for most) to list as many as 20. Of course, the problem can to an extent be addressed by assuring applicants that it is not necessary to list 20 cases. But that will not entirely remove the problem, since it will still leave an imbalance between those who *are* able to list 20 cases and those who are not. A school of thought would be bound to evolve suggesting that it is better to list a full 20 cases, if at all possible. This might indirectly discriminate against women, who are probably more likely than men to have taken parental leave during the three years before applying, and may therefore find it more difficult to list 20 cases.

18. A related issue is that the 20 case maximum could, when applied to applicants from *any* field of practice, work injustice. The Consultation Paper points out, for example, that applicants specialising in criminal law are likely to appear in considerably more cases than those with a Chancery practice (paragraph 24, second bullet). We agree. But if criminal practitioners have significantly more than 20 cases of substance, they will still be able to "cherry-pick" (assuming this is possible at all), whereas Chancery practitioners will not. The current requirement to list 12 cases is at least broadly achievable by practitioners from all fields and has worked well in practice for over 10 years.

19. A further issue is that the deterrent effect of the time and expense involved in applying for silk should not be underestimated. In our experience, many applicants take a week or more filling in the existing form. If it were necessary to give information about 20 cases, rather than the current 12, the time required could easily double. That may well be enough to put off potential applicants who might be well qualified, but who do not have sufficient time available (for example, because they provide child care, another aspect which could result in indirect discrimination against women). Cost, too, is an issue. Presumably the need to read longer forms and consider a wider range of potential applicants will result in recruitment of additional staff by the QCA, with an additional cost to applicants. And if the time and expense of applying is increased, the incentive to *re-apply* will be reduced, thereby removing a safety-valve which currently gives some assurance that excellent applicants who are mistakenly overlooked one year are not prejudiced in the long term.

20. Another problem arises from the suggestion that a failure by an applicant to list a case of substance in which they had appeared could be expected to be fatal to an application, in the absence of a convincing explanation (paragraph 22). The definition of a case of substance

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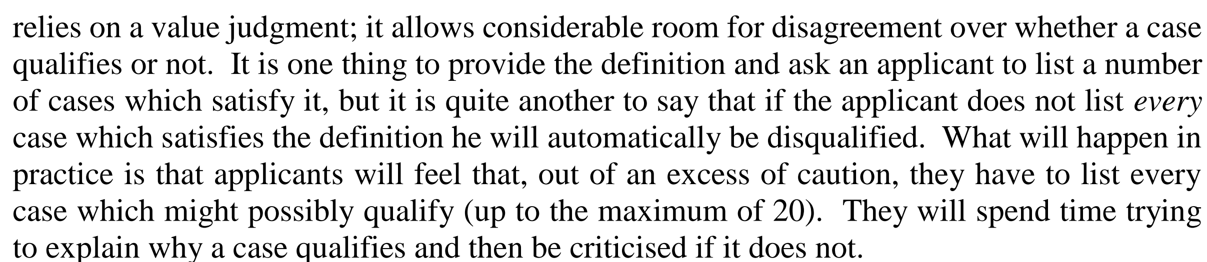

relies on a value judgment; it allows considerable room for disagreement over whether a case qualifies or not. It is one thing to provide the definition and ask an applicant to list a number of cases which satisfy it, but it is quite another to say that if the applicant does not list *every* case which satisfies the definition he will automatically be disqualified. What will happen in practice is that applicants will feel that, out of an excess of caution, they have to list every case which might possibly qualify (up to the maximum of 20). They will spend time trying to explain why a case qualifies and then be criticised if it does not.

21. For these reasons, we do not believe the proposal in the Consultation Paper will result in the Selection Panel receiving more reliable evidence about suitability for silk than they do at present. On the contrary, we believe that the proposal will result in the Panel receiving potentially unreliable evidence, with no means of assessing its reliability, leading to some applicants not being recommended who deserve to be. We also believe that the proposal is unfair on Chancery practitioners and is likely to discourage some potential applicants, particularly women.

C. Under-representation of Women / Contacting Assessors in Advance

22. We wholeheartedly support all efforts to increase diversity amongst those appointed, including increasing the number of women and BAME advocates.

23. In our view, however, there is a logical disconnect between the (alleged) problem of cherry-picking and the under-representation of women or some categories of BAME advocates. Moreover, we do not understand how the proposal in the Consultation Paper is intended to solve the diversity issue; indeed, we have suggested above ways in which the proposal might make the diversity problem worse.

24. It seems to us that if applicants are manipulating the evidence of their suitability by cherry-picking (which we doubt, for the reasons given above), there is no good reason to think that this is more prevalent amongst men than women, or amongst any particular group of applicants.

25. The link suggested in the Consultation Paper between the under-representation of women and the cherry-picking issue is that women are said to be more reluctant than men to approach assessors in advance, particularly judicial assessors, to ask if they are willing to provide an assessment (paragraph 19). We note that the Consultation Paper says that this suggestion is based on research by the QCA. We would be interested to see such research, and we have real doubts about its reliability. Amongst our working group, many confessed to some level of nervousness about contacting judges to ask them to be assessors, but that nervousness was fairly evenly spread amongst men and women. Nervousness in such circumstances does not seem to us to be surprising; it is human nature. But we suspect that, in truth, it is impossible to make reliable generalisations about one group of applicants being more susceptible to such nervousness than others.

26. We are also surprised by the Consultation Paper's criticism of the practice of contacting assessors in advance (paragraph 16). In our view, it is common courtesy to ask if someone is

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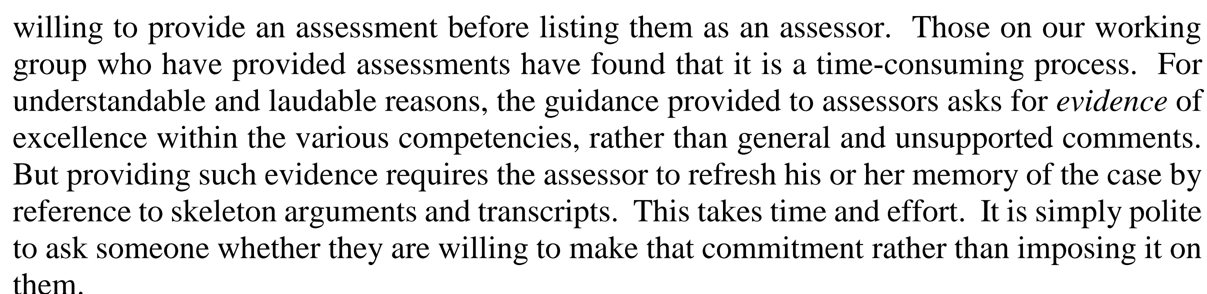

willing to provide an assessment before listing them as an assessor. Those on our working group who have provided assessments have found that it is a time-consuming process. For understandable and laudable reasons, the guidance provided to assessors asks for *evidence* of excellence within the various competencies, rather than general and unsupported comments. But providing such evidence requires the assessor to refresh his or her memory of the case by reference to skeleton arguments and transcripts. This takes time and effort. It is simply polite to ask someone whether they are willing to make that commitment rather than imposing it on them.

27. Moreover, some assessors may be listed by a number of different applicants. We suspect that applies particularly to judges. Unwillingness to be listed as an assessor need not be a hint of any kind as to the level of support the assessor might give to the applicant; it may simply arise because the assessor has already agreed to provide assessments for a number of other applicants. Furthermore, the decision to apply for silk is a significant one in someone's career. It is common, and prudent, for a prospective applicant to discuss the pros and cons with those who might end up being listed as assessors. We believe it would be a retrograde step if this were to be discouraged.

28. In our view, any concern about women being less willing than men to speak to judges in advance can be best addressed by reassurance given in the guidance to applicants that it is normal to approach judges and that they are generally happy to be approached. The guidance could, for example, include a draft email or letter to a judge which the applicant can adapt as appropriate. We wonder whether one approach to the diversity issue as a whole might be for the QCA to hold annual open sessions to which all those of an appropriate level of call are invited, explaining the process and giving encouragement to any who have concerns about any aspect of the application, including approaching judges.

29. Thus, whilst we repeat that we are in favour of any steps which will increase diversity amongst those appointed, we are strongly of the view that the proposal made in the Consultation Paper will not achieve this and, moreover, may make the situation worse. Whilst it is impossible to be confident about any generalisation, it seems to us that women are more likely to have had a career break than men, which might make it more difficult to list 20 cases, and might be more likely to be put off by the amount of time required to fill in an even longer form than at present.

D. Conclusion

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

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