



**RESPONSE TO CONSULTATION ON POSSIBLE CHANGES TO
THE QUEENS COUNSEL APPOINTMENT PROCESS**

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 4,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country.

The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all

guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

4. It is understood that the CBA probably represents more applicants to the QCA Scheme than any other specialist Bar association. The CBA has consulted its members on the possible changes including junior and senior members and successful as well as unsuccessful applicants.

Possible changes to QCA Scheme – Listing of cases and Assessors

Response

5. The CBA considers the possible changes to the listing of cases and assessors as fundamental changes to a process which for many criminal practitioners is a considered and lengthy process engaged in for a number of years in order to achieve the highest quality mark for their profession.
6. The CBA applauds the designers of the new scheme's determination to do all they can to ensure not only that the appointment system works to maximise diversity of appointments, but also to ensure that all those appointed under the new system have a good understanding of diversity issues as they affect the legal profession. The CBA is pleased that the QCA is committed to that

approach. However, from the soundings that the CBA has taken from its membership the CBA considers the extension of the Listing of cases from 12, as it is currently, to all significant cases is too onerous on applicants and potentially counterproductive in addressing issues of diversity.

7. For an applicant to keep detailed records for 3 years of every case they are involved in in order to satisfy the criteria would mean an applicant of necessity would have to plan their application at least 3 years prior to making it and retain a considerable amount of information. Those already on the cusp of making an application will therefore be prejudiced where they have not kept records of every case during the last 3 years but worked on the basis that they need only record their 12 most significant cases.
8. The CBA welcomes incremental improvements to the appointment scheme but considers that such a wide-ranging and potentially onerous change such as this would discourage applicants, particularly minorities and those of limited means at the Criminal Bar. We have found women in particular and practitioners of limited means have less choice with respect to accepting instructions, indeed most continue to abide by the “cab-rank” rule and accept cases that may seem insignificant according to the Scheme’s criteria.

9. The QCA will be aware of the research conducted by the Bar Council which revealed concerns expressed by female barristers regarding application for appointment to Queens Counsel (“*Snapshot: The Experience of Self-employed women at the Bar*”, published November 2015 – “Snapshot”). The CBA reminds the QCA of the findings of that research in which women who had successfully gone on to apply for Silk (or Judicial appointment) referred to having needed the necessary confidence to apply despite active discouragement from clerks regarding sufficiency of work. Clearly the financial implications of successful appointment play their part in discouraging female applicants in particular but we have found this concern expressed more widely at a time when the independent Criminal Bar is financially in crisis. According to the ‘Snapshot’ research confidence is clearly an important factor. Those that did apply found the process time-consuming but far less daunting than they expected and welcomed improved transparency over the application process. They did however share their concerns over the requirements for referees, a particular issue for those with less court work, who have recently taken a career break, or who work flexibly. The CBA cannot see how requiring details of every case conducted over 3 years will address these concerns, make the process less onerous or fairer for this group of applicants in particular.

10. The CBA considers that to require all cases over 3 years to be included in the application would risk discouraging female and less affluent applicants who may have a more mixed practice or fewer cases conducted over the 3 years due to caring responsibilities or flexible working. If a minority applicant considered there were too many “insignificant cases”, that applicant would be discouraged from applying for appointment despite the fact that they had ability, talent and could demonstrate the required competencies from the significant cases that they had conducted. Given that confidence is key to making the application, less confident practitioners as identified in Snapshot and elsewhere may be less likely to apply and we believe therefore that diversity would be directly impacted.

11. In addition, an applicant with a mixed practice conducted in various courts around the country is at a disadvantage when set against a practitioner conducting most of their cases in one court centre. This is because Judge Assessors seeing Counsel regularly in one place are more likely to have an accurate and more detailed memory of that advocate as opposed to a single appearance. It is likely that Judge Assessors may be more willing and able to provide a positive reference for an applicant that they see regularly. This is particularly the case when considering Prosecution Counsel as opposed to Defence Counsel. The CBA would ask the QCA to consider researching the

number of recent appointees that are engaged in Prosecution work as opposed to Defence work at the Criminal Bar to ensure fairness.

12. The CBA agrees with the professional bodies view that the application process is fundamentally sound and agree with the recent comments from the Lord Chancellor as to the system being “robust, rigorous and based on competence and merit”. We therefore do not consider that such a wide-ranging change is required.

13. The consultation’s concern that applicant’s have “too much control” over the cases listed or “take hints” from prospective referees is to suggest that applicants are somehow taking advantage of the system. The CBA feels that this is an unjustified criticism where applicants are invited to present their best work as supported by those that have experienced it. Further the suggestion that women are so lacking in confidence and naïve as to not “sound out” assessors is not something we have seen among those we have consulted. Indeed if this is a concern of the professional body we consider it should be a requirement that applicants do not contact assessors at all rather than require more of them to consult.

14. It is important to appreciate that unsuccessful applicants seeking to re-apply and barristers aspiring to apply have an appreciation of the current system as described above, and this is reflected in an increase in the numbers of successful minority and female applicants. We do not think the current Scheme therefore requires the significant change proposed but should be maintained in its current form for a longer period before identifying any “tweaking” that is needed.

Possible changes to QCA Scheme – Character, Conduct and Integrity

15. The CBA has considered the consultation document with respect to this area of the application process. We are encouraged to note that there have been very few, if any, issues with the character, conduct and integrity of our members with respect to the application process or appointment. We would suggest that in the absence of significant issues regarding this aspect of applicants' behaviour it would be inadvisable to make an amendment that could potentially discourage applicants who already have to deal with a lengthy and detailed process.

16. The CBA would urge the QCA to trust the other professional bodies and assessors' judgment rather than through the application process requiring further material or evidence on this subject. In a profession already at a low

ebb due to financial constraints and ever increasing workload, to even hint that individuals may have character, conduct or integrity issues is likely to reduce even further applications in our view.