MAY 31, 2018

Queen's Counsel Appointments: assessment process validation

FINAL REPORT

JENNY CREWE
Jenny Crewe Consulting Limited

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Executive summary

The Queen's Counsel (QC) appointments scheme is generally well-regarded by applicants, the judiciary and other court users. In part the current scheme benefits from the contrast with its deeply unpopular predecessor, but it also stands up well to comparisons with other similar processes. Selection Panel members with experience of other high-level appointment schemes are particularly impressed with the rigour with which the appointments process operates.

The QC appointments scheme is viewed as being more transparent, more accessible to a wider group of applicants, more accountable and more rigorous than the previous appointments scheme. Although controversial for a few, the competencies relating to working with others and diversity have had a positive impact. This is both in terms of highlighting the importance placed on QCs to act as role-models for constructive working relationships and their responsibility for fostering a more diverse legal profession at all levels.

New Statement of Purpose

Legal work has changed considerably since the revised appointments scheme was established in 2005. Significant cuts to legal aid funding, together with advances in technology and online resolution, means that in civil work an ever-greater number of cases are settled by negotiation or arbitration, and opportunities for oral advocacy in the traditional sense of cross-examination in court, have diminished.

The appointments scheme has sought to keep abreast of these developments whilst keeping within the spirit and rubric of the 2005 framework. This is reflected in the Guidance provided to applicants and in the deliberations of the Selection Panel (QCA, 2017 (a)). However, to ensure that all prospective applicants are aware of that flexibility and to ensure the continued relevance of the scheme to the legal sector, this message needs to be communicated to assessors (particularly the judiciary) and the legal profession from which applicants are drawn. This should take the form of a clear and unambiguous Statement of Purpose which would guide the operation of the scheme.

Excellence

The QC appointments scheme seeks to identify and reward excellence in advocacy, yet nowhere is excellence defined or described. The Competency Framework sets out what applicants should be able to do, rather than the level at which they should be able to do it. Nevertheless, the Selection Panel operates with a high-level of consistency which is testimony to the dedication and community of practice which develops each year within that group.

However, the Selection Panel is only a part of the picture in relation to the identification of excellence. Without a high-level description of excellence, it is very difficult to envisage that all participants in the process (applicants, assessors and Selection Panel), have a consistent notion of what it entails.

The appointment scheme is extremely dependent on the assessors (in particular the judicial and practitioner assessors) for the assessment of excellence in advocacy. The variety of practice area specialisms of applicants means that the Selection Panel (whether lay or legal) relies heavily on assessors' judgement. Whilst most assessors take the task very seriously and map their experience of the candidate to the Competency Framework, others are extremely brief or employ a high degree of artistic licence. Consequently the utility of the reports can vary significantly. It therefore follows that improving the quality of these reports must be an absolute priority for QCA.

Operational consistency

Although there is a high degree of consistency in the decision-making of the panel, it was evident from the interviews and the sample of applications that there are different approaches to grading, recording and interviewing.

This is in part the consequence of the Selection Panel and Secretariat endeavouring to adapt the operation of the scheme to make it work in changing circumstances. However, there are several instances, such as the choice of questions at interview and the recording of decision-making, where there should be greater standardisation across the piece.

1. Introduction

The current QC appointment process has been in place since 2005, with some modifications made in 2006. It was introduced after the old system was abolished as a result of dissatisfaction with the way it operated. The new scheme aims to be more transparent, and to treat applicants from all backgrounds fairly. In recent years, the numbers appointed have remained relatively steady with around 100 QCs appointed each year (see Fig.1). Around 5% of appointments are solicitors, with the majority being from the Bar.

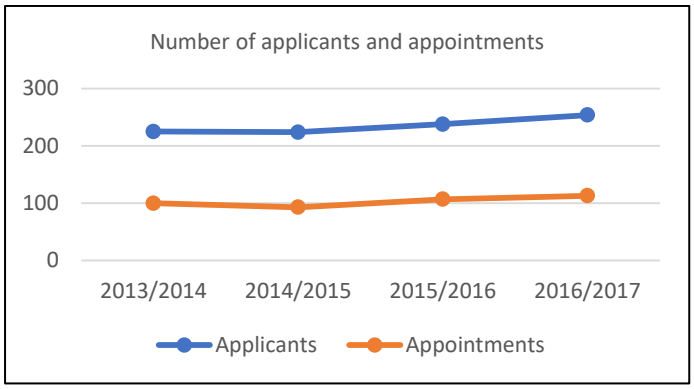

Fig.1 Source: QCA, 2017(b) and (c), 2016, 2015

The designation of Queen's Counsel is widely recognised as indicating that an individual has a high-level of advocacy skill:

> *"The award of Queen's Counsel is for excellence in advocacy in the higher courts. It is made to advocates who have rights of audience in the higher courts of England and Wales and have demonstrated the competencies in the Competency Framework to a standard of excellence."* (QCA, n.d. (a))

According to the QCA (and its founding documentation), the appointments process:

> *"serves the public interest by offering a fair and transparent means of identifying excellence in advocacy in the higher courts"* and *"provides for the identification of the very best advocates rigorously and objectively and promotes fairness, excellence and diversity".* (QCA, n.d. (b))

The purpose of this review is to evaluate the current appointment process, ascertain the extent to which it achieves these aims and to determine whether improvements can be made to its validity.

What is meant by validity? The term validity is used here in the technical sense and means the inferences which can be reasonably drawn by stakeholders about the process given its aims. For example, how confident can applicants be that they are being treated fairly, and how confident can those working within the court system be, that the right standard of applicant is being appointed as QC?

2. Current situation

The selection process or 'competition' takes place between March and December each year. The process is set out below.

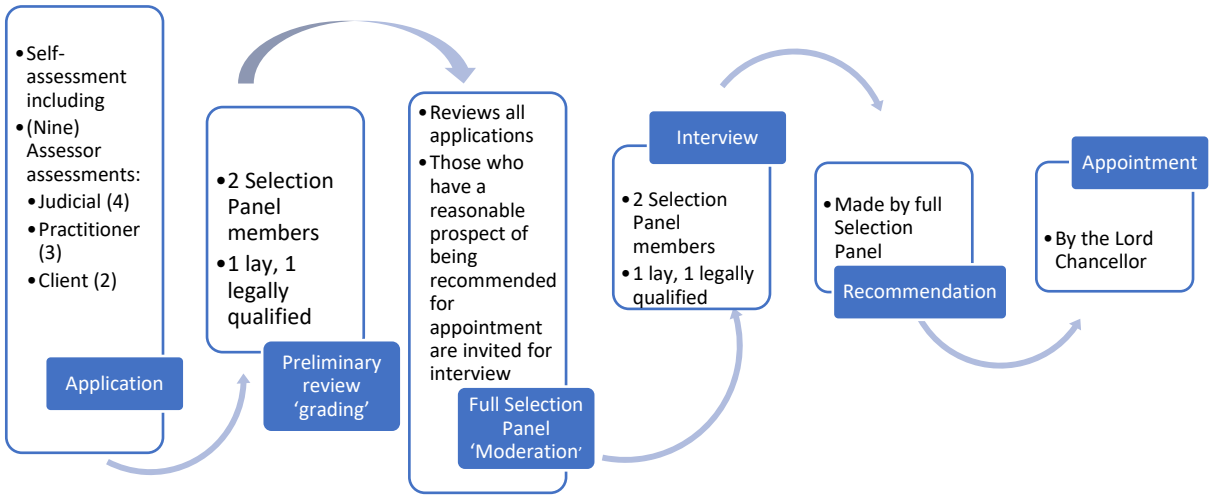

Fig.2

3. Methodology

This report draws on a structure of validation familiar to assessment practice, and considers the following issues:

	Validation category	What this means
1	Cognitive validity	▪ What is the assessment seeking to achieve? ▪ Does it achieve it?
2	Context validity	▪ Are the processes transparent and fair?
3	Scoring validity	▪ Is the scoring and decision-making reliable?
4	Test taker characteristics	▪ Does the assessment process favour some candidates over others?

The report is based on a combination of sources:

- Interviews with six Selection Panel members

- Desk-based review of available information i.e. forms, guidance, reports and the results of the 2017 surveys of both assessors and applicants[1]
- Desk-based review of 15 applications

Each of the current Selection Panel members who have experience of at least one competition was invited to participate in a semi-structured interview. Each member accepted and was interviewed either by telephone or in person. The interviews typically lasted 45-60 minutes. The questions asked are set out at Annex 1.

The operational documentation and surveys which were analysed and consulted are referenced at Annex 3.

Finally, the 15 applications provided by the Secretariat comprised:

- Three applications which were rejected at Moderation Panel
- Five applications which were rejected following the Interview, and
- Seven applications which were recommended for appointment

This sample was analysed to ascertain patterns in grading pair marking, quality of assessor reports, consistency and utility of commentary provided by the Selection Panel and the variability in the length of interview and questions asked. Anonymised extracts of this analysis are at Section 7.

[1] Quotes of, and references made in relation to, assessors and applicants are all taken from the results of the 2017 surveys of assessors and applicants.

4. A Statement of Purpose - what is the appointment scheme seeking to achieve?

The purpose of the appointment process is to assess and identify excellence in advocacy. The Competency Framework establishes the competencies which are expected under each of the five headings:

A Understanding and using the law
B Written (B1) and oral (B2) advocacy
C Working with others
D Diversity
E Integrity

> *"To merit recommendation for appointment all competencies must be demonstrated to a standard of excellence in the applicant's professional life. In general the Selection Panel will be looking for the demonstration of the competencies in cases of substance, complexity, or particular difficulty or sensitivity.* Competency *B (Written and oral advocacy) must be demonstrated in such cases."* (QCA, 2018 (a))

The appointments process involves two stages of assessment:

1. Nine assessments (akin to references) provided by judicial, practitioner and client assessors; and
2. Interview

The overarching purpose of the QC appointments scheme is ostensibly clear. However it was apparent from the interviews, sample of applications and survey reports, that in practice there was a breadth of opinion about the purpose of the appointments scheme and the applicants it was intended to attract. These differences are to an extent moderated in relation to the Selection Panel by the full panel meetings but are clearly evident in comments made by assessors, and in the scoring, style and content of the interviews. Inevitably this has a potential impact on the reliability of the results and fairness to the applicants.

What is meant by reliability? "reliability relates to the stability of the assessment, for example, whether on different occasions or using different markers the same outcomes are rated in the same way." (Cambridge Assessment, 2017)

For an assessment such as the QC appointments, very high levels of reliability should not be expected due to the importance of professional judgement which is inevitably subjective. Nevertheless, the objective should remain to achieve the highest level of consistency which is compatible with this style of assessment.

One issue which arose frequently both in the interviews and in the surveys, was the relative balance to be accorded to written and oral advocacy. Some panel members wondered whether the QC scheme should be moving towards a system which *more explicitly* acknowledged that some very able advocates could be conducting very little court-based advocacy. It was felt that this would reflect changes in litigation practice which means *inter alia* that civil advocacy increasingly takes place outside the court room. It was felt this would also broaden the pool of potential applicants.

One Judicial and Practitioner assessor noted:

> *"The real difficulty is for those senior juniors with large and high value civil practices which rarely get to court. Their practices merit silk but there is no way they can get the assessors to appraise in the way required."*

Another remarked:

> *"a first-class candidate was repeatedly told that he had not spent enough time in court when the reason was that he (as he absolutely should have done) was settling cases that would otherwise have ended in court. In the end he was (much too tardily) awarded silk."*

The Guidance to Applicants emphasises that the Panel is aware of these issues and is flexible in its approach (QCA, 2017(a) p16). However, whilst some assessors and Selection Panel members are alive to the changing legal environment, others retain a much more traditional view of what it means to be a QC. Without a clear Statement of Purpose, it is very difficult to ensure with any kind of confidence that assessors, Selection Panel members, applicants, potential applicants and clients are in agreement about what the QC designation means.

Panel members gave some indication of what they think the scheme is looking for:

- *"In his/her specialist area they are acknowledged to be an expert in their field and able to provide the right level of advice/service on the law in order to truly support the legal objectives of their client … if they are in an area of law which requires a lot of court appearances, they should be in court at the highest level for that particular practice and handling the most difficult cases. If they don't go to court very often they need some evidence of occasionally going to court or at least evidence that they are able to advocate for their particular view in whichever environment they operate e.g. in chambers/advisory capacity – and that's where it gets a bit woolly."*
- *"Able to argue a point, able to lead a judge and jury in a direction, about being able to see the whole picture, being able to describe a 'fine line' to jury or judge, minimising things that do damage, maximising best things. It's not about being a fine orator"*
- *"barristers are expected to be able to do both written and oral very very well, it's not for [the Selection Panel] to say 'don't worry if you haven't got oral advocacy"*
- *"It's not just advocacy because it's excellence in all 4 competences which is quite important when it was set up and agreed by Bar Council and Law Society"*
- *"QC badge designates excellence in the profession, taking profession in wide sense including all barristers and solicitor advocates – it's about excellence and role models in the profession, not just people who are brightest in knowing about the law, it does require a slightly wider set of capabilities"*

It seems to be an area where there is some uncertainty amongst Panel members as to how much flexibility there should be in the system. One Panel member said *"there needs to be a set of rules*

and that's what they need to abide by. If it makes it impossible for some people to apply, then that may well be the case".

The underlying unease was best summed up by one Panel member who wondered:

> *"whether there is an invisible barrier that they're not acknowledging; they're not interpreting who we're appointing wide enough in order to attract a wider field in the first place; particularly when they say it's a shame about London-centric or few solicitors – but that's probably because oral advocacy opportunities are fewer outside of London or for solicitors; that isn't a comfortable position. How can lawyers advance if they are not in London?"*

There was no support for a rubric which rigidly set out how much written or oral advocacy work was expected in a particular area. However, there was support for the Panel to be (as is currently the case) well-informed by the Secretariat of the relative balance which might be expected in a particular area of law. One Panel member felt that perhaps more time could be spent at full meetings understanding the various fields, but that the process needed to be pragmatic too.

In light of the changing legal environment and the desire to ensure that excellent practitioners, whatever their practice area and wherever their location, can be recommended for silk it seems that the time has come for the professional bodies to review the purpose of the scheme with a view to developing a potentially broader Statement of Purpose to encourage a wider group of applicants. The professional bodies should consider, *inter alia*, whether it would be in the public interest for the scheme to recognise specialisms and in particular, whether the need for 'excellence' in both written and oral advocacy should be modified or qualified in some way.

5. Excellence – What does it mean? How is it assessed?

QCA documentation is full of references to 'excellence' as being the standard to which all of the competencies must be evidenced. However, 'excellence' is not defined[2].

It is not entirely surprising that 'excellence' has not been defined given that describing and measuring the higher-level knowledge, skills and attributes which might represent excellence is notoriously difficult. This is particularly so in relation to advocacy skills given the inevitable subjectivity surrounding any judgement.

The issue therefore arises, not just as to whether the Selection Panel are consistent amongst themselves, but whether their view of 'excellence' equates to that of the assessors, applicants and other court users.

There are in fact two 'level' or 'standard' hurdles which applicants must meet to be recommended for silk. In addition to excellence there is "substance, complexity, or particular difficulty or sensitivity" (often shortened simply to 'substance'). There are examples of cases that might be of 'substance' included in the Guidance to Applicants (QCA, 2017(a) p12), and applicants are instructed to describe how their 'role in the cases of substance has involved challenging and substantial work'. In summary the applicant must demonstrate:

[2] There seems to be an assumption that the Competency Framework defines excellence, however for the most part it describes the knowledge, skills and attributes which could be expected of a lawyer with much less expertise and experience. The Guidance to Applicants states that there should be *"strong and consistent evidence of excellence"* (QCA, 2017(a), p2) but this is not included in the Competency Framework.

- Strong and consistent evidence of excellence in each competency, in cases of substance (complexity, or particular difficulty and sensitivity) where their role has involved challenging and substantial work

Individual assessors are asked to determine themselves what constitutes 'substance':

> *"Precisely what constitutes a case of substance, complexity, or particular difficulty or sensitivity is a matter for your own judgement, but please explain why you consider a case falls into such a category."* (QCA, 2017 (d) p3, para. 11)

This does make it very difficult to be sure with any level of accuracy, that over 1000 assessors and ten Selection Panel members have the same expectations in mind let alone potential applicants considering whether to apply. This is corroborated by both assessors and Panel members:

- *"Although you have a general common-sense idea of the standard that you are measuring against, it is not always easy to judge the standard and more guidance would be helpful."* (Judicial and Practitioner Assessor)
- *"The marking scheme provided is in many ways subjective: I have heard some assessors say they would never score a 5 because that is rarely warranted. I think more guidance on 'excellence' (since this is the standard) would be helpful."* (Judicial assessor)

We know that nearly 90% of assessor respondents thought the standard against which they were expected to assess applicants was clear[3]. However, it is not clear how they would describe that standard and therefore whether the standard they think is clear is anything approximating to the standard of other assessors (or indeed the Selection Panel). Given some of the comments made by assessors both in their assessments and the Assessor survey, it seems likely that there are some significant differences in terms of their interpretation of the QC standard.

For example, it is evident from comments made that there are differences of opinion around whether the QC designation is purely for the absolute best, or whether there is a threshold standard with a spectrum of excellence thereafter:

- *"My only reservation is that his oral advocacy does not always have the level of finesse and incisiveness of the best silks"* (Judicial assessor)
- *"clearly good enough to become a QC. My only reservation would be whether this application is a little too soon"* (Judicial assessor)
- *"his oral advocacy was very competent but was not (yet) at the top level"* (Judicial assessor)

The review of the candidate sample and views expressed by Panel members suggests that there is a spectrum of excellence, but that some assessors and interviewers may be expecting a higher standard and marking candidates down if they do not perceive them to meet these sometimes very subjective qualities.

Some of the comments on excellence provided by the Selection Panel are useful to consider, partly as they emphasise a variety of different approaches, but partly as they may form the starting point for an overarching description of excellence:

[3] 90% represents 567 responses; 10% (60) disagreed (QCA, 2017 (e)).

- *"QCs must be rounded – polite, understanding, working with others; excellence is about how you conduct yourself; combination of what assessors have said and how they can bring that knowledge, experience skills and empathy into their broader practice"*
- *"It's quite difficult to define what excellence looks like but there is a reasonable sense of you know it when you see it"*
- *"The best applicants can explain difficult issues very well and others immediately lapse into impenetrable jargon – although some cases are very difficult to explain"*
- *"It's identifying excellence within the legal profession for the public benefit. It's to identify the leaders in that field of practice. Primarily it is about advocacy, however QCs don't just advocate in the highest courts, they should be giving incredibly intelligent and strategic high-level written advice and oral opinion to clients and consumers of legal services face to face. There are skills that rest with the QC which are outside the court room environment."*
- *"Unqualified support from assessors at the highest level that is evidence based; understated comfort in one's own field of law; exudes confidence, empathetic, articulate, presents well, demonstrates grasp of cases, when your read their self-assessment they have explained everything so well and they are playing down very difficult legal constructs, that's when you are looking at excellence. But you only see this a handful of times."*
- *"There is a spectrum of excellence" – but they are looking for a wider field so standard is a little lower"*
- *"Whose view is 'true excellence'? The one who says it most compellingly, based on deep insight into the person, that strikes at the heart of that person's level of ability".*

This comment from a panel member neatly sums up the conundrum facing the Selection Panel:

> *"Notions of excellence shift from one year to another, some keep up and others don't; they establish a common level without exactly articulating it. The level is held in unstable equilibrium and it shifts, their job is to bring it back into a common understanding; it's a difficult challenge"*

Reliability is about ensuring consistency of standards year on year. This comment suggests that because there is no definition of excellence, the goal posts shift each year. The Selection Panel is in a very difficult position attempting to determine where 'excellence' should lie.

A clear articulation of excellence should therefore be developed which flows from the Statement of Purpose. This should describe the level to be achieved by a QC at the bottom of the spectrum of excellence although it may provide greater clarity if the 'stellar' QC was described as well. This would make it clear that there is a spectrum of excellence and that assessors should not be dismissing candidates simply because they are not the absolute best.

Selection Panel

The Selection Panel is made up of ten individuals comprising five lay members and five lawyers. The Chair is always a lay member of the Panel and one of the lawyer members is a retired member of the judiciary.

The recruitment process for lay members is by open recruitment. Lay applicants are shortlisted by the Chief Executive, together with colleagues from the Bar Council and the Law Society. Shortlisted applicants are interviewed by the QCA Directors (the Chief Executives of the Bar Council and the Law Society) together with the Chair of the Panel. The Bar Council and Law Society each appoint two members of their respective branches of the profession, usually after an open recruitment process.

The retired senior judicial member is appointed by the two professional bodies, often with the benefit of a suggestion from the retiring judicial member. Each member serves a term of two years initially, extendable to a maximum of five years.

The Selection Panel is the decision-making body. It collectively determines which candidates will be recommended to the Lord Chancellor for appointment based on their review of the assessors' reports and of the interviews. They have to work cohesively as a team, in a robust and defensible manner. Therefore, the competence of individual panel members, is fundamental to the scheme's ability to identify and reward excellence.

There were two issues which recurred in relation to the constitution of the Selection Panel itself:

(a) Who is appointed and how; and
(b) Whether they (lay or legal members) can meaningfully probe applicants on the law if they are not familiar with the candidate's specialist area.

Unsurprisingly, amongst the Selection Panel, there was full support for the 50:50 membership of the panel between lay and lawyer members. The view was expressed that unless you were going to have a panel that was tailored to the applicant (seen by every member as impossible), then the current combination of lay and lawyer input worked well.

It was felt that lay involvement was in the public interest and ensured that the scheme remained in touch with its wider societal impacts and responsibilities.

> *"The QC appointments process belongs to the whole of society not just lawyers; it's as important to a civilian as to lawyers. It is also important that it has a lay chair. It preserves a sense of good governance and accountability and keeps the legal profession in check!"* (Selection Panel member)

From the panel interviews, it was clear that there was a tendency for lawyer members to defer to lay members on competencies C and D, and for lay members to defer to the lawyers on competencies A and B. There is also an overall expectation that competencies A and B need to be largely evidenced by the assessors' reports given that applicants cannot proceed to interview without at least a '6' in both of those competencies. Therefore, whilst it is possible for grades to improve at interview (QCA, 2017 (f) p8 para 23), in relation to competencies A and B any movement – especially downwards – is marginal.

Greater awareness of this might assuage the concern articulated by some candidates and assessors who feel that being interviewed by someone who is not familiar with their practice area is a nonsense:

> *"I question how sensible it is for non-lawyers to participate in the selection process. The standard for appointment is described as "excellence", and it seems to me that this is more likely to be accurately assessed by those within the various branches of the legal profession. It has often struck me that this may well explain the incidence of "false positives" (i.e. surprising appointments or failures to appoint)."* (Judicial and Practitioner Assessor)

Whilst there were applicants who felt that they benefited from having an interviewer who knew their practice area, the review of the sample of applications revealed some instances where applicants were given a much tougher interview because an interviewer knew their area. This variability impacts on the perceived fairness of the process and was clearly of concern to Selection

Panel members. This issue is returned to below in relation to the consistency of interviews, however it seems clear from the above that there should be greater transparency around the role of the Selection Panel, and that the proposed move to a more standardised competency-based interview (as indicated by the training being provided to Selection Panel members) could allay some concerns of stakeholders about the membership of the Selection Panel. It may also re-emphasise the importance of the assessors' reports for the identification of excellence in competencies A and B.

Quality of assessors' reports

> *"The successful operation of the QC appointment system depends to a large extent on the information which is provided by assessors who have recent professional experience of seeing the applicant in practice."* (QCA, 2017(d) p2, para.4)

This feels like an understatement. The main source of evidence for the Selection Panel, in particular in relation to competencies A and B, is provided by the assessors. This is logical as they are the ones who are best placed to assess 'excellence' and have seen the candidate's legal skills in practice. In principle this is the best evidence available.

Many assessors take this role very seriously, regarding it as a 'privilege' and an 'essential part of the process'. However the value of what is submitted varies enormously. Whilst the Guidance for Assessors asks for *"around 10 lines of typed text on a competency"* (QCA, 2017(d) p1), this seems to be rare (at least from the judicial assessors) and the Selection Panel is left with the difficult task of determining the weight which should be given.

The variance in the assessors' reports is due to:

- Time pressures
- Differences of opinion over excellence and substance
- Lack of commitment to the process
- A weak or partial assessment due to the assessor having limited exposure to the candidate (both in terms of occasions and in terms of the different competencies), or limited recollection of the candidate

As the system currently stands, the credibility of each application rests on the voluntary input of well over 1000 untrained assessors[4], who are asked to participate in a competency-based process with which they may be unfamiliar.

Selection Panel members were acutely aware that the appointment process was only as good as the assessors and the view was expressed that ideally the panel would put greater weight on the assessors' reports and less on the interview. There appear to be two key issues here, (a) the quality, and (b) the objectivity of the reports.

In relation to quality, a number of judicial assessors expressed their discomfort at being asked to provide assessments for candidates with whom they had had very little contact:

[4] In 2017, over 1,744 letters were sent to assessors requesting 2,625 assessments and 2, 447 assessments were received. (QCA, 2017 (f) p5 para 11)

- *"If it was possible to allow candidates to reduce the number of judicial assessors to those who they felt confident could provide a useful assessment that would reduce the burden and I suspect produce a better outcome."*

- *"I think that no assessor should be asked for an opinion unless the applicant has appeared before them at least twice in two different matters save in exceptional circumstances."*

One practitioner recommended: *"Requiring the candidates to provide documents relating to the case(s) in respect of which the assessor is being asked to provide an assessment. So, for example, copies of relevant skeletons, pleadings, opening* statements etc.". Applicants are currently told that they may send an assessor a copy of a written argument as an aide-memoire (QCA, 2017(a), p20), but it is not a requirement.

In relation to objectivity, there were some panel members who felt that because the candidate can choose and nominate assessors, the panel is presented with almost universal praise for the candidate. This makes it very difficult to distinguish one candidate from another, but also means that if one assessor has a more critical style than others, they may unwittingly have a terminal impact for the candidate as the panel may consequently over-emphasise any criticism given its short supply:

> *"although a single adverse assessment will not deprive an applicant of interview if there is otherwise sufficient evidence of excellence, a single adverse assessment may be a key factor in a decision not to recommend appointment"* (QCA, 2017 (f) p20)

Conclusions

A recurrent theme throughout this report is the need for clarity around the specific purpose of the QC appointments scheme. This is the starting point for the development of all forms of assessment, and QC appointments are no different. Once there is clarity then the types of assessment, requirements of assessors and panel members, and resourcing priorities become clearer.

The use of two forms of assessment (i.e. assessor assessments and interview) rather than relying on one, adds to the reliability of the scheme and should be retained. However, a lack of understanding persists among applicants and assessors about the priorities accorded to the different competencies at each stage. This has given rise to criticism (not least from the judiciary) and impacts on the credibility of the scheme. For example, if it was clearer that the priority for assessors is competencies A and B, and to a lesser extent C, but that the interview played a larger role in relation to Competency D, then the assessors could focus on A, B, and C, and the interviews focus more on C and D.

At present the scheme is largely dependent on unpaid, untrained assessors who have variable commitment to the process and to individual candidates. This, coupled with the lack of definition of the standard to which they are being asked to assess, makes for an imperfect basis on which the Selection Panel are asked to make their judgements.

There are definite improvements which can be made to the processes utilised by the Selection Panel and these will be dealt with later in the report, but if 'excellence' is to be validly and reliably assessed, increased emphasis must be placed on improving the assessments provided by the assessors.

Recommendations

I. A Statement of Purpose for the appointments scheme should be developed which provides clarity in particular in relation to oral and written advocacy, the relative weight of the competencies and jurisdiction.

II. A broad description of 'excellence' should be developed to provide the benchmark level descriptor for the scheme.

III. (As an anticipated consequence of I. above) consider reducing the number of Judicial assessors from four to three to (a) encourage a broader range of candidates, (b) reduce the burden on judicial assessors, and (c) potentially improve the quality of report

IV. Given the limitations on the Selection Panel for the direct assessment of 'excellence', more effort should be made to improve the quality of assessments provided to them. This could be achieved by providing assessors with exemplar competency-based responses, requiring candidates to submit documents related to the cases to help jog the memory of assessors, and providing applicants with a matrix which enables them to highlight which competencies they expect an assessor to be able to comment on.

V. Ensure rigour, parity and transparency across all appointments to the Selection Panel

VI. Communications (such as the Guidance for Assessors) should further emphasise that in general competencies A and B are primarily tested through the assessors, although for competencies C and D the interview plays a more significant part.

6. Operational consistency – Are the processes transparent and fair?

The focus of this section is on the information available to applicants and assessors. Consistency of grading and recording is dealt with in Section 7.

Despite a considerable amount of information being available to applicants and assessors, confusion persists. Some of this is due to 'Chinese whispers' but some of this is due to a lack of transparency around the actual operation of the assessment process or some information being mentioned in one document but not another (for example, that the panel are looking for strong and consistent evidence of excellence).

This issue is highlighted by the question of whether or not a candidate will fail due to a lack of 'excellence' in diversity, which was also considered in a recent Selection Panel paper (QCA, 2018 (b)). The perception (repeated by others) is well-articulated by these comments:

- *"So … the most outstanding advocate recognised in the land would fail to meet the current appointment criteria if they could only demonstrate evidentially a limited proactivity in furthering diversity. Is that failure to appoint in that example appropriate and just?"* (Successful applicant)
- *"…it is not correct to have this as a category of valuation apparently equal to all the others that relate directly (as this does not) to the ability of the candidate to do his job to the very high standard required."* (Judicial and Practitioner Assessor)

As the recent Secretariat paper shows, it is very unusual for a stellar applicant to be failed on either competency C or D. Indeed, and this was confirmed in the reviewed sample (see Section 7, Fig. 6 below), it would appear that stellar candidates may be permitted to meet a lower threshold than other borderline candidates in this regard. The following excerpt from an interview note suggests almost that words are being put into the interviewee's mouth in order to get them over the threshold "*We tried to get out of him how he allocated tasks and in essence he was saying he would….".*

The Secretariat paper suggests that the close correlation between high achievement on A and B and C and D may in part be because outstanding candidates are outstanding across the board. Whilst there is certainly evidence for this in assessment practice, this tends to be the case where you are testing similar things. Diversity and legal knowledge are very different constructs so it is less likely that the theory applies here.

As has been suggested in the paper, it is more likely that the Selection Panel *"mark more generously on Competencies C and D those applicants who are making the grade on A and B".* This is entirely understandable (as the paper states) because the aim of the scheme is to identify 'excellence in advocacy'. However, if this is how the Selection Panel marks candidates, the Competency Framework should be amended to indicate that 'excellence' is not required across the board and that for C and D, the Selection Panel is looking for something different such as proactivity, leadership or commitment.

It is clear from the surveys, assessments and Selection Panel actions, that this is a logical outcome, and is another example of the Selection Panel seeking to flex a competency framework which needs to be updated. However it would be better for the credibility of the scheme, for the guidance to assessors and applicants to be clear on this point.

Whilst a great deal of information is provided to both assessors and applicants, there appear to be plenty of rumours in relation to the process and grading scales. This is perhaps inevitable given their current complexity, and the fact that knowledge is patchy. For example this assessor appears to be confusing a 4 for an assessor rating (reflecting Very Good) with 4 for a competency, which would indeed mean the candidate did not progress to interview:

> *"I have heard that a candidate cannot succeed if he or she is marked lower than 4 in any area. If untrue, this myth should be dispelled. If true, this should be changed."* (Judicial assessor)

It is best practice to publish mark schemes. Indeed it is common at both professional and higher education level[5]. It would make sense for the rating scales to form part of a Handbook published on the website which would provide uniformity of information to all applicants (and potential applicants) of the appointment process. This would alleviate the risk of key pieces of information such as 'strong and consistent evidence of excellence' mentioned above, being found in some documents but not others. It should also perhaps reduce the need some feel to engage consultants to assist them with the process:

- *"A system that effectively requires candidates to engage a consultant (whether to complete the form, or to prepare for interview) is unnecessarily opaque as to what it is that is required from candidates, and restrictive for any who are unable to do so."* (Successful applicant)

- *"I think the guidance should be clearer and more transparent about how the application should be completed. For example, completed competency examples could be provided so that applicants have an idea of what is expected of them."*

- *"The guidance does not appear to reflect how applications are actually assessed. For example, nowhere does it say that you should include only one member of a tribunal - I was told that by the professional guide and this was confirmed by the QCA, but I would not have known otherwise. I was also surprised that my feedback stated "it is not necessarily fatal" to have limited court experience, when the guidance says that court or court equivalent experience is equally acceptable."* (Unsuccessful applicant)

There is a considerable amount of information currently available to participants and this information is fundamental to the transparent operation of the scheme. However there are inconsistencies in the information provided to assessors and applicants, which are counter-productive. This is in part due to the fact that in their professional lives, assessors and applicants are part of the same cohesive group.

Recommendation

I. A handbook[6] should be developed which provides greater uniformity in the information about the appointments process. This should include the information provided to assessors, applicants and the Selection Panel and should include the rating scales.

[5] See RCGP or University of Cambridge

[6] For each assessment, Cambridge Assessment creates a manual. This provides a scheme log and includes the detailed criteria and requirements linked to specific tests, setting out their different purposes, grading tools, types of assessment and operational processes. These change over time as improvements are made. See Cambridge Approach to Assessment.

7. Operational consistency - Is the marking consistent? Is the decision-making transparent?

The focus of this section is the approach taken by the Selection Panel to grading and interviewing candidates, although it does also consider the grading by assessors. Accordingly, this section draws mainly on the interviews with Selection Panel members and the desk-based view of applications.

By way of context, Fig. 3 sets out the various grades and scales against which the applicant is marked. Over the course of the selection process applicants are assessed and graded by the assessors, and these assessor reports are then graded by two members of the Selection Panel. The full Selection Panel then decides whether it agrees with the grading pair. Those who progress beyond this stage are invited to an interview conducted by two members of the Selection Panel (one being the same as the initial grading pair) and the results of the interview are then considered by the full Selection Panel. In addition, the Integrity Sub-Panel meets before the initial Selection Panel meeting. Fig. 4 highlights the number of individuals involved.

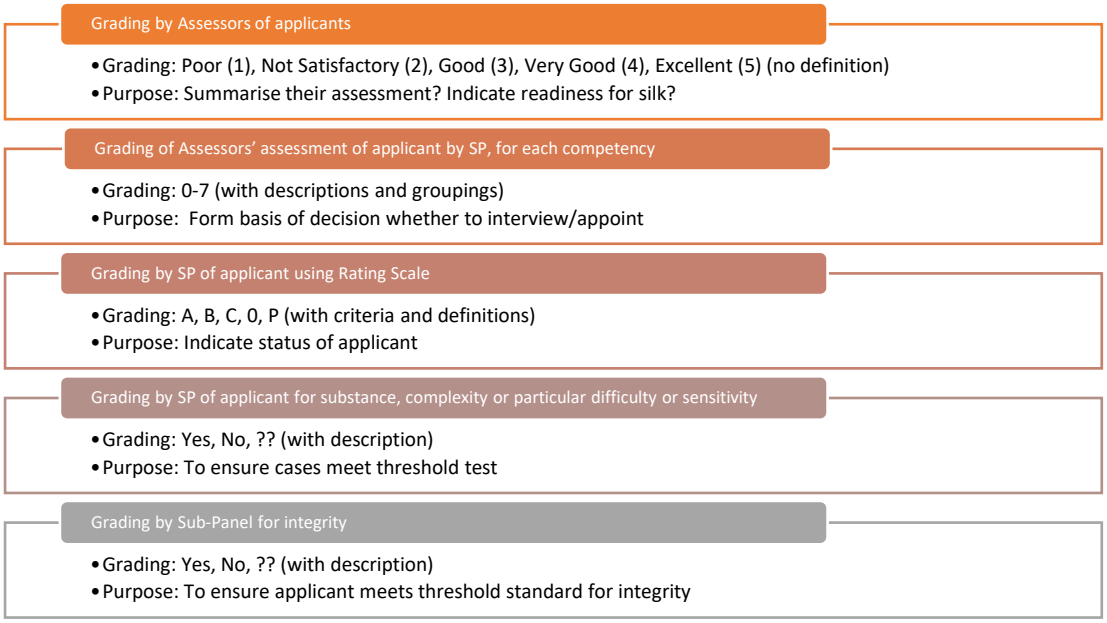

Fig. 3

Generally speaking in assessment terms the more assessors you have, the more robust the assessment. This is because the risk of error due to bias is reduced. One Selection Panel remarked: *"At no point can an individual hold complete sway, last year a recommendation by lead and support was reversed at panel".* The full panel meetings serve the purpose of ensuring that the Selection Panel applies a consistent standard to all candidates.

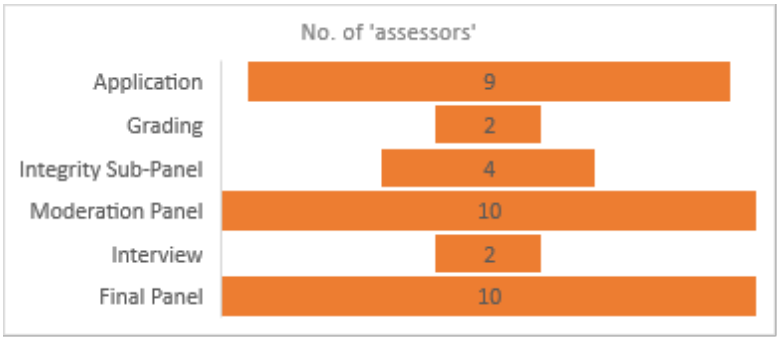

Fig. 4

Therefore, whilst the current QC appointment system may seem excessive to some, there is a logic to this given that the standard (as we have seen earlier) is opaque.

i. Assessors

The importance of the quality of the assessor reports is discussed in Section 5. Here we consider the consistency in the grading. All assessors are asked to comment on whether the cases were of substance and to evidence how the applicant meets the competencies. They are then asked to grade the applicant as Excellent, Very Good, Good, Not satisfactory or Poor and these are in turn translated into a numerical value with Excellent being a 5.

It is evident from analysis by the Secretariat that assessors have different notions as to what each of these designations means, and that occasionally they need to look back at previous years to identify an assessor's marking habits. One Panel member commented that sometimes the grading does not seem to match the rest of the report and they have to make their own judgement about what the assessor had in mind. For example, one assessor said: *"I would not put her in the highest category (and few are) but she is a very competent professional advocate in whom any court will have trust and confidence"*. This person was rated Very Good by the assessor, but it is possible that another assessor (perhaps with a broader idea of what excellence looks like), would have scored her as Excellent. This seems like an unnecessarily complex way of obtaining the assessors' overall view of whether the applicant has met the standard from appointment.

The Guidance for Assessors states that *"There is no need to give the applicant a lower rating simply on the grounds that your own knowledge of them is limited. However, it is important to remember that the overall rating sought is not of the applicant's performance as a junior advocate; it is of their suitability for silk."* (QCA, 2017 (d) p4 para 22). The Guidance also states that Very Good and Excellent both translate as suitable for appointment. However it was clear from the sample that many judicial assessors in particular, are uncomfortable about grading where they have had limited experience of the applicant.

There was considerable support from the Selection Panel for amending the assessor grading scale to provide greater clarity about what each of the ratings meant and make them 'less impenetrable'. A possible solution which takes account of a 'spectrum of excellence' and enables assessors to provide a cautious green light for appointment where their knowledge is limited, is set out at Fig.5 below:

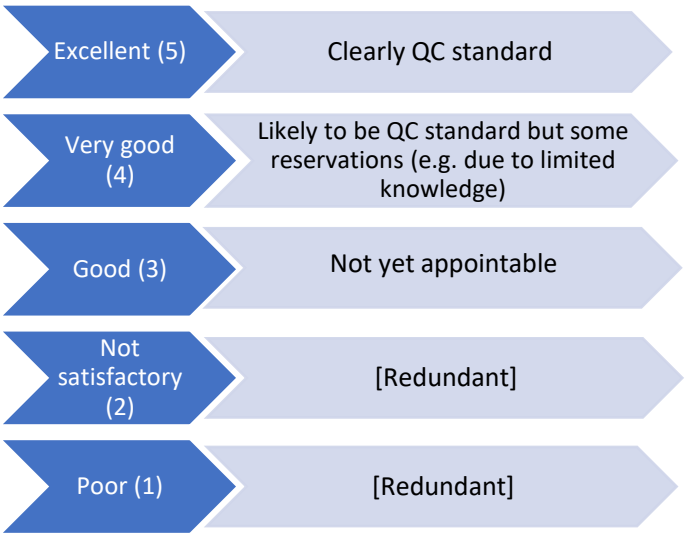

Fig.5

This would make it easier for the Selection Panel to understand assessors' overall view of the applicant's standard, thereby removing the potential for error in translating the grade into something more tangible. Obviously a common understanding of the QC standard of excellence is first needed.

Inevitably, due to the lack of standardisation or training, there is a lack of consistency in the way assessors complete their forms and this can have a dramatic impact on the utility of the reports in enabling the panel to assess for excellence. A few assessors (including one judicial assessor) asked for a template to be provided which enabled them to better understand what format and length would be most helpful for the Selection Panel. This seemed like a sensible request and could be supplemented with more online assistance such as experienced assessors outlining the standardised approach. Whilst there appears to be a good deal of caution about providing direction to the assessors, there are those who are looking for guidance. Given the imperative is to improve the quality of the assessor reports, this interest and enthusiasm should be encouraged.

ii. Grading pairs

Selection Panel members evidently take their role seriously, reading through each application in detail and noting aspects of the self-assessment to triangulate with evidence provided by the assessors[7]. Although one grader is designated the lead and completes the paperwork for the Moderation Panel, legally qualified and lay Panel members play an equal part in the grading process.

It was evident from the interviews and the sample of applications that there is rarely any real disagreement between grading pairs on scores: *"The points of disagreement are few and far between; partly because lawyers defer on C/D and lay members defer on A/B".*

Within the sample reviewed, there were two cases where there was some disagreement over scores. Whilst the second grader's scores could have impacted the overall score for a particular competency, it had no impact on the overall grading awarded to the candidate[8].

[7] This is despite the support grader only being paid for half as much time as the lead grader for grading.
[8] In both cases the candidate was graded C and not invited for interview.

Double-marking is where two people mark the same item. It is considered good practice and can and should contribute to the reliability of the marking. However, this effect is considerably reduced if the second marker can see the marks or comments of the first marker before determining their own. This in turn can lead to an overestimation of the level of marker agreement. Despite this, second markers are often permitted to see the first grader's markers for reasons of cost and feasibility (Tisi et al, 2013, p14)

The panel members who were interviewed usually determined their own marks before looking at the other grader's marks. However sometimes, when time was tight, they would look at the other marker's comments before determining their own marks.

The Approach to Completion of Grading Sheets (QCA, 2016 (b) p2) states that:

> *"Panel pairs should endeavour to reach agreement on the grading of applicants. Where that is achieved through one member modifying their original view, there is no need to recite that on the grading sheet, although there is no objection to doing so, particularly if this might illuminate possible later Panel deliberations."*

However the transparency and defensibility of the decision-making process (and potentially the rigour of questioning by other panel members at Moderation) would be improved, if the mark of each of the grading pair was logged and presented at Moderation alongside the marks agreed by the pair.

The process would be improved yet further if the second marker could not see the marks of the first marker until they had completed their marking, and further still if the second marker approached the marking entirely independently of the other marker. Obviously time and feasibility become factors, but the aim should be for both graders to develop their initial grade as independently as possible, and then for a discussion to take place as to the agreed marks and overall rating. One member felt that if the scores were hidden then there might be more disputes about the correct score, but that although this might add more time to the process, it would be more robust and they would make better decisions.

A further advantage of splitting out the marks is that it enables the Secretariat to monitor marker behaviour, which is an essential part of any assessment system. The marks as currently recorded, make it impossible to analyse marker behaviour in any detail in order to identify 'hawks and doves' or a particular bias on the part of the marker.

Given the wide variety of assessors who participate in the process and the significant variations in the content of the information provided by applicants, the guidance frequently talks about the Selection Panel giving more or less weighting in various circumstances. For example (underlining has been added):

- *"When considering an application, the Panel will use its own judgement to determine what <u>weight</u> to give to any one assessor's evidence"* (QCA, 2017 (a) p18)
- *"where applicants are assessed very highly, <u>especially by a knowledgeable assessor</u>, '7' should be used"* (QCA, 2016 (b) p1)
- *"although eligibility to provide judicial assessments is not confined to the judges of the higher courts in England and Wales, the Panel may well <u>give more weight</u> to assessments provided by judges from those courts than to those provided by judges who have less experience of what is expected of advocates in the higher courts in England and Wales"* (QCA, 2017(a) p24)

- *"The Panel has found that, partly because of their particular familiarity with what is expected of QCs, assessments from High Court Judges or more senior judges can be particularly helpful, but these are not essential."*

Panel members also felt that it was particularly difficult to weight judicial assessors which were slightly unusual such as international arbitrators, planning inspectors and those working in the military courts.

There is not a formula for these weightings and given the range of factors it is difficult to see how there could be. Selection Panel members were on the face of it, opposed to the overall mark for a competence being the arithmetical average of each of the marks awarded to the assessors reports because there were so many reasons why 'weighting' or knowledge of the practice area could have an impact on the mark. There was however agreement that the panel needed to be more transparent about when and how weightings were applied.

To investigate this further, the grading pair score sheets from the sample were used to discover the aggregate score for each of the competencies. Fig. 6 shows the agreed marks of the grading pair for each competency with the aggregate score in brackets. Where the score awarded does not represent the aggregate score rounded to the nearest whole number, the score is highlighted in red. The aggregate score includes instances where 0 has been scored. The number of * indicates the number of 0 scores for each competency (excluding Competency D for which the vast majority of scores are 0).

	Competency						**Initial rating**	**Final rating**
	A	**B1**	**B2**	**B Overall**	**C**	**D**		
1	6 (6.1)	6 (6.4)	6 (5.8)	6	5 (4.5*)	0 (1)	B	Recommended
2	7 (6.4)	7 (6.7)	6 (5.7)	6	6 (4.1***)	0 (1.6)	B	Recommended
3	6 (6)	6 (6.1)	5 (5.5)	6	5 (2.4*****)	0 (1.3)	B	Recommended
4	6 (5.7)	6 (5.8)	6 (5.4*)	6	6 (3.3****)	0 (1.6)	B	Recommended
5	6 (5.5)	6 (5*)	6 (5.3)	6	6 (3.4****)	0 (0.5)	B	Recommended
6	5 (4.7)	5 (4.5*)	5 (5.4)	5	6 (5*)	0 (0.5)	P	Recommended
7	6 (5.7)	6 (5.7)	6 (4.8*)	6	6 (5.3)	0 (0.6)	B	Recommended
8	6 (5.6)	6 (4***)	6 (5.6)	6	6 (5.1*)	0 (3.2)	B	Not recommended
9	6 (6)	6 (5.7)	6 (5.8)	6	6 (5.8)	0 (1.3)	B	Not recommended
10	6 (5.6)	6 (5.6)	6 (5.7)	6	5 (2.2****)	0 (0.5)	B	Not recommended
11	6 (5.8)	6 (6.1)	6 (6.4)	6	6 (4.6)	0 (0)	B	Not recommended
12	5 (5.2)	6 (5.6)	6 (5)	6	5 (5.2)	0 (1.1)	C	Not interviewed
13	5 (5.2)	5 (4.6*)	5 (5.3)	5	5 (5.3)	0 (1.8)	C	Not interviewed
14	6 (4.6*)	5 (5.1)	6 (5.3)	5	5 (4.3*)	0 (0)	C	Not interviewed
15	5 (4.8*)	5 (2.7****)	5 (5.3)	5	5 (3.5***)	0 (1)	C	Not interviewed

Fig.6

Although the sample is small, it appears to indicate that:

- Discrepancies between the aggregate and the awarded score are frequent and sometimes significant
- Some particularly large discrepancies can be seen in candidates which might otherwise be described as stellar, in relation to competencies C and D[9]. In the sample above, four out of the seven recommended for appointment would not have made it through to interview unless their marks for C had been weighted (in some cases by a significant amount).
- The decision to score Diversity as 0 where there is very little evidence[10] may suggest that potentially good evidence from the assessors may not systematically be highlighted to the interviewers.

Taken as a whole, this suggests that where the mark awarded is not the rounded mark, the grading note should clearly explain why. This would highlight to the Moderation Panel (and anyone else who subsequently read through the paperwork) how weightings have been applied. In particular it would indicate whether and why they have been flexible in relation to written and oral advocacy e.g. because of the requirements of a particular practice area or because some assessors have been scored '0' due to a lack of evidence rather than a poor reference.

It also seems to suggest that candidates should explicitly be invited for interview primarily on the basis of their marks in competencies A and B, (as opposed to A, B and C as is currently the case). This would deter graders from feeling the need to ensure the mark for C enabled that high calibre candidates who have evidenced 'excellence in advocacy' make it through to interview[11].

The formal record of the grading decision takes the form of the overall grades awarded and a structure which for substance and each competency, prompts the lead grader to set out points of excellence, other supportive comment, weaknesses and issue(s) to be raised at interview. Panel members tend to complete this task by naming an assessor and their grading, quoting from the assessor's report and then inserting the score awarded for that competency for that assessor. The record ends with 'overall comments from assessors' with further quotes from the assessors, and finally the 'pre-interview' summary. This is in accordance with The Approach to Completion of Grading Sheets.

There are various problems with this approach:

a. It divorces the record from the Competency Framework as it's not always clear how the quote relates to the competency or (with extensive quotes) which part of the quote relates to the competency
b. There are inconsistencies in what panel members put into each category. For example, although the Guidance for Assessors encourages assessors to state where they have no information to add in relation to a competency and that it won't be held against an applicant, this is often included in the 'weakness' section.
c. The analysis and/or weighting is usually unclear unless included in the final 'pre-interview summary'.

[9] This correlates with the findings of QCA, 2018(b) mentioned above.
[10] See QCA, 2016 (b) p1.
[11] According to the Report to the Lord Chancellor, "*applicants are invited to interview unless their score for one or more competencies at pre-interview moderation is at least two lower than the minimum level required to be recommended for appointment"* (QCA, 2017 (f) p8).

It would improve the rigour of the exercise considerably if the lead grader provided a summary analysis of the assessors for each competency in addition to short quotes which are particularly pertinent to evidencing the applicant's excellence in each competency. The focus should be on providing a thread throughout the decision-making process which would enable a third party to understand the rationale for how the mark had been constructed.

The information provided to the Moderation Panel should be standardised and include:

a. Area of practice
b. (Revised) assessor gradings, marks of both lead and support graders and agreed marks
c. Commentary which explains any differences from aggregate of the agreed score e.g. because of weighting between oral and written in particular practice area, outlier assessor etc
d. Questions for interview or feedback (for those who are not being invited to interview), both closely referenced to the Competency Framework

The analogy with a relay team handing the baton over to the next group is helpful. The grading pair's objective is to provide the Moderation Panel and (if necessary) the interviewers, with all the information they need for the remainder of the process to run as efficiently and rigorously as possible.

As has been recently noted by the Secretariat (QCA, 2017(g)), the Rating Scales are unwieldy and could be simplified. Given that the appointments process is in two-parts, and this enhances the validity of the scheme, it should not be possible for a candidate to score A at grading. The grading pairs options are therefore:

a) Invite for interview
b) Unsure – consider at full panel
c) Reject

The sample analysis also suggests that the focus of any decision to interview should be on competencies A and B and that the need to achieve 5 or above for competency C should be reviewed.

iii. Interviewing

The interviews are conducted by two panel members – one lay and one lawyer member. As a rule, and in order to secure wider involvement of Panel members in the detailed consideration of each case, one of the interview pair will have been part of the grading pair for the candidate in question (QCA, 2017(f), p10), whilst the other will be new to the application (aside from consideration at Moderation Panel).

Each interview covers all four competencies, but where the assessments indicate that an applicant is very strong on A or B1, that might be dealt with very briefly. Although the aim is for each interview to last 35-40 minutes, they can take longer when necessary, especially with borderline applicants (QCA, 2017(f) p9).

From the sample the average number of questions asked was just over 15, although one interview pair asked 22 questions and another seemed to ask only five. Most interviews took between 35 and 45 minutes, but there were some outliers (see Fig.7 below).

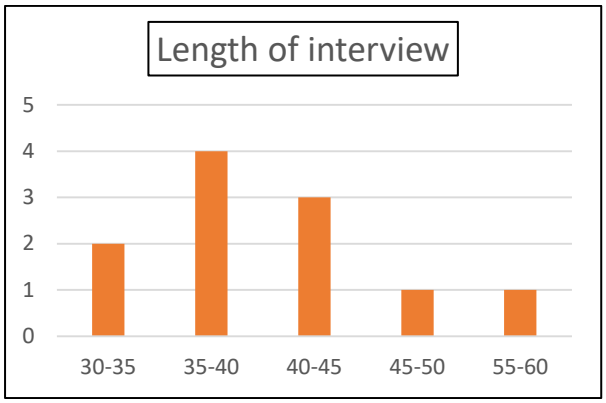

Fig.7

The applicant survey highlights that many applicants felt that their interview was fair and as expected. One (successful applicant) said *"I thought the interviewers were very well-prepared and the questions related very clearly to the different competencies."*

However, a number of applicants drew attention to the variability in interview experience:

- *"Some of the questions felt as though they were designed to trip us up rather than gather information. One of the interviewers also made unnecessary and sarcastic comments about the nature of my practice and some of my clients."* (Successful applicant)
- *"I was successful on this occasion but unsuccessful on my first application and received negative feedback after a very relaxed interview. In relation to that earlier interview, I felt that the interviewers should have tested and challenged me with greater rigour if I was at risk of failure."*
- *"From speaking to others, it is clear that there is very considerable variation between the approach taken by different interviewers (and even the length of different interviews)."* (Unsuccessful applicant)
- *"I felt one of my interviewers had a preconceived (negative) opinion about practitioners in my field of practice."* (Unsuccessful applicant)
- *Unsuccessful applicant "the principal issue is that the interview process is so uneven in approach as between different panels in terms of length, tone and content, that it is hard to understand how any two interviews from different panels can properly be compared."* (Unsuccessful applicant)

The Selection Panel members themselves were also concerned about these issues. The key issue for them was the differences in interviewing style and content between lay and legal members which became particularly stark where the lawyer interviewer had knowledge of the candidate's area of practice. This was clearly evidenced in the candidate sample where some candidates were probed on detailed legal knowledge (see the questions posed in I at Annex 2), whilst others were given broad competency-based questions. The consensus view was that in order for the interviews to be fair to all, they should be competency based and not a legal examination. This it was hoped would be facilitated by the forthcoming competency-based interview training.

The questions asked in the sample (set out at Annex 2) highlight a number of issues with the consistency of the interviewing:

- Balance between (and time-allocated to) A/B questions as opposed to C/D questions

- Leading questions. One candidate was asked whether it was difficult to identify novel law in crime? The candidate answered yes and was therefore deemed unable to meet that competency.
- Bias against a particular area of practice. *"Does Court Martial work have the same complexity and substance as crown court work?"*
- Questions that are not linked to the Competency Framework. *"Would it be an issue if he stepped up to QC and earned less?"*
- Questions that are unlikely to elicit a constructive response or where the candidate is likely to be confused as to the answer the interviewer is looking for. *"Do you like oral advocacy?" "Is there any place for aggression/hostility in oral advocacy?"*

Whilst a formulaic and predictable interview would benefit no-one, there is research which indicates that standardisation improves the accuracy of marking. One panel member noted that sometimes they run out of time for the diversity questions and end up making decisions which are emotional rather than rational.

It is unclear whether any time is allocated to allow interviewers to agree in advance which questions they need to ask, and how much time will be allocated to them. However, given the differences between candidates, and therefore the different emphases of the interviews, it is important that time is factored into the process for the interview pair to decide which questions will be asked and, given the Grading and Moderation Notes, how much time should be allocated to each competency.

As with the grading process, the consistency of the recording of the interview was felt be Selection Panel members to be in need of standardisation. With most of the sample interview records it was relatively easy to identify the questions that had been asked, but for some it was quite difficult. In general, the notes of the interview provided more narrative and prose, than analysis linked to the Competency Framework.

There was evidence of some good practice in terms of firmly relating the responses to whether the requirements of the Competency Framework had been met: For example, one member noted: *"team leadership evidenced but not all the elements such as establishing working relationships with all"*. This should be encouraged.

Training and monitoring

Selection Panel members are broadly expected to pick things up as they go along. There is one-to-one training when members are first appointed to the panel, where they assess several applications and their work is commented upon by the Secretariat and the Chair.

In addition to this a benchmarking exercise takes place at the beginning of each competition where each panel member is given the same three applications to score. One panel member noted that the emphasis of this exercise was on ensuring consistency of scoring and it was felt that this exercise could additionally be used to bring about consistency of recording too. Ongoing moderation takes place with the Chief Executive sitting on some[12] interviews.

However, to achieve the level of consistency required to ensure the validity of the scheme and be able to defend the scheme against criticism, it is likely that more ongoing intervention is required.

[12] Four in 2017 (QCA, 2017(f) p10)

This task would be assisted by the creation of a Selection Panel Handbook which would set the expectations for panel members and better ensure year on year consistency of practice.

Recommendations

I. Provide more guidance to assessors on completing the forms, including examples and online advice from high-level experienced assessors
II. Systematically document lead and support graders' marks, and monitor on an ongoing basis
III. Standardise post-grading information provided to the Moderation Panel e.g.
    a. Area of practice
    b. (Revised) assessor gradings, marks of both lead and support graders and agreed marks
    c. Commentary which explains any differences from aggregate of the agreed score e.g. because of weighting between oral and written in particular practice area, outlier assessor etc
    d. Questions for interview or feedback (for those who are not being invited to interview), both closely referenced to the Competency Framework
IV. Do not grade applicants "A" at pre-interview moderation, to emphasise this is a two-stage process
V. Revise Assessor grading to assist consistency
VI. Time should be allocated to allow the interview pair to plan and agree the questions and timings of the interview
VII. Questions asked should be systematically logged, together with brief answers and analysis of whether the Competency Framework requirements have been met. The emphasis should be on evidencing that the competencies have been met rather than prose (which has a tendency to reveal bias)
VIII. Selection Panel Handbook should be created
IX. Regular monitoring of panel member consistency (marking and recording) should take place

8. The applicants – Does the system favour some more than others?

This final section considers whether the appointment system favours some candidates over others. Issues such as areas of practice; oral/written split and regional variations have been dealt with above.

There is no evidence that candidates with a disability are disadvantaged by the process. The Guidance for Applicants invites candidates with a disability to request adjustments to the assessment process to ensure that they are not disadvantaged by the application process. Furthermore, candidates are invited to explain to the Panel how their disability has impacted their practice (QCA, 2017(a) p2 and p18).

One successful applicant commented that the appointment scheme seemed to favour those who were more willing to *"talk him or herself up"*. This applicant saw this as a discrimination issue and a reason why fewer women applied or applied later. Consideration of the possible factors affecting female applicants are addressed more fully in the report produced for the QCA by The Work Foundation in 2017.

A significant number of applicants now receive some coaching in some form whether for preparation of the application or in order to practise a competency-based interview. Given that

Question - Did you employ professional consultants to assist you with the preparation of your application?				
Response	**Total**	**Successful**	**Unsuccessful**	**Filtered Out**
Yes	71	46	14	11
No	88	43	19	26
Prefer not to say	7	6	0	1

Question - Did you employ professional consultants to help you prepare for the interview?			
Response	**Total**	**Successful**	**Unsuccessful**
Yes	90	67	23
No	30	21	9
Prefer not to say	8	7	1
Not applicable - Filtered out	38	0	0

Fig.8 Source: QCA, 2018(c)

a higher proportion of successful candidates responded to the survey than those that were either unsuccessful at interview or filtered out[13], Fig. 8 above seems to indicate that those who have had assistance tend to perform better. The position is less clear cut in relation to interview preparation where significant numbers were successful without assistance and unsuccessful with. Two successful applicants commented:

- *"For the interview… the main reason I engaged a consultant was for the practice - having not had an interview myself in the last 10-12 years or so. This I did find helpful - mainly in terms of practising giving concise answers which focus on the "What I did" part, rather than spending a long time setting out the context. This is the advice that QCA gives to candidates anyway, but I did find it very helpful to practise it in advance since there is a big difference knowing what to do and actually doing it in this regard."*
- *"Given that I had no previous experience of a competency-based interview, I think I would have completely under-prepared for the interview if I had not had professional assistance to*

[13] The response rates were: 80% of successful candidates, 49% of unsuccessful candidates and 45% of filtered out candidates

guide and focus my preparations. It also helped that I could have a mock interview with someone who had recently taken Silk."

The Selection Panel had mixed views on coaching. Whilst they could see that anyone who was unfamiliar with competency-based applications and interviews might want to avail themselves of some assistance, there was also perceived to be a risk that responses (in particular at interview) became formulaic and inauthentic[14]. This seemed to be a particular problem in relation to questions on diversity.

The QCA's objective should be to provide as much information as possible to reduce the need for applicants to turn to consultants for assistance. Inevitably given the investment of time and money which applicants put into the appointments process, there will be those who feel that further fees paid to consultants is money well spent.

9. Conclusion

The revised QC appointments framework has been in operation since 2005 and is in need of revision to enable it to reflect the needs of today's legal sector. In particular it needs to ensure its purpose is drawn broadly enough to encourage the right people to apply, and it needs to be clear about what level of competence is needed to succeed. This would provide an opportunity to reflect on what society and the legal profession need and expect from the QC appointments system. For example, is it reasonable to expect an advocate whose work is predominantly written, to meet the same standard of excellence as a criminal advocate? Should there be separate designations to make their area of expertise clear?

Assessors are of paramount importance to the success of this scheme, and whilst training several thousand individuals is clearly an impossibility, more must be done to reach out to these volunteer participants and to encourage them to provide insightful and valuable reports on the candidates. Without high-quality objective input from the assessors, the scheme as it stands has limited scope to assess excellence. This must therefore be the key priority.

Finally much can be done to make more robust the processes and decision-making of the Selection Panel. A review of the purpose of the scheme and a description of excellence will help in this regard, allay concerns raised by the Selection Panel themselves and improve the rigour of the scheme.

[14] This is emphasised in the Guidance to Applicants (QCA, 2017(a) p5)

Annex 1 – Selection Panel – Semi-structured interview questions

1. Given the stated objectives of the appointments process (i.e. to identify excellence in advocacy in the higher courts), what are your thoughts on:
    a) How well the process meets this objective?
    b) How it could be improved?

2. What does excellence in advocacy in the higher courts look like to you? How would you describe it?

3. Do you think there is, in general, a commonly held idea within the Selection Panel of what excellence looks like?

4. How helpful do you find the rating scales?

5. Can you describe to me how the full panel filters out applicants:
    a) Pre-interview
    b) Post-interview

6. Do you think the process is more advantageous for some individuals rather than others?

Annex 2 – Questions asked at interview taken from sample

	Questions asked
A	(1) Why now was the right time to apply for silk? (2) what was the personal quality he possessed which indicated he was silk quality? (3) did he find it frustrating to leave peripheral issues out rather than leaving no stone unturned? (4) explain the case which has given you most legal difficulty (5) when had he used creative use of his legal knowledge or had to construct a novel legal argument? (6) give an illustration of a case where his written advocacy had had a significant impact on the direction of a case (7) how did he achieve concision in that case as well as being comprehensive? (8) Why had that approach been wrong in the first hearing of that case? (9) illustration of a difficult cross-examination (10) what had he learned about leadership from his listed cases? (11) What had he learned from being led? (12) what are his motivational techniques and how would he make use of a high-performing junior? (13) what techniques he used for dealing with an under-performing junior (14) what feedback has he had about himself? (14) give an example of needing to deal with a difficult opponent (15) why is diversity a competency for silk? (16) what does diversity mean? (17) what has his work on access to bar scheme taught him? (18) do some people suffer the disadvantage that they didn't even get to apply for the profession? (19) did he think his chambers were fully compliant with BSB handbook on equality? (20) are there any problems with clerks on the allocation of work? (21) what more can be done to retain women of 10+ years call? (22) can he give an example of unacceptable behaviour or comments in a diversity context?
B	(1) Why had he decided to apply now? (2) Tell us about X and how you developed a novel argument regarding Y (3) Asked him about new areas of law in X (4) what marked his documents as attractive to the reader but retained the quality of the highest level (5) asked him about his lack of exposure to oral advocacy (6) why was his cross-examination in X so effective? (6) was the description of his advocacy as 'dispassionate' a criticism or a compliment? (7) how he guarded against repeating contents on skeleton to Tribunal? (8) Does he have anything else to say? (9) Asked him about his teams and how the team worked (10) how does he allocate tasks (11) Asked about a situation where a junior has not delivered for him (12) what difference would it make if he was a QC? (13) Would it be an issue if he stepped up to QC and earned less? (14) why did he do his diversity activities? (15) why do we ask about diversity? (16) what do you have to take into account when you have an overseas client? (17) Anything else?
C	(1) Tell us about your cases (2) Point us to cases where you have needed to take witnesses (3) why did he want to be a QC? (4) what sort of teams do you have? (5) why do we ask about diversity?
D	(1) Legal ramifications of X (2) Example of a case where he had made new law himself (3) To what extent was he responsible for the skeleton arguments in a particular case? (4) asked to tell them about the difficult case of X (5) Asked to tell them something about his experience of live witnesses (6) had he ever re-examined a witness? (7) Asked to tell them about techniques for delegating tasks (8) how did he feel about working for a client that was a bit of a rogue? (9) had he ever refused to take on a client? (10) How had he divided up tasks between himself and 2 QCs in a particular case? (11) what had he learned from seeing 2 QCs in action? (12) What techniques does he use to deal with under-performing member of his team? (13) why does he think diversity is a competency for silk? (14) Asked him about Inns sponsorship scheme (15) what was his experience of schools/universities etc and what his message had been? (16) Asked him about retaining female barristers

E	(1) Asked about 'particular exemplified cases' (2) 'discussed' competency B2 then B1 (3) why she wished to be silk? (4) Give an example of where a case had unexpectedly changed direction (5) were there times when she had to deal with conflicts with QCs? (6) How does she handle disputes with her team? (7) what are her leadership strengths? (8) how might her leadership style need to change if she became a QC? (9) how does she handle cases where her team got into difficulties? (10) what is biggest single diversity issue facing the profession? (11) why do a smaller proportion of eligible women apply to be QCs? (12) what was her experience of diversity in her own chambers? (13) was there ever a case for positive discrimination? (14) they asked her about letting her spare room to a refugee (15) what cases is she doing at the moment?
F	(1) Why applying for silk? (2) Does Court Martial work have the same complexity and substance as crown court work? (3) An example of where he had to research law outside his practice (4) Asked about his written work in a particular case (5) Asked about another case to check for excellence (6) has he had to draft questions for cross examination of vulnerable witnesses (7) describe his standard team (8) How he divides tasks (9) Dealing with an underperforming person (10) did he see himself as the commanding officer in his military cases? (11) why do we ask questions about diversity?
G	(1) Why silk now? (2) does his practice revolve around local schemes rather than being of substance and asked him to expand on ground-breaking cases mentioned in (1) (3) Any cases he was involved in involving a novel point of law? (4) a time when he had to research a new area of law for a planning case (5) asked about complex issues of national importance in one of his cases (6) what proportion of written work in his cases was his? (7) what is his experience of examining non-experts? (8) is there any place for aggression/hostility in oral advocacy? (9) is thoroughness and organisational skills sufficient to justify silk? (10) they outlined what assessors had said about his leadership, and asked him how he dealt with underperformance (11) how might his leadership style change if he became a QC? (12) how has dealt with unproductive team member (13) why is diversity on the CF? (14) Single biggest issue facing legal profession (15) tell us about own work on diversity
H	(1) Tell us about cases where difficult points had arisen (2) Was it difficult to identify novel areas of law in criminal practice? (3) Asked about her written work in relation to particular cases (4) Asked her about how effective her cross-examination was in a particular case (5) does she enjoy oral advocacy (6) Asked her about a particular case which is mentioned but not on list (7) What role does she prefer to have in a case? (8) They asked how she had led the team in a particular case (9) How she divided up tasks when led in a particular case (10) what are the differences in leadership qualities between a good senior junior and a QC? (11) How does she need to develop her own leadership skills? (12) why does she think diversity is in the CF? (13) Can she define diversity? (14) why is it important for the legal profession to address diversity more? (15) whether the risk of stereotyping could ever effectively be removed? (16) what more could be done to attract state school and BAME applicants to the Bar? (17) Is she doing any outreach work herself? (18) Are her chambers involved in outreach?
I	(1) Why wants to be a QC? (2) What was his approach to the toolkits in case of X? (3) why did he think it important to input into legal directions? (4) what was the legal complexity of getting video link to another country? (5) Asked about sentencing criteria in X (6) Explain the general principles set out in X (7) whether it was wise to write defence statements (8) tactical problems in applications to dismiss? (8) why did he make an unusual bad character application in X? (9) they asked him to cite a significant document he had drafted (10) had he drafted any cross-examination questions of vulnerable witnesses (11) what were his qualities as a criminal advocate compared to his peers (12) why did opposing AG reference show excellence in oral advocacy? (13) what is his cross-examination style? (14) how does he allocate work between himself and solicitor? (15) how does he delegate? (16) why does he get involved in so many 'diversity' activities? (17) why does the Selection Panel ask questions about diversity?

J	(2) balance between advisory and trial work (3) key personality which justified application for silk (4) describe case which gave him most legal difficulty (5) where has he given a creative solution to a difficult problem,(6) and had the approach been his own or developed with others (7) when his written advocacy had had a significant impact on direction of a case (8) when his written advocacy had not had the desired effect (9) most difficult cross-examination (10) describe his style of oral advocacy (11) what approach did he take with people he didn't know? (12) how does he balance demand for aggressive stance from client, with style which might go down better with a tribunal (13) biggest leadership challenge (14) what was his leadership style (15) approach to delegation (16) how does he deal with difficult opponents (16) did he get frustrated if didn't meet perfection (17) biggest single challenge facing the bar (18) impact of maternity leave arrangements on his chambers (19) might positive discrimination be good idea? (20) Asked about diversity training and how he'd used in recruitment
K	(1) explain how specialist area of law has developed (2) tell them where had to get up to speed on unknown area of law (3) challenged him on whether he was a PI specialist (4) asked to explain tricky concept in layman's terms (5) describe a case which was a particular challenge (oral advocacy) (6) how he delegated in a particular case (7) example of working with others (8) dealing with under-performing team member (9) difference between a good senior junior and a QC (10) why important for diversity to be a competency for QC (11) asked him about his chambers' BSB handbook compliance (12) what more could be done to help those with caring responsibilities (13) what was he doing to encourage state school applicants (14) what could be done to encourage more BAME applicants

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