|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| PIBA | | **PERSONAL INJURIES BAR ASSOCIATION**  Honorary President: The Right Honourable Lord Justice Irwin  Honorary Vice Presidents: The Rt Hon Dame Janet Smith, DBE  The Hon Mr Justice Langstaff  The Rt Hon Sir Philip Otton  The Rt Hon Sir Roy Beldam  The Hon Sir Robert Nelson | | |
|  | |  | |  |
| Chair: | Darryl Allen QC, Byrom Street Chambers, DX 718156 Manchester 3 | | darryl.allen@byromstreet.com | |
|  |  | |  | |
| Vice-chair: | Steven Snowden QC, 12 King’s Bench Walk, DX 1037 London Chancery Lane | | snowden@12kbw.co.uk | |
|  |  | |  | |
| Secretary: | Richard Wilkinson, Temple Garden Chambers, DX 382 London Chancery Lane | | rwilkinson@tgchambers.com | |

17 July 2018

**PIBA response to the QCA consultations on character and integrity and listing of cases and assessors**

PIBA is a Specialist Bar Association with about 1,450 members who practise in personal injury law, including industrial disease and clinical negligence cases.

Our response to the questions in the two QCA consultations is as follows:

**Character and Integrity consultation**

1. **Is it is appropriate for the QC scheme to require applicants to demonstrate all the behaviours expected of QCs, even where the applicant has not been the subject of any regulatory sanction for failure in that regard?**

Yes, the position of QC is of one of such leadership and prominence within the profession and the integrity of QCs is relied on by the Court to such an extent that only those who can demonstrate all the behaviours expected of QCs should be appointed. Those suitable for appointment should not find it any more difficult to demonstrate those behaviours than any of the other competencies required by the application process.

1. **If so, is that best dealt with by appropriate amendment to the “working with others” and “advocacy” competencies.**

Yes, this should be sufficient to encompass the sort of conduct which would not fall within the definition of true integrity as generally understood. An amendment to the behaviours required to demonstrate those competencies should provide appropriate scope for applicants – and importantly assessors – to address these matters outside the integrity competency and in a way which is more likely to lead to those issues being put before the Selection Panel.

1. **To what extent should unsatisfactory behaviour outside the field of advocacy which attracted neither criminal nor regulatory sanction be taken into account in considering applications for Queen’s Counsel?**

Matters related to advocacy should be given more weight as they go directly to the competencies which are required for QC appointment. However, other unsatisfactory behaviour may be equally relevant- e.g. a finding of harassment or inappropriate behaviour in chambers, dealt with internally rather than by a regulator, would have a bearing on the ‘working with others’ competency (under the expanded definition to include matters falling short of true integrity issues).

1. **How should such behaviour be defined, and what additional guidance might be needed?**

Applicants are currently asked to report, ‘*any other matter which might affect the applicant’s standing or reputation or could affect their suitability for appointment as QC’.* Whilst it might be said that this is somewhat vague and subjective, it is not obvious that any other definition or guidance could overcome these shortcomings without providing an exhaustive list of examples (which inevitably could not cover all possibilities). An expansion of the competencies required for ‘working with others’ and ‘advocacy’ will require and invite applicants and assessors to address the sort of unsatisfactory behaviour which could come within this definition. A revised competency framework will probably provide sufficient guidance on the behaviours required of a QC and, by implication, the unsatisfactory behaviours which would be inconsistent with appointment.

1. **In what way should the Selection Panel seek to gain information about any such matters?**

It is not felt that introducing a stage under which Heads of Chambers or Senior Partners of firms are consulted is desirable or workable for the reasons given in paragraphs 29 and 30 of the consultation document. Some would have records to draw on and others would not. Some would have been in post for a considerable time and be aware of past findings and some would not. Some would know or be better disposed to a candidate than others. In addition, this would introduce an issue of whether and how what may be second hand or hearsay concerns can fairly be deployed in the assessment process.

We suggest that, on balance, any system of trying to consult Heads of Chambers and Senior Partners of firms would be hard to implement fairly and in a way which provides tangible benefits to the Selection Panel.

We would expect that the calibre of assessors which applicants have to identify (i.e. usually respected silks in their areas of work) should itself be a way of eliciting any concerns about matters of unsatisfactory behaviour which attracted neither criminal nor regulatory sanction, from those who operate at a senior level in the same sphere. This would be assisted by the introduction of the expanded competencies proposed for ‘working with others’ and ‘advocacy’ covering relevant behaviours. But this would rely upon applicants continuing to be expected to identify assessors of weight and experience.

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

The latter approach is preferable. Logically, there is likely to be a difference between conduct which would warrant the misbehaving QC being disbarred (or struck off the Roll), and that which would warrant removal of their QC status, so this is not simply an issue which can be left until the professional regulators remove the advocate from the profession.

Such behaviour would of course have to be established to a high standard of proof and would have had to have been serious. But it is anticipated that (as it has been to date) the removal of the status of QC would be reserved for extremely serious cases where allowing the QC to continue as such would bring the system into disrepute (while acknowledging at that that test is not an appropriate one for applicants’ disclosure) and would be inconsistent with the standards required for appointment in the first place.

A system would have to be devised whereby a QC who has behaved in such a manner would have to be informed of the matters against them, and a fair hearing provided. Whether as part of that process there should be an opportunity for the QC to “resign” their appointment may be worthy of further consideration.

**Listing of cases and assessors consultation**

1. **Views are invited primarily on the principle of the proposed change to reduce the scope for “cherry picking” by applicants by requiring them to list all their substantial cases, and those involved in the case, over a prescribed period. Any views on the practical issues discussed in paragraphs 22 and 23 would also be welcome.**

We are not in favour of the proposed change requiring applicants to list all their substantial cases over a prescribed period.

We do not consider that there is much, if any, scope for “cherry picking” by applicants coming mainly or exclusively from a personal injury or clinical negligence practice background. Indeed, if anything, PIBA applicants already have the reverse problem of too few substantial cases where they can satisfy the present requirement for there to have been a sufficiently substantive hearing or development and which provide sufficient judicial assessors. Whilst the Panel’s guidance makes clear that it is flexible on the number of cases listed by applicants, this requires the applicant to “explain fully” if fewer than 12 cases are put forward. Increasing the maximum number of cases will inevitably make having fewer than 12 (however legitimately) harder to justify.

This issue of too few cases of substance (especially cases providing sufficient judicial assessors) is not likely to be confined to PIBA members, but would apply to other areas of practice where much of the advocacy is done away from the formal Court environment or where few cases go to substantive hearings or trials whether due to ADR or otherwise. It will also affect those returning from a career break, parental leave or similar or those who work or have worked part-time for whatever reason. Many of those will be the female applicants which the changes are intended to help. Hence any changes would need careful planning to avoid inadvertent discrimination against particular practice areas or particular under-represented groups. The danger is that these proposed changes could inhibit rather than promote diversity.

There is also a risk that these changes simply accentuate the apparent advantage, in putting forward sufficient cases and providing judicial (and to some extent practitioner) assessors for those who practise mainly in Court. Unless they conduct very few, very long cases, such senior advocates will, (a) have little difficulty in identifying 20, rather than 12, cases of substance over a three year period; and (b) will still have ample opportunity to “cherry-pick” cases from a likely much wider choice. This means that such an advocate will be able to “load” their application with 20 cases (probably still “cherry-picked”) but the advocate who was already going to struggle to provide anything like 12 cases, will be or will perceive him or herself to be at an (even) greater disadvantage than at present. Such an advocate will have a proportionately much smaller evidence base to put forward both in terms of cases and assessors.

We agree that the only way to make such a revised scheme workable would be to have a maximum number of cases of 20 or thereabouts. But this would only in fact provide a pool of potential assessors from, “*all those who had seen the applicant in a substantial case”*, for advocates who have done no more than 20 substantial cases over a 3 year period. For advocates who are in Court most or practically all of their practising time, this will not encompass anything like all those who have seen them.

So on balance, we do not agree that a system of increasing the number of cases from 12 should be implemented or would help with the perceived problem it is seeking to address.

1. If, contrary to our views above, such a system is implemented, our answers to the specific questions in paragraph 23 are as follows:

**• Should applicants be asked to list cases over the last two years, the last three years, or some other period? Or should there be no prescribed period?**

There should be a prescribed period as the award should be for the advocate’s recent rather than historical demonstration of excellence in the competencies. The extension from two to three years was appropriate and should be retained. This promotes diversity as it gives some flexibility for those who would otherwise struggle to provide sufficient cases because of the nature of their practice, due to a career break, parental leave, part-time working or similar.

**• Should different numbers of cases be expected of practitioners in different specialisms?**

We agree that this is probably unworkable given some applicants will have mixed practices and the nature of practices vary within particular specialisms.

**• What should be the maximum number of cases sought?**

We agree that a maximum of 20 is probably appropriate to avoid making the application process overly onerous and unwieldy for both applicants and the Panel.

**• Should all judges need to be listed when a case went through several levels of the court system?**

Logically yes, if the approach is to have a pool of every potential assessor who has seen an applicant in a substantial case and to counteract “cherry picking”. But this should probably be limited to judges hearing a sufficiently substantive hearing to avoid an applicant being prejudiced by the Panel approaching a judge who may not be able to provide a meaningful assessment.

**• Should all practitioners be listed in a multi-handed trial?**

Logically yes, if the approach is to have a pool of every potential assessor who has seen an applicant in a substantial case.

**Charles Bagot QC**

On behalf of the PIBA Executive Committee

Hardwicke, New Square, Lincoln’s Inn, London WC2A 3SB

Tel 020 7242 2523