Queen's Counsel Complaints Committee

PRIVATE AND CONFIDENTIAL
REPORT OF THE QUEEN'S COUNSEL COMPLAINTS COMMITTEE 2019-20

1. The members of the Queen's Counsel (QC) Complaints Committee ('the Committee/QCCC') are grateful for the comprehensive information provided to them by the QC Appointments (QCA) Secretariat. This has been of great assistance in our work.

2. The Committee considered one complaint in relation to the QC Competition 2019. As an ancillary matter to that complaint, a limited complaint was admitted in respect of the 2018 competition, and the Committee declined to admit or reopen complaints in respect of the 2016 competition. The 2019 complaint was partially upheld, and the 2018 complaint was rejected.

The 2019 Complaint

Allegation of Bias and Undue Influence over Assessors

3. The Upheld Complaint was from a Complainant who complained that;

A: There was bias against the Complainant from two officials at QCA namely Sir Alex Allan (AA) and Russell Wallman (RW).
B: There was widespread cheating by applicants in respect of improper influencing of the references written on their behalf.
C: Feedback in respect of the Competency scoring was inadequate and misleading.
D: Reasonable adjustments in respect of disability had not been made.
E: There were processes at QCA which detrimentally affected the application.

Complaint A

4. We noted that AA recused himself from the Selection Panel in respect of the application. This was undoubtedly the correct thing for him to do because of his past involvement with a complaint in respect of a previous application, and the potential for this to give rise to an appearance of bias. RW was also involved in this previous complaint, and his active participation in the process, for example by selecting assessors, would also give rise to such a perception.

5. Subsequently AA signed off a feedback letter to the applicant which led to the complaint. It was further alleged that RW had been involved in selecting the assessors who would be

consulted on the application. On further investigation we discovered that RW had not selected the original assessors but had reviewed the selection and arranged for one of the selected referees to be changed as the original referee was giving evidence about an older case. The third issue in respect of bias was an allegation that a letter from a senior judge in respect of an earlier application had effectively blocked the applicant being appointed.

6. In respect of AA's involvement, we accepted he was not materially involved in grading the application and that his signature only appeared on the letter as this was standard practice. We did however uphold the complaint because AA's signature did, to our mind, create an impression that he had been involved in the process and that this gave an appearance of bias to the Complainant.

7. In respect of RW we were satisfied he had limited involvement in the application, however we felt that his involvement in changing the referees was inappropriate given the fact that he had been actively involved in the previous complaint.

8. Our position in respect of both of these issues was that, given AA and RW's previous involvement with the applicant, it was appropriate that they neither have, nor be seen to have, any further involvement in the assessment of the application. Accordingly, we held that the process was tainted by apparent bias albeit not actual bias.

Complaint B

9. We were satisfied that QCA actively discouraged attempts by applicants to influence their referees and that there was no evidence that this was a widespread problem.

Complaint C

10. The Complainant was dissatisfied with feedback he received which he felt was misleading. He further felt that pejorative remarks should have been put to him at an interview.

11. In investigating this we did identify one error in the approach to the assessment of the "working with others" competency and to that extent, we upheld the complaint. We also noted, however, that the feedback was only intended to be a summary of the assessments. We reviewed the assessments in detail and were satisfied that the feedback accurately reflected the totality of the references given to the applicant, not-withstanding the fact that some referees had been more positive than others. We were also satisfied that it was appropriate for the QCA to not interview those whose referees provide significant adverse comments independent of the competency assessment.

Complaint D

12. The Complainant had identified a disability in his application of a sort that is often characterized as "invisible". He felt QCA had not made appropriate adjustments in his case.

13. QCA's response was to state:

> "We will always make reasonable adjustments to ensure that applicants with a disability are not disadvantaged"

14. However, QCA did not approach the Complainant to see what adjustments he required indicating that they did not believe there was a need or a requirement to make any enquiries and further gave the panel the impression that they understood the law as requiring simply that adjustments be made to interview arrangements.

15. We noted that Section 53 of the Equality Act 2010 imposes obligations that go further than QCA appeared to understand and concluded:

> "The duty to make such arrangements will arise where any provision, criterion or practice (PCP) that QCA has, puts a disabled person at a substantial disadvantage in relation to the process of application in comparison with persons who are not disabled. The duty is to take such steps as it is reasonable to have to take, to avoid the disadvantage."

16. While we accept that there is no requirement to lower standards for applicants who disclose a disability, there is a positive obligation to take procedural steps to avoid an applicant suffering a disadvantage arising from a disability. We could not see how that obligation could be met without QCA positively engaging with an applicant and exploring what adjustments might be appropriate to accommodate the disability in a particular case.

17. It might be that on enquiry no further adjustments are needed or are appropriate, but without making those enquiries there can be no confidence that appropriate allowances have been made for a disability. Indeed, we note that no evidence was produced of any internal consideration of what might be appropriate.

18. We considered this to be a significant failing because it is a procedural failing that could impact future applications from candidates who identify themselves as having a disability.

Complaint E

19. In respect of this complaint, we felt it was outside our jurisdiction to consider and passed no further comment.

Remedies

20. We incorporated a decision on remedy in the original decision and made several recommendations:

    1. "It is of great importance to maintaining public confidence in the appointment system run by QCA that it should be seen to be acting fairly. It is therefore of the highest importance that members of the SP who have knowledge of material which should be held back from the SP should not only recuse themselves from taking part in the decision on that application, but also not give the appearance of taking such a part.
    2. For similar reasons an executive of QCA who has knowledge of a kind which should not be made available to the SP should not take any substantive decision in relation to that application, such as making a change of independently chosen assessors, unless such a change is clearly mandated by written QCA guidance.
    3. QCA must take the utmost care to avoid grading errors, in order to maintain public confidence in its processes.
    4. QCA should ensure that (a) all those involved in processing applications from disabled persons (including assessors) are familiar with the obligations in sections 20 - 21 and 53 of the Equality Act 2010, and (b) the practice is adopted of engaging

proactively with any applicant who raises the possibility that a disability may disadvantage his or her application in any way in order to discuss what reasonable adjustments may be required by the 2010 Act for each stage of the process."

21. In addition to those recommendations, we found that as a remedy the complainant's fees for the application should be refunded; he should be entitled to make a further application at no cost and that he should be permitted to rely on references over three years old.

Response to the Complaint

22. The Complainant expressed surprise at receiving our report without disclosure or without hearing from him on remedy.

23. We consulted QCA on the issue of reopening the complaint and set a timetable which we communicated to the Complainant. Notwithstanding this we received further submissions prepared by counsel and a number of other emails from the Complainant before QCA had time to reply.

24. QCA took external advice and contended that it was not open to our Committee to reopen a complaint and accordingly did not seek to comment further.

25. Further submissions from the Complainant prepared by counsel were received on remedy, as was a request to reopen a complaint from a previous year which were repeated and rephrased in a series of further messages.

26. In terms of remedy counsel asked that;

> "Accordingly, it is submitted that the QCCC should adjust rule 7 and, applying rule 7 as adjusted and/or rule 29(e), QCCC should recommend to the Lord Chancellor and the Queen that xxxxxxxxx be appointed to Silk in the current round.
> There should be safeguards, so as to ensure that this recommendation is not subverted by Mr Wallman, by QCA generally, or by the Selection Panel. The recommendation should simply be added to the overall list of those recommended. Proof that this has been done should be supplied to Sir Christopher Floyd."

27. We will not rehearse in full the extensive communication received at this stage; however we concluded that;

    a. It was open to us in appropriate circumstances to reopen a complaint
    b. The Complainant had had as much disclosure as the procedure allowed. (He appeared to have been misled by accidental disclosure in a previous complaint that went beyond what would normally be given to a complainant).
    c. The Complainant had misstated our findings. We emphasised that we did not believe anyone at QCA was actively biased against him. We stressed that our conclusion had been that the involvement of the two individuals gave rise to an "*appearance of bias".* On this basis we simply felt that most of the allegations and submissions made did not have proper basis.
    d. The Committee did not have the power to order that its own procedural rules be amended.
    e. The Complaint Committee's role is not to recommend, endorse or in any other way materially advantage an application for appointment as a QC and we did not interpret

our powers as giving scope for us to do so. Accordingly, it would be entirely inappropriate and indeed ultra vires for us to attempt to order that he be appointed QC or that he be waived through to the interview stage in a future application.

f. We did not consider there were good grounds to alter the remedy we had already proposed.

Request to Reopen Decision on 2016 Complaint, or admit a new complaint in respect of it

28. In terms of a request to admit or reopen complaints in respect of previous competitions we declined to reopen a complaint in respect of the 2016 application as the issues complained of did not go to the substantive findings.

29. We refused to admit a fresh complaint in respect of the 2016 competition because, notwithstanding the fact that there is no time limit in our rules, a 60 day time limit for complaints is communicated to all applicants, which, at the least indicates to potential complainants that, save in exceptional circumstances, complaints should be made timeously. We considered that, given that the rules which apply to us do not contain a time bar and that good administration should allow for complaints at a later stage in exceptional circumstance, we could admit a complaint more than 60 days out of time. However, on the facts of this case we concluded there was no good reason to admit a complaint late and that in any event the complaint was unfounded.

Complaint about the 2018 Competition

30. The Complainant argued that now he was aware of "bias" tainting the 2019 competition he wished to complain about the 2018 competition in which he had been unsuccessful.

31. We refused to admit the complaint in respect of allegations about a letter from a senior judge as we were satisfied that it had been fully considered and was not material to our findings. We did however agree to admit the complaint to a limited extent on the narrow issue of whether the Chief Executive may have been involved in the selection of assessors in 2018.

32. QCA were of the view that we ought not to have admitted the complaint but ultimately disclosed documents that satisfied us the complaint was unfounded and we dismissed it accordingly.

Requesting of a Redacted Copy of the Decision

33. The Complainant requested a redacted copy of our decision which we provided having consulted the Complainant and QCA about the appropriate redactions.

Observations on the Complaints

34. The Complaint and the ancillary complaints involved the Committee in a very substantial amount of work, over a substantial period of time. We endeavoured to address all aspects of the complaint as thoroughly and as fairly as possible. The deep-seated view held by the Complainant was that there was clear evidence of unfairness in the way he had been

treated by QCA both in the 2019 competition and previously. This made it challenging for the Committee in terms of marshalling the complaint, understanding the allegations and then proceeding to investigate; however, we endeavoured to address all the Complainant's concerns fully and fairly.

35. QCA were resistant to the steps we took in terms of reopening remedy and considering complaints from previous years. We note that we were advised they had taken legal advice during the course of matters.

36. The role of the Complaints Committee is to provide an avenue by which all reasonable grounds of complaint can be considered. A degree of flexibility is required in order to manage complaints effectively and to ensure that a complaints process provides candidates with an effective remedy. We believe that it is in the interests of QCA to have an effective and complete complaints process.

37. Whilst we recognise that aspects of the complaint considered may have felt like personal attacks on the named individuals and acknowledge that many of the complaints and comments were unfounded, there were still some serious issues raised which needed exploring. We observe that open and co-operative engagement with the complaints process is crucial to creating a good impression of QCA as a whole.

Ancillary Matters

Covid

38. The Committee adjusted effectively to the challenges posed by Covid by making use of remote meetings. However, a consequence of the reliance on digital communication meant that the process did become very complex this year.

39. Although other factors detailed below also contributed to the workload, the Committee has to date exchanged over 400 emails in respect of the competition and met virtually on 7 occasions. Moving to digital working has undoubtedly made some aspects of the work easier but has also contributed to the process becoming far more complex.

Other issues:

40. In previous reports the committee has noted that it is not our role to make specific recommendations as to how the process of appointment or the handling of complaints should be conducted. Those matters are plainly the province of the two branches of the profession, namely the General Council of the Bar and the Law Society. However, it is for us to raise such concerns about the operation of those processes as we have encountered in the handling of the complaint.

The 60-day "Time Limit"

41. As we have observed above the 60-day time limit for submitting complaints is not contained in our own rules and appears only in the guidance to applicants as follows;

> "32. The Complaints Committee is independent of the Queen's Counsel appointment process. Its role is to consider complaints raised by an applicant about the way in which the Panel and the Secretariat have handled an application or concerns that the Panel

has not applied its procedures properly. It is not able to substitute its opinion or judgement for that of the Panel. The Complaints Committee will consider complaints after the end of the competition. Complaints must be raised to the Queen's Counsel Competition for England and Wales 2020 Guidance for Applicants in writing no later than 60 calendar days following the announcement of the outcome of the competition."

42. In principle the 60-day time limit appears sensible and proportionate but it would be better if it were contained in our rules, and it would be better if it formally included a power to extend time. The reason for this is that it cannot be right to exclude a complaint in circumstances in which a Complainant could not have known of the grounds for a complaint, or whether extenuating circumstances prevented a complaint.

The QCA Website

43. We do not believe the website currently highlights the complaints process adequately. In the current competition https://qcappointments.org/information-for-applicants/ the only reference to our process is in the information to applicants and no details of our powers are linked in.

44. The pages for previous years competitions contained more detailed information https://qcappointments.org/2019-competition/ and a hyperlink to our procedures.

CONCLUSIONS

45. Following this year's competition and complaint cycle we recommend:

    a. As we observed in the complaint response it is of great importance to maintaining public confidence in the appointment system run by QCA that it should be seen to be acting fairly. It is therefore of the highest importance that members of the SP who have knowledge of material which should be held back from the SP should not only recuse themselves from taking part in the decision on that application, but also not give the appearance of taking such a part. Accordingly, we recommend that formal protocols be put in place for the approach to be taken where individuals are asked to recuse themselves and that recusal extend to all substantive involvement not just the marking of individual applicants.
    b. For similar reasons an executive of QCA who has knowledge of a kind which should not be made available to the SP should not take any substantive decision in relation to that application, such as making a change of independently chosen assessors, unless such a change is clearly mandated by written QCA guidance.
    c. QCA must take the utmost care to avoid grading errors, in order to maintain public confidence in its processes.
    d. QCA should ensure that (a) all those involved in processing applications from disabled persons (including assessors) are familiar with the obligations in sections 20 - 21 and 53 of the Equality Act 2010, and (b) the practice is adopted of engaging proactively with any applicant who raises the possibility that a disability may disadvantage his or her application in any way in order to discuss what reasonable adjustments may be required by the 2010 Act for each stage of the process. It may assist to put more formal processes in place for dealing with applicant's who disclose disabilities in future competitions.
    e. The QCA website is better monitored for completeness of information.
    f. Our own procedures be reviewed to address the issues of time limits, and the reopening of complaint decisions.