QC Appointment Scheme – Listing of Cases and Assessors/Character, Conduct and Integrity

Response on behalf of the Planning and Environment Bar Association

1. The Planning and Environment Bar Association ('PEBA') is the professional bar association for barristers who specialise in planning, environment, compulsory purchase, highways, housing, rating and other aspects of local government and administrative law. The majority of our members are barristers in private practice.

2. This is PEBA's response to the two consultation papers issued by QCA in April 2018, on behalf of the Bar Council and the Law Society, on proposed changes to the following components of the QC Appointments Scheme:
   (1) listing of cases and assessors; and
   (2) character, conduct and integrity.

Listing of cases and assessors

3. The Bar Council and the Law Society propose that, in principle, applicants for appointment as Queen's Counsel should be required to list all their substantial cases, and those involved in the cases, over a prescribed period. The stated purpose of the proposed change is "to reduce the scope for 'cherry picking' by applicants": see paragraph 25 of the consultation paper.

4. For the reasons given in paragraphs 14 to 20 of the consultation paper, PEBA agrees with the principle of the proposed change.

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5. PEBA welcomes the professional bodies' recognition of the breadth of cases of substance undertaken by planning advocates, in paragraph 5 of the consultation paper. It is essential that the QC appointments scheme explicitly recognises that "judicial referees" may embrace members of the Planning Inspectorate, members of the Upper Tribunal (Lands Chamber), First Tier and Upper Tribunal judges and arbitrators. Many members of PEBA will draw their lists of substantial cases principally from proceedings heard by such persons rather than by judges of the higher courts of England and Wales.

6. In paragraph 22 of the consultation paper, the professional bodies suggest that an applicant's failure to list all cases of complexity or substance could be fatal to his or her application if it was "discovered" that this had been done with a view to concealing "a sub-par performance". PEBA agrees that the deliberate omission of a substantial case by the applicant for that reason should both risk that result and potential exposure to disciplinary action. However, PEBA considers it to be essential for the protection of applicants that the guidance in respect of what constitutes a "significant case" (paragraph 21 of the consultation paper) is completely clear and precise. In particular, it may be necessary to state that, if in doubt as to whether a case is "substantial", the applicant should include that case in his or her list.

7. PEBA suggests that the following related issue also merits consideration by the professional bodies. There is a proposed cap of "up to 20" cases. What would happen, for example, if a candidate had undertaken 21 substantial cases and chose to exclude the one unfavourable one? How would the sanctions for not listing an unfavourable case be applied to that candidate compared to a candidate that listed 19 substantial cases but failed to list one unfavourable one?

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8. PEBA responds as follows to the practical issues raised in paragraph 23 of the consultation paper.

(i) PEBA agrees three years is an appropriate period for which applicants should be asked to list cases of substance. It should also be possible for applicants to go back beyond three years if they would otherwise be short of cases, whether because of a career break (or part time working), or because of the nature of their practice. It should also be made clear that it is not just those candidates who have had a career break *during* those three years that are permitted to go back further. For example, candidates resuming practice at the beginning of the three year period following a period of parental leave would be likely to be affected during the early part of that period as they re-establish their practice after their return to work. Such candidates should be able to go back further where they consider that this is necessary to gain an appropriate or representative sample of work; and provided that they give reasons for the lengthier period that they select.

(ii) PEBA agrees with the professional bodies' proposal not to vary the number of cases required to be listed depending on applicants' different specialisms. PEBA emphasises again, however, that the professional bodies must ensure that the scheme does not prejudice those applicants, such as PEBA members, whose practice profiles are typically based upon fewer and lengthier cases and hearings over any given period than other fields of practice. It is essential the requirement is explicitly to list **up to** 20 cases of substance. Applicants must also have the opportunity to specify the duration and nature of each case listed so that the Panel is able to take account of those matters; and, for the same reason, to explain

why fewer than 20 cases are listed in circumstances where, for example, some of the cases listed have been particularly lengthy.

(iii) PEBA agrees that 20 cases of substance is an appropriate **maximum** number, subject to the responses to (i) and (ii) above.

(iv) PEBA agrees that applicants should be required to list judges from each major stage in the case to be listed. PEBA repeats the points made in paragraph 5 above.

(v) PEBA agrees with the professional bodies' provisional view that applicants should list their leader (if any) and the opposing advocate. Applicants should also be free to list other advocates if they wish to do so. PEBA members often participate in planning inquiries and hearings at which a number of parties are represented by professional advocates.

Character, conduct and integrity

9. PEBA's response to the questions posed in paragraph 21 of the consultation paper is as follows –

(1) It is plainly appropriate that applicants for appointment as QCs should be required to demonstrate all the behaviours expected of a QC, even where the applicant has not been the subject of any regulatory sanction for failure in that regard. It is neither unreasonable nor burdensome to expect applicants to provide positive evidence of such behaviours, in order to ensure continuing public confidence in the QC appointments system.

(2) It makes obvious sense to address this requirement by way of appropriate amendments to the "working with others" and "advocacy" competencies. Those competencies provide the natural context within which an applicant may reasonably be expected to provide evidence of the broader elements of professional integrity required of an advocate working in an adversarial system that are discussed by the professional bodies in paragraphs 18 to 20 of the consultation paper.

10. The issue raised by the professional bodies in paragraph 31 of the consultation paper is the extent to which behaviour of a kind mentioned in paragraph 25 (i.e. sexist, racist, or homophobic behaviour, bullying or harassment) ought to be taken into account in determining applications for appointment as a QC. The questions posed are:

(i) The extent to which such unsatisfactory behaviour outside the field of advocacy which attracted neither criminal nor regulatory sanction should be taken into account in considering applications for appointment as a QC.

(ii) How such behaviour should be defined, and what additional guidance might be needed.

(iii) The way in which the Selection Panel should seek information about such matters.

11. PEBA agrees that, in principle, the Selection Panel ought to take into account evidence of unsatisfactory behaviour of the kind mentioned in paragraph 25. Such behaviour is *prima facie* in breach of the Bar Code of Conduct.

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12. It is fair and reasonable to require applicants to disclose the facts of any disciplinary action brought against them on the grounds that they are guilty of such behaviour during the course of their practice. Such disclosure should include any internal disciplinary action brought within the applicant's chambers, company, partnership or firm. Any formal complaint upheld within an appropriate period prior to the application (say 5 or 10 years) in the context of external or internal procedures should be disclosed, together with the sanction applied on that complaint.

13. However, it should not be a requirement that applicants disclose allegations that have not been made the subject of formal disciplinary action or complaint. Nor is it fair or appropriate to request that applicants' Heads of Chambers provide informal "opinions" about such matters. That risks reviving the unacceptable "soundings" approach of the old system of QC appointments prior to 2003.

14. It is also inappropriate, unfair and impractical for the Panel to seek to make judgments about alleged unsatisfactory behaviour which has not been made the subject of formal disciplinary proceedings or a complaints process. Sexual discrimination, racial discrimination, discrimination on the basis of sexual orientation, bullying and harassment are all matters that would, in principle, constitute a breach of the Code of Conduct. If such allegations are made against individual barristers, it is a matter for the regulator to determine them. Likewise, barristers' chambers and law firms are required to have in place formal and transparent internal complaints and disciplinary procedures which provide for the fair and objective investigation of alleged unsatisfactory behaviour of that kind.

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15. The issue raised by the professional bodies in paragraphs 32 to 35 of the consultation paper relates to unsatisfactory behaviour by existing Queen's Counsel.

16. PEBA agrees with the principle that QCs should be expected to maintain the high standards required of them throughout their appointments. There is a case for providing for revocation of the QC designation to be available as a sanction following any finding of professional misconduct against the individual concerned. One approach might be to build the sanction of revocation into the range of sanctions available to the regulatory body following a finding of professional misconduct. This would enable the necessary procedural safeguards to be provided for the protection of the individual concerned.

PEBA

31 July 2018