

The future of Queen's Counsel

Response from the Office of Fair Trading

October 2003

OFT680

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1 INTRODUCTION

- 1 The issuing of this consultation by the Department for Constitutional Affairs brings to a head¹ the debate on the use and relevance of the rank of Queen's Counsel.
- 2 In March 2001 OFT published a report *Competition in professions*² which, among other things, drew attention to what OFT considered to be critical shortcomings of the Silk System. That report, while acknowledging that some of the old restrictions surrounding the conduct of QCs had been removed, highlighted as fundamental the issue of whether it is appropriate for government to confer a title on selected practitioners which enhances their earning power and competitive position relative to others. The report also questioned the value of the QC system to consumers. The report recognised that the issue was one not for OFT but for government to address, and called on government to take the matter forward.
- 3 In a subsequent progress statement published in April 2002³, we reiterated our concern at government involvement in the appointment of QCs, and set out in more detail why we consider that the QC title is unlikely to be useful to consumers as a quality mark and why we consider that the award of the QC title may distort competition:

'Governmental involvement in distinguishing between junior barristers and QCs has no parallel in other markets. In addition, we question the operation of the system as a quality mark. A mark will generally only be of value to consumers where certain conditions are met. One of these is that it be awarded according to clear criteria and in a transparent way that has particular regard to the experience of purchasers. Whether the QC system meets this condition remains open to debate. Another condition is that the

¹ See the foreword by Lord Falconer to the Department of Constitutional Affairs, consultation Constitutional Reform: The Future of Queen's Counsel, July 2003.

² OFT 328 *Competition in professions*, published March 2001, at paragraphs 45 and 46, reproduced here for convenience at Appendix 1. The report is available on the OFT website at www.offt.gov.uk. See also paragraphs 270 -279 of the report of consultants LECG published with OFT's report in March 2001 reproduced here for convenience at Appendix 2 and available also on our website at www.offt.gov.uk.

³ *Competition in professions* Progress Statement, available at www.offt.gov.uk

mark can be lost as well as won; and that continued holding of the mark is contingent upon continued high quality performance. This condition is clearly not met by the QC system. Moreover, we are concerned that the QC title may operate to distort competition. One sign of this is the step-change in fees that QCs are said to command; another is that custom and practice has given rise to some de facto demarcations as to what work is and is not suitable for QCs. It has also been suggested frequently that the operation of the QC title displays elements of a quota system and that some quantitative as distinct from purely qualitative criteria may apply. In this regard, we note with interest that the number of QCs appointed in 2002 is markedly higher than in any other recent year.'

The OFT's response to this consultation reflects and develops the views set out in previous OFT reports.

2 OUR RESPONSE

Question 1

Do you consider it appropriate for the state to be awarding a promotional rank in a profession? What are your reasons?

- 4 The historical origins of the title no longer correspond to its function. We have questioned, therefore, whether it is right for government to have responsibility for conferring on selected practitioners in a profession a title that manifestly enhances their earning power and competitive position relative to others. Whatever the intention of the award, there is little doubt that many consumers of legal services are likely to see it as a strong indicator that those selected will offer a higher quality service than others.
- 5 Firstly, there may be market distortion as a result of the continued focus of the government-run scheme on advocacy, largely to the exclusion of other relevant skills. As markets for legal services are liberalised, those who may be placed at a competitive disadvantage by the conferral of this title by government, include not only junior counsel but also members of other professions and in particular solicitors. This is because, in focussing upon advocacy, the QC scheme tends to undervalue other skills that may be relevant to meeting the needs of users of legal services in markets in which the QC will subsequently compete (providing legal advice, case management, negotiation and client care are examples). We consider it significant in this regard that the Law Society has withdrawn from participation in the appointment process. Market distortion may result also where government confers legitimacy on a title that is arguably misleading insofar as it suggests excellence in all or any area of specialisation, whereas it is intended to denote only skill in advocacy. The QC title may operate, therefore, to downplay the importance of information as to specialisation, particularly where purchasers are not solicitors.
- 6 Secondly, government's direct involvement in awarding a mark that functions in a market where the state is active as a purchaser raises important issues of independence. With regard to the Bar's continuing

support for the government's involvement in conferring title, we question whether this can be reconciled with the Bar's objective, often referred to as paramount, of maintaining the fearless independence of its members (see for example the Report of the Kentridge Committee adopted by the Bar Council in 2002 in which the Bar seeks to justify prohibitions on partnership and litigation on the basis that they are necessary to guarantee the independence of barristers). Given that the state is a major, if not the major purchaser of advocacy services, there appears to us to be an evident tension between state involvement in the conferral of title on advocates and the objective of advocate independence.

Question 2

Do you consider that the public interest would suffer if the Government were not directly responsible for the selection process for any quality mark scheme? What are your reasons?

- 7 We argue above that by lending its authority to a potentially misleading mark, government involvement may be both contributing to a distortion of competition and providing at least a potential threat to advocate independence. Both outcomes are likely to be contrary to the public interest, and more particularly to that of users of legal services. Elsewhere (see answer to 7), we argue that in its current form, the QC system falls short of providing useful and objective information on quality of services to users of legal services. We set out what we consider to be the necessary hallmarks of a quality mark system if it is to be of value to consumers: objective, transparent and relevant standards and continuing quality appraisal to ensure that standards are maintained). A quality mark scheme that met these conditions is likely to involve those responsible in closer and continuing scrutiny and accreditation of advocates' performance. Closer and continuing scrutiny by government is likely to exacerbate concerns raised above about the implications of government involvement for advocate independence. It is significant also that in other professions where quality mark schemes operate, it is not usual (and presumably not thought to be in the public interest) for government to involve itself directly in making the award.

Question 3

If you do not consider that the state should continue to be involved in the award of QC, can a change to the current constitutional arrangements which prevent The Queen from acting other than on the advice of ministers be justified? What form should that change take (including adequate measures for accountability to Parliament)? What are your reasons?

- 8 We do not have a view on how constitutional arrangements could be changed to allow the Queen to confer such an award on independent rather than ministerial advice, but we doubt whether such a change will address some of the significant concerns raised by the current system. We understand the question to envisage continuing a two tier structure for counsel established on the basis of a seniority title conferred by the Queen on non-ministerial advice. Such a system, whether based on ministerial advice or independent advice perpetuates the risk that competition will be distorted between those who receive the award and those who do not. Given that those who receive the award are likely subsequently to compete in a number of different markets for example, markets for advocacy and other legal services in which not all practitioners are primarily advocates, it is difficult to envisage a scheme of royal designation of advocates that would not distort competition. In our view therefore, designation in its current form should cease. In our answer to question 7 below we set out the circumstances and conditions of any future system in order for it to provide information to consumers of legal services that is useful and necessary.

Question 4

Can an arrangement under which the relevant minister makes recommendations, having been guided by another body, be justified? To what extent should the minister be bound to accept the advice of that body? What form should that arrangement take (including adequate measures for accountability to Parliament)? What are your reasons?

- 9 See response to question 3 above.

Question 5

If you support the option in Question 4, as the Government will be establishing a judicial appointments commission, should this be the advising body? What are your reasons?

- 10 See response to question 3 above. Without prejudice to our view that the designation in its current form should cease, we make the following observation. The historical proximity between QC appointments and judicial appointments (with the exception of Treasury juniors, barrister High Court judges have invariably been silks) has led some, both suppliers and purchasers (and solicitors may be both) to a perception that the arguments advanced in court by those who have the QC title are more likely to be favourably received by the judiciary than the equally strong argument of junior counsel of a junior advocate. This may give rise to a de facto demarcation between QCs and other advocates and one which is based on misapprehension by those choosing a service provider. In its response to the previous consultation from the Department of Constitutional Affairs 'In The Public Interest?', published in 2002, the Law Society notes that clients are sometimes anxious to have apparent equality of arms, and so wish to appoint a QC if their opponent does so, even if a junior advocate could deal with the matter perfectly well. Such a de-facto demarcation runs counter to the consumer interest and distorts competition between QCs and juniors. In our view, in order to remove the perception among some consumers that they are necessarily advantaged by choosing a QC, a separation of the judicial appointments function from any scheme of recognition of quality in advocacy is likely to be necessary.

Question 6

If it were to be decided that the rank of QC should be discontinued, do you consider that the Government should have an ongoing role in overseeing the framework of any new quality mark scheme that the Bar Council and/or the Law Society (or any other body) might decide to introduce? What are your reasons?

- 11 As the consultation document underlines, it is not unusual for government to have a role in overseeing the framework of a quality mark scheme for professionals. It is, by contrast, most unusual for government

to have responsibility for conferring a title that manifestly enhances earning power and competitive position in a market. In our view it is critical that government should only confer legitimacy on a quality mark scheme that genuinely assists consumers. The conditions that a scheme should meet if it is to be genuinely useful are outlined in the response to Question 7 below.

Question 7

Do you consider that the rank of QC in its current form benefits the public? What are the reasons for your view?

12 We consider this the key question. The main public interest justification advanced for the QC system has been that it serves as a quality mark. In this answer, we question this justification on a number of fronts. Many of our responses to other questions in this consultation refer back to the arguments set out here.

13 We accept that quality marks can help markets work well for consumers in some circumstances (A) and subject to conditions (B).

(A) Circumstances favouring a quality mark

14 The circumstances in which a quality mark will benefit consumers are

(i) where the mark assists ill-informed consumers to choose between better and poorer quality suppliers; and

(ii) where the mark raises the overall quality of services by encouraging excellence.

15 On point (i), we question whether the QC system operates in the circumstances necessary for it to be of use to users of legal services.

16 We question firstly whether users of legal services are ill-informed. It is worth noting that notwithstanding reforms in favour of clients having access directly to barristers, the vast majority of those who instruct counsel remain professional clients (solicitors) to whom the QC title is likely to be very secondary, if significant at all, in assessing the quality of a barrister (although there may be reasons divorced from quality considerations that might make the title relevant – see response to question 5 above).

- 17 Secondly, the availability of alternative sources of information on barristers has blossomed in recent years. Publications, in particular, the Chambers Guide and the Legal 500 have emerged to provide guidance by subject areas to the top barristers in each major field. While total accuracy and independence of such guides cannot be guaranteed in every case, they have a clear advantage as an information source over the QC title in that they are produced annually, indicate areas of expertise and reflect continuing changes in barrister performance, in contrast to the once and for all award of the QC title. We doubt that a lay or professional client who was ignorant of the top barristers in a particular legal field would choose a barrister by reference to their QC status alone, without referring to such guides. The QC system adds little if anything to that process. We have also witnessed in recent years a dramatic growth in the number of chambers which produce comprehensive brochures and – in many cases – have developed web sites. This has increased the amount of information available to consumers. In addition, more cases are now reported – either in general or specialist law reports, many of which are available on the internet and these are a ready source of up to date information on which barristers are involved in cases in and have experience in the relevant area. The QC title by contrast, is intended to denote skill in advocacy. However it may be seen by some as indicating general expertise, across a range of skills and areas of practice. If used by an instructing client without regard to further information as to relevant skills and specialisation, the label is thus apt to mislead rather than inform.
- 18 On point (ii), it is also open to question whether the mark raises overall quality of service by encouraging excellence. On the one hand, as a one-off award, it can clearly only fulfil this function until achieved, after which the system provides no ongoing incentive for the pursuit of excellence. Indeed, it could even encourage some QCs to rest on their laurels. On the other, it also seems likely that any impetus towards quality that the system provides is very inconsistent across the Bar and varies greatly between barristers of one set of chambers and another. We would question also whether this incentive is necessary given market incentives and continuous professional development requirements. Where markets reward excellence in other ways, there is unlikely to be a need for a quality mark to encourage excellence.

(B) Conditions for a quality mark

19 Key conditions that a mark must display if it is to benefit consumers by making markets work better include:

(i) that the mark is awarded according to clear, relevant and objective criteria in a transparent way that has particular regard to the sophistication and experience of consumers;

(ii) that the mark can be lost as well as won and that quality of performance is appraised on a continuing basis; and

(iii) that the mark does not distort competition.

We comment on these points in turn.

20. With regard to (i), the relevance and objectivity of the criteria that are used appear particularly problematic. As has been argued previously, in focussing upon advocacy, the QC scheme tends to undervalue other skills that may be relevant to meeting clients needs in markets in which the QC will subsequently compete (providing legal advice, case management, negotiation, and client care are examples). It is particularly difficult to argue that awards are made with particular regard to the experience of purchasers in circumstances when the Law Society, which represents the main body of purchasers, does not participate in the consultation process and seeks an end to the system of designation. Non-solicitor purchasers are likely to find the QC title, which focuses on advocacy and says nothing as to subject specialisation, too generic to be very useful. With regards to transparency, and notwithstanding a number of reforms in recent years aimed at increasing transparency, whether the QC system is sufficiently transparent remains controversial, particularly in the context of the operation of the consultation process.

21 With regard to (ii), it is clear that the system does not meet that condition. In making the QC award a once and for all award, its value to users of legal services is significantly limited.

22 With regard to (iii), we remain concerned that the QC title may operate to distort competition in a number of ways. One sign of this may be the step-change in fees that QCs are said to command; we understand it to be widespread practice across the Bar for newly appointed QCs or their

clerks to increase their charge out rates overnight. Fixed rates for publicly funded work are determined to a significant degree by whether the advocate in question is a QC rather than to criteria such as experience and quality. It has been suggested that fee differences between QCs and juniors are the result of market forces alone and that rates for publicly funded work simply reflect the market reality, which if true, is acceptable. However, in the context of privately funded work, there is some evidence to suggest that the practice of simply paying more for a QC irrespective of quality is not only accepted as normal practice, but also may be 'formalised' by judges when awarding costs.

- 23 Where courts are unwilling to compensate junior counsel to the same extent as QCs when awarding costs (and the major work to which judges have reference when deciding costs '*Greenslade on Costs*' suggests that a QC should generally receive a higher fee for comparable work) this makes the services of a junior less valuable and those of a QC more valuable, all else being equal, and would depress the fee juniors could command and cause that commanded by QCs to rise. The size of the effect would depend on the client's perceptions of the likelihood of being awarded costs. The assumption that the QC is necessarily a better barrister, created by the conferral of title, may thus be reinforced and quantified by the judge awarding costs. Where judges place reliance on title even though it may not be a useful guide to quality of service, there is clearly a danger that users of legal services are being systematically misinformed as to the value of services.
- 24 Another sign that competition may be distorted by the QC title is that custom and practice has given rise to some de facto demarcations as to what work is and is not suitable for QCs. This effective demarcation is enforced by the perceptions of judges, solicitors and lay clients. For example, as argued previously, a common belief is that it is necessary to have a QC in certain courts - or to match the other side's 'big gun' with one's own. It is also suggested that title and the accompanying privileges such as position in court may lead a judge to listen to a QC's arguments with greater respect.
- 25 Lastly on the issue of distortion, it has been suggested frequently that the operation of the QC title displays, or at least has displayed, elements of a quota system and that some quantitative as distinct from purely qualitative criteria may apply. Any such quota would inevitably distort competition.

26 In summary, given that on the one hand the circumstances in which the QC system operates are not those in which a quality mark is likely greatly to assist the public, and on the other that the key conditions for the operation of any quality mark are either absent or subject to controversy, there would seem to be a strong case that the designation should cease.

Question 8

In the light of the arguments set out in this section, do you think the current system should be abolished or changed? What are the reasons for your view?

27 See response to question 7 above. Given that on the one hand, the circumstances in which the QC system operates are not those in which a quality mark is likely to assist the public, and that on the other, the key conditions for the operation of any quality mark are either absent or subject to controversy, there would seem to be a strong case for abolition, or at least for a change to the QC system that was sufficiently radical and comprehensive to reflect the criteria set out in response to question 7 above.

Question 9

Do you consider that the legal services market is sufficiently sophisticated to allow solicitors to choose appropriate barristers without the need of the QC mark? What are your reasons?

28 See response to question 7 above at paragraph 17 in particular.

Question 10

If the rank should continue, should it also continue to enjoy its traditional formal privileges of dress, position and precedence?

29 We answer this question without prejudice to our response to 8 that the title should be abolished or comprehensively and radically reformed. The traditional formal privileges are likely to contribute to de facto demarcations between QCs and other advocates that are based on rank rather than quality. They are likely, therefore, to contribute to a distortion in competition and they should, therefore, be ended.

Question 11

If you consider that the QC rank should be abolished, do you consider that it should be replaced by another form of quality mark (whether it be granted by the state, the professions, an independent body or the proposed Judicial Appointments Commission)? What are your reasons? (see also the sections on state involvement and the key elements of a quality mark)

- 30 The key issue from our perspective is that any system that replaces the current system should meet the conditions and circumstances set out at question 7 above. It seems clear to us that any quality mark system replacing the QC system would therefore have to be very substantially different in operation. Given our doubts about whether purchasers are ill-informed we are not persuaded that another form of quality mark is strictly necessary. If one were to be introduced we see significant advantage in ensuring that the body responsible was separate from that with responsibility for judicial appointments.

Question 12

What do you consider would be the impact (positive or negative) on customers of legal services if the rank of QC were to be removed? Do you consider there would be any increase or decrease in legal costs? What are your reasons?

- 31 Abolition of the QC system is likely to lead to an increased focus by users of legal services on quality and experience when selecting advocates. The impact on legal costs is likely to depend on circumstances but to the extent that additional costs are incurred under the present system merely by the perceived need to engage a QC, the effect of removing the rank of QC should be to reduce costs.

Question 13

What do you consider would be the impact on advocates' fees (QCs and juniors) if the rank were to be removed?

- 32 If advocates generally are selected according to more rigorous criteria of quality and experience, their fees should better reflect their abilities. This

is likely to result in fee increases for some advocates and decreases for others. Insofar as advocates' talents became better allocated to the needs of users of their services, better value for money should result.

Question 14

For those clients who qualify to use the Bar Council's current Direct Access scheme, what would be the impact (if any) of the removal of the QC rank?

33 See response to question 12 above.

Question 15

What changes, or other kind of scheme, might better help non-specialist solicitors or non-lawyers to choose the right advocate for their case?

34 Much information needed to help non-specialist solicitors and non-lawyers choose the right advocate is already available (see answers to questions 7 and 9). At present non-lawyers, in particular, might not be aware of this information, but we think it likely that the process of competition, if freed from the distortions of the QC system, would naturally lead to such information becoming more widely known.

Question 16

If a different approach had to be taken in matters where QCs are currently regularly used, what ways would you suggest for identifying practitioners with a suitable level of expertise or case-management skills, and what sources of information would you use?

35 See responses to questions 7 and 9 above.

Question 17

What other implications do you consider there would be, positive or negative, including on price, for the legal services market if the rank of QC were to be removed?

36 See responses to questions 12 and 13 above.

Question 18

What measures are needed to deal with circumstances where the use of a QC has been stipulated as a contractual condition?

- 37 If the rank of QC were abolished then contracts which stipulated the use of a QC would have to be amended to refer to criteria that focus on quality and experience. To achieve this, one solution might be may be to introduce legislation to the effect that any previous legislation or contracts...etc referring to QC should be read as (for example) 'barrister with suitable expertise and experience'.

Question 19

If the Government decided that it was no longer appropriate for the state to provide a guide to the quality of advocacy services through appointment by The Queen to a rank, which of the options given for transitional arrangements, referred to in paragraphs 68 to 71, (if any) should be preferred, and why?

- 38 Allowing existing title holders to continue to benefit from the title in the absence of potential competition from new appointments may result in an even greater distortion to competition than that we believe currently may result from the system. We therefore support option 1.

Question 20

If you do not support these options, what other approach would you suggest and why?

- 39 Not applicable.

Question 21

Should the quality mark be granted only after, for example, examination, or interview? Why?

- 40 If a quality mark is deemed necessary it should meet the conditions set out in our answer to question 7. In particular it should be awarded on clear, relevant and objective criteria in a transparent way that has particular regard to the experience of purchasers. Examination or

interview might be elements of the assessment of this condition but there could well be others.

Question 22

Should it include regular re-appraisal or re-accreditation? How might this be achieved?

41 Regular reappraisal or re-accreditation is a key condition of any quality mark that is of benefit to the users of legal services

Question 23

Should it include appeals and complaints mechanisms? How would you envisage them working?

42 An appeals mechanism against non-award of the mark is probably desirable. If a quality mark were to be awarded that met the conditions set out at question 7 above, this would assist in creating the pre-conditions for a meaningful appeal. Once a mark was awarded, a system for dealing with complaints that the quality of the service to which the mark attests has not been met is essential. We envisage that it would be an extension of the existing complaints mechanisms run by the Bar Council and Law Society (whether one or both of them should be involved would depend on whether the quality mark covered solicitors as well as barristers).

Question 24

Do you think some new form of quality mark is desirable? By whom should it be run, and how? What would be the impact on the market for legal services?

43 In our view and as set out at question 7 above, a quality mark is desirable only in some circumstances and subject to certain conditions. We do not believe that these conditions are met by the current system. We do not believe that a quality mark is needed. If one is advanced, it should necessarily meet the conditions discussed above.

Question 25

If some form of quality mark is necessary, should it continue to focus primarily on advocacy?

- 44 As has been argued previously, in focussing upon advocacy, the QC scheme tends to undervalue other skills that may be relevant to meeting clients needs in markets in which the QC will subsequently compete (providing legal advice, case management, negotiation, and client care are examples). If a quality mark were to focus primarily on advocacy it would be essential to make sure that this was absolutely clear to users of legal services. Those who needed another service, for example legal advice, would need to understand that the advocacy quality mark had no necessary relevance to them. Subject to this and to conditions set out at question 7, other relevant skills might equally be the subject of a quality mark. Whatever is the focus, it would be essential to make sure that the scope and nature of the quality mark was made absolutely clear to users of legal services.

Question 26

If you consider that any criteria should reflect a broader range of skills and experience, how do you think this might be achieved? What other skills do you consider should be recognised and tested?

- 45 We have no views on this question.

Question 27

If you consider that the criteria should focus on advocacy, should there also be a parallel mark for solicitors and barristers who undertake the many other types of legal work (including the issuing of proceedings, the preparation of instructions for advocates, and many matters which do not usually involve the court, such as conveyancing)? What differences would you envisage there being between the two schemes?

- 46 We have no views on this question.

ANNEXES

A EXTRACT FROM THE OFT'S REPORT 'COMPETITION IN PROFESSIONS', PUBLISHED MARCH 2001

QC system

- 45 It is right to recognise first that some of the old restrictions surrounding the conduct of QCs have been removed some time ago. For example, it is now no longer obligatory for a QC to be supported by a junior barrister. However, other restrictions both in rules and in custom and practice relating to this distinction persist, and have significant effects on competition. The Lord Chancellor, in 1999, commissioned a report from Sir Leonard Peach on the selection of QCs, which in general found that the selection of QCs was made after appropriate consideration. The report nonetheless made a number of recommendations, the implementation of which has resulted in improved transparency and objectivity in the selection process. New features of the process include the opportunity for unsuccessful applicants to receive feedback on their applications, safeguards against discrimination, and provision for the process to be scrutinised by the Commissioner for Judicial Appointments.
- 46 That report did not however address the fundamental issue of whether, given that the historical origins of the title no longer correspond to its function, it was right for the Government to have responsibility for conferring on selected practitioners in a profession a title that manifestly enhances their earning power and competitive position relative to others. There remain concerns also that there is no continuous quality appraisal to ensure that the quality mark of QC remains justified, that there is no peer review on selection and that there are no professional examinations that must be taken in order to become a QC (although this latter point was a recommendation of the *Peach report*). In any event, even if it could be shown that such an appointment system were transparent, objective and non-discriminatory, and operated as a genuine quality mark, it is difficult to understand the client's need for a quality mark where

restrictions upon direct access by clients to barristers remain in place and barristers' services are consequently purchased by solicitors who are specialists. Given these considerations, it is questionable what the value of the system is to consumers.

B EXTRACT FROM THE REPORT BY CONSULTANTS LECCG, PUBLISHED ALONGSIDE THE OFT'S REPORT 'COMPETITION IN PROFESSIONS', MARCH 2001

Demarcation within the barristers' profession: QCs and the Junior Bar

- 270 Originally Queen's Counsel (QC) were retained for royal work (QCs are appointed by the Queen on the advice of the Lord Chancellor), but the appointment is now described as 'a mark of eminence'. Juniors who wish to become QCs can apply to the Lord Chancellor's Department, and it is now open to employed barristers and solicitors to do the same. By 1999, four solicitors had been appointed QCs. Becoming a QC has also been the traditional pathway to the judiciary.
- 271 There is no formal reservation of any service to QCs. As the result of long-standing perceptions, however, the QC system results in an effective demarcation between the Senior Bar (QCs) and the Junior Bar in certain areas of work. For example, QCs do not normally do paperwork but concentrate almost entirely on advocacy. (According to paragraph 605 of the Code of Conduct, a QC in independent practice does not have to accept instructions to settle alone any document of a kind generally settled only by or in conjunction with a junior). Originally this demarcation was more rigidly enforced: there were rules of etiquette, for example, preventing a QC appearing in court without a junior ('double manning'), and entitling a junior to two-thirds of the QC fee. These rules were abolished, respectively, in 1977 following a Monopolies and Mergers Commission report (see Annex B) and in 1966 - although it is alleged that convention still means that QCs generally do not appear alone in court.
- 272 Arguments in favour of the QC system are that it is in the public interest to have a recognised elite of specialists, and that the QC badge acts as a qualitymark. Furthermore, the Bar Council maintains that a QC's exemption from the cab-rank rule (see paragraph 284 below) in paragraph 605 of the Code allows QCs to specialise in advocacy without being bogged down in paperwork. Defenders of the system deny that double manning is the norm and argue that the appearance of two barristers reflects case loads and a sensible division of labour. There are a number of objective criticisms that can be made of the current QC system: the

effective demarcation of certain services may distort competition between barristers and others (such as solicitor-advocates), and it may not operate as a reliable quality mark.

- 273 As noted earlier, the QC system leads to the effective reservation of certain types of work to QCs only (despite the removal of formal demarcation restrictions). This effective demarcation is enforced by the perceptions of judges, solicitors and lay clients. For example, a common belief is that it is necessary to have a QC in certain courts - or to match the other side's 'big gun' with one's own. It is also suggested that a judge will listen to a QC's arguments with greater respect (for a discussion of the attitude to judges to advocates in general, see Chapter IV, paragraphs 173 to 175).
- 274 One sign that competition may be distorted is the step-change in fees that QCs are said to command following appointment (even though they are no more experienced than just before appointment). The precise extent of the difference was not made known to us, but we were told that it is substantial. It should also be noted that not all QCs are able to sustain these higher fee levels. This may be because potential clients do not consider some QCs to be of sufficient quality to justify the fees charged. Although the higher fees that QCs charge may simply reflect superior experience or quality, they may also be indicative of some form of quota. This quota may act as a barrier to entry to the Senior Bar and allow the incumbent QCs to charge fees higher than they would command in a more competitive market.
- 275 Numbers of QCs are not determined by the market but by the Lord Chancellor. In practice, they are limited to about 10% of the profession (see Figure 15 above). Although there is no official quota, the appointments system has some features that might indicate an unofficial quota. An appendix to the Kalisher Report (1994), attached at Annex E, provides some anecdotal evidence of an unofficial quota in operation a few years ago. If the QC system was truly a reflection only of quality, and quality standards were being maintained through the training system, one might expect the level of new QC awards to have risen roughly in proportion to the increase in the number of barristers in total. In fact, they have stayed fairly constant year on year (see Figure 14), at a level sufficient to maintain the number of QCs as a proportion of all barristers

at roughly the 10% mark (see Figure 15). We think this might suggest some disguised quota arrangement.

- 276 Even if there is no quota in operation (and we do not have sufficient information to establish with certainty whether there is or is not), the appointments system (despite recent reform following the Peach report) does not appear to operate as a genuine quality mark. The system is secretive and, so far as we can tell, lacks objective standards. It also lacks some of the key features of a recognised accreditation system, such as examinations, peer review, fixed term appointments and quality appraisal to ensure that the quality mark remains justified. We were told that many solicitors and some barristers criticise the lack of objectivity of the system.
- 277 For other professional services it is has not proved necessary for the Government to intervene to distinguish the most expert practitioners. The profession itself should be capable of assessing, awarding and monitoring badges of quality without government intervention⁴. Even in the absence of a quality mark, however, the evidence we have suggests that the market would be able to make informed choices without the aid of an accreditation scheme. Clients for advocacy services are usually very well informed as to the past performance and reputation of barristers (and other advocates) operating in their field. As a result, and because the pool of barristers is relatively small, particularly in specialist areas, they are normally capable of identifying and selecting the most appropriate provider without the aid of an accreditation scheme. Even with the current prohibition on direct access to clients by barristers, client awareness of service quality is likely to be high in the kinds of cases where top quality advocacy services are required.
- 278 In our view, therefore, the existing QC system does not operate as a genuine quality accreditation scheme. It thus distorts competition among junior and senior barristers. Our evidence indicates that clients do not generally need the assistance of a quality mark, but if there is to be such a scheme, it should be administered by the profession itself on transparent and objective grounds. Furthermore, there is some evidence that an informal quota is in operation within the current QC appointment

⁴ Particularly as many of the other restrictions imposed on the profession are justified on grounds that they visibly maintain independence from government. (See, for example, the prohibition on partnerships between barristers and the cab rank rule discussed below).

system, and that it appears to have the effect of raising fees charged to litigation clients.

279 We do not think that a mark of quality or experience is necessarily anti-competitive, so long as the award is governed by transparent and objective criteria, and restrictions are based on qualitative, rather than quantitative, factors. On the evidence available to us, however, the current system does not pass these tests.