

*From the Employed Bar Committee*

*And*

*The Bar Association for Commerce, Finance and Industry (BACFI)*

Barbara Mills KC, Chairman

Malcolm Cree, Chief Executive

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Bar Council

*Dear Colleagues*

1 September 2025

### **Reform of the King's Counsel Appointment (KCA) System**

1. As promised, we write to set out the representations of the Employed Bar Committee (EBC) and The Bar Association for Commerce, Finance and Industry (BACFI) in respect of the operation of the current KCA system and the two reforms we would like to see the Bar Council consider adopting as a matter of policy, leading to expedited and meaningful change for the both the employed and self-employed bar, and a significant contribution to the aim of One Bar to which we know you are committed. These are (i) reform of the criteria for appointment by means of the adoption of an expanded definition of *advocacy* and (ii) drawing assessors from a wider pool to include independent non-judicial assessors of equivalent standing to the current judicial assessors, able to apply the competencies for selection. As you have previously acknowledged, this issue has long been a matter of concern to our constituent members.
2. The Bar Association for Commerce Finance and Industry (BACFI) is the specialist bar association which represents barristers employed in commercial organisations, in the financial services sector, in professional services firms and other employed settings. The Employed Bar Committee represents the interests of approximately a fifth of the practising Bar comprising barristers employed in industry, by the Government Legal Department and other civil service departments, the Crown Prosecution Service, the Criminal Defence

Service, the financial and professional and safety regulators, the Armed Forces, Charities, non-governmental organisations and those in private practice outside Chambers, and also promotes their interests inside the Bar Council of England and Wales. There is a significant overlap in the membership of BACFI and those represented by the Employed Bar Committee. For convenience, we refer to the Employed Bar throughout.

3. The policy recommendations in this letter are also supported by the two largest employers of non-courtroom-based Employed Barristers: the Government Legal Department and the Royal Navy who have reviewed and helped formulate the recommendations in this letter.

*The Summary of Revised Process for KC Award for England and Wales*

4. The King's Council Appointment Scheme was developed by the Bar Council and the Law Society and its Summary Process was approved by the professions on 23 November 2006. It has since undergone considerable modification and revision in January 2014, then in February 2019, in September 2020 and most recently in June 2023. In our conversations with the KCA's management, they have frequently observed that the capacity to make the changes sought lies not with the KCA, but with the Bar Council and Law Society. It is the hope and expectation of the Employed Bar that their representative body will treat their concerns with the utmost seriousness.

*The issue*

5. The appointment of 105 new King's Counsel (KCs) was announced earlier this year. Not one of the 5 employed barrister applicants was successful. No employed barrister has been appointed in the past 4 years.
6. Less than 1.4% of the Employed Bar has been appointed to the rank of King's Counsel. Only 1 in 50 King's Counsel are Employed Barristers. Almost all of these were appointed whilst at the Self-Employed Bar and then moved to the Employed Bar. The Crown Prosecution Service has two King's Counsel.
7. The KCA Guidance for Applicants states as follows:

*"The King's Counsel scheme aims to identify those advocates best qualified to represent clients in legal disputes of particular difficulty, complexity or sensitivity in the higher courts of England and Wales or in equivalent forums.*

*To be eligible, applicants must: hold rights of audience in the Higher Courts of England and Wales and a current practising certificate; have demonstrated excellence in advocacy in cases of substance in the higher courts of England and Wales or in tribunals, arbitrations or other forums; demonstrate consistent excellence across each of the competencies; and, provide evidence of both written and oral advocacy in relation to developing and advancing a client's case, although the best outcome may have been achieved through arbitration, court determination or a settlement agreement."*

Whilst it might be thought that the explicit references to “*equivalent forums*” and “*or other forums*” must necessarily include non-courtroom based advocacy and so be inclusive of those whose advocacy is not courtroom based, the criteria in the Summary of Revised Process, the Application Form and the Guidance for Applicants, in particular, the strict requirements for Judicial Assessors ensures that those who practise outside the courtroom cannot be recognised. The requirements are as follows:

*“5.1 Applicants will be expected to list 12 cases of substance, complexity or particular difficulty or sensitivity in which they have been engaged as advocate over the past three years. Where an applicant is unable to list 12 such cases over the previous three years, he or she may list cases from earlier”<sup>1</sup>*

Firstly, many Employed barristers do not work on “cases”. They may work on matters, issues or situations depending on their employment.

The Guidance for Applicants provides an explanation of what constitutes “cases that may present the characteristics of a case of substance” and includes only examples of cases which would normally be undertaken by a self-employed barrister.

Secondly, whilst ostensibly it ought to be possible for non-courtroom based advocates to be considered, the requirement for judicial or arbitral assessors means that, in practice, there is no possibility of appointment for those who practise in “*equivalent*” or “*other forums*” precisely because of this requirement:

*“6.2 Applicants will be required where possible to list a judge or arbitrator from each of their listed cases*

*6.3 Applicants will be asked to nominate two judges from those listed, numbering them in order of preference...*

*6.4 The Selection Panel will select a further three judges or arbitrators from the list (in addition to the first nominated judge) for confidential written assessments...”<sup>2</sup>*

The Guidance for Applicants places further restrictions on judicial assessors stating:

*“Judicial assessments can only be provided by those exercising a judicial function and, consequently, mediators are not acceptable as judicial assessors”<sup>3</sup>*

Thirdly, Applicants are “*required to identify a practitioner against whom they have appeared or by whom they have been led, in each of their listed cases*”<sup>4</sup>

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<sup>1</sup> Summary Process page 6

<sup>2</sup> Summary Process page 6

<sup>3</sup> Guidance for Applicants page 23

<sup>4</sup> Summary Process paragraph 7.2 page 6

For Employed Barristers in Government and in the Armed Forces, this is a wholly unreasonable and impractical requirement. The adversary may well be a Foreign Government, Coalition Partner or enemy force.

Fourthly, Applicants are *“required to identify at least six individuals who have been (in their own right or on behalf of the firm or employer) professional clients, clients or client proxies, in one of their 12 listed cases”*.<sup>5</sup>

Most Employed Barristers have a single client: their employer.<sup>6</sup>

Fifthly, the KCA has introduced a further restriction which does not appear anywhere in the Summary Process agreed by the Bar Council and the Law Society as governing the application criteria which operates as a significantly barrier to the ability of the KCA to recommend an Employed Barrister for appointment. It is a requirement for appointment that oral advocacy is undertaken:

*“Whilst the Panel recognises that some applicants may have a paper or desk-based practice it is imperative that there is some evidence of oral advocacy, ideally in a contested setting, and that these examples provide sufficient evidence of consistent excellence.”*<sup>7</sup>

8. Thus the Application criterial would seem to have been designed to be as restrictive as possible to exclude all but a tiny minority of Employed Barristers from eligibility for appointment, no matter how senior or respected they are in their field from the only recognition available to them within their profession. We consider below whether such restrictions are actually necessary in the public interest when so many other countries operate systems which are far less restrictive and the wider consequences of what would seem to be an injustice to the Employed Bar. One of those consequences is the impact on recruitment to the senior judiciary.

9. Whilst it is not necessary to be an excellent advocate to be an excellent judge, the statistics of appointment to the senior judiciary show an extremely high correlation between appointment as King’s Counsel and senior judicial appointment, King’s Counsel being the cadre from which most of the senior judges are still drawn.<sup>8</sup> This has ramifications for the diversity of the senior judiciary including diversity of thought, experience of the world of work outside of chambers and expertise within Government,

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<sup>5</sup> Summary Process Paragraph

<sup>6</sup> A minority of Employed Barristers do provide reserved legal activities to clients of their employers through SRA regulated entities, NGO’s or charities.

<sup>7</sup> Guidance for Applicants page 14

<sup>8</sup> As of the date of this letter there are 12 Justices of the Supreme Court, one of whom has never been appointed to King’s Counsel. There are 38 Judges of the Court of Appeal. All were previously appointed as King’s Counsel. There are 108 High Court Judges of whom only 7 had not been previously appointed as King’s Counsel. In the most recent round of appointment of 6 new High Court Judges, all were self-employed King’s Counsel.

finance, industry and defence and the experience of holding senior leadership positions involving hundreds and sometimes thousands of employees and substantial budgets.

10. It is an irony that there have been Employed Barristers appointed to the Supreme Court – indeed as President, without having been eligible for consideration for appointment as King’s Counsel. This would seem to be indicative that there is no shortage of ability just a failure of recognition.
11. The exclusion of applicants without judicial assessors fails to recognise and value the breadth and quality of the advocacy practised by the growing numbers of the Employed Bar outside the courtroom.
12. As major purchasers of legal services as well as providers of legal services, the Employed Bar is well placed to recognise excellence and can make comparative judgements as to ability across practice specialisms. Many Employed Barristers purchase the services of King’s Counsel on a daily basis on behalf of their clients. They can often watch the service being delivered. They know the result achieved. They achieve equivalent standards in their own professional lives. It is noteworthy that the academic standards achieved by Employed Bar entrants to international law firms and the senior civil service roles are at least as high as the entry standards to the most elite chambers.

#### *The impact on the Employed Bar*

13. The inability of nearly every Employed Barrister to meet the criterial for appointment as King’s Counsel does impact upon our confidence in the current system of King’s Counsel appointments. We question whether the current criteria result in the right people being precluded from appointment for the wrong reasons. The unjustifiably narrow definition of “advocacy” and reliance solely upon judicial assessors excludes all but a very tiny minority of employed barristers from applying at all.

#### *The public interest test*

14. We support meritocratic appointment in the public interest.
15. The majority of the Employed Bar is employed in public service – in the military, government, regulation and the Crown Prosecution Service. We consider the only possible justification for the existence of the King’s Counsel system is if the public interest is better served by its existence than in its abolition. The KCA says “*the King’s Counsel scheme aims to identify those advocates best qualified to represent clients in legal disputes of particular difficulty, complexity or sensitivity*”. It therefore represents that the appointment is a kitemark for quality.<sup>9</sup>

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<sup>9</sup> It is noteworthy that the KCA does not explain how an appointment for the entirety of the remainder of the professional life of an advocate and the complete absence of any continuing ongoing quality assessment might

16. The award of King’s Counsel is not merely a quality assurance measure, or the recognition of talent within a professional body or the mastery of a craft by a Guild because it carries the imprimatur of the State. King’s Counsel Appointments submit a list of successful applicants to the Lord Chancellor “*and thence to the King for the issue of letters patent*”<sup>10</sup>. Yet excluded from appointment by the adoption of unnecessarily restrictive criteria for appointment is almost every barrister actually employed in the service of the State. Excluded by the application of these criteria from consideration are those who actually serve, on a daily basis, as the Government’s or King’s Counsel.
17. There is a public interest in quality advocacy inside the courtroom but there is as great a public interest in high quality advocacy outside the courtroom. This may involve Employed Barristers persuading Ministers of State to accept robust and independent representations when making decisions, persuading military commanders in the theatre of war to observe human rights and the laws of war and in advocating for proper disclosure in the investigation of crime to avoid miscarriages of justice occurring.
18. Importantly, persuasive advocacy may take the form of discouraging unnecessary litigation by counsel prepared to negotiate, mediate and compromise as well as those who seek to avoid disputes occurring.
19. The current KCA Competency B criteria does recognise that some applicants may have a paper or desk-based practice but that the requirement for some evidence of oral advocacy, albeit only “*ideally in a contested setting*”, is far too narrow and should be widened beyond the current “*Evidence can come from arbitration, court determination, settlement agreements or mediations.*” to encompass a wider range of examples that provide sufficient evidence of consistent excellence.
20. It is particularly inappropriate for there to be undue emphasis on advocacy in the Higher Courts of England and Wales in the light of the judgement of the Court of Appeal in Churchill Merthyr v Tydfil CBC [2024] 1 W.L.R 3827 (“Churchill”), which confirmed that the Court can make an order for the parties to engage in non-court dispute resolution and/or order a stay in proceedings to allow for non-court dispute resolution to take place in accordance with the Overriding Objective being “*the legitimate aim of settling the dispute fairly, quickly and at reasonable cost*”. This endorsement of the pivotal role of non-court dispute resolution brings England and Wales in line with best practice internationally and ought to be endorsed by the KCA.

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affect that rationale or undermine the justification that it is a quality assurance measure. We are unable to identify any case in which the award of King’s Counsel has been lost on the grounds of an incompetency or incapacity assessment.

<sup>10</sup> Summary Process paragraph 12.1

21. Non-court dispute resolution can be a highly effective and cost-efficient means of resolving a dispute in private which allows for greater access to justice for some demographics including the vulnerable and impecunious.
22. There is a compelling public interest in recognising the specialist advocates who have pioneered non-court dispute resolution. Mediation is an increasingly popular and effective form of alternative dispute resolution with success rates of around 75 to 80 per cent. Mediation has the advantage of allowing parties the opportunity to preserve confidentiality, reputation and relationships. This is especially important where children and vulnerable adults encounter the justice system. Sir Geoffrey Vos noted that “*even with initially unwilling parties, mediation can often be successful*”.
23. However, mediators are not acceptable to the KCA as an equivalent to a judicial assessor.<sup>11</sup> They can only be practitioner assessors. This means that those whose role as an advocate is to seek to resolve disputes through mediation particularly where there are strong public interest considerations – for example where children are concerned – will not be able to provide the requisite judicial assessors and so are prevented from achieving recognition as King’s Counsel. We cannot see how this restriction could be considered to be in the public interest.
24. Many of the roles performed by Barristers outside an adversarial courtroom setting have far greater impact on the promotion of the rule of law, development of the law, respect for democratic institutions and government, law and order, international policy, economic wellbeing, health and safety, the proper governance of corporate entities and the financial services sector than advocacy in the courtroom.
25. The criteria adopted in 2006 and subject to revision now requires further updating to correct the anomalies which have resulted from the adoption of unduly restrictive criteria and the Bar Council has the opportunity to fundamentally shape that reform.
26. The Employed Bar is not only increasing, it is also increasing in influence, in seniority and economic power. Employed barristers are now in senior leadership positions in the military, commerce, industry, law firms and the Government Legal Profession.
27. If the King’s Counsel Appointments system is to survive, it must retain the confidence of the wider profession and the public. There would seem to be no good reason why brilliant advocates who practice outside the courtroom, for example as a naval barrister on an aircraft carrier on deployment in international waters, who serve as targeting counsel advocating for compliance with the laws of naval warfare when a coalition partner is advocating for a contrary position, should be permanently deprived of recognition as King’s Counsel for the entirety of their career.

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<sup>11</sup> Guidance to Applicants page 23

28. Those who support retention of the award of King's Counsel might reflect that this is far more likely to be achieved by reform of the selection criteria which enables applications from a more diverse cohort and includes the opportunity for the most brilliant and respected practitioners in government, industry, financial services, commerce, charities, the armed forces and law firms to be recognised.

*A broader definition of "Advocacy"*

29. From at least 2002, when the professional governing bodies came to consider advocacy standards a broad definition of advocacy has been applied. These standards and principles were first articulated in this form by the late Timothy Dutton QC CBE and described follows:

***"The essential skills for a persuasive modern advocate are, in combination: the ability to persuade orally; the ability to persuade in written argument; cogent legal and factual analysis; the ability to develop reasoned arguments; forensic skills with evidence (both written and oral) with all of the foregoing undertaken to high ethical standards."***<sup>12</sup>

30. These criteria can be applied to all forms of advocacy in the widest sense including advocacy practised outside the court room. Advocacy need not be limited to "cases" but can be applied to matters, issues or situations such as those frequently encountered by both self-employed and employed barristers in the course of their professional lives.
31. Many other countries which still retain either a King's Counsel, or now much more commonly, a Senior Counsel or Senior Attorney scheme, have either a broad persuasive advocacy requirement with no requirement that the advocacy must be practised inside the courtroom or no advocacy requirement at all.
32. The following is the criteria used in the Canadian state of Saskatchewan for the designation of King's Counsel by the Minister of Justice:

*"The selection of CBA [Canadian Bar Association] nominees for the King's Counsel designation is based on the following criteria. As prerequisite qualifications: demonstrated superior legal ability; proof of good character and integrity; ten year entitlement to practice in the superior courts of the United Kingdom of Great Britain and Ireland or of any province or Territory of Canada; member of the CBA; contributions as a legal professional to the community; contributions to the community generally; and contributions to the legal profession. The Nominating Committee will also take into account considerations of gender, diversity and geography."*

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<sup>12</sup> At the Inception of the South Eastern Circuit Advanced Advocacy Course. This definition has subsequently been widely adopted in formal advocacy training for over 25 years including by the Inns of Court College of Advocacy.



33. In the state of Alberta, the criteria are as follows: (i) Legal leadership; (ii) Competence; (iii) Professional qualities; and (iv) Contributions to the administration of justice, the community and the legal profession.
34. South Africa has a dual track process which allows for appointment as a Senior Legal Practitioner which encompasses both Senior Counsel and Senior Attorney appointments, both of equal status and being appointed by the President of the Republic of South Africa by a single body, the Senior Legal Practitioner Committee.
35. Each of the six federated states of Australia has different set of criteria for appointment either as King's Counsel (for those which retain the status) or Senior Counsel but there are none which are as restrictive as those of the system in England and Wales.
36. In particular, New South Wales specifically acknowledges in its criteria for appointment as Senior Counsel both "*advocates and advisers*" and emphasises "*the importance of the work performed by way of giving advice, as well as appearing in or sitting on courts and other tribunals; or conducting or appearing in alternative dispute resolution, including arbitrations and mediations*".
37. The Republic of Ireland has a statutory regime<sup>13</sup> for the issue of a Grant of a Patent of Procedure which replaced King's Counsel appointment. Legal practitioners seeking to have a Patent granted must demonstrate:

*(iii) one or more of the following:*

- (I) A proven capacity for excellence in the practice of advocacy;*
- (II) A proven capacity for excellence in the practice of specialist litigation; or*
- (III) Specialist knowledge of an area of law.*

The Guidance for Applicants for a Grant of Patent of Precedence is explicit that Government employed lawyers are entitled to apply:

*"Lawyers in the Service of the State*

*The Committee has been advised, and considers, that lawyers in the full time service of the State providing legal services and who otherwise satisfy the conditions for eligibility under the Act, are entitled to make application where appropriate seeking recommendation for the Grant of a Patent of Precedence".*

38. There is no reason to believe that the English King's Counsel Appointments Scheme (KCA) could not operate an adjusted assessment criteria when other countries have

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<sup>13</sup> Legal Services Regulation Act 2015 Part 12

demonstrated that that it is both eminently possible and desirable to recognise excellence from a wider pool of applicants representing a diverse range of practices.

39. It would not be difficult to identify a wider pool of non-judicial assessors of equivalent standing who could provide an equivalent assessment to a judicial assessor for an Employed Bar candidate.

*Drawing assessors from a wider pool to include independent non-judicial assessors of equivalent standing to the current judicial assessors, able to apply the competencies for selection*

40. We suggest the following non-exhaustive list of potential legal assessors would be of equivalent standing to a judicial assessor and well placed to apply the competency framework.
41. For King's Counsel applicants from Government: the Lord Chancellor and Secretary of State for Justice,<sup>14</sup> the Attorney-General for England and Wales, the Solicitor-General for England and Wales<sup>15</sup>, the Counsel General for Wales, the Attorney-General for Northern Ireland, the Treasury Solicitor, the Permanent Secretaries, the Heads of Legal Government Departments and Senior Civil Service Grade 2 (Director) legal office holders.
42. For King's Counsel applicants from the specialist regulators: the Director of the Serious Fraud Office; the General Counsel of the Serious Fraud Office; the General Counsel of the Financial Conduct Authority; the General Counsel of the Prudential Regulatory Authority, the Directors of Enforcement and the Chief Enforcement Counsel of the regulatory agencies.
43. For Kings Counsel applicants from the military: legally qualified or experienced members of the Defence Council, the Permanent Secretaries, the Chief of Defence Staff, the First and Second Sea Lords, the Chief of the Air Staff, the Chief of the General Staff, the Directors of the Single-Service Legal Teams.
44. To illustrate the discriminatory impact of the current criteria, why the restrictions do not serve the public interest and how the reforms we recommend could be applied in practice

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<sup>14</sup> The Lord Chancellor and Minister of State for Justice is responsible for a Government Department which employs large numbers of Employed Barristers. The Lord Chancellor and Secretary of State for Justice has no role in the selection of Kings Counsel. The Summary Process makes clear at paragraph 12 "The Lord Chancellor and the King" that the "final list of successful applicants will go to the Lord Chancellor and then to the King for the issue of letters of patent". The role of the Lord Chancellor is simply to send the list to the King and to hand out the letters patent at the KC award ceremony. The latter role should not prevent the Lord Chancellor providing an assessment on an applicant of whom they have personal knowledge in their capacity as the responsible Secretary of State which is subsequently determined by a wholly independent selection panel.

<sup>15</sup> Applicants are currently prohibited by the KCA from listing as an assessor the Attorney General or the Solicitor General for England and Wales (Guidance for Applicants page 20). This obviously also puts those barristers employed in their departments at a disadvantage when nominating practitioner and client assessors.

we offer three anonymised case studies of suitable candidates for appointment as Kings Counsel from the Employed Bar at Appendix A to this letter.

45. We request that Bar Council supports an independent review of the KCA selection process that (i) looks anew at criteria; and (ii) widening the pool of judicial assessor equivalents.
46. We are co-hosting an event in January 2026 to advocate for reform and the need for a modern and fairer system and we welcome your engagement.



Sara George

Chair, Employed Bar Committee



Gaynor Wood

Chair of BACFI

## Appendix A

### **Case studies of suitable counsel for appointment to King's Counsel from the Employed Bar**

#### **The Naval Barrister**

Naval barristers, of whom there are 50, form an integral part of the Royal Navy and Royal Marines and are the Nation's subject matter experts on the law of Naval warfare. They advise and advocate across a broad spectrum of practise areas including International and Operational Law, Military Discipline and Criminal Law, Employment and Administrative Law and Legal Compliance and Governance. They range in rank from Lieutenant to Commodore and the most senior are in excess of 22 years' call.

Naval barristers are routinely deployed on military operations, including in every major conflict in which the UK has fought over the past 25 years. Naval barristers are required to provide advice and advocacy on legal matters of the utmost gravity and usually involving the use of lethal force.

Beyond armed conflict, advice and advocacy is provided on issues where the UK carries significant reputational and operational risk including maritime interdiction of illegal arms and weapons, detention, mine clearance, counter-piracy and counter-narcotics operations.

Naval barristers also advise and advocate in respect of all issues related to the employment of sailors, deaths in service, coronial inquests and criminal and disciplinary law. They are responsible for all international law training in the Naval service to satisfy the UK's Geneva Convention obligations.

Internationally, Naval barristers serve in the Pentagon, at NATO, are permanently deployed as the senior lawyer at the world's largest maritime coalition, the Combined Maritime Force based in Bahrain and advocate for the UK's position with numerous allies and partners. Recently this has included all legal aspects of the AUKUS trilateral security partnership including the legal protection and regulation of nuclear material in Australia.

Naval barristers also participate in the UN Group of Government Experts, the UK International Humanitarian Law Committee, have written the UK's legal position on the law of Naval warfare and captured persons in armed conflict and teach at the world's leading law schools. By any objective measure, the contribution of senior Naval barristers to the UK legal profession, and the significance of the legal issues, is comparable to that of King's Counsel in self-employed practice.

### ***Why they are not eligible to apply under the current criteria***

Whilst Naval barristers prosecute and defend at Courts Martial and appear at the Court Martial Appeal Court they typically only spend several periods of two years, interspersed throughout their career, in court-based roles. At other times, they are employed in a broad spectrum of non-court related legal advisory and advocacy roles. As such, they would not be able to satisfy the current advocacy criteria to provide 12 cases given the peripatetic demand-led nature of their legal work and frequent deployment or to be able to nominate 12 judicial assessors (or indeed any in some roles) as currently defined by the KCA .

### ***Why the public interest is not served by their exclusion***

Naval barrister ensure that the Royal Navy complies with the entire panoply of legal obligations across a broad spectrum of disciplines including criminal, human rights, health and safety, employment and international law. More specifically, Naval barristers are often deployed in the most demanding of circumstances for prolonged periods of time where they advise and advocate on issues that are legally complex, of extraordinary gravity and carry significant national and international risk to the UK.

### ***How they could meet the reformed criteria proposed***

Given the complexity and breadth of legal work undertaken by Naval barristers they could easily satisfy the proposed reformed KC appointments advocacy criteria by nominating matters, issues or situations in which they have been involved. Specifically, Naval barristers advise on legal matters that can affect the entire Naval service, address detailed and complex legal problems that can cover multiple areas of law, for example, international humanitarian law, international human rights law, the law of the sea, the law of naval warfare, the law of state immunities, international environmental law and weapons law. Beyond that, the expertise of Naval barristers is in demand worldwide to teach and advise international allies and partners. This includes, but is not limited to, Malaysia, India, Singapore, the US, and Australia. Put simply, the legal work, leadership roles and responsibilities of senior Naval barristers is comparable with senior barristers applying for silk.

### ***Identity of potential non-judicial assessors***

Naval barristers' clients include the most senior ministers, government officials and military officers both the in UK and overseas including the Secretary of State for Defence, Minister for Veterans and People, Chief of the Defence Staff, First Sea Lord, Second Sea Lord and the Naval Secretary, the Attorney General's Office, Foreign, Commonwealth and Development Office and the Ministry of Defence Legal Advisers. They also regularly interact with senior academics at the world's leading law schools, the ICRC and non-governmental organisations all of whom could comment upon their work. As such, it is submitted that a broad range of senior non-judicial legally qualified assessors could comment upon Naval barristers' suitability for recognition as King's Counsel.

## **Case Study: The Barrister employed in Government**

The Government Legal Service (GLS) consists of around 2000 qualified lawyers providing legal services to a wide range of Government organisations.

The single largest provider of legal services to government is the Government Legal Department (GLD). The GLD provides services to 11 Whitehall departments including the Home Office, Ministry of Justice, HM Treasury, Cabinet Office and the Departments for Education and Transport as well as most of the Government's litigation and employment law services, along with a specialist Commercial Law Group and European law division.

The GLD is the largest in-house legal firm in the country. The Government is the largest employer of Barristers.

GLD barristers are often subject matter experts, for example in public and administrative law, international trade, national security, intelligence co-operation, space and technology or litigators with the capability to deal with large-scale commercial contracts and disputes related to procurement and public inquiries.

Government barristers provide legal support to government departments and agencies. Their advocacy work is crucial for the effective functioning of the government and ensuring it operates within the bounds of the law. Government lawyers advocate to Ministers on the legal implications of proposed policies, ensuring they are compatible with existing laws and regulations. Government barristers handle litigation on behalf of the government, defending its decisions in court and pursuing legal action when necessary. They represent the interests of the UK in international legal disputes advocating on behalf of the Government of the day in relation to treaties and agreements.

### ***Why they are not eligible to apply under the current criteria***

Government barristers usually cannot meet the requirement to nominate 12 "*cases*" of "*substance, complexity or particular difficulty or sensitivity*". Whilst the work of a barrister in Government will frequently involve working on matters, issues or situations involving some of the most complex law and challenging fact patterns of any practicing barrister which shape the future direction of the law and affect every person in the United Kingdom and often overseas, these are often not "*cases*".

Applicants are required to list a judge or arbitrator from each of their "listed cases". Often there will be no judge or arbitrator who could provide an assessment because the advocacy undertaken by a GLD barrister does not take place in a court or arbitration and equivalents are not permitted by the KCA. The KCA will only acknowledge assessments provided by those exercising a judicial function.

Applicants are required to identify a practitioner against whom they have appeared or by whom they have been led, in each of their listed cases, but a GLD barrister of sufficient seniority to apply is unlikely to the “led” and their adversary may well be a Foreign Government, Coalition Partner or an antagonist against the Government.

Applicants are required to identify at least six individuals who have been (in their own right or on behalf of the firm or employer) professional clients, clients or client proxies, in one of their 12 listed cases. Government Employed Barristers only have a single client: the Government.

***Why the public interest is not served by their exclusion***

The Government Legal Department (GLD) provides legal services to the Government in support of its core purpose of helping the Government to govern well, within the rule of law. There is a strong public interest in recognising those who are essential for ensuring the rule of law within government operations, providing expert legal advice, and representing the democratically-elected Government's interests in legal proceedings in pursuit of its policies.

***How they could meet the reformed criteria proposed***

The work of a barrister in Government naturally lends itself to working on issues, matters and situations of legal complexity, sensitivity and significant potential impact. The adoption of a broader definition of what constitutes advocacy and the acknowledgement of the nature of Government work does not necessarily involve “cases” would enable barrister applicants from Government.

***Potential non-judicial assessors***

The Lord Chancellor and Secretary of State for Justice, the Attorney-General for England and Wales, the Solicitor-General for England and Wales, the Counsel General for Wales, the Attorney-General for Northern Ireland, the Treasury Solicitor, the Permanent Secretaries, the Heads of Legal Government Departments and Senior Civil Service Grade 2 (Director) legal office holders.

## **Case Study: Financial Services Regulatory and Enforcement Counsel**

Financial Services Regulatory and Enforcement Counsel either work for the UK's Financial Services Prudential and Conduct Regulators or for law firms which represent regulated institutions and individuals and defendants to actions brought by the Financial Services Regulators. There are currently at least 70 Employed Barristers performing these roles employed by the Financial Services Prudential and Conduct Regulators and the Bank of England.

Financial Services Regulatory and Enforcement Counsel are critical to the integrity of UK Financial Services. Their work includes supervising payments services essential to the smooth operation of the economy, advise on the setting the of main interest rate, which affects spending across the country and helps keep inflation on or close to the Government's 2% target, regulate major banks, building societies, credit unions, insurers and investment firms in the UK, stabilise the country's financial system by lending to other banks, providing liquidity support to financial institutions and ensuring failing banks exit the market in an orderly way without causing damage to the economy.

They draft the rules and develop the standards and policies that set out what is required of authorised firms, financial market infrastructures and those involved in their management.

They are responsible for determining the appropriate legal interventions when rules are breached or where risks are identified. They are responsible for ensuring that there are credible mechanisms for holding the regulated community to account where they do not meet the requirements and expectations and providing a wider deterrent effect.

Counsel for the Regulators are responsible for appointing investigators and overseeing investigation and enforcement action in respect of contraventions of the United Kingdom's rules and principles for Banks and financial services institutions.

### ***Why they are not eligible to apply under the current criteria***

The advocacy conducted by Financial Services Regulatory and Enforcement Counsel is almost always conducted in private before Administrative Decision Makers appointed by the Financial Conduct Authority or the Prudential Regulatory or other international regulatory or enforcement agencies such as the United States Securities and Exchanges Commission or the Commodities and Futures Trading Commission or before the European Securities and Markets Authority and all Asian financial markets regulators.

Whilst the matters are contentious and the hearings adversarial in respect of both liability and quantum, redress and censure, settlements with major regulated financial services firms are the normal outcome as few Banks can afford an acrimonious relationship with their regulator. Successfully defended actions remain private. Many of these decisions have consequences for everyone in the United Kingdom.



The advocates who conduct these hearings are extremely sophisticated practitioner specialists who appear before an expert tribunal of law and fact with a legally qualified Chairman and specialist financial services wing members. They are not courts or tribunals but Administrative Decision Makers whose decisions are guided by public and administrative law principles.

### ***Why the public interest is not served by their exclusion***

The work of Financial Services Regulatory and Enforcement Counsel is essential to protect the integrity of the UK financial services system. As was demonstrated in 2008, the failure of systemically critical institutions can have devastating impact on the economy of the UK. Mis-selling of financial products, such as pension transfers, has life changing consequences for those dependant on those products and their future economic wellbeing. Redress schemes for widely miss-sold products such as payment protection insurance can involve almost every single person in the UK.

This work is of critical importance to the UK economy and the stability of its payment systems. The work of Regulatory and Enforcement Counsel underpins the UK's reputation as a leading global financial centre – one where consumers are protected, financial crime is deterred, firms can operate and innovate with clarity and certainty and financial markets are clean, transparent, efficient and operate with integrity.

### ***How they could meet the reformed criteria proposed***

The adoption of a wider definition of “advocacy” could encompass hearings before Administrative Decision Makers and expert specialist committees both in the United Kingdom and internationally.

### ***Identity of potential non-judicial assessors***

Administrative Decision Makers who comprise the Chair and panel members of expert Financial Services disciplinary and regulatory bodies, the senior Treasury appointments, the Directors of Enforcement and Senior Legal Counsel of the Prudential and Conduct Regulators and the Bank of England and their European equivalents<sup>16</sup>.

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<sup>16</sup> Financial Services are cross-border and most rules which apply to the transfer and settlement of transactions and the trading of securities derive from European Directives which apply even post-Brexit. European Securities regulators such as ESMA which regulate many of the Exchanges on which UK based market participants trade apply the jurisprudence of the ECJ.