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# Taking Silk: an empirical study of the award of Queen's Counsel status 1981-2015

Michael Blackwell\*

This article considers which junior barristers are appointed to the rank of Queen's Counsel. The criticisms of the old appointments system are discussed and statistical methods are used to assess whether the changes to the QC appointments system introduced in 2004 improved the prospects of appointment for groups, such as women, that were disadvantaged by the previous system. The results show that under the reformed system groups that were historically less likely to be appointed QCs, such as women, continue to be so. However it is discussed how this may (partly) be attributable to lower rates of application, rather than unfair discrimination among applicants.

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## INTRODUCTION

Who holds the status of Queen's Counsel ('QC'; or 'silk') is of general public importance for three reasons. First, the overwhelming majority of High Court judges are appointed from the pool of practising Queen's Counsel.<sup>1</sup> Thus fewer women becoming QCs effectively impedes progress towards greater judicial diversity: and in doing so brings into question the legitimacy of the judiciary.<sup>2</sup> Secondly, the status is justified as a 'kitemark' of quality for the consumers of legal services,<sup>3</sup> so if it is awarded on the basis of factors that are irrelevant to ability as a lawyer (such as gender) then this undermines the stated reason for its continued existence. Finally, who gets to become a QC is also important to individual barristers. The award of the status causes an immediate step-change in the level of fees<sup>4</sup> that they charge and generally (historically at least) resulted in a change of work towards advocacy rather than paperwork.<sup>5</sup> The importance to

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<sup>1</sup> 'of the 386 judges appointed to the High Court since 1965 only 31 have not been Queen's Counsel prior to their appointment – of those eight (all men) were junior counsel to the Crown who may not have wanted silk due to the associated loss of lucrative work and 19 (three women) were existing members of the judiciary': M. Blackwell, 'Old Boys' Networks, Family Connections and the English Legal Profession' [2012] PL 426.

<sup>2</sup> B. Hale, 'Equality and the Judiciary: why should we want more women judges?' [2001] PL 489, 502.

<sup>3</sup> Written Statement of the Lord Chancellor (Lord Falconer of Thoroton) announcing the decision to retain the rank of Queens Counsel: HC Deb vol 661 WS54 26 May 2004.

<sup>4</sup> For example, see the reference to the 'automatic uplift of fees when a person was appointed a QC' in The Law Society, 'Response to the consultation paper on 'Constitutional reform: the future of Queen's Counsel' (Department of Constitutional Affairs, 2003) at

<http://webarchive.nationalarchives.gov.uk/20040105065916/http://www.dca.gov.uk/consult/qcfuture/responses/qc312.pdf>.

<sup>5</sup> *Royal Commission on Legal Services*, Report Cmnd 7648, 1979 vol 1 para 33.72; Director General of Fair Trading, *Competition in professions* (OFT, 2001) para 274.

individual barristers is similar to some of the arguments of equity/equal opportunities<sup>6</sup> used in the context of judicial diversity: ie that ‘individuals should not be unfairly advantaged by factors that do not relate to their capacity to undertake a particular role’.<sup>7</sup> However, other arguments used in the context of judicial diversity, such as ‘democratic legitimacy’ are not relevant (save to the extent that discrimination feeds into judicial appointments), as QCs are not (unlike judges) exercising power and so not ‘engaged in politics as widely defined’.<sup>8</sup>

There was a radical change to the appointments process for QCs in 2004, when an independent appointments panel was established. This replaced the earlier much criticised system where QCs were appointed on the advice of the Lord Chancellor, after he took confidential soundings from judges and senior barristers. Criticisms of the earlier appointments system, discussed further below, were both that it lacked transparency and that it discriminated against groups including women, barristers who practised outside London and ethnic minorities. This reformed system has strong similarities to the reforms that took place at around the same time to judicial appointments: moving from ‘secret soundings’ with the establishment of an independent appointments commission and clear criteria for appointment.

This paper uses a statistical model to assess if some of these criticisms of the earlier system with regard to who was appointed were well founded, and to see if the new appointments system altered things. The model analyses a dataset, assembled by the author, of the membership of 138 barristers’ chambers (otherwise known as sets) between 1981 and 2011. In total the dataset contains 11,453 different barristers. The model considers how attributes of barristers (such as gender, length of call and educational background) and characteristics of the chambers from which they practise (such as the area of legal specialisation) are associated with the likelihood of a member of one of those sets being appointed as a QC. This research shows that, post-reform, women and non-Oxbridge educated barristers continue to be less likely than other barristers in the same set and of equivalent call to become QCs.

This is the first academic study of the reformed QC appointments system. Indeed, whilst there has been recent large-scale research into the effects of diversity on the career progression of pupil barristers,<sup>9</sup> there have been no previous longitudinal quantitative studies of career progression among qualified barristers.<sup>10</sup> Most previous empirical research on the English Bar has been based on limited surveys, such as the *Bar Barometer*, which provide aggregate data at one moment in time. As noted in Appendix 7 (‘Data for Future Statistical Analysis of Entry to the Bar’) to Lord Neuberger’s *Entry to the Bar Working Party: Final Report*,<sup>11</sup> very limited inferences can be made from such data, in sharp contrast to the inferences that can be made from

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<sup>6</sup>eg Hale n 2 above 489-496; K. Malleon, ‘Justifying Gender Equality on the Bench: Why Difference Won’t Do’ (2003) 11 *Feminist legal studies* 1.

<sup>7</sup> Malleon n 6 above 17.

<sup>8</sup> Malleon n 6 above 18.

<sup>9</sup> A. Zimdars, ‘The Competition for Pupillages at the Bar of England and Wales (2000-2004)’ (2011) 28 *JLS* 575; A. Zimdars, ‘The Profile of Pupil Barristers at the Bar of England and Wales – 2004-2008’ (2010) 17 *International Journal of the Legal Profession* 117.

<sup>10</sup> Part of a longitudinal study commissioned by the Law Society surveyed half of an entire cohort of law students, following them over a six-year period, and so contained some important analysis of pupillage applications. However the focus of these reports was on solicitors and it did not include a quantitative multivariate analysis of the barristers after the completion of pupillage, largely it seems because of the small number in the sample, and regrettably the sections on the Bar disappear after the fourth year of the study when this data would have been most available: M. Shiner, *Entry into the legal professions: the Law student cohort study year 4* (Research Study 25, Law Society 1997) 134.

<sup>11</sup> D. Neuberger, *Entry to the Bar Working Party Final Report* (General Council of the Bar, 2007).

longitudinal data. Further, although annual statistics are published by the QC Appointments Panel, those statistics only enable bivariate analysis of success rates of applicants by gender – whilst this article both allows a multivariate analysis as well as additional insight by looking at the pool of potential applicants. The most thorough previous study of QC appointments was that of Malleeson and Banda,<sup>12</sup> but that study is now dated as it took place before the reforms to the appointment process. Also that study, which was based on a survey and follow-up interviews, considered barristers’ subjective perceptions of the appointments process. In contrast this research considers who actually is appointed from the pool of potential barristers. A further advantage of this research is that the dataset was assembled by compiling publicly available data. Accordingly the research underpinning this article did not require the cooperation of Bar regulators, so is not subject to restrictions on access or how analyses may be broken down.<sup>13</sup> This is especially valuable in relation to the Bar, where there appears to be more reticence to engage with the requirement<sup>14</sup> to publish workforce diversity data than with regard to solicitors.<sup>15</sup>

This paper is in nine parts, including this introductory section. Part two of the paper discusses the appointment process prior to the reforms and Part three discusses the official appointment criteria and other factors that were perceived to influence the likelihood of appointment under the old system. Part four details the establishment of the new appointments process and its features. Part five introduces the dataset assembled by the author. Part six introduces the statistical method of analysis that is used in Part seven to assess the extent to which gender and educational background are associated with the likelihood of a junior barrister being appointed a QC, controlling for other factors such as length of call and which set they are members of.<sup>16</sup> The results show that in the post-reform period taking silk is highly contingent on gender and educational background, controlling for other factors. Part eight considers, in respect of gender, the extent to which the apparently disadvantaged position of women might be explained by them applying for silk at a lower rate to men, rather than direct discrimination against those women who apply. The paper concludes in Part nine summarising the research findings and then tentatively noting further arguments as to whether or not the continued

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<sup>12</sup> K. Malleeson and F. Banda, *Factors Affecting the Decision to Apply for Silk and Judicial Office* (Lord Chancellor’s Department Research Series, 2000).

<sup>13</sup> For an example of how Inns of Court and the Bar Council may restrict access and use of data, see Zimdars, ‘The Competition for Pupillages at the Bar of England and Wales (2000-2004)’ n 9 above.

<sup>14</sup> Legal Services Board, *Increasing diversity and social mobility in the legal workforce: transparency and evidence: LSB response document & accompanying statutory guidance issued under Section 162 of the Legal Services Act 2007* (2011).

<sup>15</sup> Many chambers have not published such data, and of those who have published such data some have done so in a way that is unhelpful: for example only reporting the combined values for clerks and barristers. The instances of non-publication may be attributable to a the carve-out under which the BSB do not require publication where ‘The number of individuals identified with any characteristic within any category is fewer than 10 (ten), save in cases where there is consent from all those to whom the data in question relates.’: Bar Standard Board, *Guidance on the Bar Standard Board’s Diversity Data Collection Rules* (2012) para 1.4. The justification for this, as a data protection requirement, may be questioned. The SRA has not thought it necessary but just refers firms to the Information Commissioner’s guidance: Information Commissioner’s Office, *Anonymisation: managing data protection risk code of practice* (2012). The ICO guidance only suggests the fewer than 10 rule in the context of the release of entire datasets: *ibid*, 77. This can be contrasted to the publication of workforce diversity data by chambers, where only aggregate data is made available, which presents far fewer risks: *ibid*, 52. It should be remembered that the statutory test looks at whether it is *likely* that individuals would be identified, not whether it is *possible* that they might: *ibid*, 16.

<sup>16</sup> The method of analysis is more fully discussed in the statistical appendix to this article.

existence of QC status is in the interests of the consumers of legal services or the interest of justice.

## **HISTORICAL BACKGROUND: THE PRE-2005 APPOINTMENT PROCESS**

Until the establishment of the Queen's Counsel Selection Panel in 2005 the selection of new Queen's Counsel was by the Lord Chancellor, assisted by his civil servants. There was an annual appointment process in which barristers (and from 1995 solicitors, although few were appointed)<sup>17</sup> could apply for QC status. The information provided by applicants was very slight and generally confined to biographical details and the amount of their earnings.<sup>18</sup> Accordingly, the 'central core of the [appointment] process'<sup>19</sup> was the consultation of judges and senior members of the Bar: often referred to as 'secret soundings'. In 1993 Lord Mackay (then Lord Chancellor) described the consultation process as follows:

The lists of applicants are sent to the Law Lords, to all members of the Court of Appeal and to all High Court judges, as well as certain senior and specialist Circuit Judges in London and the Provinces. The list also goes to the Chairman of the Bar and the Leaders of the Circuits and specialist Bars. I ask for views from each on as many of the candidates as possible and I encourage them, where appropriate, to take discrete soundings among other leading Silks in their field...

The application form contains a request for judges before whom the candidate has appeared in cases of substance over the last year, or senior members of the Bar who will be familiar with their practice and professional standing. I do not automatically approach those named... However, if by January, when a large number of views are to hand, there appears to be less information than is needed about a particular individual, my staff will then write to those named...<sup>20</sup>

Most consultees submitted their views in writing, although some senior members of the judiciary and Bar would be invited to meetings with civil servants from the Lord Chancellor's Department to discuss candidates.<sup>21</sup> In addition to specific comment, from 1994 consultees were also asked to place each applicant in one of five lettered classifications,<sup>22</sup> with a grade of A+ being added sometime before 1999<sup>23</sup> and a reformulation of the criteria taking place sometime before 2001.<sup>24</sup>

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<sup>17</sup> Prior to the 2004 reforms, only eight solicitors were appointed as QCs: Catherine Baksi, 'Date for QCs round nears' *The Law Society Gazette* (7 July 2005) 3.

<sup>18</sup> The form appears to have grown from a single side of A4, where a statement of fees is specified as entirely optional, to seven sides of A4 in 1994 with a declaration of earnings being compulsory. The earlier form can be found in Commonwealth Secretariat, *The Practice Relating to the Appointment of Queen's Counsel and Senior Counsel in some Commonwealth jurisdictions* (1981) 27. The later form is in M. Kalisher, *Report of the Working Party Established by the Bar Council on the Appointment of Queen's Counsel* (Bar Council, 1994) Appendix 4.

<sup>19</sup> J. Mackay, 'The myths and facts about Silk' *Counsel* (October 1993) 11, 11.

<sup>20</sup> *ibid*, 11-12.

<sup>21</sup> *ibid*, 11; Kalisher n 18 above, para 2.8.

<sup>22</sup> These were '(A) Ready for silk now and recommended for silk this year; (B) Ready for silk now, but not recommended for silk this year because other, named, candidates are preferred in this field; (C) likely to be silk material in due course but is not ready for appointment; (D) Borderline; may be silk material in time, but this is not yet certain; (E) Not silk material and not recommended for appointment': Kalisher n 18 above, para 2.10.

<sup>23</sup> L. Peach, *Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel* (Lord Chancellor's Department 1999) 39.

Following the consultation the Lord Chancellor was presented with a list of candidates. The information provided to the Lord Chancellor seems to have altered somewhat over the period in question.<sup>25</sup> In 1994 it consisted of two parts. Part I contained the names of those ‘apparently deserving serious consideration’ and Part II contained other candidates. The Lord Chancellor was provided with full briefing notes for all the candidates listed in Part I, but only brief details of the candidates in Part II (although he could ask for details on any of them).<sup>26</sup> Examples (for fictional candidates) of such full briefing notes were provided to the Working Party established by the Bar Counsel on the appointment of Queen’s Counsel.<sup>27</sup> What seems, from those mock briefings, to separate out candidates who were perceived as strong by the LCD was support of the senior judiciary, even if support was expressed in what could be regarded as generalities. This suggests that support from the senior judiciary was key to appointment as a QC.

### **HISTORICAL BACKGROUND: APPOINTMENT CONSIDERATIONS**

Whilst in earlier periods there had been a concern that political considerations<sup>28</sup> and a desire not to flood the market<sup>29</sup> had influenced QC appointments decisions, by the 1990s the major concerns were that the process discriminated against women, ethnic minorities and those who were not well-connected with the judiciary. In the pre-reform period the criteria for appointment to silk were very vague and considered ‘not easy to define with precision’ with recommendations for appointment ‘based exclusively on the strength and quality of support received by each individual in that years’ round of consultation’.<sup>30</sup> A system based on such soundings was widely considered to inhibit diversity. The annual report of the Commission for Judicial Appointments (which also monitored QC appointments) commented:

The apparent lack of diversity among Silk cannot be attributed solely to the appointment procedure... Nevertheless, there is a risk that a selection process which relies almost entirely on consultation with a body of consultees who are overwhelmingly white, male and from a narrow professional background will tend to have a ‘cloning’ effect which will act against increasing diversity.<sup>31</sup>

The groups of barristers that were thought to be particularly disadvantaged by this process were women, ethnic minorities and barristers who practiced out of non-élite chambers (such as chambers from which no High Court judges were appointed, including most chambers outside London). These concerns came out clearly in the study of Malleson and Banda on applications

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<sup>24</sup> The Commission for Judicial Appointments, *Annual Report 2002* (2002) para 4.9.

<sup>25</sup> For a description of the Silk competition in 2001, see The Commission for Judicial Appointments, n 24 above, paras 4.3-4.16.

<sup>26</sup> Kalisher, n 18 above, para 2.16.

<sup>27</sup> They are reproduced in Kalisher, n 18 above, Appendix 10.

<sup>28</sup> P. Plowden ‘The Legal Professions’ in W. Cornish and others, *The Oxford History of the Laws of England: 1820-1914* (OUP 2010) vol XI, 1059-60; Kalisher n 18 above, para 5.5.

<sup>29</sup> Royal Commission on Legal Services, n 5 above, para 33.70. Some evidence suggests that this practice persisted until at least 1994: Director General of Fair Trading, n 5 above, para 275 and Annex.E. See also the criteria listed in n 22 above.

<sup>30</sup> Mackay, n 19 above, 12.

<sup>31</sup> The Commission for Judicial Appointments, *Annual Report 2003* (2003), paras 4.30-4.31.

for silk and judicial office. Their research was carried out by a survey of barristers and solicitors of between 15-22 years call/qualification, followed up by selected interviews (320 questionnaires were sent out and 136 responses were received, of which 52 were interviewed).<sup>32</sup>

Malleson and Banda note that some men perceived that women were at an advantage when applying for silk. One respondent commented:

I have actually heard people say 'have you applied for Silk because these days any woman at the Bar who applies for Silk should expect to get it' and other people say 'Have you ever applied for Silk? If you get it, that's wonderful, but can you really live with the fact that you will have been appointed because you are a woman?'<sup>33</sup>

Not all barristers however shared this perception. In their response to the Government's consultation paper, *Constitutional reform: the future of Queen's Counsel*, the Association of Women Barristers stated:

In its current form the selection process perpetuates discrimination against solicitors, women and ethnic minorities. The system of great weight being given to automatic judicial soundings instead of references is unacceptable and probably in breach of the Sex Discrimination Act 1975 and European Equal Treatment Directives... The AWB considers that the manner of selection has fallen behind acceptable equal opportunities policy procedure and practice applicable in other professions and walks of life.<sup>34</sup>

However, it was also argued that part of the explanation for there being fewer female QCs was that women 'under apply as a proportion of their numbers in the potential applicant pool'.<sup>35</sup> One of Malleson and Banda's respondents commented:

Men and women approach things differently. Men look down a list of criteria and say, 'yes, that's me'. But women are more circumspect. Women need more encouragement than men do. You don't see yourself as having the qualities... women want to be sure before they apply whereas men will take a punt.<sup>36</sup>

References to under application might be thought to suggest that more women should apply. However, if barristers apply for QC status when their practice is not ready they take a significant risk. In his response to the consultation Lord Brightman wrote:

No doubt the retention of the rank may enable a barrister to raise his level of fees. But it can also deprive him of his living. I know of two cases where a barrister with a flourishing Junior practice applied for and was granted Silk, but failed as QC. He thereby

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<sup>32</sup> Malleson and Banda, n 12 above, 10-11.

<sup>33</sup> *ibid*, 23.

<sup>34</sup> Association of Women Barristers, 'Response to the consultation paper on 'Constitutional reform: the future of Queen's Counsel'' (UK Government Web Archive, July 2003) at <http://webarchive.nationalarchives.gov.uk/20040105065916/http://www.dca.gov.uk/consult/qcfuture/responses/qc018.pdf>.

<sup>35</sup> Malleson and Banda, n 12 above, 7.

<sup>36</sup> *ibid*, 24.

lost most of his junior practice, gained no worthwhile silk's practice, and the public was deprived of the services of a competent and inexpensive junior barrister.<sup>37</sup>

Similarly references to under application implies that the fault lies with the women, who should apply at the same (higher) rate as equivalent men. But that is unfair. It is reasonable to expect there may be different attitudes towards risk between genders, as suggested in the immediately previous quote from Malleson and Banda's study, rather than a lower application rate by women being regarded as aberrant. The perception that the application process disadvantaged women, as evidenced in the previously quoted submission by the Association of Women Barristers, is likely to also have contributed to the lower application rate. In such circumstances it is very arguable that the existence of QC status constitutes indirect discrimination against the career progression of female barristers. Thus the lower rate of applications does not show there to be no discrimination: it rather it shows a mechanism through which the discrimination might operate.

Aside from the issue of gender, a major concern was that the process of selection resulted in QCs generally coming from too narrow a group of chambers. Malleson and Banda's report commented on the 'dominance of a small group of chambers' which tend to produce the vast bulk of new QCs in contrast to 'ghetto' chambers who produce hardly any.<sup>38</sup> Their respondents were, however, somewhat divided as to why chambers were perceived to have such radical differences on the likelihood of a member taking silk. Reasons given included the connections with the judiciary, the infrastructure of the chambers and the quality of the work coming into chambers (although these may be interrelated).<sup>39</sup>

In addition to gender and set membership, this article also considers the effect of educational background on the award of QC status. Whilst prior to the reform of the QC system educational background was not a major element in the discourse on the award of QC status, it was mentioned by some participants in Malleson and Banda's research.<sup>40</sup> However, recent research into awards of pupillage has shown an Oxbridge education to have strong associations with successful applications, controlling for other relevant factors,<sup>41</sup> so it is reasonable to expect that it might influence career progression at other levels within the English Bar.

Although race was often thought to be an influence on the award of QC status in the pre-reform period, it has not been possible to consider race in this study. This is because it would not have been possible to identify barristers in the dataset as members of different racial groups,<sup>42</sup> and it would have caused difficulties because race is sensitive personal data under the Data Protection Act 1998.

## **ESTABLISHMENT OF THE NEW QC APPOINTMENTS PROCESS**

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<sup>37</sup> J. Brightman, 'Response to the consultation paper on 'Constitutional reform: the future of Queen's Counsel'' (*UK Government Web Archive*, 10 May 2003)

[http://webarchive.nationalarchives.gov.uk/20040105065916/http://www.dca.gov.uk/consult/qcfuture/responses/qc04\\_1.pdf](http://webarchive.nationalarchives.gov.uk/20040105065916/http://www.dca.gov.uk/consult/qcfuture/responses/qc04_1.pdf)

<sup>38</sup> Malleson and Banda, n 12 above, 15-16.

<sup>39</sup> *ibid*, 15-16.

<sup>40</sup> *ibid*, 15-16.

<sup>41</sup> Zimdars, 'The Competition for Pupillages at the Bar of England and Wales (2000-2004)' n 9 above; Zimdars, 'The Profile of Pupil Barristers at the Bar of England and Wales – 2004-2008' (2010) n 9 above.

<sup>42</sup> See the discussion on the problems of relying on non-English names in Malleson and Banda, n 12 above, 9.



By the early 1990s concern about the QC appointments process was so great that in October 1993 the Bar AGM passed a resolution (by 82 votes to 32) that '[t]his AGM of the Bar views with grave concern the present system of appointing silks'.<sup>43</sup> Partly in response to this there were a number of reports consultations and enquiries that looked (*inter alia*) at the rank and appointment of QCs. The earliest of these was the working party chaired by Michael Kalisher QC and established by the Bar Counsel on the appointment of Queen's Counsel (which reported in June 1994).<sup>44</sup> The Kalisher report broadly supported the then extant system of appointment, although it recommended that there be published appointment criteria.

This was followed by Lord Chancellor commissioning the enquiry by Sir Leonard Peach<sup>45</sup> into the appointment process for judges and Queen's Counsel (which reported in December 2000). Following the report's recommendations, a number of changes were made to the QC appointments process, including the establishment of the Commission for Judicial Appointments, which was empowered to investigate 'discrimination, unfairness and maladministration in the Queen's counsel appointment system.'<sup>46</sup>

Implementation of the recommendations of the Peach report in 2001 did not cause criticism of the QC appointments process to abate. Rather, all three of the complaints made in respect of the 2001 silk competition were upheld by the Commission for Judicial Appointments. The Commission 'found severe flaws in the way that the competition was administered in that year, notably the inadequate staff resource dedicated to the sift and the lack of a useful audit trail.'<sup>47</sup> This led the Commission to conduct a thorough review of the 2003 silk round. Whilst they found improvements, they noted that this was only due to dedicating an unusually high number of senior staff to the sift of applications, which was not regarded as sustainable in the long-term, due to the perceived impact on other aspects of the work of the Lord Chancellor's Department.<sup>48</sup> Also in their observations of meetings at which senior consultees gave their views the Commission found some evidence of the potential for 'irrelevant and inappropriate sentiments expressed, for example relating to a female candidate's dress sense', although they did not find evidence of such sentiments in the written consultation responses.<sup>49</sup> Further criticism of the operation of the QC system came from the Office of Fair Trading in their report on *Competition in the Professions*<sup>50</sup> (published in March 2001). The OFT report remarked that:

the appointments system (despite the 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 features of a genuine accreditation system, such as examinations, peer review, fixed term appointments and quality appraisal to ensure that the quality mark remains justified.<sup>51</sup>

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<sup>43</sup> Kalisher, n 18 above, para 9.

<sup>44</sup> *ibid*, para 9.

<sup>45</sup> Peach, n 23 above.

<sup>46</sup> Lord Chancellor's Department, *Judicial Appointments: Annual Report 2000-2001*, Cm 5248 (2001), para 4.13.

<sup>47</sup> The Commission for Judicial Appointments, n 31 above, para 4.1.

<sup>48</sup> *ibid*, para 4.7.

<sup>49</sup> *ibid*, para 4.28.

<sup>50</sup> Director General of Fair Trading, n 5 above.

<sup>51</sup> *ibid*, para 276.

The OFT therefore concluded that ‘the existing QC system does not operate as a genuine quality accreditation scheme. It thus distorts competition among junior and senior barristers.’<sup>52</sup>

In response to the OFT report, the Department for Constitutional Affairs published the consultation paper *In the Public Interest*<sup>53</sup> (in July 2002) followed by an analysis of responses.<sup>54</sup> Following this a further consultation document *Constitutional reform: the future of Queen’s Counsel*<sup>55</sup> (published in July 2003). A summary of responses to that consultation was published<sup>56</sup> in January 2004. During the latter part of this consultation, the appointment of QCs was suspended, so (apart from government law officers)<sup>57</sup> there were no QCs appointed in 2004 and 2005.

On 26 May 2004 the Lord Chancellor (Lord Falconer of Thoroton) announced that the appointment of QCs would resume. However, the appointments process was to be altered so the Lord Chancellor would ‘no longer play a part in assessing and selecting candidates.’<sup>58</sup> Instead a new system was to be developed by the Bar Council and the Law Society. The first QCs appointed under this revised system took silk in June 2006.

There were no appointments in 2007, but appointments resumed in April 2008 and annual appointments under the new system have taken place in each subsequent year. The recommendations for appointment are now made by the Queen’s Counsel Selection Panel, which is an independent and self-funding body. The panel is currently comprised of an independent lay chair, four further lay members, two solicitors, two barristers and a senior member of the judiciary. The Panel operates a competency based selection process, where recommendations are made based on evidence of candidates’ performance against specified competencies. Following the 2005 silk-round, the initial seven competencies<sup>59</sup> were reduced to the five competencies of (i) understanding and using the law; (ii) written and oral advocacy; (iii) working with others; (iv) diversity (meaning the candidate’s understanding of diversity and cultural issues and actions they take to promote diversity and equality of opportunity, rather than anything to do with their own background); and (v) integrity.<sup>60</sup>

The competencies are assessed by evidence provided by applicants on their application form (including a self-assessment), the assessments of named assessors and interviews of those who are short-listed. Accordingly the application form now contains far more than simple biographic details and is currently 64 pages long.<sup>61</sup> Applicants are entitled to name up to 12 judicial assessors, 6 practitioner assessors and 6 client assessors.<sup>62</sup> From these named assessors, the Panel seeks written assessments from four judicial assessors, three practitioner assessors and

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<sup>52</sup> *ibid*, para 278.

<sup>53</sup> Lord Chancellor’s Department, ‘In the public interest? A consultation by the Lord Chancellor’s Department following the OFT report on competition in the professions’, CP 07/02 (2002).

<sup>54</sup> Lord Chancellor’s Department, ‘Analysis of the responses to consultation ‘In the public interest?’ (2002).

<sup>55</sup> Department for Constitutional Affairs, ‘Constitutional Reform: the future of Queen’s Counsel’, CP 08/03 (2003).

<sup>56</sup> Department for Constitutional Affairs, ‘Summary of Responses to the Consultation Paper ‘Constitutional Reform: the future of Queen’s Counsel’’, CP(R) 08/03 (2004).

<sup>57</sup> Michael O’Brien (Solicitor General) took silk in 2005: Baski, n 17 above.

<sup>58</sup> Falconer, n 3 above.

<sup>59</sup> W. Blair and R. Knowles, ‘Racing Silks’ *Counsel* (April 2005) 16.

<sup>60</sup> QC Selection Panel, ‘Queen’s Counsel Competition for England and Wales 2013-14: Competency Framework’ (2013).

<sup>61</sup> QC Selection Panel, ‘Queen’s Counsel Competition for England and Wales 2013-14: Application form’ (2013).

<sup>62</sup> QC Selection Panel, ‘Queen’s Counsel Competition for England and Wales 2013-14: Guidance for Applicants’ (2013), para 37.1.

two client assessors.<sup>63</sup> It appears that having the support of the senior judiciary may be somewhat less important than it once was – 30 of the 175 QCs appointed in 2006 had no reference from the senior judiciary<sup>64</sup> – although the present guidance notes to applicants note that ‘assessments from High Court Judges or more senior judges can be particularly helpful’.<sup>65</sup> Indeed, more weight seems to be attached to the assessments of judges than other categories of assessor. Roy Amlot QC, as former Panel member, explains that ‘[t]his is because judges are in the best position to provide a detached view, with the experience that accompanies it.’<sup>66</sup>

Only candidates that on paper are graded as A (a consistently outstanding performer or an excellent performer) or B (generally a good and sometimes and excellent performer) are invited to interview.<sup>67</sup> The interviews are conducted by one lay member and one legally qualified member of the Panel, during which they probe for ‘examples of excellence’.<sup>68</sup> Of the 223 applications accepted for consideration in the 2014/15 silk-round, 148 applicants were interviewed and of those 93 applicants were appointed.<sup>69</sup>

A further change concerned the cost of taking silk. Traditionally no application fee was charged, although a small fee was payable on appointment for the letters patent.<sup>70</sup> A modest application fee of £335<sup>71</sup> had been introduced by section 45 of the Access to Justice Act 1999. However, costs of applying for and taking silk rose dramatically under the new system which is self-financing. Currently the fee payable to the Queen’s Counsel Selection Panel for applying is £2,160, with a further £3,000 being payable by successful applicants.<sup>72</sup>

## DATASET

This section discusses how the dataset – which is used in subsequent analysis – was assembled by the author. The dataset consists of the barristers in 138 barristers’ chambers,<sup>73</sup> the membership of which was recorded by the author at 5-year intervals between 1981 and 2011. The decision to record the data at 5-year intervals was taken to balance resource constraints against the desirability of precisely measuring the timing of progression events. The chambers were selected on the basis that either (i) a High Court judge appointed as such between 1980 and 2013 was a member of the chambers immediately prior to their appointment to the High Court; or (ii) the set was identified as producing 4 or more QCs between 1980 and 2013. The rationale for these two criteria was to exclude the ‘ghetto sets’ from which QCs were rarely appointed, since compiling the dataset was very labour intensive and the inclusion of such barristers would

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<sup>63</sup> *ibid*, para 36.

<sup>64</sup> S. Hawthorne, ‘Stars of the Bar’ *Counsel* (April 2005) 32, 32.

<sup>65</sup> QC Selection Panel, n 62 above, para 43.3.

<sup>66</sup> R. Amlot, ‘Silk Success’ *Counsel* (May 2009) 15, 16.

<sup>67</sup> QC Selection Panel, ‘Report of the Queen’s Counsel Selection Panel for England and Wales: 2014-15 Competition Awards’ (2013), para 23.

<sup>68</sup> QC Selection Panel, n 62 above, para 32.1.

<sup>69</sup> QC Selection Panel, n 67 above, para 4, 24 and 31.

<sup>70</sup> In 1999 the fee was £150, rising to £165 in 2003 rising further to £215 in 2008 and to £264 in 2013: Crown Office Fees Order 2003, SI 2003/92; Crown Office Fees Order 1999, SI 1999/692; Crown Office Fees Order 2008, SI 2008/1977; Crown Office Fees Order 2013/986.

<sup>71</sup> Appointment of Queen’s Counsel Fees Order 1999, SI 1999/2138. This was increased to £720 in 2002: Appointment of Queen’s Counsel Fees Order 2002, SI 2002/2037.

<sup>72</sup> This fee has actually been reduced in recent years. In 2013 the application cost was £2,340 with a further £4,200 being payable by successful applicants: QC Selection Panel website.

<sup>73</sup> In any given year there will be fewer than this number, due to mergers and splits.

be of relatively little value since they were extremely unlikely to be appointed as QCs. There is considerable overlap between these two categories used for selection of chambers, with 100 chambers in both categories (and 108 chambers in category (i) and 130 chambers in category (ii)). The first selection criterion allowed the inclusion of some small ‘élite’ sets, as well as some small sets that merged into larger sets. The exclusion of the ghetto sets means that the probabilities of appointment considered in this paper are higher than those for an ‘average’ barrister of any given length of call.

In total the dataset contains 11,452 different barristers and 2,365 of the 2,553 barristers (93 per cent) who were appointed QCs since 1980. The coverage of the dataset is summarised in Figure 1. It can be seen that in any year the dataset contains between 47 and 56 per cent of all barristers in private practice. But in any given year the dataset contains between 71 and 95 per cent of all the QCs appointed in that year.

**[INSERT FIGURE 1 HERE]**

**Figure 1: Proportion of barristers in private practice listed in the dataset and the proportion of QCs appointed in that year and listed in the dataset in that year.**

### **Identification of the sets**

A list of all the QCs appointed since 1980 was assembled from the entries in the *London Gazette*. Similarly, a list of all High Court appointments since 1980 was assembled from the list of the senior judiciary printed in the front pages of *The Law Reports*. For each such judge/QC the set from which that barrister practised immediately preceding their appointment was identified by looking up that barrister in the *Bar Directory* of the relevant year. Often, especially in the earlier years studied, there were several chambers with the same name (normally an address, such as Number 1 King’s Bench Walk). In such cases care was made to ensure the name of the head of chambers was recorded too, so that the set could be uniquely identified.

After identifying the sets the membership of that set at five year intervals between 1981 and 2011 was recorded. Care needed to be taken to ensure that the set identified in each of these years was the same set. This is because some sets merged, split, changed their name and changed their location.

In some cases it was not possible to identify the membership of the chambers at a particular 5-year interval as they did not pay for the full list of members to be printed in the *Bar Directory*. In such cases another directory was used such as *Waterlow’s Solicitors’ and Barristers’ Directory* or *Havers’ Companion to the Bar*.

### **Identification of characteristics of set members**

The gender, university attended, call-date and date of silk appointment (in all cases where identifiable) was recorded for each member of the selected sets from the information in the *Bar Directory*.

In some instances gender was identifiable by the barrister’s name being preceded by a gender specific title. In other cases it was identified by the barrister having a gender-specific first name. In a small number of cases it was not possible to identify the barrister’s gender by these means. In such instances, it was possible to identify the barrister’s gender from an internet search – for example where the search returned the chamber’s website of the barrister with a picture of them, or a reference to them as ‘him’ or ‘her’.

In all cases call year was identifiable from the *Bar Directory*. Similarly, in cases of barristers who were QCs the year of their appointment was identifiable from the *Bar Directory*. However, it would not have been possible to identify barristers who were made QCs after they were last listed in the dataset from this source. To obtain such information, the surnames and call dates of barristers who were not shown in the dataset as being appointed QCs, was checked against the list of all QCs appointed since 1980. Where there is a match on surname and call year, the full name of the barrister was checked in both sources to ensure that it is indeed the same individual.

Where listed in the *Bar Directory*, the university (or universities) attended by the barrister is recorded from this source. This is a particularly time-consuming exercise, as it necessarily entails looking up the individual barrister in the directory rather than looking up the chamber's entry. If (but only if) a barrister's education was not listed in the first 5-year period where it was checked they were repeatedly looked-up in other periods where they were listed in to obtain this educational information. Where the educational information was not obtainable from the *Bar Directory*, the barrister's chamber's website was reviewed for such information. Using these methods it was not possible to identify the university education for 1,935 (17 per cent) of the 11,452 barristers in the dataset. Judging the impact of missing data is a difficult task, however the level of missing data (17 per cent) is very small in comparison with existing studies of the Bar: the 2013 biennial survey of the Bar had a response rate of 44 per cent and (so 66 per cent of data was missing) yet the survey reported that the 'response rate compares very favourably both with the last survey of the profession and other recent surveys of barristers'.<sup>74</sup> The entries with missing data were deleted from the dataset prior to analysis. Such deletion appeared to be the best strategy since such missing data is unlikely to be missing at random: perhaps education is disproportionately not disclosed either because they did not attend university (more likely for older barristers) or because they do not consider their university prestigious enough to disclose. As long as (i) Oxbridge educated barristers who do declare their educational background have the same propensity to become QCs as Oxbridge educated barristers who do not declare their educational background; and (ii) non-Oxbridge educated barristers who do declare their educational background have the same propensity to become QCs as non-Oxbridge educated barristers who do not declare their educational background, then the omission of data (and possible disproportionate omission of a particular category of data, ie non-Oxbridge educated barristers) should not make a difference. This is because (in very broad terms) the method of analysis essentially looks at the proportion of a category (Oxbridge-educated / non-Oxbridge educated) to which the event of becoming a QC happens to, not the absolute number in any given category or the proportion of all barristers.

### **Alignment of data**

To allow for the statistical analysis of the data (as discussed below) it was necessary that the dataset was longitudinal – that is to say that if a barrister was listed in one period then they were identifiable if they were listed in any of the other periods. It will be recalled that the original form of the data does not make these links between temporal periods, just specifying who was in each sets at any given point. Owing to the size of the dataset this was a non-trivial task, but was

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<sup>74</sup> The General Council of the Bar, *Barristers' Working Lives: A second biennial survey of the Bar* (2013) 18.

greatly assisted by computer automated processes using R (a software environment for statistical computing).<sup>75</sup>

A programme was written using R to align the data within sets over periods. It is predicated in the assumption that, for any two consecutive 5-year periods, if in both such periods there is a barrister (a) in the same set; (b) with the same surname; and (c) with the same call date, then they are the same barrister (who presumably has remained in the set over the period between the two dates). This assumption appears eminently reasonable. One set of instances where it is not a reasonable assumption is the (very rare) instances where there are two different people in the same set with the same call date and same surname at any given time. The small number of these occasions has been identified in the data and appropriate modifications made to the programme and data to ensure that the data is correctly longitudinally aligned in these cases.

A trickier task of alignment was creating a dataset that eliminated ‘duplicate’ entries. Conceptually, there could be two causes of duplicate entries. One cause could be a barrister being a member of two different sets at the same point in time. Another cause could be a barrister leaving one set to join another set. Given the size of the dataset, it would have been too sweeping an assumption to presume that if two barristers in the dataset (as opposed to any given set) shared the same surname and call-date then they were the same person. All cases of a shared surname and call-date in the dataset were manually reviewed to ensure they were the same person, principally by checking that they had the same full-name. In cases where they were not the same person, the data was appropriately modified to ensure that neither entry was removed on alignment of the data.

## **Chambers characteristics**

Some chambers characteristics considered in this paper are simple aggregates of the characteristics of their members – for example the the size of the set. Other chambers-level variables, however, are not aggregates of the characteristics of that chamber’s members. For example, the effect of the chambers being located in London or outside (referred to by barristers as the ‘provinces’), is considered. The area of law in which the set specialises is also considered. Two measures are used for it. One measure is based on the division of the High Court to which the members of the set that were elevated to the High Court were allocated to. However, a potential weakness of this measure is that it leaves unclassified the 22 chambers from which judges were not appointed and also uses the very broad categories of Chancery, Family and Queen’s Bench Division (QBD) work. As an alternative measure, the paper uses the number of members of each chambers specialising in each of the 16 practice areas listed in *Havers’ Companion to the Bar*.

## **METHOD OF ANALYSIS**

The analysis was done using a form of event history analysis,<sup>76</sup> a technique frequently used in biostatistics and often used in the social sciences<sup>77</sup> and even occasionally in law.<sup>78</sup> This section

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<sup>75</sup> R Core Team, *R: A language and environment for statistical computing* (R Foundation for Statistical Computing, 2012).

<sup>76</sup> For a fuller discussion of the statistical techniques used here, which is discrete-time survival analysis, see either J. Box-Steenmeier and B. Jones, *Event history modelling: a guide for social scientists* (Cambridge University Press,

briefly introduces the terminology used in these models, to assist with interpreting the results. A longer discussion of the statistical method used is in the statistical appendix. The method works by identifying a group of barristers who are at risk of becoming QCs at a given time (in statistical parlance, the ‘risk set’). For each QC appointment round<sup>79</sup> the risk sets includes all barristers in the dataset except (i) those who had already been appointed QCs; (ii) barristers under 12 years’ call; (iii) and those over 35 years’ call. Those under 12 years call were excluded since including them would place a huge number of observations in the risk set who, viewed realistically, were not at risk of becoming QCs: of those appointed QCs since 1980 only 18 of the 2,553 (0.7 per cent) were under 12 years’ call. The few silks appointed with under 12 years’ call also tended to have unusual backgrounds, such as solicitors who had transferred to the Bar after being partners in Magic Circle law firms. Similarly, of the 2,553 barristers from private practice appointed QCs since 1980, only 22 (0.9 per cent) were over 35 years’ call.

Event history analysis relies on two important concepts that it is important for the reader to grasp to follow the results presented in this paper. These concepts are the ‘hazard rate’ and the ‘survivor function’ and are described in the immediately following two paragraphs.

The ‘**hazard rate**’ for any year post-call is the probability that a barrister becomes a QC in that year, *given that they have not been made a QC in an earlier year*. The ‘baseline’ hazard is the estimated hazard for a barrister who has a certain combination of values on the variables tested in the model – in the models considered in this paper the variables are gender and educational background. Which values are chosen for the baseline is a somewhat arbitrary decision and does not alter the substantive interpretation of the model. The model then estimates the extent that combinations of values different from those used to estimate the baseline hazard multiply the *odds* of the *hazard* of becoming a QC in any given year.

Both odds (ie 1:9 as opposed to a probability of 10 per cent) and hazards can be difficult to interpret. Accordingly, the subsequent analysis generally presents the results by deriving the ‘survivor function’ for barristers with certain combinations of values on the variables used in the model. For any year post-call the ‘**survivor function**’ is the estimated probability that a barrister who remains in practice (and so at risk of appointment) throughout the period until that year will still be a junior barrister at the end of that year.<sup>80</sup> To assist readers in following the results, the survivor functions are generally visualised as graphs.

## RESULTS

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2004) 69-84 or S. Rabe-Hesketh and A. Skrondal, *Multilevel and longitudinal modeling using Stata* (STATA Press, 2008) 331-372.

<sup>77</sup> F. Steele ‘Multilevel models for longitudinal data’ (1993) 171 *Journal of the Royal Statistical Society, Series A (Statistics in Society)* 5; J. Singer and B. Willett ‘It’s About Time: Using Discrete-Time Survival Analysis to Study Duration and the Timing of Events’ (1993) 18 *Journal of Educational and Behavioural Statistics* 155.

<sup>78</sup> P. Pleasence and N. Balmer, ‘On the Rocks: Recession-Related Life Problems and Relationship Stability’ (2012) 24 *Child and Family Law Quarterly* 39; A. Patel, N. Balmer and P. Pleasence, ‘Debt and Disadvantage: The Experience of Unmanageable Debt and Financial Difficulty in England and Wales’ (2012) 36 *International Journal of Consumer Studies*, 556-565; P. Pleasence and N. Balmer, ‘In Need of Advice? Findings of a Small Business Legal Need Benchmarking Survey’ (2013, Legal Services Board).

<sup>79</sup> Hence there is no risk set for the years 2004, 2005 and 2007 as no appointment round took place in those years.

<sup>80</sup> By way of a simple example, assume that the hazard rate is 10% in year 1, 30% in year 2 and 20% in year 3. The survivor function for year 1 will be 90% (ie 1-0.1). For year 2 the survivor function will be 63% (ie (1-0.1)\*(1-0.3)). For year 3 the survivor function will be 50.4% (ie (1-0.1)\*(1-0.3)\*(1-0.2)).

Models were first fitted to account for the likelihood of a barrister in the risk set becoming a QC, controlling for length of call, the barrister's gender, educational background and set membership, as well as variables to account for the unusual years of 2003 (the last year of the old system), 2006 (prior to which there had been no appointments in the two previous years) and 2008 (where there was no appointment in the previous year). Separate models were fitted for the pre- and post-reform periods, which allowed the effect of the variables to vary between these periods: and therefore for an assessment of whether the reforms made a difference. In the pre-reform and post-reform models barristers were considered 'censored'<sup>81</sup> if not appointed by 2003 and 2015 respectively. Model specification and the selection of variables is discussed in more detail in the Statistical Appendix.

### **Pre-reform period: partial effect of gender and educational background**

The best fitting model for the pre-reform period included a cubic function<sup>82</sup> of years' call, gender, whether or not the barrister was an Oxbridge graduate, set membership, a dummy variable to account for the year 2003 and an interaction between years' call and educational background (but no interaction of education with the second and third degrees of the cubic function). The cubic function of years' call allows the hazard of becoming a silk to increase, peak, then decrease, with differently shaped slopes on either side of the peak. The interaction of years' call with educational background allows the shape of the hazard to vary depending on educational background. The estimated coefficient of gender in this model is 0.398, which means that, controlling for other variables, for a male junior barrister the odds of becoming a QC in the pre-reform period were 1.49 times<sup>83</sup> those for an equivalent woman. However, the interaction of educational background with years' call does not allow for such a simple interpretation of the effect of educational background. Further, as noted, thinking in terms of odds can be difficult. Accordingly, Figure 2 shows the estimated hazard rate and survivor functions for the four different combinations of education and gender for a barrister in an average<sup>84</sup> set, omitting the effect of the *sui generis* year of 2003.

**[INSERT FIGURE 2 HERE]**

**Figure 2: Estimated hazard rate of becoming a QC (left) and survivor function (right) comparing each of the four combinations of gender and education in an average set in respect of the pre-reform period.**

For Oxbridge graduates the hazard rate peaks at 20 years' call, whilst for other barristers it peaks later at 21 years' call. An informative comparison is therefore of the hazard rates at 21 years' call. From the plot of the hazard functions (on the left of Figure 2) it can be seen that for a male junior barrister in an average set the chance of them taking silk in their 21st year of call is 7.8 per cent for an Oxbridge graduate and 6.9 per cent for a non-Oxbridge graduate. The equivalent figures for a female barrister are 5.4 per cent for an Oxbridge graduate and 4.7 per cent for a non-Oxbridge graduate.

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<sup>81</sup> Censoring occurs when the full event history of a barrister is unobserved: for example when they are still practising at the end of the observation period and so still at risk of taking silk, but have not done so. For a fuller discussion of censoring and why it matters, see the statistical appendix to this paper and the references cited there.

<sup>82</sup> A cubic function takes the form  $y = ax^3 + bx^2 + cx + d$ .

<sup>83</sup> since  $\exp(0.398)=1.489$ .

<sup>84</sup> ie one where the value of the set effect is set at its estimated mean value of 0.



From the survivor functions (on the right of Figure 2) it is evident that the most advantaged category is male Oxbridge graduates. This is shown by how the line representing the survivor function for this group is always below the other lines: showing how that such barristers who remain in the same set between their twelfth and thirty-fifth year post call are, at any year in that period, more likely than any other category of barrister in the same set to be a QC. Conversely, the survivor function for female barristers who are non-Oxbridge graduates is always the highest line: suggesting that they are over the same period less likely than any other category of barrister in the same set to be a QC. A male Oxbridge educated barrister who remains in an average set between their twelfth and thirty-fifth year post call has an estimated 57 per cent chance of being a QC by the end of this period, compared to only 42 for a female barrister otherwise educated. The equivalent figures for a male barrister otherwise educated and a female Oxbridge educated barrister are 55 and 44 per cent. From the survivor functions it is apparent that the estimated probability of taking silk for these latter two groups is very similar until 21 years' call, after which point they markedly diverge. So the model suggest that, in the pre-reform period for barristers that remained in practice until 35 years' call, the effect of gender is much greater than the effect of educational background: for such barristers education is only associated with a 2 per cent difference in the estimated probability of taking silk, compared with an estimated 13 per cent difference associated with gender. For such a barrister it appears that educational background had a substantial effect on *when* they take silk, but much less effect on *whether* they ultimately took silk.

### **Post-reform period: partial effect of gender and educational background**

Similarly for the post reform period, the best fitting model included a cubic function of years' call, gender, whether or not the barrister was an Oxbridge graduate, set membership, a dummy variable to account for the *sui generis* year of 2006 and an interaction between years' call and educational background. However, in this model educational background interacts with all three degrees of a cubic hazard function of years' call and there is also an interaction between years' call (but not with the second and third degrees of the cubic function) and gender. This means that the shape of the hazard function is different for each combination of gender and educational background and it is not possible to interpret the effect of gender as was done in the pre-reform model by just considering the value of the coefficient.

As with the pre-reform period, an assessment of the effect of educational background and gender may be done by a comparison of the fitted values for the four different combinations of education and gender for an average set. A plot of such estimated hazard and survivor functions for barristers in an average set is shown in Figure 3.

**[INSERT FIGURE 3 HERE]**

**Figure 3: Estimated hazard rate of becoming a QC (left) and survivor function (right) comparing each of the four combinations of gender and education in an average set in respect of the post-reform period.**

For Oxbridge graduates (of both genders) the hazard rate peaks at 20 years' call, whilst for other male barristers it peaks later at 21 years' call and for other female barristers at 22 years' call. An informative comparison is therefore of the hazard rates at 21 years' call. From the plot of the hazard functions (on the left of Figure 3) it can be seen that for a male junior barrister in an average set the chance of them taking silk in their 21st year of call is 7.2 per cent for an

Oxbridge graduate and 4.7 per cent for a non-Oxbridge graduate. The equivalent figures for a junior female junior barrister are 4.9 per cent for an Oxbridge graduate and 3.2 per cent for a non-Oxbridge graduate.

From the survivor functions (on the right of Figure 3) it is evident that the most advantaged category is male Oxbridge graduates. This is shown by how the line representing the survivor function for this group is always below the other lines: showing how that such barristers who remain in the same set between their twelfth and thirty-fifth year post call are, at any year in that period, more likely than any other category of barrister in the same set to be a QC. Conversely, the survivor function for female barristers who are non-Oxbridge graduates is always the highest line: suggesting that they are over the same period less likely than any other category of barrister in the same set to be a QC. A male Oxbridge educated barrister who remains in an average set between their twelfth and thirty-fifth year post call has an estimated 52 per cent chance of being a QC by the end of this period, compared to only 30 per cent for a female barrister otherwise educated.

An idea of the relative impacts of gender and education in this period may be gleaned by comparing the positions of a female Oxbridge educated barrister to a male barrister otherwise educated. From the plot of the survivor functions (on the right of Figure 3) it is apparent that the survivor functions for female barristers educated at Oxbridge and male barristers otherwise educated are always very close to each other, with the lines crossing twice so neither is consistently above or below the other. This suggests that in the post reform period the effects of gender and educational background are very similar.

It will be recalled that the reforms to the QC appointments system were introduced to address concerns that the old system of secret soundings unfairly disadvantaged groups such as women and those who were not part of a well-connected élité, eg non-Oxbridge graduates. Given this it is very surprising that in the post-reform period the estimated partial effect of gender remains substantively large. As noted previously, in the pre-reform period an Oxbridge graduate who remained in an average set between their twelfth and thirty-fifth year post call had an expected 57 per cent chance of taking silk if male and 44 per cent chance if female. In the post-reform period these expected values are 52 and 40 per cent, suggesting hardly any improvement. Further in the model for the post-reform period the partial effect of educational background has a much greater estimated effect on whether a barrister who remained in practice until 35 years' call ever took silk, not just when they did as in the pre-reform period.

### **Effect of set membership**

As discussed earlier, a major criticism of the pre-reform appointments system was that the award of silk was highly contingent on which chambers the junior barrister was a member of. Up to this point, where estimated probabilities have been given, these have been for an average set. However, it is also possible to predict values for the effects of each of the chambers in the risk set and use these to calculate hazard rates and survivor functions for members of each of these chambers.

Figure 4 shows, for each of the four categories of barrister, the survivor function for the sets with the highest and lowest predicted values, together with the sets at the median predicted value and the sets at the 25th and 75th centiles. From Figure 4 it is apparent that the prospect of becoming a QC in the post reform period is highly contingent on which set the barrister is a member of: even though all the sets in the risk set are selected on the basis that they do produce

QCs and represent approximately the top-half of the Bar in that regard. For example, for an Oxbridge educated male barrister, the estimated probability of becoming a QC between 12 and 35 years' call is 98 per cent if they are in the set most likely to produce QCs, but only 14 per cent if they are in the set least likely to produce QCs: a range of 84 per cent. This full range necessarily shows the widest variation. But there is still wide variation if we look at the interquartile range: being the difference between the predicted values for the sets at the 25th and 75th centiles. For male Oxbridge educated barristers the interquartile range is between 74 per cent and 33 per cent: a difference of 41 per cent. For female otherwise educated barristers the interquartile range is between 49 per cent and 18 per cent: a difference of 31 per cent.

**[INSERT FIGURE 4 HERE]**

**Figure 4: From top-left clockwise, for (i) Oxbridge educated male barristers in the risk set; (ii) Oxbridge educated female barristers in the risk set; (iii) otherwise educated female barristers in the risk set; (iv) otherwise educated male barristers in the risk set; the survivor function for the sets with the highest and lowest predicted values, together with the sets at the median value and the sets at the 25th and 75th centiles in respect of the post-reform period. As noted previously, the survivor function is the estimated probability that a barrister who remains in practice throughout the period until the end of that year will still not have been appointed a QC at the end of that year.**

Comparisons between the magnitude of the partial effects of set membership and the effects of gender and educational background are somewhat problematic, since there are many different sets but the variables of gender and education only have two states. However, the following comparison, based on the estimated probability of a barrister becoming a QC at any point between 12 and 35 years' call, might be thought to suggest that the effect of set membership is more salient than the effects of gender or education. The smallest interquartile range in Figure 4 is 31 per cent (for female barristers educated otherwise than at Oxbridge). Even this interquartile range is greater than the difference between the combined effect of gender and education for a barrister in an average set, being 22 per cent: this can be seen in Figure 2, being the difference between the survivor function for Oxbridge males (52 per cent) and otherwise educated females (30 per cent) at 35 years' call. Another indication of the importance of set membership is the statistical model selection (DIC) statistic, which is discussed further in the statistical appendix.

This discussion has focused on the effect of set membership in the post-reform period. Similar analysis shows that it had a significant and large substantive effect in the pre-reform period too.

### **Set level variables**

Up to this point the analysis has focused on how the characteristics of individual barristers are associated with those barristers' prospects of taking silk. The analysis has also considered how those prospects vary between sets: but not considered what characteristics of a set are associated with a set being more likely to produce QCs. This section considers how these set level variables (ie variables which are the same for each member of a set) are associated with the chance of barristers in those sets taking silk.

Models were fitted to account for set level variables, in addition to the barrister level variables in the previous model for the post-reform period. The best fitting model included set level variables that accounted for the geographic location of the set (London or the provinces) and the number of barristers in the set immediately prior to the appointment. The estimated

partial effect of these variables, that is to say the effect controlling for the barrister-level variables and the other set level variables, was as follows:

*Geographic location:* the estimated coefficient of being a provincial set in this model is -0.921, which means that, controlling for other variables, for a barrister in a provincial set the odds of becoming a QC in the post-reform period were 60 per cent<sup>85</sup> smaller than those for an equivalent barrister in a London set.

*Set size:* the estimated coefficient of set size in this model is -0.005, which means that, controlling for other variables, having an additional member of the set is associated with reducing the odds of becoming a QC by 0.5 per cent.<sup>86</sup>

In short, being a small set in London is associated with the highest probability of a junior barrister becoming a QC. This model was also estimated to include variables associated with the area of law in which the set specialised and also the number of QCs in the set, but this did not improve the fit of the model.

### **The effect of different application rates**

The previous section has shown that members of certain groups appear less likely to become QCs, controlling for certain other factors. However it does not follow that these groups are directly disadvantaged by the selection mechanism: rather members of these groups may be less likely to apply. Alternatively it could be a combination of both. Some insight into this may be gleaned in respect of gender for the period between 1993 and 2015. In respect of this period aggregate data is available which shows, for each year in which there was a QC appointment round, the number of applicants and the number of appointments by year. These are summarised in Figure 5.<sup>87</sup>

**[INSERT FIGURE 5 HERE]**

**Figure 5: The percentage of applications for QC status which were successful, broken down by year and gender.**

It is immediately apparent from Figure 5 that the success rate for both genders is higher in the post-reform period: which is likely to be explained by the increased cost disproportionately deterring speculative applications. The cost is not only the application fee, but also the more extensive (and so time consuming) application procedure, i.e. an opportunity cost.

From Figure 5 it is also apparent that the success rate for women is generally greater than the success rate for men. This suggests that at least part of the explanation for the lower likelihood of female barristers becoming QCs, controlling for other factors, is that fewer apply. This is because it would be expected that if a smaller proportion of female barristers apply, those barristers will be disproportionately drawn from those who are objectively more likely to be awarded silk, and thereby inflate the overall success rate for female applicants.

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<sup>85</sup> since  $0.60 = 1 - \exp(-0.921)$ .

<sup>86</sup> The P-value for the set size variable is 0.098 and so it is only significant at the 0.1 level of significance. (This is the only variable in the various models fitted in this paper which is not significant at the 0.05 level.) The reason for including this variable (despite the P-value) is that it is part of the model with the lowest DIC. Further, because (i) P-value for the post-reform period is below the 0.1 level of significance (ii) there are good reasons to consider the association likely and (iii) because of the non-trivial estimated effect.

<sup>87</sup> For 1995 and subsequent years the data was obtained from the QC Appointments website, the pre-1995 data was obtained from the Lord Chancellor's Department, *Judicial Appointments: Annual Report 2001-2002* Cm 5248 (2002) para 57.

To gain further insight, the data in the table was disaggregated and regression analysis was used to estimate the effect of gender on the probability of an applicant for QC status being awarded that rank, controlling for the year of application by using dummy variables for each year. To allow for the effect of gender to vary in the pre- and post- reform period, separate regressions were used for each period.

The estimated effect of gender was far higher in the later period than in the pre-reform period. In the pre-reform period the estimated coefficient of gender was -0.18, meaning that controlling for year the odds of a successful application were 0.83 times those for men than for women, i.e. they were 17 per cent lower. In the post reform period the estimated coefficient of gender was -0.448, meaning that controlling for year the odds of a successful application were 0.639 times those for men than for women, i.e. they were 36 per cent lower.

The far higher success rate by women *applicants* in the post reform period suggests that a substantial part of the explanation for female junior barristers in elite sets being less likely to become QCs is a lower propensity among women to apply for QC status. But a lower application rate among women does not necessarily fully explain why fewer women were appointed under the pre-reform system. In any event, a lower propensity to apply does not mean that women were not disadvantaged – it only explains the mechanism through which that disadvantage operates.

No similar data is available that provides details the educational background of applicants for QC status. However, here different rates of application do not seem a plausible explanation. This is because in the models considered in the previous section the partial effect of educational background appears far more substantial in the post-reform period. Yet there seems to be little reason why the reforms would cause barristers from different educational backgrounds to apply at different rates.

## CONCLUSION

The introduction set out three reasons why who holds the status of QC is of general public importance. These were that (i) traditionally the overwhelming majority of High Court judges have been appointed from the ranks of QCs; (ii) the status is justified as a kitemark of quality; (iii) it is important for the individual barristers who wish to become QCs. This conclusion reviews these reasons in the light of the findings of this article. This conclusion then tentatively notes three further arguments as to whether the existence of QC status is in the interests of the consumers of legal services or the interest of justice. These additional arguments are: (i) that it fails to operate as a genuine kite-mark of quality due to the absence of reappraisals; (ii) that it artificially distorts the level of QCs fees; and (iii) that it inappropriately privileges some advocates in a court setting.

The statistical models in this paper have suggested that, controlling for length of call, educational background and set membership, female junior barristers are less likely to take silk than their male equivalents. This remains the case despite the changes to the appointments process in 2004. The difference in the appointment rates between genders may, at least partially, be explained by differences in application rates between genders. The statistical models also suggest that, controlling for length of call, gender and set membership, barristers who are Oxbridge graduates are more likely to take silk than equivalents who are not Oxbridge graduates. This was statistically significant (ie the difference between groups was unlikely to be attributable to chance) before the 2004 reforms. However the substantive effect (ie the estimated effect of the difference on whether or not an individual is appointed a QC) is far greater in the post-reform

period. The models also show the likelihood of taking silk to be highly contingent on the chambers which the barristers are members of: in the post-reform period small London based chambers are more likely to produce QCs.

It has already been noted that part of the explanation as to why women and non-Oxbridge graduates are less likely to be appointed QCs is that they are less likely to apply. This may be explained either by them knowing that they are less likely to be appointed or by different attitudes to risk. Whilst the introduction of a more open and transparent appointment system might have been expected to rectify this, it appears not to have done so.

One would only legitimately expect to see a disproportionately high award of QC status to men and Oxbridge graduates in circumstances where they were discriminated against at an earlier stage in their careers at the Bar. Such discrimination may mean that they would be, on average, better advocates as they would have needed to have more merit in order to achieve what they have despite the discrimination. In such circumstances the QC appointments system might legitimately recognise this and disproportionately appoint them as QCs. But the premise is not true. The existing literature shows that the groups that are advantages at the appointment stage are advantaged at earlier stages too. It therefore appears that it is still not the case that the best advocates are being appointed QCs. This may be either due to lower rates of application by women and non-Oxbridge graduates or to the selection process not favouring them.

Thus because of the failure of the QC system to appoint the best advocates it does not operate as a perfect kite-mark of quality for consumers. Nor does it equally distribute the awards of QC status on any equitable basis. Finally, it might be thought to inhibit judicial diversity by restricting the pool from which the senior judiciary is traditionally recruited. The final paragraphs of this paper explore some additional arguments for abolition of QC status, particularly drawing on responses from the consultation undertaken at the time of the reform.

The existence of the rank of QC is often justified as being a kite-mark of quality, which assists consumers in the selection of barristers. Given that the majority of instructions to barristers are still from solicitors, themselves sophisticated consumers, it is may be doubted whether such a state-sponsored accreditation scheme is necessary. Further the award of QC status is effectively<sup>88</sup> for life, which might be thought to make the claim that it is a kite-mark of quality dubious. When the QC reappointment process resumed in 2004 it was anticipated that there would be 'provision for the kitemark to be removed where the holder has failed to meet the high standards required',<sup>89</sup> but this has not materialised. In the absence of regular reappraisals, quite how the status is supposed to ensure a kitemark of quality is unclear. As Yvonne Brown,

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<sup>88</sup> This is a relatively modern phenomenon, traditionally the appointment ended on the death of the monarch: J.H. Baker, *The common law tradition: lawyers, books, and the law* (Hambledon Press, 2000) 89. It became effectively a life appointment following the enactment of the Demise of the Crown Act 1901, except that the status is lost on appointment to the High Court: J.H. Baker, 'On Taking Silk' *Inner Temple Year Book* (1996-1997) 42, 48. There are four instances in the twentieth century where letters patent of revocation have been issued: J. Sainty, *A list of English Law Officers and King's Counsel and Holders of Patents of Precedence* (Selden Society, 1987) 84. Three of the revocations took place in association with a barrister becoming a solicitor, the fourth occurred after a QC was convicted of smuggling: 'Judge who smuggled whisky and tobacco in yacht is fined £2,000' *The Times* (30 November 1983) 3. The practice of removing this kitemark of quality from those convicted of serious offences appears to have been discontinued. A search of the *London Gazette* reveals no letters patent of revocation in respect of Rohan Pershad QC, despite his conviction for cheating the public revenue, which was upheld by the Court of Appeal, for which he was jailed for three years and six months in February 2013: *R v Pershad* [2014] All ER (D) 70 (Apr).

<sup>89</sup> Written Statement of the Lord Chancellor (Lord Falconer of Thoroton) announcing the decision to retain the rank of Queens Counsel: HC Deb vol 661 WS54 26 May 2004.

Chair of the Black Solicitors' Network noted 'It is accepted that there are many holders of the rank of QC who provide an excellent high quality service. There are however some who do not and there is no means of ensuring that the holders of the rank of QC have maintained the necessary level of skill and expertise which the rank suggests.'<sup>90</sup> Indeed the Bar Standards Board have recently asked the Queen's Counsel Selection Panel to introduce re-accrediting QCs who practice criminal law,<sup>91</sup> but given the failure of the BSB to implement the Quality Assurance Scheme for Advocates<sup>92</sup> it is doubtful whether such reappraisals will ever be implemented.

The rank of QC also might be thought to work against the consumer by distorting the level of barristers' fees. The award of QC status immediately results in a huge increase in the fees that barristers charge.<sup>93</sup> It is natural the more experienced barristers would charge a higher fee rate, but given that such experience gradually accrues, this would not justify a large 'step change' in fees on the award of silk.

Additionally the award of QC status might be thought to work against the interests of justice by privileging some advocates in a court setting. QCs get to wear a different gown – made of silk rather than the stuff gown of junior barristers.<sup>94</sup> Also, in the superior courts they get to sit in the front row of the court which is only ever occupied by QCs – so if they are appearing against a junior the junior will sit on the row behind them.<sup>95</sup> These differences in rank seem particularly unjustified in a court setting, where the overriding objective is to 'deal with cases justly'<sup>96</sup> which includes, in the Civil Procedure Rules, 'so far as is practicable, ensuring that the parties are on an equal footing'.<sup>97</sup> Indeed, the concept of equality of arms is 'central to the concept of a fair trial, in civil as in criminal proceedings,'<sup>98</sup> and while it does not require the state to fund equal representation it surely does require that one side is not advantaged over the other due to the court according a higher status to that party's advocate. Yet, since the time of Aristotle it has been accepted by rhetoricians that characteristics of the speaker are an important means of persuasion.<sup>99</sup> Accordingly, in a court setting, enhancing the status of one of the representatives with such honorific devices would seem to violate the overriding objective.<sup>100</sup> Indeed, in response to the 2003 consultation on whether the rank of QC should be abolished, the City of London Law Society responded that 'There is a clear, perceived, competitive advantage to QCs from their distinctive position in the courtroom... It is wrong in principle for advocates to be

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<sup>90</sup> Black Solicitors' Network, 'Response to the consultation paper on 'Constitutional reform: the future of Queen's Counsel'' (*UK Government Web Archive*, 10 May 2003) <http://webarchive.nationalarchives.gov.uk/20040105065916/http://www.dca.gov.uk/consult/qcfuture/responses/qc034.pdf>.

<sup>91</sup> J. Hyde, 'Bar regulator seeks QC re-accreditation scheme' *Law Society Gazette* (24 March 2015) <http://www.lawgazette.co.uk/law/bar-regulator-seeks-qc-re-accreditation-scheme/5047830.article>.

<sup>92</sup> At the time of writing the scheme remains unimplemented, following the challenge which culminated in *R (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41. The Supreme Court confirmed QASA as lawful and proportionate.

<sup>93</sup> See The Law Society, n 4 above.

<sup>94</sup> Practice Direction of the Lord Chief Justice 1994.

<sup>95</sup> *Halsbury's Laws* (2010) vol 57, 1124, n.6.

<sup>96</sup> Civil Procedure Rules, r 1.1; Criminal Procedure Rules, r 1.1.

<sup>97</sup> Civil Procedure Rules, r 1.1. There is not such an express provision in the Criminal Procedure Rules, but it is probably covered by the requirements of 'dealing with the prosecution and the defence fairly' (r 1.1(2)(b)) and 'acquitting the innocent and convicting the guilty' (r 1.1(2)(a)).

<sup>98</sup> *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

<sup>99</sup> W.M. Salter, 'Conceptions of ethos in ancient rhetoric' (1947) 14 *Speech Monographs* 55.

<sup>100</sup> Given that these privileges of silk appear to be purely customary it is arguable that they should yield to the statutory requirement of the overriding objective set out in the CPR.



perceived in court to have a different status whether by reason of dress, position or otherwise.’<sup>101</sup> One leading Barristers’ chambers noted ‘Silks are sometimes instructed simply to “get the ear” of the judge (because some judges undoubtedly listen more attentively to submissions from a silk).’<sup>102</sup> This later point suggests that it is not merely the physical position in court and the dress that advantages the QC, but also their status. Accordingly, it could be argued that it would be desirable to abolish that status, not merely to equalise the dress and position of advocates in court, to promote equality of arms between the parties.

Serious policy debate about abolishing QC status has evaporated following the 2004 reforms. But the research in this article and the additional arguments noted above show there to be serious issues as to whether the existence of QC status is in the public interest. It is hoped that this research will inform any such future debate.

## STATISTICAL APPENDIX

The particular type of event history analysis used was a discrete time logit model.<sup>103</sup> This was appropriate since many QCs have the same length of call on appointment, as each year’s batch of QCs is appointed on the same date. The models were fitted in the R software environment for statistical computing<sup>104</sup> using R2MLwiN<sup>105</sup> as a command interface to enable Markov Chain Monte Carlo (MCMC) estimation in the MLwiN<sup>106</sup> multilevel modelling software package.<sup>107</sup> The Bayesian approach of MCMC estimation was preferred over more traditional frequentist

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<sup>101</sup> City of London Law Society, ‘Response to the consultation paper on ‘Constitutional reform: the future of Queen’s Counsel’ (UK Government Web Archive, 10 May 2003)

<http://webarchive.nationalarchives.gov.uk/20040105065916/http://www.dca.gov.uk/consult/qcfuture/responses/qc058.pdf>

<sup>102</sup> Matrix Chambers, ‘Response to the consultation paper on ‘Constitutional reform: the future of Queen’s Counsel’ (UK Government Web Archive, 10 May 2003)

<http://webarchive.nationalarchives.gov.uk/20040105065916/http://www.dca.gov.uk/consult/qcfuture/responses/qc211.pdf>

<sup>103</sup> For examples of the use of such models in non-legal contexts see D. Hedeker, O. Siddiqui, and F. Hu, ‘Random-effects regression analysis of correlated grouped-time survival data’ (2000) 9 *Statistical Methods in Medical Research* 161; S. Rabe-Hesketh, S. Yang, and A. Pickles, ‘Multilevel models for censored and latent responses’ (2001) 10 *Statistical Methods in Medical Research* 409; L. Grilli, ‘The random effects proportional hazards model with grouped survival data: a comparison between the grouped continuous and continuation ratio versions’ (2005) 168 *Journal of the Royal Statistical Society: Series A* 83; and J. Barber, S. Murphy, W. Axinn and J. Maples ‘Discrete-Time Multilevel Hazard Analysis’ (2008) 30 *Sociological Methodology* 201.

<sup>104</sup> R Core Team, n 75 above.

<sup>105</sup> Z. Zhang, C. Charlton, R. Parker, G. Leckie, and W. Browne *R2MLwiN* (Centre for Multilevel Modelling, University of Bristol 2012).

<sup>106</sup> J. Rasbash, C. Charlton, W. Browne, M. Healy and B. Cameron, *MLwiN v2.1* (Centre for Multilevel Modelling, University of Bristol 2009); W. Browne, *MCMC Estimation in MLwiN v2.1* (Centre for Multilevel Modelling, University of Bristol 2009).

<sup>107</sup> As creating the dataset required significant programming in R it was natural for the author to conduct the analysis in R. It would have been possible to conduct the analysis directly in *MLwiN* without using R, or indeed to conduct it using the *runmlwin* interface with Stata. The preference for *R2MLwiN* was because of the author’s preference for R as he finds it is easier to replicate and check than the MS Windows interface with *MLwiN*.



inference both because of general advantages of the Bayesian method<sup>108</sup> and specific advantages in the multilevel context.<sup>109</sup>

To carry out this analysis it was necessary to put the data in unit-period data format, so that there was a separate entry for every year in which a barrister was present in the dataset. As barristers were only observed at 5-year intervals, if they were assumed to be present in the same set in the four years subsequent to each observation. All continuous variables were mean centred, to assist the computational process of estimation. Using survival analysis with the data in unit-period data format allows the model to adequately deal with (i) barristers who are only first observed more than 12 years' post-call (technically called 'left-truncated' observations) who are therefore 'at risk' of appointment prior to when they are first observed; and (ii) barristers who are not observed to become QCs while in the dataset (technically called 'right-censored' observations). This therefore avoids various errors of inference<sup>110</sup> that could be introduced by a more naïve approach, such as one that just considered the time it took barristers who did become QCs to do so, ignoring those that did not (ie who were right-censored).

The model estimates a 'baseline hazard'. The 'hazard rate' for any year post-call is the probability that a barrister becomes a QC in that year, given that they have not been made a QC in an earlier year. The 'baseline' hazard is the estimated hazard for a barrister who has a certain combination of values on the variables tested in the model – which values are chosen for the baseline is a somewhat arbitrary decision and does not alter the substantive interpretation of the model. The model then estimates the extent that combinations of values different from the baseline multiply the odds of the hazard of becoming a QC in any given year. Both odds (ie 1:9 as opposed to a probability of 10 per cent) and hazards can be difficult to interpret. Accordingly, the analysis in this paper generally presents the results by deriving the 'survivor function' for barristers with certain combinations of values on the variables used in the model. For any year post-call the survivor function is the estimated probability that a barrister who remains in practice (and so at risk of appointment) throughout the period until that year will still be a junior barrister at the end of that year.

Separate models were fitted for the pre- and post-reform periods. The models were first fitted by specifying different hazard functions, using a random coefficient to control for dependency between members of the same set and thereby avoiding certain errors<sup>111</sup> that would be likely to arise if such dependency was not taken into account. Models were first estimated in which the baseline hazard was allowed to independently vary in each year of call, by using different dummy-variables for each year. The results of these models showed the hazard to increase, peak and then decline over years call. This suggested that modelling the hazard as a polynomial function of years' call might be appropriate. Accordingly models were fitted in which the hazard was specified as a quadratic, cubic and fourth-degree polynomial function of time. For both time periods the best-fitting model (including the model using a dummy variable for each year) was the one in which the hazard was specified as a cubic function of time.

The model with the cubic baseline hazard was then fitted with covariates, including gender, educational background and dummy-variables for the years 2003, 2006 and 2008. The

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<sup>108</sup> S. Jackman, *Bayesian Analysis for the Social Sciences* (Wiley, 2009) xxvii-xxxiv.

<sup>109</sup> A. Gelman and J. Hill, *Data Analysis Using Regression and Multilevel/Hierarchical Models* (CUP, 2007) 345-348.

<sup>110</sup> See Box-Steensmeier and Jones n. 76 above 16-19 or Rabe-Hesketh and A. Skrondal n. 76 above 330-333 as to the possible errors that a more naïve approach could introduce.

<sup>111</sup> See Gelman, n. 109 above 6-8 and T. Snijders and R. Bosker, *Multilevel Analysis: An introduction to basic and advanced multilevel modeling* (SAGE, 1999) 13-16.

best fitting model for the both periods included the variables of years' call, gender, whether or not the barrister was an Oxbridge graduate and set membership. Additionally the pre-reform model contained a dummy variable to account for the year 2003 and similarly the post-reform model contained a dummy variable to account for the year 2006. In neither period was there any significant interaction between gender and educational background: in both periods including such an interaction resulted in a less well-fitting model.

The models were then tested to see if there was any interaction between years' call (and years' call squared and years' call cubed) and educational background and/or gender. In the pre-reform period the best-fitting model included such an interaction between years' call (but not the second and third degrees of the cubic function) and educational background. This means that in the pre-reform period the shape of the hazard function differs depending on educational background. In the post-reform period the best fitting model included an interaction of educational background with all three degrees of a cubic hazard function of years' call, in addition to an interaction between years' call (but not the second and third degrees of the cubic function) and gender. This means that in the post-reform period the shape of the hazard function differs depending on both educational background and gender. The resultant models for the pre- and post- reform period are shown in Tables 1 and 2 of this Appendix.

Model selection was done both by reference to the statistical significance of the variables and by using the DIC statistic,<sup>112</sup> a generalisation of Akaike's Information Criterion, a lower value of which indicates a better fitting model.<sup>113</sup> The DIC statistic was especially important for evaluating the extent to which the hazard was associated with set membership, as it was a random rather than fixed parameter. An indication of the importance of set membership is shown by the following results. If set effects are removed from the final model for the post-reform period which does not include set-level variables, then the DIC statistic increases by 412. By comparison if just gender is omitted the DIC statistic only increases by 25 and if just education (and its interactions with years' call) are omitted the DIC statistic increases by 30.

For the post-reform period, models were fitted to account for set level variables, in addition to the barrister level variables in the previous model. The best fitting model included set level variables that accounted for the geographic location of the set (London or the provinces) and the number of barristers in the set immediately prior to the appointment. Table 3 shows the estimated coefficients for this model.

Parameter	Coefficient			Odds ratio	
	Estimate	SE	Central credibility interval for 2.5 and 97.5 quintiles accurate within 0.005 with probability 0.95		
<i>Fixed part</i>					
male	0.398	0.119	0.165	0.637	1.489
oxbridge	2.046	0.374	1.309	2.784	7.737
year 2003	0.312	0.115	0.085	0.533	1.366

<sup>112</sup> D. Spiegelhalter, N. Best, B. Carlin and A. van der Linde, 'Bayesian measures of model complexity and fit (with discussion)' (2002) 64 *Journal of the Royal Statistical Society: Series B (Statistical Methodology)* 583.

<sup>113</sup> Browne, n 106 above, 28.

years post call	3.420	0.361	2.705	4.125	30.569
years post call <sup>2</sup>	-0.132	0.017	-0.166	-0.098	0.876
years post call <sup>3</sup>	0.002	<0.001	0.001	0.002	1.002
(oxbridge* years post call)	-0.091	0.019	-0.128	-0.054	0.913
Constant	-5.177	0.256	-5.690	-4.687	0.006
<i>Random part</i>					
set level variance	0.531	0.097	0.367	0.745	
DIC	8228.744				

Table 1: MCMC Estimates for best fitting model in the pre-reform period<sup>114</sup>

Parameter	Coefficient			Odds ratio	
	Estimate	SE	Central credibility interval for 2.5 and 97.5 quintiles accurate within 0.005 with probability 0.95		
<i>Fixed part</i>					
male	1.492	0.501	0.517	2.479	4.445
oxbridge	-15.899	6.243	-28.151	-3.636	<0.001
year 2006	0.728	0.102	0.527	0.924	2.072
years post call	2.951	0.684	1.619	4.305	19.116
years post call <sup>2</sup>	-0.103	0.031	-0.164	-0.042	0.902
years post call <sup>3</sup>	0.001	<0.001	<0.001	0.002	1.001
(oxbridge* years post call)	2.505	0.873	0.801	4.214	12.245
(oxbridge* years post call <sup>2</sup> )	-0.12	0.04	-0.198	-0.043	0.887
(oxbridge* years post call <sup>3</sup> )	0.002	0.001	0.001	0.003	1.002
(male* years post call)	-0.051	0.024	-0.099	-0.003	0.95
constant	1.051	2.545	-3.953	6.002	2.859
<i>Random part</i>					
set level variance	0.928	0.167	0.644	1.296	
DIC	6064.185				

Table 2: MCMC Estimates for best fitting model in the post-reform period<sup>115</sup>

Parameter	Coefficient			Odds ratio	
	Estimate	SE	Central credibility interval for 2.5 and 97.5 quintiles accurate within 0.005 with probability 0.95		
<i>Fixed part</i>					

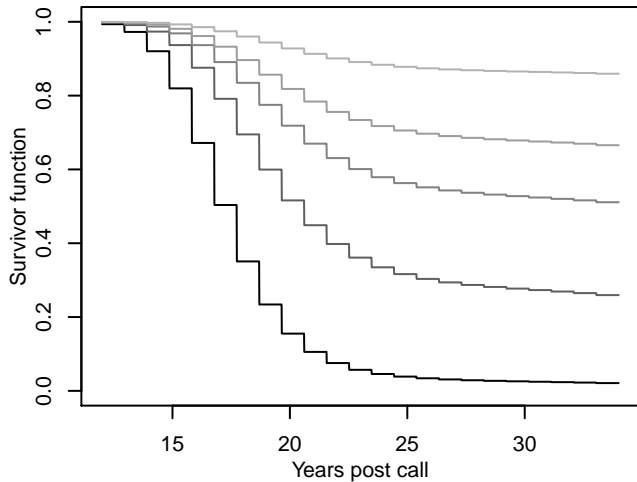
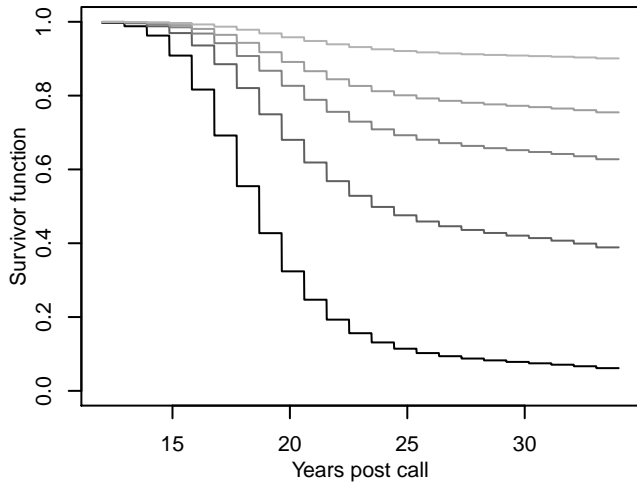
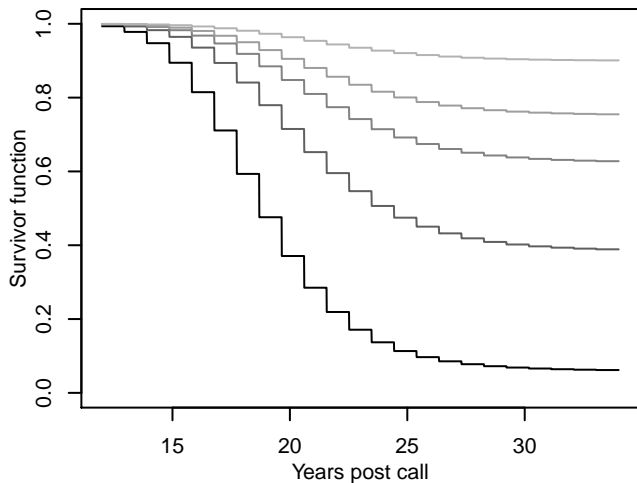
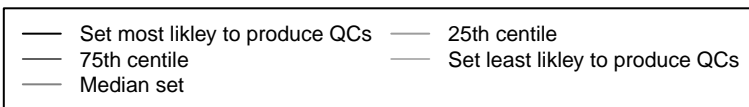
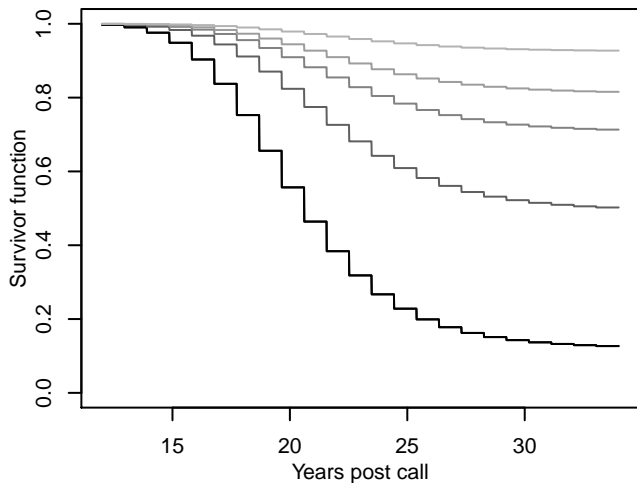
<sup>114</sup> For the MCMC estimation the burn-in length was 500 and the chain length was 35,000.

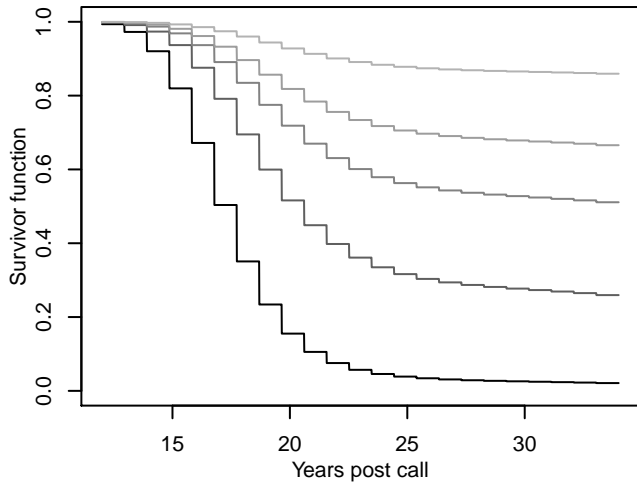
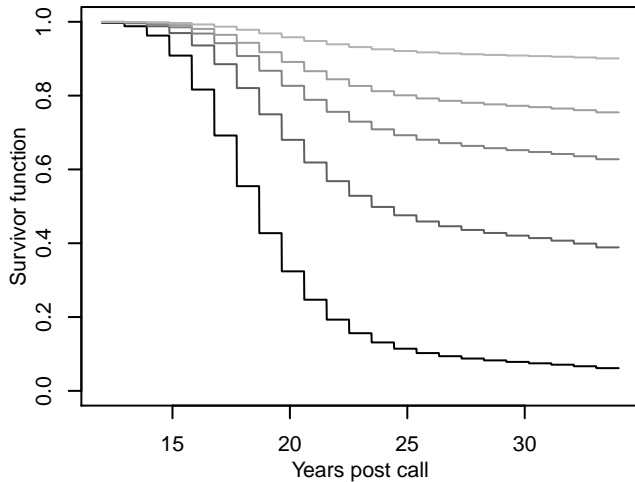
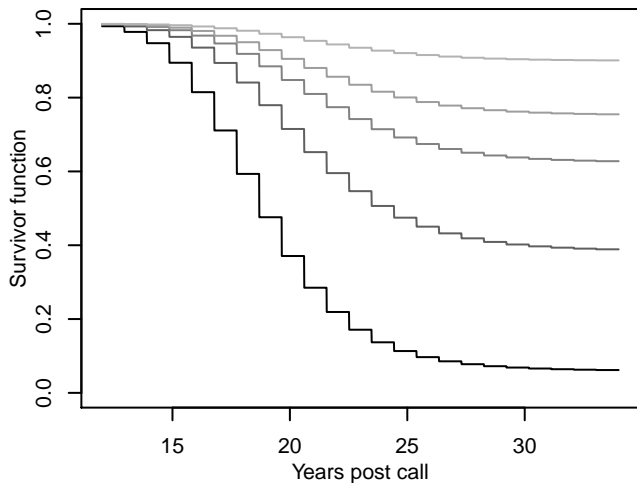
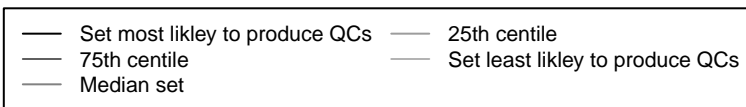
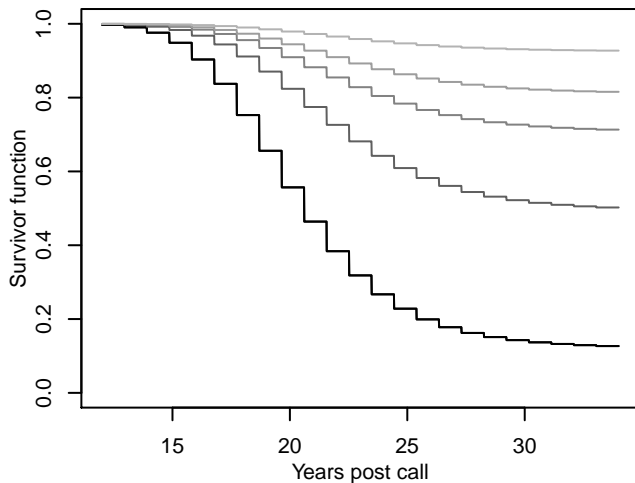
<sup>115</sup> For the MCMC estimation the burn-in length was 500 and the chain length was 100,001.

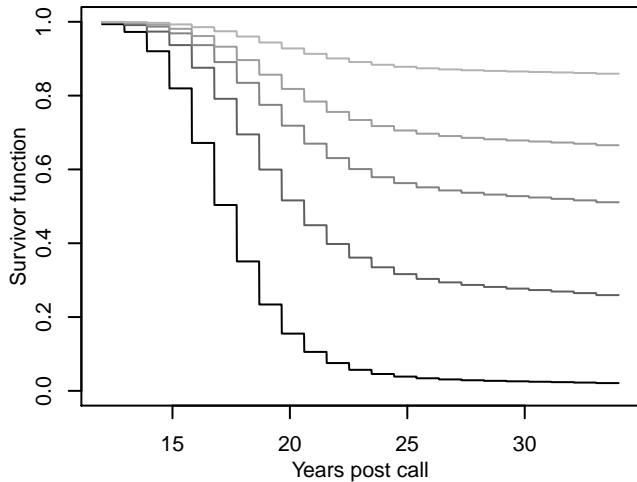
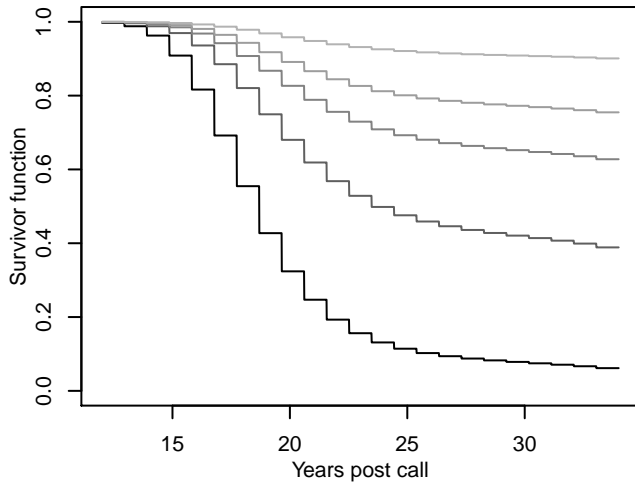
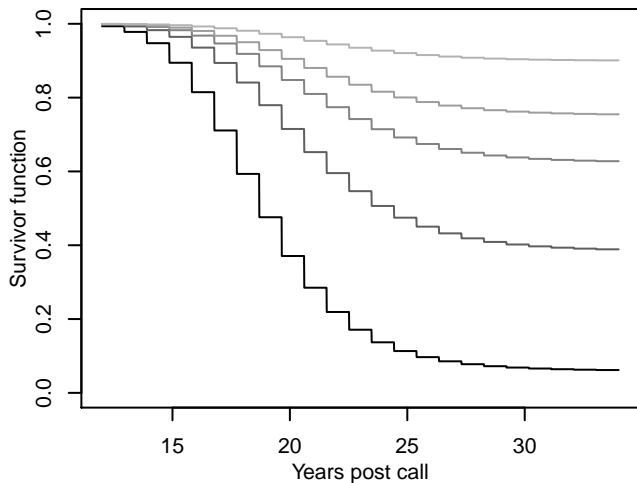
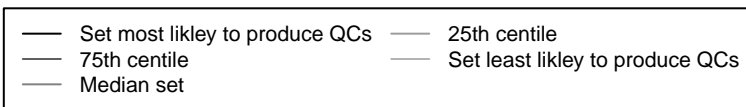
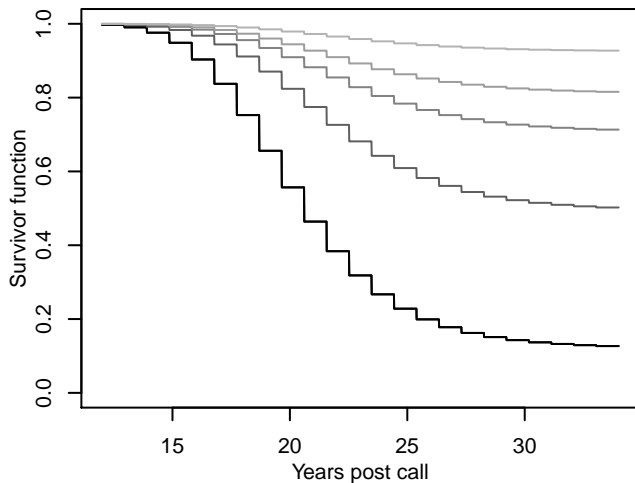
male	1.491	0.502	0.504	2.466	4.440
oxbridge	-16.058	6.222	-28.222	-3.769	<0.001
year 2006	0.699	0.103	0.495	0.897	2.013
years post call	2.932	0.682	1.591	4.278	18.772
years post call <sup>2</sup>	-0.102	0.031	-0.162	-0.040	0.903
years post call <sup>3</sup>	0.001	<0.001	<0.001	0.002	1.001
(oxbridge* years post call)	2.528	0.871	0.815	4.241	12.524
(oxbridge* years post call <sup>2</sup> )	-0.121	0.040	-0.200	-0.044	0.886
(oxbridge* years post call <sup>3</sup> )	0.002	0.001	0.001	0.003	1.002
male*years post call	-0.051	0.024	-0.099	-0.003	0.950
set size	-0.005	0.003	-0.011	0.001	0.995
provinces	-0.921	0.227	-1.371	-0.478	0.398
constant	1.603	2.549	-3.404	6.586	4.966
<i>Random part</i>					
set level variance	0.751	0.143	0.512	1.068	
DIC	6061.806				

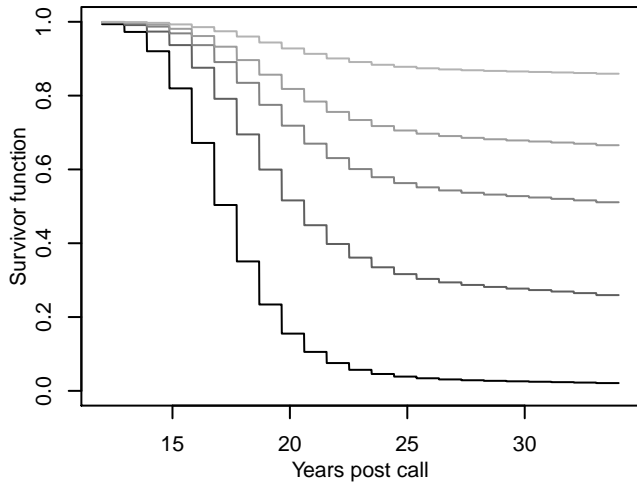
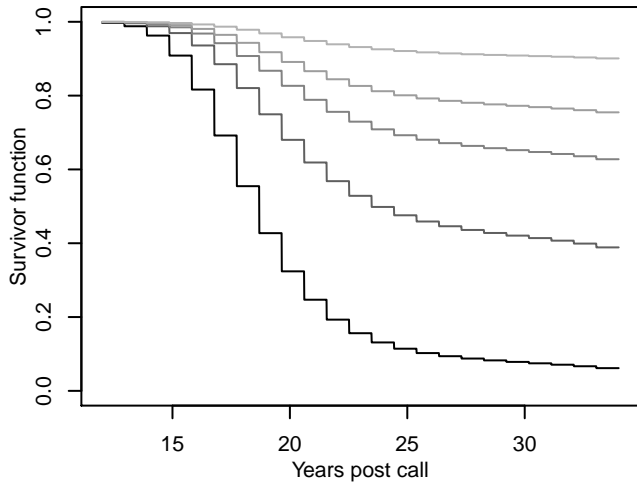
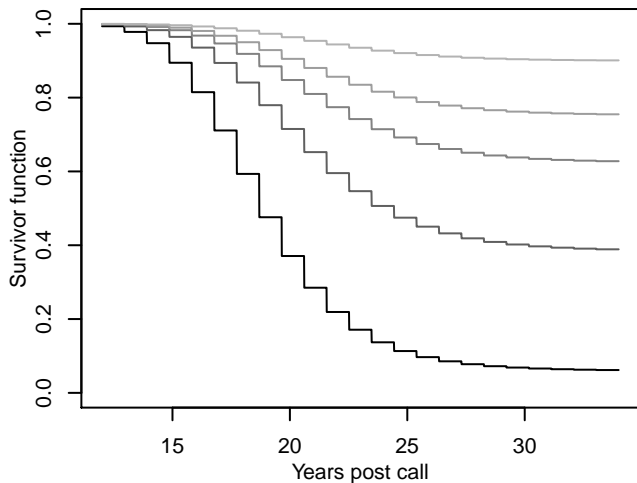
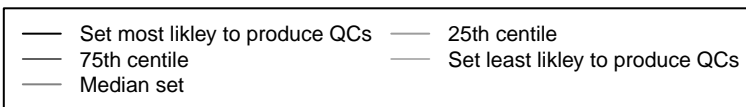
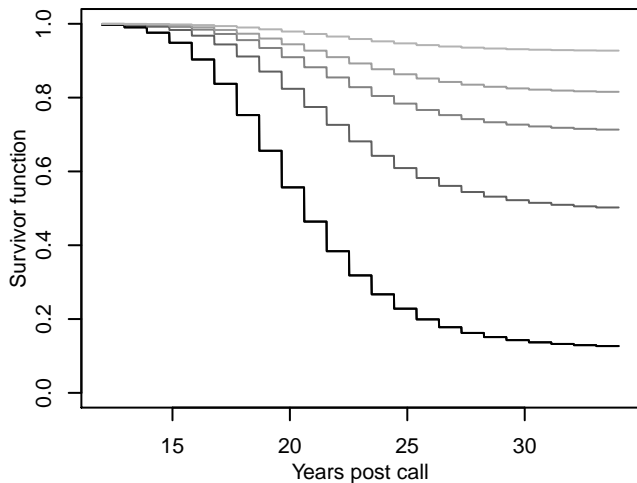
Table 3: MCMC estimates for the best fitting model in the post-reform period including set level covariates<sup>116</sup>

<sup>116</sup> For the MCMC estimation the burn-in length was 500 and the chain length was 100,000.

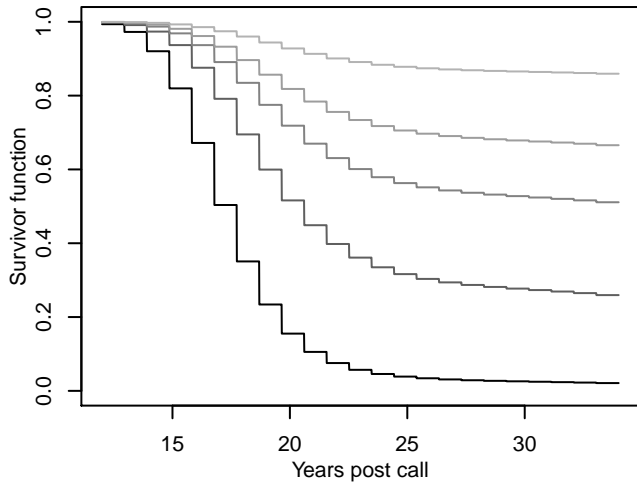
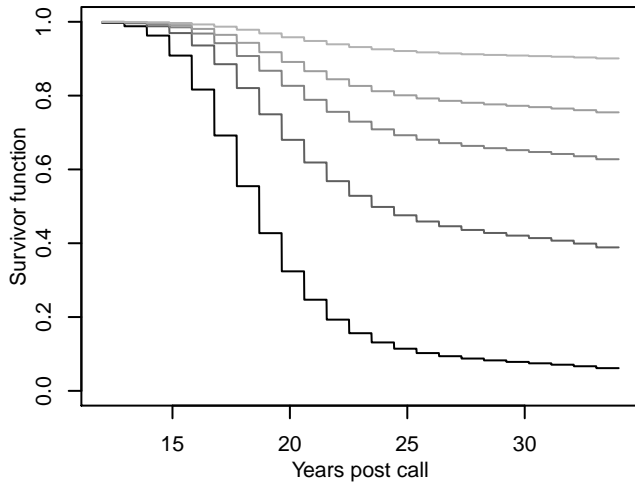
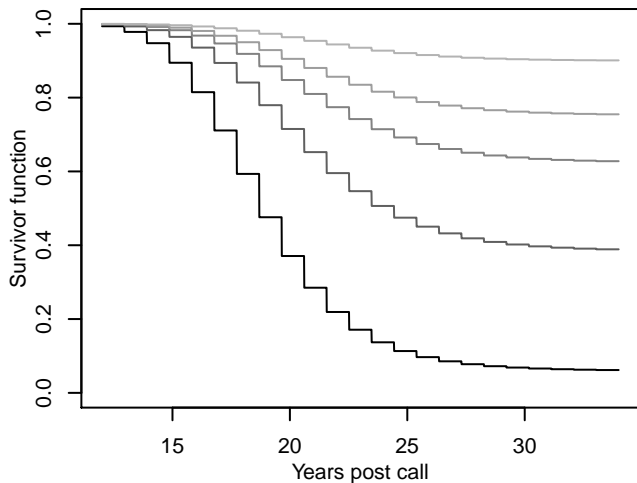
**Oxbridge male****Oxbridge female****Other male****Other female**

**Oxbridge male****Oxbridge female****Other male****Other female**

**Oxbridge male****Oxbridge female****Other male****Other female**

**Oxbridge male****Oxbridge female****Other male****Other female**



**Oxbridge male****Oxbridge female****Other male****Other female**