

Appointment of Queen's Counsel in Scotland 2018

Report by Jessica M Burns, Independent Observer

September 2018

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Introduction

This is my first report to the First Minister for Scotland as Independent Observer of the appointment of Queen’s Counsel in Scotland. I was invited to consider accepting this appointment in March 2018 and was subsequently appointed on 12 May 2018. I was asked to review the process of appointment and to provide a report of my findings and any recommendations to the First Minister at the end of the current appointment round.

I was a Regional Tribunal Judge for Social Security Appeal Tribunals for the past 16 years. I have applied my previous training and professional experience of appointment and equality issues gained during this period through the Lord Chancellor’s appointment process and more recently through the Judicial Appointments Commission.

The Queen’s Counsel appointment process is well established and in preparing this report I have carefully considered the reports of my predecessors in Scotland and also had regard to the scrutiny process applying in England and Wales together with two current consultation documents.

The Guide at paragraph 1.2 indicates that the rank of QC is “primarily a mark of distinction in advocacy when combined with other qualities.” The process does not include those candidates where the rank of QC may be awarded on an honorary basis.

The annual cycle of appointments commences when the Lord President and the Lord Justice General, the Rt Hon. Lord Carloway, gives notice to the First Minister that he intends to invite applications for appointment. At the same time he notifies the Dean of the Faculty of Advocates and the President of the Law Society of Scotland and takes account of their views of the need to increase the number of Queen’s Counsel. There is a balance to be struck between the applicants who may be appointable, the need to ensure appropriate career progression and the demand for the services of Queen’s Counsel. Those applying will doubtless have assessed the impact, financial and otherwise, that such an appointment is likely to have on their practice.

I was provided with all relevant paperwork. I had regard to the information which appeared on the Scotland-judiciary website. I was assisted by the Lord President’s Private Secretary who provided any further information I requested. I

met with the Lord President prior to accepting the appointment and again in June to discuss the current round of appointments.

As noted in past reports, Independent Observers have overseen each round of appointments of Queen's Counsel in Scotland since 2004 thus providing a greater degree of transparency than was hitherto possible.

The Independent Observer, Elaine Noad, summarised the procedure in her 2012 report which can be found at: -

<https://www.gov.scot/resource/0040/00401924.pdf>

Review of the process of recommendation for appointment

I was provided with the following:

- Guide for Applicants amended 12 March 2018
- All application forms
- Equality Act 200 monitoring forms
- References
- Applicant Self-assessment forms
- Assessments by senators
- Copy advertisements in the Journal of the Law Society of Scotland and Scottish Legal News
- Copies of the emails announcing this round of appointments

The Lord Justice General confirmed that he had held consultations with the Dean of the Faculty of Advocates, the President of the Law Society of Scotland and the Lord Advocate regarding the appointment process.

I carefully considered the terms of the Guide for Applicants and the application forms.

Analysis of the Information Considered

Guide for applicants

The Guide was updated in March 2018 and can be found at the Judiciary of Scotland website: [Guide for Applicants 2018](#). This provides a link to the application forms for both Advocates and Solicitor Advocates together with an explanation of the application procedure. Contact details for the Lord President's Private Secretary are provided for enquiries and general feedback for unsuccessful applicants.

The criteria required for recommendation for appointments as Queen’s Counsel in Scotland are set out together with an explanation of the process.

Timetable and advertisements

The 2018 round of appointments commenced on Friday 16 March and closed on Friday 6 April.

Notice of the commencement of this round of appointments was placed on the Scotland Judiciary website and successively in the online editions of the Journal of the Law Society of Scotland and Scottish Legal News. As in past years, newspaper advertisements were not considered necessary. Email notifications were also sent to the Faculty of Advocates, the Law Society of Scotland and to the Society of Solicitor Advocates.

Since the persons eligible to apply are necessarily limited, and there is adherence to an established timetable, I am satisfied it is appropriate that the advertising in this regard is targeted and proportionate.

Number of applications received from Advocates and Solicitor Advocates in 2018 and since 2003.

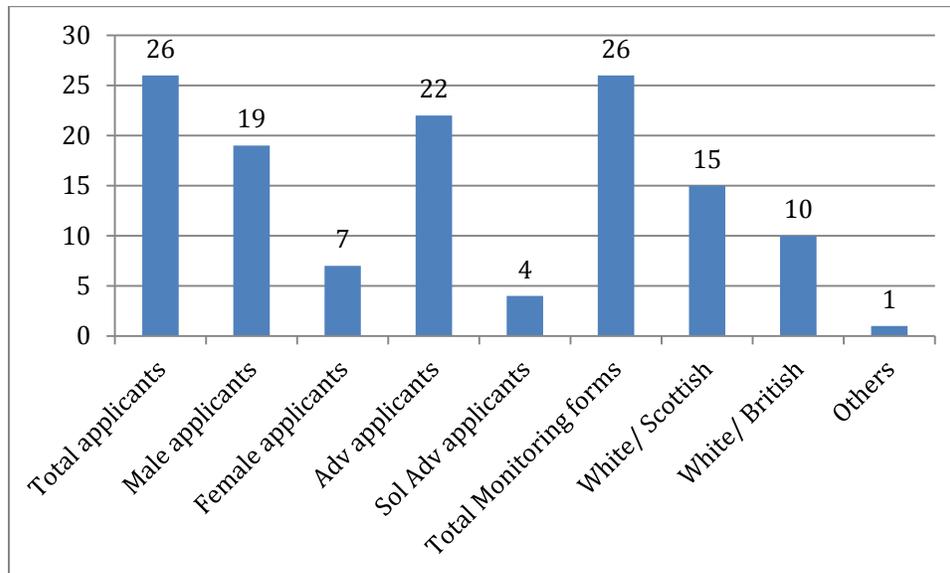
	No. of Applications	
Year	Members of the Faculty of Advocates	Solicitor Advocates
2003	35	6
2004/5	36	11
2006/7	38	6
2008	32	5
2009	25	1
2010	26	3
2011	26	4
2012	26	4
2013	26	5
2014	20	2
2015	20	5
2016	23	8
2017	24	5
2018	22	4

Recommendations

The Lord Justice General has recommended the appointment of 9 QCs to the First Minister for Scotland, 7 advocates and 2 solicitor advocates.

Equality Act 2000 Monitoring

All applicants completed the Equalities monitoring form.



Senators' Assessments

The Lord Justice General provided the opportunity for all 34 Senators of the College of Justice to comment on the applications, in confidence, and they were provided with copies of the self-assessments and the references to inform this process.

The references and the assessments were critical in determining the suitability of those recommended for appointment. Those references and assessments which gave specific examples of performance were the most helpful and it was clear that those providing references had taken considerable care to make these as evidence-based as possible. These assessments no longer follow prescribed banding but generally can be distinguished by positive comments, negative comments and insufficient knowledge. It was important to understand if the comments were based on isolated instances or from a number of encounters and also how recent the opinion had been formed.

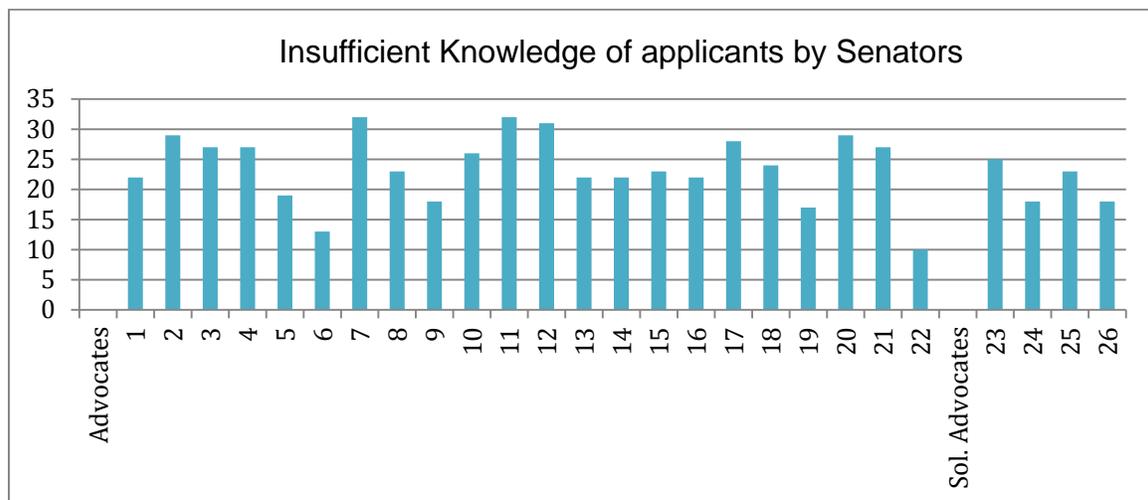
As in the previous year, the Lord Justice General had established a panel of 7 senators, including himself and the Lord Justice Clerk, Lady Dorrian, to consider the applications taking account of the comments provided by the senators. The Guide at paragraph 4.8 sets out the composition of the scoring panel. In addition

the Lord Justice General had provided his own observations in respect of each applicant-providing summary reasoning for his conclusions. His observations take account of the need to ensure that there is a suitable range of expertise available for instruction in the Upper Courts.

The panel assessments informally banded applicants as follows:

- A. Well-fitted
- B. Possibly-fitted
- C. Not obviously fitted
- D. Not fitted
- P. Premature
- N. No sufficient knowledge of applicant to express a view

In view of the procedural changes in the Courts, which have particularly impacted on the opportunities for those engaged in civil work to appear in court on a regular basis, it seems appropriate to benchmark, in this current round, those applicants where the senators consulted indicated they had insufficient knowledge.



Discussions with the Lord Justice General

I was wholly satisfied that the Lord Justice General was concerned to engage in a meaningful and informed discussion about this process with the Senators in order to reach reasoned conclusions. He was also very willing to fully discuss the process with me in our meetings.

One issue which arose in discussion was the possible impact on appointment where the applicant had matters to disclose in terms of paragraph 3.5 of the Guide where it states “It is essential that there is nothing in the conduct, affairs or

circumstances of an applicant which would make his or her appointment inappropriate.”

Whilst it is understood there may be some matters of character, conduct and integrity which would render any future appointment inappropriate, in some instances the matter may not result in the applicant being considered unsuitable for recommendation on an indefinite basis but, particularly if the matter is recent, it may still be regarded as sufficiently significant to lead to a deferment in making a recommendation for appointment.

It is appropriate that where a candidate is particularly outstanding in only one field of law by having demonstrated “an ability to present complex, difficult and novel cases in court both clearly and cogently” in terms of paragraph 1.2 of the Guide, an application which is somewhat less impressive in depth would ordinarily be strengthened by also evidencing some breadth of expertise.

There was little evidence of identified shortages of QCs in most areas but the need to allow for career progression and refresh the pool of existing QCs was recognised.

Feedback to unsuccessful Applicants

It was recognised that it was important to identify the reasons which would be provided to unsuccessful candidates in order to manage their expectations in relation to any future application and encourage development in individual areas. It was gratifying to see that a number of applicants from past years had acted positively on this feedback and had flagged it up on renewing their application.

Independent Observer’s Comments

Recommendations for appointment of Silks to the First Minister is a matter for the Lord Justice General alone. As noted above, there is no fixed quota of QCs to be appointed. The process includes appropriate consultation with the Dean of the Faculty and the President of the Law Society of Scotland.

In this round just over one third of those applying have been recommended for appointment, 9 out of 26. This number compares somewhat less favourably with the last two rounds of appointments where in 2017, 29 applied with 14 recommended for appointment and in 2016, 31 applied with 13 recommended.

I am satisfied that the criteria for appointment in the current year have been amply met whilst still reflecting a degree of diversity. For instance, women represented 22% of all applicants but 30% of those recommended for appointment. Two solicitor advocates have been recommended for appointment and this also represents an increase from the single solicitor advocate recommended in each of the past two years.

Conclusion

On the basis of the above, I am satisfied from my observations and discussions that the process was conducted following an established, proportionate and well-understood procedure. I consider that the three-week window allowed for applications was sufficient even in this year where that period fell over the Easter holiday period. The process was conducted in a fair and objective manner and wholly in accordance with the published procedure for the appointment of Queen's Counsel in Scotland. There was careful and considered scrutiny of all the applications and the criteria for recommendation have been applied consistently and rigorously. I was given full co-operation and support throughout my involvement in the appointment process.

Recommendations

The Queen's Counsel appointment process has been carefully honed in respect of the implementation of several significant recommendations made by my predecessors to improve the procedures over the last 5 years. My understanding is that the process has not given rise to difficulties or complaints.

In this context the sole recommendation I would make is in relation to the future monitoring of the process in that it would be helpful to continue to track the degree to which those applying are known to the Senators making assessments, as this might be useful information in informing future applicants.

As noted above, possible changes to the QC appointment process in England and Wales are currently open for consultation, which ends on 31 July 2018. Queen's Counsel Appointments (QCA) in England and Wales has recently issued two consultation papers on behalf of the Bar Council and the Law Society. These can be accessed via the website on the home page at qcappointments.org. One canvasses a possible change to the way in which applicants are asked to list cases and assessors. The second deals with possible changes to the way in which issues of character, conduct and integrity are dealt with. The scale of the recommendation process in England and Wales requires a significantly different approach but it will be appropriate to have due regard to any recommendations made in relation to these consultations.

I have no further recommendations to make.

Jessica M Burns
22 June 2018



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