

Appointment of Queen's Counsel in Scotland 2016

September 2016

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Report by Heather Baillie, Independent Observer

Introduction

This is my second report to the First Minister for Scotland as Independent Observer of the appointment of Queen's Counsel in Scotland. I was appointed in February 2016. 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 appointment round.

The 2016 round of appointments began in February 2016 after the Lord President and Lord Justice General, the Rt. Hon. Lord Carloway gave notice to the First Minister that he intended to invite applications for appointment. This is the first round of appointments since Lord Carloway was appointed Lord President.

Advertisements were placed in a range of media in March 2016. I was provided with all relevant paperwork. I was assisted by the Lord Justice General's Private Secretary with any further information I requested. I met with the Lord Justice General in June 2016 to discuss the current appointments round.

Independent observers have been appointed for each round of appointment of Queen's Counsel in Scotland since 2004. A summary of the appointments procedure was provided by the last independent observer in her report in 2012 and can be found at: - <http://www.scotland.gov.uk/resource/0040/00401924.pdf>

I was not advised of any substantive changes to the appointments procedure in the last year.

Review of the process of recommendation for appointment

I was provided with the following documents:

- All application forms
- Equality Act 2000 monitoring forms
- References
- Self- Assessments by applicants
- Criteria for assessment by Senators
- Assessments by Senators,
- Copy advertisement, and
- Copies of the newspapers, journals and websites where the advertisement was placed.

I was provided with a note of the conversations which took place between the Lord Justice General and the Dean of the Faculty of Advocates, the President of the Law Society and the Lord Advocate.

The Lord Justice General also provided me with a note of his preliminary thoughts on simplification of the process of judges commenting on applicants for silk for future appointment rounds.

I considered the Guidance provided for Applicants and the application forms.

I considered the process of consultation with the Dean of Faculty, President of the Law Society and the Lord Advocate to confirm that none of the proposed recommendations would be inappropriate.

Analysis of information considered

Guide for applicants.

The Guide was updated in March 2016 and can be found at the Judiciary of Scotland website: <http://www.scotland-judiciary.org.uk> This provides a link to the application forms for both Advocates and Solicitor Advocates and an explanation of the application procedure. Contact details for the Lord Justice General's private secretary are provided for enquiries and general feedback on unsuccessful applications. The criteria required for recommendation for appointment as Queen's Counsel in Scotland are set out and an explanation of the process is provided.

Timetable and advertisements.

Advertisements were published in March 2016. The closing date for applications was 1 April 2016. Applications were submitted to the Lord Justice General's office, and the advertisement provided the name and contact details of his Private Secretary for any enquiries in relation to the appointment round.

Advertisements were placed with: Thomson Reuters; Herald Times Group (S1 jobs - 4 March, Sunday Herald - 6 March, The Herald - 4 and 11 March, and www.heraldscotland.com - 3 March); Johnston Publishing Ltd (Scotland on Sunday - 6 March, The Scotsman - 4 and 11 March and Scotsman Recruitment www.scotsman.com - 4 March); Law Society of Scotland – 4 March; www.lawscotjobs.co.uk, Law Society Journal, Judicial website and the Scots Law Times.

Number of applications received from Advocates and Solicitor Advocates in 2016 and since 2004/5.

Year	Advocates	Solicitor – Advocates
2016	23	8
2015	20	5
2014	20	2
2013	26	5
2012	26	4
2011	26	4
2010	23	3
2009	25	1
2008	32	5
2006/7	38	6
2004/5	36	11

Recommendations by the Lord Justice General to the First Minister for Scotland.

Thirteen applicants have been recommended by the Lord Justice General to the First Minister. Twelve advocates (6 female and 6 male) and one solicitor advocate (male).

Equality Act 2000 monitoring.

All applicants completed the Equalities monitoring form.

Gender of applicants.

23 Advocates (9 female and 14 male)

8 Solicitor Advocates (one female and 7 male)

Black or ethnic group other than white/Scottish or white/British - none

Disability Applicants who declared a disability - one.

Age and year of calling/qualification

Applicants declared years of birth ranging from 1937 to 1975.

Advocates called to the Bar since 2000 - 7; prior to 2000 - 16

Solicitor Advocates qualified since 2000 - 5; prior to 2000 - 3.

The equalities monitoring form did not gather information relating to other Protected Characteristics as defined by section 4 of the Equalities Act 2010.

Senators' Assessments.

The Lord Justice General provided an opportunity for 28 Senators of the College of Justice to comment on the applicants in confidence. The Senators were provided with copies of the applicants' self-assessments, the Guide for applicants including the criteria for recommendation and an assessment form for each applicant.

The assessment form allowed Senators to grade each applicant.

The first section of the assessment form provides an opportunity for each Senator to comment on his/her knowledge of the applicant and how recent that knowledge is.

The second section invites comment on the criteria for recommendation identified in the Guide – Advocacy Skills, Legal Ability and Practice and Professional Qualities.

The third section allows the Senator to grade the application as follows:

- A** Well fitted for Silk now and sufficiently outstanding to merit appointment this year.
- B** Possibly ready for Silk now but not in the front rank of applicants for appointment this year.
- C** Not obviously fitted for Silk at present.
- D** Not fitted for Silk.
- P** This application is premature.
- N** Insufficient knowledge of the applicant to express a view.

Discussion with the Lord Justice General.

I met Lord Carloway on 6 June, and with Lord Carloway and Lady Dorrian, Lord Justice Clerk on 14 June 2016 to discuss the appointment process, the applications and his recommendations. The Lord Justice General provided his reasoning in relation to all the applicants, having carefully analysed the applications, references and the comments made by senators. He had discussed his recommendations with the Lord Justice Clerk. He provided me with an explanation for each recommendation. His recommendations reflected his desire to ensure that there is a suitable range of expertise available for instruction in the upper courts in Scotland. After these discussions, I was satisfied that the reasoning and decision making in relation to all candidates was robust and consistent with the guidance and criteria for recommendation.

Independent Observer's Comments

Recommendation for appointment of silks to the First Minister is a matter for the Lord Justice General alone, having considered all the information provided by applicants, responses from Senators and others consulted and his own knowledge of the applicants. There is no fixed quota of Queen's Counsel to be appointed in any year.

The Lord Justice General endeavours to ensure that there is an adequate supply of Queen's Counsel providing extensive experience of appellate advocacy in the Scottish courts. He has a responsibility in relation to the efficient business of the courts to ensure a suitable range of expertise at the Senior Bar to promote public confidence. The Lord Justice General consulted with the Dean of Faculty and the President of the Law Society of Scotland to identify the extent of any perceived need to increase the number of Queen's Counsel in particular areas of legal practice.

The advertising arrangements were similar to last year and appeared fit for purpose. The time table for response was slightly shorter than last year however it gave candidates adequate notice to submit their applications. A wide range of media was used and it was appropriate for the category of appointment.

The Lord Justice General wished to complete the appointment process in time for newly appointed Silks to be introduced at the beginning of the new term in September 2016.

The Guide for applicants provides clear, concise information and an explanation of the procedure to be followed. A link is provided to the application form. The Lord Justice General's private secretary is available to provide further clarification and feedback.

As I reported last year, there was a wide variation of information provided by applicants in the self-assessment part of the application. Most continue to provide information in a paper apart and the number of pages apart ranged from one page to 26 pages, the majority of applicants (27) provided between one and 10 pages. A minority of applicants made specific reference to the Criteria for Recommendation set out in the Guide for Applicants.

Solicitor Advocates have the opportunity to provide additional information in the application form itself under the heading 'Work as a Solicitor Advocate'. All Solicitor Advocate applicants used the opportunity to provide between one and 19 pages of additional information. Few of the Advocate applicants used the section in the Application Form headed 'General' to provide additional information.

Most applicants, when asked to provide detail of experience before the courts including lists of cases, adhered to the requirement that the information related to the last 5 years. Some applicants provided explanation in relation to the cases listed. Applicants provided considerable detail of their experience and competence and all provided 2 references as required by the Guide.

All 28 Senators completed the assessment forms. All gave their assessments based on the application and self-assessment and the criteria for recommendation outlined in the Guide for Applicants. The assessments varied in the amount of detail provided to support the grade chosen. Recommendations appeared to be objective, consistent and based on knowledge of the applicant, however as in previous years the percentage of senators indicating that they had insufficient knowledge of the applicant to comment remained high.

Although the assessment form does not have a tick box for Senators to indicate if they acted as a referee for an applicant, all Senators, who provided a reference indicated that they had done so. Senators indicated in 18 applications that they had provided references for the applicant. In 16 of the 31 applications, 20 or more

senators indicated “insufficient knowledge of the applicant” to comment. This amounted to 68.5%.

The Lord Justice General is minded to appoint a panel of senior senators to provide comment on future applications in light of this. Consideration is also being given to charging an application fee and to a biennial appointment round.

It was clear from discussion and scrutiny of the papers, that the Lord Justice General had taken account of all the comments made by senators, applied his own knowledge of candidates and had given careful consideration to every application.

The Lord Justice General wrote to the Dean of the Faculty of Advocate, the President of the Law Society and the Lord Advocate to seek confirmation that nothing in the conduct or circumstances of the applicants to be recommended to the First Minister would make recommendation inappropriate. On receipt of the necessary confirmation, the Lord Justice General made the recommendations referred to above to the First Minister for Scotland.

Conclusion

I can confirm based on my observations and discussions that the process was conducted following an established procedure, careful scrutiny of all applications and that the criteria for recommendation were applied consistently. Applicants had sufficient notice and guidance to allow them to present the information they wished to be considered by the Lord Justice General.

The assessment process was conducted in a fair and objective manner. I was provided with all the information I required and I had the opportunity to meet the Lord Justice General and the Lord Justice Clerk to discuss matters relating to his recommendations. I was given co-operation and support by the Lord Justice General’s private secretary throughout the review.

I am satisfied on the basis of my observations and my discussions with the Lord Justice General that the recommendations made to the First Minister were based on merit taking account of the applicants’ experience and established appellate advocacy skills. There was no evidence of discrimination or bias. Consideration was given throughout the process of the need to maintain the availability of experienced representation of the highest standard at the Senior Bar in Scotland.

Recommendations

1. In my last report , I recommended, given the wide variation in the amount of information provided by applicants in the self-assessment part of the application form (one to 26 pages), that consideration is given to the introduction of a word limit. Applicants should also be encouraged to focus on the Criteria for Recommendation set out in Guide for Applicants. I also recommended that if applicants provide a list of cases they wish to rely on, they should provide a brief explanation of the significance of each case and the reason for referring to it. Consideration should be given to the need for additional information provided by Solicitor Advocates in the 'Work as a Solicitor Advocate' part of the application form as the same opportunity to provide a curriculum vitae is not afforded to Advocate applicants. I understand that the Lord Justice General intends to give consideration to these recommendations as part of a review of the application form and the Guide for Applicants.
2. I noted in my last report that where a Senator is providing a reference for an applicant, it is not clear whether further comment and scoring is required. I recommended that clarification is provided in order to ensure a consistent approach, whether additional comment and scoring is required as part of the assessment. This suggestion could form part of the discussion regarding simplification of the process for recommendation proposed by the Lord Justice General. I understand that this would involve a small number of senators being appointed to consult and comment on applications. This would address the high percentage of judges who have insufficient knowledge to comment on applications.
3. Finally, I understand that the number of applicants seeking feedback on their applications has been disappointing. There are a number of repeat applications by unsuccessful candidates in previous years. Feedback would provide applicants with useful information regarding their application and the opportunity to address any perceived deficiencies. I recommend that as part of the review of the Guide for Applicants, consideration is given to developing the process for feedback to encourage applicants to seek comment on unsuccessful applications.

Heather Baillie 19 July 2016



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