

Appointment of Queen's Counsel in Scotland 2019

Report by Jessica M Burns, Independent Observer

September 2019

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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 on 12 May 2018 and submitted my first report last year. I have now reviewed the process of appointment and submit a report of my findings and recommendations to the First Minister for the annual current round of appointments.

As noted in my previous report, I was the Regional Tribunal Judge in Scotland for Social Security Appeal Tribunals for 16 years until my retirement last year. 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 and this consideration applied to some candidates who submitted applications for the current round.

Honorary QC appointments

As a result of these applications for the rank of QC on an honorary basis, in the process of drafting this report I ascertained that there is currently no clear procedure for persons to seek, or be nominated, for the rank of QC on an honorary basis in Scotland. This contrasts with the position in England and Wales where there is a nomination scheme similar to that of the honours system. The current round was commenced through general advertisement on 13 June and applications closed on 13 August 2019. Details of the scheme can be found at this link: [Honorary Queen's Counsel](#).

I discussed with Lord President the absence of any comparative procedure in Scotland and in view of the current lack of a recognised procedure, it has been agreed with Scottish Government that this should be subject to further discussion with a view to providing clarity on the award of the rank of QC on an honorary basis. However this process will be entirely separate from the appointment process after individual application which is the subject of this report.

The annual cycle of QC appointments

This process 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 always 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, particularly at the present time when demand for the services of counsel has diminished somewhat due to a number of factors.

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 including copies of feedback letters to unsuccessful candidates from the 2018 cycle. I met with the Lord President at the commencement of preparing my report to discuss the current round of appointments and again on submission of the draft report.

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 and this level of scrutiny has been regarded as satisfactory.

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

<https://www2.gov.scot/resource/0040/00401924.pdf>

Review of the process of recommendation for appointment

I was provided with the following:

- Guide for Applicants amended 11 March 2019
- All application forms
- Equality Act 2000 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 appearing in March 2019 for a closing date of Friday 5 April
- Copies of emails announcing to potential applicants the current round of appointments
- Candidate feedback letters from the 2018 cycle

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 2019 and can be found at the Judiciary of Scotland website: www.scotland-judiciary.org.uk. 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 2019 round of appointments commenced on 15 March and closed on 5 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 pool of persons eligible to apply is limited, and there is adherence to a well-established timetable, I remain satisfied it is appropriate that advertising in respect of this process is targeted and proportionate.

Number of applications received from Advocates and Solicitor Advocates in 2019 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

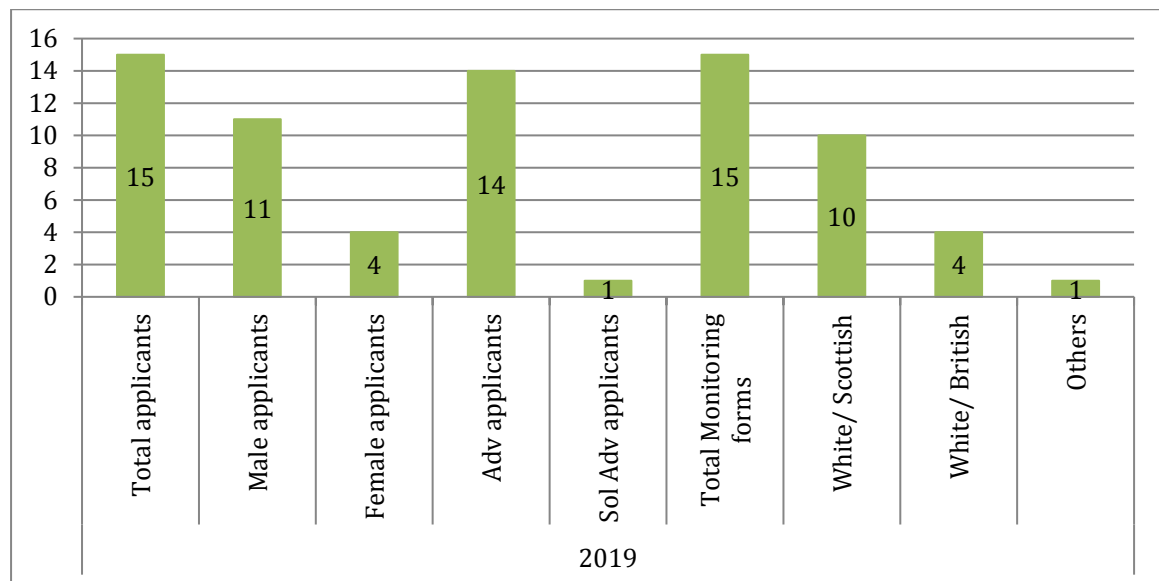
Year	Members of the Faculty of Advocates	Solicitor Advocates
2009	25	1
2010	26	3
2011	26	4
2012	26	4
2013	26	5
2014	20	2
2015	20	5
2016	23	8
2017	24	5 (1 withdrawn)
2018	22	4
2019	14	1

Recommendations

The Lord Justice General has recommended the appointment of 9 QCs to the First Minister for Scotland, one of whom is a solicitor advocate and the others are all currently serving advocates.

Equality Act 2000 Monitoring

All applicants completed the Equalities monitoring form.



Senators' Assessments

The Lord Justice General provided the opportunity for all 32 Senators of the College of Justice to comment on the applications, in confidence, and they were each provided with copies of the self-assessments and the references to inform this process.

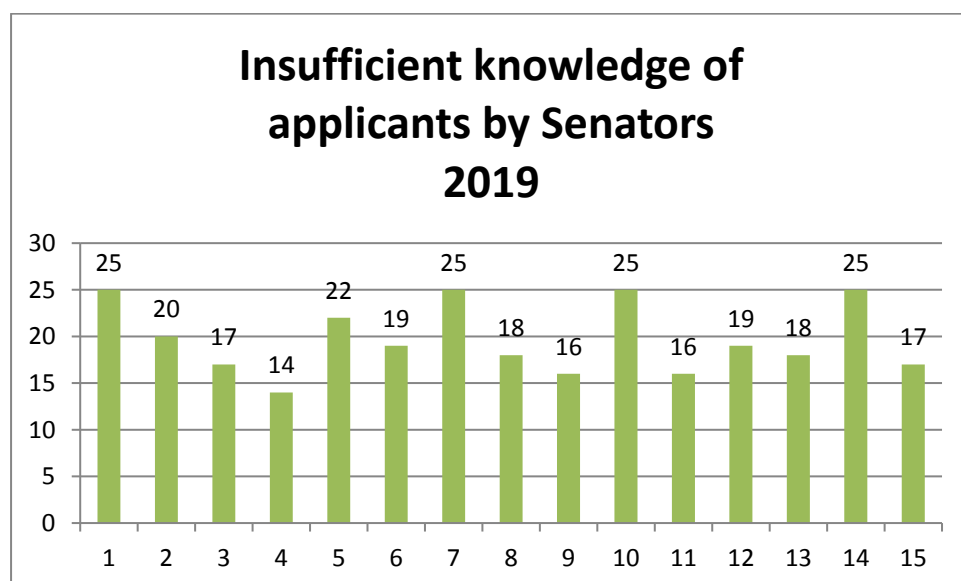
The references and the assessments were critical in determining the suitability of those recommended for appointment. As in the past, those references and assessments which gave specific examples of performance were the most helpful and it was clear that those providing references had taken considerable care to make these as evidence-based as possible. These assessments do not 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 past two years, the Lord Justice General had established a panel of 7 senators, including himself and the Lord Justice Clerk, Lady Dorrian, to consider the applications in detail, taking account of the comments provided by all 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 keeping with last year's report, view of the impact of procedural changes in the Courts, which have reduced the opportunities for those engaged in civil work to appear in court on a regular basis, it is appropriate to record those instances where the senators consulted indicated they had insufficient knowledge of the applicant.



Discussions with the Lord Justice General

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

There were no instances in this round where the “conduct, affairs or circumstances of an applicant made his or her appointment inappropriate.”

Of the six applicants not recommended for appointment, two already hold judicial office and therefore do not meet the criteria for this selection process, four were unknown or virtually unknown to the senior judiciary and consequently their applications also lacked evidence of depth of experience to fit the criteria at the present time.

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 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. Again, 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. Having had regard to feedback letters from the previous cycle I was satisfied that constructive and meaningful feedback is provided.

Independent Observer’s Comments

Recommendations for appointment of Silks to the First Minister are 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 almost two thirds of those applying have been recommended for appointment, 9 out of 15. The higher percentage of successful applications reflects the fact that fewer, but proportionately more fitted, applications were received this year.

I am satisfied that the criteria for appointment in the current year have been amply met whilst still reflecting a degree of diversity. Of the 15 applicants only four were women but of these three were recommended for appointment representing one third of those recommended for appointment. The one solicitor advocate who applied has been recommended for appointment this year.

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. 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 has been applied consistently and rigorously. I was given full co-operation and support throughout my involvement in the appointment process.

It is fair to comment that there were no applications from persons from diverse ethnic groups. This reflects the overwhelming homogeneity of the Scottish Bar, at least in terms of those likely to be within the experience range to make an application.

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 previous years. My understanding remains that the process has not given rise to difficulties or complaints.

It is proper to note that concern has been expressed directly to me by the Faculty of Advocates on the basis that reduced lack of opportunity to appear in the courts due to recent reforms has the potential to mitigate against members of the bar who have a practice away from the higher courts; those who have taken a career break or whose work is essentially paper-based opinion work. Since the criteria explicitly states that the rank of QC may be conferred on those who can demonstrate "distinction in advocacy", unless this level of attainment can be evidenced, it necessarily follows that those whose career takes them in different directions may not be able to satisfy this essential ability. It may be that the reduced number of applications in the current year already reflects this but, at the same time, it has to be acknowledged that all those who fit the criteria have been recommended for appointment without regard to whether there is sufficient work at the Scottish bar for all those who hold the rank of QC. It has to be assumed that those who seek this appointment will have taken this factor into account when they make their applications.

In this context, following the recommendation I made last year, in order to assist the future monitoring of the process my report contains a graph showing the degree to which those applying for the rank of QC are known to the Senators involved making the assessments, since this may be useful in informing future applicants.

In my report last year I noted possible modifications to the QC appointment process in England and Wales which had been in place since 2005, was the subject to a consultation which ended on 31 July 2018.

This resulted in the publication of a report entitled, Queen's Counsel Appointments: Assessment Process Validation, produced by an external consultant, Jenny Crewe Consulting Ltd. As might be expected, the scale of the process in England and Wales requires a significantly different approach due to the number of applications (109 applicants were appointed to the rank of QC following the 2018 selection exercise). End to end the process takes 11 months. There is a fee levied of £1,800 for each application and a further fee of £3,000 for all those appointed. A reduced fee is payable for those earning less than £60,000 per year but only one applicant took advantage of that in the last reporting year.

The QC Selection Panel responded to the recommendations as follows:

- It was resolved to invite the professional bodies to adopt a "statement of purpose" for the appointment process
- Include a broader description of what is meant by "excellence" in the Guidance to applicants
- Publish an "exemplar" assessment to assist those providing assessment
- Revise the rating scale so that the potential to become a QC is assessed as opposed to reflecting performance as a junior advocate
- Explain more fully to candidates the significance of the assessments and the interview

- The recommendation to reduce the number of assessments was rejected on the basis that it would impair the ten person Selection Panel's ability to make the most informed decisions

It will be noted that these amount to relatively minor changes and it is not considered that any of these recommendations has direct relevance to the process as it operates in Scotland and that the process as it currently operates in this jurisdiction is both proportionate and fit for purpose.

I recommend that there is publication of clear guidelines for Honorary QCs in Scotland.

I have no further observations to make.

Jessica M Burns
2 August 2019



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