

Appointment of Queen's Counsel in Scotland 2020

Report by Jessica M Burns, Independent Observer

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Introduction

This is my third report to the First Minister of Scotland as the Independent Observer of the appointment of Queen’s Counsel in Scotland. I was initially appointed on 12 May 2018 and have previously submitted reports for the years 2018 and 2019. I have now reviewed the process of appointment for the current year and submit this report of my findings and recommendations to the First Minister for the year 2020.

As noted in my previous reports, I was formerly the Regional Tribunal Judge in Scotland for Social Security Appeal Tribunals for 16 years until my retirement in 2018. In my role as the Independent Observer I have applied my previous training and professional experience of appointment processes and equality issues gained during my working life through my involvement in the Lord Chancellor’s appointment process and through the Judicial Appointments Commission.

The Queen’s Counsel appointment process is well established and in preparing this report I have had regard to the reports of my predecessors in Scotland and also considered the appointment process applying in England and Wales together with recent 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 therefore does not include those candidates where the rank of QC may be awarded on an honorary basis. In my report for 2019, I highlighted a lacuna in the Scottish system where there was no recognised process for those meriting an honorary QC ranking. This contrasts with the position in England and Wales where there is a nomination scheme, similar to that of the honours system, and I set this out in full in my previous report. It is therefore disappointing that, partly due to changes in key personnel, progress on developing a similar system in Scotland has been slow and a suitable procedure is yet to be finalised. I have been assured that work on this is now underway and should be concluded before the end of the year. I fully accept that the working conditions in the last few months have been exceptional due to the lockdown period and that this has impacted on the progress of matters which were not urgent.

Procedure

The annual cycle of QC 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 on the need to increase the number of Queen’s Counsel and any other relevant considerations. As at 18 September 2019, the date of the announcement of nine QCs appointed in last year’s round, there were 132 practicing QCs in Scotland, including those who had just been appointed. 30 of those were women. Typically QCs cease to practice due to retirement, illness or death, on being appointed to salaried judicial positions and, less commonly, on

taking up other types of employment. 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 Judiciary of Scotland website. I was assisted by the Lord President's Private Secretary who provided any further information I requested. I met with the Lord President at the commencement of preparing my report to discuss the current round of appointments and communicated 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.

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
- 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 2020
- Copies of emails announcing to potential applicants the current round of appointments

The Lord Justice General confirmed that once again he had consulted 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 all the relevant documentation.

Analysis of the Information Considered

Guide for Applicants

The Guide was last updated in March 2020 and can be found at the Judiciary of Scotland website: <http://www.scotland-judiciary.org>. 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 appointment as Queens's Counsel in Scotland are set out together with an explanation of the process.

Timetable and Advertisements

The 2020 round of appointments commenced on 16 March and closed on 30 March.

Notice of the commencement of this round of appointments was placed on the Judiciary of Scotland 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 in view of the narrow eligibility criteria. 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 from 2003 to 2020.

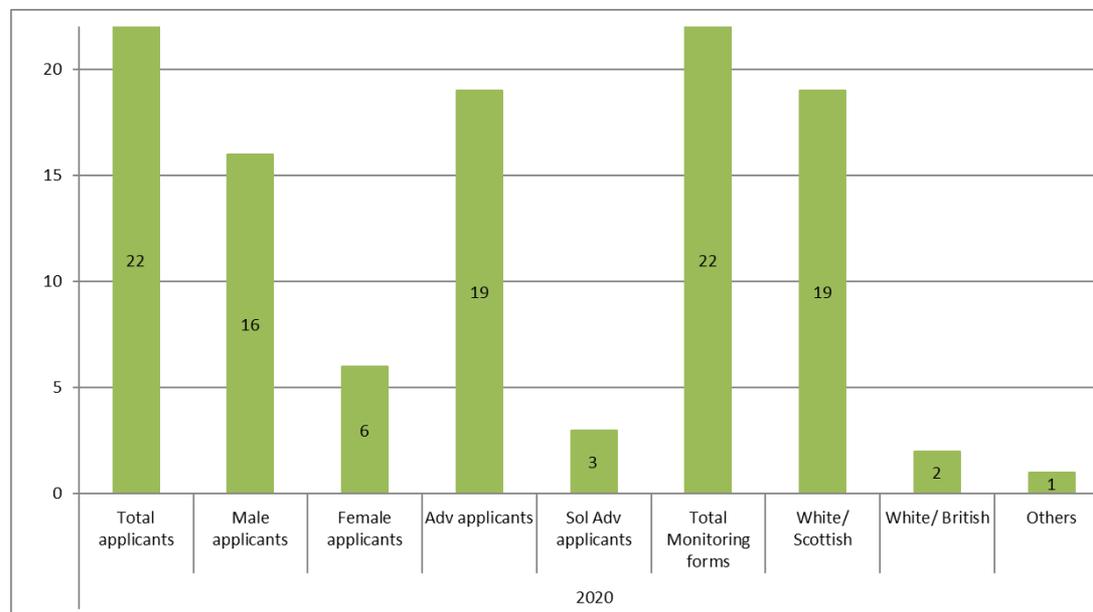
| Year | No. of Applications | |
|--------|-------------------------------------|---------------------|
| | Members of the Faculty of Advocates | Solicitor Advocates |
| 2003 | 35 | 6 |
| 2004/5 | 36 | 11 |
| 2006/7 | 38 | 6 |
| 2008 | 32 | 5 |
| 2009 | 25 | 1 |
| 2010 | 26 | 3 |
| 2011 | 26 | 4 |
| 2012 | 26 | 4 |
| 2013 | 26 | 5 |
| 2014 | 20 | 2 |
| 2015 | 20 | 5 |
| 2016 | 23 | 8 |
| 2017 | 24 | 5 (1 withdrawn) |
| 2018 | 22 | 4 |
| 2019 | 14 | 1 |
| 2020 | 19 | 3 |

Recommendations

The Lord Justice General has recommended the appointment of 10 Queen's Counsel to the First Minister of Scotland.

Equality Act 2000 Monitoring

All applicants completed the Equalities Monitoring form.



Senators' Assessments

The Lord Justice General provided the opportunity for 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.

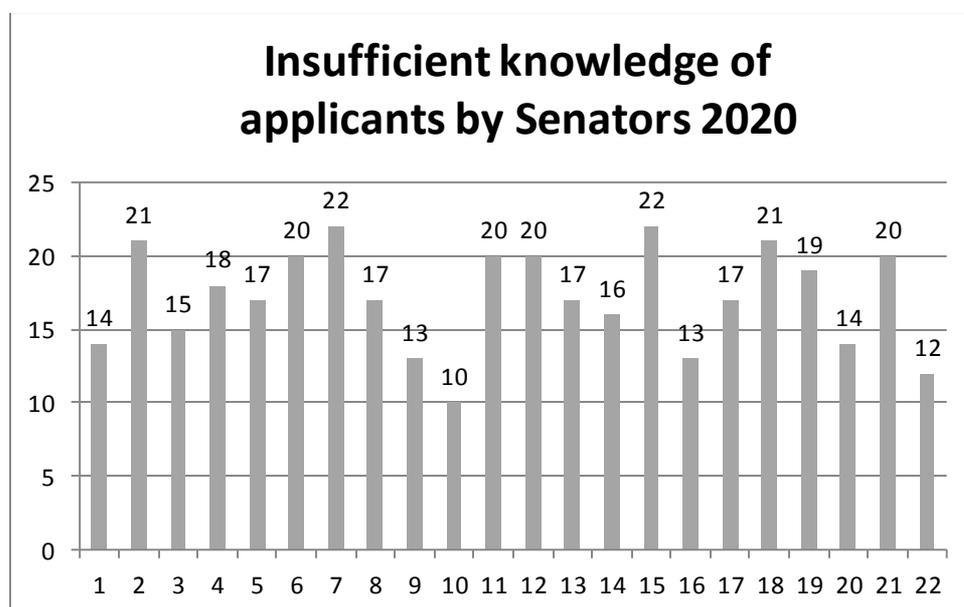
The references and the assessments were critical in determining the suitability of those recommended for appointment. As in the past, those references and assessments which gave specific examples of performance were the most helpful and it was clear that those providing references had taken considerable 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 an indication of 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, review 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. It is noted that Senators were, on average, better acquainted with the applicants for the current year than for the previous year; an average of 17 had no knowledge of the candidates for 2020 compared to 20 for the year 2019 when there were fewer senators to consult.



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 12 applicants not recommended for appointment, two could be regarded as leaders in their field but did not meet the criteria for excellence in advocacy in the Upper Courts and thus do not meet the criteria for this selection process. Four applications, which were considered in particular detail, showed some strengths but were premature and these applicants will be required to consolidate their experience in the coming year. Of the remaining six, these did not sufficiently demonstrate that they met the criteria as leaders in the profession nor excellence in advocacy and

consequently their applications lacked the necessary evidence of depth of experience to fit the criteria at the present time.

There was little evidence of identified shortages of QCs but I did request information on the natural wastage of QCs in the past year to determine to what extent the 10 candidates recommended for appointment could be regarded as replacing those lost. This should never be regarded as the determining factor in making QC appointments since the need to allow for career progression and refresh the pool of existing QCs must also be recognised. I was advised that there are currently 430 current members of Faculty of whom 125 are QCs (96 male and 29 female). 14 members have retired from Faculty in the past year of whom 5 held the rank of QC. I noted that as at 18 September 2019 when last year's QC appointments were announced, there were 132 practising QCs at the Scottish Bar of whom 30 were women. On this basis the replacement rate of a further 10 QCs seems reasonable, anticipating the further number who are likely to retire in the current year.

Feedback to Unsuccessful Applicants

I recognise it is important to identify the reasons why applicants do not meet the appointment criteria and how they can be provided with meaningful feedback in order to manage their expectations in relation to any future application and encourage development in individual areas. Where any candidate had previously received feedback on their application, I asked that particular regard be had to the feedback previously given to ensure that this could be considered in relation to the current application and taken account of in any further request for feedback.

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. I am satisfied that the process properly includes appropriate consultation with the Dean of the Faculty and the President of the Law Society of Scotland.

In this round almost half of those applying have been recommended for appointment, 10 out of 22. I was impressed with the strength of the applications this year and the potential for appointments in coming years.

I am satisfied that the criteria for appointment in the current year have been amply met whilst reflecting some degree of diversity. It is perhaps disappointing that of the 22 applicants only six were women but of these four were recommended for appointment and this reflects an increase in the total number of practising female QCs.

There were three solicitor advocates who applied and one 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 two 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 appropriate to note that there were no applications from persons from diverse ethnic groups. This reflects the continuing overwhelming homogeneity of the Scottish Bar, at least in terms of those likely to be within the experience range to make an application and it is a matter which the Faculty may wish to address.

Recommendations

I am satisfied that the Queen's Counsel appointment process in Scotland is fair, proportionate and works well. My understanding remains that the process has not given rise to difficulties or complaints and there is general satisfaction that those who achieve this rank demonstrate the required criteria.

The number of applicants fell to 15 last year but increased again to 22 this year. Given the small numbers eligible to apply it is difficult to draw any statistical conclusions from this variation.

My only recommendation in this year's Report is to repeat the recommendation that I made last year, namely that there is a proper process established for the appointment of honorary QCs in Scotland reflecting the attainment of excellence in other areas of Scots Law which may be conferred on those who have made an outstanding contribution.

I have no further observations to make.

Jessica M Burns
14 July 2020



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