

Appointment of Queen's Counsel in Scotland 2021

September 2021

Appointment of Queen's Counsel in Scotland 2021 Report by Bill Thomson, Independent Observer

Introduction

I was engaged by the Scottish Ministers as Independent Observer of the appointment of Queen's Counsel in Scotland in June 2021. This is therefore my first report to the First Minister on my findings after reviewing the process.

The process

The history and mechanics of the appointment process and the criteria against which assessment is made are set out in the Guide for Applicants, last revised in March 2021. The Guide is available from the Judiciary of Scotland website at <https://www.judiciary.scot>. Applications can only be made by advocates and solicitor advocates. Nominations for appointment are made to the First Minister by the Lord President and Lord Justice General, the Right Hon Lord Carloway.

2021 Appointment Round

Lord Carloway, acting in his capacity as Lord Justice General, intimated to the First Minister on 26 January that he intended to invite applications for appointment as Queen's Counsel.

Advertisements were placed in the Journal of the Law Society of Scotland and in the Scottish Legal News on 15 March. Copies had also been sent by email to the Faculty of Advocates, the Society of Solicitor Advocates and the Law Society of Scotland.

Whilst this amounts to minimal publicity in comparison with many public appointment processes, it is in line with recent practice and appears appropriate given the limited field of potential applicants.

Separate application forms were provided for advocates and for solicitor advocates. All applicants were also required to obtain two references from senior members of the legal profession who were fully familiar with their work. The Guide for Applicants explains that referees are expected to address directly the criteria for nomination. Applications and references were to be submitted by close of business on 5 April to the Private Secretary to the Lord President. Contact details were supplied, including a telephone number for enquiries.

21 applications were received, including 19 from advocates and two from solicitor advocates. Five of the applicants were female advocates: all others were male. Applicants completed a self-assessment form addressing their fitness for appointment in terms of the specified criteria of advocacy, legal ability and experience, and professional qualities.

One application was not supported by any references. The referees for two of the applicants had only limited knowledge or experience of the applicant's work. In the case of

three other applicants, one referee was able fully to address the criteria whereas the other had only limited knowledge.

The process is repeated annually. It might therefore be expected that intending applicants would consult in advance with potential referees. However, it is also possible that an extension of the three week period between advertisement and closing would be of assistance to some applicants and referees.

All applicants completed a confidential equalities monitoring form, giving details of gender and place of origin. No other information was disclosed.

Assessment

The Lord Justice General is solely responsible for determining which of the applicants should be nominated to the First Minister for appointment by Her Majesty The Queen. Holders of that office are, of course, particularly well placed to make such decisions.

In making his assessment, the Lord Justice General is assisted by the views of other judges. Copies of the applicants' self-assessments are made available to the members of a scoring panel comprising the Lord Justice Clerk and eight other judges from the Inner and Outer Houses. Judges on the scoring panel are invited to express an opinion on each applicant's fitness for nomination against the following scale:

- 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 - No sufficient knowledge of the applicant to express a view.

Copies of the applicants' self-assessments are also available to all other judges in the Inner and Outer Houses who can submit:

- P - Positive comments in support of Silk
- N - Negative comments
- U - Unable to comment due to insufficient knowledge of applicant.

The Lord Justice General also conducts a detailed assessment of each application, including checking the reports of cases cited in the self-assessments, and of the references. The opinions of judges on the scoring panel are carefully considered but are not regarded as binding. The judges submit their opinions but do not normally meet as a scoring panel. Likewise, the weight of opinions expressed by other judges is taken into account, but is not in itself a conclusive factor.

The Lord Justice General has decided to recommend for appointment 11 of the advocate applicants and one solicitor advocate. Four of the successful advocates are female. Seven are male, as is the successful solicitor advocate. Compared to previous years, the success rate of female applicants is high at 80%. However, given the gender balance amongst the applicants, the overall percentage of successful applicants who are female is only 36%.

Amongst the successful applicants, there were only five who received one or more A scores from members of the scoring panel. All received P scores from other judges. The total number of P scores varied from four in the case of two of the successful applicants to 11 in the case of two others. Three were also marked as N by one or more of the judges.

Another factor taken into account was an observation from the Dean of the Faculty of Advocates that there was a shortage of QCs who specialise in Family Law and in Criminal Defence work. The Faculty is the only body consulted as to the need for appointments.

Feedback is given by the Lord Justice General to all unsuccessful applicants. Prior to 2020, feedback was only given when requested. Since then, it has been given to all who are not successful and includes a level of detail which is intended to be constructive for any candidate who may wish to apply again. In addition, the Lord Justice General has indicated his willingness to meet any applicant who wishes to discuss their application with him.

Four of the successful applicants have applied previously, as have four of the unsuccessful applicants.

The Lord Justice General consults with the Dean of the Faculty of Advocates, the President of the Law Society of Scotland and the Lord Advocate before submitting his nominations to the First Minister. Letters were issued on 30 June. The principal purpose of this final consultation is to ensure that no issues relating to the professional quality of the proposed nominees has been missed in the assessment process. No such issue has been raised.

Observations

The QC appointment process differs in significant respects from the process applied to public appointments by the Scottish Ministers under the Code of Practice for Ministerial Appointments to Public Bodies in Scotland.

The pool of potential applicants is strictly limited. This appears to be unavoidable if the high standards of representation in the superior courts in Scotland are to be maintained. Any reduction could impact on the level of service available to those who choose to instruct senior counsel and, perhaps in time, on the reputation of the Scottish legal system.

There is no advance indication of the number of senior counsel to be appointed in any round. As noted, the Lord Justice General invites the Dean of the Faculty of Advocates to indicate if there is a shortage of senior counsel specialising in particular areas of practice. However, this is not tested in any way - for example by consulting the Law Society of Scotland, by whose members counsel are generally instructed on behalf of clients. Nor is any shortage formally intimated to potential applicants.

The period for lodging applications and providing references is short by comparison with other appointment processes. As noted above, it may be that consideration should be given to allowing a longer period for detailed references to be supplied. The proposed introduction of a reference form will undoubtedly be of assistance to some referees by setting out clearly the aspects of the applicant's work and professional record to which their observations should relate.

The criteria against which QC applications are assessed are less specific than for public appointments by the Scottish Ministers. Moreover, the Lord Justice General is firmly of the view the three criteria, as set out in paragraphs 3.2 to 3.5 of the Guide for Applicants, are inseparable. That raises a semantic question as to whether the position might be more accurately set out in the Guide by indicating that a single criterion of excellence and experience in advocacy will require to be demonstrated by reference to the applicant's record in relation to the three elements currently described as criteria.

The Guide for Applicants sets out the importance of "extensive experience in advocacy at both first instance and appellate level". The Lord Justice General has explained that changes to the way in which appeals are heard in the Court of Session coupled with a trend for senior counsel alone to be instructed in these proceedings mean that it is becoming more difficult for junior counsel to demonstrate their abilities and experience at appellate level. This appears to be an important aspect of the current assessment process and may need to be reviewed in future appointment rounds. Even in this round, the most frequent comment from judges not on the scoring panel was U (unable to comment due to insufficient knowledge of applicant).

Unlike assessments made by a panel dealing with a Ministerial public appointment, which are marked and weighted, aggregated or averaged, judges' scores are not expressed numerically. They are worded as opinions and are treated by the Lord Justice General as advisory. Multiple positive opinions are clearly influential. However, there is no minimum level which must be achieved by applicants and only five of the successful applicants were marked as A (well fitted ... and sufficiently outstanding to merit appointment this year) by any of the judges on the scoring panel. There is no right of appeal against the decision of the Lord Justice General.

Positive adjustments have been made to the process in recent years, such as the provision of feedback to all unsuccessful applicants, and I welcome the Lord Justice General's willingness to consider adjustments to the Guide and application forms and to introduce a form for references.

My immediate predecessor as Independent Observer, Jessica M Burns, recommended in her reports for 2019 and 2020 that there should be a proper process for the appointment of honorary QCs in Scotland. I understand that some progress has been made towards establishing such a process, although no details are yet available.

Conclusion

I have examined all of the applications, including the self-assessments and references, and have seen the scoring by judges. The Lord President's Private Secretary has provided me with all relevant papers and background information. After meeting with Lord Carloway to ask about any matters on which I considered that further explanation would be helpful, I am satisfied that the assessment of QC applications has been conducted fairly and thoroughly in accordance with the process set out in the Guide for Applicants. It is clear from the information available to me that the recommendations to be made to the First Minister are based on merit and that they go some way to addressing perceived shortages in the availability of senior counsel with specialisms.

William (Bill) Thomson
20 July 2021



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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80201-290-3 (web only)

Published by The Scottish Government, September 2021

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS922506 (09/21)

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