

Appointment of King's Counsel in Scotland 2022

October 2022

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Report by Bill Thomson, Independent Observer

Introduction

[Please note prior to the publication of the Independent Observer's Report, Her Majesty The Queen sadly passed away on 8 September 2022, and prior to the appointments being finalised, most references have now been changed to King's Counsel.]

The appointment of King's Counsel is made by His Majesty The King on the recommendation of the First Minister, who seeks nominations for that purpose from the Lord Justice General. The Lord Justice General in turn invites applications from suitably qualified advocates and solicitor advocates.

The history and mechanics of the application process and the assessment criteria are set out in the Guide for Applicants, as revised in March 2022. The Guide is available from the Judiciary of Scotland website at <https://www.judiciary.scot>.

The role of the Independent Observer is to review the appointment round, including all applications, assessments and related documents and correspondence, taking account of any policy developments since the last round and, after discussing any issues with the Lord Justice General, submit a report to the First Minister.

2022 Appointment Round

The Right Hon. Lord Carloway, acting in his capacity as Lord Justice General, intimated to the First Minister on 21 January 2022 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 18 March. Notice was also 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, as I noted in my report on the 2021 round, 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 required to obtain two references from senior members of the legal profession who were fully familiar with their work. Applications and references had to be submitted by close of business on 11 April. Contact details were supplied, including a telephone number for enquiries.

Applications

Twenty five applications were received, including twenty three from advocates and two from solicitor advocates. Both solicitor advocates are male.

Eight female advocates applied. This represents an increase over the previous year in numerical and percentage terms: 8/25 (32%) in 2022 as compared to 5/21 (23.8%) in 2021. At 34% of the total number of applications from advocates, it exceeds the percentage of practising advocates who are female (123/440 – 28% per the Faculty of Advocates' website).

Applicants completed a self-assessment form addressing their fitness for appointment in terms of the criteria set out in paragraphs 3.2 to 3.5 of the Guide: Advocacy, Legal Ability and Experience, and Professional Qualities. All applicants also completed a confidential equalities monitoring form, giving details of gender and place of origin.

I noted in my report on the 2021 round of applications that the Dean of the Faculty of Advocates had observed that there was a shortage of Queen's Counsel who specialise in Family Law and Criminal Defence work. I am advised that there was a further, informal discussion between the Lord Justice General and the Dean of the Faculty in advance of the current round. Fourteen of the advocates who applied and both solicitor advocates practise at the criminal bar. One applicant is a specialist in Family Law. It appears that the need for additional King's Counsel experienced in these fields has been noted.

Assessment

The Lord Justice General is solely responsible for determining which of the applicants should be nominated to the First Minister for appointment by His Majesty The King. He conducts a detailed assessment of each application, including checking the reports of cases mentioned in the self-assessments and considering the references supplied. The Lord Justice General is assisted in making his assessment by the views of judges from the Court of Session and High Court of Justiciary. All judges have access to the applicants' self-assessments and are invited to express an opinion on each applicant's fitness for nomination.

There is a "scoring panel" comprising the Lord President, the Lord Justice Clerk and five other judges. Members of the scoring panel use 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.

The Lord Justice General convened a meeting of the scoring panel on 15 June 2022 to consider the range of views expressed by judges. The minutes of the meeting have been made available to me. It is apparent that agreement amongst the members of the scoring panel is an important factor, albeit that their views are not binding on the Lord Justice General. All but one of the successful applicants received one or more A or B assessments from members of the scoring panel. The comments from other judges are also influential, when they align. All successful applicants received between three and fourteen positive scores. No applicant who received more than two negative comments from judges has been recommended for nomination.

The weight attached to references is difficult to assess. Only fifteen references complied with the requirement in paragraph 4.7 of the Guide to address directly the criteria for nomination. Some referees stated that they had limited knowledge or experience of the applicant's work. Nevertheless, six candidates were successful despite neither of their referees directly addressing the criteria and a further six successful candidates had only one compliant reference.

Recommendations for nomination

The Lord Justice General has decided to recommend for nomination fourteen of the advocate applicants (nine criminal and five civil) and the two solicitor advocates. The overall success rate of 64% (16/25) is higher than in 2021 (52.4% - 11/21).

Three of the eight female advocates who applied have been successful (37.5%). This is clearly a low percentage in comparison to the success rate for male advocates (73%). However, there are many factors which can influence success rates, and these tend to vary significantly as between application rounds. In 2021, for example, 80% of female advocate applicants were successful (4/5). Care must also be taken in drawing conclusions from these percentages, given the small numbers involved.

Figures collated in the office of the Lord Justice General over the period from 2008 to 2022 show that the average success rate for female applicants over that period (43%) exceeds that for male applicants (35%).

On the basis of the information available to me in the 2022 round of applications and taking account of the figures from past rounds, I am satisfied that there is no obvious bias in the assessment process for or against male or female applicants.

One of the successful applicants has applied previously, as have three of the unsuccessful applicants. Feedback is given by the Lord Justice General to all unsuccessful applicants 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.

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 to the Dean of the Faculty, President of the Law Society of Scotland and to the Lord Advocate were issued on 29 June 2022. 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 King's Counsel nomination process differs in significant respects from 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, the assessment criteria are narrowly drawn and specific to a singular field of practice, and the decision to recommend applicants for appointment is made without any interview or other interaction with applicants. There are, however, points in the process where fairness and transparency may be demonstrated.

In order to ensure fairness, the criteria for success must be set out clearly in advance and applied rigorously. The criteria set out in paragraphs 3.2 to 3.5 of the Guide require applicants to have:

- demonstrated an ability to present complex, difficult and novel cases in court (3.2 Advocacy) and
- extensive experience in advocacy at both first instance and appellate level (3.3 Legal Ability and Experience).

Paragraph 3.3 also states that particular significance will be attached to cases in the official (Session Cases) reports.

I have noted that amongst the successful applicants in 2022 there are five who were unable to refer to their involvement in any reported appeal cases and one who cited only one such case. If this is indicative of a recognition that the criteria may be met without applicants being able to refer to reported appeal cases, I would recommend that consideration be given to making that clear in the criteria as set out in the Guide. Failure to do so may unfairly discourage future potential applicants.

There is evidence from studies in other spheres of human activity which demonstrates that women are generally less likely than men to put themselves forward if they consider that they do not meet all the specified requirements.

On a point of detail, I have noted that assessments have taken account of a wider range of reported cases than simply those in the Session Cases.

I am aware that planned changes to the way in which references are submitted in future rounds are designed to encourage greater compliance with the requirement to address the criteria. If successful, this will improve the transparency of the assessment process.

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 King's Counsel in Scotland. I understand that some further progress has been made since my last report towards establishing such a process, although no details are yet available.

Conclusion

I have examined all of the applications and related documents and the Lord Justice General's detailed summary of the assessment of each application. I am satisfied that the assessment of King's Counsel 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.

William (Bill) Thomson
7 July 2022



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