

# Appointment of King's Counsel in Scotland 2023

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Report by Bill Thomson, Independent Observer

## Introduction

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 2023. The Guide is available from the Judiciary of Scotland website at [Guide for Applicants](#).

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.

## 2023 Appointment Round

The Right Hon. Lord Carloway, acting in his capacity as Lord Justice General, intimated to the First Minister on 23 January 2023 that he intended to invite applications for appointment as King's Counsel.

Advertisements were placed on the website of the Law Society of Scotland and in the Scottish Legal News from 10 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, 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 3 April. Contact details were supplied, including a telephone number for enquiries.

## Applications

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

Five female advocates applied. This represents a reduction from the previous year in numerical and percentage terms: 5/22 (22.7%) as compared to 8/25 (32%) in 2022. It is also somewhat below the current percentage of advocates who are female (121/435 – 27.8% per the Faculty of Advocates' website).

All the solicitor advocate applicants were male.

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.

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 QCs who were specialists in Family Law and Criminal Defence work. I am advised that the Lord Justice General held informal discussions in May of this year with the Dean of the Faculty and with the President of the Law Society but that no specialism was identified as being a particular priority.

## 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.

Significantly, the Lord Justice General is assisted in making his assessment by the views of the Senators of the College of Justice - the judges sitting in the Court of Session and in the High Court of Justiciary. All judges have access to the applicants' self-assessments and are invited to indicate if they have knowledge of the applicants' performance in court and, if so, to express an opinion on their fitness for nomination.

Paragraphs 4.8 to 4.10 of the Guide for Applicants explain the role of the panel of Senators appointed by the Lord Justice General to consider each of the applications. The panel met on 23 May. It is apparent from the minutes that agreement amongst the members of the scoring panel is an important factor, as are the comments from other judges, when they align. All successful applicants were endorsed by the panel and received between three and twelve positive scores from Senators.

A new reference form was introduced this year and almost all of those who submitted references completed the form. This has improved the transparency of the process by linking the supporting comments directly to the assessment criteria and thereby clarifying their strength and relevance.

## Recommendations for nomination

The Lord Justice General has decided to recommend for nomination thirteen of the advocate applicants and two solicitor advocates. The overall success rate of 60% is

slightly below last year, when 16 out of 25 applicants were nominated for appointment (64%).

Three of the five female advocates who applied have been successful (60%). The success rate for male advocates is similar (59%). Amongst the solicitor advocates, it was 66%. Of course, these percentages are based on small numbers and there are many factors which can influence success rates.

Figures collated in the office of the Lord Justice General over the most recent 10-year period show that the average success rate amongst advocates has been 42% for female applicants and 36% for male applicants.

On the basis of the information available to me in the 2023 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. There is insufficient information for conclusions to be drawn in relation to other protected characteristics.

Two of the successful applicants and four of those who were unsuccessful had applied previously. 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. The principal purpose of this final consultation is to ensure that no issues relating to the professional conduct of the proposed nominees has been missed in the assessment process. No such issue has been raised.

## Observations

The KC 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.

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), with particular significance attached to applicants' involvement in cases which merit inclusion in the official (Session Cases) reports.

In my report on the 2022 appointments, I noted that amongst the successful applicants there were five who had been unable to refer to their involvement in any reported appeal cases. The pattern has been repeated this year. I understand that there is an increasing tendency for senior counsel (KCs) to be instructed to appear alone in appeal cases, following an adjustment to the rules of court to require written submissions to be lodged in advance of appeal hearings and on cost grounds. I have discussed with the Lord Justice General the need to ensure that the criteria for appointment as set out in the Guide for Applicants properly reflect these circumstances. Failure to do so may unfairly discourage future potential applicants.

Paragraph 1.3 of the Guide for Applicants states that applications will generally not be considered before the applicant has practised in the superior courts for at least thirteen years. A possible relaxation of the normal requirement was discussed in respect of two applicants at the panel meeting on 23 May: both were successful.

I have suggested in discussion with the Lord Justice General that consideration be given in future years to identifying at an earlier stage in the process any perceived need for additional Kings Counsel generally or in specific areas of specialisation (paragraph 1.6 of the Guide for Applicants). That would permit, if appropriate, an indication to be given to potential candidates at the point where applications are invited.

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 KCs in Scotland. I understand that a detailed procedure is now under consideration.

I am grateful to the Lord Justice General and to his private office for their courtesy and prompt response in providing me with papers and in dealing with my questions about the assessment process.

## Conclusion

I have examined all the applications and related documents and have had an opportunity to discuss with the Lord Justice General the assessment process and his detailed summary of each KC application. I am satisfied that the process has been conducted fairly and thoroughly in accordance with the criteria 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.

Bill Thomson  
3 July 2023



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