

Appointment of Queen's Counsel in Scotland 2017

Report by Heather Baillie, Independent Observer

September 2017

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Introduction

This is my third report to the First Minister for Scotland as Independent Observer of the appointment of Queen's Counsel in Scotland. I was appointed in March 2017. I was asked to review the process of appointment and to provide a report of my findings and any recommendations to the First Minister at the end of the appointment round.

The 2017 round of appointments began in March 2017 when the Lord President and Lord Justice General, the Rt. Hon. Lord Carloway gave notice to the First Minister that he intended to invite applications for appointment.

Advertisements were placed in March 2017. I was provided with all relevant paperwork. I was assisted by the Lord Justice General's Private Secretary with any further information I requested. I met with the Lord Justice General in June 2017 to discuss the current appointments round.

Independent observers have been appointed for each round of appointment of Queen's Counsel in Scotland since 2004. A summary of the appointments procedure was provided by the last independent observer in her report in 2012 and can be found at: - <http://www.scotland.gov.uk/resource/0040/00401924.pdf>

There have been some changes to the appointments procedure which are referred to later in the report.

Review of the process of recommendation for appointment

I was provided with the following documents:

- All application forms
- Equality Act 2000 monitoring forms
- References
- Self- Assessments by applicants
- Assessments by Senators,
- Copy advertisements in Journal of Law Society of Scotland and Scottish Legal News, and
- Copies of the emails announcing this round of appointment.

The Lord Justice General confirmed that he had conversations with the Dean of the Faculty of Advocates, the President of the Law Society and the Lord Advocate regarding the appointment process.

I discussed my previous recommendations and the changes made to the appointment process with the Lord Justice General.

I considered the Guidance provided for Applicants and the application forms.

I considered the process of consultation with the Dean of Faculty, President of the Law Society and the Lord Advocate to confirm that none of the proposed recommendations would be inappropriate.

Analysis of information considered

Guide for applicants.

The Guide was updated in February 2017 and can be found at the Judiciary of Scotland website: <http://www.scotland-judiciary.org.uk>. This provides a link to the application forms for both Advocates and Solicitor Advocates and an explanation of the application procedure. Contact details for the Lord Justice General's private secretary are provided for enquiries and general feedback on unsuccessful applications. The criteria required for recommendation for appointment as Queen's Counsel in Scotland are set out and an explanation of the process is provided.

Timetable and advertisements.

Advertisements were published online in March 2017. The closing date for applications was 31 March 2017. Applications were submitted to the Lord Justice General's office, and the advertisement provided the name and contact details of his Private Secretary for any enquiries in relation to the appointment round.

Advertisements were placed on the Scotland Judiciary website and in the March editions of the Journal of the Law Society of Scotland and the Scottish Legal News. No newspaper advertisement was placed as this was not considered necessary. Emails were sent to the Faculty of Advocates and the Society of Solicitor Advocates.

Number of applications received from Advocates and Solicitor Advocates in 2017 and since 2004/5.

| Year | Advocates | Solicitor – Advocates |
|-------------|-----------|------------------------|
| 2017 | 24 | 5 (1 withdrawn) |
| 2016 | 23 | 8 |
| 2015 | 20 | 5 |
| 2014 | 20 | 2 |
| 2013 | 26 | 5 |
| 2012 | 26 | 4 |
| 2011 | 26 | 4 |
| 2010 | 23 | 3 |
| 2009 | 25 | 1 |
| 2008 | 32 | 5 |
| 2006/7 | 38 | 6 |
| 2004/5 | 36 | 11 |

Recommendations by the Lord Justice General to the First Minister for Scotland. Fourteen applicants have been recommended by the Lord Justice General to the First Minister. Thirteen advocates (2 female and 11 male) and one solicitor advocate (male).

Equality Act 2000 monitoring.

All applicants completed the Equalities monitoring form.

Gender of applicants.

24 Advocates (6 female and 18 male)

5 Solicitor Advocates (all male, one application withdrawn)

Black or ethnic group other than white/Scottish or white/British - 2

Disability Applicants who declared a disability - one.

Age and year of calling/qualification

Applicants declared years of birth ranging from 1947 to 1976.

Advocates called to the Bar since 2000 - 12; prior to 2000 - 12

Solicitor Advocates qualified since 2000 - 2; prior to 2000 - 3.

The equalities monitoring form did not gather information relating to other Protected Characteristics as defined by section 4 of the Equalities Act 2010.

Senators' Assessments.

The Lord Justice General provided an opportunity for 33 Senators of the College of Justice to comment on the applicants in confidence. The Senators were provided with a list of all applicants and a link to the self assessments submitted by the applicants. Hard copies of all self-assessments and the Guide for applicants including the criteria for recommendation were also made available.

Senators were asked to provide comment on his/her knowledge of the applicant, whether that knowledge was recent and on the criteria for recommendation identified in the Guide – Advocacy Skills, Legal Ability and Practice and Professional Qualities. The Lord Justice General discussed his recommendations with the Lord Justice Clerk.

No grading was requested. All applicants provided 2 references as required in the Guide.

Discussion with the Lord Justice General.

I met Lord Carloway on 23 June 2017 to discuss the appointment process and the changes to the assessment of applications. He explained a number of changes to the consideration of applications. He set up a panel of 5 judges, including the Lord Justice Clerk, to consider applications taking account of the comments provided by senators. All senators were asked to make comment but only if they had knowledge of the applicant. There was no grading or scoring of applicants. This resulted in more focused comment, which the Lord Justice General found to be of considerable assistance. This change together with the introduction of a word limit resulted in

more focus on the criteria for appointment. The Lord Justice General added his own observations in respect of each applicant in a detailed note to the Lord Justice Clerk. We discussed the recommendations. The Lord Justice General provided his reasoning in relation to each applicant. He had carefully analysed all the applications, references, self assessments and comments by senators. His recommendations reflect a desire to ensure that there is a suitable range of expertise available for instruction in the upper courts in Scotland. I was satisfied on the basis of our discussion and the other information made available to me that the decision making in relation to all candidates was robust and consistent with the guidance and criteria for recommendation.

Independent Observer's Comments

Recommendation for appointment of silks to the First Minister is a matter for the Lord Justice General alone, having considered all the information provided by applicants, responses from Senators and others consulted and his own knowledge of the applicants. There is no fixed quota of Queen's Counsel to be appointed in any year. The Lord Justice General endeavours to ensure that there is an adequate supply of Queen's Counsel providing extensive experience of appellate advocacy in the Scottish courts. He has a responsibility in relation to the efficient business of the courts to ensure a suitable range of expertise at the Senior Bar to promote public confidence. The Lord Justice General consulted with the Dean of Faculty and the President of the Law Society of Scotland to identify the extent of any perceived need to increase the number of Queen's Counsel in particular areas of legal practice.

The advertising arrangements appeared fit for purpose. A considerable saving was made by restricting newspaper advertisement. Advertisements were placed in the Scottish Legal News and the Journal of the Law Society of Scotland. Emails were sent to the Faculty of Advocates and the Society of Solicitor Advocates alerting them to this round of appointment. The time table for response gave candidates adequate notice to submit their applications. Online notice was given via the Scotland Judiciary website. The Lord Justice General wished to complete the appointment process in time for newly appointed Silks to be introduced at the beginning of the new term in September 2017.

The Guide for applicants provides clear, concise information and an explanation of the procedure to be followed. A link is provided to the application form. The Lord Justice General's private secretary is available to provide further clarification and feedback.

Last year, I reported that there was a wide variation of information provided by applicants in the self-assessment part of the application. I recommended the introduction of a word limit. This has resulted in more focused applications. Half the advocate applicants provided information in a paper apart with a range in the number of pages from 2 to 7 pages. This represents a reduction in the amount of information provided by applicants and more focus on the criteria for appointment. Half the advocate applicants and all the solicitor advocate applicants made their application using the application form only, which required a word limit of 1500 words. Most applicants made specific reference to the Criteria for Recommendation set out in the Guide for Applicants.

Applicants provided detail of experience before the courts including lists of cases in the last 5 years. Particular attention was given to reported cases in the appellate courts.

Senators provided comments only where they had knowledge of the applicant. Their comments were based on the information provided in the application form and the self-assessment using the criteria for recommendation outlined in the Guide for Applicants. All comments appeared to be objective, consistent and based on knowledge of the applicant. Senators indicated as part of their comments if they acted as a referee for an applicant.

It was clear from discussion and scrutiny of the papers, that the Lord Justice General had taken account of all the comments made by senators, applied his own knowledge of candidates and had given careful consideration to every application. The Lord Justice General wrote to the Dean of the Faculty of Advocates, the President of the Law Society and the Lord Advocate to seek confirmation that nothing in the conduct or circumstances of the applicants to be recommended to the First Minister would make recommendation inappropriate. On receipt of the necessary confirmation, the Lord Justice General made the recommendations referred to above to the First Minister for Scotland.

Conclusion

I can confirm based on my observations and discussions that the process was conducted following an established procedure, careful scrutiny of all applications and that the criteria for recommendation were applied consistently. Applicants had sufficient notice and guidance to allow them to present the information they wished to be considered by the Lord Justice General. The changes made to the application process have resulted in a more focused approach.

The assessment process was fair and objective. I was provided with all the information I required and I had the opportunity to meet the Lord Justice General to discuss matters relating to his recommendations. I was given co-operation and support by the Lord Justice General's private secretary throughout the review.

I am satisfied on the basis of my observations and my discussions with the Lord Justice General that the recommendations made to the First Minister were based on merit taking account of the applicants' experience and established appellate advocacy skills. There was no evidence of discrimination or bias. Consideration was given throughout the process of the need to maintain the availability of experienced representation of the highest standard at the Senior Bar in Scotland.

Recommendations

The recommendations I made in my last report have been implemented. A word limit has been introduced and there is no longer a wide variation in the amount of information provided by applicants in the self-assessment part of the application form. Many applicants did not use paper apart. Applicants appeared to focus on the Criteria for Recommendation set out in the Guide for Applicants.

Applicants providing a list of cases they wish to rely on, provided an explanation of the significance of each case and the reason for referring to it. Consideration was given to reported cases in particular. There was no additional information provided by Solicitor Advocates compared to Advocate applicants.

Senators providing a reference for an applicant made this clear when providing further comment. Simplification of the process for recommendation introduced by the Lord Justice General involved a small number of senators being appointed to consult on applications. Only judges with sufficient knowledge of applicants were asked to comment on applications. I understand that there has been an increase in the number of applicants seeking feedback on their applications.

I have no further recommendations to make.

Heather Baillie 17 July 2017



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