

## **APPOINTMENT OF QUEENS COUNSEL 2012**

### **REPORT BY INDEPENDENT OBSERVER**

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#### **1.0 Introduction**

1.1 I was appointed by the Scottish Government in July 2012 as the Independent Observer for the 2012 round of appointment of Queen's Counsel in Scotland. I was asked to submit a report of my findings, including any recommendations, to the First Minister for Scotland. I was also asked to consider policy and practice issues concerning equal opportunities in relation to how any changes could enhance the appointments procedure. It should be noted that the appointments round commenced in January 2012 with the then Lord Justice General and Lord President of the Court of Session, the Rt Hon Lord Hamilton inviting applications. Advertisements were published at the end of March 2012. I did not meet with the Lord Justice General prior to the commencement of the round. This may be attributable to the fact that the new Lord Justice General and Lord President of the Court of Session, the Rt Hon Lord Gill, took up his position in June 2012 which left no opportunity for initial discussions with him.

1.2 I have used my previous professional experience of recruitment, equalities issues, and past experience as an independent assessor for the Public Appointments process in Scotland, to inform my role as an Independent Observer in the current round. I shall comment on the appointments round which I have observed in terms of the procedure, practice, and paperwork.

1.3 Since 2004 Independent Observers have been appointed for each round to undertake an independent role in observing and reporting on the appointment process.

1.4 Recommendations have been made following previous appointment rounds, and these have been considered and taken forward.

#### **2.0 Summary of the appointments procedure**

2.1 The appointments procedure is now well established and is outlined below:

2.2 The Lord Justice General notifies the Dean of the Faculty of Advocates and the President of the Law Society for Scotland of the date the appointments process is due to commence, and takes account of any view they may subsequently express in relation to the perceived need to increase the number of Queen's Counsel;

2.3 The Lord Justice General invites applications from qualified Advocates and Solicitor Advocates by public advertisement;

2.4 The Lord Justice General provides an opportunity to the Senators of the College of Justice to express their views to him, in confidence, in relation to each of the applicants;

2.5 The Lord Justice General evaluates the applications, and the views of the Senators, and following any other consultation he considers necessary, he determines the applicants he intends to recommend;

2.6 The Lord Justice General consults the Dean of the Faculty of Advocates, the President of the Law Society for Scotland, and the Lord Advocate, to confirm that there is nothing about the applicants he is minded to recommend that would make it inappropriate for any of those applicants to be appointed;

2.7 The Lord Justice General submits his final recommendations to the First Minister for Scotland, listing the names of those Advocates and Solicitor Advocates he considers should be nominated to her Majesty the Queen for consideration for appointment for Queen's Counsel in Scotland.

2.8 It is the responsibility of the Lord Justice General to make formal recommendations to the First Minister, having considered the information provided by applicants within the application forms, his own knowledge of the applicants, and the responses of those whom he has consulted. There is no fixed quota of Queen's Counsel to be appointed at any time. However, the Lord Justice General ensures, in the interest of clients and Courts, that there are sufficient numbers of Queen's Counsel with the required level of specialist expertise and experience.

2.9 A Guide for Applicants is available and gives a summary of the appointments procedure, and the basis upon which the Lord Justice General, in consultation with others, will make his formal recommendations to the First Minister.

2.10 Separate application forms are available for Advocates and Solicitor Advocates, and these provide for the specification of personal and professional details, academic and professional qualifications, professional and other relevant experience as Advocates or as Solicitor Advocates, and areas of special expertise. The application forms separate out certain personal details required for monitoring purposes from the information submitted in support of the application by the applicant.

2.11 The Lord Justice General, his Private Secretary, and the Independent Observer, see all paperwork relating to the appointments round. The Senators are issued with copies of the self assessment section of applications, an assessment form for each applicant (including a grading scale) with space for comments. The Senators are also provided with a copy of the Guide for Applicants. The letter issued by the Lord Justice General to Senators seeking their views, indicates that they should make comment in the context of the guidance within paragraphs 3.2 – 3.5 of the Guide for Applicants; and that they can access the application forms from his private office on request.

2.12 The assessment form for each applicant has three sections to grade (and includes space for Senators to make comments on each applicant). The first section is for text/comment and for the Senators to indicate how recent is their knowledge of the applicant. The second section focusses on the applicant's advocacy skills, legal practice and ability, and professional qualities- which need to be graded on a scale of 1-5, ranging from very well demonstrated to not demonstrated. This informs the third section of the form which addresses the applicant's suitability for appointment, using the following 6 band scale:

- A. Well fitted for Silk now, and sufficiently outstanding to merit appointment this year;
- B. Possibly ready for Silk now, but not in front rank of applicants for appointments this year;

- C. Not obviously fitted for Silk at present;
- D. Not fitted for Silk.
- P. Application is premature;
- N. No sufficient knowledge of applicant to express a view;

### **3. Approach**

3.1 I met with the Lord Justice General at the beginning of August 2012 in order to discuss the current round of appointments, and to clarify issues. I also discussed with him possible ways of clarifying information in the Guide for Applicants, the means of improving the presentation and quality of information provided in applications in future rounds. I discussed with him issues relating to two applications. I was satisfied with the explanations given in relation to the decision-making process. I was advised by the Lord Justice General that it is imperative that applicants have a sufficient level of experience and practice as a Senior Counsel, in addition to the time they have been at the Bar as Advocates or qualified as Solicitor Advocates.

3.2 I was given access to: all application forms; all references; all assessments from Senators; the letter from the Lord Justice General to Senators; a copy of the list of newspapers and websites where the advertisements were placed; the Guide for applicants; template application forms for Advocates and Solicitor Advocates and equalities monitoring forms and analysis.

3.3 I accessed reports from Independent Observers from previous rounds from the Scottish Government website.

3.4 I had discussions with the Lord Justice General's Private Secretary in order to clarify administrative matters.

### **4. Analysis**

4.1 Number of applications received:

Year	Advocates	Solicitor Advocates
2012	26	4
2011	26	4
2010	23	3
2009	25	1
2008	32	5
2006/7	38	6
2004/5	36	11

4.2 Characteristics of applicants in 2012

- 30 applications were received in the 2012 appointments round of which 6 were formally recommended by the Lord President to the First Minister - of which there were 5 Male and 1 Female, all are Advocates.
- Applications received; Advocates, 26; Solicitor Advocates, 4;
- Advocates: Male, 23; Female, 3;
- Solicitor Advocates: Male, 4; Female, 0;
- Applicants from black or ethnic minority groups: Advocates, 1; Solicitor Advocates, 0.
- There was information provided relating to disability (nil return) but information was not asked concerning the other Protected Characteristics (as defined within the Equalities Act 2010).
- Called to the Bar since 2000 –4, called to the Bar prior to 2000 - 22.
- Qualified as Solicitor Advocates since 2000 – 2, qualified prior to 2000 - 2.
- References provided by applicants: No references provided - 17; Two references provided- 10; One reference provided- 3;

#### 4.3 Insufficient Knowledge of applicants by the 30 Senators consulted

<b>Applicant</b>	<b>% Insufficient Knowledge</b>
Advocates	
1	63
2	33
3	47
4	70
5	53
6	60
7	63
8	30
9	40
10	27
11	47
12	73
13	47
14	73
15	83
16	83
17	83
18	60
19	67
20	80
21	80
22	67
23	73
24	80
25	73
26	47
Solicitor Advocates	
27	37
28	40
29	87
30	63
Average	61

- The above table indicates the percentage of Senators who stated that they had insufficient knowledge of an applicant to express a view. These ranged from 27% to 87%, with an average of 61%. Of the 30 applicants only 7 were below the 50% mark.
- In the case of Advocates the range was 27% to 83% with an average of 62%. Of the 26 advocate applicants only 6 were below 50%.
- In the case of Solicitor Advocates the range was 37% to 87% with an average of 57%. Of the 4 solicitor advocate applicants only 1 was below 50%.
- The explanation for such a high percentage of the applicants not known to the Senators might be that their practice may be limited, specialised, or outside the Court of Session or High Court of Justiciary, so that only a few Judges see them. I was advised by the Lord Justice General that the percentage of Senators who express that they have insufficient knowledge of applicants is of itself a helpful indication of the type of work and complexity of work an applicant has undertaken, and whether they have sufficient experience as a Senior Counsel.

## **5. Independent Observer's comments**

5.1 Timetable and advertisements: The appointments round was commenced in January 2012, advertisements were placed in March 2012, with applications invited to be submitted by 12<sup>th</sup> April 2012. Applications had to be submitted to Ms. Debbie Laidlaw at the Lord Justice General's office. No contact name or number was given in the advert for enquiries. Advertisements were placed in the Herald, Sunday Herald, Hotlisting and internet listing Glasgow (Herald Group website), Scotsman, Scotland on Sunday, www.scotsman.com, www.scotland-judiciary.org.uk, the Journal of the Law Society of Scotland, and the Scots Law Times. The advertisements were widely publicised in relevant broadsheet newspapers, relevant websites, and professional journals. I have no further comments to make in this regard as advertising arrangements would appear to be fit for purpose. I was advised that the Lord Justice General wished to complete the appointments round in time for the new Silks to be welcomed at the opening of the new legal year in September 2012.

5.2 Guide for Applicants: The Guide is clear and concise. It was reviewed and updated in March 2012.

5.3 Use of application forms: Applicants' approach to completing the application form varied, leading to differences of quality and quantity of information provided. In particular, applicants often listed cases they had been involved with, but giving no indication of their role as Junior or Senior Counsel, or skills/experience they used in undertaking those cases. Furthermore, the self assessment section of the application forms differed in length from half a page to eight pages, with the average self assessment being four pages in length. The quality of information provided in this section also varied, and applicants often missed the opportunity to use examples to showcase their relevant skills and experience.

5.4 Use of References: Just over 50% of applicants failed to provide references, thereby missing a further opportunity to present testimonials of their competences.

5.5 It should be noted that the variance in quality and quantity of the self assessment section of application forms and the reluctance to provide references has been commented upon by previous Independent Observers to past appointments rounds. Furthermore, the

low number of Solicitor Advocates continues to be an issue with only 4 of 30 applications (13%) being received from Solicitor Advocates in the current appointments round.

5.6 Assessment forms provided to Senators: I am satisfied that the assessment forms were completed in a consistent and objective manner, and forwarded to the Lord Justice General for his consideration. I noted that some Senators stated if they knew an applicant in a personal/professional capacity, but there was not a consistent approach to such notations. I was advised that none of the Senators requested to see the full application forms from the Lord Justice General's private office during the current round.

5.7 I was advised that the Lord Justice General wrote to the Dean of the Faculty of Advocates, the President of the Law Society for Scotland, and the Lord Advocate, to seek confirmation that there was nothing about the conduct or affairs of the applicants he was minded to recommend to the First Minister for nomination that would make it inappropriate for him or her to be appointed.

5.8 Confidential Equalities monitoring form: Equalities monitoring forms were completed by 19 of the 30 applicants for the current round. The forms were available to the Lord Justice General's Private Secretary, the relevant civil servant in the Legal System Division of the Scottish Government, and the Independent Observer. It would be helpful to continue to conduct an annual confidential equalities monitoring process to establish any trends in terms of the number of applications received from Advocates and Solicitor Advocates, gender, and other Protected Characteristics of applicants (as defined within the Equalities Act 2010). This may facilitate wider consideration of issues such as the number of women, people from black and ethnic minorities, and disabled people, choosing to enter the legal profession and take a career path inclusive of applying for Queen's Counsel in Scotland, and for positions within the Judiciary; including any perceived or actual barriers to a career path within the legal profession, which may include part time appointments/positions at a more senior level within the legal profession, inclusive of taking Silk and entering the judiciary.

## **6. Conclusions**

6.1 I can confirm that the recruitment and assessment process was conducted in a fair and objective manner, and in accordance with the established procedure for the appointment of Queen's Counsel in Scotland. All available written information pertaining to the appointments round was provided to me, and all enquiries were dealt with timeously by the Lord Justice General's Private Secretary. A meeting with the Lord Justice General towards the end of the appointment round afforded me the opportunity to discuss with him the appointments procedure, the applications, and his formal recommendations to the First Minister. I was given co-operation and support throughout my involvement in the appointment process.

## **7. Recommendations**

R1. Guide for applicants: Whilst the Guide is clear and concise, consideration should be given to providing additional prompts within paragraph 4.4, to encourage applicants to give relevant concise information, and examples to demonstrate competences, in completing application forms – perhaps drawing on some of the criteria listed within the Additional Fee Rule, as a guide.

R2. Template application forms: Consideration should be given to providing prompts within the application form to encourage the submission of relevant and concise information, including examples to demonstrate competences (particularly in relation to the list of legal specialisms section – perhaps drawing on some of the criteria listed within the Additional Fee Rule, as a guide) and also to answer each section of the form. Consideration should also be given to proscribing a total of pages/words to be submitted within the self assessment section of the form, with prompts of how best to showcase with examples which highlight the applicant's skills and relevant experience.

R3. References: Consideration should be given to the requirement within paragraph 4.7 of the Guide to Applicants, for each applicant to provide two references with their application (rather than this being optional), thereby affording the Lord Justice General a greater source of knowledge and testimonial for each applicant.

R4. Senators' assessment forms: Consideration should be given to the inclusion at the bottom of the assessment form tick boxes for the Senator to tick to confirm if he/she knows the applicant in a personal capacity; a professional capacity; or acted as a referee for the applicant in the current round.

R5. Equalities monitoring forms. Consideration should be given to make it obligatory for each applicant to submit a confidential equalities monitoring form (to be available only to the Lord Justice General's Private Secretary, the relevant civil servant within the Legal System Division of the Scottish Government, and the Independent Observer), covering the Protected Characteristics – as defined within the Equalities Act 2010. An analysis of the information should be undertaken to identify trends and any necessary action to be taken as a result of such trends.

R6. Career path for legal professionals. Three considerations...

a. Consideration should be given to encouraging an increase in the number of Solicitor Advocate applicants for Queen's Counsel, and the steps they would require to take to gain the necessary experience and competences – inclusive of taking on a greater number of complex cases, increasing the proportion of their workload in favour of Advocacy work, and acting as consultant Solicitor Advocates to other firms of solicitors.

b. Consideration should be given to removing barriers or perceived barriers to advancement for individuals who fall within the Protected Characteristics (as defined by the Equalities Act 2010) such as encouraging part time positions, flexible working etc.

c. Consideration of undertaking research about why disproportionately fewer individuals from the Protected Characteristics (as defined by the Equalities Act 2010) choose not to enter the legal profession and progress to apply for Queen's Counsel and the Judiciary.

R7. Good practice: Consideration should be given to drawing on good practice from the public appointments process in Scotland (which is well established) to assist in providing the Lord Justice General with reliable evidence in support of individuals' applications to become Queen's Counsel in Scotland.

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