



The Rt Hon Lord Carloway
Lord President

Parliament House
Edinburgh, EH1 1RQ

8 February 2015

Michael McMahon MSP
Convenor of the Public Petitions Committee
Scottish Parliament, T3.40
Edinburgh
EH99 1SP

Dear Mr McMahon,

PUBLIC PETITION PE1458: REGISTER OF JUDICIAL INTERESTS

Thank you for your letter dated 7 January 2016.

The proposal for a public register of the judiciary's interests, gifts and hospitality is both unnecessary and undesirable.

I have had the benefit of reading the views offered by my predecessor, Lord Gill, both in correspondence and in evidence on 10 November 2015. I agree with his views regarding:

- (i) the sufficiency of current safeguards protecting the impartiality of the judiciary;
- (ii) the potential for unintended consequences of the register;
- (iii) the impracticality of such a register; and
- (iv) the petition not, in fact, achieving its stated aims.

The petition raises the issue of the balance to be struck between the principles of openness and transparency in public life, on the one hand, and the proper administration of justice, on the other. I support the need for openness and transparency, where appropriate. There is a potential for tension between these principles and the proper administration of justice. Within the proposals in this petition there lies the potential only to undermine the latter, without advancing respect for the principles in any meaningful way. For example, it was Lord Gill who made the point, with which I agree, that the vast majority of matters that in theory could undermine judicial impartiality, such as familial and social relationships, would not be addressed by such a register.

The proper administration of justice could be inhibited by the disclosure of the judiciary's otherwise confidential financial arrangements. In that connection, there is the possibility that an individual judge may be the subject of misconceived criticism, deriving from the disclosure of personal financial information, where those interests are tangential and *de minimis*. It is inappropriate for judges to make public comment beyond their judicial opinions in relation to individual cases. Therefore, unlike an elected representative or a member of the Government, a judge enjoys no right of reply. Judges thus have no scope to remedy unjustified reputational and professional damage by explaining their decisions or responding to criticism.

The appropriate safeguard with regard to the judiciary is not a register of interests, but the obligation to decline jurisdiction in a case ("recuse himself/herself") where he or she has any real or perceptible conflict of interest, whatever the nature of that conflict. In that regard, in the interests of openness and transparency, all instances of (and reasons for) recusals are published on the judiciary's website.

It is of great constitutional importance that the judiciary remain functionally distinct from both elected representatives, who make the law, and the Government, who promote changes to the law and take executive decisions in areas involving wide discretionary powers covering many areas of economic interest. The danger that representatives and the Government could be influenced by personal interest is ameliorated by the relevant disclosure requirements incumbent upon them. The judiciary's function is not that of law-making nor is it equivalent to any kind of executive power. The same considerations do not apply.

Lord Gill said that judges, "by their imaginative development of the law, [...] improve and extend the law, explaining it in their judgments". I echo this characterisation, but it is not reasonable to suggest that a judge, through the means Lord Gill explained, would be able to dispense jurisprudence over a period of time that would advantage a particular financial interest which he or she had.

I hope that this assists the Committee.