

PE1458/D

Response from Petitioner Peter Cherbi re: Petition PE1458: Register of Interests for Judges Petition

Response to Law Society of Scotland submission from Alan McCreadie Deputy Director, Law Reform:

I agree with the Law Society of Scotland's contention that the ten questions put forward by the New Zealand Law Commission (and any others arising from particular information or events relating to the Scottish judiciary) should be considered by the Scottish Parliament if it is minded to introduce legislation regarding a register of interests for the judiciary in Scotland.

Regarding the Law Society of Scotland's contention that the Society is not aware of any evidence to suggest that (1) the Judicial Oath; (2) the Statements or Principles of Judicial Ethics for the Scottish Judiciary and (3) the Judiciary and Court (Scotland) Act 2008 "are not working in practice", I respectfully point out there is no statistical or analytical information available to the public or media to confirm that this is the case or not.

For instance, there exists no reports or available information on how many judges have recused themselves from cases before them on grounds of conflict of interest, or specifically what those conflicts of interest are/were. It is only proper therefore the Petitions Committee should request this information for study.

The Law Society refers to Section 35 of the act which allows the First Minister to set up a Tribunal to investigate whether a Judge of someone holding judicial office is unfit to hold the office by reason of inability, neglect of duty or misbehaviour. Given the absence of any recorded example of such an enquiry and the ingrained secretiveness of the judiciary it is unrealistic to expect these powers to be used, as there would almost certainly be resistance from the legal establishment claiming "political interference in the independence of the judiciary". An example of this occurred post *HMA v Cadder & Fraser v HMA* in which both the First Minister & Justice Secretary were severely criticised after making public attacks on the most senior members of the UK judiciary, comparing their knowledge of Scots law to that of spectators at the Edinburgh Festival, among other comments.

Further, it is clear parts of legislation with particular regard to the Judiciary & Court (Scotland) Act 2008 and complaints about the Judiciary (Scotland) Rules 2011 are not working either in practice or in public expectation. This is illustrated in the recent findings of the Judicial Complaints Reviewer, who has been hampered/obstructed in considering requests for complaint reviews against members of the judiciary. I attach

the most recent report from the Judicial Complaints Reviewer and media coverage as evidence supporting that fact.

Judicial Complaints Reviewer Annual Report 2011/2012:

http://www.judicialcomplaintsreviewer.org.uk/sites/default/files/publications/460350_v4_20130128_0.pdf

Media coverage: <http://www.flickr.com/photos/lawreporterscot/8464583361/>

I believe the report by the independent Judicial Complaints Reviewer does go some considerable way to show there is sufficient evidence to demonstrate that the systems referred to by the Law Society being currently in place are not effective and therefore need Parliamentary scrutiny and appropriate legislation.

Responding to the submission from the Lord President, Lord Gill:

The Lord President states the catalyst for this petition relates purely to a similar petition filed in New Zealand, which came about after a Judge failed to recuse himself. He then goes on to claim **"To my knowledge, no such situation has arisen within my tenure as Lord President."**

The Lord President is incorrect. The catalyst for this petition arises from investigations by the Scottish media into members of our own judiciary. These investigations revealed a host of criminal charges & convictions including benefit cheating, drink driving, other criminal charges and a variety of alleged personal & financial circumstances consistent with undeclared interests relating to members of Scotland's judiciary.

The Lord President goes on to quote the Council of Europe Group of States against Corruption (GRECO) who considered the need for a Judicial Register of interests who stated ***"As regards the institutions that are entrusted with the fight against corruption the GET noted that judges in the United Kingdom are not required to register their interests. Given, however, that the United Kingdom judiciary is generally perceived as conforming to social demands for observance of high integrity standards, the GET did not consider it necessary to address a recommendation in this connection."*(paragraph 87)**

With all due respect to the Lord President, members of the judiciary holding office and presiding in cases where it may well have occurred that criminals have been judged & sentenced by judges with criminal records does not conform to social demands for observance of high integrity or standards. The judiciary also does itself a disservice by concealing information relating to judges criminal records by concealing information from the Scottish public at large all who appear in court.

The Lord President further makes reference to the Judicial Oath, The Statement of Principles of Judicial Ethics and The Judiciary and Courts (Scotland) Act 2008, claiming each safeguard and all, collectively, ensure there is no need for a register of interests. However, the Lord President presents no evidence or analytical information which can be independently verified to support his claims.

The Lord President goes on to argue that transparency in terms of disclosure obligations of the three branches of Government is apparently not desirable when it comes to the judiciary. The Lord President said : **"The petition appears to proceed on an apparent misconception that equal treatment in terms of disclosure obligations of each of the three branches of Government is desirable. The three branches have significantly different roles to perform."**

I would respectfully point out there is quite rightly a greater public expectation in 2013 of transparency and accountability across all branches of Government, than there may have been previously. Additionally, all three branches of Government should adhere to the same rules in their respective roles. This includes the judiciary who have a duty to be accountable to the wider community in terms of adhering to the same standards and requirements as those which already apply to politicians, the armed forces and the public sector where registers of interests and declarations of interests are mandatory and commonplace requirements.

The Lord President goes on to state: **"The judicial role requires independence and impartiality in relation to the individual case which the judge has to decide. In this context, the potential for conflict of interest or apparent bias extends beyond pecuniary interests alone. The judge's duty of disclosure is more far-reaching than a barelisting of particular pecuniary interests identified by legislation as warranting disclosure. For example, a judge's disclosure duties, as set out in the Statement of Principles of Judicial Ethics, will extend to material relationships."**

Put simply, if the Prime Minister, First Ministers of the devolved assemblies of the United Kingdom, Ministers of the Crown, all Members of Parliament, Members of the devolved assemblies, Members of the House of Lords, Civil Servants & members of the armed forces are required to declare interests, then it should be so for members of the judiciary. Furthermore it is disingenuous to suggest that no oversight or scrutiny can be put in place because no perfect system has yet been discovered.

The Lord President goes on to state : **" The petitioner is also incorrect in his assumption that *"being obliged to declare pecuniary interests...would relieve a judge from a repetitive weight of responsibility to make discretionary judgments about his or her personal affairs as each case arises."* This is a naive interpretation that does not appreciate the role of a judge. Judicial conflicts of interest based on a judge's pecuniary interests arise infrequently**

but, when they do, the existence of an entry on a judicial register of pecuniary interests would not relieve the judge concerned from his or her obligations to make full disclosure and to reach a principled decision as to whether recusal is warranted. For that reason, I do not consider that the vehicle that the petitioner proposes would achieve its stated purpose of *"providing greater transparency within the judicial system and to avoid any conflict of interest in the judicial role."*

Respectfully, the Lord President is wrong in his interpretation of my petition. A register of interests, regularly updated, effectively, independently scrutinized and published would ensure any conflicts of interest in the judicial role could be avoided and go further to ensure those persons appearing in court before a judge could expect a fair hearing.

A published register of interests for members of the judiciary would also allow those before a judge and their legal representatives, any relevant independent regulator, members of the public and the media to question whether a judge's decision to recuse or not to recuse themselves in a particular case was a correct decision.

The Lord President goes on to state: **" In practical terms it would be impossible for all judicial office holders to identify all the interests that could conceivably arise in any future case. The terms of the Judicial Oath and the Statement of Principles of Judicial Ethics ensure that such a difficulty does not arise and that the onus is on the judicial office holder to declare any interest at the outset. This is a view shared and supported by the Justices of the Supreme Court who have publicly stated that:**

"it would not be appropriate or indeed feasible for them to have a comprehensive Register of Interests, as it would be impossible for them to identify all the interests, which might conceivably arise, in any future case that came before them. To draw up a Register of Interests, which people believe to be compete, could potentially be misleading. Instead the Justices of the Supreme Court have agreed a formal Code of Conduct by which they will all be bound and which is now publically available on the UKSC website."

This is not a position acceptable in terms of the public's expectation of transparency in the 21st Century. I would respectfully point out that judicial office holders of the Supreme Court were once required to comply with a register of interests while they held positions as Law Lords in the House of Lords.

The UK Supreme Court website confirms this to be the case : **"Prior to the creation of the Supreme Court of the United Kingdom, the highest court in the UK was the Appellate Committee of the House of Lords. The members of the Committee were Lords of Appeal in Ordinary appointed under the Appellate**

Jurisdiction Act 1876. Although those appointments gave them full voting and other rights in the House of Lords, the Law Lords had for some years voluntarily excluded themselves from participating in the legislative work of the House. Notwithstanding that, they were bound by the rules of the House and provided entries for the House of Lords Register of Interests."

It is therefore plainly wrong to suggest that just because someone is a member of the judiciary yet still a public servant, they are above public expectations of accountability and the demands of transparency in terms of adhering to rules such as a register of interests, which the Lord President appears to be suggesting.

The Lord President then goes on to argue the case of "**Unintended consequences**" of a register of interests, claiming : "**The introduction of such a register could also have unintended consequences. Consideration requires to be given to judges' privacy and freedom from harassment by aggressive media or hostile individuals, including dissatisfied litigants. It is possible that the information held on such a register could be abused. These are significant concerns. If publicly criticised or attacked, the judicial office holder cannot publicly defend himself or herself, unlike a politician. The establishment of such a register therefore may have the unintended consequence of eroding public confidence in the Judiciary. It also raises the question whether such a measure would have an adverse impact on the recruitment and retention of the Judiciary."**

With all due respect, the Lord President's view on this point is inconsistent with the expected norms of transparency, accountability, and the functionality of register of interests in other branches of Government and those relating to Public Bodies, Public Appointments & other Public officials.

The Lord President claims "**Consideration requires to be given to judges' privacy and freedom from harassment by aggressive media or hostile individuals, including dissatisfied litigants.**" 'Clearly this possibility exists in all walks of life, both in the public & private sector, and is a necessary adjunct to those who would take Public Office.

Judges hold highly paid public positions of incredible importance and their decisions can significantly impact on public life, Government policy, the integrity of legislation and indeed the state of a nation. If a judge has failed to adhere to the rules, or failed to declare an interest which could impact on the case before them, like anyone else, the appropriate legislation must exist to ensure they are held accountable by the appropriate independent authority and that decision open to Public scrutiny.

The Lord President then goes on to claim: "**It is possible that the information held on such a register could be abused. These are significant concerns. If publicly criticised or attacked, the judicial office holder cannot publicly defend himself or herself, unlike a politician.**"

It cannot be the case the judiciary can exempt themselves from public criticism, questioning of their actions, activities, or judgements. Criticism of the judiciary occurs already, how much fairer that would be if there the means to ensure it was better informed. The Lord President suggests the judiciary require unquestionable powers to continue in office. This cannot be so. Judges are making significant decisions affecting the Scottish public at large. They must, like everyone else, be held to the same rules & high standards of public office, and expect to be criticised if their decisions undermine the confidence of the community at large.

If it is the case judicial office holders cannot publicly defend themselves currently, they should be encouraged to do so if an instance arises where they are being unfairly attacked. It is a matter of record members of the judiciary have publicly commented (usually negatively) on Government policy, the integrity of legislation and the functioning of the courts on many occasions before, so it is clearly not the case the judiciary has no voice. The current Lord President has himself appeared before MSPs and voiced criticisms of legislation before.

Lastly, the Lord President claims **"The establishment of such a register therefore may have the unintended consequence of eroding public confidence in the Judiciary. It also raises the question whether such a measure would have an adverse impact on the recruitment and retention of the Judiciary."**

This has not been the case for those areas of public life & Government where a requirement of a register of interests already exists, nor has it eroded public confidence in public officials. Rather a register of interests has promoted public confidence in public bodies & public servants, as those who fail to declare their interests can be held to account, both publicly and by the relevant rules of those appointed to regulate these particular registers of interests.

I respectfully suggest the Lord President is wrong in his assertions and that a register of interests for the judiciary should not be implemented. Such a register will generate increased public confidence in the judiciary and their role in Scottish public life, not detract from it.

**Responding to the Scottish Government's response by Robert Sandeman
Head of Courts Team:**

The Scottish Government states it considers there are sufficient safeguards in place to ensure the impartiality of the judiciary in Scotland, and makes reference to the Judicial Oath, Statement of Principles of Judicial Ethics & the Judiciary and Courts (Scotland) Act 2008.

The judicial oath states **"First, all judges of the Court of Session and the High Court of Justiciary must take a judicial oath under which those judges must**

swear that they will do right to all manner of people without fear or favour, affection or ill-will."

There is ample evidence to suggest the oath has been regularly breached by judges, in both civil and criminal cases or actions. Members of the judiciary with criminal records or judges facing criminal investigations or criminal charges, have apparently carried on serving in a judicial capacity while information relating to their status has been concealed, facts which were only revealed when uncovered and published in the media. Circumstances like this, alleged attitudes by some judges to certain sections of the community, and what appear to be increasingly vitriolic personal attacks on litigants in some civil judgements clearly show such an oath is not working, or at least is not effective in maintaining standards.

With regard to the Scottish Government's reference to the Statement of Principles of Judicial Ethics and specifically Paragraph 5 of the Statements of Principles discussing financial conflicts of interest in the context of judicial impartiality. It is simply the case there is no statistical or analytical information published or made available by the Judiciary of Scotland to document whether such declarations of conflict of interest are being made or can be independently verified to assure their authenticity. The Petitions Committee should request this information from the Lord President to consider matters further.

In response to the Scottish Government's reference to the Judiciary and Courts (Scotland) Act 2008 setting out various rules which may be invoked if a holder of any judicial office in Scotland were to be accused of not acting impartially because of their personal financial interests, the Scottish Government admits in its response these particular rules have yet to be used in this way and nor are there any means within the Act at present for independent consideration of any personal financial interests.

I respectfully submit that the findings of the Scottish Government's own Judicial Complaints Reviewer in her report which clearly demonstrates the judiciary's opposition to any meaningful external scrutiny, its resistance to any semblance of transparency or accountability and illustrate that the judiciary cannot be relied upon to properly or effectively regulate itself.

The Scottish Government goes on to state that **"In general terms, a register of interests such as that suggested by the Petitioner could be established administratively and without legislative provision. That would be a matter for the Lord President, in his capacity as Head of the Scottish judiciary."**

However, the Lord President has already indicated he will not establish a register of interests for the judiciary in Scotland, therefore the Scottish Parliament must assume its rightful responsibility to consider this petition and legislate accordingly.

Peter Cherbi

Petitioner: Petition PE1458: Register of Interests for Judges Petition