



## Briefing for the Public Petitions Committee

**Petition Number:** [PE01458](#)

**Main Petitioner:** Peter Cherbi

**Subject:** Register of Interests for members of Scotland's judiciary

Calls on the Parliament to urge the Scottish Government to create a Register of Pecuniary Interests of Judges Bill (as is currently being considered in New Zealand's Parliament) or amend present legislation to require all members of the Judiciary in Scotland to submit their interests & hospitality received to a publicly available Register of Interests.

### Background

The petition appears to be at least partly motivated by the New Zealand [Register of Pecuniary Interests of Judges Bill](#) ("the New Zealand Bill"), which is a Member's Bill introduced by a member of the New Zealand Green Party proposing a mandatory register of New Zealand judges' financial interests.

The New Zealand Bill has its origins in the resignation of a former New Zealand Supreme Court judge who was accused of misconduct for allegedly failing to disclose a large debt apparently owed to a lawyer appearing in a case before him.<sup>1</sup> The New Zealand Bill is currently being considered by the Justice and Electoral Committee of the New Zealand Parliament.

The New Zealand Law Commission has also considered the issue in an [Issues Paper](#) published earlier this year. It provides a detailed review of the pros and cons surrounding the setting up of such a register (see chapter 8), as well as a useful overview of relevant rules in the USA, England and Wales, India and South Africa.

The petitioner has also submitted a very similar [e-petition](#) to the UK Government. The e-petition closed on 25 October 2012 with 22 signatures and appears unlikely to progress further at UK level.

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<sup>1</sup> See New Zealand parliamentary speech of Dr Kennedy Graham of 10 November 2010 - <http://www.greens.org.nz/speeches/justice-bill-wilson-resigns-urgent-debate-dr-kennedy-graham> and also [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10682122](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10682122)

## Current position – Scotland

A general register of judicial financial interests does not currently exist in Scotland.

Instead, the issue of judicial financial interests currently falls under the general rules governing the Scottish judiciary – in particular:

- The judicial oath;
- the [Statement of Principles of Judicial Ethics for the Scottish Judiciary](#); and
- [the Judiciary and Courts \(Scotland\) Act 2008](#).

### *Judicial oath*

In Scotland, judges of the Court of Session and the High Court of Justiciary are required to take the judicial oath, swearing that they will do right to all manner of people without fear or favour, affection or ill-will. Broadly speaking, the common law<sup>2</sup> test of judicial impartiality is whether a fair-minded and informed observer would conclude that there was a real possibility of bias.<sup>3</sup>

### *Statement of Principles of Judicial Ethics*

The Judicial Office for Scotland, which forms part of the Scottish Court Service and provides support to the Lord President as head of the Scottish judiciary, issued a Statement of Principles of Judicial Ethics for the Scottish Judiciary (“the statement of principles”) in April 2010. The statement of principles is not intended to prescribe a code of conduct, but rather to offer guidance in the light of which judges<sup>4</sup> will make their own decisions. It is directed towards all judicial office holders within Scotland and covers various ethical matters.

The statement of principles explains that judges have a general duty to act impartially (principle 5). A judge’s financial interests are viewed as part of this obligation, and the statement of principles notes that:

*Plainly it is not acceptable for a judge to adjudicate upon any matter in which he, or she, or any members of his or her family has a pecuniary interest ... he or she should carefully consider whether any litigation depending before him or her may involve the decision of a point of law which itself may affect his or her personal interest in some different context, or that of a member of his or her family, or the interest of any*

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<sup>2</sup> The “common law” is the traditional law and the law made by the decisions of judges in individual cases

<sup>3</sup> See [Magill v. Porter Magill v. Weeks](#) (House of Lords), paragraph 103

<sup>4</sup> The statement of principles applies to: all judges of the Court of Session/High Court of Justiciary; Sheriffs Principal; Acting Sheriffs Principal; Sheriffs; part-time Sheriffs; the Chairman and other members of the Scottish Land Court; temporary judges or retired Court of Session judges; Justices of the Peace; Stipendiary Magistrates; and Judges and Members of tribunals who exercise the functions of their office wholly or mainly in Scotland (para. 2.1)

*business in which a judge holding a part-time appointment may be involved.*<sup>5</sup>

The statement of principles explains further that there will be situations where a pecuniary interest is so limited that litigants would normally not object to the judge handling the case (the example is given of a judge owning shares in a public company involved in litigation). According to the statement of principles, it would generally be reasonable for judges to disclose such interests and, unless there is an objection, to continue to hear the case.

However, the statement of principles also explains that there will be situations where a pecuniary interest (or a perceived interest) would make it inappropriate for a judge to hear a case. In such situations, judges should recuse themselves (i.e. disqualify themselves) from hearing such a case.<sup>6</sup>

### *The Judiciary and Courts (Scotland) Act 2008*

The Judiciary and Courts (Scotland) Act 2008 (“The 2008 Act”) contains various rules which would likely be of relevance if a so-called “judicial office holder” (in essence a judge, sheriff, stipendiary magistrate or justice of the peace)<sup>7</sup> were to be accused of not acting impartially due to his/her financial interests. One should note, though, that the rules do not yet appear to have been used in this context.

Section 28 of the Act gives the Lord President the power to make rules regarding the investigation of “any matter concerning the conduct of judicial office holders.” These rules – [the Complaints about the Judiciary \(Scotland\) Rules 2011](#) - came into force on 28 February 2011 and allow complaints to be made to the Judicial Office of the Scottish Court Service.

Section 35 of the 2008 Act also provides a mechanism whereby the First Minister can set up a tribunal to investigate whether a person holding a judicial office is “unfit to hold the office by reason of inability, neglect of duty or misbehaviour.” The offices covered by this section are the Lord President, the Lord Justice Clerk, Court of Session Judges, the Chairman of the Scottish Land Court and temporary judges.<sup>8</sup> The tribunal is required to report on its conclusions to the First Minister who must lay such a report before the Scottish Parliament.<sup>9</sup> If the Scottish Parliament agrees to such a motion, the First Minister can recommend removal from office to Her Majesty.<sup>10</sup>

Similar provisions exist in the 2008 Act for investigating the fitness for office of sheriffs principal, sheriffs and part-time sheriffs<sup>11</sup> as well as justices of the

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<sup>5</sup> See para. 5.2

<sup>6</sup> See para. 5.3

<sup>7</sup> See section 41(2) of the 2008 Act for a full definition of “judicial office holder”

<sup>8</sup> Section 35(2) of the 2008 Act

<sup>9</sup> Section 38 of the 2008 Act

<sup>10</sup> Sections 95(6), (7) and (10) of the Scotland Act 1998

<sup>11</sup> Sections 40 of the 2008 Act

peace.<sup>12</sup> The procedures for removal from office are, however, less onerous than for the judges mentioned above.

## Other jurisdictions

### *England & Wales/UK*

There is currently no general register of judges' pecuniary interests in England & Wales.

Prior to the creation of the UK Supreme Court in 2009, the highest court in the UK was the Appellate Committee of the House of Lords. The judges in the House of Lords, known as the Lords of Appeal in Ordinary, were, at least officially, members of the House of Lords in a legislative capacity, and were therefore also bound by the House of Lords' Assets Register which required members' financial interests to be declared.

When the House of Lords' appellate jurisdiction was terminated and the Supreme Court was set up, the new Supreme Court judges decided not to maintain the existing financial register and instead to draw up a [Code of Judicial Conduct](#) covering various ethical issues (including judges' financial interests). The Supreme Court's arguments against continuing with a financial register were that: (i) it would not be possible to identify a comprehensive list of all interests, with the result that any list could be misleading; and (ii) the existing ethical rules are an appropriate remedy.<sup>13</sup>

Certain UK regulatory bodies do require financial interests to be disclosed - for example Ofcom<sup>14</sup> and the Financial Services Authority whose Code of Conduct requires staff to disclose shareholdings/other investments.<sup>15</sup>

### *USA*

In the USA, the Ethics in Government Act 1978 requires senior public officials, including judicial officials, (and their spouses and dependent children) to file detailed public reports of their finances.<sup>16</sup> It is possible to view these filings online.<sup>17</sup> Similar rules exist at state level, for example in California.<sup>18</sup> The rules provide for a high level of transparency. However critics argue that the US law is too intrusive pointing to: privacy and security risks; the impact on

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<sup>12</sup> Sections 41 of the 2008 Act and also Section 71 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007

<sup>13</sup> See <http://www.supremecourt.gov.uk/about/interests-and-expenses.html>

<sup>14</sup> See <http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board-2/members/register-of-disclosable-interests/>

<sup>15</sup> See [FSA Code of Conduct](#), para. 3.6(c). This information is held on a confidential basis by the FSA Ethics Officer.

<sup>16</sup> See <http://www.oge.gov/Financial-Disclosure/Public-Financial-Disclosure-278/Public-Financial-Disclosure/>

<sup>17</sup> See [www.judicialwatch.org/judicial-financial-disclosure](http://www.judicialwatch.org/judicial-financial-disclosure)

<sup>18</sup> See <http://www.kcet.org/news/balotbrief/judicial-branch/fppc-calif-judges-must-publish-financial-interests-but-not-personal-info.html>

judicial independence; the potential for such rules to inhibit lawyers from applying for judicial office; and the potential regulatory burden.<sup>19</sup>

### **Scottish Government Action**

No action in this area is planned.

### **Scottish Parliament Action**

[PE306](#) (2000) asked judges to declare membership of organisations such as the Freemasons. SPICe is unaware of any other Scottish Parliament activity in this area.

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<sup>19</sup> For details see the [Issues Paper](#) of the New Zealand Law Commission at page 13. See Appendix C for an example of a financial disclosure report by a US judge