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Margaret Mitchell MSP  
Convenor  
Justice Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP

7 February 2020

Dear Margaret,

### **Public Petition PE 1458: Register of interests for members of Scotland's judiciary**

Thank you for your letter of 22 November asking me to review the evidence you heard on 19 November and the previous evidence taken regarding this petition and to then set out in detail why I do not think it is necessary to establish a register.

### **The evidence of 19 November**

#### Written Evidence

On the 19 November, the Committee considered written evidence in the form of a letter from the petitioner. I think it is important to address a number of issues with the evidence contained in his letter. The Lord President does not appoint judges or sheriffs to the bench. Judicial appointments are made by the Scottish Ministers on the recommendation of the Judicial Appointments Board for Scotland (JABS). JABS are an independent statutory body and carry out a rigorous recruitment process which involves written application, tests, interview, references and background checks carried out before recommendations are made based on merit from candidates who meet statutory criteria.

The petitioner highlights the press coverage of two former Scottish judges sitting in other jurisdictions. One of these judges was retired, the other was still a temporary judge at the relevant time. Once a member of the judiciary has retired, the individual would not be included in any proposed register of interests. Temporary judges are not full time salaried judiciary. These are judges who can be called on to cover gaps in the court rota and therefore not covered by the restrictions on other employment which full time judiciary are. Whilst a register of interests would have disclosed this additional work, it would not have prevented it being carried out.

Since the Petition was originally introduced to the Parliament, a register of recusals was introduced in 2014 and, I understand, is being used by both the judiciary and those appearing

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in court. From 1 February 2018, the register was extended to also include members of the Scottish Tribunals. The reasons for recusal tend to relate to personal knowledge of a litigant or witness or previous involvement in another relevant case. The register of recusals does not appear to have highlighted the sort of problems with conflicts of interest of the nature that the petitioner is concerned about. For clarification also, there are 277 justices of the peace, rather than 450.

The proposed reforms to the law of corroboration in Scotland, which the petitioner refers to, were aimed at addressing the difficulty in prosecuting certain types of criminal cases. These proposals were based on detailed research and analysis conducted by Lord Carloway and set out in a published report. It is difficult to see the relevance of this as evidence in support of a register of judicial interests.

The petitioner cites extensive written submissions of evidence in relation to this petition and the Committee have asked that I review all previous evidence. In doing so, I can see that almost half of those submissions are from the petitioner and over one third are either correspondents declining to make a submission or from the Scottish Government, the Scottish Courts and Tribunals Service or the Lord President and present evidence which is not in support of the register. The petitioner's submissions do not always raise new evidence and cover some matters that would be outwith the scope of this petition.

### Oral evidence

In terms of the oral evidence taken, a considerable part of this discussion focussed on the system for complaints about members of the judiciary. I note the point raised that Scotland differs from other jurisdictions in that upheld complaints are not published. I agree that this is a matter that consideration could be given to as it is transparent and consistent with the complaint process for many professions, however complaints against the judiciary are the responsibility of the Lord President and there may be valid reasons why complaints are not published. I also note the distinction that was explained by Ms Ali between judicial decisions and service complaints about the judiciary. This was followed by discussion on independence and accountability.

I have also considered the written and oral submissions from Professor Alan Paterson, the academic who has contributed views on this petition. I note that Professor Paterson told the Public Petitions Committee that he had not reached a concluded opinion on a register of interests for the Scottish judiciary. He explains that this question comes back to the role of the judiciary in a democracy and there is a need to balance judicial independence and accountability. Professor Paterson told the Public Petitions Committee that he considers transparency as part of accountability. I would agree with this point and I'm of the view that the judiciary's decision making is transparent and subject to appeal.

### International factors

At the time the Petition was lodged, and in a number of the petitioner's subsequent written submissions, reference is made to the New Zealand Parliament's consideration of a judicial register of interests. By a large majority, the New Zealand Parliament voted down a Bill to create a register after considering the whole issue and its difficulties. Few analogous jurisdictions to Scotland have legislated for a judicial register of interests, and those that have did so in response to evidence of challenges specific to those jurisdictions. South Africa, for example, created one as part of cementing its new democracy.

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The Council of Europe Group of States Against Corruption (GRECO) is an independent international body tasked with monitoring and advancing anti-corruption measures in countries across the world. It has examined the need for a judicial register of interests twice in Scotland and the most recent report of the Fourth Evaluation Round concluded that there was no evidence of corruption in relation to the judiciary in Scotland or of judicial decisions being influenced inappropriately. They do not recommend the introduction of an asset declaration scheme.

### Ways to introduce a scheme

Your letter also asked for the Scottish Government's view of what would be involved in establishing such a register and whether this would require primary legislation or could be achieved by some other means.

At present, and in line with the requirement to uphold the continued independence of the judiciary, set out in section 1 of the Judiciary and Courts (Scotland) Act 2008, Scottish Ministers do not have existing powers to establish such a register, whether voluntary or mandatory. Accordingly primary legislation would be required to implement any such register. I would caution however that if such a register were to be established by way of legislation, rather than through the powers of the Lord President, this may be perceived as undermining the principle of judicial independence and the separation of powers between the judiciary and other branches of government.

### Conclusion

My predecessors set out in detail in earlier correspondence the safeguards in place. These safeguards are the judicial oath, the statement of principles of judicial ethics and the various rules made under the Judiciary and Courts (Scotland) Act 2008 which concern complaints about the judiciary and judicial conduct. I would draw particular attention to the statement of principles of judicial ethics. This is some thirty five pages long and sets out clearly the standards judicial office holders are expected to meet. Breach of the ethics can result in serious consequences for a judicial office holder. Having considered the evidence, I share the views of both of my predecessors that there are sufficient safeguards in place to ensure the impartiality of the judiciary.

As mentioned previously, in the time since this petition was lodged with the Parliament, further measures have been introduced for, and by, the judiciary; such as the register of recusals and publication of judicial expenses and overseas travel. I believe that these measures have increased the transparency of the judiciary.

I am also mindful of the statutory requirement within the Judiciary and Courts (Scotland) Act 2008, that Scottish Ministers and Members of the Scottish Parliament must uphold the continued independence of the judiciary.

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I have given further consideration to the matter and have considered the evidence before the Justice Committee. I remain of the view that it is not necessary to establish a register of interests. I hope the detail of this letter explains my reasons for that.



**HUMZA YOUSAF**

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