

PE1458/V

Petitioner Letter of 5 February 2014

Petition PE1458 Register of Interests for Scotland's Judiciary

Response to note of Private meeting with Lord President Lord Gill, Stephen Humphreys Executive Director of the Judicial Office for Scotland, Convener David Stewart MSP, Deputy Convener Chic Brodie MSP, Anne Peat clerk

Note: If a judge recuses him or herself it is recorded in the minute of court proceedings, part of the formal court process. No tally is kept of figures. Lord Gill had recused himself twice. Any interested person could make an FOI request with respect to a particular judicial office holder to seek information on that person's recusal record

If a judge recuses him or herself in court it may well be the case in some instances it is recorded in the minute of proceedings. To date however the Lord President has not provided any examples of these to the full Committee nor has he answered any questions on how this works or what happens when it transpires no recusal has been made.

It does appear judges frequently do not recuse themselves in cases or declare their interests. We already have examples reported in the media and in submissions made to the PPC, particularly regarding cases involving appeals against criminal convictions.

It is also the case that frequently, legal agents refuse to even raise a recusal issue with a judge. Clearly a register of interests with statutory obligations, oversight and independent authority will help put an end to these issues and problems faced by court users and create an information database to avoid or at least lessen instances of failures to recuse in the future.

Freedom of Information requests for recusals is not very practical and does not create a central register of interests for members of the judiciary to which this petition is seeking. It is well known FOI requests are sometimes ignored, sometimes not always responded to fully, and frequently refused when the public body in receipt of the FOI request claims that as it costs £600 or more to search a database, no information will be returned.

A fully published and updated register of interests will be a superior and centralised publicly available database of information, enabling information on recusals and interests to be used to prevent a conflict of interest occurring before it does rather than revisit a situation after months of wrangling over FOI requests, reviews, and a possible appeal to the Scottish Information Commissioner and then the inevitable journey back to court if a recusal is in dispute.

Note says: **No need for a register of interests as there are currently 3 safeguards in place which are deemed sufficient as set out in the letter of February 2013. Lord Gill has confidence in the integrity of judges and sheriffs.**

Much work went in to the letter of Feb and it was felt by Lord Gill that this was the best help and explanation for his stance that could be provided.

The three safeguards appear to have already failed, therefore it is time to move on.

Lord Gill has confidence in his colleagues. However, I am talking about the public, transparency and declaring interests in a register.

Lord Gill's letter of February to the PPC put forward an EU report written itself by judges who said they did not need a register of interests. The Lord President also said **"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"**

There is no evidence to suggest any of the Lord President's claims regarding registers of interest have adversely affected anyone else in public life who are bound by registers of interest. Indeed, the Scottish Court Service itself operates a register of interests as does the Crown Office and neither have encountered any of the difficulties the Lord President included in his letter of February 2013.

Note says: **A Register of Interests would not be workable as it could not be predicted what might arise in a court case and it could not be anticipated what might need to be recorded. Not practical to try to think of every situation that might arise**

The "unworkable" myth does not appear to prevent registers of interest operating in all other walks of life.

I would emphasise I am not asking the Lord President and his colleagues to predict anything, as "predicting" or "anticipating" in terms of what may or may not need to be declared implies that interests or information may be withheld if the member of the judiciary feels it ought not to be declared.

The petition is asking for a complete and detailed register of judicial interests so that members of the judiciary themselves, and others, including the public, court users, legal practitioners etc can review the information within it and then make a determination whether those interests should be raised with the judge regarding recusal or conflict of interest.

This would create a mechanism which is open, properly recorded and archived for future reference, and which does not as currently happens, lead litigants into conflict with their own legal teams when solicitors are so afraid for their own career they will not question the judge's position by raising a recusal issue or conflict of interest. It happens. It shouldn't. A register will address these failings of the current system.

Note says: **The petition seeks a register of pecuniary interests. This would not address the concerns, for example about undeclared family relationships, and would not achieve the purpose sought as problems cited would not be caught by such a register**

I view my petition as asking for a register of judicial interests to include this kind information and have previously included links to a report from New Zealand where it was suggested. There is also the question of criminal convictions of judges which made headlines in the media, clearly something which I feel is required to be put on a register of interests.

Some of us are very much aware judges have family and business relationships throughout the legal profession, other professions and industries which are connected with the justice system and in the courts.

Clearly such a register should include such information otherwise what use would it be. I have suggested this previously in my submissions. I note Deputy Convener Chic Brodie argued for the inclusion of such information at an earlier PPC hearing on 5 March 2013:

Chic Brodie: **I know that the petitioner called for a register of judges' pecuniary interests. However, I am not sure that the investigation should be limited just to that. Perhaps we should consider the issue of a register of judges' total interests.**

I support Mr Brodie on this point as I believe registers of interest should encompass much more than just financial or pecuniary interests, as most registers of interest do.

Note says: **The legislation being proposed in New Zealand was in response to a particular issue that would not have been revealed by having a register of pecuniary interests**

New Zealand learned the hard way and are in the process of creating a register of judicial interests or at the very least are trying to bring in a system of recusals more detailed than they previously had, due to a case involving a judge and possibly additional cases which have been reported in their media. In any case, the petition seeks a wider register of interests than simply pecuniary, which may well have revealed the position of the judge in the New Zealand case.

Note says; **If it was practicable and helpful the courts admin could be asked to investigate whether its software could be adapted to provide aggregated information on recusals**

The SCS website is not user friendly. Information is often difficult to come by, searches often turn up blanks even when the information is staring viewers in the face.

I do not think attempting to modify the already lumbering SCS website will assist the public, litigants, court users or even legal practitioners in seeking out or confirming whether information they may hold may constitute a recusal issue for a judge.

Rather a full, separate, regularly updated register of interests governed by rules and obligations overseen and administered by an independent body completely devolved from and not held in consultation with the Lord President.

Note says; **Recusal does not cover monetary considerations but relationships**

Recusals should have to cover both, and also monetary, positions of wealth, earnings business, and other relationships. If there is a judge with investments in a bank and the bank or one of its subsidiaries or partner firms is before him in an action, declarations of interest must be required, and a recusal may well be necessary and so on.

Note says: **3 judges sit on the Board of SCS. The SCS annual report notes the offices and interests held by the Board members.**

Actually there are 7 members of the judiciary who sit on the Board of the SCS as I have already pointed this out and provided the copies of the declarations to the PPC in November last year. There are in fact three Court of Session Senators, one Sheriff Principal, two Sheriffs, and an Honorary Sheriff/JP who sit on the SCS Board and have declared "some" interests. If a single register of judicial interests were to be created, it would exist for the entire judiciary, not only senators of the court of session (judges).

The SCS board declarations were apparently referred to as new information in the verbal report of the Convener & Deputy at the PPC meeting of last week and it was added we are to expect more of an understanding regarding these 'declarations' in the forthcoming letter from the Lord President.

The declarations appear to be of a narrow focus and do not reflect the level of detail the petition seeks to be applied in a register of judicial interests.

Whatever the points the Lord President wishes to present regarding declaring interests as a board member in comparison to obligations in court regarding declarations of interest (which one would think should be prioritised as a matter of natural justice for those in court), the fact is a register of interests would clear all this up with a single requirement and single source for the public, and legal practitioners to turn to when such information is required, rather than what appear to be varying rules on what interests are to be declared in what venue and when.

Given the Lord President has claimed a register of interest for the judiciary is unworkable, I suggest the Petitions Committee call in the Scottish Court Service to attend an evidence session to discuss the operation of SCS staff register of interests which has existed for a number of years without any difficulty. As the Crown Office also operate a similar register without any of the difficulties claimed by the Lord President, Committee members may also benefit from the Crown Office also attending an evidence session.

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