



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 2 March 2021**

**Session 5**



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Pàrlamaid na h-Alba

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**JUSTICE COMMITTEE**  
**9<sup>th</sup> Meeting 2021, Session 5**

**CONVENER**

\*Adam Tomkins (Glasgow) (Con)

**DEPUTY CONVENER**

\*Rona Mackay (Strathkelvin and Bearsden) (SNP)

**COMMITTEE MEMBERS**

\*Annabelle Ewing (Cowdenbeath) (SNP)  
\*John Finnie (Highlands and Islands) (Green)  
\*Rhoda Grant (Highlands and Islands) (Lab)  
\*Liam Kerr (North East Scotland) (Con)  
\*Fulton MacGregor (Coatbridge and Chryston) (SNP)  
\*Liam McArthur (Orkney Islands) (LD)  
\*Shona Robison (Dundee City East) (SNP)

\*attended

**LOCATION**

Virtual Meeting



# Scottish Parliament

## Justice Committee

*Tuesday 2 March 2021*

*[The Convener opened the meeting at 10:30]*

### Petitions

#### Justice for Megrahi (PE1370)

**The Convener (Adam Tomkins):** Good morning, and welcome to the Justice Committee's ninth meeting in 2021. Our first agenda item is consideration of two public petitions that remain open as we approach the end of the parliamentary session. I refer members to the relevant papers.

PE1370, on the Lockerbie inquiry, was lodged by Dr Jim Swire, Professor Robert Black QC, Robert Forrester, Father Patrick Keegans and Iain McKie, on behalf of Justice for Megrahi. The petition calls on the Scottish Parliament to urge the Scottish Government to open an independent inquiry into the 2001 conviction of Abdelbaset al-Megrahi for the bombing of Pan Am flight 103 in December 1988. We have received some additional submissions from the petitioners and they have been circulated.

The committee has had the petition for a long time and it was sisted until such time as the legal process in our courts had been completed. That is now the case, although I read in the newspapers that the petitioners may be taking the case to the United Kingdom Supreme Court.

I will open the floor to members for their views. We need to decide whether we are minded to close the petition or keep it open for session 6. If we take the latter course, we need to justify why we want to do that. I will pause there and invite comments from members.

**John Finnie (Highlands and Islands) (Green):** Thank you, convener; you have correctly laid out the position on the petition. I have been on the Justice Committee since 2011 and I think that I am the only member who has been on the committee throughout the time that the petition has been referred to the committee. We would all agree that the petitions system is one of the strengths of our Parliament, but this is an example of where there might be a measure of frustration in some quarters, and that frustration might be for different reasons. I know that a lot of people simply want the issue to go away.

We have to be clear as a committee on what we are being asked. The petition calls on the Scottish Parliament to urge the Scottish Government to do

something. The Scottish Parliament has determined that that falls to the Justice Committee. We know that the petitioners would urge the Scottish Government to hold an independent inquiry and we know that it would be competent for the Scottish ministers to hold such an inquiry, but we also know that that could not happen at this time.

In their submission, the petitioners say that the petition has been kept open by the committee to allow various developments in relation to the Lockerbie case to be monitored, and that is entirely the case. I have spoken in similar terms on each of the occasions on which the committee has discussed the petition but, for a number of reasons, it is for others to articulate whether they want the issue disposed of.

We need to be clear about what message we would be sending—that is something that I will repeat on other committees. As we come to the end of the session, there should be an analysis of the position. We have not discharged what is being asked of us as a committee—that is not a criticism; it is a fact—because we are not in a position to do so and we have not been in a position to do so until now, because of a number of factors in relation to the legal process.

The convener alludes to press reports of an appeal to the UK Supreme Court. I am not party to whether that is the case, but I guess that it is likely. That is only one factor that we need to consider, because there are a number of other live matters. There are live criminal inquiries by the Scottish, UK and US authorities. There is the issue of the disclosure of information by the UK Government.

I get that, in administrative terms, it would be nice to tidy things up by closing the petition but, for all the reasons that I have said, it is a live matter, and we have not been in a position to do what the petition calls for. If we were to close the petition, what would happen? Would the interest of all those distinguished petitioners go away? No, it would not—it remains a live issue. Are we saying that, for the sake of our processes, we will tidy it away and that it would be for the petitioners to come back in future? That does not seem respectful of the petitions process.

For all those reasons and many more—I acknowledge that it is time for me to be quiet now—I urge members to reflect on the fact that this is unfinished business. It does not matter what people's views are on the innocence or otherwise of Mr al-Megrahi. I happen to think that the man was innocent, but that is immaterial in relation to on-going matters, of which, as I have highlighted, there are several. For all those reasons, I plead with colleagues to keep the petition open.

**The Convener:** That is helpful. For the record, the petition was first lodged in November 2010, so it might predate even John Finnie's membership, if he has been a member of the committee since 2011. More importantly, it needs to be pointed out that neither the committee nor the Parliament has the power to establish a public inquiry, although the committee could recommend that a public inquiry be established, and individual MSPs are free to lodge and/or support motions that call for a public inquiry to be established. Therefore, during today's discussion, one thing that the committee might helpfully be able to do is state whether a public inquiry should be established.

Finally, on a point of detail, closing a petition does not prevent petitioners from submitting a similar petition after a period of one year. However, I agree with Mr Finnie about the importance of petitions in the Scottish Parliament. Closing a petition with the expectation that a petition will re-emerge after a year, or an invitation for that to happen, is not an appropriate way to proceed. That is enough from me.

**Annabelle Ewing (Cowdenbeath) (SNP):** I read the notes that have been prepared by the clerk and had some thoughts, as a relatively new member of the committee, although I have some background in justice matters. It seems that, in previous years, the petition was kept open specifically to allow for the outcome of the Scottish Criminal Cases Review Commission work, for example. Therefore, having heard that an appeal to the UK Supreme Court is possibly pending, it would seem inconsistent that we would take any action other than keeping the petition open, which is what the committee did when there was to be consideration by the Scottish Criminal Cases Review Commission. Consistency is always useful, wherever possible, and I am therefore minded to support keeping the petition open.

I do not think that I would go as far as calling for things, because I do not think that we are in a position to do that. It seems to me that the petition has not been fully considered. It would be for the next committee to call for something, in the event that it actually considers the petition. However, I support keeping the petition open.

**The Convener:** That is helpful.

**Rona Mackay (Strathkelvin and Bearsden) (SNP):** I do not want to repeat everything that my colleagues have said—I agree with them. I fully support keeping the petition open. It would not make any sense for us to close it at this stage. John Finnie is correct that we have always been in a position where we could not actually do anything, and it would definitely send out the wrong message if we closed it.

**The Convener:** That is helpful.

**Liam McArthur (Orkney Islands) (LD):** Much like my colleagues, I think that it would not necessarily do the reputation of the committee, the Parliament or the petitions process much good if we were to close the petition for administrative neatness because we are coming up to the end of a session, when the reason for sisting it last time remains extant. It is fair to assume that there is at least the possibility—it is a very real possibility—of an appeal to the Supreme Court.

Therefore, I am minded to support the view of colleagues that we should keep the petition open until the next session so that our successor committee can take a view on it—if for no other reason than that John Finnie, once he stands down from Parliament, might be minded to lodge a petition of his own, which he would not need to wait 12 months to do. We can spare our successor committee that embarrassment.

**The Convener:** Indeed. I do not think that I should comment on that.

**Rhoda Grant (Highlands and Islands) (Lab):** Can I ask what it is possible for the Parliament to do about the petition, other than call for a public inquiry, which we cannot do while there are legal proceedings going on? I understand that people are uncomfortable with the whole case but, if we cannot do anything, keeping the petition open does not help the petitioners—it gives them false hope. I am keen to know what we can do once the legal proceedings have finished, other than call for a public inquiry.

**The Convener:** As I understand it—I am happy to be corrected if I am wrong—the petition calls on the Scottish Parliament to urge the Scottish Government to open an independent inquiry. I am not sure that much is being asked of us at this point, short of keeping that matter alive. As I understand it, the question is whether we want to keep that matter alive—in other words, keep the option of an inquiry on the table—or whether we want to close the petition, albeit in the expectation that a similar petition would be lodged in the next session after a year had elapsed. However, I am getting a very clear steer from the committee that it does not want to close the petition. The committee has a range of reasons for wanting to keep the petition alive and on the table, which, frankly, I think are good reasons.

As I said, the petition calls on the Scottish Parliament to urge the Government to open an inquiry. Neither the committee nor the Parliament can establish an inquiry—that is a matter that is in the hands of ministers. However, the committee, individual MSPs and the Parliament—if it were minded to do so—could call on the Government to act in that way. I do not know whether that answers your question, Rhoda.

**Rhoda Grant:** Yes, it does—thank you.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** I will be brief. I run the risk of repeating what has already been said, although I think that I should put my view on record, as someone who has been a member of the committee throughout the session, apart from for a very short period.

John Finnie summed up the situation well. The petition is one on which we have not been able to take any definitive action, and I think that we would be doing the petitioners a disservice if we were to close it at this stage simply because we are coming to the end of the parliamentary session. We probably would not have had such a long discussion if the election had been next year, say. I think that there could be scope for our successor committee to do more with the petition, and I will vote for us to keep it open.

**The Convener:** I do not think that we will need to vote to keep it open, because I have not heard anyone dissenting from that view.

To summarise the position, there has been a very clear steer from every committee member who has spoken on the petition that it should remain open for all of the reasons that will be recorded in the *Official Report* of this morning's meeting. I am grateful to members for their consideration of the petition. The committee's decision is not to close the petition at this time.

### Judiciary (Register of Interests) (PE1458)

10:45

**The Convener:** The second of the petitions before us is PE1458, which concerns a register of judicial interests. The petition, from Peter Cherbi, calls on the Scottish Parliament to urge the Scottish Government to create a register of pecuniary interests of judges bill or to amend the present legislation to require all members of the judiciary in Scotland to submit their interests and information on any hospitality received to a publicly available register of interests. I refer members to the relevant papers, which include submissions from supporters of the petition.

As with the previous petition, the committee has had PE1458 before it for a long time—the petition was lodged in December 2012. The last time that the committee considered the petition, it agreed to seek further information on other potential conflicts of interest relating to key stakeholders in the Scottish judicial system and to hold a round-table session on the matter with constitutional and academic witnesses. I am afraid that the pressures of competing work have meant that we have not been able to organise a round-table event on the subject, so that remains undone.

I open the discussion to members. As with the previous petition, we need to decide whether to close the petition or to keep it open for session 6. If we take the latter course, we need to justify our decision.

**Annabelle Ewing:** I am mindful of the fact that I should probably have waited for my colleagues to indicate that they wished to speak first, because that might have been more appropriate, given that I am a newish member of the committee. In any event, I have read the clerk's note and have been peripherally aware of the petition over the course of several years.

I cite a few points. First, as far as I can see, the statement of principles of judicial ethics is a comprehensive set of requirements. The idea that there is nothing in place is a fallacy. Secondly, I note that additional safeguards have been put in place during the time that the petition has been open. I cite the register of recusals and the publication of judicial expenses and overseas travel. Thirdly, and most importantly, I was struck by the letter from the Lord President and the key point about the need for the independence of the judiciary, which is not comparable to any other profession. The independence of the judiciary of the country is a fundamental tenet of our laws and our society. I agree with the Lord President on those matters, so I do not support the continuation of the petition.

**The Convener:** Thank you, Annabelle. The *Official Report* will not show this, but I was nodding vigorously as you commented on the fundamental importance of the independence of the judiciary as a tenet of the separation of powers. That is the principle that should be front and centre when we consider questions such as this one.

For a register of judicial interests to be created, either the Lord President would need to set that up or Parliament would need to legislate to do so. As Annabelle Ewing has just said, the Lord President has said that he does not see the need for such a register. That is also the view of the current Scottish Government, which has said that it does not support a register.

**Liam Kerr (North East Scotland) (Con):** For complete transparency, I make the usual declaration that I am a member of the Law Society of Scotland.

I listened carefully to Annabelle Ewing and the convener, who spoke very persuasively. It is an interesting debate. I have not, as yet, heard a convincing argument against the proposal. I think that there is something in what Annabelle Ewing and the convener said, but I need to hear more. Some of the recent debates that the convener and

I have been involved in give me pause for thought about the petition.

The convener prefaced his comments by saying that the committee was previously interested in obtaining more information on the issue, and that we talked about having a round-table session. I want to hear and learn more about the issue before I decide what I think about a register of interests. For that reason, I am inclined to think that we should keep the petition open with a view to me—or whoever has the privilege of coming back and being on the committee—looking at the issue again in the cold light of day of the new session of Parliament.

**The Convener:** Annabelle Ewing has asked me to remind members that, like Liam Kerr, she is a member of the Law Society of Scotland, although, again, like Liam Kerr, she has never been—not yet, at least—on the bench. Thank you, Annabelle.

**Liam McArthur:** I have no such declaration to make. I agree whole-heartedly with what you said, convener, and with what Annabelle Ewing said in opening the debate. It is indisputable that steps have been taken to address at least some of the principles of the concerns that were raised in the petition.

The point where I am slightly anxious—here, I refer back to Annabelle Ewing’s comments on the earlier petition about the value and benefits of consistency—is that, having sisted the petition previously on the basis that the committee would hold a round-table session to solicit wider views from stakeholders, but then not having done so, it would be difficult to make an argument for closing the petition. Again, that argument seems to be for administrative neatness. We made a commitment as a committee. If, after the election, the incoming committee does not feel that it needs to be beholden to that commitment, that is a decision for it, but it would be passing strange for us to abandon, simply because of the prospect of an election, the conclusion that we reached when we considered the petition previously.

On that basis, as with the earlier petition, I am minded to suggest that we keep this one open until the next session.

**Rona Mackay:** I was on the Public Petitions Committee when the petition started its journey before it came to the Justice Committee, and I am supportive of it—I am on record as saying that. However, given that the Lord President and the cabinet secretary have made their views clear on it several times, at this stage, we should close it, with the knowledge that the petitioner can bring it back in the next session of Parliament if he wants to carry on with it.

I do not think that that would be inconsistent. The petition is different from the previous one,

which we decided to keep open, because the circumstances are different. At this stage, my preference is to close the petition, and the petitioner can always bring it back. However, I am sympathetic to the subject.

**John Finnie:** I will follow on from the convener’s comments about the separation of powers. Of course, in any liberal democracy, it is absolutely right that we have an independent judiciary. I accept that. However, we are talking about one individual—the Lord President.

I do not know that individual and I have no axe to grind one way or another, but I will paraphrase the previous exchanges with him. He said, “No, I don’t want it.” The committee decided to write to him again, and he said, “I’ve already told you that I don’t want it, and I’m telling you again that I don’t want it.” There were discussions about his coming to give evidence and even about whether it was appropriate to ask him to come to give evidence. He said, “Well, I could come and give evidence but, as I’ve told you and I’ll tell you for a third time, I don’t want it.” To be perfectly honest, that does not seem to me like a functioning liberal democracy.

What is there to fear from disclosing the information that is being asked for? Examples of other jurisdictions have been given where that is done without a problem. Should we be surprised that a Government of whatever persuasion wants to be in accord with the Lord President and does not want to dissent from the Lord President’s position? Perhaps not.

I am not persuaded by either of those arguments, but there is a more compelling reason why we must keep the petition open. I am supportive of the intention of the petition. As always, the devil will be in the detail, but the detail that has been shared with us is that we are being urged to commission the work that we had already decided on. It is very clearly unfinished work for the committee. We undertook to do things in relation to the petition; we have not done those. For that reason, we must pass it on to our successor committee to pick up on that work, and it will be for it to decide how to proceed thereafter. The petition should be kept open.

**Shona Robison (Dundee City East) (SNP):** I do not have strong views on the petition. I have some sympathy with Annabelle Ewing’s comments about the additional safeguards, and I think that we all agree on the independence of the judiciary. However, I also have some sympathy with what John Finnie has said, in that we should be consistent—if we feel that there is some unfinished business for our successor committee to take forward, even if that is just the holding of a round-table session and the gathering of further evidence, it might be in a better position to make a



definitive call on whether there is more that should be done here.

I hope that we can reach a consensus. I would be content for the petition to be included in our legacy report as something for our successor committee to consider further.

**Rhoda Grant:** I agree with what John Finnie said and proposed.

**The Convener:** I am grateful to colleagues for what has been a very helpful debate. My sense of the discussion is that members of the committee do not feel as strongly about this petition as they did about the previous one. Some modest and minor disagreement has been expressed about whether to keep the petition open or to close it. However, I think that the balance of opinion is in favour of keeping it open, if only because there is a sense of unfinished business. However unfinished the business is, though, I think that everybody who has expressed a view on the matter is clearly of the view that that business needs to be transacted subject to and in the light of the fundamentally important principles of the separation of powers and the independence of the judiciary.

I think that the body of opinion is that the petition should not be closed at the moment, but that our successor committee in session 6 should be invited to consider the matter, if only to hear views and perhaps to explore a little why the Lord President is opposed—or why the judiciary, who are represented by the Lord President, are opposed—to the creation of such a register.

I will close by saying that just because it is appropriate for elected members in the legislature to have a register of interests, that does not mean that it is appropriate for members of the judiciary to have a similar register of interests. The function of the separation of powers is to treat different branches of government differently, according to their institutional function.

I hope that that is a fair summary—albeit with a gloss from me at the end—of the committee's decision.

## Subordinate Legislation

### Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/56)

10:59

**The Convener:** The next item of business is consideration of a negative instrument. I refer members to the relevant paper in our pack, which is a note by the clerk, and to a letter from the Law Society of Scotland, which is among the papers. Annabelle Ewing and Liam Kerr do not need to repeat their declarations of interest.

Do members have any comments on the instrument?

11:00

**John Finnie:** I note the Law Society of Scotland's comments in relation to the instrument. I have a general comment. Almost every week, we seem to refer to legal aid and the challenges around it. For a number of years, the Law Society has consistently expressed concerns about the diminution in relative value of legal aid in monetary terms to the profession. This is maybe for another day—you will correct me if it is, convener—but I hope that the issue will be reflected in our legacy report. That is a general comment rather than a specific comment on the instrument.

**The Convener:** Thank you—I would like that to be reflected in the legacy report. I have not been a member of the Justice Committee for long, but I recall that the costs of civil justice was one issue that we discussed in the context of the Defamation and Malicious Publication (Scotland) Bill, which reaches stage 3 this afternoon. Of course, legal aid applies to civil justice and to criminal justice. You are absolutely right that the committee has referred to the issue on numerous occasions, even in the short time for which I have been the convener. Speaking for myself, I certainly want that on-going interest in and concern about the costs of litigation and of the justice system generally to be reflected in the legacy report.

**Liam Kerr:** I fear that John Finnie is not going to enjoy this, but I fully agree with his comments. Obviously, I support the regulations.

My comment is perhaps more for the legacy report or for general questions to the cabinet secretary. It feels as though the measure is an acknowledgement that legal aid is short of where it needs to be, but I would like that to be an explicit acknowledgement. I would like to understand whether the 5 per cent increase is the result of a detailed assessment that shows that legal aid is

about 5 per cent short of where it needs to be to be sustainable and reasonable, or whether it is the result of putting a finger in the air and saying that 5 per cent feels about right. More detail is needed on that.

The Law Society's letter is useful and asks the pertinent questions: what is the Government doing to ensure that the system is kept under review and that legal aid keeps pace with where it needs to be, and what is the Government doing to create a mechanism to ensure that, at the very least, legal aid increases with inflation? That would ensure that, if a 5 per cent increase is the right level now, it at least keeps going at the right level.

**Annabelle Ewing:** I have two points. First, I welcome the 5 per cent uplift, as the Law Society has done in its letter. I am sure that it will be very welcome to legal aid practitioners across the land.

Secondly, reference has been made to the legacy report. In that report, it will be important to seek to secure further clarity on specifically what the Government plans to do further to the comprehensive legal aid review that was carried out by Martyn Evans. I think that the Scottish Government's initial response to that was some time last year. Obviously, things have got caught up with the coronavirus pandemic, but I think that there are a number of outstanding issues that need to be taken forward.

**Liam McArthur:** I will add to what colleagues have said. I agree with the points that have been made, and I think that there is a broad consensus that the move, which is a result of the review, is welcome. Many of us see it as the first stage in what we hope will be further refinements to the scheme.

I simply want to note the particular issue in relation to legal aid in the island communities that I represent, where there is a real risk that, without change, we could see legal aid deserts. Such deserts are likely to be in island and rural communities. That needs specific attention, along with the issues that the Law Society and others have raised. I support the point that the convener and others have made that we should reflect the issue in some way in our legacy report for the incoming committee in the next session of Parliament.

**The Convener:** It has been a helpful debate. A number of members have made comments about the issues pertaining to legal aid generally, although not so much about the regulations as such.

Are members content not to make any formal comments to Parliament on the specific instrument but for the comments that have been made pertaining to legal aid in a more general manner to be reported in a letter from me to Ash Denham,

the responsible minister, inviting the minister to respond to those comments? Is the committee amenable to that course of conduct?

I see that members are indicating that they are happy to proceed in that way. I am grateful for that.

That concludes our consideration of the SSI and it concludes our business this morning. Our next meeting will be announced in due course. I wish you all a good morning and a good rest of the day.

*Meeting closed at 11:06.*

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