

PE1458/DDD

The Rt Hon Lord Carloway Lord President submission, 27 February 2017

I refer to your letter of 23 January. I have taken some time to review the evidence provided to the Committee by Professor Alan Paterson and to reconsider the position.

I note that you request a response on three specific issues, as follows:-

- First, whether there have been any inhibitions to the administration of justice arising in relation to those members of the judiciary who have to register financial or other interests in connection with other roles.

Scotland has a relatively small judiciary and only a very small proportion of those judges and sheriffs sit on bodies which require disclosure of financial interests. For example, only four – one senator, the Chair of the Scottish Land Court, one sheriff principal and one sheriff – sit on the Judicial Appointments Board, while seven judges – three Senators including myself, a sheriff principal, two sheriffs and a JP – sit on the Board of the SCTS. I am aware that my predecessor, Lord Gill, in his letter of 5 February 2013 noted that a register of judicial interests could have other consequences. He 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.”

All senators and all sheriffs exercise a civil and criminal jurisdiction. I am concerned that, at a time when online fraud is becoming increasingly sophisticated, a dissatisfied litigant, or a convicted person, may choose to retaliate by these means. A register of judicial interests may provide a starting point for that. That has not, to the best of my knowledge, happened with the small cohort of judges who have disclosed financial interests through JABS or the SCTS Board, but that sample is so small that no comfort can be derived from that. Rather, I expect that judges will become increasingly vigilant about the risks of personal information appearing in the public domain.

Accordingly, one possible inhibitory effect on the administration of justice is that judges may start to decline positions on important public bodies such as these if that requires the disclosure of financial interests. In the same way, a register of judicial interests may have a damaging effect on judicial recruitment. You may be aware that, partly because of major changes to pension arrangements, difficulties have arisen in the recruitment of the senior judiciary. Revealing personal financial information is likely to act as a further powerful disincentive.

- Secondly, whether a decision on “recusal” should rest with a judge other than the individual who has been challenged or who has been identified as having a potential conflict of interests.

I assume that the proposition here is that the decision on declinature of jurisdiction should be made by someone other than the judge hearing the case, presumably another judge, or judges. At present, if a judge is asked to decline jurisdiction, and does not do so, then that decision can be reviewed, on appeal, by the appellate court. Any other system would not be an improvement. Cases are often allocated to judges, both in the Court of Session and the sheriff courts, at short notice. A party or a judge may not be aware of the circumstances in which the issue of declinature must be considered until the morning of the case. If he then requires to pass that issue to another judge, for consideration, the case is likely to be adjourned for that purpose, to the disappointment of litigants and the inefficient disposal of business in the courts.

The present system whereby a judge, having seen the papers and being aware of the precise extent of any interest financial or otherwise he may have, makes the decision on recusal, is the preferred option. Judges are invariably prudent in declining jurisdiction appropriately, but the right of appeal ensures that in, any rare case where that is not done, redress is available.

I should add that, as a generality, the problem, if there is one at all, rests with an over cautious approach to declinature: ie with judges or sheriffs declining jurisdiction and thus prompting an adjournment and causing delay when they should, in accordance with their duty, have heard and determined the cases placed before them.

- Thirdly, whether it would be in the interests of greater transparency for the "Register of Recusals" to be extended to cover instances where recusal has been considered or requested but jurisdiction has not been declined.

I would have no difficulty with the proposition that the register of recusals could be extended to cover instances when a judge has recused himself, and when he has declined to do so. The additional burden, which will fall upon the clerks of court, should not be great, and I agree that this may provide additional transparency.

I hope this is of assistance to the Committee. I indicated in previous correspondence that I felt I could add little more to the views previously expressed. That remains my view. However, if the Committee wishes me to provide this evidence orally, I will do so.