

**Complaint against Lord Carloway.**

From: Tom Muirhead of the Fair Trial Project (Registered Charity Number SCO48283).

To: The Judicial Office for Scotland

Date: 19.4.2021

**Summary**

1. I am the Chief Executive Officer of the Fair Trial Project. We contend that no one in Scotland has ever had a fair trial. I am complaining about Lord Carloway's part in this.
2. The complaint is that Lord Carloway has failed, throughout his career, to disclose a) his lack of independence and impartiality brought about by the links between himself and the Scottish Government (and the advocates, solicitor advocates and solicitors that regularly appear in the courts he is judging in); and b) his numerous conflicts of interest brought about by directly working with the Scottish Government on heading up the Scottish Courts and Tribunals Service and reviewing criminal law and procedure.
3. Disclosure is a necessary part of the common law and human rights law, and the failure to disclose is, amongst other things<sup>1</sup>, criminal and civil fraud. Lord Carloway has not only failed in his duty to disclose his own lack of independence and impartiality and conflicts of interest, but also those of other Scottish judges.
4. The lack of disclosure and resulting lack of independence and impartiality means that no one in Scotland has ever received a fair trial as guaranteed by article 6 ECHR and the common law.
5. One of the main issues concerns the Faculty of Advocates (The Faculty). The Faculty is a criminal organisation and Lord Carloway, as an advocate, took part in its criminal activity. The criminal activity was the failure to disclose the financial and other links between

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<sup>1</sup> In addition to civil and criminal fraud, it is contended that a failure to disclose is attempting to pervert the course of justice and contempt of court.

members of the Faculty and a) Scottish judges; and b) advocates acting as part-time judges. This has an effect on all senior Scottish judges, past and present, who, with a few exceptions, started their career as advocates. Criminals can't be judges.

## **Introduction**

6. This complaint will set out the facts and issues, then the relevant law on disclosure and independence and impartiality. It will conclude by applying this law to the facts and issues to show that Lord Carloway has committed civil and criminal fraud by failing to disclose his links to the Scottish Government, his various conflicts of interest and his links to the advocates, solicitor advocates and solicitors that take part in the cases he is judging.

## **The facts and issues**

### ***Four issues***

7. There are four main issues.

### ***Issue 1 – The Faculty of Advocates is a criminal organisation.***

8. The first issue concerns the Faculty of Advocates (The Faculty). The Faculty is a criminal organisation. Appendix 1 explains this in detail. Lord Carloway started as an advocate and took part in this criminality. As an advocate and now as a judge he failed to disclose a) the organisation of Faculty Services Ltd (FSL) and that 6.5% of an advocate's fees are paid to FSL; b) that many judges are non-practising members of the Faculty and therefore benefit from the 6.5% fees paid to FSL; and c). that QCs are appointed or not approved for appointment by Scotland's senior judges in conjunction with the Scottish Executive.
9. Appendix A of appendix 1 lists a further set of issues that Lord Carloway and Faculty members have failed to disclose.
10. See <https://fairtrialproject.org/why-the-faculty-of-advocates-is-a-criminal-organisation/> for more information.

**Issue 2 – The Carloway Review, judges working for the government.**

11. The second issue concerns Lord Carloway’s participation in the Carloway Review.

11.1. ‘In October 2010, the Cabinet Secretary for Justice, Kenny MacAskill MSP asked the Lord President to nominate a single High Court judge to lead an independent review of key elements of Scottish criminal law and practice...The Lord President’s nominee, Lord Carloway, started work on the Review in November.’ Lord Carloway organised roadshows and received input from Scottish Government employees and legal professionals, from Scotland and abroad, at all levels. It seems that promotion is guaranteed for a judge that works for the Scottish Government, as Lord Carloway, after finishing the Carloway Review, was promoted to the position of Lord Justice Clerk and then to the position of Lord President.

11.2. The Fair Trial’s view on this is that Judges have no business working for government and for taking the lead, or any role, in advising on legislation. No disclosure of involvement in the Carloway Review by judges and practitioners has ever been made. An example of the problems this causes is that it is certain that prosecutions and appeals have taken place that involve judges and government lawyers who worked together on the Carloway Review and where the prosecution or appeal concerned the legislation that the Review covered and / or was made as a result of it.

**Issue 3 – Senior judges working with government and being responsible for the court system**

12. The third issue is that Lord Carloway is the head of the Scottish Courts and Tribunals Service (SCTS).

12.1. The chief responsibility of SCTS is to ensure the smooth running of Scotland’s courts and tribunals. Scotland’s judges control the management board. Judges, when resolving disputes, must be free from bias. Any conflict of interest will make a judge biased, and therefore unable to resolve a dispute fairly. It is obvious that a duty to ensure the smooth running of Scotland’s courts and tribunals conflicts with a judge’s duty to decide a case or appeal fairly.

- 12.2. Section 60 and Schedule 3 of the Judiciary and Courts (Scotland) Act 2008 (JCSA 2008). Section 60 sets up the Scottish Courts and Tribunals Service (SCTS) and Schedule 3, amongst other things, gives the SCTS a membership of: The Lord President, the Lord Justice Clerk (the second most senior judge in Scotland), the president of the Scottish Tribunals, a Sheriff Principal, a Sheriff or Summary Sheriff, a Justice of the Peace, a person holding the position of Chamber President in the First-tier Tribunal for Scotland, an advocate, a solicitor, a Chief Executive and three other members.
- 12.3. This means that judges at all levels, alongside the Scottish Government, run the Scottish Courts and Tribunals. It is easy to see why this creates a conflict of interest: Any appeal happens when a party claims that something has gone wrong in the court below. This can be an error of law or procedure. If a judge on the appeal panel is also a member of the SCTS, then it is easy to see that their duty to decide the appeal fairly is compromised. They will have concerns about the possible disruption caused to the courts below if they send the case back for a retrial or rehearing.
- 12.4. See <https://fairtrialproject.org/judges-with-a-conflict-of-interest/> for more information.

#### ***Issue 4 - Open Justice and the banning of the media and public from the courts***

13. The fourth Issue concerns the banning of the media and public from the courts.
  - 13.1. During the Covid-19 pandemic, SCTS banned the press and public from all court buildings. This is contrary to the principle of Open Justice. A total ban on the press and public was unnecessary. It would have been possible to place a limit on the number allowed in the viewing gallery of each court, with social distancing and screening measures in place.
  - 13.2. The Supreme Court has explained the rule on Open Justice: 'It is a general principle of our constitutional law is that justice is administered by the courts in public, and is therefore open to public scrutiny,' (*A v BBC* [2014] UKSC 25 at para. 23).
  - 13.3. There is a long line of judicial decisions, from the highest courts, that confirm the principle and rules of Open Justice. These cases state that trials and hearings must take

place in open court with the press and public allowed to be present (Av BBC at paras. 23 to 41). The European Court of Human Rights has also confirmed the principle by stating that ‘The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny.’ (*B and P v United Kingdom* (2001) 34 EHRR 529, para 36).

13.4. Lord Carloway as head of SCTS has a conflict of interest. There is evidence that shows it was Lord Carloway who authorised the exclusion of the press and public. If there is any doubt about this, then I will supply this evidence. I’m hoping this is unnecessary, as Lord Carloway did this.

13.5. See <https://fairtrialproject.org/open-justice/> for more information.

### **The law**

14. Parts of this section are extracted from Appendix 1.

### ***The Right to a fair trial***

15. The common law rules on natural justice, Article 6 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union establish that everyone is entitled to a fair trial. The right to a fair trial covers criminal trials and civil hearings.

16. One of the most important elements of a fair trial is the requirement of independence and impartiality. ‘The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case.’<sup>2</sup>

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<sup>2</sup>. *Davidson v The Scottish Ministers (No 2)* 2005 1 S.C. (H.L.) 7 at para. 6

17. Note that a lack of independence and impartiality is assumed when a judge has a financial interest in a case.

### ***Automatic disqualification of a judge for financial interest***

18. A judge is automatically disqualified<sup>3</sup> from hearing a case if he or she ‘has a personal or financial interest in the outcome, however small.’ There may be an exception to this where a judge ‘holds a relatively small number of shares in a large company and the sums involved in the litigation are not such as could, realistically, affect the value of the judge's shares or the dividend he could expect to receive.’<sup>4</sup>

### ***Impartiality - Subconscious<sup>5</sup> Bias***

19. All judges are required to be free from bias. This enables them to decide a case based on the facts presented to them and the applicable law. They must be free from any influence that might affect them subconsciously. Once it is shown that there is a factor that may affect a judge then the judge is disqualified due to unconscious bias.

20. The test is whether the fair minded and informed observer with full knowledge of the facts would conclude that the judge is biased.<sup>6</sup> Once a factor is rationally and objectively shown to exist then the test is a very strict one. It must be shown that any possibility of a matter affecting the judge can be dismissed.<sup>7</sup>

21. Note that as this is unconscious bias, it cannot be measured<sup>8</sup>. All that can be shown is that there is a possibility of a ‘factor extraneous to the case’ affecting the judge. It is unnecessary to show what effect the factor will have, as there is no way of knowing.

### ***The requirement of independence***

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<sup>3</sup> *Bow St Stipendary Magistrate, ex parte Pinochet* [2000] 1 AC 6. Lord Hope says in his judgement that automatic disqualification applies where the judge ‘has a personal or pecuniary interest in the outcome, however small’. Lord Hope cites with approval Lord Buckmaster in *Sellar v. Highland Railway Co.* 1919 S.C. (H.L.) 19 who states that ‘if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside.’

<sup>4</sup> See paragraph 8 of *Locabail (U.K.) Ltd. v Bayfield Properties Ltd* [2000] 2 W.L.R. 870

<sup>5</sup> Subconscious and unconscious are used interchangeably throughout this paper.

<sup>6</sup> Lord Hope of Craighead in *Porter v Magill* [2002] 2 A.C. 357 at para. 103 approving *R V Gough* [1993] AC 646 and stating that a real danger of bias is the same thing as there being a real possibility of bias.

<sup>7</sup> Lord Goff in *R V Gough* approving Lord Ackner’s application of the test in *Reg v Spencer* [1987] AC 128 ‘Lord Ackner found himself unable totally to dismiss that possibility [of subconscious bias]’

<sup>8</sup> *Almazeedi v Penner* [2018] UKPC 3 at para. 1

22. A judge must be independent of the Legislature and Executive, the parties to a case and their representatives. One crucial aspect to independence is the existence of guarantees that a judge's security of tenure will not be interfered with.<sup>9</sup> Lord Carloway regularly works with Government every day and this is in addition to his judicial duties.

### ***If independence and impartiality is missing – what happens?***

23. "It is accepted as "axiomatic" that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all': *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 68.<sup>10</sup> and 'that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded.'<sup>11</sup>

24. Therefore, if a criminal trial has been presided over by a judge who lacked independence and impartiality then any conviction made is set aside, even if the convicted person had pleaded guilty.<sup>12</sup> In civil cases the result is the same and any decision made has no validity and the judgement can be set aside.

### ***The duty to disclose***

25. Judges must disclose any factor that might lead to a person not receiving a fair trial<sup>13</sup> (or a fair hearing in a civil matter). The common law rules of declinature set out in paragraph 10 of *Clancy v Caird* 2000 SC 441 'form an integral part of the common law' and state that 'If, however, a judge finds himself in a position where he considers that there is a possible conflict of interest<sup>14</sup>, it is his duty to disclose that possible conflict to the parties in the case and to propone declinature.' Additionally, a judge's judicial oath required them to speak out if they know of any matter affecting the fairness of trials and hearings that they are not involved with.

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<sup>9</sup> Lord Bingham of Cornhill in *Millar v Dickson* 2002 S.C. (P.C.) 30 citing *Starrs v Ruxton* 2000 SLT. 42

<sup>10</sup> Lord Bingham of Cornhill in *Attorney General's Reference No 2 of 2001* [2003] UKHL 68 at para 13.

<sup>11</sup> *Millar v Dickson* 2002 S.C. (P.C.) 30 at para 16.

<sup>12</sup> *Millar v Dickson* 2002 S.C. (P.C.) 30 at para 16 and 24.

<sup>13</sup> *Davidson v The Scottish Ministers (No 2)* 3005 SJC (HL) 7 at paras. 19, 20 and 54.

<sup>14</sup> A conflict of interest includes anything that may interfere with independence and impartiality.

26. All legal professionals including solicitors, solicitor advocates and advocates have a fiduciary duty to disclose to their clients any matter that might interfere with their right to a fair trial. A failure to disclose is criminal and civil fraud<sup>15</sup>. All legal professionals have a duty to the court that requires them to raise any matter within their knowledge that interferes with the right to a fair trial, whether at first instance or on appeal.
27. The Lord Advocate and the Crown Office and Procurator Fiscal Service have a duty to act as a 'Minister of Justice'<sup>16</sup> and to ensure that an accused receives a fair trial. The Court Staff are employed by the Scottish Executive and it is contended that they have similar duty.
28. The duty of disclosure is not confined to cases that legal professionals are directly involved in. There is a duty to speak out about any matter that affects the fairness of the system.

### ***Fraud***

29. Criminal Fraud is defined as 'a false pretence made dishonestly in order to bring about some definite practical result. It is not necessary that the result should be actual gain to the offender or actual loss to some victim. Where the practical result is achieved, the fraud is complete.'<sup>17</sup> It is contended that the false pretence is that a person will receive a fair trial and the practical result is that a person took part in a trial or civil case without challenging the fairness of the proceedings.
30. Civil fraud is mainly covered by contract or delict law. In brief, a misrepresentation can be made innocently, negligently or fraudulently. Here, the contention is that the misrepresentation that caused loss is that a person would receive a fair trial.

### ***Damages for Human Rights Violations***

31. It is possible to claim damages for violations of a person's right to fair trial<sup>18</sup>.

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<sup>15</sup> And possibly criminal negligence, contempt of court and attempt to pervert the course of justice.

<sup>16</sup> *McDonald (John) v HM Advocate* 2008 SLT 993, JCPC at para. 60.

<sup>17</sup> See *Whyte v HMA* [2017] HCJAC 14 at para. 3

<sup>18</sup> Section 8 Human Rights Act 1998.

### **Application of the law to the facts and issues**

32. Automatic disqualification for financial interest applies whenever a part-time advocate judge is presiding over a case involving other advocates due to their share of the 6.5% fees paid to FSL.
33. Automatic disqualification for financial interest also applies when any member of the Faculty appears in front of a full-time judge who is a non-practising member of the Faculty. The financial benefit to the judge is less than that of a part-time advocate judge. The judge does not benefit from the stable<sup>19</sup> organisation but does benefit from the funds used for the maintenance of the Advocate's Library and their association with the pro-bono and charity work undertaken by the Faculty.
34. Therefore, Lord Carloway is automatically disqualified from hearing any case where a member of the Faculty is, or potentially, involved. Additionally, the appendix points out that Lord Carloway is the bassist and lead singer in the Faculty's band. The failure to disclose these matters is civil and criminal fraud.
35. There is a possibility of subconscious bias a) in cases involving judges who are non-practising members of the Faculty when practising members appear in front of them; b) whenever a QC is involved in a case<sup>20</sup>; and c) when advocates are involved in cases with a part-time advocate judge.
36. On the Faculty issue Lord Carloway has failed in his duty to disclose these links between himself and also the existence of the links between Faculty members and other judges.
37. On the QC issue Lord Carloway has failed in his duty to disclose that there is a possibility of bias every time a QC is involved in a case he is judging.
38. It is contended that this means that all judges, all solicitors, all solicitor advocates and all advocates, by their failure to disclose these matters, are committing criminal and civil fraud,

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<sup>19</sup> A stable is an administrative structure used by a group of advocates.

<sup>20</sup> See Appendix 1 for full details on how the appointment of QCs creates the possibility of subconscious bias.

39. It is very obvious that when a judge works for the government to create new legislation that this will lead to the possibility of unconscious bias. The *Davidson* case and the cases cited within make this very clear.<sup>21</sup>
40. Therefore, Lord Carloway cannot take part in any criminal case or appeal due to his work with the Scottish Government on Scottish criminal law and procedure. His work with SCTS means that he is not independent of Government. He works for and with the Scottish government every day (in addition to his judicial role). This is a clear conflict of interest known to all legal professionals who along with Lord Carloway have failed in their duty to disclose.
41. On the Open Justice issue Lord Carloway has failed to uphold this principle and has introduced secret courts to Scotland. Every case needs to be redone and it is obvious that no judge in Scotland can take part in these retrials as they failed in their duty to disclose that excluding of the public from the courts is unlawful.

### ***Suicides in Scottish Prisons***

42. In 2016 11 people committed suicide in Scottish Prisons.<sup>22</sup> Five of these prisoners were on remand. The Scottish Prison Service report suicides in Scottish prisons every year. If these prisoners got a fair trial, then this is a tragic statistic. If they did not, then these suicides are unlawful killings. 'But for' the unlawful prosecution and lack of a fair trial the prisoners would not be in prison to commit suicide<sup>23</sup>.

### ***Effect on the Supreme Court***

43. The criminality of Scottish advocates and judges results in no one ever being able to receive a fair trial in the United Kingdom (UK). The reason why the actions of advocates and judges in Scotland affect fair trials in the UK is because Scotland maintains two judges in the Supreme Court. All of these, past and present, started as advocates. These judges should never have been appointed due to the criminality they engaged in previously in their

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<sup>21</sup> *Davidson v The Scottish Ministers* (No 2) 3005 SJC (HL) 7 at paras. 10 – 17 and 48 – 50.

<sup>22</sup> See <https://www.sps.gov.uk/Corporate/Information/PrisonerDeaths.aspx>

<sup>23</sup> If correct, this is corporate manslaughter.

career. You cannot benefit from a crime. Note that Lord Carloway has recently been co-opted as a Supreme Court judge.

### ***Some major cases***

44. In the recent Megrahi appeal<sup>24</sup> Lord Carloway failed to disclose that he is not independent of Government and that there are many links between himself and the advocates arguing the case. This is criminal fraud.
45. The Scotch Whisky Association and others challenged the introduction of minimum pricing on alcohol in Scotland.<sup>25</sup> This matter was referred to the Court of Justice of the European Union who stated that it was for the national court to decide whether minimum pricing was capable of protecting ‘human life and health’ and therefore allowed as an exception to the free movement of goods. Lord Carloway failed in this reference to inform the Court of Justice that no court in Scotland could carry out this task in an independent and impartial manner. This once again is criminal fraud.

### **Conclusion**

46. Although this complaint is about Lord Carloway it affects the whole of the legal system of the UK. The criminality of the Faculty of Advocates and their links to the senior Scottish Judges means that no independent and impartial tribunal exists.
47. The question of who planted the bomb on Pan Am 103 remains unresolved. Scottish judges and legal professionals defrauded the whole world by failing to disclose the links between the judges and the lawyers for the prosecution and defence. This took place at the original Megrahi trial and at the subsequent appeals and reviews.
48. The accusation I make is that Lord Carloway is a major criminal and every case that he has been involved in since his entry to the Faculty in 1977 has to be redone.

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<sup>24</sup> [2021] HCJAC 25, HCA/2020/5/XM

<sup>25</sup> See [2016] CSIH 77.

## **Appendix 1 – Fair Trial – Why the Faculty of Advocates is a Criminal Organisation.**

### **Summary**

1. An advocate<sup>26</sup> is a Scottish lawyer who can practice in Scotland's highest courts. In contrast, a solicitor can only act in the lower courts. The Faculty of Advocates (The Faculty) is the professional body. Financial and other links exist between members of the Faculty and Scotland's judges. No judge or advocate has ever disclosed these links. This paper will show that disclosure is necessary and that the lack of disclosure is, amongst other things, criminal and civil fraud.
2. The paper will concentrate on three areas where the links between judges and the Faculty result in the possibility of bias. Note that all advocates in Scotland are members of the Faculty and that the Senators of the College of Justice (Scotland's senior judges), with a few exceptions, were members of the Faculty at an early stage in their career.
3. The first area of concern is the organisation of Faculty Services Ltd (FSL): An advocate pays 6.5% of their fees to FSL. Whenever an advocate acts as a part-time judge, and one or both of the parties to a case or trial are represented by another advocate, the part-time judge benefits from the fees paid to FSL. It is obvious that there is no possibility of a part-time judge being independent and impartial in this situation. All judges and advocates know about this, but none have made disclosure. All the senior judges and members of the Faculty have a duty to disclose these links, not just those involved in a case. The lack of disclosure by those required to do so is civil and criminal fraud.
4. The second area of concern is a judge's continuing membership of the Faculty. When an advocate becomes a judge, they change from being a practising member and become a non-practising member. Whenever an advocate appears in front of a judge who is a non-practising member of the Faculty, then it is possible that both being members will affect the judge subconsciously. The Fair Trial Project contends that a failure to disclose a

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<sup>26</sup> Advocates and solicitors can represent clients in the civil and criminal courts. The difference between them is that only advocates can represent in the higher courts. For more information on the role of an advocates see: <http://www.jonathanmitchell.info/old/advocates.html> and <http://www.advocates.org.uk/>

membership of the Faculty, when hearing a case involving other members, is civil and criminal fraud. Again, the duty to disclose covers all members of the Faculty and all judges.

5. The third area of concern involves the appointment of Queens Counsel in Scotland. The Senators of the College of Justice and the Scottish Government approve or disapprove applications for Queens Counsel (QC). It requires no exam. This raises the possibility of subconscious bias. There are many ways this subconscious bias can operate. One example would be that it is possible that a judge will subconsciously favour the arguments of a QC who he or she had approved of when arguing against an advocate who he or she had disapproved of (or a Litigant in Person, or a Solicitor Advocate, or any other representative). No senior judge or QC in Scotland has ever disclosed the approval or disapproval of QC applicants. This once again is, amongst other things, civil and criminal fraud.
6. The contention is that the links listed above coupled with the failure of any member of the Faculty to make disclosure means that the Faculty is a criminal organisation. The criminality is failing to disclose the three links / issues listed. The consequences of this are that no one has received or can receive a fair trial where members of the Faculty and the senior Scottish judges are, or are potentially, involved.

### **Introduction**

7. There are other situations where judges and advocates have failed to disclose links. Appendix-A lists some of these. This paper will concentrate on the three issues set out in the summary. This paper will also explain the duty that all legal professionals have to disclose any matter that might affect the right to a fair trial.
8. The paper will start by analysing the three issues set out in the summary and for each will set out the facts and issues, then the relevant law, before applying this law to the facts and issues. It will conclude by explaining that the Scottish Legal Profession's failure to disclose the links between the Faculty and judges means that no one has ever received a fair trial in Scotland and the rest of the UK.

## **Facts and issues**

### **Faculty Services Ltd (FSL) and Part-time or Temporary Judges**

9. The Faculty has existed since ‘1532 and regulates the training and professional practice, conduct and discipline of advocates.’<sup>27</sup> All advocates are members of the Faculty.<sup>28</sup> All but one of the senior Scottish judges in the Supreme Court(s) of Scotland started as an advocate.<sup>29</sup>
10. The Faculty elects the Chair<sup>30</sup> of FSL and controls its management board<sup>31</sup>. FSL provides administrative and other support services to advocates by organising them into groups called Stables. Each Stable organises an advocate’s workload. All communication with an advocate is through their Stable. FSL keeps 6.5%<sup>32</sup> of an advocate’s fees. This money is used to pay staff costs, administration, advertising, IT infrastructure, the upkeep of the Advocate’s Library, and charitable work, etc.
11. Therefore, when a part-time or temporary judge who is an advocate is judging a case where the representatives are advocates, the judge benefits financially from the fees paid. Think of the situation where an advocate asks for a continuation or other procedural change, the judge has a financial interest in whether to grant or deny this request.
12. The issue of advocates acting as temporary judges came before the Court of Session in the case of *Clancy* in 2000.<sup>33</sup> None of the people involved mentioned FSL. Their names are:  
The part-time temporary judge: - Coutts QC; the inner house judges – Lords Sutherland, Coulsfield and Penrose; The Advocates – Bovey QC, Stewart QC and Lord Hardie QC.  
Unless a suitable explanation is available then the Fair Trial Project contends that the

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<sup>27</sup> See: <http://www.advocates.org.uk/faculty-of-advocates/what-is-the-faculty-of-advocates>

<sup>28</sup> See: <http://www.advocates.org.uk/about-advocates/what-is-an-advocate>

<sup>29</sup> See: <https://www.judiciary.scot/home/judiciary/judicial-office-holders/senators-of-the-college-of-justice> . Only Lord Mulholland is an exception

<sup>30</sup> <http://www.advocates.org.uk/faculty-of-advocates/governance>

<sup>31</sup> <http://www.advocates.org.uk/news-and-responses/news/2018/sep/new-chair-of-faculty-services-ltd> and <https://find-and-update.company-information.service.gov.uk/company/SC048261/officers>

<sup>32</sup> <https://find-and-update.company-information.service.gov.uk/company/SC048261/filing-history> and see the ‘Accounts for a small company made up to 31 October 2019’

<sup>33</sup> *Clancy v Caird* 2000 SC 441

failure to disclose any of the three issues to the parties involved is, amongst other things, civil and criminal fraud.

13. Note that since *Clancy* in 2000, the use of members of Faculty as temporary judges in the High Court or Court of Session seems to have disappeared,<sup>34</sup> although it is still allowed by the legislation<sup>35</sup>. Paragraph 4 of *Clancy* explains that between 1991 and 1998 13 appointments of temporary judges were made. Nine were Sheriffs, and one was the Chair of the Scottish Land Court. The remaining four were QCs. Two of these went on to become permanent judges of the Court of Session. The remaining two were temporary judges who still practiced as advocates. Today (January 2020) all temporary High Court and Court of Session Judges are full-time Sheriffs or Sheriffs' Principal.
14. Many members of the Faculty are part-time Sheriffs<sup>36</sup> and, of course, advocates regularly appear in the Sheriff Court. Advocates also act as part-time judges in the Upper Tribunal, and again, other advocates regularly appear in front of them<sup>37</sup>. Again, there is no record of anyone disclosing the financial links via FSL.
15. It is contended that these changes make very little difference to the allegations of criminality due to the lack of disclosure of this issue. Solicitors and advocates who qualified over the last 20 years may not have had as much exposure to this issue as those who qualified before them. But the allegation remains that all judges and members of the Faculty who had been advocates before 2000 have acted criminally. Therefore, the whole Scottish Legal system is infected. You can't have criminals judging others. Further, the allegations of criminality by failing to disclose stand in relation to part-time Sheriffs and part-time Upper Tribunal Judges.

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<sup>34</sup> <https://www.judiciary.scot/home/judiciary/judicial-office-holders/senators-of-the-college-of-justice/temporaryjudges>

<sup>35</sup> <https://www.legislation.gov.uk/asp/2014/18/section/123/enacted/data.xht?view=snippet&wrap=true>

<sup>36</sup> <https://www.judiciary.scot/home/judiciary/judicial-office-holders/sheriffs/part-time-sheriffs>

<sup>37</sup> See [https://assets.publishing.service.gov.uk/media/5e1f2a7eed915d7c6b793100/CSPIP\\_384\\_2017\\_.pdf](https://assets.publishing.service.gov.uk/media/5e1f2a7eed915d7c6b793100/CSPIP_384_2017_.pdf) in this case neither Mr Richard Pugh, Advocate nor part-time Upper Tribunal Judge Caldwell QC disclosed their financial link via FSL although disclosure was made by the judge that she and Mr Pugh shared the same stable. (TM v SSWP (PIP) 2018 UKUT 447 (AAC)).

## ***Membership of the Faculty***

16. Membership of the Faculty: ‘The Faculty of Advocates comprises both practising and non-practising members. Practising members of Faculty are available for instruction as advocates in accordance with the cab-rank rule, set out in the Court of Session Act 1532 and ratified in the Court of Session Act 1540.’
17. ‘The non-practising membership includes, among others, members of the judiciary, Law Officers, Parliamentarians, academics, retired advocates and advocates who are employed in various capacities.’<sup>38</sup>
18. All the senior judges in Scotland are non-practising members of the Faculty, or if not, know colleagues who are. Non-practising members benefit financially from the 6.5% fee paid to FSL when this money is allocated to services that they have access to like the Advocate’s Library. No judge or advocate has ever disclosed this link or financial benefit.

## ***The Appointment of a QC***

19. The Lord Justice General (Scotland’s most senior judge) is responsible for the appointment of QCs<sup>39</sup>. The route to becoming a QC is summarised as follows: Advertising for applicants takes place, appointments are made after applicants are recommended or disapproved of by a panel of Senators of the College of Justice<sup>40</sup>. The Lord Advocate and other representatives of the Scottish Executive<sup>41</sup> are consulted as part of this process.
20. The structure of the appointment process, would, of course, lead the fair-minded and informed observer to conclude that there is a possibility of bias, of a judge on the selection panel, when any applicant (whether appointed or rejected as a QC) appears in a case. This is in the sense that it is possible for the recommendation or disapproval to affect the judge subconsciously.

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<sup>38</sup> See: <http://www.advocates.org.uk/faculty-of-advocates/governance/membership>

<sup>39</sup> <https://www.gov.scot/publications/appointment-queens-counsel-scotland-2020/pages/4/>

<sup>40</sup> The Senators of the College of Justice are Scotland’s senior judges. <https://www.judiciary.scot/home/judiciary/judicial-office-holders/senators-of-the-college-of-justice>

<sup>41</sup> The Scottish Government, the Scottish Ministers and the Scottish Executive are used interchangeably throughout this paper.

21. Two examples of the many possible ways that the application process may affect a judge subconsciously are: a) it is possible that a judge will be subconsciously inclined to favour the arguments of a QC who he or she has recommended while on the selection committee; and b) it is possible that a judge will be subconsciously inclined to disfavour the arguments of an applicant who he or she disapproved of during the selection process. When a judge is hearing an argument by a QC or advocate who has been through the application process, there is a possibility that this will have a subconscious influence on them.
  
22. The contention is that the QC selection and appointment process has introduced a structural flaw in the Scottish Court System. There is a possibility that a fair trial or hearing in front of an independent and impartial tribunal, either at first instance or on appeal, will not take place (please note that the fairness of any appeal process must be guaranteed). Therefore, all decisions made by the Scottish Courts must be set aside due to the possibility of unconscious bias, and the corresponding unlawful lack of disclosure.
  
23. Note that apart from one, all Lord Advocates have been QCs. This is probably the best example of this structural flaw. It is clearly possible that all judges will be unconsciously biased in any case that involves the Lord Advocate. This is in the sense that the Lord Advocate's appointment as a QC, by the senior judges, will influence all judges subconsciously.
  
24. If the appointment of a QC was based upon the results of an exam, then the possibility of bias for this reason would disappear. The introduction of an exam is very important, as it would lead to the appointment of a QCs being decided on merit. If a test, possibly set by the Law Professors, was introduced then this structural flaw would disappear (and help restore public confidence in the Scottish legal system).
  
25. Please note that the recommendation or disapproval of QC candidates has never been disclosed by any of those involved.

## **The relevant law**

### **The Right to a fair trial**

26. The common law rules on natural justice, Article 6 of the European Convention of Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union establish that everyone is entitled to a fair trial. The right to a fair trial covers criminal trials and civil hearings.
27. One of the most important elements of a fair trial is the requirement of independence and impartiality. ‘The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case.’<sup>42</sup>
28. Note that a lack of independence and impartiality is assumed when a judge has a financial interest in a case.

### **Automatic disqualification of a judge for financial interest**

29. A judge is automatically disqualified<sup>43</sup> from hearing a case if he or she ‘has a personal or financial interest in the outcome, however small.’ There may be an exception to this where a judge ‘holds a relatively small number of shares in a large company and the sums involved in the litigation are not such as could, realistically, affect the value of the judge's shares or the dividend he could expect to receive.’<sup>44</sup>

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<sup>42</sup>. *Davidson v The Scottish Ministers (No 2)* 2005 1 S.C. (H.L.) 7 at para. 6

<sup>43</sup> *Bow St Stipendary Magistrate, ex parte Pinochet* [2000] 1 AC 6. Lord Hope says in his judgement that automatic disqualification applies where the judge ‘has a personal or pecuniary interest in the outcome, however small’. Lord Hope cites with approval Lord Buckmaster in *Sellar v. Highland Railway Co.* 1919 S.C. (H.L.) 19 who states that ‘if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and may be set aside.’

<sup>44</sup> See paragraph 8 of *Locabail (U.K.) Ltd. v Bayfield Properties Ltd* [2000] 2 W.L.R. 870

### ***Impartiality - Subconscious<sup>45</sup> Bias***

30. All judges are required to be free from bias. This enables them to decide a case based on the facts presented to them and the applicable law. They must be free from any influence that might affect them subconsciously. Once it is shown that there is a factor that may affect a judge then the judge is disqualified due to unconscious bias.
31. The test is whether the fair minded and informed observer with full knowledge of the facts would conclude that the judge is biased.<sup>46</sup> Once a factor is rationally and objectively shown to exist then the test is a very strict one. It must be shown that any possibility of a matter affecting the judge can be dismissed.<sup>47</sup>
32. Note that as this is unconscious bias, it cannot be measured<sup>48</sup>. All that can be shown is that there is a possibility of a 'factor extraneous to the case' affecting the judge. It is unnecessary to show what affect the factor will have, as there is no way of knowing.

### ***The requirement of independence***

33. A judge must be independent of the Legislature and Executive, the parties to a case and their representatives. The crucial aspect to this is the existence of guarantees that a judge's security of tenure will not be interfered with.<sup>49</sup>

### ***If independence and impartiality is missing – what happens?***

34. "It is accepted as "axiomatic" that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all': *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 68.<sup>50</sup> and 'that the right of an accused in criminal proceedings to be tried by an

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<sup>45</sup> Subconscious and unconscious are used interchangeably throughout this paper.

<sup>46</sup> Lord Hope of Craighead in *Porter v Magill* [2002] 2 A.C. 357 at para. 103 approving *R v Gough* [1993] AC 646 and stating that a real danger of bias is the same thing as there being a real possibility of bias.

<sup>47</sup> Lord Goff in *R v Gough* approving Lord Ackner's application of the test in *Reg v Spencer* [1987] AC 128 'Lord Ackner found himself unable totally to dismiss that possibility [of subconscious bias]'

<sup>48</sup> *Almazeedi v Penner* [2018] UKPC 3 at para. 1

<sup>49</sup> Lord Bingham of Cornhill in *Millar v Dickson* 2002 S.C. (P.C.) 30 citing *Starrs v Ruxton* 2000 SLT. 42

<sup>50</sup> Lord Bingham of Cornhill in *Attorney General's Reference No 2 of 2001* [2003] UKHL 68 at para 13.

independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded.’<sup>51</sup>

35. Therefore, if a criminal trial has been presided over by a judge who lacked independence and impartiality then any conviction made is set aside, even if the convicted person had pleaded guilty.<sup>52</sup> In civil cases the result is the same and any decision made has no validity and the judgement can be set aside.

### ***The duty to disclose***

36. Judges must disclose any factor that might lead to a person not receiving a fair trial<sup>53</sup> (or a fair hearing in a civil matter). The common law rules of declinature set out in paragraph 10 of *Clancy* ‘form an integral part of the common law’ and state that ‘If, however, a judge finds himself in a position where he considers that there is a possible conflict of interest<sup>54</sup>, it is his duty to disclose that possible conflict to the parties in the case and to propone declinature.’ Additionally, a judge’s judicial oath required them to speak out if they know of any matter affecting the fairness of trials and hearings that they are not involved with.

37. All legal professionals including solicitors, solicitor advocates and advocates have a fiduciary duty to disclose to their clients any matter that might interfere with their right to a fair trial. A failure to disclose is criminal and civil fraud<sup>55</sup>. All legal professionals have a duty to the court that requires them to raise any matter within their knowledge that interferes with the right to a fair trial, whether at first instance or on appeal.

38. The Lord Advocate and the Crown Office and Procurator Fiscal Service have a duty to act as a ‘Minister of Justice’<sup>56</sup> and to ensure that an accused receives a fair trial. The Court Staff are employed by the Scottish Executive and it is contended that they have similar duty.

39. The duty of disclosure is not confined to cases that legal professionals are directly involved in. There is a duty to speak out about any matter that affects the fairness of the system.

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<sup>51</sup> *Millar v Dickson* 2002 S.C. (P.C.) 30 at para 16.

<sup>52</sup> *Millar v Dickson* 2002 S.C. (P.C.) 30 at para 16 and 24.

<sup>53</sup> *Davidson v The Scottish Ministers (No 2)* 3005 SJC (HL) 7 at paras. 19,20 and 54.

<sup>54</sup> A conflict of interest includes anything that may interfere with independence and impartiality.

<sup>55</sup> And possibly criminal negligence, contempt of court and attempt to pervert the course of justice.

<sup>56</sup> *McDonald (John) v HM Advocate* 2008 SLT 993, JCPC at para. 60.

## ***Fraud***

40. Criminal Fraud is defined as ‘a false pretence made dishonestly in order to bring about some definite practical result. It is not necessary that the result should be actual gain to the offender or actual loss to some victim. Where the practical result is achieved, the fraud is complete.’<sup>57</sup> It is contended that the false pretence is that a person will receive a fair trial and the practical result is that a person took part in a trial or civil case without challenging the fairness of the proceedings.

41. Civil fraud is mainly covered by contract or delict law. In brief, a misrepresentation can be made innocently, negligently or fraudulently. Here, the contention is that the misrepresentation that caused loss is that a person would receive a fair trial. More detail on this area of the law will be set out in a future version of this paper.

## ***Damages for Human Rights Violations***

42. It is possible to claim damages for violations of a person’s right to fair trial<sup>58</sup>. This area will be covered in more detail in a future version of this paper.

## ***Application of the law to the facts and issues***

43. Automatic disqualification for financial interest applies whenever a part-time advocate judge is presiding over a case involving other advocates due to their share of the 6.5% fees paid to FSL.

44. Automatic disqualification for financial interest also applies when any member of the Faculty appears in front of a full-time judge who is a non-practising member of the Faculty. The financial benefit to the judge is less than that of a part-time advocate judge. The judge does not benefit from the stable organisation but does benefit from the funds used for the maintenance of the Advocate’s Library, their association with the pro-bono and charity work undertaken by the Faculty and other activities.

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<sup>57</sup> See *Whyte v HMA* [2017] HCJAC 14 at para. 3

<sup>58</sup> Section 8 Human Rights Act 1998.

45. There is a possibility of subconscious bias a) in cases involving judges who are non-practising members of the Faculty when practising members appear in front of them; b) whenever a QC is involved in a case; and c) when advocates are involved in cases with a part-time advocate judge.
46. It is contended that this means that all judges, all solicitors, all solicitor advocates and all advocates, by their failure to disclose these matters, are committing criminal and civil fraud,
47. No one in Scotland (and possibly the UK) has ever received a fair trial due to the lack of disclosure of these three issues. Every case, both civil and criminal, must be re-done.

### ***Suicides in Scottish Prisons***

48. In 2016 11 people committed suicide in Scottish Prisons.<sup>59</sup> Five of these prisoners were on remand. The Scottish Prison Service report suicides in Scottish prisons every year. If these prisoners got a fair trial, then this is a tragic statistic. If they did not, then these suicides are unlawful killings. 'But for' the unlawful prosecution and lack of a fair trial the prisoners would not be in prison to commit suicide<sup>60</sup>.

### ***Effect on the Supreme Court***

49. The criminality of Scottish advocates and judges results in no one ever being able to receive a fair trial in the United Kingdom (UK). The reason why the actions of advocates in Scotland affect fair trials in the UK is because Scotland maintains two judges in the Supreme Court and all of these, past and present, started as advocates. These judges should never have been appointed due to the criminality they engaged in previously in their career. You cannot benefit from a crime.

### **Conclusion**

50. The Faculty of Advocates is a criminal organisation.

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<sup>59</sup> See <https://www.sps.gov.uk/Corporate/Information/PrisonerDeaths.aspx>

<sup>60</sup> If correct, this is corporate manslaughter.

**Appendix A – Other links between Scotland’s judges and the Faculty of Advocates.**

**51. Lord Carloway and the Reclaimers.**

- a. It is widely reported that Lord Carloway (Scotland’s senior judge) is the bassist and lead singer in the Faculty of Advocate’s band – the Reclaimers.<sup>61</sup>
- b. It is contended (applying the common law rules of declinature) that the relationship between Lord Carloway and other band members must be disclosed anytime band members are involved in a case.
- c. Has this ever been disclosed? What happens when a member of the band or someone who hired the band, watched the band, partied with the band, etc appears in front of Lord Carloway?

**52. The Lord Advocate’s Wife.**

- a. The Lord Advocate is the chief public prosecutor in Scotland. He is a member of the Scottish Government and all criminal prosecutions are performed in his name and under his instructions. His wife, Lady Wolffe QC, is a senior Scottish judge. This means that each time a criminal trial takes place in Scotland, the prosecution is taking place in front of the prosecutor’s wife or one of her colleagues.
- b. It is contended (applying the common law rules of declinature) that this issue must be disclosed in any case involving the Scottish Ministers or at any criminal trial in Scotland. It is obvious that this is a factor extraneous to every case that may subconsciously affect a judge.

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<sup>61</sup> See <https://www.thetimes.co.uk/article/top-judge-to-hear-crimes-against-music-jlvw5kbns>;  
<https://www.heraldscotland.com/news/12481029.no-nonsense-but-fair-minded-the-judge/>;  
<https://www.scottishlegal.com/article/lord-president-and-others-made-fellows-of-the-royal-society-of-edinburgh>

### **53. Lady Dorrian's Seminars.**

- a. The Society of Solicitor Advocates organised an online seminar on Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (CPSA 1995). The seminar was hosted by John Scott QC and took place on the 30<sup>th</sup> of July 2020 over Zoom.
- b. The seminar was given by Lady Dorrian, the Lord Justice Clerk (Scotland's second most senior judge). Lady Dorrian, previously, gave the same talk to the Faculty. During the seminar, Lady Dorrian coached and advised the attendees on how to write submissions on these two sections; She advised on what the judges need in order to allow or disallow questions.
- c. Lady Dorrian mentioned that she often speaks to the Faculty and other groups. John Scott QC suggested that the Solicitor Advocates and Faculty of Advocates work together, with Lady Dorrian and other judges, on joint events so they don't have to do the same talk twice. During this exchange and throughout the questions from other attendees you could see that Lady Dorrian was friendly with these professionals and it looked that this was not just politeness but had a long history.
- d. It is contended (applying the common law rules of declinature) that disclosure must be made by Lady Dorrian whenever this area of the law is involved in a case she is judging or when any attendee at one of her seminars is involved in a case. The attendees have a similar duty.
- e. Why has no one disclosed this? What happens when one of the people present at the seminars appears in front of Lady Dorrian? What if someone decides to defend themselves? Are they disadvantaged if they appear in front of Lady Dorrian when the advocate appearing for the Crown or other party attended one of her seminars? Can the fairness of any appeal from the Sheriff or High Court be guaranteed?

### **54. Involvement with the Scottish Courts and Tribunals Service.**

- a. The chief responsibility of the Scottish Courts and Tribunals Service (SCTS) is to ensure the smooth running of Scotland's courts and tribunals. Scotland's judges control the management board. Judges, when resolving disputes, must be free from

bias. Any conflict of interest will make a judge biased, and therefore unable to resolve a dispute fairly. It is obvious that a duty to ensure the smooth running of Scotland's courts and tribunals conflicts with a judge's duty to decide a case or appeal fairly. This has never been disclosed.

- b. Section 60 and Schedule 3 of the Judiciary and Courts (Scotland) Act 2008 (JCSA 2008). Section 60 sets up the Scottish Courts and Tribunals Service (SCTS) and Schedule 3, amongst other things, gives the SCTS a membership of: The Lord President, the Lord Justice Clerk (the second most senior judge in Scotland), the president of the Scottish Tribunals, a Sheriff Principal, a Sheriff or Summary Sheriff, a Justice of the Peace, a person holding the position of Chamber President in the First-tier Tribunal for Scotland, an advocate, a solicitor, a Chief Executive and three other members.
- c. This means that judges at all levels, alongside the Scottish Government, run the Scottish Courts and Tribunals. It is easy to see why this creates a conflict of interest: Any appeal happens when a party claims that something has gone wrong in the court below. This can be an error of law or procedure. If a judge on the appeal panel is also a member of the SCTS, then it is easy to see that their duty to decide the appeal fairly is compromised. They will have concerns about the possible disruption caused to the courts below if they send the case back for a retrial or rehearing.
- d. See <https://fairtrialproject.org/judges-with-a-conflict-of-interest/> for more information.

**55. The Carloway Review:** 'In October 2010, the Cabinet Secretary for Justice, Kenny MacAskill MSP asked the Lord President to nominate a single High Court judge to lead an independent review of key elements of Scottish criminal law and practice... The Lord President's nominee, Lord Carloway, started work on the Review in November.' Lord Carloway organised roadshows and received input from Scottish Government employees and legal professionals, from Scotland and abroad, at all levels. It seems that promotion is guaranteed for a judge that works for the Scottish Government as Lord Carloway, after finishing the Carloway Review, was promoted to the position of Lord Justice Clerk and then to the position of Lord President.

- a. The Fair Trial's view on this is that Judges have no business working for government and for taking the lead, or any role, in advising on legislation. No disclosure of involvement in the Carloway Review by judges and practitioners has ever been made. An example of the problems this causes is that it is certain that prosecutions and appeals have taken place that involve judges and government lawyers who worked together on the Carloway Review and where the prosecution or appeal concerned the legislation that the Review covered and / or was made as a result of it.

**56. The Northern Lighthouse Board (NLB):** The Lord Advocate, the Solicitor General and the Sheriffs Principal of all the sheriffdoms of Scotland are Commissioners of the Northern Lighthouse Board and take part in committees set up to oversee and run the NLB. No Sheriff Principal, Lord Advocate, Solicitor General or other legal professional have ever disclosed these links when a trial or civil case involved a Sheriff Principal and the Scottish Government.