

# **The Fair Trial Project: No Fair Trial in Scotland (25 Reasons)**

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## **No Fair Trial in Scotland – The Facts and Issues (25 Reasons).**

V1.0 - V1.0 of this document has been published on <https://fairtrialproject.org/library/> as a first draft because of the importance of putting the contents into the public domain. There will be frequent updates.

V1.1 – 5<sup>th</sup> Jan 2022 – Reordered 25 Facts and Issues to start with SCTS Issue.

### **Introduction**

1. This paper will briefly set out several facts and issues that call into question the independence and impartiality of Scotland's judges. Note that all these facts and issues are easily verifiable.
2. Before listing the facts and issues, the paper will first give a quick summary on the requirement for judges to be independent and impartial.

### **Summary – the requirement of independence and impartiality**

3. Lord Bingham, in a Scottish appeal to the House of Lords, explained that judges must be independent and impartial, he said: '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>1</sup>
4. Judges must be independent from the legislature (the Scottish Parliament), the executive (the Scottish Government), other judges and the parties to a case and their representatives. Many of Scotland's judges, in addition to their judicial role, work for and with the Scottish Government. This means they are not independent.

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

5. Judges cannot be seen to be impartial when they have financial, personal and business links to the parties to a case or their representatives (the advocates and lawyers appearing in court).
6. Any involvement in the passage of legislation may cast doubt on the impartiality of a judge who has to decide a dispute where the legislation is in play.
7. The primary danger is subconscious bias. What disqualifies a judge is the existence of a factor, outside of the case, that may influence them subconsciously. The test is very strict. If some factor extraneous to the case exists, such as a personal, financial or business link between a judge and a representative, then the judge is disqualified.
8. Judges have a duty to disclose any matter that may affect the fairness of a trial or hearing. Advocates, lawyers and others, such as the court administration, have a similar duty. This duty is to the court and to their clients. A failure to disclose is criminal fraud.
9. If the 25 facts and issues listed in this paper show that there has never been an independent and impartial judiciary in Scotland, then some of the consequences are: a) People are being held in jail without a fair trial. All prisoners should be released immediately; and b) Every person involved in any sort of legal matter where the lack of independence and impartiality was not disclosed is entitled to compensation.
10. For more information on the requirement of disclosure and independence and impartiality see: <https://fairtrialproject.org/why-the-faculty-of-advocates-is-a-criminal-organisation/>
11. The paper will now list a set of 25 facts and issues that call into question the independence and impartiality of Scotland's judges.

## ***Facts and issues***

### **Facts and Issues 1 – Judges control the management board of the Scottish Courts and Tribunals Service.**

1. 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 conflict of interest has never been disclosed.
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.
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.
4. Judges must be independent of the Legislature and Government. The Legislature (the Scottish Parliament) has legislated to appoint judges to work for the Scottish Government. This means that none of these judges is

independent. Being independent means being free of links and / or control. The Scottish judges are being controlled by the Legislature and work alongside the Government. This is the complete opposite of being independent.

5. See <https://fairtrialproject.org/judges-with-a-conflict-of-interest/> for more information.

## Facts and Issues 2 - The Carloway Review:

6. '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.<sup>2</sup>
7. It is possible that working for the Scottish Government aids promotion prospects. Lord Carloway, after finishing the Carloway Review, was promoted to the position of Lord Justice Clerk and then to the position of Lord President.
8. The Fair Trial's view on this is that Judges have no business working for government and 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.

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<https://www.webarchive.org.uk/wayback/archive/20170105091216/www.gov.scot/About/Review/CarlowayReview>

9. How can Lord Carloway be viewed as independent if he works for Government and advises the legislature? It seems that any Scottish judge can be called upon to lead an advisory / review team. This is the opposite of being independent.

### Facts and Issues 3 - Lord Carloway and the Reclaimers.

10. 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>3</sup>
11. This has never 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? Is it possible that the links between people associated with the band and Lord Carloway will influence him subconsciously?
12. All advocates and judges know about Lord Carloway and the 'Reclaimers' and none have disclosed. This means that all are complicit in this fraud.

### Facts and Issues 4 - The Lord Advocate's Wife / Husband.

13. The Lord Advocate is the chief public prosecutor in Scotland. She<sup>4</sup> is a member of the Scottish Government and all criminal prosecutions are performed in her name and under her instructions.
14. The wife of the previous Lord Advocate, Lady Wolffe QC, is a senior Scottish judge. After Lord Wolffe's resignation, Dorothy Bain QC was appointed Lord Advocate. Her husband is Lord Turnbull, who is a senior Scottish Judge.<sup>5</sup>

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<sup>3</sup> See <https://www.thetimes.co.uk/article/top-judge-to-hear-crimes-against-music-jlvw5kbns>; <https://www.heraldsotland.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>

<sup>4</sup> At the time of writing James Wolffe QC was Lord Advocate it is now Dorothy Bain QC.

<sup>5</sup> <https://www.thetimes.co.uk/article/husband-of-lord-advocate-nominee-dorothy-bain-to-step-aside-from-criminal-judge-role-hlb0sjk6m>

15. This means that each time a criminal trial takes place in Scotland, the prosecution is taking place in front of the prosecutor's husband or one of his colleagues.
16. It is contended 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.
17. One problem here is the effect of indirect links<sup>6</sup>. Whenever Lord Turnbull hears a case, he may be subconsciously influenced by the relationship between an advocate representing one of the parties and his wife. Many advocates work for the Lord Advocate on an ad hoc basis.<sup>7</sup>

#### Facts and Issues 5 – Lady Dorrian's Seminars.

18. 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.
19. 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 of Advocates. 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 (to complainers in sexual offence cases).
20. Lady Dorrian mentioned that she often speaks to the Faculty of Advocates 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

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<sup>6</sup> See Pétur Thór Sigurðsson v. Iceland, no. 39731/98 for an explanation of the problem of indirect links between judges and the parties or their representatives.

<sup>7</sup> <https://amadvocates.co.uk/2017/crown-appoints-new-ad-hoc-advocate-deputes/>

exchange and throughout the questions from other attendees, you could see that Lady Dorrian was friendly with these professionals.

21. It is contended 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.
22. Why has no one disclosed this? What happens when one of the people present at the seminars appears in front of Lady Dorrian?<sup>8</sup> 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?

#### Facts and Issues 6 - The Northern Lighthouse Board (NLB):

23. The Lord Advocate, the Solicitor General and the Sheriffs Principal of all the sheriffdoms of Scotland are Commissioners<sup>9</sup> 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 (Noting that the Lord Advocate represents the Scottish Government).
24. This became an even greater problem in 2015 with the setup of the Sheriff Appeal Court.<sup>10</sup> Sheriff Principals regularly hear appeals involving the Lord Advocate. No one has ever disclosed the links between them created by the NLB.

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<sup>8</sup> *HMA v Craig Murray* [2021] HCJ 2. Lady Dorrian and John Scott QC appearing for Mr Murray.

<sup>9</sup> <https://www.nlb.org.uk/who-we-are/commissioners-board-business/>

<sup>10</sup> <https://www.scotcourts.gov.uk/the-courts/sheriff-appeal-court/sheriff-appeal-court>

## Facts and Issues 7 – Sheriff Principals Dual Responsibilities

25. Sheriff Principals have the responsibility for the smooth running of the courts in their Sherifffdom.<sup>11</sup> Obviously, this creates a conflict of interest. This has never been disclosed.

## Facts and Issues 8 – Judges closed the courts to the public.

26. It was the judges, acting in control of the SCTS (see facts and issues 7), who closed the courts to the public during the Covid-19 pandemic. This was not necessary as limiting the number allowed in each courtroom would have been the correct and lawful way to proceed.

27. This creates a conflict of interest. Who can hear a challenge to the lawfulness of hearings and trials being held in secret? See the paper on Open Justice on the web-site of the Fair Trial Project for more information on this topic.<sup>12</sup>

## Facts and Issues 9 – Scottish Civil Justice Council

28. The Scottish Civil Justice Council<sup>13</sup> makes the executive rules for the Scottish Courts. Scotland's judges, who work alongside senior Government Officials, control it. This creates the possibility of bias, lack of independence, and conflicts of interest.

## Facts and Issues 10 – Family Law

29. The Scottish Government and before them, the Scottish Office consulted with Scotland's judges on family law. Most of the consultation replies were confidential. Appendix A contains a public reply from the Sheriff's Association based at Glasgow Sheriff Court.

30. Please read Appendix A and see if you agree with the contention that Scotland's judges are prejudiced against all men, especially unmarried

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<sup>11</sup> See section 27 of the Courts Reform (Scotland) Act 2014

<sup>12</sup> <https://fairtrialproject.org/open-justice/>

<sup>13</sup> See <https://www.scotcourts.gov.uk/rules-and-practice/rules-councils>

fathers. After the Sheriff's Association produced this response, it is impossible for anyone to receive a fair trial or hearing in Scotland.

31. The Fair Trial Project contends that, due to biased judges, all family law cases need to be redone. The Scottish Court Service continues to schedule family law cases in front of judges that they know are biased.

#### Facts and Issues 11 – Lady Dorrian – Review of the management of sexual offence cases

32. Lady Dorrian (the Lord Justice-Clerk, the second most senior judge in Scotland) led a review of the 'Management of Sexual Offence Cases'. The review was published in March, 2021.<sup>14</sup> The following paragraphs are direct quotes from the review.
33. 'The Lord President and Lord Justice General, Lord Carloway, commissioned this review to develop proposals for an improved system to deal with serious sexual offence cases, following discussions with the Lord Advocate and the Cabinet Secretary for Justice.'
34. Lady Dorrian 'willingly agreed to Chair the review, believing it is essential to meet the increased workload with a modern sustainable system promoting the efficient disposal of business with fair, and just outcomes delivered at the earliest opportunities and as locally as possible. It was clear that to achieve effective improvements, we had to take an entirely fresh look at the way in which sexual offences are dealt with. To support me in undertaking this review I established a cross justice Review Group with representation from members of the judiciary and representatives of the Scottish Courts and Tribunals Service, Police Scotland, the Crown Office and Procurator Fiscal Service, the Faculty of Advocates, the Law Society of Scotland, the Scottish Children's Reporter's Administration, the Scottish Government and the Scottish Legal Aid Board, as well as third sector organisations including Rape Crisis

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<sup>14</sup> <https://scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2021/03/18/improving-the-management-of-sexual-offence-cases>

Scotland, Scottish Women's Aid and Victim Support Scotland. I am very grateful to all participants for the wealth of their contributions. I asked from the outset that we should adopt a "clean sheet" approach and I am indebted to members of the group for their willingness to approach the issues involved with open minds and in a collaborative spirit. I am also grateful to my law clerk, Danielle McLaughlin, for additional research and her valuable assistance in the writing of this report.'

35. The paragraphs above show the extent of Lady Dorrian's lack of independence and impartiality. If you do a 'google' search for 'Lady Dorrian Review of the management of sexual offence cases' you will find a host of links to the Scottish Government and advocates and lawyers.

36. How can Lady Dorrian be viewed as independent and impartial when judging in a case involving any of the people involved in the review or where the subject matter of the case is a sexual offence?

#### Facts and Issues 12 – Judges consulting with government, some examples.

37. The Scottish Government has run consultation exercises on all areas of the law. Many of these have invited the judges to participate. This will always cause a problem as judges will give their position on hypothetical facts and then feel bound by what they have previously said when asked to decide on the matter in real life. Judges should not take any part in the making of legislation, as it will inevitably interfere with their judicial role.

38. Three examples of judges consulting on legislation are listed here:

- a) Aspects of Family Law 2020 (<https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/>).
- b) Homicide (<https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>).
- c) The Carloway Review of Scottish Criminal Law and Practice.

### Facts and Issues 13 – Judges having part-time jobs. This disqualifies them from being a judge.

39. Legislation in Scotland bans Sheriff Principals, Sheriffs and Summary Sheriffs from engaging in any business outside of their judicial role.
40. The legislation is mandatory. It uses the words ‘must not...engage.’ If a Sheriff does engage, then they cannot act as a Sheriff. It then follows that to continue to act as a Sheriff is unlawful. A sheriff who engages in any other business has no authority or jurisdiction to act judicially. Therefore, anything they have done is null and void.
41. See <https://fairtrialproject.org/judges-unlawfully-working/> for examples of judges having part-time jobs and more information.

### Facts and Issues 14 – Fettes College

42. Fettes College (Fettes) is a boarding and day school in Edinburgh. The governing body is the Governors of the Fettes Trust. The Senators of the College of Justice (Scotland’s Senior Judges) and the Faculty of Advocates are part of the governing body. Each year, they elect one of their members to sit as a governor and represent them.
43. The Scottish Child Abuse Inquiry (SCAI) has been set up by the Scottish Government to look ‘at the abuse of children in care in Scotland.’ Fettes has admitted that children were abused at the school between 1930 and 17 Dec 2014.
44. The SCAI is chaired by Lady Smith (a senior Scottish Judge and a Senator of the College of Justice) and the questioning is being done by practising advocates (who are members of the Faculty of Advocates). This means that people who are responsible for the child abuse at Fettes are investigating child abuse in care in Scotland (including the child abuse that happened at Fettes and other schools).

45. The SCAI has run since 2015 and the cost has been over forty-six million pounds (£46,874,090 to the 30<sup>th</sup> of June 2021).
46. Legal proceedings, concerning child abuse allegations at Fettes, are taking place in Scottish courts. None of the judges or advocates involved in these cases have disclosed that they are part of the Fettes governing body.
47. The Lord Advocate, a government minister, state prosecutor and part of the governance of Fettes, decided not to prosecute or investigate some child abuse allegations made by former Fettes pupils. The Lord Advocate did not disclose to these former pupils that their complaints were against him, other advocates, and the judges (as they are all part of the governing body of Fettes).
48. For more information and references see: <https://fairtrialproject.org/fettes-college-child-abuse-cover-up-judges-involved/>

#### Facts and Issues 15 – Trustees of Charities.

49. Scottish Judges regularly act as trustees of charities. This is a bad idea. What happens when an action is taken against the charity? This is in effect an action against the judge as a trustee, and makes it impossible for any dispute to be decided by an independent and impartial tribunal (as the action is against the judge or one of the judge's colleagues).
50. A famous example of where a judge being associated with a charity led to problems was the case of *Pinochet*<sup>15</sup>. In *Pinochet* the House of Lords had upheld an extradition order to extradite Senator Pinochet (the ex-head of State of Chile) to Spain to face allegations of murder and torture.
51. Amnesty International (AI) was a party in the case and Lord Hoffman was the chair of the AI. His vote was the decisive one in a 3 to 2 decision to extradite

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<sup>15</sup> <https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm> or *R v Bow Street Metropolitan Stipendiary Magistrate and Ors, ex parte Pinochet Ugarte (No 2)* [2001] 1 AC 110 (HL).

Pinochet. But, in one of the few times the House of Lords has overturned a decision, this was set aside due to the bias of Lord Hoffman. Pinochet returned to Chile.

52. Lord Hoffman should not have sat. He should have disclosed his involvement with AI and stepped down. Pinochet never had to face the allegations of mass murder and torture that had taken place during his time as the head of state.

53. See the Fettes Child abuse cover up paper for another example of where judges being trustees of a charity creates problems (linked to above).

#### Facts and Issues 16 – Edinburgh Royal Society.

54. Scotland's senior judge, Lord Carloway, is a fellow of the Royal Society of Edinburgh. What happens when another fellow or the Royal Society is involved in an action? Note Lord Wolffe, the Previous Lord Advocate, is also a fellow.<sup>16</sup>

55. There is no record of disclosure of the links between The Royal Society, its fellows and the judges having been made. There is evidence of judges, who are fellows, being involved in a case<sup>17</sup> where the other party is also a fellow.

#### Facts and Issues 17 – Society of Writers to Her Majesty's Signet (SWHMS).

56. The SWHMS (Scottish Charity SCO50897) 'is the incorporated body of Scottish lawyers known as Writers to the Signet or "WS" with over 500 years of heritage. We [they] are one of the oldest incorporated bodies in Scotland for public benefit.'<sup>18</sup>

57. The SWHMS are also on the Board of Governors of the Fettes Trust and have failed to mention the links between the judges, advocates and Fettes. See the Fettes Child Abuse Cover Up Paper for more information on this topic.

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<sup>16</sup> <https://www.rse.org.uk/fellows/>

<sup>17</sup> *David Callaghan (Appellant) v HMA* [2021] HCJAC 4. Lord Wolffe as Lord Advocate, Lord Carloway as a judge.

<sup>18</sup> <https://www.wssociety.co.uk/>

## Facts and Issues 18 – Robbie the Pict and the Scottish Judges and the Speculative Society.

58. Robbie the Pict (AKA Brian Robertson) who campaigned against the Sky Bridge tolls in a series of cases that he lost. Not one judge disclosed their links to the Lord Advocate and other Advocates appearing against him. This is a massive fraud. The Fair Trial Project will report the judges to the police.
59. 'Robbie the Pict, a veteran Skye Bridge tolls protester, had claimed that the bench was biased against him because of the influence of the Speculative Society. His claim related to a failed appeal against his conviction for non-payment of the bridge tolls, heard in 1998 by Lord Osborne, a member of the Edinburgh-based society.'<sup>19</sup>
60. If anyone knows Robbie the Pict, can they please ask him to contact the Fair Trial Project.

## Facts and Issues 19 – Faculty of Advocates helping other advocates in live cases.

61. Advocates use the Advocates Library and the other advocates there to help assist them when running cases in the High Court and the Court of Session<sup>20</sup>. This places people acting for themselves at a tremendous disadvantage.
62. This means that non-advocates do not have equality of arms<sup>21</sup> when appearing in Scotland's Supreme Court(s).

## Facts and Issues 20 – Upper Tribunal.

63. Advocates act as part-time judges and as representatives in the Upper Tribunal. No advocate has ever disclosed the financial, personal and business links between an advocate acting as a representative and an advocate acting part-time as a judge (see the first three facts and issues).

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<sup>19</sup> <https://www.thetimes.co.uk/article/robbie-the-pict-defeated-3x10865gsws>

<sup>20</sup> <http://www.advocates.org.uk/faculty-of-advocates/what-is-the-faculty-of-advocates>

<sup>21</sup> [https://www.echr.coe.int/documents/guide\\_art\\_6\\_criminal\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf)

64. 'The President is the senior member of the Scottish Tribunals and is assigned to their position by the Lord President. The current President of Scottish Tribunals is The Rt Hon Lord Woolman.'<sup>22</sup> This creates a conflict of interest whenever an appeal is taken from the Upper Tribunal to the Court of Session.

### Facts and Issues 21 – Judicial Appointments Board

65. The Judicial Appointments Board Scotland (JABS) contains judges, advocates, lawyers and government officials working side by side to choose judges.<sup>23</sup>

### Facts and Issues 22 – Scottish Law Commission.

66. The Scottish Law Commission<sup>24</sup> has judges, advocates, lawyers and government officials working on advising the government on the law. They run consultation exercises on law reforms. These consultations involve the Scottish judges and their associations.<sup>25</sup>

67. The chair of the Scottish Law Commission is Lady Paton. She spends 40% of her time as chair and 60% as a judge. Can Lady Paton be considered independent when she works part-time with the Scottish Government? Note that no one has ever disclosed their involvement with the Scottish Law Commission.

### Facts and Issues 23 – Faculty Services Ltd (FSL) and Part-time or Temporary Judges

68. The Faculty of Advocates (Faculty) elects the Chair<sup>26</sup> of FSL and controls its management board<sup>27</sup>. FSL provides administrative and other support services

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<sup>22</sup> <https://www.judiciary.scot/home/judiciary/judicial-office-holders/tribunals>

<sup>23</sup> <https://www.judicialappointments.scot/about/meet-our-team/board-members>

<sup>24</sup> <https://www.scotlawcom.gov.uk/>

<sup>25</sup> <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/>

<sup>26</sup> <http://www.advocates.org.uk/faculty-of-advocates/governance>

<sup>27</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>

to advocates by organising them into groups called Stables. Each Stable organises an advocate's workload and FSL keeps 6.5%<sup>28</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.

69. When a part-time or temporary judge who is an advocate is judging a case where the representatives are also advocates, the part-time judge benefits financially from the fees paid. Think of the situation where an advocate asks for a continuation or other procedural change, the judge, the part-time advocate, has a financial interest in whether to grant or deny this request (as they benefit from the 6.5% of fees paid to FSL).

70. Many members of the Faculty are part-time Sheriffs<sup>29</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>30</sup>. Again, there is no record of anyone disclosing a financial link via FSL.

71. For a full explanation of 'Facts and Issues' 1, 2 and 3 see the 'Faculty...Criminal Organisation' paper linked to above.

## Facts and Issues 24 - Membership of the Faculty

72. Membership of the Faculty: 'The Faculty of Advocates comprises both practising and non-practising members. 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>31</sup>

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<sup>28</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>29</sup> <https://www.judiciary.scot/home/judiciary/judicial-office-holders/sheriffs/part-time-sheriffs>

<sup>30</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)).

<sup>31</sup> See: <http://www.advocates.org.uk/faculty-of-advocates/governance/membership>

73. All the senior judges in Scotland are non-practising members of the Faculty. Non-practising members benefit financially from the 6.5% fee paid to FSL when this money is allocated to services that they are associated with or have access to. No judge or advocate has ever disclosed this link or financial benefit.

## Facts and Issues 25 - The Appointment of a QC

74. The Lord Justice General (Scotland's most senior judge) is responsible for the appointment of QCs<sup>32</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>33</sup>. The Lord Advocate and other representatives of the Scottish Executive<sup>34</sup> are consulted as part of this process.

75. 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.

76. Two examples of the many 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; 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.

77. 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,

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<sup>32</sup> <https://www.gov.scot/publications/appointment-queens-counsel-scotland-2020/pages/4/>

<sup>33</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>34</sup> The Scottish Government, the Scottish Ministers and the Scottish Executive are used interchangeably throughout this paper.

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.

78. 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 it is possible the Lord Advocate's appointment as a QC, by the senior judges, will influence all judges subconsciously.

79. 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).

80. Please note that the recommendation or disapproval of QC candidates has never been disclosed by any of those involved.

81. There are many examples of people in criminal trial and civil cases acting for themselves. This highlights a situation where the links between the judges and the advocates will lead to the possibility of subconscious bias.

## Appendix A – Sheriff’s Association Response to Family Law Consultation.

THE SHERIFFS’ ASSOCIATION

Sheriff’s Chambers  
Sheriff Court of Glasgow & Strathkelvin  
P.O. BOX 23  
1 Carlton Place  
GLASGOW G5 9DA  
29 November 2000  
Dear Mr Clarke

WHITE PAPER ON SCOTTISH FAMILY LAW

I enclose the response of the Council of the Sheriffs’ Association in respect of the above consultation. In this instance we waive confidentiality.

Please acknowledge receipt  
Yours sincerely

SHERIFF B A LOCKHART  
Enc

PARENTS AND CHILDREN

A White Paper on Scottish Family Law

Comments on proposals and responses to questions on behalf of the Sheriffs’ Association. In March 1999, the Scottish Office issued a consultation paper entitled “Improving Scottish Family Law” which invited responses on a number of proposals. In the light of these responses, after the Scottish Executive took over administrative and policy responsibility for such matters, preliminary decisions were announced by the Minister for Justice in the Scottish Parliament on 20 January 2000.

The present White Paper on Scottish Family Law now invites comments on the 16 proposals and responses to the four questions there set out. What follows represents the views of the Council of the Sheriffs' Association.

## **Chapter 1 - Introduction**

Amongst the Principles upon which the Executive indicate Scottish Family Law should be based is: "No divorce should be granted until appropriate arrangements have been made for the children of the marriage". Since the passing of the Children (Scotland) Act 1995 courts have had power to make orders *ex proprio motu* and the terms of Section 12 indicate that it is only in exceptional circumstances that a divorce should be delayed to enable a Sheriff to be satisfied about the child's welfare. The Sheriff Court Rules no longer require a court to deal with arrangements for children before granting a divorce and paras 10.1 — 10.3 of the present Paper recognise the current state of the law. It is presumed that no change of emphasis or policy is intended by the inclusion of this as a "Principle".

## **Chapter 2 - Parental Responsibilities and Rights**

### **Proposal 1**

In the original Consultation Paper, we were opposed to any change in the law on parental responsibilities and rights of unmarried fathers for the reasons which we set out. We note that our view has not been accepted, although we find it surprising that this proposal, with the potential which it has for disturbing the lives of mothers in vulnerable situations and of jeopardising the welfare of their children, should be made at a time when there is increasing concern about domestic violence, now said to be at a level perhaps as much as twice as high as that in England. and should be made before the recommendations of the Scottish Partnership on Domestic Abuse are known. If, as the Paper suggests, families in Scotland already operate on an assumption that fathers who register the birth of a child jointly with the mother have parental rights and responsibilities - and apparently operate satisfactorily on that basis - a change in the law will effect a practical difference only in controversial and potentially unmeritorious cases. We consider that such cases are better left to be regulated by the courts upon an application by the father. The position of the mother and children would thereby be secured until a judicial decision was made.

We remain of the view that attendance by a father to register jointly the birth with the mother demonstrates only a commitment at that very early point in time, and is far from necessarily demonstrating the continuing commitment upon which the proposal to extend parental rights is predicated. We consider that it could also put the mother at a disadvantage if the rights

were to be asserted after a long interval in which there had been no indication of interest in or acknowledgement of responsibility for the child.

As an Association we remain opposed to any change in the law on parental rights and responsibilities of unmarried fathers. However a number of Sheriffs consider that as the best interests of a child are the paramount consideration, both parents should be presumed to have full and equal responsibilities for their child unless a court rules otherwise. They contend that the mere securing of an official document confirming parenthood should not *per se* create additional rights and responsibilities which would not exist in the absence of such documentation. They also believe that the preclusion of a father (once that has been established) from his parental rights on this basis might breach his human rights to family life.

As to question 1, we are totally opposed to the “retrospective” option. The arguments against that option are, we consider, well stated in paragraph 2.18 of the Paper. We cannot usefully add to them.

### **Proposal 2**

In our original response, we favoured in principle the proposal for agreements by which stepparents might acquire parental responsibilities and rights although we noted a reservation about possible difficulties inherent in a situation unregulated by the court in which three people enjoy full parental responsibilities and rights. We consider that that situation carries a risk of giving rise to difficulties and of being confusing for the child. Moreover, the extensive discussion which certain aspects of the proposal receive in the current Paper prompts questions of whether the whole proposal, even if good in principle, may be bad in practice. The views of the child seem to us to be particularly important in this connection. That parents, perhaps ignorant of section 6 of the Children Act 1995, may not take appropriate account of the views of a child even in relation to an important decision, may be one of the misfortunes of life which children have to endure; but on an issue of fundamental change as significant as the acquisition of parental responsibilities and rights by a third party, we believe that there should be some guarantee that the views of the child were taken into account. Whatever the difficulties of ascertaining the views of a child in a judicial process, that process, or at least some equivalent formal process, would be the only way of providing such a guarantee. There are also the added problems, discussed in the

Paper, where only one birth parent has parental responsibilities and rights and where questions of termination of an agreement arise. As the Paper says, the area is complex. While it may be unfortunate that step-parents have to go to court in order to acquire parental responsibilities and rights when all parties including the children are agreed, we believe that the difficulties inherent in changing the law may outweigh the advantages. Accordingly, on reflection, we would strongly recommend leaving the law in its present state. In particular, as regards paragraph 2.33, we do not favour opening the procedure to cohabitants. So far as question 2 is concerned, if the law is to be changed, it seems illogical to us to allow acquisition of parental responsibilities and rights by agreement where there are two birth parents having those responsibilities and rights but not to allow it where there is only one. However, we are impressed by the objections raised in the Paper (particularly in paragraph 2.34) and we would therefore answer question 2 in the negative. We would therefore consider that Step-parents' Agreements should not be available to the spouse of someone who has sole parental responsibilities and rights. So far as question 3 is concerned, we would answer it in the affirmative since we are of the view that a Step-parent's Agreement should be able to be terminated only by a court. We consider that the arguments for this set out in paragraphs 2.38 and 2.39 are persuasive and should be followed.

### **Chapter 3 — Domestic Abuse**

#### **Proposals 3 to 7**

In the light of what is proposed in the Paper, we would only observe that, although we expressed the view that there were difficulties - which might in part be described as difficulties of definition — in giving legal recognition to cohabitation for the purpose of certain legal effects in relation to property, we did not voice any concern about the definition of cohabitation for the purposes of interdict. We consider that that reflects the practical reality. Faced with an application by a person claiming to be a cohabitant for protection by way of interdict against violence or molestation, if there was any indication of “living together”, we do not consider that the definition of cohabitation would prove difficult. However, while that is true of current or recent cohabitation, there may be rather more difficulty in the case of former cohabitants where a significant period of time has elapsed between the cessation of cohabitation and the events giving rise to the application for interdict. We believe that that difficulty would be avoided if interdicts with a power of arrest were available in all cases of violence or molestation. That would have the advantage of extending the protection which may be needed irrespective of the relationship. That is an option which the Executive seems

not to have considered and which, while we did not suggest it originally, we consider may have merit.

We would urge that, when consideration is being given to the recommendations of the Scottish Partnership on Domestic Abuse and any other debates of the Justice and Home Affairs Committee of the Scottish Parliament, there is kept in mind any overlapping provisions offering protection to those who have been abused. There is a need above all for existing remedies and those set out in chapter 3 of the Paper to be rationalised and made as straightforward as possible - as well as complying with and safeguarding the human rights of all concerned.

## **Chapter 4 — Divorce**

### **Proposal 8 and Question 4**

We note that the views which we expressed in our response to the initial Consultation on divorce have not been accepted.

As to question 4 in the present Paper, the majority of the Council have no strong view on whether or not adultery should remain a separate ground for establishing irretrievable breakdown or should merely be regarded as an aspect of intolerable behaviour. They are therefore inclined to answer question 4 in the affirmative which would result in the fault grounds of adultery and unreasonable behaviour being merged into a single fault ground. If divorce is to be available with consent after separation for one year and even without consent after two years, the advantages of retaining any fault ground at all must, in our view, be marginal. A minority take the view that adultery should remain a separate ground of divorce.

## **Chapter 5 — Supporting Families in Transition**

### **Proposals 9 and 10**

We have no comments to offer on these proposals.

## **Chapter 6 — Tidying Up the Law on Marriage**

### **Proposal 11**

We have no comments to offer on this proposal.

## **Chapter 7 — Financial Provision for Cohabitants**

### **Proposals 12 to 15**

We note that the views which we expressed in response to the original Consultation have not been accepted. In the light of that, we accept that there is, no doubt, a certain equity in what is proposed — or at least that will be so in some cases. The potential for complex, expensive and difficult litigation is, however, as we indicated, considerable.

## **Chapter 8 - Other Proposals**

### **Proposal 16**

We note this proposal and would observe that the form of legislation may, however require some attention. We are somewhat perplexed by the final sentence of paragraph 8.5 where it is indicated that in legislating, powers will be taken to make similar provision for other faith groups, should they so want. It is not clear to us whether the legislation proposed is to be comprehensive or whether it is to cover only religious groups which request that they be covered. We consider that the former course may be difficult but the latter seems likely to give rise to injustice to individuals.

## **Chapter 9 - Impact of Proposals**

We have no comment to offer on this chapter.

On behalf of the Sheriffs' Association.