

## The Scottish Human Rights Commission

### Response to the The Public Petitions Committee

#### *PE No. 1455*

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The Scottish Human Rights Commission (the Commission) was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of **its functions. The Commission's mandate is to promote and protect human rights for everyone in Scotland. We are one of the 67 National Human Rights Institutions accredited with 'A status' and established according to the United Nations Principles relating to the Status of National Institutions (The Paris Principles).**

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Thank you for your letter regarding public petition PE1455. The Committee invited the Commission's views on whether there is a need for new legislation in order 'to create a free of charge public right of access to information generated in relation to court proceedings, including all documents which have been read in open court, whether aloud or not, and to proactively publish this information online'. In providing this response, the Commission offers its views in relation to the relevant human rights standards. We will focus on question one. This response is not, however, intended to set out a definitive view on the issue nor on human rights compatibility of the law of Scotland at this point.

The right to access to court is one of the components of the right to fair trial protected by Article 6 of the European Convention on Human Rights (the Convention). Although the text of the Convention does not contain specific reference to the right to access the court, it has been established by the case law of the European Court of Human Rights that the right of access to a court is an inherent part of the fair trial guarantees provided by Article 6<sup>1</sup>. Where civil rights or criminal charges, as defined by the Court's case-law, are involved everyone must have access to court.

The right to access to court is not an absolute right and some limitations will be compatible with the Convention if:

- They pursue a legitimate aim; and
- There is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.<sup>2</sup>

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<sup>1</sup> See for example *Golder v. UK* (1975)

<sup>2</sup> *Ashingdane v. the United Kingdom*, (1985)

In criminal cases, disclosure of information is vital to ensure a fair trial. Article 6(3)(b) imposes an obligation on prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence. This principle extends to material which might undermine the credibility of a prosecution witness.

In civil cases, there is a right to equality of arms. This requires parties to be able to have knowledge of and comment effectively on all the evidence or observations filed with a view to influencing the court's decision.<sup>3</sup>

UK Courts have emphasised the centrality of open justice in the common law tradition. For instance, the Court of Appeal in *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court*<sup>4</sup> upheld the *Guardian's* application for access to court documents opened during a high profile extradition hearing. However, public right of access to information should be carefully considered.<sup>5</sup>

Human rights law and standards indicate that the entitlement to disclosure of relevant evidence and other documents which have been read in open court is not an absolute right and that there may be competing interests such as the right to respect for private and family life (Article 8 of the Convention) or the effective administration of justice (i.e. protecting witnesses or secret police methods of investigation of crime), which need to be balanced.<sup>6</sup>

In Scotland, the High Court of Justiciary recently considered the issue of public access to court documents when the BBC asked to see photographs that were entered as Crown productions in the case *HMA v Hainey*<sup>7</sup>. Lord Woolman ruled that the photographs should be disclosed as they were "significant adminicles of evidence at the trial" that had been "effectively published in open court".

## Conclusion

Access to a court is an inherent part to the right to fair trial. The proper administration of justice should consider the modern notions of transparency, access to information, and good governance norms in order to allow for a reasonable process for permitting public access to court documents. Any restrictions upon the principle of open court/justice must be read in a manner compatible with the Convention, in particular Article 6 (fair trial) and Article 10 (freedom of expression) and Article 8 (Private and family life).

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<sup>3</sup> *Dombo Beheer NV v Netherlands* (1993) 18 EHRR 213

<sup>4</sup> [2012] EWCA Civ 420 (03 April 2012)

<sup>5</sup> Article 14 of the ICCPR states that '*judgement rendered in a criminal case or in a suit at law shall be made public except*' in certain narrowly circumstances. See also Article 6 (1) of the Convention

<sup>6</sup> *Rowe and Davis v. the United Kingdom* (2000)

<sup>7</sup> [2010] HCJDV 10