PE1455/E

Petitioner Letter of 24 January 2013 (as updated at 4 March 2013)

A. Victim Support Scotland

I agree with the views of Victim Support Scotland. They recognise both the importance of making information readily available, to ensure the openness and transparency of the justice system, and that the right to information cannot be unlimited and the rights of victims and witnesses to privacy must be balanced against the proposed presumption in favour of disclosure.

Under my proposal the presiding judge would have the discretion to withhold certain information from automatic disclosure. Victim Support Scotland raises the concern that victims/witnesses may not be able to specifically apply to have information withheld from dissemination. It may therefore be appropriate for the judiciary to have a proactive role in withholding information rather than a reactive one.

There are rules governing what information should be redacted before documents are made available on PACER (the US system which I highlighted in the petition). This sees dates of birth and social security numbers, etc. removed as a matter of course, without judicial intervention. The decision to withhold certain information could therefore become an administrative one in the majority of cases.

Victim Support Scotland states that "courts are already 'open' for members of the public and the media to attend and report on the proceedings". Whilst this is true in principle, cases consist of many different hearings, and their long and sporadic nature can make it difficult in practice for members of the public to attend. For example, a person living in the Scottish Highlands would likely find it difficult and costly to attend the hearings of a case held in the High Court of Justiciary in Edinburgh.

Victim Support Scotland notes that "information often is not directly or proactively communicated to victims about proceedings in their case by criminal justice agencies". I believe that this is something that should be improved as opposed to a reason why members of the public and the press should be denied the same information on a "if the victims can't have it then neither should the public" basis.

Victim Support Scotland raised concerns of implications in accordance with Data Protection legislation. The law on the processing of data on identifiable living individuals is defined by the UK wide *Data Protection Act 1998*. This Act explicitly allows information to be disclosed where such disclosure is "required by or under any enactment, by any rule of law or by the order of a court"[1] or where the disclosure is necessary in connection with legal proceedings[2]. If the Committee wishes a conclusive opinion on data protection implications, I would suggest it consults the UK Information Commissioner.

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[1] s35(1)
[2] s35(2)

It will inevitably be necessary for some information pertaining to victims and witnesses to be disclosed in order for the case to be understood. However, I agree with Victim Support Scotland of the necessity of "robust limitations and safeguards" to protect both victims of crime and third party witnesses.

B. Scottish Court Service

The response from the Scottish Court Service gives the view that providing public access to court records "would place an unreasonably and disproportionately high administrative burden upon SCS".

Whilst the proposal would have an impact on court administration, I disagree with the contention that such an impact would be "unreasonable and disproportionate". The SCS was established by the Scottish Parliament to provide administrative support for the Scottish courts and the judiciary. If the Parliament wishes to provide public access to court documents, it will decide how this will be implemented and if an additional duty is placed on the SCS then the Parliament would provide the SCS with a sufficient budget to fulfil this duty to ensure that an unreasonable burden is not placed on them.

In his *Report of the Scottish Civil Courts Review* of 2009, the then Lord Justice Clerk (Gill) highlighted that the services provided by the Scottish civil courts could be substantially improved by investing in information technology solutions, which could include e-filing and electronic document management systems. Using such systems, where documents are held electronically rather than on paper, would make it substantially easier to implement the proposed public right of access.

My petition specifically called on information to be proactively published online. This should ensure an even workload for court staff and prevent an influx of requests during a case of particular interest.

C. Scottish Government

The Scottish Government states that "many court documents are held by the parties themselves rather than the courts". If documents presented before a court need to be returned to the parties, they could be scanned into a document management system or, preferably, sent to the court electronically ("e-filing").

The Scottish Government recognises that there would be a financial implication in implementing the proposal for public access to court records. I appreciate that this will inevitably be the case and that public funds are currently in high demand and short supply. However, the issue at hand is an important one. A well implemented system allowing the public to access court documents would certainly increase openness and transparency and have the effect of maintain and improving public confidence in the administration of justice.

The Scottish Government suggests that there may be concerns over data protection and interests competing with the public interest in open justice, such as the right to privacy and a fair trial. I have already commented on this as Victim Support Scotland raised similar points, and would like to add that a fair trial is ultimately secured

through proceedings held in public. In fact, public justice is required by the *European Convention on Human Rights*[3].

To an extent I agree with the Scottish Government's view that access to court documents should be a matter for the courts. However, I believe that they courts lack a suitable infrastructure to disclose documents on a large scale. Investment need to be made in information technology – in line with Lord Gill's proposals – to ensure that public access can be made easily and efficiently, ensuring that information is available when it is still relevant. It may also be favourable for the Parliament to confirm the presumption towards allowing access to information, in order to ensure the open justice principle is fully enshrined in Scots law.

Finally, the Scottish Government states that court documents may contain financial or medical information and consideration of whether such information should or should not be made publicly available often requires a delicate balancing of private and public rights, something which should be done by the court. If this must be the case, then I would argue that there needs to be a simplified way of applying for access that does not require lodging an application, paying full court fees and appearing in court to argue grounds for access.

D. Scottish Human Rights Commission

I agree with the response of the Scottish Human Rights Commission and appreciate that they refer to the same cases I highlighted in the petition. These cases give the latest insight into how the courts favour the open justice principle.

E. Law Society of Scotland

I believe I have already covered most of the points raised by the Law Society. They note the importance of accurately conducting the balancing exercise between the right to open public justice against the right to privacy. It may therefore be more suitable to publish only basic uncontroversial information and provide a mechanism whereby the public can easily request additional information.

General Comments

Many of the responses claim that implementing my proposal would be costly and burdensome on the courts. I would like to invite the committee to investigate – or ask the Scottish Government to investigate – the possibility of various routes to achieving public access to court records and the costs of such options, so that hard evidence is available and we do not need to rely on speculation of the workload involved.

If this committee wishes to conduct further consultation it might be appropriate to consult the Faculty of Advocates, Lord President, Lord Advocate and Article 19.

[3] article 6(1) – "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law