Passage of the

Criminal Cases
(Punishment and Review)
(Scotland) Bill 2011

SPPB 176
Passage of the

Criminal Cases (Punishment and Review) (Scotland) Bill 2011

SP Bill 5 (Session 4), subsequently 2012 asp 7

SPPB 176

EDINBURGH: APS GROUP SCOTLAND
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
Introduction, followed by publication of the Bill and its accompanying documents;
Stage 1: the Bill is first referred to a relevant committee, which produces a report
informed by evidence from interested parties, then the Parliament debates the Bill
and decides whether to agree to its general principles;
Stage 2: the Bill returns to a committee for detailed consideration of
amendments;
Stage 3: the Bill is considered by the Parliament, with consideration of further
amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of
four weeks within which they may challenge the Bill under sections 33 and 35 of the
Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which
point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases.
For example, Bills may be referred back to a committee during Stage 3 for further
Stage 2 consideration. In addition, the procedures vary for certain categories of
Bills, such as Committee Bills or Emergency Bills. For some volumes in the series,
relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft
Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of
legislation more generally, is advised to consult in the first instance the Guidance on
Public Bills published by the Parliament. That Guidance, and the Standing Orders,
are available for sale from Stationery Office bookshops or free of charge on the
Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber
Office. Comments on this volume or on the series as a whole may be sent to the
Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process
described above.

Written submissions to the Justice Committee for its Stage 1 Report were originally
published on the web only, but have been reproduced in full within this volume and
can be found after the body of the Report.

The Subordinate Legislation Committee’s report is included in the Justice
Committee’s report as an Annexe. This report refers to meetings of the Subordinate
Legislation Committee on 24 January and 7 February. Official Reports of these
meetings are not included in this volume as proceedings were either conducted in
private (7 February) or because the matters discussed are contained within the
Committee’s report (24 January).
Criminal Cases (Punishment and Review) (Scotland) Bill
[AS INTRODUCED]

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Criminal Cases (Punishment and Review) (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to amend the rules about the punishment part of non-mandatory life sentences imposed in criminal cases and to amend the rules about the disclosure of information obtained by the Scottish Criminal Cases Review Commission.

PART 1

PUNISHMENT PART OF NON-MANDATORY LIFE SENTENCES

1 Setting the punishment part

(1) Part 1 (detention, transfer and release of offenders) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is amended as follows.

(2) In section 2 (duty to release discretionary life prisoners), in subsection (2)—

(a) in the opening text, the words “(ignoring the period of confinement, if any, which may be necessary for the protection of the public)” are repealed,

(b) paragraph (aa) and the word “and” immediately preceding paragraph (c) are repealed,

(c) after paragraph (c) there is inserted “; and

(d) in the case of a life prisoner to whom paragraph (a) or (ab) of subsection (1) above applies, the matters mentioned in section 2A(1).”,

(d) after subsection (2) there is inserted—

“(2A) The matters mentioned in subsection (2)(a) to (c) above (taken together) are for the case of a life prisoner to whom paragraph (aa) of subsection (1) above applies; and, as respects the punishment part in the case of such a prisoner, the court is to ignore any period of confinement which may be necessary for the protection of the public.”.

(3) After section 2 there is inserted—

“2A Rules for section 2(2)(d) cases

(1) For the purpose of section 2(2)(d), the matters are—
(a) any period of imprisonment which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to imprisonment for life, or (as the case may be) not made the order for lifelong restriction, for it,

(b) the part of that period of imprisonment which would represent an appropriate period to satisfy the requirements of retribution and deterrence, and

(c) where appropriate, the ones mentioned in paragraphs (a) and (b) of section 196(1) of the 1995 Act.

(2) But—

(a) in the application of subsection (1)(a), the court is to ignore any period of confinement which may be necessary for the protection of the public,

(b) subsection (1)(b) is subject to section 2B,

(c) subsection (1)(c) is inapplicable until the court has made the assessment required by virtue of subsection (1)(a) and (b).

2B Assessment under section 2A(1)(a) and (b)

(1) The part mentioned in subsection (1)(b) of section 2A in relation to the period mentioned in subsection (1)(a) of that section is—

(a) one-half of that period, or

(b) if subsection (2) applies, such greater proportion of that period as the court specifies.

(2) This subsection applies if, taking into account in particular the matters mentioned in subsection (5), the court considers that it would be appropriate to specify as that part a greater proportion of that period.

(3) In subsections (1)(b) and (2), the references to a greater proportion extend so as to include the whole of that period.

(4) In subsections (1) to (3), the references to the period mentioned in subsection (1)(a) of section 2A are to that period as informed by subsection (2)(a) of that section.

(5) For the purpose of subsection (2), the matters are (continuing to ignore any period of confinement which may be necessary for the protection of the public)—

(a) the seriousness of the offence, or of the offence combined with other offences of which the prisoner is convicted on the same indictment as that offence,

(b) where the offence was committed when the prisoner was serving a period of imprisonment for another offence, that fact, and

(c) any previous conviction of the prisoner.”.

(4) Part 2 (confinement and release of prisoners) of the Custodial Sentences and Weapons (Scotland) Act 2007 is amended as follows.

(5) In section 20 (setting of punishment part)—
in subsection (3), the words “(ignoring any period of confinement which may be necessary for the protection of the public)” are repealed,

(b) after subsection (4) there is inserted—

“(4A) As respects the punishment part in the case to which subsection (4) relates, the court is to ignore any period of confinement which may be necessary for the protection of the public.”,

(c) in subsection (5)—

(i) the word “and” immediately preceding paragraph (b) is repealed,

(ii) in paragraph (b), for the words “, by virtue of section 6, the court would have specified as the custody part.” there is substituted “would represent an appropriate period to satisfy the requirements of retribution and deterrence,”,

(iii) after paragraph (b) there is inserted “and

(c) where appropriate, the ones mentioned in paragraphs (a) and (b) of section 196(1) of the 1995 Act.”,

(d) after subsection (5) there is inserted—

“(5A) But—

(a) in the application of subsection (5)(a), the court is to ignore any period of confinement which may be necessary for the protection of the public,

(b) subsection (5)(b) is subject to section 20A,

(c) subsection (5)(c) is inapplicable until the court has made the assessment required by virtue of subsection (5)(a) and (b).”.

(6) After section 20 there is inserted—

“20A Assessment under section 20(5)(a) and (b)

(1) The part mentioned in subsection (5)(b) of section 20 in relation to the period mentioned in subsection (5)(a) of that section is—

(a) one-half of that period, or

(b) if subsection (2) applies, such greater proportion of that period as the court specifies.

(2) This subsection applies if, taking into account in particular the matters mentioned in subsection (5), the court considers that it would be appropriate to specify as that part a greater proportion of that period.

(3) In subsections (1)(b) and (2), the references to a greater proportion extend so as to include the whole of that period.

(4) In subsections (1) to (3), the references to the period mentioned in subsection (5)(a) of section 20 are to that period as informed by subsection (5A)(a) of that section.

(5) For the purpose of subsection (2), the matters are (continuing to ignore any period of confinement which may be necessary for the protection of the public)—
(a) the seriousness of the offence, or of the offence combined with other
offences of which the prisoner is convicted on the same indictment as
that offence,
(b) where the offence was committed when the prisoner was serving a
period of imprisonment for another offence, that fact, and
(c) any previous conviction of the prisoner.”.

2 Ancillary provision

(1) The Scottish Ministers may by regulations make such supplemental, incidental,
consequential, transitional, transitory or saving provision as they consider necessary or
expedient for the purposes of or in connection with section 1.
(2) Regulations under subsection (1) may (in particular) modify Part 1 of the Prisoners and
Criminal Proceedings (Scotland) Act 1993 or Part 2 of the Custodial Sentences and
Weapons (Scotland) Act 2007.
(3) Regulations under subsection (1) are subject to the affirmative procedure.

PART 2
DISCLOSURE OF INFORMATION OBTAINED BY SCCRC

3 Exception to non-disclosure rule

(1) Part XA (Scottish Criminal Cases Review Commission) of the Criminal Procedure
(Scotland) Act 1995 is amended as follows.
(2) In section 194J (offence of disclosure), in subsections (1) and (2), after the words
“section 194K” in each place where they occur there is inserted “or 194M”.
(3) After section 194L there is inserted—

“Special circumstances for disclosure

194M Further exception to section 194J

(1) The disclosure of information, or the authorisation of disclosure of
information, is excepted from section 194J by this section if—
(a) the conditions specified in subsection (2) are met, and
(b) the Commission have determined that it is appropriate in the whole
circumstances for the information to be disclosed.
(2) The conditions are that—
(a) the information relates to a case that has been referred to the High Court
under section 194B(1),
(b) the reference concerns—
(i) a conviction, or
(ii) a finding under section 55(2), and
(c) the case has fallen, or has been abandoned, under the provisions or other
rules applying by virtue of section 194B(1).
(3) However—
Criminal Cases (Punishment and Review) (Scotland) Bill
Part 2—Disclosure of information obtained by SCCRC

(a) subsection (1) is subject to (as they have effect in light of section 194Q)—
   (i) section 194N(1) (for information generally),
   (ii) section 194O(1) as read with section 194P (if foreign interest),

(b) see also section 194R (about certain final matters).

194N Notification and representations etc.

(1) When caused to consider for the purpose of section 194M(1) the question of whether it is appropriate for the information to be disclosed, the Commission have the following duties.

(2) The Commission must—
   (a) so far as practicable, take reasonable measures to—
      (i) notify each of the affected persons of the possibility that the information may be disclosed, and
      (ii) seek the views of each of them on the question, and
   (b) to such extent (and in such manner) as they think fit, consult the other interested persons.

(3) The Commission must—
   (a) allow the prescribed period for each of the affected and other interested persons involved to take steps (including legal action) in their own favour in relation to the question, and
   (b) have regard to any material representations made to them on the question by the any of those affected and other interested persons within the prescribed period.

(4) The Commission must have regard to any other factors that they believe to be significant in relation to the question.

(5) In subsections (2) and (3)—
   (a) the references to the affected persons are to the persons—
      (i) to whom the information directly relates, or
      (ii) from whom the information was obtained, whether directly or indirectly,
   (b) the references to the other interested persons are to (so far as not among the affected persons)—
      (i) the Lord Advocate, and
      (ii) such additional persons (if any) as appear to the Commission to have a substantial interest in the question.

(6) In subsection (3), the references to the prescribed period in relation to a particular person are to—
   (a) the period of 6 weeks, or
   (b) such longer period as the Commission may set,
starting with the date on which the notification was sent to, or (as the case may be) consultation was initiated with respect to, the person.

(7) Subsections (3) and (6) are inapplicable in relation to a particular person if the Commission cannot reasonably ascertain the person’s whereabouts.

194O  Consent if foreign interest

(1) Unless subsection (4) is complied with, section 194M(1) is of no effect in relation to any information obtained and supplied as mentioned in subsections (2) and (3) (taken together).

(2) That is, obtained—

(a) whether directly or indirectly, by the Lord Advocate at any time, or

(b) by the Commission in consequence of their own application.

(3) That is, supplied by a designated foreign authority under international assistance arrangements (whether or not through an intermediary).

(4) This subsection is complied with if the designated foreign authority has in connection with section 194M(1) given its consent to disclosure of the information by virtue of—

(a) international assistance arrangements, or

(b) subsection (5).

(5) Where not previously given by virtue of such arrangements, it is for the Commission to seek the designated foreign authority’s consent.

(6) The reference in subsection (1) to information includes information consisting of or deriving from evidence of any kind.

194P  Terms used in section 194O

(1) The references in section 194O to international assistance arrangements are to arrangements falling within subsections (2) and (3) (both of them).

(2) That is, arrangements which are or were set by an enactment or agreement (present or past).

(3) That is, arrangements by means of which a prosecutorial, judicial or other authority within Scotland or another part of the United Kingdom is or was entitled to make a request—

(a) directed at a foreign authority of any type, and

(b) for assistance in relation to a criminal matter.

(4) It is immaterial in this regard how such a request is or was issuable by the authority within the United Kingdom or transmissible to the foreign authority (or how either of those authorities is described).

(5) The references in section 194O to the designated foreign authority are to the current or previous authority of any type which is or was—

(a) within the other country or territory (including at any particular place in it), and
(b) mentioned in the enactment or agreement concerned as the addressee or recipient (however described) of such a request.

(6) But, if in connection with subsection (5) of that section—

(a) the Commission cannot reasonably identify or find the relevant foreign authority (as described in subsection (5)), or

(b) they are unsuccessful in their reasonable attempts to communicate with it,

the references in subsections (4) and (5) of that section (ignoring paragraph (a) of that subsection (4)) to the designated foreign authority are to be read as if they were to the relevant foreign government.

(7) In subsection (6)—

(a) the references to the Commission include their acting with the Lord Advocate’s help,

(b) the reference to the relevant foreign government—

(i) is to the government of the other country or territory,

(ii) in the event of doubt as to the status or operation of a governmental system in the other country or territory, is to be regarded as being to the body described in subsection (8).

(8) That is, the principal body in it (for the time being (if any)) that is recognised by Her Majesty’s Government in the United Kingdom as having responsibility for exercising governmental control centrally.

194Q Disapplication of sections 194N to 194P

(1) Sections 194N to 194P (and section 194M(3)) cease to have effect if subsection (2) prevails.

(2) This subsection prevails where, on their preliminary examination of the question to which section 194N(1) relates, the Commission determine for the purpose of section 194M(1) that it is manifestly inappropriate for the information to be disclosed.

(3) But—

(a) if there is a material change in any significant factor on which the determination depended, it is open to the Commission to re-examine the question (and this is to be regarded as another preliminary examination of the question),

(b) where they choose to re-examine the question, the effect of sections 194N to 194P (and section 194M(3)) is restored unless subsection (2) again prevails.

194R Final disclosure-related matters

(1) If the Commission decide in pursuance of section 194M(1) to disclose the information—

(a) subsection (2) applies initially, and

(b) subsection (3) applies subsequently.
(2) Before disclosing the information, the Commission must—

(a) so far as practicable, take reasonable measures to notify of the decision—

(i) each of the affected persons, and

(ii) to the same extent as they were consulted under section 194N(2)(b), the other interested persons, and

(b) allow the prescribed period for each of the affected and other interested persons involved to take steps (including legal action) in their own favour in relation to the decision.

(3) In disclosing the information, the Commission must—

(a) explain the context in which the information is being disclosed by them (including by describing the background to the case), and

(b) where (for any reason) other information relating to the case remains undisclosed by them, explicitly state that fact,

and do so along with the material by which the disclosure is made.

(4) In subsection (2), the references to the affected and other interested persons are to be construed in accordance with section 194N(5).

(5) In subsection (2)(b), the reference to the prescribed period in relation to a particular person is to—

(a) the period of 6 weeks, or

(b) such longer period as the Commission may set,

starting with the date on which the notification was sent to the person.

(6) Subsections (2)(b) and (5) are inapplicable in relation to a particular person if the Commission cannot reasonably ascertain the person’s whereabouts.

(7) In subsection (3)(b), the reference to other information is to any other information obtained by the Commission in the exercise of their functions.”.

4 Consequential revocation


PART 3

COMMENCEMENT AND SHORT TITLE

5 Commencement

(1) This Part comes into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.
6 **Short title**

The short title of this Act is the Criminal Cases (Punishment and Review) (Scotland) Act 2012.
Criminal Cases (Punishment and Review) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to amend the rules about the punishment part of non-mandatory life sentences imposed in criminal cases and to amend the rules about the disclosure of information obtained by the Scottish Criminal Cases Review Commission.

Introduced by: Kenny MacAskill
On: 30 November 2011
Bill type: Executive Bill
CRIMINAL CASES (PUNISHMENT AND REVIEW) (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Criminal Cases (Punishment and Review) (Scotland) Bill introduced in the Scottish Parliament on 30 November 2011:

   - Explanatory Notes;
   - a Financial Memorandum;
   - a Scottish Government Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 5–PM.
These documents relate to the Criminal Cases (Punishment and Review) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 30 November 2011

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW

4. The Criminal Cases (Punishment and Review) (Scotland) Bill makes provision in two specific areas. The Bill addresses an issue arising from the Appeal Court’s judgment in the Petch and Foye v. HMA case concerning the time those prisoners given a discretionary life sentence or an Order for Lifelong Restriction must serve before they become eligible to apply for parole. The Bill also provides a framework for the Scottish Criminal Cases Review Commission to decide whether it is appropriate to disclose information concerning cases it has referred to the High Court for appeal against conviction where such an appeal has subsequently been abandoned.

COMMENTARY ON SECTIONS

Part 1 – Punishment part of non-mandatory life sentences

Section 1 – Setting the punishment part

5. Section 1 of the Bill makes various amendments to section 2 of the 1993 Act. Section 1(2) of the Bill makes various changes to section 2(2) of the 1993 Act. Section 1(2)(b) and (c) of the Bill repeals section 2(2)(aa) of the 1993 Act and replaces it with new section 2(2)(d) providing that a court, when determining the punishment part of a non-mandatory life sentence, is to follow the rules laid out in new section 2A of the 1993 Act (as being inserted by section 1(3) of the Bill).
8. Section 1(2)(a) and (d) of the Bill inserts (with a consequential change) new section 2(2A) into the 1993 Act and this new section retains the matters mentioned in existing section 2(2)(a) to (c) of the 1993 Act for application in fixing the punishment part of a sentence of all offenders who receive mandatory sentences of life imprisonment i.e. for murder or any other offence for which life imprisonment is the sentence fixed by law.

9. Section 1(3) of the Bill inserts new section 2A into the 1993 Act. New section 2A provides the rules by which the court is to set the punishment part of non-mandatory life sentences.

10. New section 2A(1)(a) provides that the court must firstly assess the period of imprisonment which the court considers would have been appropriate for the offence had the prisoner not been sentenced to a non-mandatory life sentence. New section 2A(2)(a) provides that in considering the period of imprisonment under new section 2A(1)(a), the court must ignore any period of confinement which may be necessary for the protection of the public.

11. New section 2A(1)(b) provides that the court must then assess the part of that period of imprisonment which would represent an appropriate period to satisfy the requirements of retribution and deterrence. New section 2A(2)(b) provides that new section 2A(1)(b) is subject to the requirements of new section 2B.

12. New section 2B(1) provides that the part of the period of imprisonment is to either be one-half of the period specified under new section 2A(1)(a) or a greater proportion of the period specified under new section 2A(1)(a). However, a greater proportion than one-half can only be specified if new section 2B(2) applies. New section 2B(2) provides that the court can specify a greater proportion of the period specified under new section 2A(1)(a) if it considers it appropriate to do so having considered, in particular, the matters specified in new section 2B(5).

13. New section 2B(5)(a) to (c) provides that the matters are:
   - the seriousness of the offence, or the offence combined with other offences of which the prisoner is convicted on the same indictment as that offence;
   - where the offence was committed where the prisoner was serving a period of imprisonment for another offence; and
   - any previous convictions of the prisoner.

(In considering these matters, the court is still not to take into account any period of confinement which may be necessary for the protection of the public.)

14. New section 2B(3) provides that the court can specify a greater proportion of the period under new section 2A(1)(a) up to and including the whole of that period. New section 2B(4) provides that references in new sections 2B(1) to (3) to the period mentioned in new section 2A(1)(a) are references to that period as informed by new section 2A(2)(a) (i.e. ignoring any period of confinement which may be necessary for the protection of the public).
15. The combined effect of new sections 2A(1)(c) and 2A(2)(c) is to provide that the required consideration by the court as to whether and at what level any sentence discount for an early guilty plea is appropriate is to be left until after the court has made the assessment under new section 2A(1)(a) and (b).

16. Sections 1(4) to (6) of the Bill make a number of amendments to section 20 of the Custodial Sentences and Weapons (Scotland) Act 2007 ('the 2007 Act') and introduces new section 20A into the 2007 Act. Section 20 of the 2007 Act contains as yet uncommenced provisions relating to the setting of punishment part of life sentences. The purpose of sections 1(4) to (6) of the Bill is to make similar changes to the 2007 Act as are being made to the existing 1993 Act framework for the setting of punishment parts of life sentences by sections 1(1) to (3) of the Bill. When the provisions in Part 1 of the 2007 Act are brought into force, part 1 of the 1993 Act will be repealed. The changes contained in sections 1(4) to (6) make a number of necessary changes to the 2007 Act so that when they are commenced along with the rest of the as yet uncommenced provisions in the 2007 Act, the system for setting punishment parts of life sentences as provided for in the 1993 Act and amended by the Bill will continue in the same manner within the 2007 Act.

Section 2 – Ancillary provision

17. Section 2 of the Bill provides for a regulation-making power for the Scottish Ministers to make such supplemental, incidental, consequential, transitional, transitory or saving provisions as they consider necessary or expedient for the purpose of, or in connection with, section 1. The power covers modification to Part 1 of the 1993 Act or Part 2 of the 2007 Act for this purpose. Any regulations made under the power will be subject to the affirmative procedure.

Part 2 – Disclosure of information obtained by Scottish Criminal Cases Review Commission

Section 3 – Exception to non-disclosure rule

18. Part XA of the Criminal Procedure (Scotland) 1995 Act ('the 1995 Act') established the Scottish Criminal Cases Review Commission ('the Commission'). Sections 194A to 194L and Schedule 9A of the 1995 Act provide for the operation of the Commission. Section 194J(1) of the 1995 Act provides for an offence in relation to either a member or employee of the Commission disclosing information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted by virtue of section 194K of the 1995 Act. Section 194J(2) provides for an offence where a member of the Commission authorises the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of their functions unless the authorisation of the disclosure of the information is excepted by virtue of section 194K of the 1995 Act. This is the means by which disclosure of information is regulated. Section 3 of the Bill is described below in this context.

19. Section 3(2) adds two new references into section 194J of the 1995 Act. These new references are to new section 194M of the 1995 Act (added by section 3(3) of the Bill) and the effect of adding these references is to provide a further exception to the offence provision in section 194J of the 1995 Act.
20. Along with adding in new section 194M of the 1995 Act, section 3(3) adds a number of other new sections 194N to 194R into the 1995 Act which taken together constitute a framework for the Commission to determine whether it is appropriate to disclose information on certain cases they have referred to the High Court.

21. Section 194M(1) provides that the disclosure of information, or authorisation of disclosure of information, by the Commission is excepted from the offences listed in section 194J of the 1995 Act if the conditions specified in section 194M(2) are met and the Commission have determined in the whole circumstances of the case that it is appropriate for the information to be disclosed. The rule in section 194M(1)(b) may be called the ‘appropriateness test’.

22. Section 194M(2) sets out the conditions that require to be met for the Commission to determine that the disclosure of information, or authorisation of disclosure of information, is excepted from the offence of disclosure under section 194J. Section 194M(2)(a) provides the information must relate to a case that has been referred to the High Court by the Commission under their powers contained in section 194B(1). Section 194M(2)(b) provides that the reference made by the Commission under section 194B(1) must concern either a conviction or a finding under the examination of facts procedure under section 55(2) of the 1995 Act. Therefore, a reference made by the Commission under section 194B(1) which relates to a sentence is not included within the ambit of section 194M(2). Section 194M(2)(c) provides that the case (upon which the reference relates) must have fallen or been abandoned. A case may have fallen because, for example, the party has chosen not to proceed or has missed a time limit for lodging notice to proceed with the court. A case may have been abandoned through, for example, the lodging of a notice of abandonment under section 116 or 184 of the 1995 Act.

23. Section 194M(3)(a) provides that the disclosure of information under section 194M(1) is subject to sections 194N(1) and 194O(1) (as read with section 194P), noting that section 194Q informs their effect. Section 194M(3)(b) points to the requirements of section 194R.

24. Whether information is actually released turns principally on the appropriateness test under section 194M(1)(b). As well as the matters referred to in section 194M(3) though, it should be noted that the Commission’s ability to disclose information will be informed (and may be restricted) by the application of ECHR law and the operation of reserved statutes such as the Data Protection Act 1998 and the Official Secrets Acts 1911-1989.

25. Section 194N sets out the duties that the Commission has in considering the question of whether it is appropriate for information to be disclosed under section 194M(1).

26. Section 194N(2)(a) requires the Commission (so far as practicable) to take reasonable measures to notify each of the affected persons of the possibility that the information may be disclosed and seek the views of each of them. Section 194N(2)(b) requires the Commission (to such an extent and such manner as they consider appropriate) to consult the other interested persons.

27. ‘Affected persons’ and ‘other interested persons’ are defined in section 194N(5). References to an ‘affected person’ are to a person to whom the information pertains (e.g. a suspect or witness in the investigation) or from whom the information was obtained. References
These documents relate to the Criminal Cases (Punishment and Review) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 30 November 2011

to ‘other interested persons’ are to the Lord Advocate, and to other persons (if any) who the Commission consider have a substantial interest in the question of whether the information should be disclosed and who do not fall within the definition of an ‘affected person’. The effect of including the Lord Advocate as an interested person is that in every case where the Commission is considering whether it is appropriate to disclose information under section 194M(1), the Lord Advocate will always be notified.

28. Section 194N(3)(a) requires the Commission to allow for the prescribed period for the affected persons and other interested persons to take steps (including legal action e.g. interim interdict) in their own favour, in relation to the question as to whether it would be appropriate for the Commission to disclose information. Section 194N(3)(b) requires that the Commission must have regard to any material representations made to them by the affected or other interested persons within the prescribed period on the question of whether it is appropriate for the information to be disclosed. The ‘prescribed period’ is defined in section 194N(6) as being a period of at least 6 weeks starting on the last date on which the notification or consultation period commenced. Section 194N(7) provides that where the Commission cannot reasonably ascertain the person’s whereabouts, sections 194N(3) and (6) do not apply.

29. Section 194N(4) provides that the Commission must have regard to any other factors that they consider to be significant in relation to the question of whether the information should be disclosed.

30. Section 194O applies in respect of information which has originally been obtained by the Lord Advocate or the Commission from a designated foreign authority under international assistance arrangements.

31. The effect of section 194O(1) is that an offence under section 194J would be committed if the Commission disclosed any information under section 194M(1) unless section 194O(4) has been complied with (because the exception to the offence would not stand).

32. Section 194O(4) is complied with where the designated foreign authority has given their consent to the disclosure of the information. Section 194O(4) provides that this consent may be given by virtue of international assistance arrangements or by section 194O(5), which provides that where such consent has not previously been given under international assistance arrangements it is for the Commission to seek the designated foreign authority’s agreement.

33. Section 194O(6) states (for the avoidance of doubt) that the reference to information includes, in the context of the section, information consisting of or deriving from evidence of any kind.

34. Section 194P defines important terms used in section 194O.

35. Section 194P(1) to (3) provides that references to ‘international assistance arrangements’ are to arrangements which are or were set by or arose from a past enactment or agreement and by which means a prosecutorial, judicial or other authority within the United Kingdom is or was
entitled to send to a foreign authority of any type a request for assistance in relation to a criminal matter. An example of another authority would be the police.

36. Statutory examples of such international assistance arrangements are sections 7, 8 and 9(1) to (3) and (6) of the Crime (International Co-operation) Act 2003, section 3(1) to (7) of the Criminal Justice (International Co-operation) Act 1990 as that section had effect until its repeal by that 2003 Act (see Schedule 6 to that Act) or the corresponding provisions of a previous Act (as they had effect at the relevant time). As regards the Commission, see existing section 194IA of the 1995 Act. The reference to an agreement is not restricted to statutory or formally-recognised agreements between states – it may also cover, for example, informal prosecutor to prosecutor assistance arrangements. Any such informal arrangement will naturally have an international sense in this context.

37. Section 194P(4) provides (for the avoidance of doubt) that it is irrelevant how such a request under section 194P(3) is or was made or how either the requesting authority or the foreign authority are described.

38. Section 194P(5) provides that references to the ‘designated foreign authority’ are to the current or previous authority which is or was responsible under international assistance arrangements for receiving such requests within that foreign country or territory and which are mentioned in the enactment or agreement concerned as the addressee or recipient of such a request. See paragraph 36 above for examples of relevant enactments and agreements.

39. Section 194P(6) provides that where the Commission is unable to locate the designated foreign authority for the purpose of section 194O, including where the Commission is being assisted by the Lord Advocate (section 194P(7)(a)), the references to the ‘designated foreign authority’ should be read as if they were to the government of the country or territory.

40. Section 194P(7)(b) provides the reference in section 194P(6) to relevant foreign government is a reference to the government of the other country or territory. In the event of any doubt as to the status or operation of a governmental system in the other country or territory (which is possible in times of political upheaval), section 194P(8) provides that the relevant foreign government is to be regarded as the principal body in the country or territory that is being recognised by the UK Government as having responsibility for exercising governmental control centrally within the country or territory.

41. Section 194Q provides that where, on their preliminary examination of whether it is appropriate to disclose information under new section 194M(1), the Commission determines that it is manifestly inappropriate for the information to be disclosed, they are not required to undertake the steps at new sections 194N to 194P. This is particularly relevant in the application of section 194N(1). The effect of section 194Q(3) is that where there is a material change in any significant factor on which the Commission made that determination, the Commission may re-examine the question and that, if (on doing so) it is concluded that it is no longer manifestly inappropriate that the information should be disclosed, the effect of sections 194N to 194P and section 194M(3) is restored.
42. Section 194R sets out the functions of the Commission when they decide under section 194M(1) it is appropriate to disclose information. Section 194R(1) provides that the Commission must initially meet the requirements of section 194R(2) and then subsequently section 194R(3).

43. Section 194R(2)(a) provides that before the Commission disclose information, they must (so far as practicable) take reasonable measures to notify their decision to disclose to each of the affected persons and any other interested persons. In the latter case, this is to the same extent as they were consulted under section 194N(2)(b). Section 194R(2)(b) provides that the Commission must allow the prescribed period pass in order to allow any of the affected persons and other interested persons to take steps (including legal action) in their own favour in relation to the decision to disclose information. Section 194R(4) attracts the earlier definition of the affected and other interested persons, and section 194R(5) provides that the prescribed period runs for at least 6 weeks and starts with the date notification was sent to the particular person (but subsection (6) negates this where the person’s whereabouts are unknown).

44. When the Commission disclose information under section 194M(1), section 194R(3) provides that the Commission are required to explain the context in which the information is being disclosed. This would include the Commission describing the background to the case and may include the reasons that it is considered appropriate to disclose the information. If the Commission decide it is appropriate to disclose information, but other information relating to the case remains undisclosed by them (for example, because it consists of information from a designated foreign authority where consent has not been obtained), the Commission are required to explicitly state this fact. Section 194R(7) ties the reference to other information in section 194R(3)(b) to the Commission’s exercise of their functions.

Section 4 – Consequential revocation

45. In consequence of section 3, section 4 of the Bill revokes the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 (SSI 2009/448¹). This Order contains a different approach to disclosure by the Commission (involving the seeking of consent) in a case of the type falling within section 194M(2) of the Bill.

Part 3 – Commencement and short title

Section 5 – Commencement

46. Section 5(1) confirms that the provisions in Part 3 of the Bill will come into force on the day after Royal Assent. Section 5(2) provides for the rest of the Bill to come into force by appointed-day order. Section 5(3) provides that a commencement order may include transitional, transitory or saving provision. Section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010 allows for different days to be appointed for different purposes.

47. Section 6 gives the short title of the Bill.

FINANCIAL MEMORANDUM

INTRODUCTION

48. This Financial Memorandum sets out the Scottish Government’s estimated costs associated with the provisions contained within the Bill. It should be read in conjunction with the Bill itself and the other accompanying documents, including the Policy Memorandum, which explains in detail the policy intention of the Bill.

49. The Scottish Government does not envisage significant additional costs associated with the introduction of the Bill. Additional costs, where they occur, will generally fall upon the Scottish Criminal Cases Review Commission and will relate to the functions and duties they must undertake in considering whether it is appropriate to disclose information they hold under the framework provided within the Bill.

COSTS ON THE SCOTTISH ADMINISTRATION

Part 1 of the Bill – Punishment part of non-mandatory life sentences

50. Part 1 of the Bill addresses an issue arising from the Appeal Court’s judgment in the Petch and Foye v. HMA case concerning the time those prisoners given a discretionary life sentence or an Order for Lifelong Restriction (‘OLR’) must serve before they become eligible to apply for parole. The provisions will have a neutral long-term financial impact as they respond to an Appeal Court judgement in a way that seeks, in broad terms, to put back in place arrangements that applied before the judgement was issued in March 2011.

51. Since the Petch and Foye v HMA judgement was issued in March 2011, a small number of non-mandatory life prisoners have been successful in having the punishment part of their sentences reduced on appeal. However, none of these prisoners have been released from prison as the effect of the judgement was not to directly reduce the length of time that a non-mandatory life prisoner would serve in prison, but rather reduce the length of time that a non-mandatory life prisoner would serve in prison before they are able to apply to the Parole Board for release on life licence. None of the prisoners who have been able to apply for parole earlier as a result of the judgement have been released by the Parole Board. In the same way that there has been no direct reduction in prison costs as a result of the Petch and Foye v HMA judgement (as no one has been released from prison), there should be no long term increase in prison costs with the effect of the Bill being to increase the discretion of the court when setting the punishment part of a non-mandatory life sentence back to a position that broadly existed prior to the Petch and Foye v HMA judgement. What is likely to change as a result of the Bill’s provisions is the point at which some non-mandatory life prisoners are able to apply for parole with no direct impact on the length of time a non-mandatory life prisoner actually spends in prison.
Part 2 of the Bill – Disclosure of information obtained by the Scottish Criminal Cases Review Commission

52. The Scottish Criminal Cases Review Commission (‘the Commission’) was established in 1999 as a non departmental public body. The Commission is funded by the Scottish Government. The Commission’s statutory role is to review and investigate cases where it is alleged that a miscarriage of justice in criminal cases in Scotland may have occurred in relation to a conviction, a sentence following conviction or both a conviction and sentence.

53. The Commission can review and investigate both solemn and summary cases and has wide ranging powers of investigation. After a review of a case has been completed, the Commission will decide whether a case should be referred to the High Court. The effect of referring a case is that it allows the alleged recipient of a miscarriage of justice to raise an appeal which will be heard and determined by the High Court as if it were a normal criminal appeal.

54. The framework provided by the Bill for the Commission to consider whether it is appropriate to disclose information on a case they have investigated only relates to case referrals made by the Commission on conviction grounds (i.e. where the Commission consider a miscarriage of justice may have occurred in the conviction of a person). In the period between the establishment of the Commission on 1 April 1999 and 31 March 2011, the Commission has referred 65 cases to the High Court on the grounds that it considered a miscarriage of justice may have occurred in relation to a conviction. Of these 65 cases, 3 cases fit the criteria provided in the Bill (i.e. 3 were cases where a referral was made and then an appeal based on the referral was subsequently raised and then abandoned or fell).

55. There will be a cost for the Commission in considering whether it is appropriate to release information they hold in relation to these 3 existing cases (and any future cases that may arise which fit the Bill’s framework). The cost for the Commission will depend on the size and complexity of the case and whether it is clear from the outset that it is manifestly inappropriate for the information to be disclosed (see section 194Q(2) of the 1995 Act being inserted by section 3 of the Bill). If the Commission is satisfied at the outset of consideration of a case that it would be manifestly inappropriate to disclose information under section 194Q(2), then the costs incurred would be minimal.

56. The most complex case referred by the Commission that fits the Bill’s framework is the conviction of Mr Abdelbaset Al-Megrahi, who was convicted in 2001 for the murder of 270 people in the Lockerbie bombing. Cases of this size and complexity are very rare, but given that the Commission would require to consider this particular case if this legislation is passed, we have provided an estimate of costs for the Commission in considering this case as an example of the highest level of costs a relevant case would trigger.

57. In view of the size and complexity of the Al-Megrahi case with the likely large number of affected parties in this case and the fact that information was likely obtained from foreign authorities under international assistance arrangements (thus triggering the application of the provisions requiring the Commission to obtain consent from those authorities at new section 194O of the 1995 Act as inserted by section 3 of the Bill), we estimate the total cost of considering the release of information in the Al-Megrahi case would be approximately £116,000.
These documents relate to the Criminal Cases (Punishment and Review) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 30 November 2011

This is based on the assumption that it would take the Commission in the region of 12 months to take forward this work.

### AL-MEGRAHI CASE – ESTIMATED COSTS TO THE COMMISSION IN CONSIDERING WHETHER IT IS APPROPRIATE TO RELEASE INFORMATION UNDER THE BILL’S FRAMEWORK

<table>
<thead>
<tr>
<th>AREA WHERE COSTS WILL BE INCURRED</th>
<th>NOTES</th>
<th>ESTIMATED COSTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Staffing</td>
<td>12 months staff time of senior legal officer with Al-Megrahi case experience</td>
<td>£54,000</td>
</tr>
<tr>
<td></td>
<td>6 months legal officer cover for senior legal officer’s case volume (senior legal officers operate with a 50% case load)</td>
<td>£22,000</td>
</tr>
<tr>
<td>Board</td>
<td>Approximately 5 additional Board meetings over the course of 12 months to oversee framework and outcome</td>
<td>£29,000</td>
</tr>
<tr>
<td>Travel &amp; Subsistence</td>
<td>Contact with relevant parties is likely to involve numerous meetings throughout UK and Europe</td>
<td>£6,000</td>
</tr>
<tr>
<td>Communications</td>
<td>There are likely to be considerable costs associated with press, publications and communications throughout the process and at the conclusion based on final decision to release information</td>
<td>£5,000</td>
</tr>
</tbody>
</table>

**TOTAL** | **£116,000**

58. As noted above, we anticipate that, in cost terms, the Al-Megrahi case is at the very high end of cases which the Commission may have to consider under the Bill’s framework. Given the rarity of appeals against conviction being abandoned (recalling that only 3 such cases since the Commission was established in 1999), it is not practical to provide specific estimates for the average cost to the Commission of considering whether it is appropriate to disclose information relating to a case as each case can be very different. We would however expect costs incurred in considering whether it is appropriate to disclose information in other relevant cases to be much lower than the costs for the Al-Megrahi case as other cases are likely to be much less complex.

**Costs that may arise under legal action**

59. It is possible that legal action may be taken by affected parties and/or interested parties in respect of the Commission’s considerations as to whether it is appropriate to disclose information. In such circumstances, the Commission would incur legal costs through being a party to these legal proceedings. It is very difficult to precisely estimate with any degree of confidence either what these legal costs could be or how many affected parties and/or interested parties may wish to take forward legal action.

60. For the purposes of the Financial Memorandum, we have considered the only comparable type of legal action which the Commission have recently been involved in. This was a defence of a judicial review where the Commission had decided not to refer a case to the High Court. Clearly this can only be used as a very loose benchmark when considering what the possible
These documents relate to the Criminal Cases (Punishment and Review) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 30 November 2011

costs of any legal action arising from the Bill may be. The costs to the Commission were approximately £9,000.

61. In terms of how many actions, if any at all, may be raised, it is likely that if a number of affected and/or interested parties intend to raise legal actions, the underlying issues involved may either be very similar or the same. One legal action may therefore cover the interests of a number of affected parties and/or interested parties. For the most complex case such as the Al-Megrahi case and offering this figure as no more than a very imprecise estimate, we would suggest that it may be possible that between 4 and 8 affected parties and/or interested parties may wish to use existing law to raise legal actions. Using the costs of the judicial review as a proxy, this would suggest a very imprecise estimate of costs on the Commission as being between £36,000 and £72,000. This assumes that all the actions are entirely separate and one legal action does not act as a test case for any other legal action. Depending on how long the legal action takes, it is likely these costs would be incurred over a number of months (and even years).

COSTS ON LOCAL AUTHORITIES

62. The Bill has no financial implications for local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

63. Under Part 2 of the Bill, there may be minimal costs for other bodies, individuals or businesses who are interested or affected parties in respect of a case about which the Commission are considering the release of information. This would result if that body, individual or business wishes to consider making representations to the Commission regarding the release of information. However, the Bill places no obligation on affected or interested parties to make such representations and it will be a matter for those parties to consider whether they wish to do so.

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

64. On 30 November 2011, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Criminal Cases (Punishment and Review) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

65. On 30 November 2011, the Presiding Officer (Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Criminal Cases (Punishment and Review) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
CRIMINAL CASES (PUNISHMENT AND REVIEW)  
(SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Criminal Cases (Punishment and Review) (Scotland) Bill introduced in the Scottish Parliament on 30 November 2011. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 5–EN.

POLICY OBJECTIVES OF THE BILL

2. The Criminal Cases (Punishment and Review) (Scotland) Bill makes provision in two specific areas. The Bill addresses an issue arising from the Appeal Court’s judgment in the Petch and Foye v. HMA case1 (“the Petch and Foye judgement”) concerning the time those prisoners given a discretionary life sentence or Order for Lifelong Restriction (“OLR”) sentence must serve before they become eligible to apply for parole. The Bill also provides a framework for the Scottish Criminal Cases Review Commission (“the Commission”) to decide whether it is appropriate to disclose information concerning cases they have referred to the High Court for appeal against conviction which have subsequently been abandoned or have fallen.

3. The provisions relating to the Petch and Foye judgement reassure the public by providing courts with discretion to determine that discretionary life sentence prisoners and OLR sentence prisoners will only become eligible to apply for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.

4. Although general in nature, the provisions relating to the Commission will apply in the circumstances of the case of Abdelbaset Al-Megrahi, who was convicted in 2001 of the murder of 270 people in the Lockerbie bombing, and take forward the Scottish Government’s commitment to be as open and transparent as it can be in respect of that case.

Part 1 of the Bill - Punishment part of non-mandatory life sentences

Background

5. Discretionary life sentences and OLR sentences are two sentencing options available for offenders who courts consider are likely to pose a continuing high risk to public safety in the future. Discretionary life sentences have been a sentencing option for many years in Scotland. OLRs were introduced in 2006 and data showing how often courts have imposed OLRs is as follows—

- 2006 – 1 OLR
- 2007 – 4 OLRs
- 2008 – 12 OLRs
- 2009 – 24 OLRs
- 2010 – 18 OLRs
- 2011 – 15 OLRs

As can be seen, there are a total of 74 OLRs\(^2\) which have been imposed by courts since they were introduced in 2006.

6. A court will impose an OLR sentence if certain risk criteria in relation to the offender are met. The risk criteria that must be met before an OLR sentence can be imposed are provided in section 210E of the Criminal Procedure (Scotland) Act 1995 where it states that an OLR is able to be imposed if—

“… the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.”

7. The OLR is a sentence designed to ensure that offenders, after having served an adequate period in prison to meet the requirements of punishment, do not present an unacceptable risk to public safety once they are released into the community. The period spent in the community is an integral part of the OLR sentence which lasts for the remaining period of the offender’s life. Discretionary life sentences are also designed for the protection of the public from high risk offenders, though the monitoring and supervisory regime is less restrictive than under an OLR sentence. Since the introduction of OLRs in 2006, courts have generally tended to impose OLR sentences instead of discretionary life sentences for relevant high risk offenders. Collectively, we refer to discretionary life sentences and OLRs as non-mandatory life sentences (as the court has discretion as to whether to impose such a sentence).

8. The “punishment part” of a sentence is the minimum period of time which an offender must serve in prison before they become eligible to apply to the Parole Board for consideration

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\(^2\) This figure excludes 2 OLRs which were imposed by courts, but where 1 OLR for which the offender has died and 1 OLR for which the sentence was successfully appealed.
of being released on parole. The role of the Parole Board is to consider whether prisoners continue to present a risk to public safety. If the Parole Board considers an offender does continue to present a risk to public safety, the Parole Board will not authorise the parole of that offender.

9. Morris Petch and Robert Foye are offenders who appealed against how the “punishment part” of their non-mandatory life sentences had been set by the court. These appeals were heard together by the Appeal Court and led to the Appeal Court’s judgement in *Petch and Foye v. HMA* issued in March 2011.

10. The effect of the Petch and Foye judgement has been that some offenders who had received a non-mandatory life sentence have been able to successfully appeal against the length of the punishment part of their sentences. In the case of Petch, his punishment part was reduced from 12 years to 8 years. In the case of Foye, his punishment part was reduced from 9 years to 4 years and 6 months. However, although some offenders have had the punishment parts of their non-mandatory life sentences reduced on appeal, no offender has been released from prison as a result of the judgement. Some offenders have (and will) be able to apply for parole at an earlier point in their sentences than previously had been the case, but no prisoner has been or will be released unless the Parole Board is satisfied that the prisoner no longer poses a high risk to public safety.

11. The Petch and Foye judgement had no impact on how courts set the punishment part of mandatory life sentences. A mandatory life sentence is a sentence which is fixed by law i.e. upon conviction of an offender, the court has no discretion in deciding the sentence. In Scotland, a conviction for murder carries a mandatory life sentence. Therefore, the Petch and Foye judgement (and the provisions in the Bill) have no impact on the setting of the punishment parts of life sentences given for murder.


13. Section 2 of the 1993 Act as a whole was originally enacted to give effect in Scotland to the decision of the European Court of Human Rights in *Thynne, Wilson and Gunnell v United Kingdom*, in which it was held that non-mandatory life sentences imposed by English courts were composed of a “punitive” element and subsequently of a “security” element. In respect of the security element of such a sentence, the European Court of Human Rights found that the applicants were entitled under Article 5(4) of the Convention “to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court”. The Parole Board had been held to have the status of a court for these purposes, and gradually, the power to direct the release of prisoners has moved from the Scottish Ministers to the Parole Board itself, whose decisions are now binding on the Scottish Ministers.

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3 http://www.scottishparoleboard.gov.uk/page/about_the_parole_board
4 (1990) 13 EHRR 666
5 Weeks v United Kingdom (1987) A 114
14. In terms of how punishment parts of non-mandatory life sentences should be calculated, case law decreed that it is the imposition of the non-mandatory life sentence itself that protects the public, and therefore protection of the public should not be reflected in the punishment part of the sentence that the court would have imposed. The punishment part is therefore the part of the sentence that collectively reflects retribution and deterrence elements necessary for the punishment of the offender, and is expressed as a determinate figure.

15. This led to the adoption of an approach to determining the punishment period of a non-mandatory life sentence by taking half the determinate period that would have been passed (if a non-mandatory life sentence had been deemed necessary) as the period of ‘punishment, retribution and deterrence’. The English courts noted, however, that the figure of one half may not be the final figure, and “there may well be circumstances where it would be appropriate for the judge, in the exercise of his discretion, to fix a larger fraction, but not more than two thirds”.

The O’Neill case

16. The Appeal Court in Scotland considered the issue of how to interpret section 2 of the 1993 Act in the case of O’Neill v HMA (1999) S.L.T. 958. In that case, the appellant had pled guilty to assault to severe injury, and was given a discretionary life sentence. The “designated part” (as the punishment part was then called under section 2(2) of the 1993 Act) was fixed at seven years. The appellant appealed against the period designated and was successful, the period was reduced to three years, being one half of an appropriate determinate sentence (leaving out of account the element for protection of the public) of six years.

17. Lord Rodger said in his judgement that “… since the purpose of the order under section 2(2) is to determine the punitive period which the prisoner must serve before he can require the Secretary of State to refer his case to the Parole Board, the period selected must be the minimum period which the prisoner should actually serve in prison as a punishment for his crime before he is released.” In selecting that period, “… the prisoner should not be at a disadvantage when compared with a prisoner serving a determinate sentence for a similar crime.”.

18. The O’Neill case resulted in a method being prescribed for determining the designated part (as it then was), with guidance from the English case of R v Marklew and Lambert in particular. This method was as follows—

(a) the judge must determine what sentence would have notionally been imposed had a non-mandatory life sentence not been imposed;
(b) the judge should discount from that figure any proportion of that sentence which would have been necessary for the protection of the public;
(c) from that figure, the judge should work out the proportion of that period that the prisoner would or might serve before being released, whether unconditionally or on licence.

19. The punishment part is the period that is left having gone through this process. The court recognised that (emphasis added) “… in deciding what the appropriate notional determinate sentence is, a court is likely to have regard to the need to protect the public. If, therefore, the court were simply to have regard to what would be the appropriate determinate sentence, given the need to protect the public, the figure reached would include an element of protection of the
public, rather than being a figure which was concerned only with punishment. If, on the other hand, the element of protection of the public were stripped out, the effect would be to reduce what might be the usual figure for the determinate sentence and hence, correspondingly, to reduce the figure for half that determinate sentence. On that second approach it would be possible, in theory at least, for the Parole Board to recommend that a designated life prisoner should be released earlier than a prisoner who had been given a determinate sentence for the same crime.”.

The Convention Rights Compliance (Scotland) Act 2001

20. Section 2(2) of the 1993 Act was amended by the Convention Rights Compliance (Scotland) Act 2001 (“the 2001 Act”). The general purpose of the amendments made to the 1993 Act by the 2001 Act were to bring mandatory life prisoners and those who commit murder before reaching the age of 18 within the scope of section 2 and no changes in this area are being made by this Bill.

21. However, there were also changes made by the 2001 Act relating to non-mandatory life prisoners. In relation to the setting of punishment parts of non-mandatory life prisoners and following the 2001 Act changes, section 2(2)(aa) provides that the court must consider—

(a) the period of imprisonment, if any, which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to imprisonment for life, or as the case may be not made the order for lifelong restriction, for it;

(b) the part of that period of imprisonment which the court considers would satisfy the requirements of retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public); and

(c) the proportion of the part mentioned in sub-paragraph (ii) above which a prisoner sentenced to it would or might serve before being released, whether unconditionally or on licence, under section 1 of this Act.

22. Section 2(2)(aa) was introduced to the 2001 Act at Stage 3. The then Deputy First Minister and Minister for Justice, Jim Wallace, stated to Parliament that the legislative provisions were “… to preserve the effect of the decision in the case of O’Neill”. The amendment can be seen as having been lodged to avoid any doubt that that decision in the O’Neill case will be maintained in statute law.

Ansari v HMA case

23. The appellant in the Ansari v HMA case had been sentenced to discretionary life imprisonment for abduction and rape. The trial judge selected a punishment part of 12 years which was reduced on appeal to 9 years in the case of Clark v HMA 1997 S.L.T. 1099, when the appellant was still known as George Clark. Following the O’Neill decision, the Scottish Criminal Cases Review Commission referred the case to a five judge bench to determine whether the approach taken in O’Neill had proceeded on a misunderstanding of the R v Marklew case.

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6 http://www.scotcourts.gov.uk/opinions/C94_02.html
24. The approach taken by the majority of judges in the Ansari v HMA case was that the relevant punishment part of the appellant’s sentence should have been assessed with the early release provisions in view, so that when imposing a discretionary life sentence the court should—

- assess what determinate sentence it would have imposed, taking into account the seriousness of the offence, any previous convictions of the accused, and any plea of guilty (“the notional sentence”),
- discount the risk element from that sentence and fix a proportion of the resulting period as a punishment part, in light of the early release provisions that would be available to a prisoner sentenced to a determinate sentence for the same crime.

25. The difference in Ansari case judgement was that the majority of the bench considered that the reference point specified in section 2(2)(aa)(iii) of the 1993 Act was not the date at which the prisoner became eligible for consideration by the Parole Board, but rather the period he “would or might” serve before release. The view taken was that, in applying this provision, the sentencing judge would normally fix the appropriate portion within the limits of one half to two thirds of the notional sentence, and that it was open to the judge to set a proportion that was even higher in cases of exceptionally grave cases.

26. In the judgement of the Ansari case, the Lord Justice Clerk argued that the gravity of the crime was likely to be a significant factor in a decision regarding the early release of a long term determinate sentence prisoner, and thus “it should also be a significant factor in a decision as to the proportion that is appropriate for the assessment of the punishment part of a discretionary life sentence.” It was the view of the majority in that case that the gravity of the offence might, in itself, operate as a mitigating factor against the grant of parole at the halfway stage of a long sentence, because Rule 8 of the Parole Board Rules 2001 (SSI 2001/315) allows the Board to consider “any matter that it considers relevant” in considering release. It therefore followed that the Parole Board might, in some cases, consider the nature of the offence was a factor to be considered in deciding whether parole was to be granted.

27. Lord Reed, however, disagreed with this reasoning. In his view, “… the fact that the Parole Board is entitled to take account of the nature of an offence does not however entail that its functions include retribution and deterrence: for the nature and circumstances of a person’s offences, as well as the level of risk of reoffending, may plainly be important in deciding whether his confinement is necessary for the protection of the public.”

28. Lord Reed therefore concluded that there did not seem to be any principled basis on which the court could take the gravity of the offence into account in calculating the notional sentence in terms of section 2(2)(aa)(iii), having already taken it into account in selecting the sentence in terms of section 2(2)(i) and (ii). In general, he concluded that the discount to the notional sentence to reflect the proportion which a determinate sentence prisoner would have to serve before being considered by the Parole Board was one half of the notional sentence, although in some cases it could be higher.

29. The consequences of the majority decision in Ansari v HMA case was that it was now suggested that the sentencing judge, at the time of sentencing, had to second guess the outcome...
This document relates to the Criminal Cases (Punishment and Review) (Scotland) Bill (SP Bill 5) as introduced in the Scottish Parliament on 30 November 2011

of a parole application to be decided in the future in selecting the proportion in terms of section 2(2)(aa)(iii).

The decision in Petch and Foye

30. The Petch and Foye judgement confirmed that Lord Reed’s analysis of the position was the correct one, and overruled the majority in Ansari. The Lord Justice General pointed out in the Petch and Foye case judgement, however, that by giving statutory effect to the O’Neill decision, effect had been given to the situation whereby an indeterminate sentence prisoner could become eligible for parole at an earlier stage than a determinate sentence prisoner sentenced for the same crime, because of the need to strip out the element of public protection from the notional determinate sentence.

The effect of the Bill’s provisions

31. The changes contained in the Bill ensure that the court has discretion to specify that a prisoner given an OLR or discretionary life sentence can become eligible to apply for parole at a point when the court considers the prisoner has served an appropriate period of imprisonment to satisfy the need for punishment of the offender.

32. Lord McCluskey, in his opinion in the Ansari case, explained what he thought the effect of section 2(2)(aa)(iii) was. His interpretation was accepted by the Lord President in Petch and Foye judgement. In Lord McCluskey’s opinion (at paragraph 92) he stated “... if the legislative intention had been that the period selected by the sentencing judge (as appropriate to satisfy the requirements of retribution and deterrence) has to be cut down by some specific fraction, and that that should be done by the judge at the time of sentencing, then it would have been easy to say so in unambiguous terms”.

33. The Bill provisions require the court to set a proportion of that period that is equal to one half of the notional determinate sentence, having stripped out the elements of public protection (i.e. the figure derived from going through steps (i) and (ii) in section 2(2)(aa)). However, the Bill also provides the court with the power to increase that period up to the whole of the punishment element of the notional determinate sentence in cases where the seriousness of the offence, the previous convictions of the offender or other relevant factors, make that appropriate.

34. The effect of the Bill is essentially similar what the court was doing in the Ansari case judgement. That decision has been found by the Petch and Foye judgement not to be correct in terms of the legislation as provided, but this is our broad policy intent as to what the legislation should provide for and the approach we have adopted in the Bill. The anomaly in the O’Neill case was created by the need to strip out the public protection element in a discretionary life sentence case, but not a determinate case, leading to the discretionary life prisoner potentially being released earlier. We consider this “stripping out” exercise does have to remain in order to satisfy the requirements that the ECHR has specified need to take place in respect of a discretionary life sentence. However, by giving the court the power to adjust the subsequent proportions upwards, it allows the anomaly to be addressed so that the court has discretion to specify that a prisoner given an OLR or discretionary life sentence will only become eligible to apply for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.
35. The Bill maintains the current position with regard to the court being able to consider whether to apply a sentence discount for the offender offering a guilty plea.

Illustrative examples of the effect of the Bill

36. This is a very complex and technical area of law. Some illustrative examples of how the Bill’s provisions could operate in practice are provided in the following paragraphs. The examples compare the overall determinate sentence and the period of time an offender would have spent in prison before becoming eligible to apply for parole (if they had not received a non-mandatory life sentence) with both the period of time the offender would spend in prison before becoming eligible to apply for parole following the Petch and Foye judgement and also the period of time the offender would spend in prison before becoming eligible to apply for parole as a result of the Bill. The examples should be seen as merely an illustration of how a court may go about applying the provisions. Interpretation and application of the law is always for the courts to determine and inclusion of these examples are simply to aid understanding of the likely effect of the Bill’s provisions rather than prescribing exactly how courts will interpret and apply the law.

Example 1

37. Offender A receives a non-mandatory life sentence. If the court had decided not to impose a non-mandatory life sentence, the starting determinate sentence would have been 12 years. However, the court decides that a sentence discount of 25% applies in respect of an early guilty plea by the offender. This reduces the determinate sentence to 9 years. For a determinate sentence of 9 years, an offender is eligible to apply for parole at the halfway point of the sentence at 4 years 6 months. Offender A is therefore eligible to apply for parole after 4 years 6 months.

38. Following Petch and Foye, where the court chooses to impose a non-mandatory life sentence, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 12 years. The protection of the public element is 2 years. This must be stripped out and this leaves 10 years. Applying early release provisions, this would leave a punishment part of 5 years. A sentence discount applies of 25% in respect of an early guilty plea. This leaves a punishment part for offender A of 3 years 9 months.

39. Using the Bill, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 12 years. The protection of the public element is 2 years. This leaves 10 years. The court therefore has discretion to set the punishment part at between 5 years and 10 years (this being between one half of and the full amount of the part of the notional determinate sentence relating to punishment (i.e. retribution and deterrence) and excludes the protection of the public element). Whatever the court decides, a sentence discount of 25% applies for an early guilty plea. This means a punishment part for offender A of between 3 years 9 months and 7 years 6 months can be set.
Example 2

40. Offender B receives a non-mandatory life sentence. If the court had decided not to impose a non-mandatory life sentence, the starting determinate sentence would have been 15 years. However, the court decides that a sentence discount of 10% applies in respect of an early guilty plea by the offender. This reduces the determinate sentence to 13 years 6 months. For a determinate sentence of 13 years 6 months, an offender is eligible to apply for parole at the halfway point of the sentence at 6 years 9 months. **Offender B is therefore eligible to apply for parole after 6 years 9 months.**

41. Following Petch and Foye, if the court chooses to impose a non-mandatory life sentence, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 15 years. The protection of the public element is 1 year. This must be stripped out and this leaves 14 years. Applying the early release provisions, this would leave a punishment part of 7 years. A sentence discount of 10% applies in respect of an early guilty plea. **This leaves a punishment part for offender B of 6 years 3 months 18 days.**

42. Using the Bill, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 15 years. The protection of the public element is 1 year. This leaves 14 years. The court therefore has discretion to set the punishment part at between 7 years and 14 years (this being between one half of and the full amount of the part of the notional determinate sentence relating to punishment (i.e. retribution and deterrence) and excludes the protection of the public element). Whatever the courts decides, a sentence discount of 10% applies for an early guilty plea. **This means a punishment part for offender B of between 6 years 3 months 18 days and 12 years 7 months 6 days can be set.**

Example 3

43. Offender C receives a non-mandatory life sentence. If the court had decided not to impose a non-mandatory life sentence, the starting determinate sentence would have been 9 years. However, the court decides that a sentence discount of 33% applies for an early guilty plea. This reduces the determinate sentence to 6 years. For a determinate sentence of 6 years, an offender is eligible to apply for parole at the halfway point of the sentence at 3 years. **Offender C is therefore eligible to apply for parole after 3 years.**

44. Following Petch and Foye, if the court chooses to impose a non-mandatory life sentence, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 9 years. The protection of the public element is 1 year. This must be stripped out and leaves 8 years. Applying early release provisions, this would leave a punishment part of 4 years. A sentence discount of 33% applies in respect of an early guilty plea. **This leaves a punishment part for offender C of 2 years 8 months.**

45. Using the Bill, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 9 years. The protection of the public element is 1 year. This leaves 8 years. The court therefore has
discretion to set the punishment part at between 4 years and 8 years (this being between one half of and the full amount of the part of the notional determinate sentence relating to punishment (i.e. retribution and deterrence) and excludes the protection of the public element). Whatever the court decides, a sentence discount of 33% applies for an early guilty plea. **This means a punishment part for offender C of between 2 years 8 months and 5 years 4 months can be set.**

**Example 4**

46. Offender D receives a non-mandatory life sentence. If the court had decided not to impose a non-mandatory life sentence, the starting determinate sentence would have been 20 years. There is no sentence discount for an early guilty plea in this case. For a determinate sentence of 20 years, an offender is eligible to apply for parole at the halfway point of the sentence at 10 years. **Offender D is therefore eligible to apply for parole after 10 years.**

47. Following Petch and Foye, if the court chooses to impose a non-mandatory life sentence, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 20 years. The protection of the public element is 2 years. This must be stripped out and leaves 18 years. Applying the early release provisions, this would leave a punishment part of 9 years. There is no sentence discount for an early guilty plea. **This leaves a punishment part for offender D of 9 years.**

48. Using the Bill, the court would set the punishment part of the non-mandatory life sentence as follows. The starting notional determinate sentence would have been 20 years. The protection of the public element is 2 years. This leaves 18 years. The court therefore has discretion to set the punishment part at between 9 years and 18 years (this being between one half of and the full amount of the part of the notional determinate sentence relating to punishment (i.e. retribution and deterrence) and excludes the protection of the public element). There is no sentence discount for an early guilty plea. **This means a punishment part for offender D of between 9 years and 18 years can be set.**

49. The above examples demonstrate that the effect of the Bill’s provisions is to give discretion to courts to specify that an offender given an OLR or discretionary life sentence will only become eligible to apply for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.

**Part 2 of the Bill - Disclosure of information obtained by the Scottish Criminal Cases Review Commission**

**Background**

50. The Commission’s role is to review and investigate cases where it is alleged that a miscarriage of justice may have occurred in relation to a conviction, a sentence or both a conviction and sentence. The Commission can review and investigate both solemn and summary cases and has wide ranging powers of investigation. After a review has been completed, the Commission will decide whether or not the case should be referred to the High Court. If the Commission decide to refer a case, if accepted, the case will be heard and determined by the High Court as if it were a normal appeal. The legislation governing the work of the Commission is set out at Part XA of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”).
51. There has been considerable interest in the Commission’s referral in June 2007 of the case of Mr Abdelbaset Al-Megrahi, who was convicted in 2001 of the murder of 270 people in the Lockerbie bombing, to the High Court of Justiciary. The Commission sent a Statement of Reasons for its referral of the case to the relevant parties; namely the High Court, the Crown Office and Procurator Fiscal Service and Mr Al-Megrahi himself. The Commission is prohibited from disclosing information relating to cases it has investigated by virtue of section 194J of the 1995 Act. Section 194K of the 1995 Act provides very limited exceptions where disclosure is authorised. The disclosure by the Commission of its Statement of Reasons in the Al-Megrahi case to the relevant parties was in line with section 194K(1)(a) of the 1995 Act where disclosure of information is excepted from general non-disclosure requirements if disclosure is for the purposes of any criminal, disciplinary or civil proceedings.

52. Following the referral of his case by the Commission, Mr Al-Megrahi was able to lodge an appeal against his conviction. Mr Al-Megrahi subsequently abandoned this appeal in August 2009. Although some of the material contained in the Statement of Reasons was heard in open court during court proceedings while the appeal was live, the appeal did not reach a stage before it was abandoned whereby the substantive content of the Statement of Reasons was heard in open court.

53. The Scottish Ministers have, by virtue of section 194K(1)(f) of the 1995 Act, an order-making power to set out circumstances in which the normal non-disclosure rules that the Commission are subject to may be disapplied. In view of the wider public interest issues raised in the Al-Megrahi case and following the abandonment by Mr Al-Megrahi of his appeal in August 2009, the Cabinet Secretary for Justice made the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009. This order, which was brought forward in late 2009, disapplied the non-disclosure rules in respect of appeals against conviction that had been referred to the High Court and had subsequently been abandoned, providing that the Commission obtained consent from those who provided information to them. This provided a mechanism for the Commission to work towards considering releasing information in the Al-Megrahi case. However, in December 2010, the Commission advised in a news release that it had been unable to obtain the relevant consent from all those who provided information contained in the Statement of Reasons in the Al-Megrahi case and, as such, the Commission was not in a position to publish its Statement of Reasons.

54. In February 2011, in answer to a Parliamentary Question from Christine Grahame MSP, the Cabinet Secretary for Justice stated that—

“The Scottish Government intends to bring forward legislation to allow the Scottish Criminal Cases Review Commission to publish a statement of reasons in cases where an appeal is abandoned, subject of course to legal restrictions applying to the commission such as data protection, the convention rights of individuals and international obligations attaching to information provided by foreign authorities.”

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Effect of the Bill provisions

55. The Bill provides that, in circumstances where an appeal against conviction has been abandoned or has otherwise fallen following a Commission referral, the Commission may disclose information relating to the case where they determine that it is appropriate to do so. In determining whether it is appropriate, the Commission is required to consult with those affected by, or who otherwise have an interest in, the information being considered for release. This would include those who provided the information and those to whom the information relates.

56. In deciding whether it is appropriate to disclose information, the Commission is required to have regard to any material representations made to it by affected or interested parties as regards whether the information should be disclosed. However, the final decision with regard to whether it is appropriate to disclose information is for the Commission to make. There is one exception to this, and that is where the information that is being considered for disclosure has been obtained by either the Lord Advocate or the Commission from foreign authorities under international assistance arrangements. For this type of information, the consent of the foreign authority that provided the information is required before the Commission can disclose that information. This provision is included to ensure international obligations are not breached. In addition, disclosing information obtained from foreign authorities without their consent could risk undermining the operation of existing mutual legal assistance agreements, adversely affecting efforts to tackle crime, including serious organised crime, in the future.

57. If the Commission decide it is appropriate to disclose information, they are required to notify the affected persons and interested persons and allow at least a 6 week period to elapse. As disclosure of information would be irreversible, this further notification mechanism helps ensure affected persons and interested persons are aware of what the Commission is planning to do and allows these persons to consider what steps, if any, they may wish to take in respect of the forthcoming disclosure of information. Where the Commission decides that it is appropriate to disclose information, the Bill provides that the Commission must explain the context in which the information is being disclosed when they are disclosing the information. This will aid general understanding of the wider context of the case and help ensure information being disclosed is properly interpreted. Where the Commission determines that it is appropriate to disclose some but not all of the information that it holds, it is required to state explicitly that not all the information that it holds is being disclosed. Again, this is to aid general understanding of the context within which the information should be considered and help ensure the information being disclosed is properly interpreted as being part of a wider set of information.

58. In considering whether it is appropriate to disclose information that it holds relating to a case, the Commission will be required to ensure that the disclosure of the information did not contravene any relevant statute applying in the situation. Statutory requirements contained in legislation such as the Data Protection Act 1998 and the Official Secrets Acts are not affected by the provisions in this Bill and these statutory requirements are likely to be relevant in considering the disclosure of information. Other potential obstacles to disclosure of information will remain such as ensuring that the ECHR is not breached.

59. The Bill’s provisions demonstrate that the Scottish Government is being as open and transparent as it can be in respect of responding to the wide ranging public interest in the Al-Megrahi case.
ALTERNATIVE APPROACHES

Part 1 of the Bill - Punishment part of non-mandatory life sentences

60. An alternative approach to legislating to address the Petch and Foye judgement would be to leave the 1993 Act unchanged. This would not necessarily result in prisoners who are given a discretionary life sentence and OLR sentence being released from prison any earlier than would have been the case had they received a determinate sentence for the same offence, as the Parole Board would still be required to be satisfied that the offender did not pose a significant risk to public safety before they could be released. However, the approach of leaving the legislation unchanged would leave the statutory position so that courts had no discretion in some cases to impose anything other than a punishment part of a discretionary life sentence and OLR sentence at a lower level than an equivalent offender given a determinate sentence. This is not considered to be in the interests of justice.

61. Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (asp 17) replaces Part 1 of the 1993 Act. These provisions are not yet commenced. Consideration was given to whether limited commencement of certain provisions of this Act could achieve the desired policy aim. However, it was concluded the policy intention in this case is to address an issue arising out of the operation of the 1993 Act, rather than to bring the provisions of the 2007 Act into force. Also, the approach we have taken is to give discretion to court to specify, if the court considers it appropriate in the circumstances of a case, that up to all of the punishment part of the notional determinate sentence must be served before an offender is eligible to apply for parole. In the 2007 Act, an upper limit of three-quarters of the punishment part of the notional determinate sentence is established. Therefore, commencement of the 2007 Act would not have delivered our policy aim in full and therefore it was not pursued.

Part 2 of the Bill - Disclosure of information obtained by the Scottish Criminal Cases Review Commission

62. The Scottish Government has made clear that we wish to be as open and transparent as possible with regard to the Al-Megrahi case. As such and given the constraints of current legislation, failing to bring forward legislation to enable the Commission to consider whether it was appropriate to disclose information was not considered to be a realistic option.

63. An alternative approach would have been to use the existing power in section 194K(1)(f) of the 1995 Act to provide simply an exception to the offence in 194J where the Commission could disclose information relating to an appeal against conviction which has been abandoned or otherwise fallen, without consent, where the Commission considers it appropriate to do so, without providing a detailed legislative framework setting out how the Commission should undertake this task. However, given the potential for sensitivities to exist with regards the disclosure of information relating to an appeal against conviction, we believe it is necessary and appropriate that the Bill should set out the functions and duties of the Commission in considering whether the disclosure of information is appropriate.

64. In particular, the Bill requires that all those who are affected by, or otherwise have an interest in, the information (e.g. because they provided the information to the Commission, or because the information relates to them) are consulted on the release of the information and have
an opportunity to make representations to the Commission. By providing this framework, the Bill’s provisions balances the rights of those who are mentioned in, or gave information contained in, a Statement of Reasons with wider public interest aims of openness and transparency.

65. We consider Parliament should have full scrutiny powers over the proposed framework for the Commission. As such, we think the legislative process attached to primary legislation is appropriate for the Parliamentary scrutiny of the framework.

CONSULTATION

66. There has been no formal consultation on the content of the Bill. Provisions in part 1 of the Bill are intended, in broad terms, to put back in place policy that existed prior to the Petch and Foye judgement being made in March 2011. As such, the provisions do not implement new policy, but rather respond very specifically to the terms of a judgement.

67. In respect of part 2 of the Bill, we have been clear that we want to be as open and transparent as possible in relation to the Al-Megrahi case given the wide ranging public interest in the case. We announced our intention to bring forward legislation in this area in February 2011 and Ministers have repeated the policy intentions of the Bill’s provisions on a number of occasions since. We have informally consulted the Commission who have offered views that have been considered as the Bill provisions have been developed.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

68. We do not consider that the Bill’s provisions are discriminatory on the basis of age, gender, race, disability, marital status, religion or sexual orientation.

Human Rights

Part 1 of the Bill - Punishment part of non-mandatory life sentences

69. The provisions of Part 1 of the Bill relate to the setting of the punishment part of a discretionary life sentence. This may engage Article 5(4) of the Convention, as the provisions have an impact on when a person serving such a sentence is eligible to have his case considered by the Parole Board.

70. As a preliminary point, Part 1 of the Bill gives powers to the courts. Courts, as public authorities under section 6(3) of the Human Rights Act 1998 (c. 42), have a duty to act in a manner that is compatible with Convention rights. The court would have to apply the provisions in a manner that complied with Convention rights. A person who is unhappy with either their conviction or the sentence they have received is entitled to appeal against their conviction and/or sentence under section 106(1) of the 1995 Act.
71. The European Court of Human Rights has held that a discretionary life sentence is made up of two distinct elements – a “punishment” element and a “security” element. The security part of such a sentence is assessed on the basis of risk factors. Risk factors are liable to change over time, and so must be periodically reviewed by the Parole Board. A non-mandatory life sentence prisoner must be able to have his detention reviewed once he has served the punishment part of his sentence.

72. The provisions of Part 1 are compatible with Article 5(4) for two reasons. First, it is not possible for the sentencing court to include factors relating to public protection (i.e. those which properly form part of the “security” element mentioned above) in the assessment of the punishment part. Therefore there is no possibility that a discretionary life prisoner could be detained beyond the part of their sentence that can be attributed to deterrence and retribution without recourse to the Parole Board to have the lawfulness of their detention challenged. Second, the Parole Board itself has been held to be a “court” for the purposes of Article 5, meaning that the discretionary life sentence prisoner, having served the punishment part of their sentence, has their detention examined by a body that satisfies the requirements of Article 5(4).

73. The provisions of Part 1 of the Bill may also engage Article 14 of the Convention, taken together with Article 5(4), because discretionary life prisoners may have to spend longer in prison than those serving determinate sentences, to whom an automatic early release regime applies. It is considered that any interference with Article 14 can be justified because a discretionary life sentence is imposed for a different purpose than a determinate sentence, therefore does not require be treated in exactly the same way. The overarching legitimate aim of differences in treatment between different groups of prisoners is the protection of the public.

Part 2 of the Bill - Disclosure of information obtained by SCCRC

74. The disclosure of information by the Commission under Part 2 of the Bill could give rise to issues in relation to Convention rights, particularly Article 8 (right to respect for private and family life).

75. As a preliminary point, nothing in the Bill requires the Commission to disclose any information. It remains for the Commission to determine that the disclosure of information is appropriate, in accordance with the requirements set out in sections 194N, 194O and 194R.

76. The Commission is a public authority within the meaning of section 6(3) of the Human Rights Act 1998, and therefore may not act in a way that is incompatible with Convention rights.

77. The disclosure of information is authorised by section 194M(1) if the Commission has determined that it is appropriate that the information be disclosed, subject to sections 194N(1), 194O(1) (read with 194P) and 194R. The procedural safeguards contained within these sections are designed to prevent the disclosure of any information that may breach a person’s Convention rights.

Islands and rural communities

78. We are satisfied the Bill has no differential impact on island and rural communities.
Local government

79. We are satisfied that the Bill has no detrimental impact on local authorities.

Sustainable development

80. We are satisfied that the Bill will have no negative impact on sustainable development.

Business and Regulatory Impact Assessment

81. We are satisfied that the Bill will not have a significant impact on businesses and other non-public bodies.
CRIMINAL CASES (PUNISHMENT AND REVIEW)
(SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Criminal Cases (Punishment and Review) (Scotland) Bill (‘the Bill’). Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Standing Orders, of provisions the Bill conferring powers to make subordinate legislation. It describes the purpose of each provision and explains the reasons for seeking the proposed delegated powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Bill makes provision in two specific areas. The Bill addresses an issue arising from the Appeal Court’s judgment in the Petch and Foye v. HMA case concerning the time those prisoners given a discretionary life sentence or Order for Lifelong Restriction sentence must serve before they become eligible to apply for parole. The Bill also provides a framework for the Scottish Criminal Cases Review Commission to decide whether it is appropriate to disclose information concerning cases they have referred to the High Court for appeal against conviction where such an appeal has subsequently been abandoned.

Rationale for subordinate legislation

3. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the importance of each matter against the need to:

- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in light of experience, without the need for primary legislation; and
- ensure the proper use of parliamentary time is made.
Delegated powers

Section 2 – Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

4. Section 2 of the Bill provides for a regulation-making power for the Scottish Ministers to make such supplemental, incidental, consequential, transitional, transitory or saving provisions as they consider necessary or expedient for the purpose of or in connection with section 1. The power covers modification to Part 1 of the 1993 Act or Part 2 of the 2007 Act for this purpose.

Reason for taking this power

5. Any body of new law may give rise to the need for a range of ancillary provisions. For example, whilst we have included a number of substantive and consequential modifications within the Bill, it may be that the need arises post-commencement for further changes in order to fully and properly implement section 1. We consider the regulation-making power to be necessary to allow for this flexibility in what is in our view an important and complicated area of law.

6. We consider that the power to make such provision should extend to the modification of Part 1 of the 1993 Act and Part 2 of the 2007 Act. Without the power to make provision affecting each of these Acts, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the Bill. We believe that this would not be an effective use of resources by Parliament or the Scottish Government.

7. The power, whilst potentially wide on the face of it, is limited to the extent that it can be used only if the Scottish Ministers consider it necessary or expedient for the purposes of or in connection with section 1 of the Bill.

Choice of procedure

8. Any regulations made under the power will be subject to the affirmative resolution procedure. We consider this provides the appropriate level of parliamentary scrutiny for the power, particularly given the ability to amend primary legislation.

Section 5 – Commencement

Provision

9. Section 5(2) of the Bill provides that the Scottish Minister may by order bring Parts 1 and 2 of the Bill into force on an appointed day (with section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010 allowing for different days to be appointed for different purposes). Section 5(3) provides that a commencement order may include transitional, transitory or saving provision. It is common to allow for such provision in conjunction with a commencement order.
where (as in this case) rights of individuals are affected. In line with the standard approach to commencement, no procedure is attached to this section.
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**Remit and membership**

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Justice Committee

Remit and membership

Remit:
To consider and report on:
a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:
Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
Jenny Marra (Deputy Convener)
Alison McInnes
David McLetchie
Graeme Pearson
Humza Yousaf

Committee Clerking Team:
Peter McGrath
Joanne Clinton
Andrew Proudfoot
Christine Lambourne
The Committee reports to the Parliament as follows—

PREFACE-RECENT EVENTS IN RELATION TO PART 2 OF THE BILL

1. On Sunday 25 March, a Scottish newspaper published online a document it described as the statement of reasons in the Megrahi case. The newspaper said that it was doing so because it had received Megrahi's permission and because it was in the public interest to do so. It also indicated that these factors provided a robust legal case for disclosure should data protection concerns be raised. It indicated that it had made a very few redactions to protect the names of confidential sources and private information.¹ The Scottish Criminal Cases Review Commission has confirmed that, whilst it has not considered the document in detail, it appears at first impressions to be the statement of reasons in the Megrahi case.² This online publication occurred three days before the Committee was due to agree this report. The Committee notes that this is a hugely significant development, given the policy intentions behind Part 2 of the Bill. We have sought, at this very late stage, to take account of it in the text of the report. However, we also consider that it is important that we place our consideration of the evidence received before the Parliament in full. In this regard, it is worth underlining that, whatever the main intentions behind Part 2, it is drafted in general terms and may still be relied upon in future cases. The Committee also wishes to make clear that we are in principle firmly on the side of openness and transparency in relation to the Megrahi statement of reasons and have always wished to see it published in as complete a state as is legally possible.

¹ The Committee has had no opportunity to consider the online document but notes that the online document, which is a PDF, runs to 802 pages. Previous indications were that the statement of reasons was 821 pages long.
SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

**General**

2. The Committee supports the general principles of the Bill (see paragraphs 94 and 134).

3. The Committee appreciates that the policy aims behind both Parts of the Bill are perhaps unusually narrow for an Executive Bill but still considers that the Scottish Government might have benefited from consulting more widely before introduction.

**Part 1 – punishment part of non-mandatory life sentences**

4. The Committee is supportive of the aim of Part 1 of the Bill in seeking to address the anomaly identified in the *Petch and Foye* case whereby a life prisoner is likely to have a parole hearing earlier than a non-life prisoner sentenced for a similar crime.

5. The Committee accepts that the existing legislative framework on non-mandatory life sentences is already a complex area of law. However, we also note the difference of views between the Scottish Government, which considers the Bill to provide a clear framework for judges to use when calculating the punishment part of non-mandatory life sentences, and those expert witnesses who consider the legislation overly complex. These views are difficult to reconcile. It may be that the Bill is acceptable in the interim to rectify an anomaly that has arisen at short notice. To that extent the Committee is supportive of the general principles of Part 1 of the Bill. The Committee returns to possible long-term solutions later in this report.

6. The Committee seeks an assurance from the Scottish Government that procedures are in place so that victims and witnesses are able to fully understand what the sentences handed down by the courts mean in practice.

7. On the basis of the evidence received, the Committee is generally satisfied that the proposals in Part 1 of the Bill are ECHR-compliant. However, we are not certain whether the possibility of double-counting (discussed further below) might give rise to difficulties in relating to the requirement for comparative justice under the ECHR.

8. The Committee invites the Scottish Government to consider whether the potential for “double counting” under section 2B(5) referred to by witnesses at Stage 1 give rise to any concerns. The Committee also notes the Faculty of Advocate’s views as to potential ambiguity in the drafting of section 2A(2).

9. The Committee is attracted by the relative simplicity of alternative approaches to the drafting of Part 1 proposed by some witnesses at Stage 1. Following the assurance from the SHRC that it believes these approaches to be ECHR compliant, the Committee invites the Scottish Government to consider whether a less prescriptive approach would be clearer and more appropriate.
10. The Committee seeks an update from the Scottish Government on when the relevant sentencing provisions in the Custodial Sentencing and Weapons (Scotland) Act 2007 will be brought into force.

**Part 2—disclosure of information obtained by Scottish Criminal Cases Review Commission**

**General points**

11. The Committee recognises that publication of the statement of reasons in the Megrahi case might serve a relatively limited purpose as it is unlikely to resolve all outstanding issues. However, we are supportive in principle of there being as much openness as possible about the reasons why Megrahi was allowed to make his appeal.

12. The Committee also notes that the Bill is in general terms and may apply in future to cases other than that of Megrahi. However, the main policy aim behind the Bill has been to facilitate the publication of the statement of reasons pertaining to that case. The Committee invites the Scottish Government to consider whether recent events provide an opportunity to consider whether the Bill’s provisions are robust enough to apply in circumstances other than the Megrahi case.

13. Whilst the Committee notes that the intended main purpose of Part 2 appears to have been superseded, the Committee supports there being as much openness as possible in relation to abandoned appeals arising from a reference from the SCCRC, subject to there being a substantial public interest. The Committee therefore supports the general principles of Part 2 of the Bill, but recognises that there has been very little opportunity to take evidence on the general applicability of Part 2.

**Provisions in the Bill**

14. Following recent events, the Committee notes that the question whether the SCCRC is the appropriate body to undertake (a) the administrative process of preparing the Megrahi statement of reasons for publication, and (b) the final decision whether to publish the statement (or a redacted version of it) may have been superseded by events.

15. However, the Committee is clear that the SCCRC would generally be the appropriate body to undertake the administrative process envisaged under Part 2 of the Bill.

16. In relation to the final decision-making process, the Committee notes the SCCRC’s evidence that it would have been willing to take the decision to publish the Megrahi statement given the appropriate legal tools. The Committee invites the Scottish Government to consider whether it would be of benefit, for future cases, if the factors the SCCRC should take into account in determining whether to disclose information should be expressly set out (whether in the Bill or, for instance, in guidance from the Scottish Ministers.) If so, it appears to the Committee that the public interest should be a key consideration.

17. The Committee broadly welcomes the provisions in Part 2 relating to the notification of interested and affected parties and notes, in particular, the
Information Commissioner’s view that they may help ensure that information is disclosed in compliance with data protection requirements.

18. In relation to information emanating from foreign authorities under international agreements, the Committee notes that the Bill in effect gives the authority a veto power over the disclosure of such information. This might be considered contrary to the principles underlying Part 2, but the Committee accepts that the inclusion of such a provision may be practically unavoidable.

19. The Committee notes that the Bill makes it possible for the SCCRC to publish an incomplete statement of reasons, but requires the SCCRC to make this expressly clear, as well as to explain the context in which information is being disclosed. This appears to be a measured approach. On the other hand, questions would be raised about the disclosure of a statement that has been substantially redacted, given the aim of openness and transparency that lies behind Part 2 of the Bill. We also note the SCCRC’s comments that they would be unlikely to publish the Megrahi statement if, following redaction, it had become “unbalanced” and recommend that similar reasoning should be applied in any future cases.

Data protection and other potential obstacles to disclosure

20. The Committee notes the recent publication of a redacted version of the Megrahi statement of reasons by a Scottish newspaper, but considers it useful to set out our conclusions on the applicability of data protection law to the SCCRC.

21. The Committee is not persuaded by the argument that any data protection obstacles could have been avoided through the Cabinet Secretary for Justice exercising an order-making power rather than introducing a Bill. The legal position is clear: the Parliament does not have the power to override data protection law whether by primary or secondary legislation.

22. The Committee notes the emergence of an apparent consensus among key stakeholders that one of the conditions permitting the lawful disclosure of personal data and sensitive personal data (that the processing is necessary for the administration of justice) may be applicable. This would permit the publication of information in the statement of reasons whether or not consent was obtained. If this is ultimately accepted, then an order enabling disclosure from the UK Secretary of State for Justice would not be necessary.

23. The Committee invites the Scottish Government to clarify whether it considers there would be any legal benefit or disbenefit, in terms of data protection law, in altering the current test to be applied by the SCCRC in determining whether to publish a statement of reasons (for instance by providing that this is, under certain circumstances, a duty rather a power).

24. The Committee notes that if the SCCRC acted in compliance with the data protection principles in releasing information, this does not necessarily mean that human rights considerations would not arise. This would need to be taken account of particularly in circumstances where the SCCRC disclosed sensitive personal data without express consent. However, the Committee has no reason to believe that this is an insurmountable legal difficulty.
25. The Committee invites the Scottish Government to consider the points raised by the SCCRC on legal professional privilege and on whether it would be possible to competently address this within the Bill.

Delegated powers in the Bill

26. The Committee notes that there are two competing views on the scope of section 2(2), which concerns the power to amend primary legislation on sentencing by subordinate legislation. The Committee recommends that the Scottish Government give further consideration to the drafting of this provision prior to Stage 2.

Financial aspects of the Bill

27. The Committee would welcome a response from the Scottish Government to the financial concerns raised by the SCCRC, and on whether the Scottish Government considers that these have been superseded by recent events.

INTRODUCTION

28. The Criminal Cases (Punishment and Review) (Scotland) Bill\(^3\) was introduced on 30 November 2011 by Kenny MacAskill MSP, Cabinet Secretary for Justice, and was referred to the Justice Committee for Stage 1 consideration. It has also been considered by the Finance Committee and Subordinate Legislation Committee.

29. The Bill deals with two distinct issues.\(^4\)

30. Part 1 of the Bill amends the rules about the punishment part of non-mandatory life sentences imposed in criminal cases. This is considered necessary by the Scottish Government to address an issue arising from the March 2011 Appeal Court judgement, \textit{Petch and Foye v HM Advocate}. This concerned the time Morris Petch\(^5\) and Robert Foye\(^6\) must serve in prison before they become eligible to apply for parole.

31. Part 2 of the Bill amends Part XA of the Criminal Procedure (Scotland) Act 1995. This is in order to set out a procedure for enabling the disclosure of information obtained by the Scottish Criminal Cases Review Commission (SCCRC) in circumstances where an appeal against conviction has been abandoned or has otherwise fallen following an SCCRC referral to the appeal court. Although the reforms being proposed in Part 2 are of general effect, the

\(^3\) Criminal Cases (Punishment and Review) (Scotland) Bill, as introduced (SP Bill 5, Session 4 (2011)). Available at: http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Bill_as_introduced.pdf

\(^4\) The Bill also has a Part 3, containing standard provisions on commencement and short title, which do not require to be commented upon.

\(^5\) Morris Petch was found guilty of two charges of rape in 2007 and sentenced to (discretionary) life imprisonment.

\(^6\) Robert Foye pled guilty to a charge of rape in 2008 and was given an Order for Lifelong Restriction.
Policy Memorandum\textsuperscript{7} makes clear that the changes are in response to the case of Abdelbaset Al-Megrahi, convicted in 2001 for the Lockerbie bombing.

Overall structure of Bill

32. The Committee notes that the Scottish Government has brought forward these two very disparate issues in a single Bill. The Committee notes that such an approach is not unprecedented in Scottish Parliament legislation and can sometimes be justified on pragmatic grounds (eg scheduling of legislation). However it does have the potential to create some handling difficulties when the legislation is being considered. One witness also deprecated the practice of combining different provisions on different matters in one Act on the ground that “it makes life more difficult for anyone trying to find the law on any matter.” The Committee has some sympathy with this view.

Policy memorandum and pre-introduction consultation on the Bill

33. Under Rule 9.6.3 of Standing Orders, the Committee is required to report on the Bill’s Policy Memorandum.

34. The Committee considers the Policy Memorandum to provide an adequate explanation of the policy intentions behind both main Parts of the Bill.

Consultation

35. The Policy Memorandum must comment on any consultation prior to the Bill being introduced. Unusually for a non-emergency Executive Bill, there was no formal consultation on the content of either Part. In relation to Part 1, the Bill’s Policy Memorandum said that the provisions were intended—

“to put back in place policy that existed prior to the Petch and Foye judgement being made in March 2011. As such, the provisions do not implement new policy, but rather respond very specifically to the terms of a judgement.”\textsuperscript{8}

36. In relation to Part 2, the Scottish Government indicated that it did not consider consultation to be necessary because it has repeatedly been clear as to its legislative intentions in relation to the Megrahi case. The Scottish Government stated, however, that it informally consulted the SCCRC.

37. The Committee appreciates that the policy aims behind both Parts of the Bill are perhaps unusually narrow for an Executive Bill but still considers that the Scottish Government might have benefited from consulting more widely before introduction. This is particularly the case given (a) concerns over the complexity of the drafting of Part 1 and (b) uncertainty over the impact of data protection law in relation to Part 2 (both issues discussed later). Experts from

\textsuperscript{7} Criminal Cases (Punishment and Review) (Scotland) Bill. Policy Memorandum (SP Bill 5-PM, Session 4 (2011)), paragraph 5. Available at: http://www.scottish.parliament.uk/S4_Bills/Criminal\%20Cases\%20(Punishment\%20and\%20Review\%20(Scotland)\%20Bill/Policy_Memo.pdf

\textsuperscript{8} Policy Memorandum, paragraph 66.
outside the Scottish Government may have been able to assist it on these issues before the Bill was introduced.

**Parliamentary scrutiny at Stage 1**

38. On 6 December 2011, the Parliamentary Bureau agreed to refer the Bill to the Justice Committee as lead committee at Stage 1.

39. The Finance Committee agreed at its meeting on 22 December to adopt level one scrutiny in relation to the Financial Memorandum of this Bill. This is applied where there appears to be minimal additional costs as a result of the legislation and means that the Finance Committee does not take oral evidence or produce a report. However, it does seek written evidence from affected organisations. Written submissions from those invited to the Finance Committee are set out in Annexe A. The financial impact of the Bill is considered towards the end of the report.

40. The Subordinate Legislation Committee considered the delegated powers provisions in the Bill at Stage 1 at its meetings on 24 January and 7 February 2012. The Subordinate Legislation Committee’s report is attached at Annexe B and the issues it raises are also considered near the end of the report.

**Justice Committee consultation**

*Approach and call for evidence*

41. The Committee issued a call for written evidence on 6 December 2011 and received nine submissions and five supplementary submissions. The Committee took further evidence over three meetings in January and February 2012 from:

- the Law Society of Scotland (Michael Meehan, Member of the Criminal Law Committee, giving evidence only on Part 1);
- the Faculty of Advocates (James Wolffe QC and Joanna Cherry QC, giving evidence almost exclusively on Part 1);
- the Scottish Criminal Cases Review Commission (Gerard Sinclair, Chief Executive, and Michael Walker, Senior Legal Officer, giving evidence exclusively on Part 2);
- Justice for Megrahi (Robert Forrester, Iain McKie, Len Murray, and Dr Jim Swire, giving evidence exclusively on Part 2);
- Sir Gerald Gordon QC (giving evidence on both Parts: Sir Gerald is a former sheriff, temporary judge and Member of the SCCRC, and author of a leading textbook on Scots criminal law);
- James Chalmers, Senior Lecturer, University of Edinburgh School of Law (giving evidence mainly on Part 1 but also on Part 2, in relation to which he helpfully went on to provide additional written evidence);

9 Full details of written submission are given in Annexe E.
Justice Committee, 3rd Report, 2012 (Session 4)

- the Information Commissioner's Office (Ken Macdonald, Assistant Commissioner (Scotland and Northern Ireland), giving evidence only on Part 2); and

- the Cabinet Secretary for Justice, giving evidence of course on both Parts.\(^{10}\)

42. Lord McNally from the UK Ministry of Justice was invited to give evidence on data protection issues relating to Part 2. He could not attend in person but provided written evidence.

43. The Committee is very grateful to all those who took the time to provide evidence on the Bill.

PART 1

44. Part 1 of the Bill would amend section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 ("the 1993 Act") and section 20 of the Custodial Sentences and Weapons (Scotland) Act 2007 ("the 2007 Act").\(^{11}\) The Scottish Government explain that these amendments—

> "will resolve a technical anomaly which arose following the Appeal Court's judgement in the case of Petch and Foye v. HMA, which meant that prisoners given a discretionary life sentence or Order for Lifelong Restriction (OLR) can apply to become eligible for parole earlier than those serving sentences of a fixed length. Under this new legislation the courts will regain the discretion to set a 'punishment part' of those sentences that it considers appropriate in all the circumstances of a particular case."\(^{12}\)

45. Amendments to the two Acts are necessary because section 20 of the 2007 Act, which will supersede section 2 of the 1993 Act, has yet to come into force. The Bill's Explanatory Notes indicate that the intention is to repeal Part 1 of the 1993 Act once Part 1 of the 2007 Act is brought into force.\(^{13}\)

**The current sentencing system**

46. Custodial sentences can be grouped under three categories:

- determinate sentences;

- mandatory life sentences; and

---

\(^{10}\) Full details of witnesses are given in Annexe D.

\(^{11}\) The Bill amends both the 1993 Act and the 2007 Act because section 2 of the 1993 Act is due to be replaced by section 20 of the 2007 Act once the relevant provisions of that statute come into force.


\(^{13}\) Criminal Cases (Punishment and Review) (Scotland) Bill. Explanatory Notes (SP Bill 5-EN, Session 4 (2011)), paragraph 16. Available at: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf)
47. Although the Bill deals specifically with the punishment part of non-mandatory life sentences, it may be useful for the reader to have an overview of all custodial sentencing options as all three categories are referred to later in the report. (Below, and later in the discussion of Part 1, a set of bar graphs are provided to aid understanding. The length of the whole bar indicates the whole sentence, though, as will become clear in the course of the discussion, in many cases the “whole sentence” is more of a notional sentence rather than something that would ever actually be served.)

Determinate sentences

48. Determinate (or fixed term) sentences are currently split into short and long term sentences.\(^{14}\)

49. A short term sentence is one of less than four years. Prisoners sentenced to less than four years are entitled to automatic and unconditional release half-way through their sentences. The Parole Board therefore has “no role in determining whether or not individuals are released into the community”\(^ {15} \).

Fig 1 – short term determinate sentence prisoners (less than 4 years):

<table>
<thead>
<tr>
<th>Period of imprisonment</th>
<th>Must be released</th>
</tr>
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<td>1/2</td>
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50. A sentence of four years or more is considered a long term sentence. Such prisoners are eligible to apply for parole half-way through their sentence and must be released after serving two-thirds of their sentence. Unlike short term prisoners, long term prisoners are released on licence,\(^ {16} \) the conditions of which are set by the Parole Board.

Fig 2 – long term determinate sentence prisoners (4 years or greater):

<table>
<thead>
<tr>
<th>Minimum period of imprisonment</th>
<th>Eligible for parole</th>
<th>Must be released on license if still in custody</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/2</td>
<td></td>
<td>2/3</td>
</tr>
</tbody>
</table>

51. James Chalmers, Senior Lecturer at the University of Edinburgh School of Law, outlined how courts set a determinate sentence—

“This sentence does not differentiate between any part imposed for the purposes of retribution and deterrence and any part imposed for the protection of the public.”\(^ {17} \) The baseline for determining such a sentence is

\(^{14}\) The release arrangements for fixed term sentences will change when the relevant provisions of the 2007 Act are brought into force.

\(^{15}\) The Parole Board for Scotland. *Sentence Type*. Available at: [http://www.scottishparoleboard.gov.uk/page/sentence_type](http://www.scottishparoleboard.gov.uk/page/sentence_type) [Accessed 9 February 2012]

\(^{16}\) The licence generally continues until the end of the whole determinate sentence.

\(^{17}\) The 2007 Act will require the courts to clearly identify a part of the whole determinate sentence which is appropriate for retribution and deterrence alone – to be called the ‘custody part’.
the requirements of retribution and deterrence in a given case, but it may be
necessary to impose a higher sentence than those requirements would
suggest because of the risk presented to the public by the offender.\(^{18}\)

**Mandatory life sentences**

52. A mandatory life sentence is imposed “for an offence in relation to which a
life sentence is required by law (i.e. in relation to murder)\(^{19}\). When a life sentence
is imposed, the court sets a punishment part which must be served in its entirety
before the prisoner is eligible for parole. Once the punishment part of the sentence
has been served the Parole Board will decide if the prisoner should be released on
life licence. Where the prisoner is not released, the prisoner’s continued detention
is reviewed at regular intervals.

**Fig 3 – mandatory life sentence prisoners:**

| Punishment part (minimum period of
imprisonment) | Eligible for parole |
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>X years</td>
<td></td>
</tr>
</tbody>
</table>

53. The punishment part of a sentence is described in section 2 of the 1993 Act
as what the court “considers appropriate to satisfy the requirements for retribution
and deterrence (ignoring the period of confinement, if any, which may be
necessary for the protection of the public)\(^{20}\). The length of the punishment part of
a mandatory life sentence is calculated by the court taking into account the
seriousness of the offence, any previous convictions and whether there has been
an early guilty plea.

**Non-mandatory life sentences**

54. Non-mandatory life sentences cover two specific sentencing options which
are available to the courts.

55. The first option is an Order for Lifelong Restriction (OLR). The Criminal
Procedure (Scotland) Act 1995 (as amended by the Criminal Justice (Scotland)
Act 2003) defines the criteria for which an OLR might be given—

> “the nature of, or the circumstances of the commission of, the offence of
which the convicted person has been found guilty either in themselves or as
part of a pattern of behaviour are such as to demonstrate that there is a
likelihood that he, if at liberty, will seriously endanger the lives, or physical or
psychological well-being, of members of the public at large.”\(^{21}\)

56. An OLR is therefore designed to ensure that “offenders, after having served
an adequate period in prison to meet the requirements of punishment, do not

\(^{18}\) James Chalmers. Written submission, paragraph 5.

\(^{19}\) Scottish Parliament Information Centre. (2012) Criminal Cases (Punishment and Review)
(Scotland) Bill: Custodial Sentences. SPICe Briefing 12/08, page 4. Available at:
http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_12-08_.pdf

\(^{20}\) Prisoners and Criminal Proceedings (Scotland) Act 1993. Available at:

\(^{21}\) Criminal Procedure (Scotland) Act 1995. Available at:
present an unacceptable risk to public safety once they are released into the community.”

57. The second form of a non-mandatory life sentence is known as a discretionary life sentence. While similar to an OLR in that it is intended to protect the public from high risk offenders, the monitoring and supervisory regime is less restrictive than under an OLR sentence.

58. Discretionary life sentences have a long history in the Scottish legal system. OLRs were only introduced in 2006. The policy memorandum states that since the latter were introduced, “courts have generally tended to impose OLR sentences instead of discretionary life sentences for relevant high risk offenders.”

59. When calculating the punishment part of either type of non-mandatory life sentence, the court is directed to take into account the same three factors applicable to mandatory life sentences; the seriousness of the offence, any previous convictions and whether there has been an early guilty plea. However, the court is also required to take into account “a number of factors which effectively require it to consider the approach it would have taken if imposing a determinate custodial sentence”.

60. Section 2 of the 1993 Act provides that these are:

- the length of custodial sentence it would have considered appropriate if imposing a determinate sentence;
- the part of that determinate sentence which it considers would have satisfied the requirements for retribution and deterrence (ignoring any period of confinement which may have been necessary for the protection of the public); and
- the proportion of the retribution and deterrence part which a determinate sentence prisoner “would or might” serve in custody prior to early release under the provisions in section 1 of the 1993 Act.

61. The interpretation of these statutory provisions has proved to be challenging for the courts.

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22 Policy Memorandum, paragraph 7.
23 Policy Memorandum, paragraph 7.
25 While legislated for in the Criminal Justice (Scotland) Act 2003, OLRs were commenced by the Criminal Justice (Scotland) Act 2003 (Commencement No. 9) Order 2006. Available at: http://www.legislation.gov.uk/ssi/2006/332/contents/made [Accessed 7 March 2011]
26 Policy Memorandum, paragraph 7.
27 SPICe Briefing 12/08, page 4.
28 SPICe Briefing 12/08, page 5.
Difficulties arising from interpreting current legislation

62. There have been a number of appeals in relation to the interpretation of section 2 of the 1993 Act when calculating the punishment part of non-mandatory life sentences, including O’Neill v HMA (1999)\textsuperscript{29} and Ansari v HMA (2002)\textsuperscript{30}. The O’Neill appeal led to section 2 of the 1993 Act being amended in the Convention Rights Compliance (Scotland) Act 2001 while Ansari, which at the time maintained the status quo, was a majority decision of a five judge bench. Lord Reed’s dissenting opinion in Ansari was later considered the correct one by the majority of the seven judge bench in the \textit{Petch and Foye}\textsuperscript{31} case.

\textit{The Petch and Foye} case

63. The \textit{Petch and Foye} appeal again centred on the court’s interpretation of the 1993 Act when determining the punishment part of a non-mandatory life sentence. Prior to the decision in \textit{Petch and Foye}, a commentator summarised the state of the relevant law as—

“something of a mess. It has to be said that this is largely due to the statutory wording itself. Just what factors must (and must not) be taken into account when fixing the punishment part? What weighting is to be given to the relevant factors? What comparisons (if any) are to be made with determinate sentences? What discounts are to be made for what elements? Is it appropriate to second-guess the view of the Parole Board? These are just some of the points which await decision.”\textsuperscript{32}

64. The subsequent judgement in March 2011 resulted in the punishment parts of both of the appellants’ sentences being reduced (from 12 to 8 years in Petch’s case, from 9 years to 4 years, 6 months in Foye’s case).

65. Lord Justice General Hamilton observed that, as a result of the reasoning applied by the majority in the case (to which he belonged), a person sentenced to a non-mandatory life sentence—

“could become eligible for parole at an earlier stage than a determinate sentence prisoner sentenced for the same crime, because of the need to strip out the element of public protection from the notional determinate sentence.”

66. It is important to stress that, despite now being eligible for parole at an earlier date, both prisoners will still be required to satisfy the Parole Board that they “no longer pose a high risk to public safety”\textsuperscript{33} before they can be considered for release. However the result clearly appears to be anomalous.

\textsuperscript{29} High Court of Justiciary. (1999) \textit{O’Neill v Her Majesty’s Advocate}. Available at: http://www.scotcourts.gov.uk/opinions/C59198.html [Accessed 14 February 2012]
\textsuperscript{30} High Court of Justiciary. (2002) \textit{Ansari v Her Majesty’s Advocate}. Available at: http://www.scotcourts.gov.uk/opinions/C94_02.html [Accessed 14 February 2012]
\textsuperscript{33} Policy Memorandum, paragraph 10.
67. The Petch and Foye judgement requires courts to use a three-step approach in the application of section 2 of the 1993 Act. It also determines that other provisions in that section should not be used to depart from the punishment part identified by the application of the three steps. The following indicates the reasoning now to be applied, taking the case of Morris Petch as an example. (To repeat; the punishment part of his original discretionary life sentence was set at 12 years.)

68. Following *Petch and Foye*, step 1 is to set the equivalent determinate sentence that Petch would have received had he not received a life sentence. The court determined that this was 20 years.34

69. Step 2 is to strip out the part of that notional determinate sentence which would have been imposed for public protection. For Petch, the Appeal Court considered this to be a period of 4 years.

*Fig 4 – stripping out the notional period for public protection:*

70. The third and final step is to then reduce by half the notional punishment part of the sentence to take into account early release provisions for the equivalent determinate sentence.

*Fig 5 – discretionary life sentence imposed on Petch following the ruling in Petch and Foye:*

71. However, had Petch originally been given a 20 year determinate sentence, he would only have been eligible for parole after a minimum of 10 years (although he would have had to be released between one-half and two-thirds of his sentence).

*Fig 6 – equivalent determinate sentence of 20 years:*

72. This is where the anomaly lies. As Lord Justice General Hamilton, in concluding his opinion, said—

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“I have accordingly come, with regret, to the view that, however unsatisfactory it may appear as a matter of comparative justice, Parliament has given statutory effect to an arrangement under which an indeterminate prisoner will, or at least may, become first eligible for consideration for parole at an earlier stage in his sentence than an equivalent determinate prisoner. If this situation is to be remedied, it is for Parliament to remedy it. The divisions of opinion expressed judicially in these appeals would suggest that a clear, well-considered legislative solution is called for.”

**Purpose of the Part 1**

73. Part 1 of the Bill seeks to amend the statutory rules used by courts when calculating the punishment part of a non-mandatory life sentence. In effect, it seeks to reverse the *Petch and Foye* judgment.

74. The Policy Memorandum states that the aim of the Bill is to require the court to “set a proportion of that [punishment] period that is equal to one half of the notional determinate sentence, having stripped out the elements of public protection. … However, the Bill also provides the court with the power to increase that period up to the whole of the punishment element of the notional determinate sentence in cases where the seriousness of the offence, the previous convictions of the offender or other relevant factors, make that appropriate.”

**Illustrative example**

75. Under the Bill, courts would be given discretion to set the punishment part between one-half and the whole of the punitive period (ie the part excluding any period required for public protection) of the equivalent notional determinate sentence.

76. The approach envisaged under the Bill is as follows. The court begins by setting a notional sentence for an equivalent determinate sentence rather than the life sentence that the convicted person has in fact been given. Taking as an example the notional equivalent sentence applied to Petch in his appeal, this is set at 20 years. From this, the court strips out a period to reflect a notional period for public protection, say (again following the decision in the Petch appeal) 4 years. This leaves a figure of 16 years.

![Fig 7 – stripping out the notional period for public protection:](image)

77. The second step (and where the approach would begin to differ from the Petch and Foye decision) is for the court to set a minimum period of imprisonment for the non-mandatory life sentence prisoner (ie the punishment part). This may be anywhere between one-half (8 years) and all (16 years) of the notional stripped
down punitive period set under the first step, taking into account factors such as the seriousness of the crime and any previous convictions of the prisoner.

Fig 8 – possible calculation of a punishment part under the provisions of the Bill:

<table>
<thead>
<tr>
<th>Minimum length of punishment part</th>
<th>Scope for extending the length of the punishment part</th>
<th>Eligible for parole</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>8</td>
<td>16</td>
</tr>
</tbody>
</table>

78. Although not directly covered in the Bill, the Committee also understands that there can be a third step of applying a sentence discount for a guilty plea (where relevant). The question of whether a discount is always appropriate in response to an early guilty plea was raised with the Cabinet Secretary for Justice. In his response, the Cabinet Secretary referred to a recent opinion by the Lord Justice Clerk who “pronounced that he did not see the discount as necessarily being automatically available.”

Evidence received on the Bill

Underlying aim of Part 1

79. The Bill’s Policy Memorandum refers to the Petch and Foye judgment having produced an “anomaly” and says that the legislation will—

“reassure the public by providing courts with discretion to determine that discretionary life sentence prisoners and OLR sentence prisoners will only become eligible to apply for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.”

80. Witnesses were generally welcoming of the underlying aim of Part 1. The Association of Chief Police Officers in Scotland considered that Part 1 of the Bill appeared to be “a fair way to approach the issue”, while James Chalmers of the University of Edinburgh’s School of Law, who raised a number of concerns with regard to the approach taken in Part 1, nevertheless described it as “tolerable as an interim means of addressing the difficulty identified in *Petch and Foye*.”

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37 Section 196 of the Criminal Procedure (Scotland) Act 1995 provides the statutory authority for sentencers to consider whether to reduce the length of a sentence as a result of a guilty plea by the accused. Available at: [http://www.legislation.gov.uk/ukpga/1995/46/section/196](http://www.legislation.gov.uk/ukpga/1995/46/section/196) [Accessed 20 March 2012]


40 Policy Memorandum, paragraph 34.

41 Policy Memorandum, paragraph 3.

42 The Association of Chief Police Officers in Scotland. Written submission.

43 James Chalmers. Written submission, paragraph 10.
81. The Law Society of Scotland, which also questioned whether the Bill would in fact effectively remedy the anomaly found in *Petch and Foye*, nevertheless said that it recognised that the Bill is “seeking to provide such a remedy.”

82. In evidence, the Cabinet Secretary for Justice acknowledged that the Bill “is meant to be an immediate fix to *Petch and Foye*”, rather than seeking to address the structure of custodial sentences more broadly. He said that the Scottish Government took the view that “given the clear problems caused by the Petch and Foye decision, we needed an immediate solution.”

83. Putting to one side the merits of the legislative approach taken in Part 1 (discussed below), the Committee is supportive of the aim of Part 1 of the Bill in seeking to address the anomaly identified in *Petch and Foye* whereby a life prisoner is likely to have a parole hearing earlier than a non-life prisoner sentenced for a similar crime.

**Interpretation and perceived complexity of the Bill**

84. Much of the evidence received by the Committee in relation to Part 1 of the Bill centred on how it would be interpreted and how its provisions would be applied in practice. The Bill has given rise to some difficulties in these areas.

85. In its written submission, the Faculty of Advocates referred to the complexity of existing law and said that the proposed amendments to the 1993 Act “address the perceived problem not by revisiting the structure of the existing legislation but by further elaboration on it.” James Wolffe QC characterised the approach of the Bill as being to “take an already complex piece of legislation and make it even more complex.” Sir Gerald Gordon expressed similar views.

86. The Law Society of Scotland also questioned whether the Bill “will result in a clear legislative solution to this difficult and complex issue.”

**Public confidence and clarity in sentencing**

87. Joanna Cherry QC, who appeared in *Petch v HMA* as Advocate Depute, referred to the tortuous judicial history of existing legislation and its tendency to divide judicial opinion. She added that—

“It is not just lay people who find the legislation extremely difficult to understand. It gave rise to the most difficult statutory interpretation of my career—colleagues who were involved in the case in question would agree with me about that. I am sure that it is an issue for the Parliament that legislation should be readily understandable to the public, particularly legislation to do with the sentencing of prisoners who have been convicted of the most serious crimes—other than murder, of course. That is a strong factor in our concern about the bill’s complexity.”

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44 The Law Society of Scotland. Written submission.
48 The Law Society of Scotland. Written submission.
88. This issue was also pursued by her colleague Mr Wolffe, who noted that

“sentencing judges are expected to explain sentences in a way that will be
intelligible not only to the accused who is being punished and sentenced, but
to the victims of the crime, the public at large and, ultimately, the appeal
court. It is open to question, at least, whether provisions of such complexity
will be helpful to sentencing judges in the task that they must carry out, and I
invite the committee to question those who are responsible for the bill about
that.”  

89. James Chalmers considered that the Bill “seeks to create a tortuous system
which is barely intelligible to lawyers, let alone the general public.” He said that
had not spoken to anyone who had felt comfortable reading it and in working out
what judges were required to do under it.

90. Underlying these general comments appeared to be a view that the Bill
imposes an unnecessarily rigid approach (proposed simpler alternatives are
discussed later) and, in particular, that the requirement to calculate a parallel
notional sentence pertaining to a set of circumstances that did not in fact occur (ie
the setting of a determinate sentence) was inherently unsatisfactory. Michael
Meehan of the Law Society told the Committee that—

“The bill complicates matters by requiring judges not only to consider the
sentence that they will impose but to conduct a parallel notional sentence
exercise. In other words, they will almost have to be like computers with dual
processors: they will have to consider not only the discretionary life sentence
but what they might have done had they gone down another route. That is
where things begin to get complicated. First of all, they will have to work out a
different type of disposal and then try to compare the two. The exercises are
different because, of course, the paramount consideration in cases with a
discretionary life sentence element is protection of the public. No matter
whether we are talking about a discretionary life sentence or an order for
lifelong restriction, that is what is at the forefront of one’s mind with regard to
what is a relatively rare disposal.”

91. The Cabinet Secretary for Justice told the Committee—

“We accept that this is a complex area of law, but we do not think that the
provisions are unnecessarily complex. They exist within a context and they
seek to address a specific issue.”

92. He added that the Scottish Government believed the Bill—

“provides a clear framework within which judges must calculate the
punishment part of a non-mandatory life sentence. We are making the law
easier to understand. The provisions provide clear limits within which the
judge can set the punishment part, and they seek to remove the areas of uncertainty that gave rise to the *Petch and Foye* decision."\(^{55}\)

93. Mr MacAskill also remarked that it is the role of the Judicial Studies Committee, which is responsible for judicial training in Scotland, to explain the legislation to the judiciary.

**Conclusions**

94. The Committee accepts that the existing legislative framework on non-mandatory life sentences is already a complex area of law. However, we also note the difference of views between the Scottish Government, which considers the Bill to provide a clear framework for judges to use when calculating the punishment part of non-mandatory life sentences, and those expert witnesses who consider the legislation overly complex. These views are difficult to reconcile. It may be that the Bill is acceptable in the interim to rectify an anomaly that has arisen at short notice. To that extent the Committee is supportive of the general principles of Part 1 of the Bill. The Committee returns to possible long-term solutions later in this report.

95. The Committee seeks an assurance from the Scottish Government that procedures are in place so that victims and witnesses are able to fully understand what the sentences handed down by the courts mean in practice.

**ECHR compliance and comparative justice**

96. The decision in *Petch and Foye* was based on the interpretation of the 1993 Act itself, rather than detailed consideration of relevant provisions of the European Convention of Human Rights (ECHR). However, ECHR case law does stand in the background, setting some requirements for any approach to calculating the punishment part of non-mandatory life sentences that have influenced both statute law and its interpretation by the courts.

97. The first strand of case law originates from the European Court of Human Rights decision in the English case of *Thynne, Wilson and Gunnell v United Kingdom (1990)*, which was subsequently given effect to in Scotland by section 2 of the 1993 Act. The outcome of the 1990 case is summarised in the Policy Memorandum—

> “it was held that non-mandatory life sentences imposed by English courts were composed of a ‘punitive’ element and subsequently of a ‘security’ element. In respect of the security element of such a sentence, the European Court of Human Rights found that the applicants were entitled under Article 5(4) of the Convention ‘to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court'. The Parole Board had been held to have the status of a court for these purposes, and gradually, the power to direct the release of prisoners has moved from the

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Scottish Ministers to the Parole Board itself, whose decisions are now binding on the Scottish Ministers.\textsuperscript{56}

98. The second strand of ECHR case law concerns comparative justice; specifically that the calculation of the punishment part of a non-mandatory life sentence should be linked (although not necessarily identical) to the period a determinate sentence prisoner would have to serve in custody before being released under early release provisions.\textsuperscript{57} The requirement to ensure comparative justice is in essence the aim of Part 1 of the Bill (and has been covered in more detail above), as a prisoner sentenced to non-mandatory life imprisonment can currently become eligible for consideration for parole at an earlier stage than a prisoner given a determinate sentence for a like crime.

99. While the Committee has not received much evidence arguing that the Bill’s proposals may not be ECHR compliant (although see the issue of double counting below), the issue of ECHR compliance has been raised with regard to some of the alternative proposals submitted by witnesses (see below).

100. The Policy Memorandum states that the proposals in Part 1 of the Bill are compatible with the Article 5(4)\textsuperscript{58} for two reasons—

“First, it is not possible for the sentencing court to include factors relating to public protection (i.e. those which properly form part of the ‘security’ element mentioned above) in the assessment of the punishment part. Therefore there is no possibility that a discretionary life prisoner could be detained beyond the part of their sentence that can be attributed to deterrence and retribution without recourse to the Parole Board to have the lawfulness of their detention challenged. Second, the Parole Board itself has been held to be a ‘court’ for the purposes of Article 5, meaning that the discretionary life sentence prisoner, having served the punishment part of their sentence, has their detention examined by a body that satisfies the requirements of Article 5(4).”\textsuperscript{59}

101. During his appearance before the Committee, the Cabinet Secretary for Justice gave further justification of the Bill’s compliance with ECHR—

“We must accept that ECHR law makes it clear that the security aspect is separate from the punishment part and should not be included in it. We formally accept that. Non-mandatory life sentences are not given routinely, as is shown by the fact that there have been 75 in six years. It is necessary to take account of the ECHR. Equally, we have to look at our domestic law and

\textsuperscript{56} Policy Memorandum, paragraph 13.
\textsuperscript{58} Article 5(4): Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
\textsuperscript{59} Policy Memorandum, paragraph 72.
consider how to get an element of parity between a non-mandatory life sentence and the determinate sentence that would be given. It is not an either/or situation—it is both.\(^60\)

102. Following the evidence session with Mr MacAskill, the Committee wrote to the Scottish Human Rights Commission to seek its view on whether or not Part 1 of the Bill is ECHR compliant. In its response,\(^61\) the SHRC outlined the current human rights framework relating to life sentences. The SCHR concluded that the proposals set out in Part 1 of the Bill are “consistent with current ECHR jurisprudence” but that an “apparent potential for ‘double-counting’ (i.e. considering the same set of factors at two stages of the determination of a sentence) may raise ECHR concerns”. This caveat would appear to concern the second strand of ECHR case law as outlined above.

103. On the basis of the evidence received, the Committee is generally satisfied that the proposals in Part 1 of the Bill are ECHR-compliant. However, we are not certain whether the possibility of double-counting (discussed further below) might give rise to difficulties in relating to the requirement for comparative justice under the ECHR.

“Double-counting” and other discrete drafting issues

104. Some witnesses highlighted the potential for inappropriate “double-counting” in the provisions of the Bill which seek to provide the judiciary with more discretion in setting the length of the punishment part.

105. Their observations concern proposed new section 2B(5) of the 1993 Act, which sets out the grounds upon which the court may set the punishment part of a non-mandatory life sentence at more than one-half of the notional equivalent (stripped down) determinate sentence. The specified grounds are the seriousness of the offence; whether the offence was committed while the offender was serving a period of imprisonment for another offence; and any previous convictions. These are similar to the criteria to be used to determine the length of the overall notional determinate sentence. In other words, it appears that the same set of factors that had been used to set a notional equivalent determinate sentence longer than is the “norm” for a particular offence (thus making for a longer minimum period of imprisonment) could then be used again to lengthen the minimum period of imprisonment of that extended sentence longer than is the norm.

106. The Law Society considered that this approach was “unfair and amounts to double-counting”\(^62\) and could therefore be open to appeal. This concern was also raised by the Faculty of Advocates and Sir Gerald Gordon, who said—

“On any view, I am unhappy with the proposed s2B(5). Subparas (a) and (c) are surely matters to be taken into account in determining the punishment


\(^{62}\) The Law Society of Scotland. Written submission.
part itself, being factors which would be relevant whether or not an OLR was being imposed.\(^{63}\)

107. The SHRC was asked whether this apparent potential for double-counting may raise an ECHR concern. The SHRC was (as noted above) not able to give a definitive answer—

“Given the complexity of the proposed procedure and the lack of clarity as to how the provisions would be interpreted, the Commission finds it difficult to address this issue without further investigation.”\(^{64}\)

108. A separate drafting issue was raised in the written evidence of the Faculty of Advocates, concerning the setting of a notional determinate sentence under new section 2A(2)(a). The Faculty suggested that there is an ambiguity in the drafting which may lead to the element of the sentence imposed for public protection effectively being removed twice. It describes this as an “apparent internal contradiction” which “illustrates that the proposed amendments do not deal with the root reason for the ‘anomaly’”.

109. The Committee invites the Scottish Government to consider whether the potential for “double counting” under section 2B(5) referred to by witnesses at Stage 1 give rise to any concerns. The Committee also notes the Faculty of Advocate’s views as to potential ambiguity in the drafting of section 2A(2).

Alternative approaches
110. As mentioned above, a number of witnesses have suggested alternative approaches to meet the broad aims of the Bill.

111. The Law Society proposed that the statutory requirement to strip out an element for public protection, from the notional equivalent determinate sentence used for the purposes of comparative justice, should be removed.\(^{65}\) This was on the basis that the requirement was not needed (the final punishment part would still need to exclude any period required for public protection) and had led to the anomaly identified in *Petch and Foye*. In the Law Society’s subsequent appearance before the Committee, Michael Meehan responded to a question on whether its proposal was ECHR compatible—

“It would depend on how the sentencer articulated what he or she did. If the sentencer were to say, “I have apportioned a discrete element to protection of the public,” that could offend the convention, albeit that the convention requires comparative sentences as opposed to absolute parity. However, in the Law Society’s submission, we make the point that protection of the public is an issue that runs through the sentencing exercise and is not regarded as some minority or discrete element.”\(^{66}\)

\(^{63}\) Sir Gerald Gordon. Written submission.

\(^{64}\) [http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120309_SHRC_to.CG.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120309_SHRC_to.CG.pdf) [Accessed 28 Mar 2012]

\(^{65}\) The Law Society of Scotland. Written submission.

112. Sir Gerald Gordon considered that those given a non-mandatory life sentence should simply be entitled to apply for parole at the same time as those serving an equivalent determinate sentence. However, Sir Gerald said he was not sure whether such an approach would be ECHR compatible. The Faculty proposed a similar sentencing method as an example of an alternative legislative approach in its written submission.

113. James Chalmers suggested that—

“If the legislation simply said—and did no more than say—that the sentencing judge was required to set a punishment part, that would be sufficient in terms of ECHR compliance. The judge would still be required to conduct the exercise of comparative justice and comply with convention requirements, but they might not have to jump through so many hoops to get there.”

114. James Wolffe QC made a similar point on behalf of the Faculty (which continually highlighted in its evidence the importance of sentencing judges having suitable discretion when imposing sentences)—

“we are questioning the extent to which it is necessary for that [parallel sentencing exercise based on determinate sentences] to be prescribed in a relatively rigid, step-by-step way instead of leaving it to experienced judges to do [it] anyway, After all, if they get it wrong, they will be corrected by the appeal court.”

115. In its letter to the SHRC on whether or not it considers the Bill as it stands to be ECHR compliant, the Committee also sought its view on whether these alternative approaches would be compliant. In its response, the SHRC said that it considered the alternative approaches suggested by the Law Society, the Faculty of Advocates, Sir Gerald Gordon QC and James Chalmers “would also be consistent with current ECHR jurisprudence.”

116. The Committee is attracted by the relative simplicity of alternative approaches to the drafting of Part 1 proposed by some witnesses at Stage 1. Following the assurance from the SHRC that it believes these approaches to be ECHR compliant, the Committee invites the Scottish Government to consider whether a less prescriptive approach would be clearer and more appropriate.

Overhaul of sentencing law

117. Part 1 of the Bill would make changes to both the Prisoners and Criminal Proceedings (Scotland) Act 1993 and relevant sections of the Custodial Sentencing and Weapons (Scotland) Act 2007. This is because the custodial sentence provisions of the more recent piece of legislation, which would (amongst
other things) supersede section 2 of the 1993 Act, have yet to come into force. The Policy Memorandum of the Custodial Sentencing and Weapons (Scotland) Bill provides the policy objectives of the custodial sentencing provisions—

“These provisions deliver the Scottish Executive’s commitments to end automatic and unconditional early release of offenders (as provided presently by the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as amended)) and to achieve greater clarity in sentencing.”

118. James Chalmers described current determinate sentencing law as “unprincipled and incoherent”\(^73\) while the Law Society said that—

“With fixed-period sentences, there is not that clarity [about how long the person must serve in prison]. If one had an overall review and removed that provision [automatic early release], there would be parity within the legislation.”\(^74\)

119. On the general issue of confidence in sentencing Michael Meehan, for the Law Society of Scotland said that—

“it can cause some difficulty if a disposal is given in court that is hard to understand or for which there is no apparent reasoning. As for complainers and victims, the Procurator Fiscal Service has in the High Court and sheriff courts a victim information service, which can explain to persons affected by crime what has happened. Having been advocate deputes at various times, all three of us—Joanna Cherry, James Wolffe and myself—have made a point of explaining things to family members or complainers afterwards. Although that can be—and certainly is—done, the question is whether it would be better simply to deliver sentences in an understandable way.”\(^75\)

120. In the Bill’s Policy Memorandum, the Scottish Government said that while consideration was given to whether limited commencement of the 2007 Act could achieve the desired policy aim, it concluded that—

“the policy intention in this case is to address an issue arising out of the operation of the 1993 Act, rather than to bring the provisions of the 2007 Act into force. Also, the approach we have taken is to give discretion to court to specify, if the court considers it appropriate in the circumstances of a case, that up to all of the punishment part of the notional determinate sentence must be served before an offender is eligible to apply for parole. In the 2007 Act, an upper limit of three-quarters of the punishment part of the notional determinate sentence is established. Therefore, commencement of the 2007 Act would not have delivered our policy aim in full and therefore it was not pursued.”\(^76\)

121. The Committee recognises that the Bill’s aim is to address a specific issue arising out of the Petch and Foye judgement, but we acknowledge the concerns

\(^73\) James Chalmers. Written submission, paragraph 7.  
\(^76\) Policy Memorandum, paragraph 61.
raised during evidence about the perceived problems with sentencing law more generally, in particular automatic early release of determinate sentence prisoners. While recognising that the Custodial Sentencing and Weapons (Scotland) Act may not mitigate all of the concerns raised by witnesses on sentencing law, the Committee notes that a law passed in 2007 with the aim of making sentencing clearer and more principled has not yet been brought into force, with no apparent commencement date yet proposed.

122. The Committee seeks an update from the Scottish Government on when the relevant sentencing provisions in the Custodial Sentencing and Weapons (Scotland) Act 2007 will be brought into force.

PART 2

Introduction

123. Part 2 of the Bill concerns the Scottish Criminal Cases Review Commission. The main role of the SCCRC is to review and investigate Scottish criminal cases where it is alleged that a miscarriage of justice may have occurred. Following investigation, the SCCRC may refer a case to the appeal court of the High Court of Justiciary for reconsideration. Part 2 makes one main change to the SCCRC’s functions: it provides a framework to enable the SCCRC to determine whether to disclose information about cases it has referred to the High Court, where the subsequent appeal has been abandoned.

124. The Policy Memorandum accompanying the Bill on introduction stated that although the provisions of Part 2 were in general terms, they had been brought forward in response to the case of Abdelbaset Al Megrahi, the man convicted in 2001 of the Lockerbie bombing. The SCCRC considered that there may have been a miscarriage in that case and in 2007 referred it to the High Court. In 2009, Megrahi abandoned his appeal when it was at a very early stage. He was shortly afterwards granted compassionate release from prison and returned to Libya.

125. In each case where it considers that there may have been a miscarriage of justice, the SCCRC is required to give to the Court a statement of their reasons for making the reference and to provide copies of it to any likely party to future appeal proceedings. It is known that the statement in the Megrahi case runs to 821 pages (not including annexes). Because Megrahi abandoned his appeal at an early stage, hardly any of the information in the statement supporting the contention that the original

case was wrongly decided would be disclosed in open court. In that way, the most important parts of the statement might be expected to enter the public domain, because they would be recited in the court’s judgment or reported by the media.\textsuperscript{80}

The early abandonment of the Megrahi appeal meant that this never happened.

**The events at Lockerbie and the Megrahi case**

127. In evidence before the Committee, the Cabinet Secretary for Justice said that the Bill was required in order to enable the Scottish Government to be “as open and transparent as can be”\textsuperscript{81} in relation to the Megrahi case, echoing words used in the policy memorandum.\textsuperscript{82} However (as discussed later) he also noted the general wording of the Bill and its potential to apply in future cases. The Committee notes that such cases are likely to be rare.\textsuperscript{83}

128. Recent events (as alluded to at the beginning of this report) means that much of the evidence that the Committee took now appears to be less relevant than it was when it was provided. However, the Committee considers it important to set out our consideration of all the main issues discussed at Part 2.

129. Inasmuch as the evidence recited below relates to the specifics of the Megrahi case, it is important to make clear that the Committee saw its role as simply being to test the provisions of Part 2 against the Scottish Government’s view that they amounted to the best means available to them to help bring to light facts about the case in the hands of the SCCRC. It was to help answer this question – and not to speak to their doubts about the conviction – that we agreed that one of the groups invited to give evidence should be the organisation Justice for Megrahi.

130. The Committee has all along recognised that publication of the statement of reasons in the Megrahi case would serve a relatively limited purpose. It may not bring any significant sense of resolution to those most closely affected by the case, and is unlikely to be seen as ending the debate over the original trial. The question as to what the ultimate outcome should be is not a question for the Committee to answer as part of our scrutiny of this Bill.

131. That said, the Committee also recognises the public interest in the Megrahi case, and the widespread sense of dissatisfaction that early abandonment of the appeal meant that key findings in the statement of reasons were never fully enunciated or tested in court. To reiterate comments made at the beginning of this report, the Committee supports there being greater openness about the reasons behind the appeal and to that extent was supportive of the original aims behind Part 2. We are supportive of as much of the statement of reasons as is possible being in the public domain.


\textsuperscript{82} Policy memorandum, paragraph 4.

\textsuperscript{83} There have been three instances of abandoned appeals since the SCCRC was set up in 1999 (including Megrahi’s); Financial Memorandum, paragraph 54. No evidence has been led to suggest that, if the Bill were agreed to, there would be any move to publish the statements of reasons in those two other cases.
132. The Committee recognises that publication of the statement of reasons in the Megrahi case might serve a relatively limited purpose as it is unlikely to resolve all outstanding issues. However, we are supportive in principle of there being as much openness as possible about the reasons why Megrahi was allowed to make his appeal.

133. The Committee also notes that the Bill is in general terms and may apply in future to cases other than that of Megrahi. However, the main policy aim behind the Bill has been to facilitate the publication of the statement of reasons pertaining to that case. The Committee invites the Scottish Government to consider whether recent events provide an opportunity to consider whether the Bill’s provisions are robust enough to apply in circumstances other than the Megrahi case.

134. Whilst the Committee notes that the intended main purpose of Part 2 appears to have been superseded, the Committee supports there being as much openness as possible in relation to abandoned appeals arising from a reference from the SCCRC, subject to there being a substantial public interest. The Committee therefore supports the general principles of Part 2 of the Bill, but recognises that there has been very little opportunity to take evidence on the general applicability of Part 2.

Posthumous appeal

135. A consensus emerged during evidence-taking that it would be legally possible for Megrahi’s abandoned appeal to be taken up again after his death. In a statement to the Chamber on 29 February, the Cabinet Secretary noted that if an application for such an appeal were made, the SCCRC would need to decide whether to make a referral and the High Court would need to determine whether to take it.84 The Committee notes that if an appeal proceeds, the SCCRC would be empowered to disclose information for the purpose of any criminal proceedings to any person likely to be a party to proceedings.85

136. We also note that the current test for the SCCRC, in deciding whether to refer an appeal, is to consider whether it is in the interests of justice that a reference should be made. In so doing, it must also have regard to the need for finality and certainty in the determination of criminal proceedings.86 The High Court currently applies a similar test in determining whether to accept the reference.87 In relation to the Megrahi case, the Committee is not clear how either body might be expected to apply this test in the context of an appeal on behalf of a deceased person, where the offence occurred a quarter century or more ago.88 The Committee is not clear, either, whether the fact that the statement has now been published, with the main findings widely discussed in the media, would affect the decision-making process of either body on this issue.

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85 Section 194D(4)(a) of the Criminal Procedure (Scotland) Act 1995.
86 Section 194C of the Criminal Procedure (Scotland) Act 1995.
87 Section 194DA of the Criminal Procedure (Scotland) Act 1995.
88 The Committee notes that Lord Carloway has recently recommended removing these tests. (The Carloway Review, Report and Recommendations, 17 November 2011.)
137. Justice for Megrahi indicated to the Committee that an application for a posthumous appeal should be expected in due course.  

138. If an appeal were to proceed, this could potentially have provided an alternative means of bringing to light key findings in the statement of reasons had the statement not been published anyway on 25 March 2012. This issue now seems to be academic. However the Committee wishes to make clear that we saw the issue of a posthumous appeal as ultimately irrelevant to our Stage 1 consideration before the online publication of the Megrahi statement, as there is no guarantee as to whether and when an appeal might proceed.

Current legal position and changes made by the Bill

Current legal position

139. Part 2 of the Bill inserts six new sections into Part XA of the Criminal Procedure (Scotland) Act 1995, which sets out the role and functions of the SCCRC. It is section 194J of the 1995 Act that currently sets out the general prohibition: it is an offence for a Member or employee of the SCCRC (or former Member or employee) to disclose information obtained by the SCCRC in the exercise of its functions. Section 194K makes some exceptions to this, one of which is that the information is disclosed “in any statement or report required by this Act”. The Act provides that the SCCRC is to provide the statement of reasons to the High Court, with a copy going to any likely party to appeal proceedings. The Committee understands that in practice this is interpreted to mean that the SCCRC should disclose the statement to these persons and to no one else.

The 2009 order

140. Another exception in section 194K, at subsection (1)(f), is the provision that information may be disclosed “in any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State” (to be read, in the light of the Scotland Act, as a reference to the Scottish Ministers).

141. In 2009, the Scottish Parliament agreed to an instrument laid by virtue of section 194K(1)(f), providing a framework for the SCCRC to disclose information if certain conditions are met. As with the Bill, the instrument was drafted in general terms but the Scottish Government made clear that it was drafted in order to enable disclosure of the Megrahi statement. The instrument would have permitted the SCCRC to disclose information on the statement of reasons relating to an abandoned appeal provided any person who provided the information (whether directly or indirectly) had consented to its disclosure.

142. On 9 December 2009, the SCCRC issued a press release indicating that, after nine months of correspondence and discussion with interested parties, it had “become obvious that there is no likelihood of obtaining the unqualified consent required in terms of the 2009 Order”. This had led the SCCRC to decide to

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discontinue the process. The SCCRC indicated that it would be happy to revisit the matter if the requirement to obtain the consent of parties were removed.

143. It would have been open to the Scottish Government to seek to lay another order. However the Scottish Government chose to go down the route of primary legislation. It set out its reasons for this in the Policy Memorandum,92 the primary one appearing to the Committee to be that “Parliament should have full scrutiny powers over the proposed framework for the Commission.”

144. The Bill takes the opportunity to revoke the 2009 Order, on the ground that it is superseded by Part 2.

Provisions in the Bill: new exception permitting disclosure

145. New section 194M inserted by the Bill would create a new exception to the general prohibition on disclosure. Information may be disclosed if—

- it relates to a case that the Commission has referred to the High Court for reconsideration (other than where it is the sentence only that the Commission is asking the Court to reconsider),

- the subsequent appeal has fallen or been abandoned, and

- the Commission determines that it is appropriate in the whole circumstances for the information to be disclosed.

The test to be applied by the SCCRC

146. Questions arose at Stage 1 as to whether the SCCRC was, in principle, the appropriate body to apply the test set out in the third of the bullet points listed above. It appears to the Committee that this test amounts to a discretion rather than a duty to disclose (if the other conditions are met). Questions have arisen as to what sort of factors the SCCRC would in practice take into account in exercising that discretion, and whether it is they who ought to have the discretion.

147. Sir Gerald Gordon, who is a former Member of the SCCRC, remarked that it had been set up—

> “to decide whether a case should be referred to the High Court. The decision whether or not to publish the SoR [ie statement of reasons in the Megrahi case] is a political one and should be decided by politicians. Nor am I happy about partial publication, or about requiring the SCCRC to explain why it has done what it did.93 This brings me back to the point about this being a political decision: it is for politicians to decide and to explain their decision.”94

148. There was an echo of these remarks in a slightly different context, when Iain McKie of Justice for Megrahi (referring to the ongoing debate about the legality of releasing information without the subjects’ consent), said that “political will”95 was

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92 Policy Memorandum, paragraphs 63 to 65.
93 As potentially required under the Bill (see discussion below)
needed to secure publication of information, rather than seeking to rely on public servants to do so.

149. The Committee accepts that it has been for politicians to show leadership in determining whether the Megrahi statement to be published. It could be argued that that leadership was partly manifested in Part 2 of the Bill being brought forward and would be further manifested if the Parliament ultimately agrees to its provisions, having satisfied itself that they are likely to do what the Scottish Government intends of them.

150. Recent events may now mean that the SCCRC is likely to have little or no role in relation to preparing the Megrahi statement of reasons for publication, even if the Bill is agreed to. However, the Committee wishes to make clear that, in our view, the SCCRC would have been the appropriate body to carry out the important administrative work required under the Bill, and indeed under other relevant legal rules (eg data protection) before any information in the Megrahi statement could have been released. The SCCRC is an independent statutory body, it was untainted by any connection with the original trial, and it is more likely than any other body to have had prior contact with the persons that would need to be contacted before any decision could have been made on releasing any information.

151. The question whether the SCCRC would have been the appropriate body to make the final decision whether to release information in the Megrahi case, once any necessary administrative steps had been taken, likewise appear to have been rendered irrelevant by recent events. The Committee notes that the current leadership of the SCCRC appeared to be comfortable in this role, having repeatedly made clear their willingness to disclose the statement if given the appropriate legal tools. Their Chief Executive, Gerard Sinclair, told the Committee that determining whether to release information would involve considering—

“whether the disclosure of information might give the public a fuller understanding of the level of investigation that the commission had carried out and the reasoning behind the commission’s decision to refer a case. On the national and international interest in the Megrahi case, the commission is on the record as saying that it feels that disclosure would benefit the public’s understanding of the commission’s role in publication of the statement of reasons document.” 96

152. Mr Sinclair was also invited to set out when the SCCRC might be minded not to disclose information. He answered that if—

“we had to redact the document and delete parts of it, 97 and if that got to the stage where we felt that the document was becoming unbalanced and did not reflect the commission’s views, we may well decide that it would not be

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97 As potentially required under the Bill: see discussion below.
appropriate to publish that edited document and we would give reasons for that.”\textsuperscript{98}

153. The above indicates that the SCCRC applied a “public interest” test in determining whether it would be willing to publish the Megrahi statement, and that in making any final decision to publish, it would also have taken into account whether the information it was able to disclose presented a balanced picture. These appear to be entirely reasonable matters for the SCCRC to be taking into account, although they are not expressly referred to in the test set out in the Bill.

154. Although Part 2 has been presented mainly as a response to the Megrahi case, there has been no indication given that the Scottish Government intends to repeal it if and when the Megrahi statement, or a redacted version of it, is disclosed. The Cabinet Secretary specifically told the Committee that the Bill had intentionally been drafted so as to be general rather than specific, in order to deal with a “lacuna” in the law, and that there may well be other cases in future where the Bill could be of assistance.\textsuperscript{99}

155. The Committee accepts that there may be a lacuna in the law that requires to be filled. It could be argued that the Megrahi appeal is a special case and that ordinarily if an appeal falls there is no particular reason why a statement of reasons should be published, following a lengthy administrative process. On the other hand, if it is appropriate in principle to disclose information about the basis of the Megrahi appeal, because that information was never recited in open court, on account of the huge public interest in the case, then there is no reason to suppose that such circumstances could not recur in another case in future. If so, it could be argued that the main factors the SCCRC should take account of in determining whether to disclose information should be expressly alluded to. In relation to the Megrahi case, the SCCRC has been clear from the outset that they would be minded to publish, given the opportunity. It is not clear whether this would pertain in future cases.

156. Following recent events, the Committee notes that the question whether the SCCRC is the appropriate body to undertake (a) the administrative process of preparing the Megrahi statement of reasons for publication and (b) the final decision whether to publish the statement (or a redacted version of it) may have been superseded by events.

157. However, the Committee is clear that the SCCRC would generally be the appropriate body to undertake the administrative process envisaged under Part 2 of the Bill.

158. In relation to the final decision-making process, the Committee notes the SCCRC’s evidence that it would have been willing to take the decision to publish the Megrahi statement given the appropriate legal tools. The Committee invites the Scottish Government to consider whether it would be of benefit, for future cases, if the factors the SCCRC should take into account in determining whether to disclose information should be expressly


set out (whether in the Bill or, for instance, in guidance from the Scottish Ministers.) If so, it appears to the Committee that the public interest should be a key consideration.

Further steps required under the Bill

159. The Bill goes on to require some additional steps before information can be disclosed. Some are to be taken before any decision to disclose information is made. Others are to be taken once that decision has been made.

160. New section 194N requires the SCCRC, so far as practicable, to notify and seek the views of any affected person before deciding whether to disclose any information. An “affected person” is a person to whom the information directly relates from whom it was obtained (directly or indirectly). It must also, as far as practicable, consult any “interested person” ie the Lord Advocate and any other person appearing to have a “substantial interest” in the question whether the information should be disclosed. Interested and affected persons must be allowed a minimum of six weeks to respond and to take steps in their in favour, which may include legal steps. The Committee takes this reference to “legal steps” to be to measures that might prevent information from being disclosed, as discussed further below.

161. New section 194O makes provision for information that originated from a foreign authority under international assistance arrangements. The SCCRC may not disclose such information without the consent of the foreign authority, whether that was signified in advance or by subsequent direct communication between the authority and the SCCRC. This is the only part of Part 2 expressly providing that a lack of consent blocks disclosure. (The SCCRC described it as a veto power. 100) The policy memo explains that this is included—

“to ensure international obligations are not breached. In addition, disclosing information obtained from foreign authorities without their consent could risk undermining the operation of existing mutual legal assistance agreements, adversely affecting efforts to tackle crime, including serious organised crime, in the future.” 101

162. A fairly complex explanation of the terms “international assistance arrangements” and “foreign authority” is provided in section 194P. The Committee notes that “foreign authority” is a wider category of person or body than “foreign government” would be.

163. The Committee briefly explored with the SCCRC whether the fact that information emanating from a foreign authority that the SCCRC held was obtained via a third party (such as the UK Government) would nullify the foreign authority’s effective veto power over disclosure of that information. The SCCRC’s Michael Walker explained that in their view it would not and that “ultimately, the issue is where the information has come from, not the route by which it has come.”102

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100 Scottish Criminal Cases Review Commision. Written evidence.
101 Policy Memorandum, paragraph 56.
164. New section 194R makes provision in relation to circumstances where the SCCRC have decided to disclose information. There are two requirements. First, before disclosing any information, the SCCRC must take reasonable steps to notify this to any affected and interested persons, giving them six weeks to take steps in their own favour (which may include legal action). Secondly, in disclosing information, the SCCRC must “explain the context in which the information is being disclosed” and explicitly state whether other information is being withheld. The Policy Memorandum states that this is to “aid general understanding of the wider context of the case” and “help ensure that information being disclosed is properly interpreted.” As noted earlier, the SCCRC appear to consider that if they are required to make redactions that risk making the report unbalanced, they may take this to be grounds not to disclose it.

165. The Committee notes overall that these provisions relating to the administrative steps to be taken by the SCCRC did not occupy much of our Stage 1 consideration. This may be because witnesses considered issues relating to data protection to be much more material to the ultimate determination as to whether information could be disclosed.

166. Justice for Megrahi described the mechanism provided to allow objections to disclosure “cumbersome.” However, the Information Commissioner’s Office expressed a favourable view overall of the process, remarking of sections 194N and 194R that, taken together they “enhance the fairness of the processing being undertaken and are consistent with the requirements of the DPA [Data Protection Act 1998].” These comments are significant because they underline the Information Commissioner’s case that the framework set out in the Bill may help ensure that what the Cabinet Secretary referred to as “data protection obstacles” can be successfully negotiated (see discussion below).

167. The Association of Chief Police Officers Scotland also expressed a generally positive view. However it expressed concerns about the SCCRC having “an unfettered legal right” under section 194M to release information, notwithstanding the objections of interested parties. This is technically true within the narrow confines of the Bill (except in relation to “foreign authority” evidence where an objection would block disclosure). But it does not take account of the likely impact of other laws, such as data protection, as discussed below. ACPOS called for (a) an appeals mechanism against a decision to disclose or (b) the right to refer such a decision to the Information Commissioner. Given the right to make representations already built into the Bill, combined with the potential availability of other legal remedies (for instance under the Data Protection Act), the Committee is not persuaded that these additional provisions are necessary.

168. In relation to the requirement to obtain consent from foreign authorities (under section 194P), the SCCRC, whilst not objecting to it, noted that it might have some difficulty in identifying the relevant authority and that it would in

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103 Policy Memorandum, paragraph 57.
105 Justice for Megrahi. Written submission
106 Information Commissioner’s Office. Written submission.
107 ACPOS. Written submission
practice require the Lord Advocate’s assistance. It considered that the key terms used in section 194P had been defined widely and would, for instance, catch information obtained from Libyan witnesses, apparently therefore requiring the consent of the current transitional Government there.  

169. The Committee broadly welcomes the provisions in Part 2 relating to the notification of interested and affected parties, and notes, in particular, the Information Commissioner’s view that they may help ensure that information is disclosed in compliance with data protection requirements.

170. In relation to information emanating from foreign authorities under international agreements, the Committee notes that the Bill in effect gives the authority a veto power over the disclosure of such information. This might be considered contrary to the principles underlying Part 2, but the Committee accepts that the inclusion of such a provision may be practically unavoidable.

171. The Committee notes that the Bill makes it possible for the SCCRC to publish an incomplete statement of reasons, but requires the SCCRC to make this expressly clear, as well as to explain the context in which information is being disclosed. This appears to be a measured approach. On the other hand, questions would be raised about the disclosure of a statement that has been substantially redacted, given the aim of openness and transparency that lies behind Part 2 of the Bill. We also note the SCCRC’s comments that they would be unlikely to publish the Megrahi statement if, following redaction, it had become “unbalanced” and recommend that similar reasoning should be applied in any future cases.

Data protection and other potential obstacles to disclosure outwith the Bill

172. The policy memorandum accompanying the Bill says that in deciding whether to disclose information, the SCCRC—

“will be required to ensure that the disclosure of the information did not contravene any relevant statute applying in the situation. Statutory requirements contained in legislation such as the Data Protection Act 1998 and the Official Secrets Acts are not affected by the provisions in this Bill and these statutory requirements are likely to be relevant in considering the disclosure of information.”

Data protection - introduction

173. Data protection was the main issue discussed in relation to Part 2. The Scottish Government and the SCCRC were amongst those of the initial view that it would be a significant, possibly insurmountable, obstruction to effective disclosure of the Megrahi statement. The Information Commissioner took a more nuanced view. The latter’s views are particularly significant, given the Information Commissioner’s regulatory role under the Data Protection Act. Lately, though, there appears to have been something of a convergence of views between these.

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108 Scottish Criminal Cases Review Commission. Written submission
three parties. Justice for Megrahi considered the whole issue of data protection to be “a complete red herring”.  109 All of this is discussed further below.

174. Data protection is a complex legal issue. The Committee saw it as its role in scrutinising Part 2 to understand the key provisions as they apply to the Bill and to seek and, where necessary, tease out, key stakeholders’ views, so as to reach an informed conclusion as to how effective Part 2 was ultimately likely to be. At the time that the Committee was taking this evidence, the statement of reasons in relation to the Megrahi case had not of course been disclosed. To that extent, the following discussion might be considered to be partly superseded by events. However, the Committee considers it important to set out the main points that were made and the conclusions we ultimately reached. It may be that the discussion is relevant to future cases.

175. Key provisions  110 of data protection law as they apply to the Bill (terms in quotation marks derive from the Data Protection Act) are that—

- the SCCRC is the “data processor”: it must process data in accordance with the “data protection principles”;
- these include the principles that “personal data” must only be obtained for “specified and lawful purposes”, and that personal data must be processed “fairly and lawfully” and cannot be processed unless at least one of the conditions set out in schedule 2 of the Data Protection Act must be met;
- in relation to “sensitive personal data”, at least one additional condition, as set out in schedule 3, must also be met;
- publishing the statement under the Bill would amount in practice to processing data;
- the SCCRC consider that much of the information in the statement of reasons is personal data or sensitive personal data.  111

176. It may be helpful to add that the fact that particular information may, if an appeal had proceeded, have ended up being disclosed in open court is apparently not in itself a ground for determining that disclosure of data is permissible.  112 Another issue clarified during evidence-taking is that consents in relation to data protection apply only to personal data pertaining to living persons.  113

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109 Justice for Megrahi. Written submission
110 As discussed further in the written submissions of the SCCRC and the Information Commissioner’s Office and in correspondence from Lord McNally and the Cabinet Secretary (letter of 23 January 2012).
111 Scottish Criminal Cases Review Commission. Written submission.
113 Scottish Parliament Justice Committee. Official Report, 31 January 2012, Col 890. Dr Ken Macdonald of the Information Commissioner’s Office qualified this by pointing out that that this did not simply mean that all data relating to the deceased person could then be published; if that information related to living third parties then they would potentially have continuing rights relating to data protection. If the deceased had provided information on condition that it remained
Consent of data subjects

177. As noted, in 2009 the SCCRC was not able to obtain consent from interested parties in the Megrahi case and in Stage 1 evidence they indicated that they thought it unlikely they would obtain the relevant consents if required to do so again. This may be considered puzzling, since those who provided information to the SCCRC as part of its investigation presumably did so voluntarily and in the awareness that the information may have ended up being recited in open court. However, the Committee is in no position to speculate as to the motivations of individuals, known and unknown, and must accept at face value the SCCRC’s view that consent is unlikely. Sensitive personal data volunteered by one individual that pertains to another is perhaps in a special category; again the Committee is not in any position to speculate as to how much of the information in the statement falls into that category.

Scottish Government view

178. In a letter to the Convener sent near the beginning of Stage 1, the Cabinet Secretary had earlier written to the UK Justice Secretary, requesting the removal of “data protection obstacles” in relation to the Megrahi statement of reasons, to help give effect to Part 2 of the Bill. It has since been made clear that the Cabinet Secretary was asking the Justice Secretary to consider making an order under schedule 3, paragraph 10 of the Data Protection Act. This enables the UK Secretary of State to specify circumstances where the processing of sensitive personal data is permissible. The Committee notes that the Cabinet Secretary repeated this request to the Secretary of State during Stage 1, most recently in relation to the disclosure of information about the statement in the confidential then that too might mean that there would be continuing legal barriers. (Scottish Parliament Justice Committee. Official Report, 7 February 2012, Cols 933-934)

114 Scottish Parliament Justice Committee. Official Report, 31 January 2012, Cols 879-880. This would not be the case if information were volunteered on the understanding that it would never be recited in open court. However, the SCCRC explained to the Committee that there is only one piece of information referred in the statement of reasons that they considered they were unable to disclose the detail of. They also explained that there is no information in the statement to which the Official Secrets Acts might apply. (Scottish Parliament Justice Committee. Official Report, 31 January 2012, Cols 885-886.)

116 There were some exchanges with Justice for Megrahi as to Megrahi’s position with regard to disclosure (Scottish Parliament Justice Committee. Official Report, 7 February 2012, Cols 908-911) We note that the newspaper’s decision to publish the statement of reasons on 25 March was apparently taken with Megrahi’s consent

http://www.scottish.parliament.uk/S4_JuiceCommittee/Inquiries/20120123_CSfJ_to(CG.pdf
[Accessed 28 March 2012]
media.\textsuperscript{119} He said that this made it “imperative” for the SCCRC to be given the power to place a “balanced account” of its statement in the public domain.

180. In relation to the view from the Information Commissioner’s Office that conditions in the Data Protection Act itself might help afford a way round some of the data protection obstacles (discussed below), the Cabinet Secretary told the Committee that this did not reflect his understanding and that he expected this view to change once the Deputy Information Commissioner for Scotland had met the SCCRC.\textsuperscript{120}

\textit{Initial UK Government position}

181. In his reply to the Cabinet Secretary’s first letter, the UK Secretary of State said that the Data Protection Act is based on a European directive, that “any consideration of data protection compliance must also include consideration of the intentions of the directive,” and that it is not possible to create a “general exception” to data protection legislation. He indicated however that he would be happy to allow officials in his department to discuss with the SCCRC the sort of personal data that would be likely to be disclosed in relation to the Megrahi case, in order to enable him to come to a more detailed view.

\textit{SCCRC view}

182. The SCCRC indicated\textsuperscript{121} that they saw data protection as a potentially formidable obstacle, particularly in relation to sensitive personal data in the statement. Their “starting position”\textsuperscript{122} was that an order from the UK Secretary of State would be necessary. In response to the question as to whether this risked creating a dangerous precedent as regards the handling of personal data and sensitive personal data, Gerard Sinclair of the SCCRC told the Committee that he did not see that making such an order would “breach the dam”. The making of such orders was preceded, and they tended to be made for very limited purposes.\textsuperscript{123}

183. The SCCRC indicated that they would be happy to meet with both the UK Ministry of Justice and the Information Commissioner’s Office to tease out whether any of the other schedule 3 conditions might permit them to lawfully disclose such data. The two conditions that they had particularly in mind were—

- paragraph 7(1)(a) of schedule 3; that the processing is necessary for the administration of justice, and

- paragraph 7(1)(b); that the processing is necessary for the exercise of any functions conferred on a person by or under an enactment.

184. However, their view was that it was unlikely that either would be of assistance in the Megrahi case unless a “very broad interpretation”\textsuperscript{124} was applied.

\textsuperscript{119} \url{http://www.scotland.gov.uk/Resource/0038/00388967.pdf} [Accessed 28 March 2012]


\textsuperscript{121} Scottish Criminal Cases Review Commission. Written submission.


\textsuperscript{124} Scottish Criminal Cases Review Commission. Written submission.
Information Commissioner’s view
185. As already noted, the written evidence of the Information Commissioner’s Office took a favourable view of the process set out in the Bill, considering that it helped meet the key data protection principles that data must be processed fairly, and for one or more specified and lawful purposes. The evidence concluded that—

“The amendments to the Criminal Procedure (Scotland) Act 1995 contained within the Bill will help ensure that the disclosure of Statement of Reasons by the SCCRC in cases where appeals have been abandoned or otherwise withdrawn, meet with the provisions of the DPA. Importantly, the Bill contains a robust legislative framework which will ensure that such disclosure is fair and lawful.”

186. In evidence to the Committee, Dr Ken Macdonald, the Deputy Information Commissioner responsible for Scotland, clarified that the import of this evidence was that the Bill appeared to satisfy the schedule 3 condition that permits the processing of information for the purpose of administration of justice (paragraph 7(1)(a) of the schedule). This meant that the SCCRC would be able to publish the information lawfully without the consent of the data subject.125

187. It is important to stress that the Committee did not understand this evidence as meaning that the Bill guarantees compliance with data protection law. Rather, it was the Information Commissioner’s view that the Bill affords a strong opportunity for the SCCRC to comply with the law, by setting out a robust framework within which the SCCRC must operate. Ultimately, if individuals thought the processing was unlawful they could still go to court for a determination.126 Dr Macdonald also expressly noted that it would still be necessary to ensure adherence to human rights law and other possible obligations such as those relating to breach of confidence, even if data protection principles were not breached.127

188. Dr Macdonald accepted that the SCCRC took a different view, adding that—

“The potential solution is to review the proposed amendments in the bill and include a more explicit statement that the SCCRC has the power to produce reports and release information on appeals that are not proceeding.”128

189. In this connection, the Committee notes that the language of the 7(1)(a) condition (and indeed of the 7(1)(b) condition) is of necessity. The test that the SCCRC must apply under the Bill in determining whether to publish a statement of reasons is that it has “determined that this is appropriate in the whole circumstances for the information to be disclosed”.129 As we discussed earlier, this appears to be in the nature more of a discretionary power, rather than of a legal duty to disclose (where certain conditions are met), although the issue is perhaps not entirely clear cut.

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129 New section 194M(1)(b) of the Criminal Procedure (Scotland) Act 1995, as inserted by section 3(3) of the Bill.
190. This led the Committee to invite Dr Macdonald to speculate as to whether, for instance, substituting “necessary” for “appropriate” in the test might help strengthen the SCCRC’s ability to rely on either of the schedule 3 conditions. He agreed that it might.\footnote{Scottish Parliament Justice Committee. \textit{Official Report}, 21 February 2012, Cols 929-930.}

191. On the other hand, the Committee notes the fundamental principle of proportionality that underpins all European law, including the directive on which the Data Protection Act is based. To that extent, the Act’s provisions should not be construed as requiring a more restrictive processing of data than is necessary to meet the Treaty objectives.\footnote{Article 5, Treaty of Rome.} This may permit a less strict interpretation of necessary that would be the case in non-EU originating legislation, such that a “necessary” action in terms of the two conditions might be an action that it proportionate in the circumstances. If this were the case, there may mitigate any perceived need for an amendment of the test along the lines proposed.

192. For their part, the SCCRC who were invited to respond to Dr Macdonald’s comments about “strengthening” the test, expressed concern\footnote{Scottish Criminal Cases Review Commission. Supplementary written submission.} that an amendment requiring rather than empowering them to disclose information (provided certain other conditions are met) might risk taking the Bill outwith the Parliament’s vires, by appearing to override data protection or human rights law.

\textit{Justice for Megrahi’s view}

193. Justice for Megrahi considered that the Scottish Government had taken a fundamentally wrong legislative route in introducing primary legislation to enable disclosure of the statement. This view turns on the proper interpretation of subsection (4) of section 194K of the Criminal Procedure (Scotland) Act 1995.

194. Subsection (1)(f) of that section sets out the power to make an order permitting the disclosure of information held by the SCCRC (for instance in a statement of reasons) that it would otherwise be unlawful to disclose. This is the power that was used to make the 2009 Order.

195. Subsection (4) of section 194K goes on to provide that—

“Where the disclosure of information is excepted from section 194J of this Act by subsection (1) or (2) above, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or imposed by, under or by virtue of any enactment) arising otherwise than under that section.”

196. In their written evidence, Justice for Megrahi noted that the Bill—

“does not (and cannot because of the restrictions on the Scottish Parliament’s legislative competence) replicate the provision of section 194K(4) of the 1995 Act. ... This means that under the Bill common law and statutory obligations of secrecy or confidentiality could be founded upon by the suppliers of the information, or any persons directly affected by it, in any legal action taken by them to block disclosure. But if a \textit{statutory instrument}
were used by the Scottish Ministers to remove the restriction on disclosure -- the mechanism which is specifically mandated in section 194K(1)(f) -- these common law and statutory obligations of secrecy or confidentiality would be overridden.\textsuperscript{133}

197. Justice for Megrahi’s solution was simple: instead of proceeding with Part 2 of the Bill, the 2009 Order should be revised, with the requirement to seek the consent of interested parties, which had ultimately frustrated the SCCRC’s attempts to secure disclosure under that route, struck out. Section 194K(4) could then be relied upon to override data protection or other obstacles.\textsuperscript{134}

198. Other witnesses to express a view did not agree with Justice for Megrahi. The SCCRC itself did not consider that an order under section 194K(1)(f) would allow it to avoid data protection considerations. It drew attention to section 57(2) of the Scotland Act, which provides that the Scottish Government may not make legislation (including subordinate legislation), or do any other act, so far as it is incompatible with Community law. The SCCRC noted that the Data Protection Act implemented a European directive.

199. James Chalmers of the University of Edinburgh Law School observed that the Data Protection Act 1998 Act post-dated the legislation creating the SCCRC. It was not clear, he argued, how section 194K “could be taken as pre-emptively carving out an exception to it”.\textsuperscript{135}

200. A supplementary written submission from Justice for Megrahi challenged Mr Chalmers’ view as “fallacious”—

"Section 194K(4) was amended by the Scotland Act 1998 to substitute "the Scottish Ministers" for "the Secretary of State".\textsuperscript{136} The Scotland Act 1998 received the Royal Assent on 19 November 1998, more than four months AFTER the Data Protection Act 1998 (16 July 1998). Accordingly, the power conferred on the Scottish Ministers by section 194K(4) to override legislative obligations of secrecy postdates the Data Protection Act. The United Kingdom Parliament had the opportunity in the Scotland Act specifically to exclude data protection from the Scottish Ministers’ power to override legislative obligations of secrecy, but it did not avail itself of that opportunity."\textsuperscript{137}

201. The Committee, however, notes that section 53(1) of the Scotland Act enables order-making powers to be devolved to the Scottish Ministers only to the extent that “they are exercisable within devolved competence”. It does not appear to be disputed by Justice for Megrahi that data protection law is outwith devolved competence; this is clearly set out in the Scotland Act.\textsuperscript{138} Section 54(2) of the Act

\textsuperscript{133} Justice for Megrahi. Written submission.
\textsuperscript{135} James Chalmers. Supplementary written submission.
\textsuperscript{136} I.e. to devolve the order-making power from the UK Secretary of State to the Scottish Ministers (in practice the Cabinet Secretary for Justice).
\textsuperscript{137} Justice for Megrahi. Supplementary written submission.
also provides that it is outside devolved competence “to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament.” This was noted by the Cabinet Secretary, who also expressed clear disagreement with Justice for Megrahi’s interpretation of the law.  

Recent developments

202. The discussions between officials of the SCCRC, the Information Commissioner’s Office and the UK Ministry of Justice alluded to above took place following the Committee’s evidence-taking but were concluded before the publication of a redacted version of the statement of reasons by a newspaper on 25 March. The latter event has of course significantly changed the circumstances but the Committee considers it useful to retain the following summary as an indication of how legal discussions on data protection were eventually resolved.

203. Following earlier indications from the Cabinet Secretary that he was minded to leave it to the SCCRC and UK Government officials to discuss data protection issues, the Committee is pleased to note that officials from the Scottish Government Justice Department also joined those discussions.

204. All four parties helpfully provided updates to the Committee on the progress of those discussions, so as to help inform the content of this report. In summary, it would appear that the main outcome of the discussions is that SCCRC officials had become more receptive to the argument put forward by both the Information Commissioner and representatives from the UK Ministry of Justice that disclosure of sensitive personal data by the SCCRC could satisfy condition 7(1)(a) of Schedule 3; that the processing is necessary for the administration of justice (condition 7(1)(a)).

205. Prior to the newspaper’s publication of the statement of reasons on 25 March, the Committee had understood the situation to be that the SCCRC were not yet in a position to formally confirm that they broadly agree with the Information Commissioner’s view, since this would require ratification by the Members of the SCCRC. An SCCRC Board meeting was to take place on 30 March. If the Board were to accept the argument put forward by the Commissioner and the Ministry of Justice, there would appear to be no need for an order from the UK Secretary of State under paragraph 10 of schedule 3. The Committee is not clear whether events have moved on to such an extent that the SCCRC now considers this issue academic.

206. In the light of these discussions, the UK Secretary of State confirmed to the Committee that he was not minded to make an order under paragraph 10.  

207. In a letter to the Convener following the discussions, the Cabinet Secretary confirmed the above, and added that if the SCCRC were to accept that condition

7(1)(a) were applicable this would appear to pave the way to the statement being capable of lawful disclosure under the Bill “without amendments to the Bill being made by the Scottish Government”. The Committee takes this to mean that the Scottish Government did not see any legal advantage to be gained from converting the power of the SCCRC to publish the statement under the Bill into a duty, or in some other way “strengthening” the power.

208. This appears to be a satisfactory outcome, and the constructive way in which discussions proceeded is to be welcomed. That said, it is perhaps regrettable in hindsight that the Information Commissioner’s Office was not consulted before Part 2 was introduced. (In this connection, the Committee notes that the Scottish Government had only one consultee on Part 2 prior to introduction – the SCCRC – which is unusual for a public Bill.) If so, some of the uncertainty that existed over data protection during Stage 1 might have been avoided.

Conclusions on data protection
209. The Committee notes the recent publication of a redacted version of the Megrahi statement of reasons by a Scottish newspaper, but considers it useful to set out our conclusions on the applicability of data protection law to the SCCRC.

210. The Committee is not persuaded by the argument that any data protection obstacles could have been avoided through the Cabinet Secretary for Justice exercising an order-making power rather than introducing a Bill. The legal position is clear: the Parliament does not have the power to override data protection law whether by primary or secondary legislation.

211. The Committee notes the emergence of an apparent consensus among key stakeholders that one of the conditions permitting the lawful disclosure of personal data and sensitive personal data (that the processing is necessary for the administration of justice) may be applicable. This would permit the publication of information in the statement of reasons whether or not consent was obtained. If this is ultimately accepted, then an order enabling disclosure from the UK Secretary of State for Justice would not be necessary.

212. The Committee invites the Scottish Government to clarify whether it considers there would be any legal benefit or disbenefit, in terms of data protection law, in altering the current test to be applied by the SCCRC in determining whether to publish a statement of reasons (for instance by providing that this is, under certain circumstances, a duty rather a power).

Other potential obstacles to disclosure
213. The Policy Memorandum briefly mentioned two other possible obstacles to disclosure not set out in the Bill; the Official Secrets Acts and the case law of the ECHR. A letter from the Convener invited the Cabinet Secretary to elaborate and to state whether there might be other obstacles. The Cabinet Secretary’s reply

142 [http://www.scottish.parliament.uk/S4_J usticeCommittee/Inquiries/20120316_CSfJ_to.CG.pdf](http://www.scottish.parliament.uk/S4_J usticeCommittee/Inquiries/20120316_CSfJ_to.CG.pdf)
[Accessed 28 March 2012]
Justice Committee, 3rd Report, 2012 (Session 4)
DSSHDUVWRLQGLFDWHWKDWWKHVHWZRPDWWHUVUHSUHVHQWLQWKH6FRWWLVK*RYHUQPHQW¶V
view, an exhaustive list of those other obstacles.143
214. The only other issues raised in evidence (other than legal professional
privilege; see below) were third party confidentiality and the common law of breach
of confidence. These were raised by Dr Macdonald of the Information
&RPPLVVLRQHU¶V2IILFH 144
215. In relation to the Official Secrets ActsWKH&DELQHW6HFUHWDU\¶VOHWWHUVDLGWKDW
without knowing the content of the statement of reasons, it would be difficult to
NQRZZKHWKHUWKH$FWVZRXOGEHUHOHYDQWEXWWKDWLWZDVOLNHO\WKDWWKH\ZRXOG³DW
the very least need to be considered depending on the nature of the information in
the SoR [ie the statement of reasons in the Megrahi case]´
216. However, in their written evidence, the SCCRC said that they did not
consider that anything in the statement of reasons in the Megrahi case would be
covered by the Official Secrets Act. They were questioned further on this in the
evidence before the Committee. Gerard Sinclair of the SCCRC agreed that, in any
case that did involve official secrets, the statement of reasons would not mention
them unless they could obtain consent to do so. He elaborated²
³,IZHZHUHJLYHQPDWHULDOWKDWZDVFRYHUHGE\WKH2IILFLDO6HFUHWV$FWVZH
would not disclose it. We might go back to the providers of the information to
ask for it to be made exempt or for a dispensation. If we were told that we
could have the information to assist us in reaching a decision but that it was
not to be placed in the public domain or appear in the body of the statement
of reasons, we could choose not to accept the information under those terms
RUWRDFFHSWLWDQGDELGHE\WKHP´145
217. The potential relevance of human rights law was referred to relatively
inconclusively during Stage 1. The Committee considers that this is perhaps
understandable since, without knowing the content of the statement, it would
difficult to conjecture what human rights issues might arise, although it is
reasonably evident that the most relevant Article is likely to be Article 8 (the right to
respect for private and family life, home and correspondence). The SCCRC
considered that there was an inextricable link between data protection and human
rights considerations in that there was a correlation between the non-disclosure of
sensitive personal data and the right to private and family life.146 It is clear to the
Committee that if it turns out to be possible for the SCCRC to release information
within the terms of the Data Protection Act, but without the consent of data
subjects, then Article 8 considerations will have to be taken into account.

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http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120123_CSfJ_to_CG.pdf
[Accessed 28 March 2012]
144
&DELQHW6HFUHWDU\¶VUHSO\DOVRPHQWLRQHGWKHVH potential remedies, as well as privacy rights, but
indicated that such actions tended to be brought only in actions between private parties rather than
against a public body (such as the SCCRC), where it was not possible to rely on human rights law.
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Scottish Criminal Cases Review Commission. Written submission.

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218. Ken Macdonald of the Information Commissioner’s Office indicated that human rights aspects would have to be taken account of at two stages; first in the Parliament satisfying itself that the Bill, as enacted, would not breach Article 8 of the convention, and second when it came to the SCCRC actually deciding to disclose information under the Bill as enacted. In other words, the fact that the Bill as enacted, might not flout the ECHR would not mean that every action undertaken by the SCCRC by virtue of the powers conferred under the new Act would be ECHR compliant.

219. The Committee notes that if the SCCRC acted in compliance with the data protection principles in releasing information, this does not necessarily mean that human rights considerations would not arise. This would need to be taken account of particularly in circumstances where the SCCRC disclosed sensitive personal data without express consent. However, the Committee has no reason to believe that this is an insurmountable legal difficulty.

Legal professional privilege

220. Another potential inhibition on disclosure referred to in evidence is legal professional privilege. This was raised by the SCCRC who indicated that they intended to pursue the matter with the Scottish Government during the Bill’s progression. Privilege comes into a different category from data protection and human rights law in that it is not a reserved matter under the Scotland Act. There would therefore appear to be potential for it to be taken account of within the Bill, although as discussed below, human rights consideration may still arise.

221. The SCCRC noted the absence of any express reference to legal professional privilege to any determination whether to disclose information. The SCCRC was clear that some of the information it held would be covered by legal professional privilege. They recited the legal position that privilege could only be overridden by express words or necessary implication in statute and noted that it was uncertain whether this was currently provided for in the 1995 Act. The SCCRC said that if it were intended that they should be allowed to override privilege, it may help to make this expressly clear.

222. On the other hand, the SCCRC noted, the case law of the European Court of Human Rights would have to be taken into account, as it had previously ruled that overriding legal professional privilege could, depending on circumstances, be a breach of human rights.149 The Committee notes the legal position that a Bill passed by the Scottish Parliament is not law inasmuch as any part of it is not compliant with the European Convention on Human Rights.

223. The Committee invites the Scottish Government to consider the points raised by the SCCRC on legal professional privilege and on whether it would be possible to competently address this within the Bill.

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148 Scottish Criminal Cases Review Commission. Written submission.
OTHER ISSUES: DELEGATED POWERS AND FINANCIAL MEMORANDUM

Delegated powers

224. Section 2 confers power to make supplemental, incidental, consequential, transitional, transitory or saving provisions to either Part 1 of the 1993 Act or Part 2 of the 2007 Act, both of which concern court sentencing. This can be done if the Scottish Ministers consider that it is “necessary or expedient for the purposes of or in connection with section 1.” Regulations under section 2 are by affirmative procedure. The Bill’s Delegated Powers Memorandum explains—

“Any body of new law may give rise to the need for a range of ancillary provisions. For example, whilst we have included a number of substantive and consequential modifications within the Bill, it may be that the need arises post-commencement for further changes in order to fully and properly implement section 1. We consider the regulation-making power to be necessary to allow for this flexibility in what is in our view an important and complicated area of law.”

225. In its evidence to the Justice Committee, the Faculty of Advocates questioned whether the proposed powers in Section 2 are “appropriate, given the sensitivity and importance of sentencing policy.” The Committee takes this to be indicative of a concern that substantive primary legislation on sentencing should not be alterable by secondary legislation.

226. The Subordinate Legislation Committee (SLC) considered section 2. While it agreed that “the affirmative procedure is an appropriate level of scrutiny”, it asked the Scottish Government whether the powers in section 2 were in fact limited to Part 1 of the 1993 Act or Part 2 of the 2007 Act, or whether they “might modify any primary legislation”. In its response, the Scottish Government said that they consider that regulations made under section 2 can only modify Part 1 of the 1993 Act or Part 2 of the 2007 Act. The Scottish Government also points out that section 2(1) restricts the power to only be used in connection to section 1.

227. However, in its report, the SLC added that the Scottish Government appeared to have conceded that—

“it is at least arguable that an interpretation other than their favoured one is possible, and that it may theoretically be possible to modify other enactments, subject always to the test set out in subsection (1).”

228. The SLC subsequently concluded in their report that it was—

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150 Criminal Cases (Punishment and Review) (Scotland) Bill, section 2(1)
151 Faculty of Advocates. Written submission.
“undesirable for there to be two competing potential views on the scope of this power, and if this is considered by the Scottish Government to be a real possibility then it may be something which it wishes to review. Nevertheless, the Committee recognises that the scope of the power is appropriately limited by subsection (1).”\(^\text{155}\)

229. The Committee notes that there are two competing views on the scope of section 2(2), which concerns the power to amend primary legislation on sentencing by subordinate legislation. The Committee recommends that the Scottish Government give further consideration to the drafting of this provision prior to Stage 2.

Financial Memorandum

230. The Financial Memorandum\(^\text{156}\) outlines the anticipated costs for the Bill. While the Scottish Government considers that the provisions in Part 1 will have “a neutral long-term financial impact”, it anticipates that the Scottish Criminal Cases Review Commission will accumulate costs of approximately £116,000 in connection with Part 2. This figure is based on the SCCRC’s consideration of whether it is appropriate to disclose information it referred to the High Court in relation to the Megrahi case.

231. The Finance Committee agreed to adopt “level one” scrutiny in relation to the Bill and did not therefore take oral evidence or produce a report; however it did seek written evidence from relevant parties\(^\text{157}\). Responses were received from the Parole Board of Scotland, the Scottish Court Service and the SCCRC. The relevant correspondence is included in Annexe A.

232. Neither the Parole Board for Scotland or the Scottish Court Service highlighted any concerns in relation to the Financial Memorandum\(^\text{158}\).

233. Nevertheless, the SCCRC raised concerns about its current financial position and questioned whether it could meet the costs associated in the Bill without either additional funding or a reduction in service levels—

“At a time when the Commission is experiencing its highest case volume since it was established in 1999, meeting this level of additional cost [ie possible disclosure of the Megrahi statement] within a significantly reduced budget would present extreme difficulties for the SCCRC. It will result in further backlogs to cases awaiting initial review and/or increased review times as well as possibly fundamental changes to the structure of the organisation.

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\(^{155}\) Scottish Parliament Subordinate Legislation Committee. 7th Report, 2012 (Session 4).

\(^{156}\) Criminal Cases (Punishment and Review) (Scotland) Bill. Financial Memorandum. Available at: http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf

\(^{157}\) The Finance Committee wrote to the Law Society of Scotland, the Faculty of Advocates, the Scottish Court Service, the Scottish Prison Service, the Parole Board for Scotland and the Scottish Criminal Cases Review Commission.

\(^{158}\) The Scottish Criminal Cases Review Commission. Written submission to the Finance Committee, paragraph 9.
“With regard to the potential costs associated with any legal action following the consideration of the appropriateness of disclosure by the SCCRC, no specific financial provision has been discussed or agreed with the Scottish Government. An undertaking would need to be provided by the Scottish Government that costs associated with this type of legal challenge would be met through a direct increase in funding to the SCCRC.”

234. The SCCRC also commented on the difficulty in estimating the costs associated with any potential legal challenge being raised by affected persons should it decide to disclose information in the case of Mr Megrahi. The figure in the Financial Memorandum was based on a recent case where the SCCRC defended a legal challenge. The cost to the SCCRC in that case was £9,000 so the cost of legal challenges to any release of information related to Part 2 of the Bill is estimated as being between £36,000 and £72,000. In its response to the Finance Committee, the SCCRC said—

“It is extremely difficult to assess whether this is an appropriate benchmark and likewise it is extremely difficult to anticipate the potential number of legal challenges which might be raised.”

235. The Justice Committee acknowledges the difficulties involved in estimating the financial implications of Part 2 of the Bill. In this connection, we note the lack of certainty as to whether the SCCRC are likely to exercise any power to disclose in cases in the future other than the Megrahi case. As regards the Megrahi case, recent events involving the actions of a Scottish newspaper may now have put to rest the SCCRC’s financial concerns, but it would be helpful to have this expressly clarified.

236. The Committee would welcome a response from the Scottish Government to the financial concerns raised by the SCCRC, and on whether the Scottish Government considers that these have been superseded by recent events.

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159 The Scottish Criminal Cases Review Commission. Written submission to the Finance Committee, paragraphs 13-14.
ANNEXE A: FINANCE COMMITTEE CONSIDERATION

Written submissions received on the Financial Memorandum of the Criminal Cases (Punishment and Review) (Scotland) Bill

SUBMISSION FROM SCOTTISH COURT SERVICE

Consultation

1. Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

The Scottish Court Service did not participate in the consultation exercise. However, we have liaised with Scottish Government on the financial implications arising from the Bill.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Our views on the potential costs arising from the Bill are reflected in the Financial Memorandum.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Financial Memorandum accurately reflects the financial implications for the Scottish Court Service.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Provided that the number of cases is as projected in the Financial Memorandum, then we would expect that the Scottish Court Service would be in a position to absorb the additional work.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

We have no reason to doubt the projections made in the Financial Memorandum.
Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

We are unaware of any related wider policy initiative.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

We are unaware of any further related costs.

SUBMISSION FROM SCOTTISH CRIMINAL CASES REVIEW COMMISSION

1. The Scottish Criminal Cases Review Commission (“the SCCRC”) welcomes the opportunity to provide written evidence to the Finance Committee on the Criminal Cases (Punishment and Review) (Scotland) Bill: Financial Memorandum. This response is restricted to the issues and questions raised in respect of the Financial Memorandum contained within the Explanatory Notes and relating specifically to Part 2 of the Bill concerning the disclosure of information obtained by the SCCRC.

2. The SCCRC has given careful consideration to the questions posed by the Finance Committee and at the same time has also provided written evidence to the Justice Committee on the Bill itself. Before answering those questions, the SCCRC would reiterate that it is agreeable to the publication of the Statement of Reasons in the case of Abdelbaset Ali Mohamed Al Megrahi (“the SOR”), but that it is not empowered to do so and can do so only with the cooperation of both the Scottish and the UK Governments and certain foreign authorities.

3. Whilst the SCCRC welcomes the provision of such a “framework”, it questions whether it is necessary to incorporate such a framework into an Act of the Scottish Parliament. Incorporating this level of detail for such a restricted matter into what is the principal Criminal Procedure Act in Scotland seems unnecessarily complicated and bureaucratic. The SCCRC is of the view that a distinct Act, rather than an amendment to the 1995 Act, would be a simpler and cleaner solution.

4. These general comments in relation to the Bill are more fully explored within the SCCRC’s response to the Justice Committee. With these in mind, the SCCRC answers the questions posed under the Financial Memorandum to the Bill as follows:-

Consultation

Question 1: Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

5. Yes. The SCCRC has been involved in ongoing consultation with the Scottish Government concerning the Bill and the financial assumptions made within the
Financial Memorandum within the Explanatory Notes. This process commenced on 2 September 2011.

**Question 2: Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**

6. **Yes.** The financial assumptions used within the Financial Memorandum from paragraphs 57 to 60 were based on the information provided by SCCRC as part of the consultation. The financial assumptions used in paragraph 61 have been developed using the information provided by SCCRC and, as reflected within the Financial Memorandum, SCCRC would reiterate that it is difficult to provide any certainty in frequency or cost of either applicable cases or any subsequent legal challenges.

**Question 3: Did you have sufficient time to contribute to the consultation exercise?**

7. **Yes.** No specific deadlines were stipulated as part of this consultation process and the SCCRC was able to supply Law Reform Division with all relevant background information and opinion in a timely manner.

**Costs**

**Question 4: If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.**

8. **Yes.** The Financial Memorandum has direct financial implications for the SCCRC, particularly, as set out within the Financial Memorandum, in respect of the case of Mr Megrahi which is one of three cases meeting the criteria within Part 2 of the Bill i.e. cases involving conviction which have been referred by the SCCRC and then an appeal based on the referral has subsequently been raised and then abandoned, or has fallen.

9. The Financial Memorandum accurately identifies where there will be financial implications for the SCCRC namely - in the consideration of whether it is appropriate to disclose information in these specific cases in line with the framework established by the Bill and - as a result of possible subsequent legal action in respect of any decision to disclose made by the SCCRC.

10. In respect of the costs associated with considering the appropriateness of disclosing information, the SCCRC based its financial assumptions and projections on the case of Mr Megrahi. It assessed the timescale to consider the appropriateness of disclosure in the case to be approximately 12 months and the cost within the period to be approximately £116,000. As set out in 6 above, the Financial Memorandum is based upon the information provided by the SCCRC as part of the consultation process and is therefore accurate.

11. There are a further two cases which meet the criteria in Part 2 of the Bill. The costs associated with considering disclosure in these cases is considered to be
significantly less given the relatively straightforward nature of the cases and the number of affected parties in each. 12. In respect of the costs associated with any potential legal action being raised by affected parties in relation to the SCCRC’s decision on disclosure, the benchmark used in the Financial Memorandum was based on the most recent cost to the SCCRC of defending a legal challenge to a decision not to refer and this was approximately £9,000. It is extremely difficult to assess whether this is an appropriate benchmark and likewise it is extremely difficult to anticipate the potential number of legal challenges which might be raised. Paragraph 61 of the Financial Memorandum attempts to develop an estimate of the likely number of legal challenges and the subsequent overall cost in the case of Mr Megrahi arising from legal challenges. This has been undertaken using the benchmark figure provided by the SCCRC in paragraph 60 and the SCCRC would further reiterate the difficulty in providing such an estimate give the levels of uncertainty.

Question 5: Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

13. No. As part of the consultation process and development of the draft Bill the SCCRC provided the Scottish Government with a full assessment of the estimated costs to be incorporated within the Financial Memorandum, as discussed above. Following the 2011 Comprehensive Spending Review, the SCCRC was provided with a 3-year reduced budget for the period 2012-15 and was told that the costs associated with considering the appropriateness of disclosure in the case of Mr Al-Megrahi following the passing of the Bill would need to be met within this budget. At a time when the Commission is experiencing its highest case volume since it was established in 1999, meeting this level of additional cost within a significantly reduced budget would present extreme difficulties for the SCCRC. It will result in further backlogs to cases awaiting initial review and/or increased review times as well as possibly fundamental changes to the structure of the organisation.

14. With regard to the potential costs associated with any legal action following the consideration of the appropriateness of disclosure by the SCCRC, no specific financial provision has been discussed or agreed with the Scottish Government. An undertaking would need to be provided by the Scottish Government that costs associated with this type of legal challenge would be met through a direct increase in funding to the SCCRC.

Question 6: Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and timescales over which such costs would be expected to rise?

15. Yes. The Financial Memorandum does accurately reflect the margins of uncertainty regarding both financial estimates and timescales. The focus on the case of Mr Megrahi is appropriate given the unique nature of this case and the significant costs in this instance resulting from the large number of affected parties and the administrative process involved in considering the appropriateness of disclosure.
However, the complexity of this case clearly means that the review may take longer than the estimated 12 months contained within the Financial Memorandum and as a result the associated costs would increase. The Commission believes that it is extremely important to stress the level of uncertainty associated with these estimates and timescales and is of the view that given the levels of uncertainty, particularly in respect of the case of Mr Megrahi, both the timescales and costs associated with this case could increase significantly.

16. The Financial Memorandum also sets out the clear difficulties in estimating both the frequency and cost of any legal action arising. The SCCRC would reiterate the potential problems with the benchmark used and the uncertainties regarding frequency of action when this issue has not been encountered before.

Wider Issues

Question 7: If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

17. Yes. The SCCRC considers that the Financial Memorandum clearly sets out the infrequency of cases arising which meet the criteria in Part 2 of the Bill i.e. a total of three cases since the SCCRC was established in April 1999. The SCCRC does not anticipate that this frequency is likely to increase in the future. The SCCRC is not aware of the Bill being part of a wider policy initiative.

Question 8: Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

18. Yes. The SCCRC considers that the future costs of the Bill will be limited to the consideration of any other cases meeting the criteria within Part 2 of the Bill. As set out above and within the Financial Memorandum the likely costs associated with future cases, compared with the case of Mr Megrahi, are likely to be relatively insignificant. However, it is extremely difficult to quantify the number of future cases or estimate the costs associated with these in advance. The SCCRC is unaware of any future subordinate legislation or more developed guidance which would result in future costs.

SUBMISSION FROM PAROLE BOARD FOR SCOTLAND

The Bill does not have any financial implications for us. These cases will appear before the Board at some stage anyway so there should be no impact on workload or costs.

Can I just point out an error in your paper in relation to cases coming before the Board. In the last sentence of the first indented paragraph on page 2 you state that “What is likely to change as a result of the Bill’s provision is the point at which some non-mandatory life prisoners are able to apply for parole......”
It is important to note that prisoners do not apply for parole. The cases are referred by Scottish Ministers to the Board at the relevant point in their sentence. It is more accurate to say the point at which some non-mandatory prisoners will be eligible to have their cases considered for parole.
ANNEXE B: SUBORDINATE LEGISLATION COMMITTEE REPORT

Criminal Cases (Punishment and Review) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 24 January and 7 February 2012, the Subordinate Legislation Committee considered the delegated power provisions in the Criminal Cases (Punishment and Review) (Scotland) Bill ("the Bill") at Stage 1. The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill ("the DPM").

OVERVIEW OF THE BILL

3. The Criminal Cases (Punishment and Review) (Scotland) Bill was introduced in the Scottish Parliament on 30 November 2011. It is a Government Bill which seeks to make provision in two areas.

4. First, it amends the law governing the period of time which prisoners given a discretionary life sentence or order for lifelong restriction ("OLR") must serve before they become eligible to apply for parole. This part of their sentence is known as the "punishment part" and it is intended to represent the period imposed for the purposes of retribution and deterrence, and to reflect society's abhorrence of the crime. The remaining part of the sentence reflects the need to protect the public. Once the punishment part has been served, it is for the Parole Board to keep under review the question of whether the prisoner requires to continue to be detained for the protection of the public. If the Board determines that this is no longer necessary, the prisoner will be released on life licence.

5. The Bill also enables the Scottish Criminal Cases Review Commission to determine whether it is appropriate to release information about cases which it has referred to the High Court when those appeals are subsequently abandoned before being determined.

6. In the consideration of the Bill at its meeting on 24 January, the Committee agreed to write to the Scottish Government to raise questions on both of the delegated powers in the Bill.

7. This correspondence is reproduced in the Annexe.

Delegated powers provisions

Section 2 – Ancillary provision

Section 2(1) – power to make supplemental, incidental, consequential, transitional, transitory or saving provision
8. Section 2 confers power to make supplemental, incidental, consequential, transitional, transitory or saving provisions, if the Scottish Ministers consider that it is necessary or expedient for the purposes of, or in connection with, section 1.

9. Section 1 of the Bill amends the existing rules applicable to the setting of the punishment part, which are found in Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”). It also amends the equivalent rules in Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“the 2007 Act”), which is not yet in force but is intended to replace the 1993 Act. Section 2(2) further provides that regulations under section 2 may (in particular) modify Part 1 of the 1993 Act or Part 2 of the 2007 Act.

10. The Committee asked the Scottish Ministers whether it was intended that regulations under section 2 might modify any primary legislation, or whether the power was restricted to modification of the two enactments expressly mentioned in subsection (2). It also asked whether the Ministers’ intention was clear from the drafting as it presently stands.

11. In their reply, the Scottish Ministers indicate that they consider regulations made under section 2 may only modify the two named enactments. They point out that, indeed, it is only specified Parts of these enactments which may be amended, and that they contain the provisions which section 1 of the Bill amends.

12. The Ministers also argue that, as the power in section 2 may only be exercised “for the purposes of, or in connection with, section 1 [of the Bill]”, this would prevent modification of any enactment other than the Parts of the 1993 and 2007 Acts which are specified in subsection (2). They advise that they do not consider there to be any other legislation in the subject area which would ever require to be amended using the power.

13. However, the Ministers appear to concede that it is at least arguable that an interpretation other than their favoured one is possible, and that it may theoretically be possible to modify other enactments, subject always to the test set out in subsection (1): any provision made must be necessary or expedient for the purpose of or in connection with the changes to the rules on setting punishment parts made by section 1.

14. The Committee takes the view that it is undesirable for there to be two competing potential views on the scope of this power, and if this is considered by the Scottish Government to be a real possibility then it may be something which it wishes to review. Nevertheless, the Committee recognises that the scope of the power is appropriately limited by subsection (1).

15. Given the effect that provisions made under this power could have on individual cases, and that the power can be used to modify primary legislation, the Committee considers that the affirmative procedure is an appropriate level of scrutiny.

16. The Committee therefore draws to the attention of the lead Committee the response of the Scottish Government in relation to the effect of section 2(2).
17. The Committee considers that the effect of this power is sufficiently significant that the affirmative procedure is appropriate.

Section 5 – Commencement

Section 5(3) – commencement and ancillary provision on commencement

18. Section 5 provides a power to commence sections 1 to 4. Sections 5 and 6 come into force on the day after Royal Assent. The power to commence includes the power to make transitional, transitory or saving provision.

19. An order made under section 5, whether simply commencing provisions, or whether also making transitional, transitory or saving provision, is only required to be laid before the Parliament. It is not subject to further parliamentary scrutiny.

20. The Committee asked the Scottish Ministers what sort of transitional, transitory or saving provision they envisaged might be required, and whether this could be complex or cause practical problems in implementation.

21. The Scottish Ministers explain that they do not, at this stage, envisage making substantial transitional, transitory or savings provisions using this power. They advise that, if such provisions are needed for Part 1 of the Bill, they are likely to be made under the power in section 2 (and so be subject to the affirmative procedure). Furthermore, they consider it unlikely that any provisions of this type will be needed for the commencement of Part 2 of the Bill.

22. However, the Scottish Ministers state that they wish to have the power in case any unexpected ancillary provision is needed in connection with commencing Part 2 of the Bill. They also indicate that, if straightforward provisions are needed for Part 1, they could be included. Given the immediately preceding view that ancillary provision for Part 1 is likely to be made under section 2, the Committee assumes that this power would only be relied upon for minor matters in relation to Part 1.

23. The Committee, having considered this explanation from the Scottish Government, is content with the order making power under section 5, which provides for commencement and ancillary provision on commencement, and is content that it is not subject to parliamentary procedure beyond the default laying requirement.
Appendix

Response from the Scottish Government

Criminal Cases (Punishment and Review) (Scotland) Bill

Thank you for your letter of 24 January 2012 to Tim Ellis in relation to the Criminal Cases (Punishment and Review) (Scotland) Bill. I am replying on behalf of the Scottish Government as the Bill Team leader.

For ease of reference, the Committee’s comments are copied below followed by our response to each of the points raised.

Subordinate Legislation Committee comments on section 2 – ancillary provision

The Committee asked the Scottish Government to confirm:-

- Whether it is intended that regulations under section 2 may modify any primary legislation, or whether it is intended that they may only modify Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and Part 2 of the Custodial Sentences and Weapons Scotland Act 2007; and

- Whether this is clear from section 2(2) as presently drafted.

Scottish Government response

It is the Scottish Government’s position that regulations made under section 2 of the Bill will only be able to modify Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007.

Those Acts are mentioned expressly in section 2(2) because those are the ones the Bill is seeking to amend in the first place. The references to the two Acts are very specific. They refer to single Parts of those Acts, not the whole of each Act. Accordingly, our view is that such a narrow specificity would tend, on a normal reading, to exclude any other Act, or Part of an Act, from modification.

Further, the words “for the purposes of or in connection with section 1” in section 2(1) tie the power closely to the amendments already being made by the Bill. If another Act cannot be reasonably stated to relate sufficiently to that purpose, then in our view this would exclude modification, even if it could be argued theoretically that the specific references to single Parts in section 2(2) do not exclude modification of another Act or Part. In this regard, it is important to note that we do not consider that there is any further legislation in the relevant subject area that would ever require to be amended using this power.

We would therefore contend that it is clear from the present drafting approach that the powers contained in section 2 are limited in their scope.
**Subordinate Legislation Committee comments on section 5 – commencement and ancillary provision on commencement**

Further, the Committee asked the Scottish Government what sort of provision is envisages may be required and whether this could be complex or cause practical problems in implementation.

**Scottish Government response**

Part 1 of the Bill deals with a complex area of law. It is likely that any substantial transitional, transitory or saving provisions in connection with Part 1 will be made under the power in section 2 of the Bill and that the relevant instrument(s) will therefore be subject to the affirmative procedure.

It is unlikely that any transitional, transitory or saving provision will be required to commence Part 2 of the Bill, as this creates new, stand alone provisions.

The power in section 5(3) is, however, considered desirable so as to allow any unexpected ancillary provision in connection with the commencement of Part 2 to be included within a commencement order. A commencement order could also include any straightforward transitional, transitory or saving provision in connection with the commencement of Part 1 which it was not for any reason thought appropriate to include within section 2 regulations.

Philip Lamont  
Criminal Cases (Punishment and Review) Bill Team Leader  
31 January 2012
ANNEXE C: EXTRACTS FROM THE MINUTES

17th Meeting, 2011 (Session 4) Tuesday 6 December 2011

Work programme (in private): The Committee considered its work programme, including its approach to the Criminal Cases (Punishment and Review) (Scotland) Bill. The Committee agreed: (a) to issue a general call for written evidence on the Bill and to further consider at its next meeting the proposed timetable for consideration of the Bill and possible witnesses[. . .].

18th Meeting, 2011 (Session 4) Tuesday 13 December 2011

Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee further considered its approach to its scrutiny of the Bill at Stage 1 and agreed (1) its proposed outline timetable for consideration of the Bill; (2) initial witnesses; and (3) to write to the Cabinet Secretary for Justice seeking clarification on aspects of Part 2 of the Bill.

4th Meeting, 2012 (Session 4) Tuesday 31 January 2012

Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
- Michael Meehan, Member of the Criminal Law Committee, Law Society of Scotland;
- James Wolffe QC, and Joanna Cherry QC, Faculty of Advocates;
- Gerard Sinclair, Chief Executive, and Michael Walker, Senior Legal Officer, Scottish Criminal Cases Review Commission.

The Convener declared that she is a member of the Justice for Megrahi campaign and Roderick Campbell declared that he is a member of the Faculty of Advocates.

5th Meeting, 2012 (Session 4) Tuesday 7 February 2012

Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
- Robert Forrester, Iain McKie, Len Murray, and Dr Jim Swire, Justice for Megrahi;
- Sir Gerald Gordon QC;
- James Chalmers, Senior Lecturer, University of Edinburgh School of Law;
- Ken Macdonald, Assistant Commissioner (Scotland and Northern Ireland), Information Commissioner’s Office.

The Convener declared that she is a member of the Justice for Megrahi campaign.

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered the evidence received and agreed to invite a witness to speak to human rights aspects in relation to Part 1 of the Bill at a future meeting.
6th Meeting, 2012 (Session 4) Tuesday 21 February 2012

Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Kenny MacAskill, Cabinet Secretary for Justice.

The Convener declared that she is a member of the Justice for Megrahi campaign. The Committee agreed to write to the UK Secretary for Justice, the Scottish Criminal Cases Review Commission and the Information Commissioner seeking further information on issues relating to the Data Protection Act 1998.

7th Meeting, 2012 (Session 4) Tuesday 28 February 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence received on Part 1 of the Bill at Stage 1 in order to inform the drafting of its report. The Committee agreed to write to the Scottish Human Rights Commission concerning human rights issues in relation to Part 1.

8th Meeting, 2012 (Session 4) Tuesday 6 March 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee agreed to defer consideration of the main themes arising from the evidence received on Part 2 of the Bill at Stage 1 to a future meeting. The Committee also agreed to seek an extension to the timetable for completion of Stage 1.

10th Meeting, 2012 (Session 4) Tuesday 20 March 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence received on Part 2 of the Bill at Stage 1 in order to inform the drafting of its report.

11th Meeting, 2012 (Session 4) Tuesday 27 March 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed to consider a revised draft report in private at its next meeting on 28 March 2012.

12th Meeting, 2012 (Session 4) Tuesday 28 March 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered a revised draft Stage 1 report. Various changes were agreed to and the Committee agreed its report on the Bill.
ANNEXE D: INDEX OF ORAL EVIDENCE

4th Meeting, 2012 (Session 4) Tuesday 31 January 2012

Michael Meehan, Member of the Criminal Law Committee, Law Society of Scotland;
James Wolfe QC, and Joanna Cherry QC, Faculty of Advocates;
Gerard Sinclair, Chief Executive, and Michael Walker, Senior Legal Officer, Scottish Criminal Cases Review Commission.

5th Meeting, 2012 (Session 4) Tuesday 7 February 2012

Robert Forrester, Iain McKie, Len Murray, and Dr Jim Swire, Justice for Megrahi;
Sir Gerald Gordon QC, and James Chalmers, Senior Lecturer, University of Edinburgh School of Law;
Ken Macdonald, Assistant Commissioner (Scotland and Northern Ireland), Information Commissioner's Office.

6th Meeting, 2012 (Session 4) Tuesday 21 February 2012

Kenny MacAskill, Cabinet Secretary for Justice.
ANNEXE E: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

Association of Chief Police Officers in Scotland (124KB pdf)
Berkley, Matt (157KB pdf)
Chalmers, James (86KB pdf)
Chalmers, James (supplementary submission) (74KB pdf)
Faculty of Advocates (163KB pdf)
Gordon, Sir Gerald (75KB pdf)
Information Commissioner's Office (127KB pdf)
Information Commissioner's Office (supplementary submission) (120KB pdf)
Justice for Megrahi (83KB pdf)
Justice for Megrahi (supplementary submission) (8KB pdf)
Law Society of Scotland (120KB pdf)
Scottish Criminal Cases Review Commission (201KB pdf)
Scottish Criminal Cases Review Commission (supplementary submission) (77KB pdf)
Scottish Criminal Cases Review Commission (second supplementary submission) (95KB pdf)
The Convener: The only item on the agenda is our first session on the Criminal Cases (Punishment and Review) (Scotland) Bill at stage 1. I welcome our first panel of witnesses. Brian Simpson is a law reform officer at the Law Society of Scotland; Michael Meehan is a member of the criminal law committee of the Law Society of Scotland; and James Wolfe QC and Joanna Cherry QC are here on behalf of the Faculty of Advocates. Thank you for your written submissions, which are helpful.

We will go straight to members’ questions. I remind members to keep to part 1 of the bill first. If members wish to comment on part 2 thereafter, we will certainly proceed to it. The microphones will come on automatically. If someone indicates to me that they wish to comment, I will go straight to them.

Roderick Campbell (North East Fife) (SNP): Good morning. Could I just—

The Convener: Before you launch forth, perhaps you want to declare your position.

Roderick Campbell: Yes. I refer to my entry in the register of members’ interests. I am a member of the Faculty of Advocates.

The Convener: That is appropriate, as we have people from the Faculty of Advocates in front of us.

Roderick Campbell: I address my question principally to the Law Society, whose submission mentions matters “for the discretion of the sentencing judge”, and the bill basically providing for that. How far do you think that making matters “for the discretion of the sentencing judge” would help? Would that be quite complex? Is it likely to lead to greater clarity in sentencing, or just generally?

Michael Meehan (Law Society of Scotland): It is interesting to note Lord Hamilton’s observations in the case of Petch and Foye v Her Majesty’s Advocate. He referred to the fact that there was a time when there could have been that discretion, but that there is now a legislative framework.

Judges will often exercise discretion in sentencing. For example, there is no statutory guidance as such on how to deal with a co-accused in a case, but discretion is used. What became the complicating factor in the case in
question was the view that something should be set in statute in order to deal with human rights legislation.

To answer the question, leaving matters to judicial discretion is one way of dealing with them, but if there is a statutory requirement, it is difficult to set out in detail what factors should be considered, what weight should be attached to them, how they should be considered, and how comparisons should be drawn with other parties. The exercise, which we see has been tried in the past, is complicated when one tries to set out in statute factors that are often left to the sentencer's judgment.

The Convener: Does anyone else wish to comment?

James Wolfe QC (Faculty of Advocates): I make two declarations at the outset. First, my colleague Joanna Cherry, who is a member of the faculty council, appeared in the Petch case as advocate depute. Secondly, in relation to part 2 of the bill, I appeared on behalf of Mr Megrahi and Mr Fhimah in proceedings that were brought by the BBC, which sought to televise the Lockerbie trial. Of course, we are here to give evidence on behalf of the Faculty of Advocates.

The fixing of an appropriate sentence in an individual case is ultimately a matter of judgment. The issue that the bill presents is the extent to which it is necessary and appropriate to seek to restrict, control and direct the exercise of judgment by the sentencing judge.

The purpose of the provisions in part 1 is to reintroduce an element of flexibility that interpretation of the current legislation has removed. The question that is presented in our written submission and, I believe, in that of the Law Society of Scotland is whether the element of flexibility can be introduced in a way that avoids the undoubted complexity of the provisions that we already have.

The other point on the question of the discretion of the individual sentencing judge is that the sentencer's decisions are ultimately subject to control by the criminal appeal court. If individual sentencing judges go wrong, either in the method that they apply or in the level of individual sentences, one would expect that to be corrected by the appeal court.

My final point on the question of discretion is that we are concerned only with sentences that are imposed in the High Court, so part 1 of the bill deals with the exercise of judgment and discretion by High Court judges.

John Finnie (Highlands and Islands) (SNP): Good morning, panel. It is reassuring to hear a Queen's counsel say that the issue is complex, because I feel that when I get a grasp of it, that then goes away from me. I am not sure of my present status.

The Convener: We will find out now, will we not?

John Finnie: We may well do.

One of the papers that we have in front of us states that

"the Bill would ... make changes to the provisions relating to non-mandatory life sentences with the intention of ensuring that—"

this quote is from the Scottish Government—

"courts have the sentencing powers they need to make sure that punishment is always appropriate to the offender's crime".

If that is correct, how would the bill alter the present situation—if, indeed, it does?

James Wolfe: That takes us back to the starting point, which is the nature of the necessary exercise that the court is required to undertake when imposing a discretionary life sentence or an order for lifelong restriction. For such sentences, it is essential that the court identifies the period that the prisoner must serve by way of punishment before they can be considered for parole. After that period has expired, the Parole Board for Scotland must review the case from time to time and decide whether the prisoner can be released. The court must therefore fix an appropriate punishment part.

It is recognised that in identifying the appropriate punishment part, which is to deal only with the issue of punishment, the court should take into account the fact that, if it were not for the purposes of public protection, the prisoner would have been sentenced to a certain number of years in prison. In that situation, the prisoner would have been entitled to consideration for early release under the statutory early release provision. So, simply as a matter of fairness and comparative justice, it is right that that be taken into account when the court fixes the punishment part. Those are the two policies that are in play here.

I suggest that it is then a matter of judgment for the legislator to determine how far it is necessary to prescribe a particular methodology for individual sentencing judges and, ultimately, for the appeal court as regards how they should go about the exercise of fixing a punishment part for retribution and deterrence, taking into account the needs of fairness and comparative justice.

The approach that is taken in the amendments to existing legislation that are in the bill is to take an already complex piece of legislation and make it even more complex. It is fair to say that that is at the root of the concern that is being expressed
because, after all, sentencing judges are expected to explain sentences in a way that will be intelligible not only to the accused who is being punished and sentenced, but to the victims of the crime, the public at large and, ultimately, the appeal court. It is open to question, at least, whether provisions of such complexity will be helpful to sentencing judges in the task that they must carry out, and I invite the committee to question those who are responsible for the bill about that.

Joanna Cherry QC (Faculty of Advocates): Can I add to what James Wolffe said?

The Convener: Certainly.

Joanna Cherry: If we look at the history of the existing legislation in the appeal court, we find that it has been the subject of one appeal before five judges and another appeal before seven judges. In both cases, judicial opinion on the proper interpretation of the legislation was divided.

Picking up on what Mr Frame said, it is not just laypeople who find the legislation extremely difficult to understand. It gave rise to the most difficult piece of statutory interpretation that I have had to engage in in my career—colleagues who were involved in the case in question would agree with me about that. I am sure that it is an issue for the Parliament that legislation should be readily understandable to the public, particularly legislation to do with the sentencing of prisoners who have been convicted of the most serious crimes—other than murder, of course. That is a strong factor in our concern about the bill's complexity.

To answer Mr Frame's question, I think that the courts would have the powers that they need, but there might be issues about how the proposed legislation would be interpreted. [Interuption.] I am terribly sorry—it is Mr Finnie. I read your name incorrectly; I think I might need new glasses.

Graeme Pearson (South Scotland) (Lab): You should have gone to Specsavers.

The Convener: We will have no advertising on the committee.

You have given us some comfort because, in trying to understand matters, I felt as if I was in some kind of legal tutorial and it was giving me a headache.

John Finnie: You have partly answered my next question, which is about how important it is that the public understand the provisions. That is important for confidence in the criminal justice system. However, I presume that a sentencing judge would not need to go into the technicalities of the proposed legislation, as the rationale for a particular sentence could be expressed in general terms.

How might that apply to a co-accused? Some of the submissions refer to the variation in sentences that sometimes occurs, in which public protection is a factor.

Michael Meehan: With regard to a co-accused, although the reason for the difference in sentencing may not be articulated when the sentence is delivered—in other words, a sentencing judge may not explain why they have given the co-accused a different type of disposal—if an appeal was marked, those details would be set out in a report to the appeal court, so that it could assess whether a sentence was excessive, having regard to issues such as comparative justice. Although the reason would not necessarily be given in open court at the time, if the sentence was appealed, that would happen.

Touching on the issue of public confidence, it can cause some difficulty if a disposal is given in court that is hard to understand or for which there is no apparent reasoning.

10:15

As for complainers and victims, the Procurator Fiscal Service has in the High Court and sheriff courts a victim information service, which can explain to persons affected by crime what has happened. Having been advocate deputes at various times, all three of us—Joanna Cherry, James Wolffe and myself—have made a point of explaining things to family members or complainers afterwards. Although that can be—and certainly is—done, the question is whether it would be better simply to deliver sentences in an understandable way.

The bill complicates matters by requiring judges not only to consider the sentence that they will impose but to conduct a parallel notional sentence exercise. In other words, they will almost have to be like computers with dual processors: they will have to consider not only the discretionary life sentence but what they might have done had they gone down another route. That is where things begin to get complicated. First of all, they will have to work out a different type of disposal and then try to compare the two. The exercises are different because, of course, the paramount consideration in cases with a discretionary life sentence element is protection of the public. No matter whether we are talking about a discretionary life sentence or an order for lifelong restriction, that is what is at the forefront of one's mind with regard to what is a relatively rare disposal.

James Wolffe: I want to make two points, the first of which relates to what the sentencing judge is expected to do. Generally, sentencing judges seek to explain, at least in general terms, their process of reasoning in identifying a particular
sentence. If a methodology were to be prescribed by statute, one would not be surprised to find judges finding it necessary to explain how they have applied it.

Secondly, a parallel exercise is to some extent inherent in the requirement that the sentencing judge must take into account the way in which the early release provisions would have applied had it not been for the public protection imperative. In that respect, such an exercise is necessary. However, we are questioning the extent to which it is necessary for that to be prescribed in a relatively rigid, step-by-step way instead of leaving it to experienced judges to do anyway. After all, if they get it wrong, they will be corrected by the appeal court.

The Convener: Thank you for that. I am still in the tunnel, but I think that I see light at the end of it. Graeme, are you seeing any light?

Graeme Pearson: I thought that I had seen some, but it escaped me for a while. Nevertheless, I am very pleased to have listened to the discussion and to realise that I am not alone in the darkness.

I have two questions that are connected to the issue of the public's confidence in and understanding of the processes that are being administered on their behalf. I have no doubt that at the completion of a trial the professionals in the court would explain to victims' families and so forth what had just occurred but, as you will agree, those are not always the best circumstances in which to receive and try to understand that information. As we have all found, it is a real challenge just to try to read all this stuff in the cold light of day.

As far as understanding the process is concerned, do you have any knowledge of other jurisdictions that have dealt with such matters? Have they had to face the same challenge or have they found a different approach?

Michael Meehan: I cannot assist you with regard to how other professionals explain to those affected by crime what has happened—

Graeme Pearson: I am thinking more of the court process and the administration of justice.

Michael Meehan: No doubt others who were involved in the Petch and Foye case are better placed to answer, but I know from my knowledge of that judgment that regard was had to the English provisions, although it is pointed out that there are some distinctions in England. That is perhaps part of the difficulty. In Scotland, one looks at what would be imposed in a discretionary life sentence and takes into account what one might impose by way of parallel consideration.

When we start to look to other jurisdictions as well, it further complicates the matter.

However, the general exercise that has been conducted by the English courts has been similar. In the O'Neill case, which was one of the first cases in which the courts interpreted this type of scenario, regard was had to the English principles, albeit that there was recognition that the statute in England was slightly different in some respects.

Joanna Cherry: In the case of Petch and Foye, the court was addressed about the position in England. Put briefly, similar problems have been encountered in England in relation to attempts to achieve comparative justice between prisoners who get a discretionary life sentence and those who are given a determinate sentence.

Graeme Pearson: My second question is probably one of the daft-laddie questions that I often come up with at our meetings. Is it not possible that the judge could indicate an earliest date of release at the point of judgment and sentencing? At present, there is a notional sentence, but everybody in the system discounts it, because they presume that everything will go well with the sentence and that, although the person gets eight years, they will only do four or five. There is then the other add-on, as you rehearse in your written submissions.

Is it not feasible that the judge, at the point of judgment, could let the witnesses know what the individual's earliest release date will be? They could then be informed that, if other conditions are not met during the sentence, it will go beyond that date and the other dates will kick in. From the public's viewpoint, people see someone who has been sentenced to 10 years appearing on the public highways long before that time is up. That does not make sense to people.

Is it impossible to look towards such a system? Would it be too complex? Should I leave it alone and go and lie down in a dark room for a while? What is the answer?

James Wolfe: It is perhaps necessary to think separately about determinate sentences and the kind of sentences that we are discussing, which are essentially life sentences. In creating orders for lifelong restriction and discretionary life sentences, the judge is required to specify the punishment part. In so far as it goes, my experience is that judges are at pains to explain that that is the period that the prisoner must serve in prison. Thereafter, whether they will be released is a matter for the Parole Board. It is not the case that the prisoner will be released at the end of that period. The issue that the bill seeks to address is how the judge fixes on the right period for the punishment part.
There is a separate issue in relation to determinate sentences. The Parliament has decided that, irrespective of the considerations that go to make up the determinate sentence, the statutory early release provisions will kick in. After half the sentence has been served, if it is a long-term sentence, the prisoner will be eligible for parole, although they will not necessarily get it. The problem that the bill seeks to address is how, when fixing the punishment part of a life sentence, one should take into account the early release provisions, which statute has provided and which cut across the sentences that judges have imposed. I would not want to underestimate the difficulties of that exercise. I recognise them, and the legislation perhaps reflects them.

The question that we are putting on the table is whether it is helpful or useful for the method by which that number is obtained to be laid down in the prescriptive way in which the bill lays it down. To answer the question directly, certainly in the prescriptive way in which the bill lays it down. With fixed-period sentences, there is not that clarity about how long the person must serve in prison. The victims of the crime will be aware of that provision, there would be parity within the system should work? The challenging problem is to identify the right punishment element, the deterrent element—retribution, if you like—or the declaratory or condemnatory element? Protection of the public should be about whether it is safe to let the man out. In other words, it looks forward rather than back.

Would it be fair to say that the sentence should by and large reflect an aspect of the sentencing system, such as the punishment element, the deterrent element—retribution, if you like—or the declaratory or condemnatory element? Protection of the public is about whether the prisoner is safe to be released in the future. Am I missing something, or is that a logical statement on how the system should work?

James Wolfe: With regard to those types of sentences, you are absolutely right. First, there is the question of what period is required for punishment, and secondly, after the punishment part has been served, there is the question of whether the prisoner can safely be released. That is an issue for the Parole Board, looking forward. The challenging problem is to identify the right period that is to be served by the prisoner for the purpose purely of punishment, and to strip out from that the questions of protection, risk and so on, which will ultimately be a matter for the Parole Board to consider once the punishment part has been served.

10:30

David McLetchie: Indeed. I was struck by the Law Society of Scotland’s comments in its submission about the notional stripping out of notional discrete elements from notional fixed sentences. It concludes:

“If this stripping out exercise was removed, then as a matter of law, an indeterminate prisoner would not in any
circumstances be eligible for parole at an earlier stage than a comparable determinate prisoner."

It strikes me that that is what the bill is designed to achieve in order to remove the Petch and Foye anomaly.

What is the objection to stripping out or abandoning all those notionals, as the Law Society suggests? Why do we not get rid of those and concentrate on the real world? Instead of having a complex piece of legislation that makes things more complex, we would have a piece of legislation that one would hope would make things a bit simpler. Can someone explain why the route that the bill proposes is preferable to what seems to be the comparative simplicity and elegance of the Law Society’s suggested solution?

The Convener: Does Rod Campbell want to come in on the same point?

Roderick Campbell: I was going to ask a very similar question to the one that David McLetchie raised. Moving on from that—

The Convener: I think that we should have an answer to that one first. Is your question connected?

Roderick Campbell: It is connected—I just wanted to add something. Neither the Law Society nor the Faculty of Advocates has commented specifically on the European dimension, but from my limited understanding the decision in the case of Thynne, Wilson and Gunnell v United Kingdom was about the requirement to review the position where someone had passed the punishment part of their case and was being held for custody purposes, and the need to ensure that there are regular reviews in that regard.

If the notional element of protection of the public was stripped out, what implications would that have in terms of compatibility with the European convention on human rights?

James Wolfe: I will take the two questions sequentially. You will have to raise the question of why that particular approach has been taken in the bill with those who are responsible for it, but perhaps I can offer what I take to be the explanation.

There is a statutory framework—which has been considered in the case of Ansari v Her Majesty’s Advocate and the Petch case—that requires the court to go through three stages: to identify the notional determinate sentence, to strip out from that the risk element and to apply the appropriate percentage. In the Ansari case, the majority of the court took the view that there was a flexibility in the appropriate percentage, while in the Petch case, the court said that the percentage is ordinarily to be 50 per cent.

Essentially, the bill seeks to focus on that final element and reintroduce the flexibility that the Ansari case suggested was—or should be—there. I can understand why that approach has been taken. However, we suggest that perhaps the opportunity is being missed to stand back and look again at the structure of the legislation as a whole, and to ask whether the problem may be at least at one stage further back, where the court is asked to carry out an artificial exercise of stripping out from the determinate sentence an element that is notionally for public protection before applying the percentage.

I suggest that there are two separate questions here. One concerns the period that requires to be fixed for the purposes of retribution and deterrence—that is the overarching aim. As part of that exercise, it must also be borne in mind that, had the prisoner been sentenced to a determinate sentence, he or she would have had the benefit of the early release provisions. Going back to the case of O’Neill v Her Majesty’s Advocate, one can understand why, particularly given the historical development of this area of law, the legislator has felt it necessary that one should try to exclude rigorously from the second exercise any questions of public protection. However, standing back from that, one is entitled to ask why that should be, as the issue of fairness and comparative justice must surely be related to the actual determinate sentence that would have been imposed, not to the stripped-out determinate sentence. I do not know whether that helps to answer Mr McLetchie’s question.

On Mr Campbell’s question, as I understand it, the key convention requirement is to fix the period after which there must be a regular review by the Parole Board. There may or may not be convention issues around the parity of treatment of prisoners who are sentenced to life sentences and those who receive determinate sentences as a matter of convention law. However, it has clearly been recognised as a policy matter by the court in the case of O’Neill v Her Majesty’s Advocate, by the Scottish Parliament in the legislation that already exists and by the Government in its policy memorandum that the court ought to have regard to the significance of the early release provisions when it fixes the punishment part.

Roderick Campbell: I am still a little unclear. If we were to go down the route that has been suggested by the Law Society and remove the stripping-out for the protection of the public, would that give rise to convention issues? [Interruption.]

The Convener: This is a bit like “University Challenge”; you may confer. I was beginning to wonder where I was.

James Wolfe: Sorry, convener.
James Wolffe: I would not exclude the possibility that people might seek to raise points under the convention, so it might be rash of me to give you an off-the-cuff opinion on the matter. No doubt those who are responsible for the bill will want to consider that carefully. I invite you and them to consider whether there really is a problem, ultimately, in leaving it to the court to make the relevant comparison, taking into account the early release provisions as required and referring to the real determinate sentence rather than the stripped-down determinate sentence. The proposition that that would run into insuperable convention problems invites scrutiny, if I can put it that way.

Roderick Campbell: Do the Law Society witnesses want to comment?

The Convener: I am leaving it to them to self-nominate if they want to answer.

Michael Meehan: The answer to the question whether it would offend convention jurisprudence would have to be, “It depends.” It would depend on how the sentencer articulated what he or she did. If the sentencer were to say, “I have apportioned a discrete element to protection of the public,” that could offend the convention, albeit that the convention requires comparative sentences as opposed to absolute parity. However, in the Law Society’s submission, we make the point that protection of the public is an issue that runs through the sentencing exercise and is not regarded as some minority or discrete element.

It is informative for one to have regard to the case of Petch and Foye v Her Majesty’s Advocate. According to the report, Petch pled guilty to the rape of two girls aged between eight and 11. Looking at it realistically, we might find it somewhat odd for the issue of protection of the public to be considered later on as some kind of minority element.

With regard to Mr McLetchie’s comments, while a prisoner is in jail, the public are protected. In my respectful submission to the committee on behalf of the Law Society, I point out that, if the sentencer takes the view that some additional requirement is needed, that can be dealt with in an extended sentence. If there is no such sentence, one can work on the basis that although protection of the public is a paramount consideration it has not resulted in a separate, discrete and consecutive proposal. As the Law Society’s submission makes clear, as long as one does not conflate issues of consideration for a sentence as necessarily resulting in a discrete element of sentence one does not need to strip out this notional element from a notional sentence.

The Convener: No, it is fine.

James Wolffe: Precisely. As I understand it, the legislative purpose is to reintroduce an element of flexibility for sentencers. However, the Faculty of Advocates questions whether there are not other ways of achieving flexibility in the system and whether it is really necessary for the legislation to take this highly prescriptive approach—particularly given, as Joanna Cherry observed, the courts have found the existing prescriptive approach difficult.

The Convener: The bill is certainly written in a difficult way. You might well say that it is not for you to draft legislation but, by golly, I would certainly like to see an amendment from our witnesses to clarify things. I appreciate that the bill seeks to correct an existing flaw but we need something that makes it easier to understand not just for us but for the public. Believe you me, the committee is not stupid but every time that something gets explained the more complex I feel it becomes. We got up early this morning and are bright as buttons but the whole thing is still too complicated.

You have made your point about the bill. If you wish to suggest any amendments, you may do so to committee members or any MSP—or, indeed, the Cabinet Secretary for Justice. Do you wish to say anything about part 2, which relates to the Scottish Criminal Cases Review Commission?

James Wolffe: I have nothing to add to the very brief comment in our written submission.

The Convener: In that case, I end this evidence session. I thank the witnesses for their evidence. They tried their hardest and almost got us there; however, we got the most important point—the bill is too complicated the way it is.

I suspend the meeting for five minutes.

10:43
Meeting suspended.

10:48
On resuming—

The Convener: I welcome the second panel of witnesses to the meeting. Gerard Sinclair is chief executive of, and Michael Walker is senior legal officer at, the Scottish Criminal Cases Review
Commission. I thank you very much for your written submission.

I refer to paragraph 6 of that submission. In response to the question

"Is the framework provided in the Bill appropriate for the purpose of the SCCRC’s determining whether it is appropriate to disclose information?"
you say “Yes”, but you go on to say:

"in relation to the information the SCCRC obtained from foreign authorities, the determination for the SCCRC is not whether it considers it to be appropriate to disclose that information. Rather, if it does not receive the relevant consent from each designated foreign authority, the SCCRC is not entitled to disclose the information."

Forgive me, but you seem to see that as an unnecessary impediment being put into the bill. Have I read that wrongly?

Gerard Sinclair (Scottish Criminal Cases Review Commission): I think that the “Yes” is very much a qualified yes. We sought to outline in our written submission what the qualifications are.

In considering the bill overall, it is helpful to recognise that there are different requirements for the different types of data with which the bill deals. As we outlined in our written submission, they can probably be summarised as information that has been received or provided by foreign authorities—as the convener has already identified—information that is subject to legal or professional privilege, and information that is subject to consideration under the Data Protection Act 1998, which is the core type that the bill addresses. Information that has been provided by foreign authorities is not covered by data protection legislation; in fact, there is no requirement under our legislation or under data protection legislation to seek the views of foreign authorities.

However, it is right that the Government considers that in order to maintain mutual co-operation and mutual arrangements for the exchange of information, it should be required to get foreign authorities’ permission for release of any information that they have provided before it can consent to the commission’s releasing it. That is why it is not the “appropriate” test that is applied in that case but the “entitlement” test. In effect, if the foreign authorities from whom the information was obtained were to refuse, that would be an end to the matter; the commission would be unable to release that information, because it would not come within the remit of the Secretary of State for Justice’s consent or of the bill’s consent.

The Convener: I would challenge that. What you said is quite right, but that is where politics might come straight up to the face of justice. You will forgive me asking whether, if it is the interests of justice to disclose information from foreign authorities that are not bound by data protection legislation, it would be appropriate for the SCCRC to consider that it should be disclosed, as opposed to its not being disclosed for what might be political reasons.

Gerard Sinclair: I take your point, but the difficulty is that that is merely an interesting debate. At the end of the day, the bill will place a restriction on the commission’s disclosing information without its having explicit consent, so we would not be able to disclose the information. Whether we believe the restriction is appropriate is a separate matter. As you said, convener, it is perhaps a political rather than a legal matter. However, the bill as it stands contains that restriction.

The Convener: The bill is subject to amendment.

Michael Walker (Scottish Criminal Cases Review Commission): It is our understanding that the provision is included so that the Government or the commission complies with international obligations.

The Convener: What international obligations do you mean?

Michael Walker: I mean the obligations under which we, but not the commission directly, would have got information; the terms under which information has been given by a foreign authority to the Crown Office. That is our understanding of the position.

The Convener: How would we find out what those obligations are?

Michael Walker: The Crown Office would be the best people to ask.

The Convener: I may return to that. Do any members want to ask questions on this issue? It is one of my interests?

John Finnie: We talked with the previous panel about public confidence in the criminal—

The Convener: I am sorry, John, but as I asked other people to declare their interests, I should have declared an interest at the beginning, which is that I am a member of the Justice for Megrahi campaign.

John Finnie: Will public confidence in the criminal justice system be enhanced by the bill’s proposal, or will it remain the same?

Gerard Sinclair: Clearly, one consideration is whether the disclosure of information might give the public a fuller understanding of the level of investigation that the commission had carried out and the reasoning behind the commission’s decision to refer a case.
On the national and international interest in the Megrahi case, the commission is on the record as saying that it feels that disclosure would benefit the public’s understanding of the commission’s role in publication of the statement of reasons document. Clearly, a number of considerations must be addressed before that can happen. I think that the bill is part of the process that would go towards addressing those considerations.

John Finnie: Referring to cases generally, rather than just to Mr al-Megrahi’s case, if any information that was disclosed indicated criminality on the part of a foreign authority—for example, the involvement of the United States in rendition—would there be a conflict for your body between disclosure and the public interest?

Gerard Sinclair: Disclosure of criminality depends on whether it relates to an individual or an organisation. If the allegations of criminality relate to an individual, the case clearly falls within the ambit of sensitive personal data and would come under the auspices of the Data Protection Act 1998. The information can be released only with the individual’s consent or—as we state in our written submission—under an order under paragraph 10 of schedule 3 to that act.

John Finnie: To stick with the example of rendition, if that was a feature—I am talking in the most general sense—would you be comfortable as an organisation and as individuals that it was within your knowledge but you were unable to disclose it?

Gerard Sinclair: You prefaced your question by suggesting that we ignore Mr Megrahi’s case for the moment. His case is perhaps unique. Given that the vast majority of the commission’s cases involve, for example, housebreaking in Giffnock or serious assaults on Princes Street, rendition does not usually come within our remit.

John Finnie: With the greatest respect, I say that you cannot predict what cases will come to you in the future.

Gerard Sinclair: That is true.

John Finnie: I am giving you an entirely hypothetical example.

Michael Walker: Under the provisions in the bill, we would have to refer such a case to the High Court and the applicant would have to abandon his case. If a case fell into that category, I see no reason why we would not disclose that, although the obvious encumbrance would be that we would perhaps need the consent of the foreign state that was involved. The restrictions would be that it would have to be a case that we referred to the High Court, and that the applicant would not proceed with an appeal, as Mr Megrahi did not.

The number of such cases so far is three in the 12 years for which the commission has existed, so I do not predict that there would be a lot more.

John Finnie: Would you require the permission of the United Kingdom Government? If so, who would seek it, and from whom?

Michael Walker: I do not think that we would require such permission under the bill.

The Convener: So, the UK is not designated as a foreign legislature or country for the purposes of disclosing material.

Gerard Sinclair: We would not have thought so.

The Convener: You are able, in the case of the UK, to exercise discretion to disclose more, if you wish, than you would, were a foreign country to be involved.

Gerard Sinclair: Yes.

The Convener: It is useful to have established that.

Jenny Marra (North East Scotland) (Lab): Mr Sinclair, when you talked about criminal behaviour in your response to Mr Finnie, you drew a distinction between individuals and authorities, and you said that individuals fall under the jurisdiction of the Data Protection Act 1998. Will you clarify the position for bodies, Governments or institutions?

Gerard Sinclair: I suspect that the commission, in obtaining information, whether on rendition or any other criminality that was alleged against a national Government, would be required to obtain it through some form of mutual assistance arrangement, which would have to be Government to Government. I suspect that such an arrangement would come with conditions and that the material would be provided for the commission’s use in its considerations, but that it would not be provided for the purposes of public consumption or publication. We would have to abide by that. It is a hypothetical question, but I suspect that that would be the scenario. We would not get that type of material unencumbered by conditions.

Graeme Pearson: I have a question on gathering of information. Let us suppose that the people who are party to a case have agreed that you can have the information. The bill seems to state that you must not, thereafter, automatically disclose it to the public in releasing your case analysis. In what circumstances would the commission decide that it was not appropriate to disclose fully the information that it had gathered?

Gerard Sinclair: Application of the intended appropriateness test that the bill includes would be a question of examining the material that was
available for disclosure and then deciding whether disclosure of that material would provide a balanced and fair reflection of the commission's work and reasoning.

11:00

It is a matter of public record that the statement of reasons is some 800 pages long. If we had to redact the document and delete parts of it, and if that got to the stage where we felt that the document was becoming unbalanced and did not reflect the commission's views, we may well decide that it would not be appropriate to publish that edited document and we would give reasons for that.

Graeme Pearson: You have answered my supplementary question. Thank you.

Humza Yousaf (Glasgow) (SNP): I thank the witnesses for coming along. My question relates to the fact that their submission mentioned that they were having discussions with the Ministry of Justice about how they may release sensitive personal data without the need for a schedule 3 order under the 1998 act. What route do you envisage those discussions taking? How else do you envisage releasing the data? If they were to come to a successful conclusion, would that set a dangerous precedent for data protection?

Gerard Sinclair: We think that it would not. As indicated in our written submission, our starting position is that we will require an order under paragraph 10 of schedule 3 to the 1998 act, because we believe that the only other method that we could use legitimately to publish the sensitive personal data that are contained in the documentation would be to obtain the consent of the parties. We consider that that would be unlikely, given our previous experiences.

I note that there is some suggestion in the information commissioner's response that paragraphs 7(1)(a) and (b) of schedule 3 might be a route for the commission to overcome consent. Our view is that that is not an appropriate route, but we have indicated that we are happy to meet the Information Commissioner's Office and the Ministry of Justice to tease out why we believe that. If we persuade them of our views, we will be left with the paragraph 10 order.

You asked whether that would breach the dam for data protection. We do not believe so, because the circumstances are unique and the Ministry of Justice does not give out such orders lightly. It has given out some, but the numbers are few and they have been given out for limited purposes. We envisage that the order would be drafted for a restricted and limited purpose that would not cover all the cases with which the commission deals.

Humza Yousaf: I agree that the al-Megrahi case is entirely unique and that the circumstances are not likely to occur often. It is difficult to see how you could negotiate a route with the Ministry of Justice and the information commissioner that could not be argued to have set a precedent for cases further down the line.

Michael Walker: If the view is taken that we require an order, we would expect it to be written in such a way that it would apply only to the Megrahi case. It would probably have to pass a test of substantial public interest.

Humza Yousaf: If there was a test of substantial public interest, that alone would give a hook to a case further down the line.

Michael Walker: It would not do that if the order was written such that it applied only to the Megrahi case and the other cases to which the bill applies. As I stated earlier, those are very few. As Gerry Sinclair said, it would not bust the dam open for the release of sensitive data in the future.

If you look at how the other orders have been written, you will see that, besides the test of substantial public interest, the order would require that the disclosure of the data did not cause substantial distress to the individuals concerned. It would be very limited.

Humza Yousaf: Okay. Thank you.

I would like a clarification. Mr Sinclair said that getting the consent of the parties involved would be extremely difficult and, in fact, unlikely. Do you mean that Mr Megrahi and his parties do not want the sensitive information to be released?

Gerard Sinclair: As far as the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 is concerned, we tasked ourselves with seeking, in the first instance, the consent of what we considered to be the major parties, because it was clear that, if we did not get consent from the main parties on the matter, there did not appear to be any point in going down the line to the more minor individuals who were involved in the document. We did not get unqualified consent from any of the major parties, including Mr Megrahi. As a consequence, we do not anticipate that his position will have changed materially.

The Convener: Even if you had his consent, I take it that the statement of reasons would be redacted considerably—or would it be published in full?

Gerard Sinclair: If we had consent, that would overcome all the data protection issues, and the data protection matters could be published in full. However, as I indicated at the outset, there are two other aspects: the international aspect and the legal professional privilege aspect.
The Convener: So, such information would be left out.

Gerard Sinclair: It would not necessarily be left out because, clearly, were Mr Megrahi to provide his consent on the data protection matters, it would be rather perverse of him not to provide his consent under legal professional privilege. I would expect one to go along with the other.

The Convener: Would the foreign part remain redacted?

Gerard Sinclair: It could remain redacted, but that presupposes that the foreign and international Governments objected to publication. They may not object to publication of the matters on which they have provided material.

The Convener: Under the bill, if the information regarding foreign authorities had come via the UK Government, whether to publish it would be at the discretion of the SCCRC. You would not have to seek the consent of each designated foreign country, because the information had come from another party. Is that correct?

Gerard Sinclair: Presently, that is not correct, because the bill requires us to seek such consent. If the bill were amended and that requirement was taken out, we would not require to seek such consent.

The Convener: I am sorry, but you say in your submission that “if it does not receive the relevant consent from each designated foreign authority, the SCCRC is not entitled to disclose the information”, but if the information from foreign authorities came via the UK Foreign and Commonwealth Office, you would not need the consent of the FCO because—as you have told me—it is not a foreign authority.

Gerard Sinclair: I think that the definition of “affected persons” would extend to those foreign authorities.

Michael Walker: If you are asking whether, if the information had come via the UK Government, we would still require the consent of the foreign authorities—

The Convener: I am.

Michael Walker: Our view is that we would still require that consent, because the bill is worded such that, whether we received the information directly or indirectly, we would still have to seek consent. Ultimately, the issue is where the information has come from, not the route by which it has come.

The Convener: The UK Government might be where you had got it from.

Michael Walker: We are working on the basis that the bill is meant to catch information that has come from foreign authorities. It does not matter whether it has come via the Lord Advocate or the UK Government.

The Convener: Okay.

David McLetchie is waiting. Is your question a supplementary, Rod?

Roderick Campbell: It is to do with legal professional privilege.

The Convener: That is a separate issue.

David McLetchie: I would like you to clarify something. If the al-Megrahi appeal had proceeded, is it the case that everything in the 800-plus pages of the statement of reasons and the 13 volumes of evidence would have been published?

Gerard Sinclair: No.

Michael Walker: No.

David McLetchie: What would not have been published if the appeal had proceeded?

Gerard Sinclair: The commission would still not have published anything. There have been a number of commission referrals, some of which have led to successful appeals and some of which have led to unsuccessful appeals. Under section 194J of the Criminal Procedure (Scotland) Act 1995, the commission is still obliged to withhold publication until such time as an order is made under section 194K(1). We never publish, even if the matter has proceeded to appeal.

That does not mean to say that the information will not come into the public domain because, as is evident from previous referrals, the defence and the Crown make copious use of the materials that the commission provides. Those are addressed directly in the court, which is a public forum, so they can be reported by the press. However, the commission would not go on to publish its statement of reasons.

David McLetchie: Right, so the commission would not publish the statement of reasons, but is all the material not public, in the sense that it is available to other parties, such as prosecutors and the defence? I am trying to get a handle on what difference the bill would have made as regards publication of all the material that you have gathered.

Michael Walker: If the appeal went to court, the information in the document would be available to the parties to the appeal and the court. However, it would not necessarily be available to the general public.
David McLetchie: But one of the parties that held it could make it available to the general public.

Michael Walker: That would be a matter for the party involved.

David McLetchie: What I am trying to get at is that, if the appeal had proceeded, all this evidence that you had garnered and all this material—all 13 volumes and 800 pages of it—would have been made available to the parties to the appeal. Is that right?

Michael Walker: Yes.

Gerard Sinclair: Yes.

David McLetchie: Therefore your control of that information or data would no longer be absolute. The parties to the appeal would have it and could decide whether to publish and make it public.

Gerard Sinclair: That is right.

David McLetchie: Did all the people who provided you with evidence know when they did so that that would be a possibility?

Gerard Sinclair: Yes.

David McLetchie: When they gave you the evidence, they knew that, had al-Megrahi proceeded with his appeal, any piece of evidence contained in those 800 pages and 13 volumes could be published because it would no longer have been held in any confidential forum.

Michael Walker: I do not think that that is correct—

David McLetchie: Please tell me, then, what would not have been published. I am trying to get to the bottom of this.

Michael Walker: All the information in the statement of reasons and appendices would be with the parties to the appeal. However, as I understand it, the Crown Office would still have to comply with data protection rules and perhaps consents from the foreign authorities. Because it would have to overcome the same obstacles that we face, the Crown would not be in a position simply to publish the document—indeed, it has never done so.

As for the defence, what it did with the document would be a matter for it. Again, I think that its agents could not just publish it because of the sensitive data that it contained. I do not think that it is correct to say that, after we gave it to all the parties, one or other party could simply put it on the internet.

David McLetchie: I am not quite sure—

The Convener: I am sorry but, in an appeal at which new facts had emerged, could the defence not refer to the evidence in court, name people and cite them as witnesses?

Gerard Sinclair: Yes.

The Convener: Which is publication.

Gerard Sinclair: Perhaps I can slightly nuance Michael Walker’s previous answer. No matter whether it is a refusal or a referral that either proceeds to appeal and is concluded or is abandoned, when a decision is made, every applicant gets a full copy of it and may choose to do what they wish with it. Theoretically, there is no restriction on them. As a public organisation, we have our non-disclosure obligations, but we cannot bind an applicant to them.

As for those who give us information, we tell them that we will retain their confidentiality but that, if the matter is referred, it is possible that the information might be placed in the public domain.

David McLetchie: Which is really the point that I am making. Everyone who provides you with evidence does so in the knowledge that every single piece of it might come into the public domain because, at that point, your organisation no longer has control over it and cannot guarantee to protect its confidentiality. Is that the case?

Gerard Sinclair: That is correct. However, if there were a particularly sensitive piece of information that the commission needed to know in order to reach its deliberation but which might put someone’s life at risk, the commission could accept it on the understanding that it would not place it in the statement of reasons.

David McLetchie: But what if that information were material to the person’s guilt or innocence?

Gerard Sinclair: At the end of the day, the commission has to give reasons for its decisions—it does not have to expose all the information that it obtained to reach them. Of course, such circumstances would be very exceptional; indeed, I cannot, off the top of my head, think of any times when we have chosen to exercise that power. However, I know that the English commission occasionally issues to the applicant a slightly redacted statement of reasons and gives the court a full statement. We have never gone down that road. The situation could arise in which we would take evidence and give an undertaking that it would remain confidential, but the normal procedure is that we say that we retain confidentiality but that there is always a possibility that the evidence will become public if the matter is referred.

11:15

David McLetchie: So, there are two groups of evidence. First, there is the 800-plus pages and 13
volumes, which might have come into the public domain had the appeal proceeded, as you would no longer have had control over it. Secondly, there may be another group of evidence that you may have chosen not to incorporate because you did not think that it was material to your statement of reasons or your justification as to why the matter should be re-examined. There may be another body of evidence, which would not be released in this context—is that correct?

Gerard Sinclair: Yes.

The Convener: Sorry—I thought that you said that, in this particular case, you have never withheld evidence. Was that just for the protection of individuals’ safety? You said earlier that you have never kept a piece of evidence outwith the other, publicised—

Gerard Sinclair: Sorry—I have misrepresented the position. We have done that on occasion.

The Convener: Oh.

Gerard Sinclair: I do not think that that is a great surprise. It is a matter of record that, in this particular case, we referred to a piece of evidence in the statement of reasons but indicated that we would not disclose the detail of it. That became part of the debate at the appeal.

The Convener: That is fine—you have clarified that. I heard you say earlier that you had never done that although it had been done in England.

I want to clarify something that you have said in order to get my head round it. We have heard that some evidence is not there.

Gerard Sinclair: Yes.

The Convener: It is separate. David McLetchie has established that with you. The material that is out there, including that on third parties, could all have been referred to in court and cited, as witnesses have said. The issue of data protection would not have arisen then, as that information would simply have had to be in the public domain.

Gerard Sinclair: Yes.

The Convener: In considering personal data protection issues in your negotiations with the cabinet secretary, was it taken into account that, had the appeal proceeded to its second stage with the new evidence, that evidence would all have been out there in the public domain? Is it not a bit artificial to say now that we have to protect people because the appeal did not proceed?

Michael Walker: There is some guidance from the Information Commissioner’s Office to the effect that the fact that something has been debated in court does not equate to the information having been put online. Those two situations are not like for like. As you say, the appeal did not proceed, so we are not in the position of the evidence having been debated in open court anyway. I do not know whether that is a hypothetical point.

The Convener: It is useful to have that on the record for when we address the Cabinet Secretary for Justice.

John Finnie: I have a point that relates specifically to that. One area in which there would be no disclosure of either documentation or information arising from that documentation—indeed, witness statements—is information that is covered by the Official Secrets Acts.

Michael Walker: Yes, but in our written submissions we state that we do not perceive the Official Secrets Acts as being relevant. There is no information in the statement of reasons that would be covered by the Official Secrets Acts.

John Finnie: But such information would not be disclosed in a statement of reasons.

Michael Walker: Do you mean in general, not just in the Megrahi case?

John Finnie: Yes, in a case generally.

Michael Walker: We would be bound by the Official Secrets Acts, but they do not apply in this case.

John Finnie: That would not relate simply to documentation; it could relate to witnesses connected with the documentation.

Michael Walker: Potentially, but the issue has never arisen to date, so it is not something that we have had great discussions about.

John Finnie: Is it fair to say that, for any case that involved official secrets, the statement of reasons would not mention them?

Gerard Sinclair: Yes, unless we got consent to disclose the information. If we were given material that was covered by the Official Secrets Acts, we would not disclose it. We might go back to the providers of the information to ask for it to be made exempt or for a dispensation. If we were told that we could have the information to assist us in reaching a decision but that it was not to be placed in the public domain or appear in the body of the statement of reasons, we could choose not to accept the information under those terms or to accept it and abide by them.

John Finnie: Who would you go back to? Would it be the person who provided the information or some other central body?

Gerard Sinclair: Information that was covered by the Official Secrets Acts would probably come from a Government body. We would go back to the Government body that provided us with the information.
The Convener: Paragraph 8 of your submission states:

“The SCCRC does not consider that the information in the SOR is covered by the Official Secrets Acts.”

You have repeated that today. However, given that there is other evidence that is hived off somewhere and we will not see, is that covered by the Official Secrets Acts?

Gerard Sinclair: Some of it is—a very limited amount.

Roderick Campbell: I have a short question. Your submission points out:

“there is no indication in the Explanatory Notes accompanying the Bill that the purpose of the Bill is to override

legal professional privilege. Have you had discussions with the Scottish Government or any other parties about legal professional privilege?

Michael Walker: In discussions before Christmas, we notified the Government that we felt that there was an issue. An earlier draft of the bill had a provision that might be interpreted as providing the necessary authority to overcome the privilege. However, that is not in the bill that is before the committee. Our view is that there must be an express provision that deals with legal professional privilege. There will then be an issue about whether that provision is human rights compliant, but there certainly has to be an express provision in the bill.

Roderick Campbell: So that is needed if we seek to override legal professional privilege.

Michael Walker: Yes. Case law is clear that the privilege can be overridden only by the express authority of primary legislation.

Roderick Campbell: Therefore, there might be an indication that there is no intention to override legal professional privilege.

Gerard Sinclair: My recollection is that our discussions with the Scottish Government related mainly to data protection issues. In our initial response to the pre-introduced or draft bill, we did not focus on the issues of foreign authorities or legal professional privilege. I suspect that on-going discussion might elucidate the thinking behind the issue.

The Convener: Your submission states that you “might have some difficulty in identifying the relevant designated foreign authority for each State, and that it will require the assistance of the Lord Advocate in order to do so.”

Just for the record, is there a conflict of interest when you seek assistance from the Crown Office on something that might show—I do not know because I have not seen it, although you have—that the Crown Office got it wrong? I am not impugning your reputation. I am just saying that there might be a conflict of interest.

Gerard Sinclair: Our statutory powers entitle us to seek assistance from a number of organisations, including the Crown Office and the police. The Crown Office tends to be the first port of call, simply because the vast majority of information is filtered through there. On the practicalities, it probably speeds up the process if we liaise with the Crown Office to ask from whom it obtained the information and to ask it either to effect an introduction or to give us contact details. That is probably quicker than our seeking to discover the information with our limited resources. That is the thinking behind that.

The Convener: There is an argument that, if the measures that we have discussed are in the bill, we will make it pretty well impossible to get something that is worth the paper it is written on. Will there be much left if we have to get the consents and deal with data protection issues and foreign powers, and given that there is stuff that is not in the statement of reasons?

Gerard Sinclair: It depends on what the act that is passed allows for. If, based on the submissions that we have made, the act specifically addresses the idea of legal professional privilege and provides a specific and explicit authorisation in somewhat unique circumstances, if the UK ministers provide the order under paragraph 10 of schedule 3 to the 1998 act, and if the commission can deal with the other data protection issues and get permission from the foreign authorities, there is no reason why virtually all of the statement of reasons could not be published. However, there are a lot of ifs and buts.

The Convener: Indeed. Unless there are any other questions, we will leave that issue.

David McLetchie: Can I just clarify a couple of points? Notwithstanding the release of the information, the question of guilt or innocence is not going to be adjudicated on anywhere, is it?

Gerard Sinclair: Not based on the release of the information.

David McLetchie: No—exactly. And there is no indication that any court anywhere will, on the basis of that information, ever adjudicate on the guilt or innocence of al-Megrahi.

Gerard Sinclair: I would not expect so.

The Convener: I do not know whether that is a matter for—

David McLetchie: I just want to know—that is what I am trying to establish.

From what you said, Mr Sinclair, with regard to the 2009 order—if I understand this correctly—al-
Megrahi certainly never gave unqualified consent for the release of all that material, and I think that you indicated to the committee that he was highly unlikely to do so in the current context if one decision was consistent with the other. Is that right?

Gerard Sinclair: I would expect so.

David McLetchie: And I would not have thought that many lawyers would encourage Mr Fhimah, who was acquitted, to release a lot of information that might cast doubt on the security of his acquittal.

Gerard Sinclair: Mr Fhimah failed to respond to us.

David McLetchie: Right. One is therefore tempted to ask what the point of all this is.

The Convener: I am not giving evidence, but I say to Mr McLetchie that I think that the commission currently has powers, if an appeal is abandoned in very specific circumstances, to publish a statement. Am I wrong about that?

Gerard Sinclair: No, we do not at present have any powers to publish a statement.

The Convener: So you do not.

Gerard Sinclair: No.

The Convener: Is it possible for another party to step into the shoes of a deceased party who has been the subject of a statement of reasons and who has abandoned an appeal, and return to court? There is a process for that, as I understand it.

Gerard Sinclair: Yes. If an applicant is deceased, there is a procedure whereby a family member or whoever can continue with an appeal. However, with regard to obtaining consent, one consideration is that consents in relation to data protection are required only from a living person.

The Convener: That is an interesting point. I just wanted to clear that up. There is a judicial process if someone wished to take up an appeal if the legislation proceeds.

I thank you very much for your attendance and your evidence.

Meeting closed at 11:28.
The Convener: Agenda item 2 is our second evidence session on the Criminal Cases (Punishment and Review) (Scotland) Bill at stage 1. I declare an interest as a member of the Justice for Megrahi campaign.

I welcome the first panel, which consists of Robert Forrester, Iain McKie, Len Murray and Dr Jim Swire. I thank them for their written submission and invite Len Murray to make an opening statement.

Len Murray (Justice for Megrahi): Thank you, convener. I do not propose to take long, as it seems to me that the submission that has been lodged on behalf of JFM amply sets out our position.

Section 1.02 of our submission refers to the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009. We submit that, in the first instance, the quickest and surest way of dealing with the matter is by the Parliament altering that statutory instrument by removing article 2(b). We believe that the bill could create as many difficulties as it could solve. The committee will be aware that the bill directs the Scottish Criminal Cases Review Commission to notify and seek the views of not only the person who supplied information, but any person who is directly affected by it. It could be argued that Mr Gauci, without whose evidence a conviction could never have taken place and who was described by the Lord Advocate of the day as “not the full shilling”, could even prevent publication. We submit that the quickest way of dealing with the matter is by removing article 2(b) from the 2009 order.

The Convener: I seek questions from members.

John Finnie (Highlands and Islands) (SNP): When, last week, I asked Michael Walker of the review group about the Official Secrets Acts he replied:

“in our written submissions we state that we do not perceive the Official Secrets Acts as being relevant. There is no information in the statement of reasons that would be covered by the Official Secrets Acts.”

Len Murray: Who said that?

John Finnie: That was from Mr Walker, who is a member of—

Len Murray: Ah, the SCCRC. What did he say?

John Finnie: He said that he did not perceive the Official Secrets Acts as being relevant and that, in any case,

“There is no information in the statement of reasons that would be covered by the Official Secrets Acts.”—[Official Report, Justice Committee, 31 January 2012; c 886.]

Is that your understanding?

Len Murray: It is new to me, let me put it that way. We have not touched on the issue in our submission. Did we get a copy of that?

Robert Forrester (Justice for Megrahi): What—of Walker’s statement?

Len Murray: Yes.

Robert Forrester: I have only the Official Report. It would take me a while to—

The Convener: Please indicate your wish to speak through the chair.

Robert Forrester: My apologies, convener.

The Convener: I will take Mr McKie first and then Mr Forrester.

Iain McKie (Justice for Megrahi): I noted that comment when I read the SCCRC submission and we should accept its view that the Official Secrets Acts are not relevant. I do not think that we had formed an opinion on whether they were or were not relevant.

However, what is clear is that the SCCRC and Justice for Megrahi submissions are very similar and are pushing the same way: the present legislation and the bill as framed in fact inhibit rather than assist the release of information. We note the specific point and have nothing to say in that respect but, more generally, I suggest that, if you read the SCCRC submission and ours, you will notice a similar train of thought being expressed. The SCCRC is saying that the bill will inhibit the release of information, and we are saying exactly the same thing. Why go to the bother of introducing legislation when a simple order that already exists can be used?

The Convener: Whether we take your suggested route or the route that the Government has taken in the bill, would data protection considerations not still prevail with regard to individuals’ names?

Len Murray: As the second paragraph of section 1.06 of our written submission makes clear,

“The reference to data protection is a complete red herring” because of section 194K(4) of the Criminal Procedure (Scotland) Act 1995.

The Convener: We will need to put that argument to the witnesses from the Information Commissioner’s Office, who will be giving evidence later.

Len Murray: I understand that.

The Convener: My simple understanding of your argument, then, is that subordinate legislation made here prevails over United Kingdom data protection legislation but primary legislation does not.

Len Murray: The simple solution is to remove article 2(b) from the 2009 order; indeed, that is the primary part of our submission. If I may say so respectfully, the bill seems to be a sledgehammer to crack a fairly small walnut.

Roderick Campbell (North East Fife) (SNP): Last week, Mr Sinclair said that any information that disclosed criminality in relation to an individual or organisation would clearly be

"sensitive personal data and would come under the auspices of the Data Protection Act 1998.”—[Official Report, Justice Committee, 31 January 2012; c 877.]

If any such information disclosed criminality in those terms, do you agree that the 1998 act would be relevant?

Len Murray: I come back to Professor Black’s comment—to which I referred previously and which is mentioned in section 1.06 of our submission—that data protection is a “red herring” because of section 194K of the Criminal Procedure (Scotland) Act 1995.

Roderick Campbell: I hear your views, but we will need to put that point to the Information Commissioner’s Office.

Humza Yousaf (Glasgow) (SNP): This question might be for the next panel, but have the witnesses considered the wider implications of altering article 2(b) of the 2009 order or the precedent that alteration might set for the protection of other people’s data?

Len Murray: At the moment, the question with which we are concerning ourselves is our submission on the bill in so far as it relates to Megrahi and his conviction. As far as we are concerned, the object of the exercise is for the information that the SCCRC is in possession of to be made available. If it is the Scottish Parliament’s desire for that information to be available, which appears to be the object of part 2 of the bill, we say that there is an easier way of achieving that, which is to remove article 2(b) from the 2009 order. If there is a difficulty with removing that article, I would be interested in hearing what it is. However, so far, no difficulty has been raised.

Robert Forrester: I speak as a layman in legal matters and, to be honest, I find the whole
situation rather perverse—please stop me if you think that I am wandering off the point.

The Convener: I cannot do that to committee members if they wander off the point, so just go for it, Mr Forrester.

Robert Forrester: The commission’s informants supplied it with evidence. Are we saying that they did not expect that evidence to come into the public domain? Presumably, they were fully aware of the fact that the Crown and the defence could have used it in open court in the second appeal. As we know, that appeal was dropped.

To extend the argument, one could say that that evidence should, by rights, have been brought up at the trial in Zeist. However, it was not. If it had been, we would not be talking about quashing Mr al-Megrahi’s conviction, because he might have been acquitted some 11 years and seven days ago. What is more, the evidence that we all find so difficult to present to the public would have been in the public domain for the past 11 years and seven days.

Speaking as a layman, I am somewhat bamboozled by what is going on. I agree entirely with what Mr Murray said and with Professor Black’s comments in our submission. From my simplistic perspective, the simplest route is probably the best one: to dispose of the consent requirement in the 2009 order and to dispense with part 2 of the bill.

Dr Jim Swire (Justice for Megrahi): I speak as a layman who was convinced by what he heard at Zeist that Megrahi was not involved. However, that is not the point of today’s discussion; the point is about 2(b) in the bill. I have had the benefit of extremely expert advice from a number of people in the high echelons of law in Scotland, who say that 2(b) will not meet the requirements that we seek and that it is a cumbersome delaying tactic.

As a layman and as someone who watched not only what happened at Camp Zeist, but the second appeal in the High Court in this city, I feel that there has been an orchestrated attempt to delay the resolution of this dreadful case.

10:15

Without wishing to sound in any way aggressive about it, I advise the committee that it should be aware that extensive information relating to the case will emerge in the public sphere in the not-far-distant future. It would be a very sad day if the Administration of this country and, in particular, the administration of law were not the leading lights in making information publicly available before people have to fall back on the media and have their day producing it by that means. I think that anything that tends to delay official routes to making information public must be deemed to be bad, and I think that 2(b) seems to be a means by which the establishment has achieved an apparent desire to delay resolution of this case. That is how I, as a layman, see it, and the professional advice that I have received points in the same direction.

The Convener: For the record, I clarify that you are referring to article 2(b) of the 2009 order, not the bill that is before us.

Dr Swire: That is a layman for you.

The Convener: It is fine.

The issue of whether data protection legislation impacts is a separate issue. I think that your proposition is that it would impact on the bill, but it would not impact on the statutory instrument. Mr Forrester made the separate point that, in any event, even if the data protection legislation were to prevail, the information in question would have been available in the public domain, so the data protection office should perhaps set aside any data protection issues, because the information was going to be disclosed anyway. Was that your point?

Robert Forrester: Yes.

The Convener: I think that that point was made in evidence last week, as well. The information would have been aired in public in court, and people would have been cited and so on.

Humza Yousaf: Thank you for that clarification, convener.

In your opinion, from the work that you do and the way in which you have approached Mr Megrahi’s case over the past 11-plus years, how will Mr Megrahi’s death impact on the disclosure of the information in question?

Dr Swire: Thank you very much for that question, which I think it was aimed at me because I am probably the person who has met Megrahi the most recently. He has not got much longer to run—he is a desperately sick man.

However, the committee should be aware that the case will not disappear with the death of Megrahi. There is his family’s position to consider, and the position of those who, like me, unfortunately, are also involved in the repercussions of the case. Therefore, this will be an on-going problem unless it is resolved in some way. The death of Megrahi will be hardly more than an incident along the way, because of the amount of time that has elapsed following the original conviction. Does that answer your question, sir?

Humza Yousaf: Partly, but I wonder whether there would be any specific data protection implications. I think that Mr Murray would like to comment.
Len Murray: I was about to say that what is much more important than whether Megrahi is alive is the fact that we have a sore—the cancer of a conviction that should never have taken place. Until such time as that conviction is taken out of the way, there are a number of us who will not rest. It is an affront; it was described by the United Nations observer at the trial as being—a spectacular miscarriage of justice.

Len Murray: That spectacular miscarriage of justice still obtains, and it will do so regardless of whether Mr Megrahi is alive.

The Convener: I want to return to the question of what the point would be of releasing the information if the appeal were not to proceed and a process were not to be gone through whereby, if it were the case that Mr Megrahi was wrongly convicted, the conviction could be overturned. Is there any indication that anyone is prepared to pick up the case on the death of Mr Megrahi? Is there any indication that there is someone who could be in his shoes, as it were, in legal terms?

Dr Swire: Yes, there are indications that the case will be taken up in the event of the death of Megrahi. First, his family tell me that they would be likely to take up the cudgels; and, secondly, people such as me would also seek to do so. The professional advice that we have received says that the family would have the first option on continuing the proceedings. At the beginning, when I tried everything I knew to bring these two men to Scottish justice, I expected to see a fair court try Megrahi and two murderers brought to justice.

By the end of the first, main court proceedings, I was convinced that Megrahi had nothing to do with it, and that conviction has spread through many legal minds since then. I think that it is selfish to consider that this is a problem for people such as me, because it is not—it is a problem for Scotland and for Scotland's people, and I hope that the committee will take that into account when it is considering how best to handle this. The question is of supreme importance in the present day, with the changes in relationships between countries, which are—shall I say?—evolving. No community can function properly without a criminal justice system that people can trust.

Iain McKie: None of us around this table is here to fight with the committee, the Government or the Crown Office, but we are mystified by the bill because we believe that it is not needed. There is a danger that there is a lack of political will in this Parliament to resolve the Lockerbie crisis, and the bill is part of that. Why, otherwise, should we be taking through legislation that, according to the SCCRC, is really intended to confuse matters and to put disclosure away, not attract it? I am a lay person, but it is my personal opinion, formed over 14 years of fighting for justice for my daughter and for other people at Lockerbie, that the Crown Office and civil servants put these arguments forward and create these bills, and politicians follow them. The politicians should stop following the Crown Office and the civil servants, who do not want the information to be released and will do anything to prevent that. It seems that the bill, as framed, would suit the Crown Office and the civil service down to the ground.

As Jim Swire has said, we are calling for political will in Scotland to sort this out. I am Scots and I want it sorted out; I do not want to wait until a book comes out, or something else happens, for the truth to be revealed. You in this Parliament have the power to resolve the whole issue, but the bill is taking us away from that. I hope that you can point out to your colleagues that we do not need such legislation because the necessary power already exists; there needs to be the political will to use it, as the Cabinet Secretary for Justice is able to do. The Government's heart is in the right place, but sometimes it listens too much to the Crown Office, the civil service and the Justice Department, and the time has come to pick up the baton and run with it.

The Convener: I am sure that the cabinet secretary is listening to what you are saying, and we will certainly put those issues to him.

Roderick Campbell: I want to follow up on the distinctions between people who supply information. The panel has made the position clear: you say that if people supply the information initially, it is in the public domain. The bill seeks to make a wider distinction in referring not only to people who supply information but to people who are directly affected by that information, and so to that extent it goes beyond the 2009 order.

Robert Forrester: I think that Mr Murray has dealt with that, in a way, by giving us the example of Mr Tony Gauci. The bill refers not only to people who are directly affected by the information but to those who are directly or indirectly affected. It does not single out any individuals or specify anything more than that. However, it would be extremely disturbing if, for example, Mr Tony Gauci, whose evidence, as Mr Murray said, was so instrumental in the conviction, were provided with a red card by our own Government.

Roderick Campbell: It seems to me that the distinction goes wider than people who may have given evidence and includes people who would be affected by the disclosure of evidence but who may not have provided any information to date.

Robert Forrester: It is indistinct, the way that the bill has been drafted. I cannot speak for the
people who drafted it—I cannot say exactly what they were getting at when they were thinking of inserting that. I do not know whether Len Murray wants to say anything on that.

**Len Murray:** I do not think so. Frankly, I do not see the problem.

**The Convener:** I take it that your general proposition is that the bill is a barrier to information but the statutory instrument is not.

**Len Murray:** The bill could be a barrier—I would prefer to express it in that way, although there are those who go further than I, who say that the bill is a barrier. I am bound to say that I am concerned at the prospect of Mr Gauci—if he ever reappears from his hidey-hole, wherever the CIA has plonked him—saying, “I do not want that information to be disclosed.” That he, of all people, should have the right to prevent that information from being made available strikes me as totally absurd.

**The Convener:** But Mr McKie’s position is that this is political with a small “p”, if I may put it like that.

**Iain McKie:** If the bill were taken away, that would affect individuals, and the right of individuals not to have information released is an important right. However, there needs to be political will in this. To put it bluntly, given the way in which the bill is framed, you will be sitting here arguing next year and the year after until the Parliament finishes—the debate will go on and on. There will be test cases in court and objections will be made. Someone must stop this—that is all that we are saying—and the easy option is to use the existing legislation. I do not care what you do, but someone somewhere must make decisions. They will have to say that, unfortunately, Mr Gauci’s rights are not as important as the rights of the Lockerbie deceased and their families and the good name of Scotland. Somebody will have to make difficult decisions; the matter is not going to be decided in the law courts. They are political decisions and I am appealing to the Government to make those political decisions.

**David McLetchie (Lothian) (Con):** Good morning, gentlemen. I want to explore the issue of how a resolution of the case could be achieved. There have been a couple of references to that, but it is not clear to me what the mechanism is for achieving a resolution of the case. We have had a trial, an appeal has been rejected and a second appeal, following the SCCRC’s recommendation, was withdrawn by the convicted person. Where and in what forum is the matter going to be resolved? Mr McKie said that we should wait until a book comes out, but we do not decide guilt or innocence on the basis of the speculations of book writers.

**Len Murray:** Not yet.
may have been other underlying reasons for the withdrawal. I do not think that this is the place in which to try to define them. The professional advice that I have received is that it would be perfectly possible for other individuals affected by the case to approach the SCCRC to request that a further appeal be granted. In that event, I understand that number 1 in the pecking order, as it were, would be Megrahi’s family, to whom I have spoken. In the event that they did not wish to pursue an appeal, it would perhaps fall to other people affected by the case—such as me, unfortunately, and those who support what we have been trying to do—to do so.

One way forward would therefore be a request that a further appeal be heard in the High Court in this city. That may not be the only way; there may be ways in which we could fire our politicians to set up a forum. However, a forum to examine this case would have to have powers of investigation and the power to take evidence under oath, because it seems that some aspects of the investigation were not quite what one would hope for in a criminal justice investigation.

In order to invoke as far as we can the truth, which is what I am after, we need to have the power to extract as much of the truth as possible from anyone who might give evidence in such a forum. I cannot tell you what the forum would be called; I merely say that, as in the petition, to which we seem to be reverting rather than the bill, the request would be for a fully empowered inquiry. In my layman’s mind, that would mean an inquiry that has the power to obtain evidence under oath and ensure that its impact on the Scottish criminal justice system will be decisive. I do not know how you do that, but we ought to have done it long ago. Twelve years since before the start of the trial, when I believed that the two accused were guilty, is far too long to wait to see my country, of which in many ways I am so proud, resolve what so many people hold was a miscarriage of justice.

Len Murray: Convener, I am reminded of a saying that you, Mr McLetchie and I—and I am sure everybody else in our profession—are aware of: today we will worry about the flea that bites us today and tomorrow we will worry about tomorrow’s.

Mr McLetchie asks where we go from here. There are as many answers to that question as there are people in the legal profession. If, as a result of the SCCRC information being made available, it seems to be generally accepted that there has been a miscarriage of justice, I have no doubt that a solution will appear. Our High Court has the power of nobile officium, so I refuse to believe that, if a miscarriage is discovered, there is no mechanism in our system to deal with it.

However, that is not the issue that is before us today.

Dr Swire: To build on what has just been said, the flea that bites you today may give you the black death from which you die tomorrow. We need to do something about that flea.

David McLetchie: The issue today is the point of the bill. From different perspectives, we may be coming to a similar conclusion in that you regard the bill as unnecessary and, in some respects, for entirely different reasons, I might regard it as unnecessary. I would not necessarily say that our objectives are at odds.

However, what I find slightly difficult to understand is that your evidence implies that we do not need to bother with consent from anyone and that, in fact, the requirement for consent is a barrier to getting at the truth, as you put it. You imply that the bill is just another example of that, as was the previous statutory instrument and so on. You said how wrong it is that the requirement for consent from Mr Gauci should become a barrier to getting at the truth, but what about Mr Fhimah, who was acquitted? We heard in evidence last week from the SCCRC that when Mr Fhimah was approached for consent under the 2009 order, he could not be contacted and that his consent was therefore unobtainable.

I was surprised to hear that Megrahi would agree only to a partial release. Is that true? Is it true that Megrahi was not prepared to consent to an unconditional release of information, as the SCCRC told us last week?

Dr Swire: One of the objections that the UN observer had to the conduct of the Zeist trial was the fact that, in his view, the prosecution had failed to pass on to the defence a substantial amount of information, so making the playing field uneven, against the interests of the defence. That material resides with the Crown Office and some of it has not been made public. I do not see why we should expect the Crown Office to try to protect that information by preventing its being let out in the way that we are talking about. Surely at least the information that the Crown Office has ought to be made public, too. Surely there are ways in which that can be done without having to revert to the likes of Mr Gauci and his brother.

David McLetchie: Yes, I know, but I am not talking about that. I am talking about evidence from the SCCRC last week that Megrahi refused to consent to the release of certain information and was therefore willing to give consent only to the partial release of information—presumably information favourable to his case. One would conclude that the information that he was not so keen on releasing might have been unfavourable to his case.
Robert Forrester: If memory serves, Mr al-Megrahi is on record as saying that he refused to give consent unless all the other informers to the commission agreed to put their cards on the table. That is my understanding.

David McLetchie: I find it rather puzzling that they should get into a game of “I’ll show you mine if you show me yours”.

Robert Forrester: I cannot speak for Mr al-Megrahi.

David McLetchie: If we are talking about someone who claims that he is innocent and has the power to consent to the release of information, why are we getting into the area of partial disclosure?

Robert Forrester: You would have to address your question to Mr al-Megrahi. However, that is my understanding—

David McLetchie: Megrahi, who has a campaign called Justice for Megrahi, wants justice only on the basis of a partial release of information. That seems rather perverse to me.

Robert Forrester: Not at all.

Len Murray: That has never been part of our submission.

The Convener: Excuse me a minute, gentlemen. There is no problem with questions and answers but, so that we can hear them clearly, they should not be made over each other. Who is responding next? Mr Murray, do you wish to say something?

Len Murray: Mr McLetchie seems to be saying that we are advancing on the basis of “We’ll disclose information only if you do”, but that has never been our position.

David McLetchie: I am not saying that. My question—

Len Murray: With respect, it sounded like it.

David McLetchie: No. I think that you have misheard me. What I am putting to you is the evidence that we received last week from the SCCRC, which I am sure all the other committee members will recall. When we asked about issues relating to consent, we were informed that Megrahi did not consent to the release of all the information whose release it was within his province to consent to. That was the evidence that we were given last week. I am simply asking you whether, from your knowledge of Megrahi and your campaign, that is correct.

Dr Swire: When I met Megrahi in December, he assured me that on his death all the information available to his defence team would be passed to me.

David McLetchie: Why are we waiting for his death?

Dr Swire: It is his decision. He is the client of the defence solicitors who currently, at least in theory, run his defence. The defence solicitors tell me that they are bound by their client’s wishes and that his wish is that the information should not be made public until his death and that when he dies the information should be passed on intact to others who might pursue the case.

That may or may not be true, but I think that we are nit-picking slightly, because the case does not resolve only around people such as Gauci and information that Megrahi may or may not have; it also revolves around bigger questions, such as the mode of conduct of the original Zeist trial. International observers have said that it was not a fair trial and the SCCRC has said that there may have been a miscarriage of justice. We should try to mobilise all aspects that are available to try to resolve the doubts that remain about the case before it does terrible and even worse injury to our criminal justice system.

Robert Forrester: The fact that the appeal was dropped does not eradicate the problem. There is still a problem with the interests of justice. The case is a stain on our justice system. The SCCRC was satisfied that the case that it had laid out in the statement of reasons for Mr al-Megrahi’s second appeal passed the statutory tests that, first, he may have suffered a miscarriage of justice and, secondly, it was in the interests of justice to proceed. The fact that, for whatever reason—on health grounds or for other reasons; this is not the time or place to discuss that—the appeal was dropped does not solve the problem. We are not addressing the issue of the interests of justice and the reputation of the Scottish criminal justice system.

When the report on Shirley McKie’s case was published in December, Mr MacAskill—all dues to him—said that the Scottish criminal justice system is a pillar in our society and that it is paramount that the Scottish public have faith in that system. Quite apart from what Hans Köchler and other luminaries have said, the Scottish Sunday Express ran a poll last September that asked whether people thought that there ought to be an inquiry into the case; I admit that it is only one opinion poll, but 52 per cent of the sample of 500 said yes, compared with something like 32 per cent who said no.

The Convener: I accept that. I want to stop you on that track, because we have had a fair whack at it. We are looking at the bill and the contrast with the subordinate legislation. I want to round this up.
David McLetchie: Whether the witnesses like it or not, we are looking at the bill and at issues relating to data protection. As currently constructed, the bill will require the consent of persons for the release of information. My point—I find this inexplicable—is that the person convicted of this offence seems to want to control the release of information on a selective basis during his lifetime. I find that bizarre, to say the least. If I was terminally ill and I had a stain on my reputation, I would want it removed during my lifetime. I would not want to wait until I met my maker and then be judged in my absence. That seems to be the proposition.

The Convener: I do not think that we are going to make any further progress on the point, as only Mr Megrahi could answer that, so I want to move on. Humza, is your question on something else?

Humza Yousaf: I have a minor point, but if other members who have not asked a question want to come in, I am more than happy for them to do that.

The Convener: Nobody is indicating that they want to come in.

Humza Yousaf: The SCCRC states in its written submission that it wants to release the statement of reasons but that it can do so only with the co-operation of the Scottish Government, the UK Government and certain foreign authorities. Has there been any discussion about that between the Libyan transitional council and your campaign? Mr McKie correctly mentioned that political will is needed if we are to resolve the case. Do you see much of that political will from the new transitional council?

Dr Swire: Thank you for that question. What I found in Libya under the new transitional Government was a country that has been transformed from fear to euphoria because it has got rid of a monster in Gaddafi. In its euphoria, it wishes to place on the shoulders of the previous regime as much blame as it can. My view—as a layman, again—is that any information that is obtained from Libya at present is extremely suspect simply because it comes from an area where the atmosphere is one in which blame is attributed to Gaddafi no matter what.

Those who saw the recent broadcast will have noticed that members of the transitional Government were absolutely sure that Megrahi was involved. The reason for that is that they do not have time to look at the details of the Lockerbie case. They are trying to set up a country that has been ravaged by the previous dictatorship and by war, so they are far too busy to do that. From outside the case, the obvious position to take is, “Well, Megrahi was found guilty by a court, so obviously he was involved.” Underneath that, we immediately detect the thought, “And because he was involved, Gaddafi must have been involved. Oh, goody—we can pin this on Gaddafi as well.” That is the thinking that is going on.

This was not broadcast, but I spent a lot of my time with those people trying to explain to them that there are doubts about the verdict. They are only doubts. The SCCRC has said that there may have been a miscarriage of justice, and that is what we must all say as well, but the evidence against the verdict is building up pressure all the time, and that evidence is waiting to be heard. It does not just depend on Megrahi, on Gauci or on anybody else, as there is also the question of the way in which the court was run.

We should spare a thought for their lordships—the judges who ran the trial. They tried to run it in a situation in which the evidence was essentially assembled by the intelligence services of a number of countries, and they had no jury to apply common sense to their decisions. Those two circumstances are very atypical. It has never been part of my remit to blame the judges for the verdict that they reached. I do not think that it was the right verdict, but that is just my opinion. What we need is a national means for getting to the bottom of the case before it is eroded any more by media attempts to intrude on what should be the province of the properly constituted political and legal authorities within a proud country like ours. We have to get on with it.

I have no control over who does what and when. To revert to the very good question, “Why should the convicted man dictate what happens?”, I note that only three westerners are trusted by Megrahi. One is me, and I am in conversation with the other two, but I do not have control over them. The other two will be publishing a lot of information that pertains to what the SCCRC knows, probably within the next two months. I would love to see an official stance taken that will lead the way instead of the system being plastered with innuendos from outside, from the media—through people like me, I admit, and others who know just as much as me, or much more. That is not the way in which to put things right. Surely the way to do that is through an official, strong intervention, which has to be a political decision to set up a venue where the case can be properly reviewed. I beseech the committee to do what it can to further that purpose.

The Convener: Please be brief, Mr McKie, as I want to wind this up.

Iain McKie: The political will does not exist anywhere else. It does not exist in Libya, in America, in Europe or in England. The only place for the political will to be shown is in Scotland. I
agree with Mr McLetchie on many of the points that he made, and there are many factors to be considered, but we need the political will. If we wait for the Crown Office, the lawyers and the civil servants to sort this out, it will never be sorted out.

The Convener: Mr Murray, do you wish to sum up the panel’s position on the bill, the statutory instrument that has been referred to and the processes by which one might or might not come to a conclusion about al-Megrahi’s conviction? It would be useful to us in considering our position in our stage 1 report.

Len Murray: With respect, I think that we have strayed quite a bit from the main concern, which is that the bill’s proposals will not help to make the SCCRC information available. My primary submission is that that can be achieved by removing article 2(b) from the 2009 order. A lot of other terribly interesting points have been made this morning—and would that we had time to discuss them all. However, the immediate concern relates to that fairly short point.

On behalf of my colleagues, I thank you and your committee for affording us the opportunity of addressing you this morning. We are very grateful.

The Convener: Thank you for attending.

10:51
Meeting suspended.

10:55
On resuming—

The Convener: I welcome the second panel of witnesses, which consists of Sir Gerald Gordon QC and James Chalmers, who is a senior lecturer at the University of Edinburgh school of law. I thank both of you for your written submissions. Feel free to speak to both of the main parts of the bill, if you wish to do so. If you indicate to me that you wish to speak, I will call on you to respond.

We always feel that there is a tutorial when we are dealing with part 1 of the bill. I need a little theatrical scene in which two accused people are in front of me, one of whom is on a mandatory life sentence and one of whom is on a non-mandatory life sentence. If things were acted out, I might begin to follow the provisions, but I am simple. I hope that the witnesses can help us through a very difficult part of the bill.

Roderick Campbell: Mr Chalmers has made some not very flattering comments about the nature of determinate sentences. Last week, we wrestled quite a bit with the parts of sentences that are imposed for the protection of the public. I am not quite clear from paragraph 5 of your submission, Mr Chalmers, whether you believe that determinate sentences should be split between a part for retribution and deterrence and a part for the protection of the public, and whether that should be explicitly stated in determinate sentences. Will you expand on that?

James Chalmers (University of Edinburgh): I am not sure that I would advocate that as a system, although it might be worth considering. In effect, what currently happens with prisoners who are eligible to apply for parole is that the halfway point in the determinate sentence becomes the period that has been imposed for retribution and deterrence, because the prisoner is entitled to apply for parole at that point. The courts have concluded that the Parole Board for Scotland will operate on the basis that it will release the prisoner if it is no longer necessary to detain them for the protection of the public. By default therefore, although this is in no way set out in the statutory provisions, when a determinate sentence of some length is imposed, the halfway point becomes the retribution and deterrence point, and the remaining time that the prisoner can spend in jail if they are not released by the Parole Board becomes the period for protection of the public. The system was not designed in that way, but it has developed in that way.

Roderick Campbell: In the final paragraph of your submission, you say: “The Bill is, I think, tolerable as an interim means of addressing the difficulty identified in Petch and Foye.” What do you mean by the word “tolerable”?

James Chalmers: I mean “tolerable” in the sense that the bill is extremely difficult to understand. I have not spoken to anyone who feels comfortable in reading it and in working out what exercise the judges are required to take.

The Convener: You are cheering us up.

James Chalmers: It has taken me some time to work out—with the help of colleagues and friends with whom I have discussed the provisions—exactly what the provisions mean. Even now, I would not claim with 100 per cent confidence that I entirely understand them. The problem is that they are tortuously complex.

Roderick Campbell: I agree with that.

The Convener: I think that that will sum up our report. I think that we will say that the bill is “tortuously complex” and we do not understand it. Perhaps that will be at the end of the committee’s stage 1 report on part 1 of the bill, unless we are enlightened. Is Graeme Pearson going to enlighten us?

Graeme Pearson (South Scotland) (Lab): Unfortunately, I am not.
In our previous discussions, we were concerned about public confidence in our system and about trying to understand some of the issues to which James Chalmers has alluded. Individually, we have repeatedly acknowledged around the table that the process is very difficult to understand. Having grasped the idea, moved away from it for a while and gone back to it, we have to think it through again.

James Chalmers said that the bill is an “interim” solution. Does either witness, having thought through things with your years of experience in the administering of punishment, have a better alternative?

11:00

Sir Gerald Gordon QC: I am not disputing James Chalmers’s analysis of where we have reached with determinate sentences. However, when, with indeterminate sentences, the courts set themselves to imagining the public protection portion of the sentence, they simply—as far as I can see and with all due respect—pluck a figure out of the air. I am not aware that there is any authority of any description on assessing such matters and I think that it is, as I suggest in my submission, a totally spurious exercise that the courts are forced to undertake. I keep on changing my views on this, but I think that they might be forced to undertake it as a result of European Court of Human Rights phraseology, which followed the kind of language that had been used in English cases that had been brought before it. The idea is that in every sentence there is an element of retribution and deterrence and—perhaps—an element of public protection.

However, to take that approach is to forget other elements that may be required to be taken into account. Basically, an order for lifelong restriction—which is much the same as a discretionary life sentence—is imposed for public protection. As I say in my submission, I am not at all happy with that notion, but let us leave that to one side. In addition, there is a sentence. When an order for lifelong restriction is imposed, the court is expected to think of the sentence that it would have imposed had it not imposed the OLR. Given the seriousness in such cases, one might think that the sentence would normally be quite long. However, in one case, the punishment part of the sentence was fixed at 12 months and, in another, at 18 months.

The courts are supposed to fix the punishment period, which is what the individual has to serve as if that were the period to which they had been sentenced. However, they are supposed to take off that sentence the element of public protection. In other words, we think of what an individual would have been given if an order for lifelong restriction had not been imposed and then, in a new exercise, determine the proportion of the sentence that is meant for public protection. That gives a second notional sentence; when other discounts for guilty pleas and the rest are taken into account, what is left is the punishment part. There is no remission in that period; as I have said, it is one of the few instances—if not the only instance—when a sentence always means what it says. At the end of that period, the individual has done their time and all that is left is the period that relates to public protection.

The main thrust of the point about the European convention on human rights is that within that public protection period the prisoner should have an opportunity to have his case reviewed by a judicial body, and the Parole Board for Scotland counts as such a body for that purpose.

This is not the place to start criticising drafting, but this is all tied up in a lot of subsections and cross-references between subsections that make the bill rather difficult to read. I do not know whether my explanation has made it any clearer, but the basic idea is the distinction between the sentence for the offence and the right of the state to keep you for as long as it likes, provided the parole board thinks that you are still a danger to the public.

The Convener: I should correct you, Sir Gerald: this is certainly the place to criticise the drafting of legislation. That is what we, with your help, are here to do. If a bill is flawed, our job is to point out that flaw to the Government and to see whether it is amendable. Can you give us any pointers in that regard?

Sir Gerald Gordon: It is a technical exercise, but my feeling is that rather than have all the cross-referenced subsections it would be better to hope that members and the public are capable of reading sentences and paragraphs longer than those that appear in The Sun. However, this is the modern way of drafting.

The Convener: What you are saying is—I think—that even practitioners would have difficulty reading the provisions.

Sir Gerald Gordon: Judges would have difficulty reading the provisions.

The Convener: You are—without impugning people’s intellectual capabilities—saying that not just humble solicitors and advocates but the judiciary would have difficulty following the bill.

Sir Gerald Gordon: Yes.

James Chalmers: When the committee took evidence from the Faculty of Advocates, Joanna Cherry said that the current provisions
“gave rise to the most difficult piece of statutory interpretation that I have had to engage in in my career”.—[Official Report, Justice Committee, 31 January 2012; c 865.]

The solution that has been adopted is to make the statutory provisions somewhat more complex, by adding provisions. That might introduce clarity, and the courts have had some practice at working through that area of law, but the provisions will still present difficulty.

Roderick Campbell: The Law Society of Scotland said that one way of simplifying the exercise would be to remove the current statutory requirement to identify and strip out from the notional fixed sentence a notional or discrete element for protection of the public. What is Sir Gerald’s view on that? Would such an approach give rise to convention issues?

Sir Gerald Gordon: That approach would be much simpler. I have tried to discover what the English do and I am still not terribly sure, but I have not been able to find similar provisions about stripping out the public protection element. I am not an expert on European law and it might well be that the Parliament’s experts take the view—and took the view when the Convention Rights (Compliance) (Scotland) Act 2001 was passed—that it is necessary to make that split, in order to comply with the ECHR.

The Convener: I think that that is probably correct.

Roderick Campbell: In paragraph 34 of the policy memorandum, the Government said:

“We consider this ‘stripping out’ exercise does have to remain in order to satisfy the requirements that the ECHR has specified need to take place in respect of a discretionary life sentence.”

I am still struggling with what precise convention requirements the Government has in mind, but that is a question that I must put to the Government.

Sir Gerald Gordon: Part of the problem is that the leading European Court of Human Rights case—Thynne, Wilson and Gunnell v United Kingdom—proceeded on a number of English cases in which the English courts had talked about sentences being composed of different parts, although they had not actually done any stripping out.

James Chalmers: Even if the ECHR were not in play, there would be a need to achieve what the court called “comparative justice” between prisoners who are sentenced to a determinate sentence and who will be entitled to be released halfway through the period, and prisoners who receive a punishment element but who will not be entitled to release until the period has expired. The lack of comparative justice where it should be exercised could, in turn, create an ECHR problem, because a distinction would have been drawn between two groups of people without a clear reason for doing so other than because it was simpler, which is probably not a good basis for proceeding.

Roderick Campbell: Do you have suggestions on how to make the bill less complex?

James Chalmers: If the legislation simply said—and did no more than say—that the sentencing judge was required to set a punishment part, that would be sufficient in terms of ECHR compliance. The judge would still be required to conduct the exercise of comparative justice and comply with convention requirements, but they might not have to jump through so many hoops to get there.

The Convener: May I ask for a working example that uses the case of A, who is on a mandatory sentence, and B, who is not, so that I can understand how the situation works?

Sir Gerald Gordon: You said “mandatory”; the whole point is that the sentence is mandatory. The view—the theoretical view, I take it—is that in any mandatory life sentence, the life sentence is simply punitive.

The Convener: I beg your pardon.

Sir Gerald Gordon: The life sentence is simply punitive: that is the punishment, on the basis that the offence itself is serious enough to merit life imprisonment.

Parliament has decided that murder is always serious enough to merit life imprisonment. It is, of course, possible to impose life imprisonment simply as a sentence in other cases, but that is called a discretionary life sentence and is now treated in the same way as the order for lifelong restriction. As I have said, the offence itself may be worth 12 months but if, for one reason or another, the risk assessment people say that the man presents a risk to the public and an order for lifelong restriction is imposed, only after he has served his 12 months—or, rather, his six months, as 12-month sentences involve only six months in prison—is he entitled to apply for parole, as though he has been given a 12-month sentence. If he had been given a 12-month sentence, after six months he would have got out unconditionally—but let us not get into too much detail.

The Convener: I understand that. You are saying that the punishment part could be small but the protection of the public could be substantial.

Sir Gerald Gordon: That would depend on the Parole Board.
The Convener: Yes—but in certain cases the protection of the public could be a much longer part of the sentence.

Sir Gerald Gordon: Yes. Well,—

The Convener: I am not going to ask any more questions. I abdicate responsibility for asking questions because the more I ask, the more confused I get about this. I am sorry to say this, but I must rely on other members of the committee to take me through this—and there is silence.

David McLetchie: Can I ask a question, convener?

The Convener: Of course you can, David. Please do.

David McLetchie: The root of all the complexity seems to be the interrelationship between the different types of sentences and the operation of the rules in relation to early release—particularly automatic early release, which the Parliament is supposed to have been getting around to abolishing for the best part of five years. Would it be preferable to get back to first principles and to determine what our sentencing structure should be: release or no release; automatic review or review on a discretionary basis? I ask for your observations on that. Should we return to first principles and have a relatively simplified situation in which an offender serves a punishment part and then, in certain instances, gets out at the discretion of the Parole Board?

Sir Gerald Gordon: First principles have always said that a convicted person was entitled to some remission for good conduct.

David McLetchie: Yes.

Sir Gerald Gordon: The current situation is that they get their remission or unconditional/conditional release whatever their conduct has been, unless it has been such as to get them a consecutive sentence. I do not know how far back you want to go.

David McLetchie: Most people would say, in a simplistic way, that if someone was sentenced to 12 years, they should serve eight of those years and the Parole Board, on a discretionary basis, should determine how much of the remaining four years they would serve on the basis of estimations predominantly about protection of the public. Even with OLRs, it would be possible to have a relatively simplified system in which there would be a fixed element and a review period. It seems to me that we are just heaping complexity upon complexity in this instance and that we might be better placed to take the matter forward if we decided the principles of sentencing that we wanted in the first place.

Sir Gerald Gordon: With respect, that is crying for the moon. People have been trying to discover the principles of sentencing for a very long time, but without any marked success because the exercise is so multifaceted. As I said, I am not sure how this would fit in with Europe, but I would like to see something equivalent to what we get in extended sentences; I would like the judge to fix the sentence that he would have fixed had he not been giving an order for lifelong restriction, and we would take it from there. At whatever would have been the release point in that sentence, the Parole Board would take over. That would be a simple way of doing it, although it may not fit with the convention.

David McLetchie: How does that deal with the comparative justice issue and the issue of early release? That is what I was coming to. In an ideal situation, how would you fit that in?

Sir Gerald Gordon: I think that we move from the punishment area to the Parole Board area when we get to the early-release point—whenever that is. That is virtually what happens now, but the problem at present is that when a court says that the punishment part is 10 years, that means 10 years, whereas if it gives a sentence of 10 years, the person can get out conditionally after half that time and unconditionally after two thirds of it.

11:15

David McLetchie: Would it be possible to reconcile those two things relatively straightforwardly, assuming that you wanted to persist with that? Would it be possible for someone to say “Right. Your punishment part is 10 years, but of course that’s subject to the standing early-release provisions or the review provisions”? Would it offend the idea of comparative justice if you said “Your punishment part is 12 years and it will be treated exactly the same as it would had you been given a determinate sentence of 12 years”?

Sir Gerald Gordon: That is what I would like to see. My only problem is that at the moment I bow to the greater knowledge and experience of the parliamentary counsel which says that that would not fit in with the convention. It might—dare I say it?—be worth having a look at how they work it in England.

James Chalmers: There might be difficulty in applying what Mr McLetchie suggested. The first difficulty is that it would involve judges saying at the sentencing stage more things that do not reflect reality. For example, a judge might impose a life sentence, which does not, of course, mean that someone will spend their entire life in jail. With a punishment part of 20 years, that would not mean 20 years in jail, because the individual
would be entitled to apply for release at an earlier date. So, there would be the difficulty that that might not help with public confidence in the system.

It would also be a difficult exercise because there would still be the problem of the extent to which risk factors are involved in the punishment part. A judge might decide that on the basis of risk that a life sentence was required, then decide on the basis of risk that a sentence of a particular length was required. I am not sure what the judge is then meant to do if they conclude that the offence discloses such a high level of risk that only a life sentence would be appropriate. In that event, any determinate sentence that was imposed that had regard to risk would become an entirely fictional exercise, so judges might not feel able to do that.

David McLetchie: Right. Carry on.

The Convener: You understand now, Mr McLetchie.

David McLetchie: Oh, yes.

The Convener: You have seen the light.

David McLetchie: I will explore that point with the Government.

The Convener: I will attend your tutorial later, David.

Jenny Marra (North East Scotland) (Lab): Have you done, or are you aware of, any academic research that takes account of the public’s confidence in sentencing, in particular for life sentences?

Sir Gerald Gordon: I have never done sociological research. It is not my area, and I am not aware of research of the kind that you mention.

James Chalmers: I have never done any, but I am sure that there is a body of such research. However, I am not in a position just now to state in general terms what the academic research on public confidence in sentencing says.

Sir Gerald Gordon: You must remember that, leaving aside OLRs, post the Prisoners and Criminal Proceedings (Scotland) Act 1993 a determinate sentence did not and does not mean what it said—and that is apart from any question of executive prerogative in giving home leave and so on.

Jenny Marra: At the end of his written submission Mr Chalmers says that the system is “in need of much more far reaching review and reform.” I think that my colleagues touched on this, but do you have any suggestions in that regard?

James Chalmers: I do not have any easy solutions. For example, it is strange—if not ludicrous—that we have a situation where a sentence of, say, nine years is imposed but it means four and a half to six years because of the entitlement to early release after half to two thirds of the sentence has been served. It seems peculiar that a system of sentencing should require judges to pronounce a figure in open court which will not, unless one is familiar with the provisions on early release, reflect the time that the individual will spend in jail.

John Finnie: I have a question for Sir Gerald Gordon concerning something that he touched on earlier when referring to the other aims of sentencing. We have heard a lot about retribution, deterrence and public protection. In your written submission you also talk about denunciation and rehabilitation, which seem to be important elements. Do you think that the bill accommodates those elements in any way?

Sir Gerald Gordon: I suppose that, in some ways, the OLR is a denunciation. Many years ago when, as a professor, I was thinking about such things, I favoured the denunciatory theory, and I probably still favour it. It is the theory that one of the bases of sentencing is simply to send out a signal that this is the sort of thing that the public will not tolerate. The idea is that the higher the sentence, the stronger the signal.

On combining that with early-release provisions, there was a penal philosopher—I think it was Jeremy Bentham, but I am not absolutely sure—who envisaged a penal system in which the prison had a very large front gate and a high wall on a public street, as with Strangeways in Manchester. The public could see the prisoner going in and would know that his sentence was 20 years or whatever. The prison would also have a little garden, at the back of which was a tiny wicker gate that no one looked at, through which the prisoner would just walk back out again. That would provide denunciation, but I am not sure that it would satisfy the public on many of the other aims of sentencing.

John Finnie: You are not formally proposing that, though, are you?

Sir Gerald Gordon: I am not formally proposing it.

However, I think that the issue of marking is important. That is why offences that would not normally go to the High Court will sometimes go to the High Court when they involve a public figure. Sending a message has always been part of the system.

Rehabilitation is more difficult. I suppose that it might be said that the point of the life sentence is to enable rehabilitation. In fact, the suggestion was
made in a recent High Court case that a person cannot be kept under the OLR unless it can be shown that there are facilities for dealing with his problems. That has yet to be talked over, but it is a thought.

The Convener: Something is coming up from the depths of my memory about the case of Noel Ruddle v the Secretary of State for Scotland, in which the prisoner had not been given medication or treatment and so had to be released. We had to introduce emergency legislation to deal with such situations. That connects with what you are saying.

John Finnie: I would like to ask Mr Chalmers about rehabilitation, which the public sees as being hugely important to our criminal justice system. Do you think that the bill will facilitate rehabilitation more readily, or is it neutral in that regard?

James Chalmers: I think that the bill is neutral in that regard, because it deals particularly with life sentences.

To go back to the point that Sir Gerald made earlier, the courts and the legislature have not articulated what the purposes of sentencing are. In any case, that would be an extremely difficult exercise. In case law and in similar legislation, we have seen reference to protection of the public and to retribution and deterrence, but there are other aims of sentencing. In any case, aside from the notional exercise that judges are required to conduct in respect of discretionary life sentences, judges do not, and have never, parcelled up sentences into the element for retribution and deterrence, the element for denunciation, the element for protection of the public and so on. I doubt that judges would feel comfortable doing that and, in most cases, I doubt that it would be possible.

Sir Gerald Gordon: My fear about rehabilitation is that it means that prison is good for you and that, if it is good for you, the more you get, the better. We are seeing enough of an increase in general sentencing without that.

On the increase in general sentencing, nowadays the punishment part for murder is not normally less than 13 or 14 years. I recollect being told many years ago that most uncharged murderers—that was the vast majority of murderers, not that we had many murderers then—would get out in about nine years.

John Finnie: I have a further question that relates to part 2 of the bill.

The Convener: I want to deal with part 2 separately. I am going to go to David McLetchie’s tutorial, which I am sure will explain everything about part 1 of the bill. I will pay for the tea and coffee. Members are bound to attend now.

I turn to part 2 of the bill, which I know Mr Chalmers may not want to comment on—that is fine. Sir Gerald has commented on it. Will you explain to me the rather breathtaking idea that it should be up to politicians, not the SCCRC, to decide whether information should be published? I can see the point of that, but I can also see a whole lot of elephant traps and difficulties that would come into play if there were political—with a capital P rather than a small P—decisions. Will you explain why you favour that approach?

Sir Gerald Gordon: It is not part of the commission’s function to decide whether publication of its reports is appropriate or to decide to publish them. The argument is political. There are political—I use that word in a very broad sense—pressures about the public wanting to know and having a right to know. That is fair enough.

I accept that there are international problems and that the matter has to be dealt with at Westminster, but the easy way to achieve publication is to get the Secretary of State for Justice to agree to the necessary order to enable publication. With all due respect, I do not see why the commission should be expected to take the decision, which, of course, would mean bearing the brunt of the decision. I do not mean to be discourteous, but that looks rather like the politicians passing the buck, just as sometimes—

I will leave that aside. Taking that decision is not part of the commission’s function. It would take up its time and resources. It has done its job.

The Convener: I do not know whether you heard the previous panel’s evidence, which was that the bill is, in fact, an impediment to disclosure, but that using a statutory instrument instead could circumvent data protection prohibitions or censorship—whatever word one wants to use. Is that right?

Sir Gerald Gordon: It is difficult to see how a statutory instrument could be more effective than a bill. The problem is that the bill runs up against data protection legislation, which is a reserved matter. As I understand it, it is totally reserved, which raises some questions. I have no doubt that your lawyers have provided a satisfactory answer to the point, but I have some doubts as to whether the Parliament can make any provisions that affect the Data Protection Act 1998.

James Chalmers: The 1995 act requires the SCCRC to refrain from disclosing information and creates a criminal offence that applies if information is improperly disclosed. The bill creates an exception to that in certain circumstances. I think that that is what the 2009
order does as well—I do not have the text in front of me—but broadening the exception will not solve the problem.

The Parliament could repeal the criminal offence altogether—the prohibition on disclosure—but it would not follow from that that the commission would be free to hand out to anyone that it wished any material that was in its possession, because there would be other legal restraints. Chief among those would be the data protection legislation and, as I understand it, the Parliament has no power to do anything about that.

The Convener: So with regard to the argument that has been presented to us that a statutory instrument would be more robust in tackling data protection issues, your position is that that is not the case.

James Chalmers: After this meeting, I will certainly read the statutory instrument again and consider the argument more fully, but I cannot see how the Parliament could circumvent data protection legislation by a bill or an order and I cannot see how data protection is a red herring, as was suggested earlier.

The Convener: It is perhaps not what you set out to do, but it would be helpful to the committee if you could give that matter some thought and revert to us, as that was the prime argument that the previous panel of witnesses put to us on the bill.

John Finnie: Sir Gerald, in the last sentence of your written submission, you say:

“members and staff of SCCRC”

should be

“entitled to a formal immunity from prosecution and indemnity in respect of any civil proceedings that might be brought against them, in the wake of publication.”

Why would that be necessary if an employee or member had acted in good faith?

Sir Gerald Gordon: I do not know. I was just trying to suggest that total formal protection for my former colleagues would not do any harm and might do some good.

John Finnie: From where would any civil proceedings arise in such a case?

Sir Gerald Gordon: Persons whose sensitive personal data had been made public without their consent.

John Finnie: Is that a decision for politicians as well?

Sir Gerald Gordon: The SCCRC’s purpose is quite clear and set out in statute. It does not include deciding whether to make things public or whether to override the Data Protection Act 1998. It has done its job; it is, as they say in law, functus.
David McLetchie: So, rather than all the information being out there for anyone to pick whichever bits and pieces they choose, the court becomes the filter of what is published in the context of court proceedings.

Sir Gerald Gordon: It is not my idea. I accept that the situation is not very satisfactory because there is not much to prevent the press from reporting what is said in court and revealing various things that would otherwise have been covered by the Data Protection Act 1998. However, although a document might be lodged and produced—at least in part—in court, it is still covered by the 1998 act, except to the extent that it appears in the judge's opinions. Another exception might be if the document itself is read out in court with the press present, but I am not sure about that.

David McLetchie: That is interesting.

Roderick Campbell: Do you have any comment on the bill's proposal to extend the requirement on the SCCRC to get the views of not only the person who supplied the information but those who are directly affected by the disclosure of such information?

James Chalmers: Any such move has to be appropriate because the source of the information might not be the person who would be affected by its disclosure. In fact, the source might be entirely unaffected by disclosure; it might be almost accidental who passes that information to the commission. If the commission is trying to establish whether it is complying with data protection provisions or whether it has a case to ask the Ministry of Justice for an order allowing it to dispense with the data protection requirements, it will have to consult as far as is possible with the data subject.

The Convener: Members have no further questions. I am tantalised by the fact that while we dance around the edges of the Megrahi report, the only person in the room who knows what is in it is Sir Gerald Gordon—who is, as is absolutely appropriate, sworn to secrecy.

I thank the witnesses for their evidence. I suspend the meeting for five minutes so that members can have a little tea break before the next panel.

11:35
Meeting suspended.

11:41
On resuming—

The Convener: We are now on to our third and final panel of witnesses. I thank them for their patience while we had a slight break. We were weary from part 1 of the bill. I welcome Ken Macdonald, assistant commissioner for Scotland and Northern Ireland, and Sheila Logan, operations and policy manager, both from the Information Commissioner's Office—I take it that that is a UK body.

Ken Macdonald (Information Commissioner's Office): Yes.

The Convener: Thank you for your written submission. I invite committee members to ask questions.

Roderick Campbell: Good morning. Have you seen the Scottish Criminal Cases Review Commission's written submission?

Ken Macdonald: Yes, we have read that, and the Official Report of last week's meeting.

Roderick Campbell: Page 6 of the SCCRC's submission states:

"unless each data subject has given his explicit consent ... to disclose his sensitive personal data, or unless the UK Secretary of State for Justice has made the relevant order under condition 10, the SCCRC is not entitled to disclose the sensitive personal data of that data subject: it would be, in terms of DPA and the Human Rights Act 1998 (HRA), section 6, unlawful for the SCCRC to do so."

Do you agree?

Ken Macdonald: That is slightly against the view that we put in our submission, but we are looking at two ends of the spectrum. We suggest that the conditions that permit processing for the purpose of administration of justice can be satisfied, which would allow the SCCRC to do the processing that is proposed without the need to seek consent. The SCCRC's view is that that would be out with its legal powers so it would have to revert to a consent-based approach.

The potential solution is to review the proposed amendments in the bill and include a more explicit statement that the SCCRC has the power to produce reports and release information on appeals that are not proceeding.

Humza Yousaf: Good morning. You were here for the earlier evidence today. It was perhaps conveyed by the Justice for Megrahi panel that to alter article 2(b) of the 2009 order would, by the stroke of a pen, be enough to somewhat circumvent the Data Protection Act 1998 and consent would no longer be required. What are your views on that?

11:45
Ken Macdonald: We are rather concerned about the terminology that is being used, such as disapplying or circumventing the 1998 act. That is not the case. Anything has to comply with the
1998 act, and our role as regulator is to assist organisations to comply. We think that the provisions of the bill would assist the SCCRC in ensuring that any disclosures that it made were lawful and fair. Those two conditions—fair processing and lawful processing—are the primary ones that the SCCRC should meet. As we have suggested, there may be some debate about the legality of the processing under the current powers of the SCCRC, but the Parliament could alter that.

Ken Macdonald: To clarify issues that were raised in previous evidence sessions, while it is true that the 1998 act is reserved and can be amended only by the UK Parliament, the conditions for processing can be defined by, among other things, acts of any of the legislatures in the UK. If the Scottish Parliament passed an act that allowed the SCCRC to disclose, under the circumstances that the Parliament so wishes, it would allow—or partly allow—such disclosure to comply with the 1998 act.

The Parliament would have to recognise other principles of data protection and take cognisance of other, umbrella pieces of legislation, primarily the Human Rights Act 1998, and the ECHR as a whole. There are also some duties of confidentiality under common law.

Humza Yousaf: Thank you for that clarification.

The Convener: I think that what you are saying is that the 1998 act is not God-like—it cannot say, “Thus. No further”—and that the Scottish Parliament could, in primary legislation, intrude quite far into data protection by saying, “In these specific circumstances, we require the disclosure of X, Y and Z.” The application of data protection by the UK would then be limited. That is what I thought you were saying. If primary legislation of the Scottish Parliament said, specifically, “In relation to certain proceedings—or X, Y and Z,” that would temper the application of data protection.

Ken Macdonald: The 1998 act provides a framework in which it gives conditions for processing, among which are

“the exercise of any functions of the Crown ... or a government department”.

However, the functions of Government departments are also defined by their founding statutes. If the founding legislation for the SCCRC, as amended, included the ability for it to release information under certain circumstances, determined by itself or by politicians, that would allow the SCCRC to conform with the 1998 act, as regards the general principle of disclosure. As I said, the SCCRC would still have to consider aspects of human rights legislation and, in certain cases, it would have to respect third-party confidentiality.

The Convener: If primary legislation in Scotland said that the SCCRC was required to disclose information in X, Y and Z circumstances, that process would be necessary because of a legal obligation—imposed by the Scottish Parliament—and you would have to comply.

Ken Macdonald: Yes. The function would be set in law by the Scottish Parliament. It would be a function of the SCCRC and therefore the SCCRC would have to undertake the processing to comply with it.

The Convener: So, if the legislation were to put to one side all that stuff about third parties giving consent and people who may be connected to those who have given evidence to the SCCRC but are at arm’s length, there would be no data protection inhibitions.

Ken Macdonald: It would allow processing because those conditions would be met. One of the witnesses spoke about data protection being the red herring; that is right, but not in the way that they meant it.

Humza Yousaf: There would be other obligations in relation to sensitive personal data. Even if conditions X, Y and Z were met, there would be obstacles such as international and human rights obligations, and third parties.

Ken Macdonald: There are human rights and common law of confidence obligations that would have to be taken into consideration. The Parliament must of course ensure that the human rights obligations are met in the legislation that it passes.

With regard to foreign obligations, there is an exemption from disclosure where national security is involved, but the SCCRC would have to discuss that with UK authorities.

The Convener: I return to pursuing the point about proposed section 194M, under section 3 in part 2. Subsection (1) of proposed section 194M states that there is an exception if

“(a) the conditions specified in subsection (2) are met, and
(b) the Commission have determined that it is appropriate in the whole circumstances for the information to be disclosed.”

If the commission said that it is necessary in the whole circumstances that the information should be disclosed, data protection could not prevent that information from being disclosed.
Ken Macdonald: Yes.

The Convener: So we could change the wording from "it is appropriate" to "it is necessary", or insert the word "must".

Ken Macdonald: Sorry, convener—I will have to look at the precise wording that you are reading out.

The Convener: It is the proposed section on "Special circumstances for disclosure", at line 28 on page 4 of the bill. That is the red herring bit, but in a different way. It states:

"The Commission have determined that it is appropriate".

If that wording read, "it is necessary" or "The Commission have determined that the information must be disclosed", data protection would fly off for those particular facts.

Ken Macdonald: From reading it just now, it appears that it would give the commission the power. We would always say that the SCCRC commissioners would have to satisfy themselves that it was within their power and that it met their vires, but it would appear to be so.

The Convener: You have brought me to silence with that. I feel an amendment coming on that the Government may or may not like.

Ken Macdonald: I will just add that what we are discussing gives the legal basis for the power of the commission. We still have to look at the fairness of the processing. There are proposed sections—section 194N in particular—that help to satisfy that aspect of the 1998 act.

The Convener: What would that be?

Ken Macdonald: It would involve notifying those whose personal information may be disclosed. In the specific case that we are discussing, disclosure would apply not only to al-Megrahi but to other individuals, and in a wider sense, other people—not just the person who is the subject of the appeal—will have their information included in statements of reasons, so they should be notified that that information may well be disclosed.

Under the Data Protection Act 1998, such people would have the right to make representations—the bill specifically provides for them to do so—on why their personal information should not be disclosed, but it would be up to the commission to determine whether the public interest overruled that. A further step that the 1998 act allows such individuals to take is to go to court and ask the court to cease the processing.

The Convener: However, at the end of the day there is a tension between the commission saying, "This must be disclosed" and those with responsibility for data protection saying that they have to agree such a move. If the commission says that this or that must be disclosed, no one can object. An individual might apply to the commission, citing data protection and asking for certain information not to be disclosed, but the commission can simply say, "We don't care about that. We're going to disclose it in the statement of reasons." I guess that the final stop then will be court proceedings.

Ken Macdonald: Yes, that is a reasonable summary.

Alison McInnes (North East Scotland) (LD): Returning to what we discussed earlier, I assume that third parties and those affected cannot have a final veto.

Ken Macdonald: That is right.

The Convener: If we were to go down this route, they could successfully veto things from publication only through court order, interdict or whatever the procedure might be. Is that correct?

Ken Macdonald: Yes.

Alison McInnes: Would it be good practice to phrase the provision in such a way as to ensure, for example, that their agreement was sought?

The Convener: You do not have to do that.

Alison McInnes: Or could we merely notify third parties that the information is likely to be disclosed?

Ken Macdonald: The bill refers to the commission seeking representations. As the regulator, we feel that that is a fairer way to go about all this.

David McLetchie: I wonder whether, having dealt successfully with the Data Protection Act 1998, we can move on to the other barriers or non-barriers to disclosure. Will you elaborate for our benefit the ECHR issues that might act as a barrier to the release of certain information that we have been considering in a data protection context?

Ken Macdonald: Broadly, the barriers would come under article 8, which relates to the right to private life. Again, however, the Parliament and its officials would have to be satisfied that the legislation as framed met HRA requirements.

David McLetchie: But that would be only for the purposes of certification of competence at the outset. It would not preclude an individual relying upon that right to assert, at some later stage, that the legislation, this particular provision or whatever was ultra vires.

Ken Macdonald: Indeed. The individual would always have the right to make an application if they felt that the HRA or the ECHR had been
breached. However, that would be outwith our role as regulators of the 1998 act.

**David McLetchie:** How does the issue that was raised last week of privileged information between lawyer and client fit into this framework?

**Ken Macdonald:** The 1998 act contains an exemption for legal professional privilege. However, I would have to take my own legal advice as to whether that exemption applied at this stage in the proceedings, which, after all, would be rather beyond the initial court proceedings. Of course, the commission’s own review might include advice from its own advisers that might also be covered by an exemption.

**The Convener:** As there are no further questions, I give you the opportunity to comment on or draw our attention to anything that we have not asked about.

**Ken Macdonald:** With regard to a question that was asked in the first evidence session on what will happen when Mr al-Megrahi dies, I point out that the Data Protection Act 1998 applies only to living individuals. When someone dies, it falls. However, that does not mean that everything can be disclosed on Mr al-Megrahi’s death; for example, there would still be personal information about third parties who might still be alive and, with regard to Mr al-Megrahi himself, there might still be duties of confidentiality with regard to certain aspects of the information. Just because the 1998 act might have fallen in relation to Mr al-Megrahi’s information, that does not mean that we can push everything out. There are other legal considerations that the Parliament would have to take account of and which we would not be able to advise on because, of course, we can look only at the DPA itself.

12:00

**The Convener:** What duties of confidentiality would remain if Mr Megrahi were to be deceased?

**Ken Macdonald:** It is not really possible to say without knowing much more about what is in the papers held by the SCCRC. However, if anything had been passed to the commission on a confidential basis, it would have to take cognisance of that if he were deceased.

**The Convener:** I do not know whether that helps me.

**Jenny Marra:** Just for clarification, are you saying that you would have to look at the information to determine whether it was confidential? Would that be determined by the lawyer-client privilege that you have referred to?

**Ken Macdonald:** That is an issue. However, if information is given on the understanding that it is confidential, common-law duties will still apply. Of course, confidentiality can fall away over time and the commissioners as data controllers would have to take a view on that.

**Jenny Marra:** So on Mr Megrahi’s death the Data Protection Act 1998 might fall but his lawyer-client privilege would remain.

**Ken Macdonald:** There are certain overarching issues that would still have to be taken cognisance of.

**The Convener:** I thank the witnesses for waiting. I draw this session to a close and we move into private session.

12:01
Scottish Parliament
Justice Committee

Tuesday 21 February 2012

[The Convener opened the meeting at 10:11]

The Convener: The main item of business today is the third and—to the delight of members—final evidence-taking session on the Criminal Cases (Punishment and Review) (Scotland) Bill. Today, we will understand the bill. To bring the process to a conclusion, I welcome Kenny MacAskill, the Cabinet Secretary for Justice, who will make it all as clear as crystal to us. He is joined by two Scottish Government officials: Philip Lamont, the bill team leader; and Andrew Ruxton, a solicitor.

We will move straight to questions, as this is an evidence-taking session. No, it is not. Yes, it is. I am already confused. I invite questions from members. Humza, come to my rescue.

Humza Yousaf (Glasgow) (SNP): I am afraid that I cannot quite do that, convener.

Cabinet secretary, as has been alluded to by the convener, sentencing is a complex process to understand. Is there a danger that, in an attempt to fix the anomaly that was thrown up by Petch and Foye, the amount of complexity has been increased? If so, might that erode people's confidence in the sentencing process and the justice system?

The Cabinet Secretary for Justice (Kenny MacAskill): We do not think so. We accept that this is a complex area of law, but we do not think that the provisions are unnecessarily complex. They exist within a context and they seek to address a specific issue. It should also be remembered that, in six years, there have been 75 cases in which a non-mandatory life sentence has been given.

The provisions would give back to the courts the discretion to determine that non-mandatory life sentence prisoners will become eligible to apply for parole only at a point when the court considers that they have served an appropriate period of imprisonment to satisfy the need for the punishment of the offender. It should be remembered that judges in the High Court, who have the power to sentence offenders to imprisonment for life, will be familiar with those issues. Indeed, that was a matter that was commented on in relation to Petch and Foye.

We believe that the bill provides a clear framework within which judges must calculate the punishment part of a non-mandatory life sentence. We are making the law easier to understand. The provisions provide clear limits within which the judge can set the punishment part, and they seek

Criminal Cases (Punishment and Review) (Scotland) Bill: Stage 1

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We believe that the bill provides a clear framework within which judges must calculate the punishment part of a non-mandatory life sentence. We are making the law easier to understand. The provisions provide clear limits within which the judge can set the punishment part, and they seek
to remove the areas of uncertainty that gave rise to the Petch and Foye decision.

10:15

Humza Yousaf: Confidence in the sentencing structure gets eroded when people know that somebody who has been found guilty of a particular crime and has been sentenced to 10 years will be let out a lot earlier than that. How does the bill seek to address that, because there will still be an element of arbitrariness? The punishment part will still be 50 to 100 per cent of the sentence that has had the protection element stripped out, so how will that help to rebuild confidence in the sentencing structure? How can people be assured that somebody who is given 12 years will serve closer to that?

Kenny MacAskill: First, there are difficulties, which is why the High Court flagged up the issue. It is clearly an anomaly that somebody who is on a non-mandatory life sentence may be eligible for parole at an earlier date than somebody on a determinate sentence, as was the case in Petch and Foye. That caused a lot of consternation and upset, albeit that we caveated that by making it clear that those people were on orders for lifelong restriction.

The first thing to point out is that some provisions have to be included in the bill because of European convention on human rights requirements relating to non-mandatory life sentences. Such sentences are necessary but are used sparingly rather than given out willy-nilly. As I said, there have been 75 in six years. However, the European Court of Human Rights has made it clear that the security element must be viewed separately from the punishment part of the sentence. That left us facing difficulties in Petch and Foye because, when the security element is taken out, the punishment part is less than what would have been the case for somebody on a determinate sentence who had been given a fixed period and not a non-mandatory life sentence.

The bill gives back to the court the power to impose what it regards as an appropriate punishment part, whether 50 or 100 per cent. That will be left to the court’s discretion, but it will still be subject to the security provisions. However, the punishment part of the sentence will be imposed according to what the court wishes, which I think will probably be more in line with what the public expect.

The Convener: I just make it plain that we are asking questions on part 1 of the bill at the moment. Before we move to part 2, I declare that I am a member of the Justice for Megrahi campaign. However, we are still on part 1. I was not sure whether Graeme Pearson had a question, so it is John Finnie first, then Graeme Pearson, then Alison McInnes.

John Finnie (Highlands and Islands) (SNP): Good morning, cabinet secretary. You largely covered this issue, but I want to ask again about judicial discretion, because the public place great store on decisions being made after all the facts have been heard. Clearly, part of that discretion is the opportunity to impose a non-mandatory life sentence. Do you believe that the bill enhances judicial discretion? If so, how? Alternatively, is the bill neutral with regard to judicial discretion? You said that, following what happened in the Petch and Foye judgment, the bill is reinstating judicial discretion.

Kenny MacAskill: I think that the bill restores judicial discretion. We fully accept that the interpretation that the courts came to in Petch and Foye resulted in people having a lesser punishment part and being eligible for parole at an earlier point than the sentencing judge had intended. Moreover, the sentencing judge had taken the view that, because of the security risk that the individual prisoner posed to the public, they should be given a non-mandatory life sentence. Such sentences are used sparingly, but they reflect the risk that the judge feels that the convicted person poses to the public. That is why the prisoner is not given a determinate sentence in which they would be eligible for, and would be required to be given, parole at some stage.

The bill restores to the judiciary the ability to bring in a non-mandatory life sentence because of security risks and at the same time impose a punishment part of the sentence, which is the period that the judge views as appropriate before the prisoner can apply for parole. Clearly, in terms of comparative justice, we faced an anomaly whereby somebody who was given a fixed determinate sentence would serve longer than somebody whom the court clearly viewed as a serious risk to the public but who would be eligible for parole at an earlier stage. Therefore, we are restoring judicial discretion, maintaining the ability of a judge to impose a non-mandatory life sentence for security purposes, and restoring their ability to get a clear and—probably from their perspective and from that of the public—adequate punishment period.

Graeme Pearson (South Scotland) (Lab): The committee found it difficult to understand the logic and thought processes that you have just explained so well. My question is about the process. When the introduction of the bill was being considered, was it thought possible that a judge could decide, on the day, the earliest date of release, so that witnesses and victims would know what it was before they left the court? In my experience, and according to what I have been
told by constituents, confidence in the system has often been breached because, although people thought that they understood the process in court, the accused—the convicted person—appeared in the community much earlier than they had anticipated. When you were deciding on the technical process that you have just described, did you think that it might be possible for a judge to give a date until which such a person would not be in the public gaze, or was that deemed inappropriate or unfeasible?

Kenny MacAskill: You raise an extremely important point. The bill is meant to be an immediate fix to Petch and Foye. I have a great deal of sympathy for your point and we are discussing it with the judiciary. Caveats need to be put on them, through either Executive release or other means within the discretion of the Government or, indeed, the Scottish Prison Service. We are seeking to progress the issue in parallel.

We took the view that, given the clear problems caused by the Petch and Foye decision, we needed an immediate solution. The timescale means that it is not possible to resolve in the bill the issue that you raise, but your point has already been addressed, to some extent, in more serious cases when a clear punishment part has been disclosed by the judge in the court. I think that misunderstandings are more likely to occur in relation to lower tariffs. Those who are legally qualified understand the issue, but victims and witnesses often do not. Although the point that you have raised is not part of the bill’s provisions, we are discussing it on an on-going basis with the judiciary in order to see what can be done. Perhaps the judiciary could issue guidance or further arrangements could be made.

Graeme Pearson: Will those discussions come back to the Parliament in the foreseeable future? Is that the longer-term solution?

Kenny MacAskill: I would like to see it done as early as is practical. Obviously, it is fundamental that issues such as change in judicial high office are signed off by the Lord Justice General, so I have had discussions about that. I can give an assurance that, if we can, we will seek to reach an agreement with the judiciary on what can be done. We are discussing the issue with the judiciary and we will bring it back as soon as we can.

Alison McInnes (North East Scotland) (LD): You have spoken about simplifying the situation and restoring it to its previous status. We heard evidence from the Faculty of Advocates that this was complicating the issue significantly and interfering with judicial independence, and that there were concerns about the extent to which it was appropriate to seek to restrict, control and direct the exercise of judgments. Do you want to respond to that?

Kenny MacAskill: As I said, this is a complex area of law, but the bill focuses on matters that, although they are few in number, are significant, such as Petch and Foye.

The bill addresses the position that has come about through a variety of matters, including the European court decision on security aspects and the fact that we have to deal with matters in our jurisdiction to get an element of comparative justice between discretionary life sentences and determinate sentences. We think that the bill will restore the ability of the judiciary to deal with the issues. The public were concerned when, as a result of the Petch and Foye appeal, there was a significant reduction in the punishment part. The ability to impose between 50 and 100 per cent of the remaining sentence as the punishment part restores discretion for the judge. It ensures that there is comparative justice with someone who is on a determinate sentence and that factors such as the gravity of the offence and any previous convictions that the accused has are taken into account. The High Court sought to introduce that through its interpretation of the rules, but it was taken away as a result of the Petch and Foye case. The bill restores the ability of the judiciary to impose non-mandatory life sentences in which the punishment part is not less than the period that would be served under the determinate sentence that could have been given.

Alison McInnes: I understand what you are saying, but are we not becoming rather formulaic and therefore tying the hands of judges?

Kenny MacAskill: We have to do that because, if we did not, the situation might be worse. If we simply told judges that they could impose whatever sentence they liked, within a matter of months there would be lots of appeals from people saying, “This is not the right tariff.” After all, those matters are not laid out specifically in legislation—they are dealt with by the High Court. If a judge simply gave a certain period of time for a heinous offence, but without being able to give a rationale for that, that would cause greater problems. We think that the bill gives judges the ability to strip out what is viewed as the security period and then, on the basis of previous convictions, the nature of the offence and the danger to the public, to impose a punishment part that gets up to at least parity with, if not beyond, the period that the person would have served under a determinate sentence, but with the protection of the public element that goes with a non-mandatory life sentence. Those sentences should be few and far between but, when they are given, the individuals who are involved will usually be a huge and
significant risk. We must give the judiciary the power to give the appropriate sentence and tariff.

**Jenny Marra (North East Scotland) (Lab):** The bill is framed within the strictures of the European convention on human rights. Is the complexity of the bill primarily down to the constraints of the ECHR or the way in which Scots law has evolved?

**Kenny MacAskill:** It is both. We must accept that ECHR law makes it clear that the security aspect is separate from the punishment part and should not be included in it. We formally accept that. Non-mandatory life sentences are not given routinely, as is shown by the fact that there have been 75 in six years. It is necessary to take account of the ECHR. Equally, we have to look at our domestic law and consider how to get an element of parity between a non-mandatory life sentence and the determinate sentence that would be given. It is not an either/or situation—it is both. We need to take the ECHR into account but, equally, we need to ensure that, in our judicial system, the punishment part properly reflects what a judge thinks is appropriate in the circumstances when a non-mandatory life sentence is given. That could include the nature of the offence, which in many instances can be heinous, the danger that is posed to the public and any previous convictions.

**Jenny Marra:** Do other legal jurisdictions that are subject to the ECHR have a sentencing mechanism that is more understandable to the public?

**Kenny MacAskill:** I cannot necessarily answer that. Other systems operate on a codification basis, and I do not know what the equivalent is for a non-mandatory life sentence. There are whole-life tariffs south of the border and they exist here.

The bill is about sorting out a problem that has arisen in Scots law, partly because of the strictures of the ECHR, although we do not blame that. We and the courts think that the European Court has taken a reasonable position. The bill is about ensuring that our courts are fit for purpose when we must deal with circumstances in which people are given a whole-life sentence for the public’s safety, albeit that such people can apply for parole. Before they apply for parole, we must ensure that they are seen to have served an appropriate period as punishment.

10:30

Under the current legislation, the difficulty is that—as in the Petch and Foye case—it is likely, if not inevitable, that such people would get a lesser punishment part and would be seen by the public as serving a shorter sentence before being eligible for parole than they would have served with a fixed determinate sentence, although the court thought that such people should be kept on a whole-life licence.

It is not a matter of contrasting the situation with anywhere else or complaining about any other jurisdiction; it is about doing what is right, so that our judges have the power to impose whole-life sentences without the unintended consequence that the punishment part is less than that under a determinate sentence.

**The Convener:** I think that I have understood. I will hold that thought. I call Roderick Campbell, but I might not listen to him if he is going to confuse me.

**Roderick Campbell (North East Fife) (SNP):** That will probably happen.

I will put one point from page 3 of the Faculty of Advocates submission, which says:

> "if the Court has already, in fixing the notional determinate sentence, stripped out the element of public protection, the period required to satisfy the requirements of retribution and deterrence (as the judge perceives them) should be the same as the notional determinate sentence, and—as a matter of internal consistency—the Court should fix the part at 100% of the notional determinate sentence. Whether this is in fact the way the amended legislation would be interpreted and applied by the Court remains to be seen."

Do you have any comments on that?

**Kenny MacAskill:** Our view is that, as is clear in the bill, the court will be able to set the percentage at between 50 and 100 per cent. Given the nature of the individuals involved, the court might often go to 100 per cent, but we do not wish to fetter judicial discretion. We will leave the question to judges, because such matters are based on the facts and circumstances. The facts can be individual or collective—they can concern the nature of the offence, previous convictions or the risk that is posed. Judges would consider all such issues. As I said, the court might go to the maximum—that would be a matter for it and we would not wish to fetter its discretion. That is why the percentage is between 50 and 100 per cent.

**Roderick Campbell:** I have a smaller point about unintended consequences. I know that your view is that the bill is not that complex, but a lot of witnesses have suggested that it is complex. One of their concerns is that that complexity might give rise to unintended consequences. Do you have any thoughts on that?

**Kenny MacAskill:** Our view is that if we do not legislate the public will be aghast at what they perceive as unacceptable punishment parts of sentences and appeals, and the judiciary will see sentences reduced, as in the Petch and Foye case. That will cause great concern.

If we left it up to each judge to impose the punishment part as they saw fit, the problem of the
lack of comparative justice with determinate sentences would remain. If a judge could not detail the basis on which he set a sentence by stripping out, there might be a challenge on the tariff. The challenge would be on the basis that Mr A, who appeared one week, was given 10 years, whereas Mr B, who appeared the following week, was given only six years, after which the position would have to be clarified.

The bill provides a basis on which to set the tariff and on which the judge can lay down the reasons why he is imposing the particular punishment part, such as previous convictions or the nature of the offence.

Humza Yousaf: I will raise a brief point of process. If we assume that the bill passes all its legislative hurdles, how will the complexity of the new sentencing regime be explained to the judiciary and to sentencing sheriffs?

Kenny MacAskill: Through the Judicial Studies Committee. Correctly, the judges and sheriffs have their own body to separate them from influence from Government or anywhere else. The Judicial Studies Committee will work through the process of how that is detailed. Whether Sheriff Tom Welsh, the Lord Justice General or the Lord Justice Clerk deals with that, you can rest assured that the judiciary will ensure that everyone who deals with those matters is cognisant with the new regime.

The Convener: That would be quite a good subject for law students to study in their tutorials if and when the bill is enacted.

Jenny Marra: Given that the process of sentencing is about public confidence in punishment and in justice being done, is there any avenue open to you for giving the public more confidence in the sentencing structure and at least a bit of understanding of how the process works?

Kenny MacAskill: There is no such avenue without primary legislation. That relates to Graeme Pearson's point. There are matters that could be dealt with through the courts, which we are discussing with the judiciary. I welcome the fact that the judiciary have been making it quite clear in pronouncing sentence what part is the punishment part, so that people are in no doubt about the sentence that is imposed. We are discussing those matters with the judiciary.

The issue is about preserving judicial discretion and judicial independence, except where that is properly legislated for, and encouraging judges to do what is good practice among many on the bench, which is to make it quite clear what the sentence means. Often, the accused, the defence, the prosecution and the person who is presiding know what the sentence will mean in terms of the period of imprisonment; it is simply members of the public who do not.

We are working on that, but I am not aware of any way in which we could deal with the matter without primary legislation or without building on the positive discussions that I have had with the Lord President.

The Convener: It would surely be open for the Crown Office to speak to the victim—who might be sitting in court or who might be the primary witness—to explain what the sentence means. There should be some management of victims in court process.

Kenny MacAskill: I think that there is. I have experience of having to meet victims and I know that the Lord Advocate does that. To be fair, in my experience, advocate deputes will frequently seek to do that. Recently, we have had tragic cases in which it seems to me that the victims' families have welcomed the court making it quite clear how it viewed the devastation that they had been caused and being quite specific about what the punishment part of the sentence would be, with the result that they were quite clear about what the sentence meant in terms of the period of imprisonment.

The Convener: Perhaps there will need to be longer explanations if and when the bill is enacted.

Kenny MacAskill: That might be the case. I am happy to discuss such matters with the Lord President, the Lord Justice Clerk and the Judicial Studies Committee. As Mr Pearson has said today and previously, there is more that can be done. We will seek to work with the judiciary to reach a common solution. There are issues that cause difficulties for them. It is not that there is a reluctance on their part. It is a matter of making it clear how best we proceed to ensure that we keep both sides of the scales of justice balanced.

Graeme Pearson: I have two points. On the matter that you have just alluded to, is it feasible that some form of aide-mémoire could be created for witnesses and victims so that in the cold light of day, after the event, they would have the chance to read things over? I do not think that many families in such circumstances are in a fit state to take in the complexities of what you have explained. The committee certainly struggled hard to do so for some weeks and no sooner had it grasped the concept than it lost it again, so an aide-mémoire might be helpful.

My second point is about the perceived injustice that arises when someone pleads guilty in circumstances in which they could be described as having been caught redhanded. On the strength of that plea, they benefit from the automatic application of the process of discount. Is there any way in which that could be re-examined? From a
public viewpoint, it can cause great distress for families, who perceive that a discount is being offered to someone who had no alternative—as many people would see it—but to plead guilty. I understand the complexities around that issue, but I wonder whether there are any thoughts about how to resolve it.

Kenny MacAskill: Your first question relates to the issue of good practice. The Crown operates the victim information service, but I can assure you that we will review the procedures as we progress our proposed victims and witnesses bill. Those matters were part of our discussions with all the stakeholders; indeed, I attended a Victim Support Scotland event yesterday.

We recognise that progress has been made, but we do not underestimate the journey that has still to be travelled. I am happy to enter into discussions with the Crown on that point, although I understand that, in accordance with current good practice, a lot of that information would be available.

I am happy to discuss with the judiciary the second issue that you mentioned. However, the Lord Justice Clerk recently pronounced that he did not see the discount as necessarily being automatically available.

The Convener: Before I move on to part 2 of the bill, you mentioned the proposed victims and witnesses bill. I take it that that bill will deal with liaising with victims and witnesses in the court process. When might it come before the committee?

Kenny MacAskill: I do not think that it will come before the committee this year. There is a European Union directive coming in that states that those matters must become statutory. I had the benefit of attending the Victim Support Scotland conference yesterday, and I know that Scotland has a remarkably good system and victim support service. That is not uniform throughout Europe, and we should be proud of what Victim Support Scotland does, especially given the number of volunteers that it has.

There are glitches, and although we have made great progress on victims, the Lord Advocate wants us to make greater progress on witnesses. The EU directive says that we must have a legislative basis for what we do with victims and witnesses.

As a Government, we believe that we should positively embrace that directive and make a virtue out of a necessity. We are seeking to begin a consultation to ensure that we get matters as correct as we can, which is why we are speaking to the Crown, to Victim Support Scotland and to all the agencies such as Rape Crisis Scotland and Women’s Aid. We will consult on what goes into the bill, which is likely to be introduced in the third year of the current parliamentary session; it will not be introduced this year.

The Convener: Thank you for that, cabinet secretary—I asked just because you mentioned it.

We will move to part 2 of the bill. I will kick off, if no one else wants to come in. The Justice for Megrahi campaign believes that we do not need that part of the bill, and that the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 could simply be amended to remove the requirement for the consent of persons who provided information to the Scottish Criminal Cases Review Commission. The commission could then publish the report undoctored and unedited, as it were, and not redacted in any way. What is your comment on that?

Kenny MacAskill: We do not accept that—obviously, there is conflicting legal argument in that regard. We have always been committed to being as open as possible on the al-Megrahi case. The bill clearly goes beyond that case and deals with other situations, although those are relatively few in number.

We want to ensure that the bill provides for a full parliamentary role, and we are seeking to assist the commission with that. We can say, in analysing the position, that we must take account of the general limits on competence that are placed on ministers in the Scottish Parliament under the Scotland Act 1998.

Under section 54 of the Scotland Act 1998, those limits apply equally to subordinate legislation and primary legislation. The limits cover reserved matters such as the subject matter of the Data Protection Act 1998 and the European convention on human rights. We therefore disagree with the notion that it would be possible for Scottish ministers to have wider powers under subordinate legislation than those that exist under primary legislation—indeed, subordinate legislation is restricted further than primary legislation by the statutory powers that enable it to be made.

Therefore, it is our position that the bill is the most appropriate vehicle to achieve our policy intention, in providing a framework for the Scottish Criminal Cases Review Commission to consider whether it is appropriate to disclose information—or not, as it might decide.

10:45

Graeme Pearson: We are told that a book will be published later in the year, which, by all accounts, will rehearse many of the issues to do with disclosure that you are struggling with. Do you have a view on the Government’s current
inability to release information, given that a private individual will do that work on your behalf in a book that is published for profit?

Kenny MacAskill: It is not for me to hypothesise about what might be in the book, nor will I speculate about what is in the statement of reasons, which neither I nor the Government has seen. I have given the legislative position. We are doing what we think is appropriate, to show the willingness that we have always had to be as open as we can be. It is not appropriate for me to comment on or speculate about what other people might write.

The Convener: No, and the issue is not relevant to the bill. Let us accept your arguments about subordinate legislation and amending the 2009 order. Section 3(3) will insert into the Criminal Procedure (Scotland) Act 1995 new section 194M, “Further exception to section 194J”, under subsection 1(b) of which there will be an exception if

“the Commission have determined that it is appropriate in the whole circumstances for the information to be disclosed.”

We heard evidence that replacing the word “appropriate” with “necessary” would overcome data protection prohibitions that might be in place. What is your view on that?

Kenny MacAskill: We are aware of the comments of the assistant commissioner for Scotland and Northern Ireland in the Information Commissioner’s Office, which do not reflect our understanding. We understand that the assistant commissioner will meet the Scottish Criminal Cases Review Commission. The committee might want to take more evidence on the issue or seek further clarification. We stand by our position, which is that what you suggest would not be possible. When the assistant commissioner has had the discussion with the commission you might find that the position has changed.

The Convener: I infer from what you said that it has changed. We can follow that up.

Is it the case that the United Kingdom Government could make an order that was specifically applicable to the Megrahi case, which would allow data protection to fly off—as it were—in circumstances in which it would not otherwise do so, in relation to the statement of reasons?

Kenny MacAskill: I understand that the answer is yes. I have had a brief discussion with Ken Clarke, the purpose of which was simply to open the door to discussions between his office and the Scottish Criminal Cases Review Commission. I understand that those discussions are going on. Our understanding is that what you described is possible. Arguments might be put forward south of the border as to why such an approach would be inappropriate, but our advice is that it is possible, in theory.

The Convener: I am sorry, I was slightly distracted then. Did you say that discussions are going on between the UK Government and the commission, rather than with you?

Kenny MacAskill: Yes, because it is not for me to publish—

The Convener: No, I meant discussions on the order that the UK Government could make, which would lift prohibitions on the publication of data in the statement of reasons.

Kenny MacAskill: Those are ultimately matters for the commission to address with the Lord Chancellor. The Scottish Government raised the issue with him—I spoke to him at a meeting and I wrote to him—but given that the information would be published by the commission, and given that the commission has the information at its fingertips, whereas neither I nor anyone else in the Government is aware of it, it seems appropriate that the discussions should be between the people who have the power and the people who have the knowledge.

The Convener: How favourable is the Westminster Secretary of State for Justice, Ken Clarke, to such an approach?

Kenny MacAskill: He indicated a willingness to look at it; beyond that I cannot speculate. You would need to ask him.

The Convener: We have not done that, which I think was remiss of us. I think that the committee would want to know Ken Clarke’s view. Do members agree?

Members indicated agreement.

The Convener: We should pursue the matter in evidence.

Roderick Campbell: When Dr Swire gave evidence on 7 February, he said:

“The professional advice that I have received is that it would be perfectly possible for other individuals affected by the case to approach the SCRC to request that a further appeal be granted. In that event, I understand that number 1 in the pecking order, as it were, would be Megrahi’s family”.—[Official Report, Justice Committee, 7 Feb 2012; c 907.]

The committee has received some advice that suggests that there is a possibility of a further appeal. If Mr Megrahi is no longer on the scene, the data protection issues fall away. I know that this is a difficult area to comment on, but do you have any comments on that?

Kenny MacAskill: It would be open to Mr al-Megrahi or any other party to ask the commission to consider making a further reference to the High Court under section 194B of the Criminal
through the courts, rather than being something that might be possible for this specific issue to proceed. It would not matter whether Mr al-Megrahi was in Scotland or Libya or, indeed, if other matters applied. It is quite clearly a matter for the courts, and it would be inappropriate for me, as the Cabinet Secretary for Justice, to comment further.

Roderick Campbell: All that I am suggesting is that, to some degree, the second part of the bill is dealing with a specific issue and, if we take the comments of Justice for Megrahi at face value, it might be possible for this specific issue to proceed through the courts, rather than being something that the Scottish Government would deal with.

Kenny MacAskill: There is a lacuna in the law; that is why we have made the bill general rather than specific. Although the number of cases in which an appeal is subsequently abandoned are relatively few, it is felt that there should be the ability for information to be published, except in specific circumstances, which is why we have rights for the Crown.

Nobody would deny that the bill affects Mr al-Megrahi, but it is worth having that legislative right, in any event, because there might be other instances further down the road—one would hope that they would not be as high-profile or capable of causing as much devastation as Mr al-Megrahi’s case—in relation to which there should be an opportunity to have the information published. The Government is acting to put that legislative process in place, as well as ensuring that, with regard to Mr al-Megrahi, we do what we can to be as open and transparent as possible.

The Convener: In relation to the prospect of the reactivation of the appeal, there was a piece of emergency legislation—I cannot remember its name—that meant that there was a double test for the Scottish Criminal Cases Review Commission. The two tests were that there had probably been a miscarriage of justice and that it was in the interests of justice that there be a referral to the High Court. There was another part to that, which was that the High Court could refuse a referral from the commission on the basis that the appeal was not in the interests of justice.

Lord Carloway has recommended that that hurdle be removed. When might that be legislated on? If, in a year’s time, someone has stepped into the shoes of the deceased al-Megrahi and asked for a referral, and the commission has said that the request passes the double test, the High Court could still refuse it, if that provision is still on the books.

Kenny MacAskill: I recently sent a letter to this committee and other stakeholders indicating our intention to consult on Lord Carloway’s review. We have made it clear that we are not minded to accept the position of the Faculty of Advocates on a royal commission. We anticipate that we will perhaps come back to the committee with greater detail on the issues around the Carloway review at the end of this year or the beginning of next year.

The Convener: I would like to pursue this. You do not have to accept all Lord Carloway’s recommendations; you need implement only some of them. With respect, the issue that I am talking about is one recommendation that could be implemented quite quickly. I take it that it is an amendment to primary legislation. Are you minded to accept that particular recommendation on the High Court? If you are so minded, when might you introduce legislation to amend the primary legislation?

Kenny MacAskill: I have made it clear that Lord Carloway’s review is a welcome contribution to updating the law of Scotland to deal with not just Cadder but other matters, from detention or arrest through to final appeal. The review has a coherent logic in that regard, and that is why it is important that we consult on it. Lord Carloway has told me that he does not regard it necessarily as a package, but I think that it is an A to Z review of the law in Scotland, if I can put it that way. We will consult on the review and I would prefer not to cherry pick aspects of it. We are intent on bringing its proposals into legislation as soon as we can. They do not fall within the procedures for emergency legislation—I think that Lord Carloway accepted that the emergency legislation that we introduced in the previous parliamentary session has provided us with sufficient security as we go forward. That said, and given where we are, it is incumbent on us to proceed as expeditiously as we can. That is why, after we consult on the issue, we intend to legislate at the end of this year or the beginning of next year, depending on the time available for the legislative process.

The Convener: I just want to be clear about the position in cases in which the double test has been passed and the Scottish Criminal Cases Review Commission has made a referral to the High Court. Are you minded to remove the High Court’s test on whether it is in the interests of justice that the appeal proceed, so that the High Court must take a referral from the SCCRC?

Kenny MacAskill: I have to take the matter out to consultation, but I can be quite clear that there is nothing in Lord Carloway’s review that causes me concern. I welcome the review and believe that it will significantly advance the law of Scotland. It is a coherent and logical review of the legal process from arrest through to final appeal. I am comfortable with everything that Lord Carloway has proposed in that regard.
The Convener: I think that there may be different views in the committee about the proposals on corroborations, majority verdicts and so on, which gave us some concern. However, that debate is for another time.

Alison McInnes: Part 2 of the bill is well intended, but I do not think that it will achieve what most people want, given that it is quite clear that consent will not be forthcoming due to the complexity of the Megrahi case. Surely it would be more productive to pursue an order with United Kingdom ministers. Would that not be more effective?

Kenny MacAskill: Well, we are doing both. As I said to the convener, I have spoken to Ken Clarke about the issue and have formally written to him about it. Given that those with the power and those with the knowledge should be involved, discussions should take place between Ken Clarke and the SCCRC; if either wishes me to intervene in any shape or form, I am happy to do so. However, Ken Clarke has shown a willingness to engage and the SCCRC is happy to do so on its own volition. I think that that deals with the second aspect of your question.

On the first aspect, I have always said that I cannot speculate about what is in the statement of reasons or about what people might or might not do; all I can do is stand by the Government’s position, which is that in all matters relating to al-Megrahi and Lockerbie we have sought to be as open and transparent as possible. We have reached a position whereby we require the bill’s provisions. It is clear that there will be difficulties to be surmounted thereafter, but we believe that the bill confirms our commitment to be as open and transparent as possible. Moreover, we are taking the twin-track approach that you have suggested.

Alison McInnes: I am just a little puzzled, because you thought that the matter was important enough to draft a bill to address it, but your relationship with and approaches to Ken Clarke seem quite tentative—you seem quite willing to take a back seat and leave it to the SCCRC. I feel that it would be more helpful if you were able to be more proactive in that regard.

Kenny MacAskill: With respect, I do not think that I can be, because I do not know what is in the statement of reasons and I cannot speculate on what may or may not have to be redacted. I can go to Ken Clarke on behalf of the SCCRC, as I have done, and indicate that it has reservations about the matter. He has shown willingness to engage on the issue both verbally with me and in response to a written offer of a meeting with the SCCRC to discuss the issue with it. The SCCRC must discuss the matter with Ken Clarke because it knows what is in the statement of reasons, as do a few others—eight people, I think—but I certainly do not, nor does any other member of the Government. I cannot possibly have a meaningful discussion with Ken Clarke about a document that I have never seen and information that—I do not know—I might have to redact. I cannot have a worthwhile discussion with Ken Clarke in that regard.

I can give you an assurance that, if the SCCRC told me that Ken Clarke was not showing willing, or if Ken Clarke told me that the SCCRC was being unnecessarily obstructive, I would seek to intervene. However, neither of those things has happened. Ken Clarke, to his credit, and the SCCRC are entering into discussions. The reason why it has to be done by the SCCRC is that it knows what is in the document. I do not know and I cannot have a meaningful discussion about something that I have never seen. I cannot speculate on something of such size and complexity.

11:00

Jenny Marra: I want to return to the evidence that we heard from the assistant information commissioner that data protection could be overridden. Given the commitment that your Government has expressed on many occasions to openness and transparency on the Lockerbie bombing and conviction, which you have just reiterated, is not what the assistant information commissioner said about data protection being overridden music to your ears?

Kenny MacAskill: If only it were true that, simply through subordinate legislation, the Scottish Government could override primary legislation. You might find that I would bring statutory instruments before the Parliament on a variety of matters to provide us with the opportunity to become an independent land; to avoid becoming involved in foreign wars that cause huge damage; and to disassociate us from the huge pain and suffering that cuts in social security are causing to those who suffer from disabilities. However, that is not so. The committee might want to see the outcome of the discussion between the assistant information commissioner and the SCCRC. If I could, I would in many instances seek to subvert the Scotland Act 1998—if I can put it that way—through subordinate legislation, but I cannot.

The Convener: That was impassioned. I thank the cabinet secretary for his evidence.

I suggest that we write to Ken Clarke to ask whether he is minded to make such an order, if requested, and to the assistant information commissioner and the SCCRC to ask about the outcome of their discussions. Do members agree to do that?
Members indicated agreement.

11:02

Meeting suspended.
Written submission from the Association of Chief Police Officers in Scotland

I refer to the correspondence dated 7 December 2011 regarding the above subject and can confirm that this has been considered by ACPOS and I can now offer the following by way of comment.

Part 1 – Punishment part of non-mandatory life sentences

Does the Bill provide sufficient clarity in determining the punishment part in discretionary life sentences and orders for lifelong restriction?
Yes – in respect of the punishment part on non mandatory life sentences, no issues were identified with the suggested changes. It appears a fair way to approach this issue, allowing individuals to apply for parole earlier based on the punishment part of their sentence. It does not allow automatic early release and therefore the safeguards that were present regarding the public protection aspect of any sentence still remain and should not be diluted as a result of this, as this would still be a crucial aspect when the parole board are considering early release. The Bill also provides courts with discretion to determine that discretionary life sentence prisoners and OLR prisoners will only become eligible for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.

Part 2 – Disclosure of information obtained by SCCRC

Is the framework provided in the Bill appropriate for the purpose of the SCCRC determining whether it is appropriate to disclose information?
ACPOS agrees that the Bill meets the Scottish Government commitment to being as open and transparent as possible and leaves it to the Commission to decide whether it is appropriate to disclose information. The suggested framework in relation to the disclosure of information obtained by SCCRC causes no issues. It ensures that all interested parties are informed that information will be disclosed and give the appropriate time to respond to a decision to disclose, where the owner of the information has concerns around such disclosure.

The only matter raised relates to the disclosure of sensitive intelligence which the Crown would be aware of but which wasn’t disclosed due to the sensitivities around source protection at the time of the trial. There is an assumption that as it was not disclosed from the outset for the reasons detailed, it would not have been available to the SCCRC and as such would not be considered by them for further disclosure, particularly in the case of intelligence that has not been disclosed following an application by the Crown for non disclosure in the public interest, under the Criminal Justice & Licensing (Scotland) Act 2010.

Will the requirement for the SCCRC to consider relevant reserved statute such as the Data Protection Action 1998 and the Official Secrets Acts impact on the disclosure of information?
There are a number of implications with regard to the Data Protection Act 1988 prohibiting the unauthorised disclosure of personal information. There may be similar issues as regards to the Official Secrets Act 1911-1989, which will require to be considered by the legislative draftsmen.

Are there any other issues that you would like to draw to the attention of the Committee?

ACPOS is heartened to note that in Part 3 there is not an automatic right for information to be released and that SCCRC must undertake consultation with the affected persons, The Lord Advocate and additional persons who ‘have a substantial interest in the question of whether the information should be disclosed’. ACPOS supports and endorses the fact that the explanatory notes state ‘the Lord Advocate will always be notified’.

ACPOS is concerned however that under the proposed legislation, the SCCRC, whilst they are required to consult with all relevant parties including the Chief Constable, have an unfettered legal right under the proposed S / 94 (M) (I) contained in Section 3 of Part 2 of the Bill to release the information.

There is also no proposed right of appeal contained in the legislation against a decision to release information and ACPOS suggests that a statutory right of appeal should be considered or alternatively a right for any dispute regarding the release of information to be considered by the Scottish Information Commissioner.

Ruairaidh Nicolson
Secretary, Crime Business Area
13 February 2012
Written submission from Matt Berkley

Part 2

1. In July 2009 I attempted to warn Mr MacAskill by email, through his adviser Dr Burgess and in person as a Lockerbie air crash victim’s relative, that the situation risked inducing the prisoner to drop his appeal.¹

2. In September 2009 I compiled information from official documents for the Scottish Parliament Justice Committee relevant to the question “Did the Justice Secretary take adequate care, through promptness of action and appropriate information to the appellant, to avoid influencing the court process?”

3. Having watched the evidence sessions on Part 2 of the Bill, I would like, with the Committee’s permission, to make some observations.

4. The Committee might consider, if it has not already done so, using the opportunity of questioning Mr MacAskill to

   a) scrutinise the Scottish Government’s performance on its commitment to maximum openness on the Megrahi case, and
   b) consider what principles should be applied in decisions relevant to that commitment.

5. As I understand it, the Committee’s main purpose is scrutiny of Scottish Government policies and performance.

¹ Email to the Cabinet Secretary 6 July 2009:

“Scottish Ministers have expressed a preference for the judicial process in the al-Megrahi case to continue. However, he could drop his appeal at any time for any reason, well- or ill-founded.”

“The current situation - the decision being in your hands without an indication of your thinking - could act as a kind of inducement for the prisoner to drop the appeal. That might be especially likely if he thinks that the timing of the ratification was related to the start of the second appeal, or otherwise thinks that for political reasons the situation is special in his case.”

“It would be unfortunate if the outcome for Scottish justice were to be decided by one prisoner’s ill-informed gamble.”

“The inducement to drop the appeal is still there even if the Scottish Government does not explicitly say "if you drop the appeal we will let you go to Libya”. The inducement is already implied by the situation, and not avoided by avoiding the explicit statement.”

http://www.mattberkley.com/warningmacaskill.htm

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6. The Government’s stated policy - not an aspiration, but a commitment - is wider than the release of the SCCRC report.

7. The Government has presented release of the report not as an aim in itself, but as a means to achieve the aim of maximum openness.

8. It is therefore perhaps appropriate for the Committee to ask the Government what consideration has been given by the Government to other ways of achieving that aim, and to ask itself how the policy aim might best be achieved. Inevitably, there is some overlap in what I discuss here with the petition for a public inquiry.

9. The Policy Memorandum to the Bill refers to aims of openness and transparency five times, for example: "the provisions...take forward the Scottish Government’s commitment to be as open and transparent as it can be in respect of [the Al-Megrahi] case.”

10. The purpose in the public interest of enabling the release of the SCCRC report, and of any other material on Mr Megrahi’s case, must surely be to reveal to the public evidence relevant to:

   i) whether he is guilty; and
   ii) whether actions by investigating and prosecuting authorities have been proper.

11. The Megrahi case is about far more than one person. The concerns about this case are not accurately characterized in terms of "supporting Megrahi". It is not his character, or his words, or his actions, which have influenced people to doubt the conviction or its fairness. It is the evidence in court, the evidence available but not to the court, the new evidence since then, the withholding of evidence by police, the CIA, the US Department of Justice, and/or Scottish prosecutors from the defence and the judges, the evidence casting doubt on the integrity of aspects of the investigation, and the quality of reasoning by the judges.

12. There are also multiple concerns about the circumstances of the dropping of the appeal.

13. On the verdict, there are two separate concerns.

14. One concern is about Mr Megrahi’s guilt.

15. Another is whether the processes – investigation, prosecution, and trial – were fair.

16. If Mr Megrahi was unfairly convicted, then is it not the case that something in the Scottish legal system needs examination?
17. If in addition he is innocent, then the real perpetrators have gone unidentified and unpunished.

18. If the questions of guilt and fairness are unresolved, is it right that the decision of an ill man in a diplomatic storm should have the power to end official resolution?

19. If Members choose to consider the principles on which the Government should decide how to proceed, they may be interested in the following circumstances of the abandonment of Mr Megrahi’s appeal.

a) The judges specifically stated that they allowed Mr Megrahi to drop the appeal in light of what his counsel told them about his health and desire to return to Libya.

"We proceed upon the basis that leave is required. In light of the circumstances laid before us by Ms Scott on behalf of the appellant, we grant that leave."

His counsel had said the circumstances were illness and a desire to further applications to enable him to return to Libya.²

b) Considering those words of the judges, it was unfortunate that the convict abandoned his appeal without procedural gain, only for Mr MacAskill to make a decision the very next day which removed the procedural incentive.

It is not clear to me as a layman that it was not open to the judges either:

i) to suggest that the appellant only abandon subsequent to an arrangement with the Crown whereby the Crown would also abandon, thus giving some point to the dropping of the conviction appeal in line with the purpose to which the judges referred, or

ii) to refuse leave (within the confines of the legal context that it was debatable whether their permission was needed) until such an agreement took place.

c) Mr Megrahi only abandoned the appeal after the judges delayed a date when they could have freed him. It would thus be inaccurate to state "Megrahi abandoned his appeal before it reached the stage when it could have been decided". The judges were entitled to free him on 7 July 2009 on arguments already heard. It was only after the judges announced, on that date, delay and unforeseen illness of one judge that Mr Megrahi gave up the appeal. We

² The proceedings can be viewed at:
do not know whether the judges would have freed him on that date had they kept to their schedule. ³

d) Mr Megrahi only abandoned the appeal after the Scottish Government broke a promise to Parliament to expedite the PTA application, assigning it a priority of "routine", failing to contact key respondents for several weeks, and taking 90 days over an application that was at all stages impossible to grant. I analysed the relevant official documents in detail for the Justice Committee inquiry into the release in 2009:⁴ "Did the Justice Secretary take adequate care, through promptness of action and appropriate information to the appellant, to avoid influencing the court process?"

e) There was a political context to abandonment. A suggestion, for example, that Mr Megrahi did not know Colonel Gaddafi wanted him in Libya shortly for the 40th anniversary celebration would seem far-fetched. There was also the fact that the UK Government expressed internally a desire for Mr Megrahi to return under the PTA, which required abandonment.

Given all those factors, the possibility that Mr Megrahi might have sensed a need to do something in order to get home is not surprising.

20. One of the SCCRC's reasons for referral was based not on evidence received but on the reasonableness of an "important" part of the judgment itself - the issue of the date of purchase of clothes. Anyone can read the relevant part of the judgment. I suggest that a discussion on the release of SCCRC material might need discussants reading the SCCRC and the Opinion of the Court on that matter.

21. Is it appropriate that a verdict and process which have failed to gain endorsement from either the international observers or the Review Commission should be left to victims' relatives to deal with by attempting all the stages required for a new appeal?

22. The Convener may remember an email I sent on 23 August 2009, with the idea that the Commission could refer the case a second time. I appear to be the first person to have published the idea. But that does not mean I think it is appropriate for the Government to rely on it as an option for resolution of the case. The High Court currently has two powers to refuse to hear an appeal, even if the Commission refers a case. The Court can say that the person does not have a suitable relationship to the convict, or currently, as Committee members know, that it is not in the interests of justice.

23. As regards the relatives of Mr Megrahi, no-one foresaw in 1998 at the time of the international agreements setting up the trial a time when the case would not have reached the final stage of appeal but the Megrahi family would not have had the

financial or other support of a Gaddafi-faction government for any legal or other resources required.

24. The view that "this should only be sorted out in court" might need some detailed argument as to precisely what that would entail - or alternatively, legislative proposals ensuring such a course would be in practice reasonable.

25. Having watched the session of 7 February I would like to, rather humbly, submit the following options for the Committee's consideration. I say "humbly" because I am neither a politician nor a lawyer, and the Committee will no doubt be able to think of both better formulations and better alternatives.

26. I also suggest that irrespective of the merits or otherwise of these proposals, it may be of interest to the Committee to consider whether it is acceptable that the principles they incorporate should be ignored by a fair justice system.

27. The Committee may wish to consider the fact that the Megrahi case meets all three criteria. The ideas are presented as examples for legislation, to stimulate further thought on principles and how they might apply in the Megrahi case. The context is of the Scottish Government's commitment to be as open and transparent as possible.

28. Firstly:

"Any trial which fails to be certified as fair by relevant observers invited by the Secretary-General of the United Nations or similar authority shall automatically be fully, publicly, internationally and independently investigated, regardless of the outcome of criminal proceedings.

A mechanism shall be set up, approved and/or carried out by representatives of independent nations or their judiciary or appropriate non-governmental organisations, automatically to

a) resolve such a criminal case by examining the verdict; and

b) investigate any parts of the criminal proceedings which failed to gain certification by the observers as fair."

29. The provision would apply especially to any criminal trial for which an extradition treaty is not in force but for which the accused agree to appear on the understanding that international observers or monitors will attend to ensure fairness.

30. Secondly:

"An automatic mechanism for examination of any verdict where

a) an appeal is abandoned; and"
b) it is not clear that such abandonment has taken place without clear admission of guilt, and/or that any admission of guilt is free from undue outside influence.⁵

31. Thirdly:

"A preliminary assessment mechanism in cases where a significant proportion of victims or relatives of victims state that they do not have confidence in the verdict, the fairness of the trial or both.

The assessment is to be whether there is a case for further investigation.

Cases where there is a demonstrably unsuitable relationship between the convict and the victim would be rejected."⁶

32. Comment: It is perhaps far more usual for relatives of murder victims to take comfort in the conviction of a person who is later cleared, than for them to voice doubts after a conviction about either fairness or guilt.

33. It could be that a large proportion of UK-based Lockerbie crash victims' relatives were in a relevant sense mad to begin with - which perhaps seems statistically unlikely. It could alternatively be that many relatives have somehow been led astray, or have descended into some relevant type of madness. But in the absence of such a theory being made explicit (and in this particular case the inclusion in such a theory of doubters among non-relatives as well), it is not clear why concerns on the part of victims who have studied the case might not be thought to indicate something in need of serious consideration.

34. Perhaps Mr Megrahi’s position – wanting the release of secret documents as a condition of his consent - is more understandable given the indisputable facts that:

   a) the Crown withheld information from the defence at trial;
   
   b) it is a matter of public record in the court transcripts that the CIA, perhaps with the assistance of the US Department of Justice, attached false labels to

⁵ Similar to the idea at http://lockerbiecase.blogspot.com/2009/10/first-minister-on-release-decision.html?showComment=1255811151773#c24058122711308715479


"If, in respect of any criminal case, a significant number of persons who a) are deemed by the court to be victims of a crime, and b) have no clear potentially corrupting relationship to the convict, state that they consider the conviction to be unsafe, then that conviction will be investigated judicially by a process available independently of, and alternative to, the standard process of appeal by the convict, and with the power to quash the verdict."
censored passages in their documents for the eyes of the defence and the judges; and

c) there are other concerns as alluded to in the Justice for Megrahi submission made in relation to Petition PE1370.\(^7\)

35. It is my submission that there are matters of principle which need to be recognised explicitly, beyond discussion of this particular case. The fact that the case is highly unusual does not mean that the Committee cannot consider questions on, for instance, the principles which should apply where a trial has international observers who fail to endorse its fairness or there is evidence that Scottish prosecutors were unable or unwilling to uphold their integrity when faced with the wishes of a more powerful nation.

36. The Government has made its policy aim clear. This document suggests that the Government might be held to its promise with a thorough review of the options.

Matt Berkley
16 February 2012

\(^7\) http://www.scottish.parliament.uk/S4_JJusticeCommittee/Meeting%20Papers/Papers_20111108.pdf
Written submission from James Chalmers

1. I wish to comment only on Part 1 of the Bill, as follows.

2. In principle, a life sentence is logical and simple to understand. A “punishment part” is set, which is the minimum period a prisoner must serve before they can be considered for parole. The punishment part is based on considerations of retribution and deterrence. Once eligible for parole, they will be released if the Parole Board is satisfied that they no longer present a risk to the public.

3. The matter is complicated slightly by the fact that the test which the Parole Board should apply in deciding on release is not clearly set out in legislation, but the High Court’s decision in *Petch and Foye* proceeds on the basis that the Board is concerned with risk and risk alone. The law now assumes – if perhaps more implicitly than explicitly – that prisoners should spend a period of time in jail appropriate to satisfy the requirements of retribution and deterrence, and then be eligible for parole based on whether they present a risk to the public.

4. This framework is logical and coherent. The problem which this Bill seeks to address is not a problem with life sentences. The problem is with “determinate” sentences.

5. Determinate sentences do not operate on the same principled model as life sentences. Instead, a sentence is imposed of a fixed number of years. This sentence does not differentiate between any part imposed for the purposes of retribution and deterrence and any part imposed for the protection of the public. The baseline for determining such a sentence is the requirements of retribution and deterrence in a given case, but it may be necessary to impose a higher sentence than those requirements would suggest because of the risk presented to the public by the offender.

6. A determinate sentence does not, in any sense, mean what it says. “Short-term” prisoners (those sentenced to less than four years) are automatically entitled to release halfway through their sentence. “Long-term” prisoners (four years or more) are eligible to apply for parole halfway through their sentence and are entitled to release two-thirds of the way through.

7. In contrast to life sentences, therefore, the framework governing determinate sentences is unprincipled and incoherent. In turn, this causes a problem for life sentences, because it may in some cases be appropriate to draw comparisons between prisoners sentenced to a life sentence and a determinate sentence. In principle, two prisoners might commit exactly the same crime, but one might receive a determinate sentence and the other might receive a life sentence because of the risk they present to the public. The courts have struggled for some time with the difficulty of ensuring that these two prisoners should be eligible for parole at the same time, so as not to create comparative injustice.
8. The problem is that this task is an impossible one. This impossibility may be demonstrated by comparing three hypothetical prisoners who have all committed identical crimes, as follows:

- Prisoner A: the court is convinced that A presents no risk to the public. A sentence of 14 years is imposed.
- Prisoner B: because of the risk to the public which B poses, the court imposes a sentence of 18 years.
- Prisoner C: because of the very high risk to the public which C poses, the court imposes a life sentence.

9. Such neat comparisons are not, of course, found in reality. But this exercise illustrates the impossibility of the task faced by the court. If we believe that prisoners should spend a period of time in jail appropriate to satisfy the requirements of retribution and deterrence, and then be eligible for parole based on risk to the public, it follows that the period which A, B and C should spend in prison before being eligible for parole is identical. There is, however, no means of achieving this within the current sentencing framework. A will be eligible for parole after 7 years, B after 9. No matter what punishment part the court imposes in C’s case, it cannot be consistent with both of these cases.

10. No-one should be proud of Part 1 of the Bill. That is not to question the ability of the civil servants who designed the policy, nor of the counsel who drafted the Bill on the basis of their instructions. But the Bill seeks to create a tortuous system which is barely intelligible to lawyers, let alone to the general public, in order to try once more to achieve the impossible and make a coherent system (life sentencing) align with an incoherent one (determinate sentencing). One might at least question why it is the coherent system that has to change. The Bill is, I think, tolerable as an interim means of addressing the difficulty identified in *Petch and Foye*. But it is embarrassing, and serves as powerful evidence of a sentencing system in need of much more far reaching review and reform.

James Chalmers
University of Edinburgh School of Law
25 January 2011
Supplementary written submission from James Chalmers

1. At today’s meeting of the Justice Committee, I undertook to write to the Committee regarding the interaction of the Data Protection Act 1998 with the statutory provisions governing the Scottish Criminal Cases Review Commission. This was in respect of suggestions made by the Justice for Megrahi campaign that if the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 were amended, the Data Protection Act 1998 would provide no barrier to the disclosure of information by the Commission. I am conscious that the Committee may have obtained further guidance on this issue from the witnesses who gave evidence after me: I was, unfortunately, not able to remain in the committee room for that part of proceedings.

2. The starting point in this matter is section 194J of the Criminal Procedure (Scotland) Act 1995. This was inserted into the 1995 Act by the Crime and Punishment (Scotland) Act 1997, which created the Scottish Criminal Cases Review Commission. Section 194J provides as follows:

A person who is or has been a member or employee of the [Scottish Criminal Cases Review] Commission shall not disclose any information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted from this section by section 194K of this Act.

3. Any person who contravenes that provision is guilty of a criminal offence.

4. Section 194K sets out a number of circumstances in which disclosure would be exempt from section 194J and so would not amount to an offence. These include “any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State” (section 194K(1)(f)).

5. The Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 is such an order. This Order permits the Commission to decide to disclose information in circumstances such as that applicable in the Al Megrahi case, but only if “any person who provided the information to the Commission (whether directly or indirectly) has consented to its disclosure”. This is the “2(b)” provision which was referred to in evidence before the Committee.

6. The position taken by Justice for Megrahi is that if 2(b) were deleted, there would be no impediment to the Commission deciding to publish information relating to Al Megrahi’s case. This is because of section 194K(4) of the 1995 Act, which provides as follows:

“Where the disclosure of information is excepted from section 194J of this Act by subsection (1) or (2) above, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure.
(including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under that section."

7. Justice for Megrahi’s position, as expressed by Professor Robert Black QC and repeated in the campaign’s written submission, is that section 194K(4) means that “UK data protection legislation, or any other legislative or common law obligation of secrecy, is no bar to disclosure”.

8. There are reasons to doubt this conclusion, although I should caution that I would not regard myself as in any way expert in data protection legislation.

9. Importantly, however, the Data Protection Act 1998 is a comprehensive piece of legislation which post-dates the provisions creating the Scottish Criminal Cases Review Commission. It is not clear how section 194K(4) can be taken as pre-emptively carving out an exception to it.

10. The 1998 Act does provide that personal data is exempt from its non-disclosure provisions “where the disclosure is required by or under any enactment, by any rule of law or by the order of a court” (section 35(1)). This is, however, of no avail, because section 194K(4) would merely permit rather than require disclosure.

11. The existence of section 35(1) is important, because it suggests that Parliament did not consider that existing legal obligations to disclose information would be left intact by the Data Protection Act. Section 35(1) was necessary to preserve such obligations. By contrast, there seems to be no equivalent to section 35(1) in respect of a statutory permission to disclose, which is the most that section 194K(4) of the 1995 Act can be said to create.

12. I have difficulty seeing, in summary, how a statutory provision enacted in 1997 (section 194K(4)) can be interpreted as creating an exception to a statute enacted in 1998 (the Data Protection Act).

13. I may, of course, be wrong in this conclusion. However, the Commission is not required to disclose information relating to the Al Megrahi case, and neither the Bill as it stands nor the alternative route proposed by the Justice for Megrahi campaign would change that. It is difficult to see why it would or should be expected to exercise a discretion to disclose information without being certain of the legality of its actions in so doing. While I would reiterate that I am not an expert in the law of data protection, section 194K(4) appears, at the very least, not to provide such certainty.

James Chalmers
School of Law, University of Edinburgh
7 February 2012
Written submission from the Faculty of Advocates

Part I

1. The Faculty takes no position on the question of whether the application of the existing law has resulted or would result in punishment parts of inappropriate duration. The appropriate length of the punishment part in an individual case is a matter for the sentencing judge, applying any methodology which may be prescribed by the Parliament.

2. In *Petch v. HM Advocate* 2011 JC 210 (para. 53) the Lord Justice General expressed the view that a “clear well-considered legislative solution” to the problem identified in that case was called for. It is apparent from *Ansari v. HM Advocate* 2003 JC 1 and *Petch* that the existing legislation is problematic. The proposed amendments to the 1993 Act address the perceived problem not by revisiting the structure of the existing legislation, but by further elaboration on it. If these amendments should be enacted, these already complex provisions would become even more complex. Unnecessary complexity in relation to what is and should be a matter of sentencing judgment is, as a general rule, undesirable. The Faculty questions whether the policy aims could not be achieved by less complex provisions.

3. The current legislation requires the sentencing judge, fixing a punishment part for a discretionary life prisoner or an OLR, to carry out the following steps:

   (i) The judge is required to identify the notional determinate sentence which would have been imposed had public protection not required a life sentence or OLR.

   (ii) The judge is expected to “strip out” from that sentence such part of that notional determinate sentence as relates to public protection. This is not an exercise which a judge imposing an actual determinate sentence would have to undertake¹.

   (iii) The judge is then required to take into account the fact that the statutory early release provisions would apply to a prisoner who is given a determinate sentence by fixing the punishment part at a proportion of the “stripped down” notional determinate sentence. In the case of an actual determinate sentence, the early release provisions would apply to the actual sentence and not to some “stripped down” version of it. In effect, in the interests of requiring the judge to take into account the way that the early release provisions would have applied had the prisoner received a determinate sentence, the legislation

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¹ In *Petch*, Lord Eassie, in his opinion, challenged the premise that makes sense to “strip out” a separate public protection element in a determinate sentence. He stated that: “The passing of a determinate sentence does not involve the sentencer in any fixing or identification of a discrete period of preventative detention”: para. 69.
requires the sentencing judge to proceed on the basis that the early release provisions are applied not to the notional determinate sentence which would have been handed down, but to a different “stripped down” sentence. In Petch, the Court held that, on a correct interpretation of the legislation, the appropriate proportion to be applied to the “stripped down” notional determinate sentence is ordinarily 50%. As the Court in Petch recognized, this has the consequence that punishment parts in these cases may be shorter, and in some cases perhaps significantly shorter, than the period which the hypothetical determinate sentence prisoner would have to serve before becoming eligible for consideration for parole. The Court was nevertheless driven to that result by the statutory provisions and rejected the approach which had been taken in Ansari, where the majority had held that the sentencing judge could, having regard to the nature and circumstances of the offence, apply to the “stripped down” notional determinate sentence, a proportion of between 50% and 2/3, or even, in some cases, more.

4. The Faculty recognizes that the proposed amendments focus on the third stage of the exercise, and seek to correct the “anomaly” by giving the sentencing judge power, in specified circumstances, to apply a percentage higher than 50% (and up to 100%) to the “stripped down” notional determinate sentence. But the result is a highly complex (and artificial) way to achieve the ultimate aim, which is to fix as the punishment part the period which the Court considers appropriate to satisfy the requirements of retribution and deterrence, taking into account all relevant factors, including, as a matter of comparative justice, the way the early release provisions would have operated had the accused received a determinate sentence instead of a life sentence. The Faculty questions whether a more fundamental approach to the legislation would not produce a simpler and more satisfactory framework for the exercise of sentencing judgment in these cases.

5. There appear to the Faculty to be at least two structural problems with the proposed amended legislation:

(i) Section 2(2) of the 1993 Act as amended would appear to require the Court to take into account four matters, of which only one is the assessment or calculation set out in sections 2A and 2B. If that is the intention, the same matters are taken into account at least twice in the process. But it may be intended that the assessment or calculation in new sections 2A and 2B is in fact to be determinative of the sentence. If that is the intention, then it is confusing to include that, apparently, as only one of four factors to be considered.

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2 Petch per the Lord Justice General at paragraphs 49, 53.
3 The majority in Petch held that once the calculation or assessment carried out by reference to the notional determinate sentence had been carried out there was no room for a second stage when this was taken into account along with other factors (which would already have been taken into account in carrying out the calculation or assessment): para. 51 per the Lord Justice General, rejecting the dissenting view of Lord Osborne to this effect; para. 75 per Lord Eassie; para. 84 per Lord Clarke; para. 112 per Lord Wheatley.
The assessment or calculation required in new sections 2A and 2B contains an apparent internal contradiction. The Court is required to identify the notional determinate sentence which it would have imposed in the particular case had it not been imposing a discretionary life sentence or OLR, and in doing so is to ignore any period of confinement which is necessary for the protection of the public: section 2A(2)(a). Since the public protection element of the notional determinate sentence is "stripped out", this will be the notional determinate sentence which the Court regards as justified by considerations other than public protection – i.e. the sentence appropriate to satisfy the requirements of retribution and deterrence. But the Court is then compelled to identify the “part of that period of imprisonment which would represent an appropriate period to satisfy the requirements of retribution and deterrence” (section 2A(1)(b)) and to fix this at 50% unless the Court considers, taking into account in particular the matters specified in section 2B(5), that it would be appropriate to specify a greater proportion of the period. But if the Court has already, in fixing the notional determinate sentence, stripped out the element of public protection, the period required to satisfy the requirements of retribution and deterrence (as the judge perceives them) should be the same as the notional determinate sentence, and – as a matter of internal consistency – the Court should fix the part at 100% of the notional determinate sentence. Whether this is in fact the way the amended legislation would be interpreted and applied by the Court remains to be seen. But this apparent internal contradiction illustrates that the proposed amendments do not deal with the root reason for the “anomaly”, namely that the Court is required to consider the early release provisions by reference to a “stripped down” version of the notional determinate sentence and not to the actual determinate sentence which, were it not for the need to protect the public, the accused would receive.

6. In order to take into account, as a matter of comparative justice, the way that the early release provisions would have applied had the accused received a determinate sentence, the sentencing judge would necessarily have to carry out a process of analysis to identify the period which the accused might have expected to have to serve before being eligible for early release had a determinate sentence been imposed. But it does not follow that the legislation has to prescribe in detail the methodology by which the sentencing judge should carry out that exercise. It is not for the Faculty to draft legislation but it does seem that there are alternative drafting techniques by which the policy aims could be achieved. By way of example, the

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4 It might be suggested that it is necessary to use a “stripped down” version of the notional determinate sentence, in order to ensure that no element in the exercise contains any element of public protection. But there are two separate policies being pursued here: firstly to identify that part of the sentence which properly reflects retribution and deterrence as opposed to public protection; and, secondly, to ensure that, in fixing that period, appropriate weight is given to considerations of comparative justice, by ensuring that the judge considers the fact that had there been a determinate sentence, the early release provisions would have applied. The true comparison for the purposes of comparative justice is with the actual determinate sentence which the judge would have fixed had he or she not imposed a life sentence, and not with the notional determinate sentence further discounted to exclude a notional period for public protection.
legislation could require the Court to fix a punishment part which reflects the requirements of retribution and deterrence but specify that in doing so the Court is to take into account, inter alia, the early release provisions which would have applied if the accused had been the subject of a determinate sentence. This would leave it to sentencing judges (subject to control by the Appeal Court) to take that factor into account in an appropriate manner when fixing punishment parts in these sorts of case.

7. There are two subsidiary matters on which the Faculty would comment:-

7.1. Something has gone awry with the syntax of new section 2(2A).

7.2. It is open to question whether the proposed powers to be given to the Scottish Government by clause 2 are appropriate, given the sensitivity and importance of sentencing policy.

Part II

8. The Faculty expresses no view on the policy behind this Part of the Bill. The only observation which the Faculty would offer is that, although these provisions alter, for cases which fall within their terms, the non-disclosure rule in section 194J of the Criminal Procedure (Scotland) Act 1995, this would not affect any other restrictions on disclosure. The SCCRC would have to consider whether, notwithstanding the alteration to the provisions of section 194J of the 1995 Act, any proposed disclosure could lawfully be made, having regard to Article 8 of the Convention, and to any other legal constraints on disclosure (e.g. under the Data Protection Act).

Faculty of Advocates
27 January 2012
Written submission from Sir Gerald Gordon

1. I shall assume that infelicities in drafting will be corrected in due course. I cannot, however, resist remarking that the new s194M(3)(b) would represent what I think is a unique example of a statutory footnote, and that ‘comprise’, unlike ‘consist’, is a transitive verb.

2. I should also make it clear that although I was a member of the Board of SCCRC at the time Megrahi’s application was considered, and still have some connection with the SCCRC, what follows are my own personal views.

3. Perhaps I should also confess to considerable reservations about the whole notion of OLR’s, and in particular to the idea that any attempt to calculate the proportion of any sentence which is applicable to any specific purpose, and in particular to public protection, can achieve anything but a spurious accuracy. However, I accept that, contrary to what I said in the SCCR Commentary to Petch, the ECHR case of Thynne probably requires that attempt to be made. There is, incidentally, the further point that there are other aims of punishment than retribution, deterrence and public protection, such as denunciation and rehabilitation.

4. If, despite that, the purpose of the punishment part is to replace the determinate sentence which would otherwise have been imposed, it is difficult to see why the prisoner should not be entitled to the same early release rights as an ‘ordinary’ accused who receives such a sentence, subject, of course, to the power of the Parole Board to authorise his further detention. The problem, if problem there is, arises out of the combined effect of the early release provisions and the fact that the period of the punishment part, uniquely, requires the prisoner to be kept in custody for its entire length - subject of course to the Minister's powers to release him on various kinds of at least temporary leave, or simply to release him on compassionate grounds.

5. What I have in mind, putting it briefly, is that the legislation should simply provide that the prisoner who is subject to an OLR is entitled to apply for parole at the same time as an ordinary prisoners serving a sentence of the notional period on which the punishment part is based would be entitled to apply for parole, or to unconditional release. Thereafter the Parole Board would be responsible for deciding when to release him. I appreciate that this raises a question as to whether the ‘sentence’ for this purpose should be the punishment part, or the initial notional sentence including the part deemed to be for public protection. I
would prefer the former, since public protection is seen in this context as the function of the Parole Board and not of the court.

6. I am conscious that the court has indicated that in fixing the notional sentence, it is entitled to select a period somewhat longer than would have been imposed if there were no OLR, but, with respect, I cannot see the justification for this.

7. On any view, I am unhappy with the proposed s2B(5). Sub paras (a) and (c) are surely matters to be taken into account in determining the punishment part itself, being factors which would be relevant whether or not an OLR was being imposed. Sub para (b) can be dealt with by making the punishment part consecutive to any sentence already being served.

8. Turning to Part 2 of the Act, I would make two introductory comments. The first is that I do not like the practice of combining provisions on different matters in one Act: it only makes life more difficult for anyone trying to find the law on any matter. The second, if I may say so with respect, is that the title of the proposed Act is a bit disingenuous in respect of this Part. It should be called something like ‘The Al-Megrahi Statement of Referral (Publication) Act’, and be enacted as such and not as the umpteenth amendment to the 1995 Act. On any view it has nothing to do with either punishment or review.

9. I do not think that determining whether publication of the Statement of Referral (SOR) is appropriate, far less deciding to publish it, is itself an appropriate function for the SCCR. The SCCR was set up to decide whether a case should be referred to the High Court. The decision whether or not to publish the SOR is a political one and should be decided by politicians. Nor am I happy about partial publication, or about requiring the SCCRC to explain why it has done what it did. This brings me back to the point about this being a political decision: it is for politicians to decide and to explain their decision.

10. I have no expertise in the area of data protection, but it is clear that the Parliament has no power to dispense with the Data Protection Act, and there may even be a question as to whether it can make any specific provisions regarding the disclosure of personal data. If that is so there would seem to be little point in legislating on the matter unless and until Westminster does what is necessary.

11. It occurs to me, too, that the members and staff of SCCRC are entitled to a formal immunity from prosecution and indemnity in respect of any civil proceedings that might be brought against them, in the wake of publication.

Sir Gerald Gordon
23 January 2011
Introduction

The (UK) Information Commissioner, as regulator of the Data Protection Act (1998) ("the DPA"), is pleased to respond to the consultation on the Criminal Cases (Punishment and Review) (Scotland) Bill ("the Bill") by the Justice Committee of the Scottish Parliament. His specific interest is in Part 2 of the Bill which proposes to amend the conditions under which the Scottish Criminal Case Review Commission ("the SCCRC") may disclose information obtained by it in the exercise of its functions. The Commissioner welcomes the proposed clarification of existing legislation by specifying additional circumstances under which disclosure may be made rather than relying on a permissive order made by the Secretary of State. In doing so, the Commissioner believes that the transparency surrounding the decision to disclose is enhanced and, consequently, any disclosure made becomes fairer to the individuals concerned.

The Data Protection Act 1998

The DPA provides a statutory framework for the processing of all personal data (ie, data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, including any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual). Further protection is afforded to sensitive personal information which is defined as personal data consisting of information about:

(a) racial or ethnic origin;
(b) political opinions;
(c) religious beliefs;
(d) trade union membership;
(e) physical or mental health or condition;
(f) sexual life;
(g) the commission or alleged commission by him of any offence; or
(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Significant amounts of the personal information held within criminal case review documents will be defined as being sensitive personal data for the purposes of the DPA.

The SCCRC is the data controller for all personal data processed by it in connection with its consideration of criminal case reviews and must therefore process that information in accordance with the DPA. In doing so, the SCCRC must abide by
eight principles set out in the Act but the proposals contained within the Bill relate only to the first two principles, viz:

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

**Principle 1**

Fairness in processing concerns amongst other things, the method by which data are obtained and, more specifically, it considers whether any person from whom data are obtained is deceived or misled as to the purpose or purposes for which they are to be processed. Part 2 of the Bill prescribes specific conditions which must be met to allow additional disclosures to take place. The Commissioner particularly welcomes section 194N which requires the SCCRC to notify persons affected by any proposed disclosure that such disclosure may take place and that it must also have due regard to any representations made as a consequence of that notification. He also welcomes section 194R which requires that affected persons are subsequently notified of any decision to disclose. Taken together, 194N and 194R enhance the fairness of the processing being undertaken and are consistent with the requirements of the DPA.

Whilst the SCCRC must itself be satisfied that its processing meets the relevant conditions within Schedules 2 and 3 of the DPA, the Commissioner would expect that this would be the case. Both Schedule 2 and Schedule 3 permit processing for the purpose of administration of justice as well as for the exercise of any functions conferred on any person by or under an enactment. By amending the existing legislation as proposed, the functions conferred upon the SCCRC are more clearly stated.

**Principle 2**

The SCCRC processes personal information to review and investigate cases where it is alleged that a miscarriage of justice may have occurred in relation to conviction and/or sentence. To publish the Statement of Reasons for referral to the High Court of any case reviewed by it (whether or not the related Appeal was abandoned) is unlikely to be incompatible with the purposes for which the information was processed.

**Conclusion**

The Information Commissioner welcomes the proposals within Part 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill. The amendments to the Criminal Procedure (Scotland) Act 1995 contained within the Bill will help ensure that the disclosure of Statement of Reasons by the SCCRC in cases where appeals have
been abandoned or otherwise withdrawn, meet with the provisions of the DPA. Importantly, the Bill contains a robust legislative framework which will ensure that such disclosure is fair and lawful.

Dr Ken Macdonald
Assistant Commissioner (Scotland & NI)
The Information Commissioner's Office
26 January 2012
Supplementary written submission from the Information Commissioner’s Office

The Scottish Criminal Case Review Commission (SCCRC) is subject to governing legislation, specific to the SCCRC, which prohibits the release and publication of some information in certain circumstances. Part 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill proposes to amend the conditions under which SCCRC may disclose information obtained in the course of its duties and functions. This includes personal information processed as part of the appeals process in Scotland.

The Information Commissioner’s Office (ICO) provided a written response to the Scottish Government Paper, Criminal Cases (Punishment and Review) (Scotland) Bill. The ICO response was only in connection with Part 2 of the Bill.

In this response the ICO welcomed the clarification of existing legislation through the specification of circumstances under which disclosure of personal information contained in the material processed by SCCRC could take place. The ICO recognises that under existing legislation SCCRC may not have the powers to disclose personal information. This means that it is unable to satisfy any of the conditions for processing sensitive data under Schedule 3 of the Data Protection Act 1998 (the DPA). If the specific duty was invested in SCCRC to publish the Statement of Reasons (the SOR) under certain circumstances then the SCCRC would be able to satisfy the requirements of the Schedule 3 of the DPA by means of the condition at paragraph (7)(1)(b) of that schedule.

Schedule 3, paragraph (10), of the DPA permits processing to be undertaken under certain circumstances specified by order of the Secretary of State. Whilst the publication of an order may enable the SCCRC to satisfy a condition for processing, this would not on its own be sufficient to make the processing lawful if the processing (in this case, the publication of the SOR) remained outwith the vires of the SCCRC.

Even where the disclosure or publication of personal information is done under a legislative requirement there must also be compliance with the eight data protection principles. It is understood that the Scottish Government privacy principles may also need to be taken into consideration.

It must be stressed that the issue here is essentially one relating to the statutory powers of the SCCRC rather than to the provisions of the DPA. If the Criminal Cases (Punishment and Review) (Scotland) Bill introduces measures that either require that SCCRC to publish personal information in certain circumstances or at least authorise it to do so, compliance with the DPA will be possible. The ICO is aware that there is a perception that any changes introduced by the Bill would be “dis-applying” or “getting round” the DPA. This is not the case. The DPA would still apply in full including the need for compliance with the eight principles. It is just that the SCCRC would no longer be blocked from the necessary processing of sensitive personal
data because the limitations on its statutory powers to disclosure personal data mean it cannot satisfy any of the conditions for processing sensitive data set out in Schedule 3.

Representatives from the ICO met with SCCRC on 20 February and repeated the ICO opinion that a change to the legislation to require the SCCRC to disclose personal information in certain circumstances would mean that such disclosures could comply with the DPA. The ICO representative also confirmed that, in our view, this is a matter for devolved legislation as the changes that were required were in the devolved legislation governing the activities of the SCCRC and not in the UK wide data protection legislation.

Dr Ken Macdonald  
Assistant Commissioner (Scotland & NI)  
The Information Commissioner’s Office  
1 March 2012
Written submission from Justice for Megrahi

1. The existing law relating to SCCRC disclosure and its defects

1.01 The relevant section of the Criminal Procedure (Scotland) Act 1995 (as inserted by Crime and Punishment (Scotland) Act 1997 and as amended by the general transfer provisions of the Scotland Act 1998) reads as follows:

194K Exceptions from obligation of non-disclosure

(1) The disclosure of information ... is excepted from section 194J [Offence of disclosure] of this Act by this section if the information is disclosed—

(a) ...

(f) in any circumstances in which the disclosure of information is permitted by an order made by the Scottish Ministers. (…)

(4) Where the disclosure of information is excepted from section 194J of this Act by subsection (1) ... above, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under that section.

1.02 In 2009 the Scottish Ministers made an order (the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009) the relevant provision of which reads as follows:

Permitted disclosure of information

2. The disclosure of information is permitted in the following circumstances—

(a) the information relates to a case that has been referred to the High Court under section 194B(1) of the Act and—

(i) is, or includes, a reference of a conviction, or a finding under section 55(2) of the Act, where
(ii) the appeal, consequent on that reference, has been abandoned in terms of sections 116 or 184 of the Act;

(b) any person who provided the information to the Commission (whether directly or indirectly) has consented to its disclosure; and

(c) a decision that the information should be disclosed has been taken by the Commission.
1.03 Gerard Sinclair, the SCCRC’s Chief Executive, announcing the Commission’s failure to obtain the consents necessary to permit disclosure of its Statement of Reasons in the Megrahi case, said on 9 December 2010:

“As I indicated at the time the above Order came into force, in order to release our Statement of Reasons the Commission would require the consent of those who had, either directly or indirectly, provided the information.

"Over the last nine months I have been in ongoing correspondence and, in some instances, discussion with a number of the main parties who were responsible, either directly or indirectly, for providing information to the Commission. I asked them if they were prepared to provide their consent, in writing, to the disclosure of the information contained within our Statement of Reasons. This included Crown Office, the Foreign Office, the relevant police authorities, as well as Mr Al Megrahi and his legal representatives.

"It has become obvious that there is no likelihood of obtaining the unqualified consent required in terms of the 2009 Order, and consequently the Board decided at its last meeting to discontinue the discussions at this time.

"The Commission will be happy to revisit this matter if the 2009 Order is varied and the requirement to obtain the consent of parties is removed.”

1.04 On the same day Professor Robert Black QC in his blog *The Lockerbie Case* wrote the following:

“As Mr Sinclair correctly indicates in the last sentence of his statement, the condition in the 2009 Order that the consent of suppliers of information had to be obtained is one which the Scottish Government in making the Order was under no legal obligation to impose. It **CHOSE** to do so -- one wonders why. Pressure should now be applied on the Scottish Government to vary the Order by removing this superfluous requirement.”

1.05 There then ensued the following written question and answer in the Scottish Parliament:

“Christine Grahame (South of Scotland) (SNP): To ask the Scottish Executive whether it will introduce a further statutory instrument amending the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 to delete Article 2(b). (S3W-38294)

“*Mr Kenny MacAskill*: The Scottish Government intends to bring forward legislation to allow the Scottish Criminal Cases Review Commission to publish a statement of reasons in cases where an appeal is abandoned, subject of course to legal restrictions applying to the Commission such as data protection, the convention rights of individuals and international obligations attaching to information provided by foreign authorities. (11 January 2011)”
1.06 Professor Black in *The Lockerbie Case* blog on 12 January 2011 commented as follows:

“What Christine Grahame was seeking to discover was why the Scottish Government was proposing primary legislation (i.e. an Act of the Scottish Parliament) to remove the requirement in the 2009 Disclosure Order that the suppliers of information to the SCCRC had to consent to its release, when the requirement itself had been imposed by secondary legislation (i.e. a Statutory Instrument) and could be removed in precisely the same way. Kenny MacAskill signally fails to answer that question.

“The reference in the written answer to convention rights and international obligations is entirely superfluous: such rights would continue to apply whether the consent requirement were removed by primary or secondary legislation. The reference to data protection is a complete red herring. Section 194K(4) of the Criminal Procedure (Scotland) Act 1995 (an Act of the UK Parliament) specifically provides that where SCCRC disclosure is permitted by a Statutory Instrument (inter alia) “the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) ...” This means that UK data protection legislation, or any other legislative or common law obligation of secrecy, is no bar to disclosure. (The references in the 1995 Act to the Secretary of State and to the UK Parliament must now, by virtue of the general transfer of powers provisions of the Scotland Act 1998, be read as references to the Scottish Ministers and the Scottish Parliament respectively.)”

2. Part 2 of the Bill

2.01 The Bill removes (except in the case of information supplied by a foreign authority under international assistance arrangements) the requirement of obtaining the consent of the person who supplied the information BUT it goes on to require the SCCRC to notify and seek the views not only of the person who supplied the information but also of any person directly affected by it. And it provides a detailed (and cumbersome) mechanism to permit such persons to object to disclosure and (if the SCCRC rejects the objections) to permit them to take legal action to try to block the disclosure.

2.02 Moreover, the Bill does not (and cannot because of the restrictions on the Scottish Parliament’s legislative competence) replicate the provision of section 194K(4) of the 1995 Act that if a proposed disclosure complies with its terms then the disclosure “is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under that section”. This means that under the Bill common law and statutory obligations of secrecy or confidentiality could be founded upon by the suppliers of the information, or any persons directly affected by it, in any legal action taken by them to block disclosure. But if a *statutory instrument* were used by the Scottish Ministers to remove the restriction on disclosure -- the mechanism which is specifically mandated in section 194K(1)(f) -- these common law and statutory obligations of secrecy or confidentiality would be overridden.
2.03 A cynic might suspect that Part 2 of the Bill has been deliberately designed to ensure that no useful disclosure of SCCRC material is possible under its terms. Whether or not that is its purpose, that is its effect. The reasons for proceeding by primary legislation rather than statutory instrument which are given in paragraphs 63 to 65 of the Policy Memorandum are wholly unconvincing: they completely fail to address the issue that a statutory instrument would override common law and statutory obligations of secrecy and confidentiality whereas Part 2 of the Bill does not and cannot.

2.04 It is submitted that the Justice Committee should recommend to the Scottish Government that, if it genuinely wishes to see meaningful disclosure of SCCRC material in the Megrahi case, it should (a) reconsider the possibility of proceeding by statutory instrument and (b) formulate a scheme which, unlike the one set out in the Bill, is designed to achieve rather than impede this objective.

The Committee of Justice for Megrahi:

Professor Robert Black QC
Mr Robert Forrester
Dr Morag Kerr
Mr Iain McKie
Dr Jim Swire
Father Pat Keegans

25 January 2011
Supplementary written submission from Justice for Megrahi

At the hearing on 7 February, Sir Gerald Gordon QC expressed the view that there were real data protection concerns about disclosure of the SCCRC Statement of Reasons in the Megrahi case. Mr James Chalmers in the supplementary document submitted after the hearing seems to share that view. JFM regards these concerns as misplaced, if disclosure is authorised by Statutory Instrument rather than by Act of the Scottish Parliament.

As we said in our written submission: "Section 194K(4) of the Criminal Procedure (Scotland) Act 1995 (an Act of the UK Parliament) specifically provides that where SCCRC disclosure is permitted by a Statutory Instrument (inter alia) 'the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) ...' This means that UK data protection legislation, or any other legislative or common law obligation of secrecy, is no bar to disclosure. (The references in the 1995 Act to the Secretary of State and to the UK Parliament must now, by virtue of the general transfer of powers provisions of the Scotland Act 1998, be read as references to the Scottish Ministers and the Scottish Parliament respectively.)"

Sir Gerald's and Mr Chalmers's concerns seem to be based on the circumstance that section 194K(4) dates from 1997, whereas the Data Protection Act dates from 1998 and so, the argument goes, data protection cannot be among the legislative obligations of secrecy that a Statutory Instrument made under section 194K(4) would override.

It is submitted that such an argument is fallacious. Section 194K(4) was amended by the Scotland Act 1998 to substitute "the Scottish Ministers" for "the Secretary of State". The Scotland Act 1998 received the Royal Assent on 19 November 1998, more than four months AFTER the Data Protection Act 1998 (16 July 1998). Accordingly, the power conferred on the Scottish Ministers by section 194K(4) to override legislative obligations of secrecy postdates the Data Protection Act. The United Kingdom Parliament had the opportunity in the Scotland Act specifically to exclude data protection from the Scottish Ministers' power to override legislative obligations of secrecy, but it did not avail itself of that opportunity. It follows that data protection is amongst the legislative obligations of secrecy that a Statutory Instrument made by the Scottish Ministers would override.

Justice for Megrahi
14 February 2012
Written submission from the Law Society of Scotland

Introduction
The Criminal Law Committee (‘the committee’) of the Law Society of Scotland welcomes the opportunity to provide written evidence on Part 1 of the Scottish Government’s Criminal Cases (Punishment and Review) Bill.

Background
As Paragraph 4 of the Explanatory Notes to the Bill points out the Bill seeks to remedy the unsatisfactory situation identified in the Appeal Court’s judgement on 1 March 2011 in the cases of *Petch and Foye v Her Majesty’s Advocate*. In delivering the decision of the court, the Lord Justice General (Lord Hamilton) concluded at paragraph 53:

“I have accordingly come, with regret, to the view that, however unsatisfactory it may appear as a matter of comparative justice, Parliament has given statutory effect to an arrangement under which an indeterminate prisoner will, or at least may, become first eligible for consideration for parole at an earlier stage in his sentence than an equivalent determinate prisoner. If this situation is to be remedied, it is for Parliament to remedy. The divisions of opinion expressed judicially in these appeals would suggest that a clear, well-considered legislative solution is called for.”

The Committee recognises that the Bill is seeking to provide such a remedy. The Bill, Explanatory Note and Policy Memorandum identify the difficult and complex issues which a sentencing judge is required to consider in sentencing an offender to a discretionary life sentence. The Committee recognises the complexities of the notional arithmetical calculation and comparison exercises which currently a sentencing judge is required to undertake.

Having regard to Lord Hamilton’s conclusion, the Committee poses the question of whether the Bill will result in a clear legislative solution to this difficult and complex issue. If not, then the concerns which have been expressed over the years in respect of the statutory calculations and comparisons exercises will continue. The Committee’s view is that the Bill will not give rise to a clear legislative solution because the nature of the proposed calculation and comparison exercises proposed by the Bill are similar to what has gone before.

Main aims of the Bill
The Committee believes that the Bill addresses two main issues:

1) Removing the present anomaly whereby an indeterminate prisoner may be eligible for parole sooner than a comparable fixed term prisoner

2) Enabling the sentencing judge in certain circumstances to impose a longer punishment part which would result in an indeterminate prisoner being eligible for parole later, in some cases far later, than a comparable fixed term prisoner

The first issue is more straightforward and easier to deal with.
Removing the anomaly
As the law presently stands, an indeterminate prisoner, who has been assessed at the time of sentencing as posing a higher risk to the public upon release, nevertheless will be eligible to apply for parole at an earlier stage than a prisoner sentenced to a fixed period of imprisonment. Broadly, the reason for this is that the notional discrete element of the notional custodial sentence attributed to protection of the public ["notional protective element"] falls to be disregarded in the case of an indeterminate prisoner but not in the case of a fixed term prisoner.

Presently, the sentencing judge generally may impose a punishment part which is half, subject to a possible power to impose a punishment part of two thirds, of the whole fixed period less the notional protective element. The amendment proposed by the Bill would provide a mechanism whereby the sentencing judge would have the discretion to increase the duration of the punishment part in respect of an indeterminate prisoner. This would prevent an indeterminate prisoner from being eligible for parole before a comparable fixed term prisoner. However, this would be a matter for the discretion of the sentencing judge. The judge may decide not to increase the duration punishment part. In such a situation, the indeterminate prisoner still would be eligible for parole earlier than a comparable fixed term prisoner.

Is there a simpler solution to earlier eligibility issue?
The present anomaly whereby an indeterminate prisoner is eligible for parole earlier than a comparable notional fixed term prisoner arises because of the current statutory requirement for the sentencing judge to identify and then strip out from the comparable notional fixed sentence a notional discrete element for the protection of the public.

One way to simplify the sentencing exercise would be to remove the statutory requirement to identify and then strip out this discrete element. This proposal is suggested because, except in the situation where an extended sentence is imposed, the issue of protection of the public is not generally considered discretely by the sentencing judge when passing a determinate sentence. As Lord Eassie explains in *Petch and Foye* at paragraph 70:

"… the use of the phrase ‘protection of the public’ should be treated with some care in this area. The criminal justice system as a whole is intended to serve the dual, principal aims of protecting the public against criminal acts and protecting the citizen against wrongful, arbitrary and unjustified measures by the state. Most, if not all, sentences passed have the primary function of protecting the public. In particular, the notion of deterrence, whether of the individual convicted or of persons more generally, is inevitably directed to the protection of the public."

The Committee submits that the protection of the public is a fundamental consideration in the sentencing process and one which does not result routinely in the imposition of a discrete consecutive custodial period of imprisonment. The Committee further submits that the artificial exercise of identifying and then stripping out a discrete element from a notional determinate sentence only serves to unnecessarily complicate the sentencing process.

Furthermore, if this stripping out exercise was removed, then as a matter of law, an
indeterminate prisoner would not in any circumstances be eligible for parole at an earlier stage than a comparable determinate prisoner.

**Enabling the sentencing judge to impose a longer punishment part**
The Committee notes that the Bill seeks to enable the sentencing judge in specified circumstances, to impose as part of the indeterminate sentence a period of imprisonment (“the punishment part”) which ranges between half to the whole of the fixed period that might have been imposed less the notional protective element. The Committee observes that in many respects the language and structure of the statutory provisions proposed by the Bill which specify the circumstances are similar to the existing provisions which have proved difficult to interpret.

In particular, the Committee notes that provision is made in the sentence calculation exercise for the sentencing judge to increase the punishment part period, having further regard to the same features which the she or he would have been considered when that period was first identified. The Committee observes that a person who has been sentenced in this way might appeal on the basis that this consideration of the same features at two distinct stages of the calculation exercise is unfair and amounts to double-counting.

Law Society of Scotland
26 January 2012
Written submission from the Scottish Criminal Cases Review Commission

1. The Scottish Criminal Cases Review Commission (“the SCCRC”) welcomes the opportunity to provide written evidence to the Justice Committee on the Criminal Cases (Punishment and Review) (Scotland) Bill. This response is restricted to the issues and questions raised in Part 2 of the Bill, relating to the disclosure of information obtained by the SCCRC.

2. The SCCRC has given careful consideration to the questions posed by the Justice Committee in relation to Part 2 of the Bill. Before answering those questions, the SCCRC would reiterate that it is agreeable to the publication of the Statement of Reasons in the case of Abdelbaset Ali Mohamed Al Megrahi (“the SOR”), but that it is not empowered to do so and can do so only with the cooperation of both the Scottish and the UK Governments and certain foreign authorities.

3. The previous attempt by the Scottish Ministers to provide a route for release of the SOR, through the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009, failed at the first hurdle to provide a route to disclosure as the SCCRC was unable to obtain the relevant consents from the main parties who provided information to it. The Scottish Ministers recognise that the present Bill is not a “stand alone” route to disclosure, but instead is seen as “a framework for the SCCRC to decide whether it is appropriate to disclose information”. For the reasons we will come on to discuss the Bill will not, by itself, allow for the disclosure of the SOR. The SCCRC has previously discussed some of these issues with the Cabinet Secretary for Justice.

4. Moreover, whilst the SCCRC welcomes the provision of such a “framework”, it questions whether it is necessary to incorporate such a framework into the Criminal Procedure (Scotland) Act 1995. Incorporating this level of detail for such a restricted matter into what is our principal Criminal Procedure Act in Scotland seems unnecessarily complicated and bureaucratic. The SCCRC is of the view that a distinct Act, rather than an amendment to the 1995 Act, would be a simpler and cleaner solution.

5. With these initial caveats, the SCCRC answers the questions posed under Part 2 of the Bill as follows:

Is the framework provided in the Bill appropriate for the purpose of the SCCRC’s determining whether it is appropriate to disclose information?

6. YES. Compared with the 2009 Order the draft legislation is, in the SCCRC’s view, more compatible with the relevant matters it requires to consider in order that it complies with its obligations arising under the Data Protection Act 1998 (DPA) and the European Convention on Human Rights (ECHR). It is important to note, however, that the Bill provides expressly that the SCCRC requires the consents of the designated foreign authorities from whom, under international assistance arrangements, it
obtained information, or from whom it obtained information via the Lord Advocate (directly or indirectly), for it to disclose that information (see section 194O). Therefore, although one might say that the Bill provides a framework for the purpose of the SCCRC’s determining whether it is appropriate to disclose information, each designated foreign authority has, in effect, the power to veto the disclosure by the SCCRC of the information it gave to the SCCRC. In other words, in relation to the information the SCCRC obtained from foreign authorities, the determination for the SCCRC is not whether it considers it to be appropriate to disclose that information. Rather, if it does not receive the relevant consent from each designated foreign authority, the SCCRC is not entitled to disclose the information. A similar situation may arise in respect of sensitive personal data in the SOR as defined in terms of DPA (see paragraph 7 below). In addition, the draft legislation does not make specific reference to materials which are covered by legal professional privilege (see paragraph 9 below).

**Will the requirement for the SCCRC to consider relevant reserved statutes such as the Data Protection Act 1998 and the Official Secrets Acts affect the disclosure of information?**

7. **YES.** The Data Protection Act 1998 (DPA) provides for the concepts of “personal data” and “sensitive personal data”. The SOR contains both personal data and sensitive personal data. The first data protection principle (see Schedule 1 to DPA) provides that personal data must be processed (which includes disclosure) fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is met. These conditions are considered in greater detail in the attached appendix, but, in summary, the SCCRC considers that:

- in relation to the personal data in the SOR, there are several steps it will have to take before it is even in a position to consider whether the disclosure by it of the personal data of each individual concerned is fair and lawful, and whether at least one condition in Schedule 2 is met.

- the crucial point in relation to the sensitive personal data in the SOR is that, unless each individual concerned has given his explicit consent for the SCCRC to disclose his sensitive personal data, or unless the UK Secretary of State for Justice has made the relevant order under condition 10 in Schedule 3, the SCCRC is not entitled to disclose the sensitive personal data of that individual.

However, as stated in the appendix, the SCCRC is in ongoing discussions with the Ministry of Justice about whether other conditions might permit the SCCRC to disclose the sensitive personal data in the SOR without the need for explicit consents or a Schedule 3 Order by the Secretary of State for Justice. In addition, the SCCRC intends to discuss these matters with the Information Commissioner's Office.

8. The SCCRC does not consider that the information in the SOR is covered by the Official Secrets Acts. There is some reference in the SOR to materials which contain information covered by the Official Secrets Acts, but the information itself is not narrated in the SOR.
Are there any other issues that the SCCRC would like to draw to the attention of the Committee?

9. YES. Some of the information the SCCRC obtained from Mr Megrahi’s legal representatives and from Mr Fhimah’s legal representatives is covered by legal professional privilege (LPP). The case law as regards LPP seems clear: LPP may not be overridden by some supposedly greater public interest (see Three Rivers District Council v Governor and Company of the Bank of England [2005] 1 AC 610). However, it may be overridden by primary legislation containing express words or necessary implication (see R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax and Another [2003] 1 AC 563; see also Three Rivers and R v Derby Magistrates’ Court ex parte B [1996] AC 487). The draft Bill does not refer expressly or specifically to LPP, and there is no indication in the Explanatory Notes accompanying the Bill that the purpose of the Bill is to override LPP. If the intention of the proposed legislation is to override LPP, the SCCRC believes the Bill may require to make such an intention expressly clear. In any event, any such legislation will have to be read so that it is human rights-compliant (see R (Morgan Grenfell & Co Ltd); R v Derby Magistrates’ Court), which will involve consideration of Articles 8 and 10 of the ECHR. However, the courts have recognised, in considering those Articles, that a high degree of protection is to be afforded to the confidentiality of communication between a lawyer and his client, and that LPP is a fundamental human right which can be invaded only in exceptional circumstances (see Foxley v United Kingdom (2000) 31 EHRR 637); the interference with LPP must be shown to have a legitimate aim which is necessary in a democratic society (R (Morgan Grenfell & Co Ltd), per Lord Hoffman at paragraph 39). If LPP is not overridden by the legislation, the SCCRC will require the consents of Mr Megrahi and Mr Fhimah before it might disclose any information in the SOR to which LPP attaches.

10. Returning to the issue about the information it obtained from foreign authorities under international assistance agreements (whether directly or indirectly), the SCCRC wishes to put on record that it expects that it might have some difficulty in identifying the relevant designated foreign authority for each State, and that it will require the assistance of the Lord Advocate in order to do so. Lastly, section 194P of the proposed legislation is drawn widely (see subsections (2), (3) and (4); see also paragraph 36 of the Explanatory Notes), and will, for example, catch information the SCCRC obtained from witnesses in Libya. The SCCRC considers, therefore, that it will require to deal with, for example, the transitional government in Libya, which has come to power only recently (see section 194P(7)(b)(ii) and (8)).
APPENDIX
Data Protection Act 1998

Personal Data and Sensitive Personal Data

1. The two main elements of personal data are that the information must “relate to” a living person and that the person must be identifiable; information will relate to a person if it is about him, linked to him, has some biographical significance for him, is used to inform decisions affecting him, has him as its main focus or affects him in any way (see section 1(1) of DPA and the decision of the (English) Court of Appeal in Durant v FSA [2003] EWCA 1746).

2. The definition of sensitive personal data (see section 2 of DPA) includes the following information: information about the physical or mental health or condition of the “data subject” (the living individual to whom the information relates); information about his sexual life; information about the commission or alleged commission by him of any offence; and information about any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

The First Data Protection Principle

3. Personal data shall be processed (which includes disclosure) fairly and lawfully and, in particular, shall not be processed unless—

   (a) at least one of the conditions in Schedule 2 is met, and
   (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

The SCCRC considers that the issue about the potential disclosure of personal data in the SOR and that about sensitive personal data, although related, must be considered separately.

Fairness and the Schedule 2 Conditions

4. For the present purposes, the relevant conditions in Schedule 2 are condition 1 – ie, the SCCRC obtains the consent of each data subject – and condition 6(1) (the “legitimate interests” condition). The SCCRC considers that, in order for it to comply with condition 1 and the requirement of fairness, it will be required to send to each data subject his personal data contained in a section or sections of the SOR so that he can make an informed decision about whether he consents to the disclosure of his personal data (see the European Data Protection Directive, to which DPA gives effect, which defines “consent” as being “… any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed”).

5. Where, for example, the data subject has not consented to the disclosure of his personal data, DPA recognises that the “data controller” (in this case the SCCRC) may have legitimate interests for processing personal data. Condition 6(1) is intended to permit such processing. The first requirement of condition 6(1) is that the SCCRC
must need to process the information for the purposes of its legitimate interests. The SCCRC considers that those interests might be said to be its stated aims to promote public understanding of its role and to enhance public confidence in the ability of the criminal justice system to cure miscarriages of justice. The second requirement is that those interests must be balanced against the interests of the individual(s) concerned. Condition 6(1) will not be met if the processing is unwarranted because of its prejudicial effect on the rights and freedoms, or legitimate interests, of the individual; for the condition to be met, the legitimate interests of the SCCRC need not be in harmony with those of the individual, but where there is a serious mismatch between competing interests, the interests of the individual will come first (see section 9 of “The Guide to Data Protection” by the Information Commissioner’s Office). The SCCRC considers that, were it to be advised that the disclosure by it of information about an individual might endanger an individual, the second requirement of condition 6(1) would not be met; nor, in such circumstances, would the requirement of fairness be met.

6. Two other conditions in Schedule 2 are worth mentioning: condition 5(a) and condition 5(b). Condition 5(a) provides (as does the equivalent provision in respect of sensitive personal data, condition 7(1)(a) in Schedule 3 to DPA) that the processing of data is necessary for the administration of justice. The SCCRC considers that it is doubtful that the disclosure by it of personal data (or sensitive personal data) in the SOR might be said to be necessary for the administration of justice. Mr Megrahi abandoned his appeal. The SCCRC would not be disclosing the personal data (or sensitive personal data) in connection with any other court action, civil process or public enquiry.

7. Condition 5(b) provides (as does the equivalent provision in respect of sensitive personal data, condition 7(1)(b) in Schedule 3 to DPA) that the processing is necessary for the exercise of any functions conferred on any person by or under an enactment. The SCCRC is of the view that the function of the proposed legislation might be said to be to provide a framework within which the SCCRC can determine whether it is appropriate in the whole circumstances for the information in the SOR to be disclosed to the general public (see section 194M). The SCCRC does not consider, however, that the type of processing under consideration – the disclosure by it of personal data (and sensitive personal data) to the general public – is necessary for the exercise of that determinative statutory function, nor is it necessary for the exercise of any other statutory function conferred on the SCCRC. Accordingly, it considers that neither condition 5(b) in Schedule 2 nor condition 7(1)(b) in Schedule 3 is met. However, the SCCRC recognises that, if one takes a very broad interpretation of the function conferred on the SCCRC by the Bill, it might be said that the disclosure of the sensitive personal data to the general public is necessary in the exercise of that function. The SCCRC is in contact with the Ministry of Justice concerning these matters. In addition, the SCCRC intends to discuss these matters with the Information Commissioner’s Office.

Information in the Public Domain

8. The SCCRC considers that, where personal data in the SOR is already in the public domain, it would not be, in terms of DPA, “disclosing” such information if it were to publish the information in the SOR (cf the position in respect of sensitive personal
data). However, the disclosure of personal data may still breach the data protection principles even if the data has been disclosed in open court – both the Information Commission’s Office and the Scottish Information Commissioner, in applying the third party personal data exemptions under freedom of information legislation, have indicated that they consider there is clear difference between information disclosed in the controlled environment of a court and information disclosed directly to the general public.

**Schedule 3 Conditions**

9. For the present purposes, the conditions in Schedule 3 which merit consideration are the following conditions (in addition to those mentioned above):

   1. The data subject has given his explicit consent to the processing of the personal data;

   5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject; and

   10. The personal data are processed in circumstances specified in an order made by the Secretary of State [as data protection law is a reserved matter, the relevant government minister is a UK Government minister, in this case the Secretary of State for Justice] for the purposes of this paragraph.

For the reasons given above, the SCCRC does not consider that conditions 7(1)(a) and 7(1)(b) are applicable (although the SCCRC is in ongoing discussion with the Ministry of Justice about the applicability of those conditions). Therefore, leaving aside, for a moment, condition 5, the SCCRC considers that, unless each data subject has given his explicit consent for the SCCRC to disclose his sensitive personal data, or unless the UK Secretary of State for Justice has made the relevant order under condition 10, the SCCRC is not entitled to disclose the sensitive personal data of that data subject; it would be, in terms of DPA and the Human Rights Act 1998 (HRA), section 6, unlawful for the SCCRC to do so. The SCCRC considers that DPA and HRA are, in this context, inextricably linked: as noted, DPA gives effect to the European Data Protection Directive (Directive 95/46/EC), and to the objective of that Directive, which was to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data; as Lord Hope said in *Common Services Agency v SIC* [2008] 1 WLR 1550, section 2 of DPA, which defines the term “sensitive personal data”, must be understood in that context. In other words, DPA enacts some of the fundamental freedoms enshrined in ECHR.

10. Condition 5 merits separate consideration. As stated, the SCCRC is of the view that, where personal data in the SOR is already in the public domain, it would not be, in terms of DPA, “disclosing” such information if it were to publish the information in the SOR. However, condition 5 implies that, in relation to sensitive personal data, it must be data subject who makes public his own sensitive personal data before the condition is satisfied.

Scottish Criminal Cases Review Commission
30 January 2012
Supplementary written submission from the Scottish Criminal Cases Review Commission

Section 194K(1)(f) and (4) of the Criminal Procedure (Scotland) Act 1995

1. The Commission refers to the written evidence it provided to the Justice Committee on Part 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill on 27 January 2012. The Commission’s Chief Executive and one of its senior legal officers gave additional oral evidence to the Committee on the 31 January 2012. On the 7 February 2012 a number of witnesses, including Mr James Chalmers and representatives of the Justice for Megrahi organisation (JFM), gave evidence relating to the written submissions by JFM. In their written submissions JFM hold the view that, given the terms of section 194K(4) of the Criminal Procedure (Scotland) Act 1995, there would be no significant obstacle to the publication of the Commission’s statement of reasons in Mr Megrahi’s case (“the SOR”) if the Cabinet Secretary for Justice were to modify the SCCRC (Permitted Disclosure of Information) Order 2009 (“the 2009 Order”) in such a manner that the consent requirements set out in the Order were removed. As such, they believe the issue of “Data Protection obstacles” to be a “red herring”. The Chairman of the Justice Committee suggested to Mr Chalmers that it might be helpful if he were to provide a supplementary written note to his oral evidence before the Committee, which expressed a contrary position to that endorsed by JFM. Given the confusion which may have arisen, the Commission now believes it might be helpful if it were to give further written evidence on this particular issue. It has therefore done so below.

2. Section 194J of the 1995 Act (sections 194A–L of the 1995 Act were inserted into the 1995 Act by section 25 of the Crime and Punishment (Scotland) Act 1997) provides that a person who is or has been a member or an employee of the Commission shall not disclose any information obtained by the Commission in the exercise of any of its functions unless the disclosure of the information is excepted from section 194J by section 194K of the Act. A person who contravenes this section is guilty of a criminal offence.

3. In terms of section 194K(1)(f), the Cabinet Secretary for Justice may make an Order which excepts the Commission from its obligation of non-disclosure as narrated in section 194J (the 2009 Order is an example of such an Order). A section 194K(1)(f) Order simply means that it would not be a criminal offence for person who is a member or an employee of the Commission to disclose information in accordance with the terms of that Order.

4. Section 194K(4) provides that where the disclosure of information is excepted from section 194J by subsection (1) or (2) in 194K, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by, under or by virtue of any enactment) arising otherwise than under section 194J.
5. In simple terms, subsection (4) in 194K appears, on the face of it, to provide the Commission with the authority to disclose information where, for example, the Cabinet Secretary for Justice has made a section 194K(1)(f) Order, irrespective of any other legislation or law. However, in order to draw such an interpretation, one would require to ignore completely the passing of subsequent legislation, and in particular the terms of the Data Protection Act 1998 (DPA), the Human Rights Act 1998 (HRA), the Scotland Act 1998, European Union law (ie, Community law) and the European Convention of Human Rights (ECHR). It is important to remember that the 1997 Act was an Act of the UK Parliament, passed before the creation of the Scottish Parliament and before the passing of the aforementioned legislation. It is a reasonable inference to draw that the drafters of the 1997 Act, in drafting the legislation, did not take into account the effect of the later Acts.

6. The first data protection principle in DPA provides that personal data shall be processed (which includes any disclosure) fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 to the Act is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 to the Act is also met.

7. DPA gives effect to the European Data Protection Directive (Directive 95/46/EC), and to the objective of that Directive, which was to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. In other words, DPA enacts some of the fundamental freedoms enshrined in Community law and in ECHR.

8. Section 57(2) of the Scotland Act provides that a member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law.

9. Accordingly, any Order the Cabinet Secretary for Justice were to make under section 194K(1)(f) (or any amendment he were to make to the 2009 Order) cannot be incompatible with the terms of section 57(2) of the Scotland Act, any of the Convention rights, Community law and – given the purpose of DPA – DPA.

10. Section 6(1) of HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Accordingly, and irrespective of any Order made by the Cabinet Secretary, the Commission must act in a way which is compatible with a Convention right and – given the purpose of DPA – DPA.

11. Accordingly, the Commission must respectfully disagree with JFM in their view that the issue of data protection is a “red herring” and that any problems created by the present Bill can be cured simply by amending the 2009 Order. For the reasons outlined in our previous written evidence, and in this supplementary note, the Commission considers that it would be wrong to conclude that a section 194K(1)(f) Order (or an amendment to the 2009 Order) and subsection (4) of that section, when read together, somehow provide the Commission with the blanket authority – ie, to the exclusion of the other-mentioned law – for it to disclose the information in the SOR.

20 February 2012
Second supplementary written submission from the Scottish Criminal Cases Review Commission

1. The Justice Committee has asked the Commission for its views on the potential applicability of section 35(2) of the Data Protection Act 1998, as well as that of paragraphs 7(1)(a) and (b) of Schedule 3 to DPA, to the circumstances narrated in the Bill, including its consideration about whether amending the Bill so that it obliges the Commission to disclose the information if certain conditions are met would have any material effect on the applicability of data protection law.

2. In addition, the Justice Committee has asked the Commission whether it is at liberty to disclose the status and progress of the discussions it has had with the UK Ministry of Justice about the possibility of obtaining from the UK Government a Schedule 3 Order in relation to the disclosure of the sensitive personal data in the Megrahi case (or the cases to which the Bill applies).

3. The Commission’s further submissions on the above matters are given below.

4. The first data protection principle provides that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

5. In relation to the type of processing of data which the Bill envisages the Commission would be required to consider undertaking – the publication of personal and sensitive personal data in the statement of reasons in Mr Megrahi’s case (“the SOR”) – the Commission did consider the conditions in Schedule 3 which might apply.

6. Condition 7(1)(a) in Schedule 3 provides that the processing of data is necessary for the administration of justice. The Commission has been unable to find any case law in which the application or meaning of condition 7(1)(a) has been considered. In addition, in terms of any guidance given by the Information Commissioner’s Office, it notes that the ICO’s “Guide to Data Protection” refers in this respect only to the processing being necessary for “administering justice”. In its initial written evidence to the Justice Committee the Commission expressed the view that it is doubtful that its publishing sensitive personal data in the SOR might be said to be necessary for the administration of justice, noting that it would not be disclosing the sensitive personal data to interested third parties in connection with any court action, civil process or public enquiry.

7. On the other hand, the Commission recognises that one might argue that the Commission, as a quasi-judicial body within the justice system, is involved in the administration of justice, and that, therefore, the publication of the information in one of its statements of reasons might be construed as being necessary for the administration of justice. Against that argument, however, is the point that the publication of the Commission’s statements of reasons (as opposed to its disclosing
statements of reasons to applicants or interested third parties in connection with any court action, civil process or public enquiry) has never in the past been regarded as a necessary part of the administration of justice; indeed, the Criminal Procedure (Scotland) Act 1995 as it currently stands prohibits the Commission from publishing its statements of reasons.

8. It seems to the Commission that the justification for the argument that publication of the information in the SOR is necessary for the administration of justice amounts to the argument that publication is in the substantial public interest. The Commission does not dispute that there may be a substantial public interest in the publication of the information in the SOR. However, the Commission does not believe it follows from the existence of such substantial public interest that the publication of the SOR becomes necessary in the administration of justice. The basis for the conditions in paragraphs 7 and 10 of Schedule 3 is found in Articles 5 and 8.4 in Chapter II of the European Data Protection Directive (Directive 95/46/EC). Article 5 permits Member States to determine more precisely the conditions under which the processing of personal data is lawful; Article 8.4 permits Member States to lay down exemptions to the prohibition on processing sensitive personal data for reasons of substantial public interest and subject to suitable safeguards. As the Commission understands it, condition 7(1)(a) was included in Schedule 3, pursuant to Article 8.4, because there is a substantial public interest in allowing data to be processed where processing is necessary in the administration of justice. That does not mean that the two concepts are synonymous: it seems reasonable to infer that the drafters of DPA would not have chosen the term “administration of justice” if they simply meant “substantial public interest”. What the drafters did was to create a separate mechanism by which sensitive personal data may be disclosed where it is in the substantial public interest to do so, but where none of the other conditions in Schedule 3 is satisfied, namely by way of an Order by the UK Government under paragraph 10 of Schedule 3 (the basis for which condition is also Article 8.4). It seems to the Commission that, given the specific purpose of paragraph 10 (as delineated in the Official Report of the Grand Committee), if a data controller wishes

1 When Mr George Howarth, the then Secretary of State for the Home Department, was asked in Parliament if he would list the reason for each exemption in the Data Protection Bill which had been made under Article 8.4, and if he would indicate the nature of the suitable safeguards which are intended to protect the data subject, he simply replied: “Article 8(4) of the Directive, relating to reasons of substantial public interest, is reflected in paragraph 7 of Schedule 3 to the Bill. The latter provides an exemption for processing which is necessary for the administration of justice, the exercise of functions conferred by any enactment or the exercise of any function of the Crown, Minister of the Crown or Government Department. The exemption is necessary to enable the conduct of legitimate functions as authorised by Parliament. The safeguards are the legal constraints on the discharge of the functions in question and more specific provisions included in some of the relevant statutes.” (At: http://hansard.millbanksystems.com/written_answers/1998/feb/17/data-protection#S6CV0306P0_19980217_CWA_122.)

2 See the Official Report of the Grand Committee on the Data Protection Bill, 23 February 1998 (at: http://hansard.millbanksystems.com/grand_committee_report/1998/feb/23/official-report-of-the-grand-committee#SSLV0586P0_19980223_GCR_88), and in particular Lord Williams of Mostyn at page 35GC: “In Article 8.4 is found a provision allowing Member States to specify additional circumstances in which sensitive data may be processed on the ground of substantial public importance. That provision is reflected in paragraph 9 of Schedule 3 [which, the Commission understands, became paragraph 10 of Schedule 3 to the Act], which allows the Secretary of State by order to specify further circumstances in which sensitive data may be processed. I am happy to say that we undoubtedly recognise that there will be circumstances beyond those set out in Schedule 3 in which substantial public interest requires personal data to be processed. We have a strong preference to follow the approach for which we have made provision and to deal with those further circumstances as and when they arise, as and when the case is made for them, by means of the Secretary of State’s order made by virtue of the power given to him under paragraph 9.”
to disclose sensitive personal data because it considers that it may be in the substantial public interest to do so, the correct mechanism is by way of an Order under paragraph 10.3

9. **Condition 7(1)(b) in Schedule 3** provides that the processing is necessary for the exercise of any functions conferred on any person by or under an enactment. In its initial written evidence to the Justice Committee the Commission expressed the view that the function of the proposed legislation might be said to be to provide a framework within which the Commission can determine whether it is appropriate in the whole circumstances for the information in the SOR to be published (see section 194M of the Bill); but that it did not consider that the type of processing under consideration – its publishing sensitive personal data in the SOR – is necessary for the exercise of that determinative statutory function, nor is it necessary for the exercise of any other statutory function conferred on the Commission. It seems to the Commission to be illogical to conclude that it needs to publish the sensitive personal data in the SOR in order for it to determine whether it is appropriate in the whole circumstances for the information in the SOR (including the sensitive personal data) to be published; or, to put it another way, the Commission is not persuaded that such processing would be carried out pursuant to express statutory powers, or would be reasonably required or ancillary to the exercise of express or implied statutory functions.4 In terms of its primary function, the Commission did not need to publish the sensitive personal data in the SOR (and, as noted above, it is, as law currently stands, prohibited from doing so) in order for it to decide whether there may have been a miscarriage of justice.

10. It might be helpful if the Commission gives an example in which it considers that, in contrast to the type of processing outlined above – its publishing sensitive personal data – condition 7(1)(b) is applicable. If the Bill is enacted, the Commission is obliged to seek the views of the affected persons about whether it is appropriate for the Commission to publish the information in the SOR about them or obtained from them. The Commission considers that, in order that the affected persons can make informed material representations to the Commission, it will have to provide them with the sections of the SOR which contain the information about them or obtained from them. Some of those sections will, in addition, contain third-party sensitive personal data. Accordingly, the Commission will be disclosing third-party sensitive personal data to affected persons. However, the Commission’s basis for disclosing such data to those individuals will reflect the function the proposed legislation confers on the Commission – ie, to determine whether it is appropriate in the whole circumstances to publish the information in the SOR. The processing of data in those circumstances would be, in the language of condition 7(1)(b), necessary for the exercise of any functions conferred on the data controller by or

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3 See, for example, the Data Protection (Processing of Sensitive Personal Data) Order 2000, which was made for the purposes of paragraph 10 of Schedule 3, and which narrates sets of circumstances in which sensitive personal data may be processed; most of those sets of circumstances contain a provision whereby any such processing is necessary in the “substantial public interest”. Any such Order is subject to the “affirmative resolution procedure” – ie, the Order shall be laid before the House of Commons and shall not come into force unless and until it is affirmed by a resolution of the House of Commons introduced and passed in accordance with the rules of that House.

under an enactment. Similar considerations would apply to the requirement in the Bill for the Commission to obtain the relevant consents from foreign authorities.

11. **Section 35(2)** is an exemption provision: it provides that personal data is exempt from the “non-disclosure provisions” where the disclosure of the data is necessary for or in connection with any legal proceedings (including prospective legal proceedings), for obtaining legal advice, or for establishing, exercising or defending legal rights. The Commission does not consider that the publication of sensitive personal data in the SOR is necessary for or in connection with any of those circumstances. In any event, section 35(2) does not exempt the Commission from the duty to satisfy at least one of the conditions in Schedules 2 and 3. Accordingly, the Commission does not consider that section 35(2) is relevant to the circumstances narrated in the Bill.

12. The Commission notes that the suggestion has been made that the Bill could be amended so that it obliges the Commission to publish the information in the SOR if certain conditions are met, and that such an amendment would make the publication of the SOR the function of the Act and would thus engage condition 7(1)(b). The Commission has concerns that such an amendment might render the Act as being non-compliant with DPA and with human rights legislation, and thus render the Bill as being outside the legislative competence of the Parliament (see section 54(3) of the Scotland Act 1998).

13. On 20 February the Commission had a meeting with Mr Ken Macdonald, the Assistant Commissioner for Scotland and Northern Ireland, and, notwithstanding his written evidence to the Justice Committee, he appeared to be persuaded by the Commission’s stated position that neither condition 7(1)(a) nor condition 7(1)(b) applies to the circumstances narrated in the Bill. The Commission notes that Mr Macdonald has agreed to make further written submissions to the Justice Committee.

14. The Commission has had a conference call and telephone discussions with representatives from the Ministry of Justice, and it is due next week to discuss these matters further with representatives from the Ministry of Justice and with Mr Macdonald. It may be that the Ministry of Justice takes a different view from the Commission about the applicability of paragraphs 7(1)(a) and 7(1)(b), and that its view will be that an Order under paragraph 10 is therefore unnecessary. If the Ministry of Justice (or the ICO) provides cogent reasons in support of the view that at least one of those conditions applies, the Commission can then decide whether to proceed on the basis of that advice.

15. In conclusion, if the view is taken that neither condition 7(1)(a) or 7(1)(b) applies, and the Commission is unable to obtain the explicit consents of the individuals who are the subjects of the sensitive personal data (and the Commission does not expect that such consents will be forthcoming from certain individuals), the appropriate Order under paragraph 10 would, at least, enable the Commission to decide whether the publication of the sensitive personal data is in the substantial public interest and complies with all data protection principles.

SCCRC
29 February 2012
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Cabinet Secretary for Justice  
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December 2011

Thank you for your letter of 1 December in which you ask the UK Government to take action to remove data protection obstacles to the publication by the SCCRC of its Statement of Reasons in the case of Mr Al-Megrahi. I understand this relates to a Bill you introduced into the Scottish Parliament on 1 December, which will disapply non-disclosure offence provisions to the Commission. You also note that the SCCRC believes there may still be data protection barriers to the disclosure of the Statement of Reasons in the Al-Megrahi case.

My specific responsibility is for the Data Protection Act 1998 (DPA), which as you know, allows for the disclosure of personal data as long as the disclosure is compliant with its eight data protection principles (in the absence of a relevant exemption). The DPA gives effect to the European Union’s Data Protection Directive and as such any consideration of data protection compliance must also include consideration of the intentions of the Directive. I should add that there is no provision in either the DPA or the Directive to create a general exception to data protection legislation.

The Scottish Criminal Cases Review Commission will be the body which would decide whether or not it was appropriate to disclose under the Bill should it be enacted. If we are to provide detailed views on the questions you raise in your letter we will need to know more about what type of personal data is included in the SCCRC’s Statement of Reasons. I am happy for my officials to discuss the matter with SCCRC if that would be helpful. This will allow us to reach a view on whether the DPA is indeed the obstacle that the SCCRC currently perceives it to be.

I understand that other UK Ministerial colleagues have broader interests in the Bill you have introduced into the Scottish Parliament and may wish to discuss this with you in due course.
I am copying this letter to the Foreign Secretary, Secretary of State for Scotland, the Home Secretary, the Attorney General, the Advocate General for Scotland and Sir Gus O'Donnell.

KENNETH CLARKE
Letter from the Convener to the Cabinet Secretary for Justice

I am writing to you on behalf of the Committee in connection with Part 2 of the above Bill. We look forward to taking evidence from you and your officials in the New Year at the end of our Stage 1 scrutiny. I understand that the clerks have been in touch with officials on your side to notify a likely date.

The Committee has agreed that in advance of your appearance it would be useful to obtain further background information from you, in order to help inform our understanding of Part 2 and, in particular, of how it would in practice interact with other laws that would potentially restrict the Scottish Criminal Cases Review Commission’s capacity to publish information. We note that this is alluded to in the Policy Memorandum accompanying the Bill, as well as in your letter of 1 December to the Secretary of State for Justice, in which you call upon the UK Government to remove “data protection obstacles” to the publication by the Commission of its statement of reasons on the Megrahi case.

We would appreciate clarification on three main points:

First, the Committee would welcome clarification on what you and your advisers understand those data protection obstacles to be. We make this request in the awareness that data protection law is complicated, and that some further pointers as the precise legal factors potentially preventing disclosure of information would help us understand the underlying issues and interrogate the evidence more effectively.

Secondly, the Committee appreciates that much of data protection law derives in turn from European law, which sets out key principles of data protection that must generally be adhered to within all member states. Again, we would welcome clarification on what you and your advisors understand to be the areas where the UK Government would have a discretion to permit derogation from the rules ordinarily restricting the disclosure of the relevant information.

Thirdly, the Committee is not certain as to whether there are other legal rules than data protection law that might restrict the Commission’s ability to publicly disclose particular information relating to the Megrahi case. For instance, we are unclear whether the Official Secrets Acts might apply or whether there are any common law protections that might potentially be available to interested parties. It would be helpful to the Committee if you were able to set out your thoughts on this issue.

In addition to those three specific points, the Committee would of course be grateful for any further information you might consider relevant and helpful in relation to this issue.

Christine Grahame MSP
Convener
20 December 2011
Letter from the Convener to the Rt Hon Lord McNally, Minister of State and Deputy Leader in the Lords

The Justice Committee has been appointed lead Committee on the above Bill, responsible for taking evidence and reporting to Parliament on whether to approve the general principles of the Bill. We will be taking evidence over January and February. I am writing to invite you to provide evidence on behalf of the UK Government on Part 2 of the Bill.

Part 2 makes provision to enable the Scottish Criminal Cases Review Commission to disclose information concerning cases it has referred to the High Court for appeal against conviction where such an appeal has subsequently been abandoned.

The Scottish Government has made clear that, although Part 2 is drafted in general terms, it is intended to enable the Commission to publish its Statement of Reasons on the case of Abdelbaset Al-Megrahi, the convicted Lockerbie bomber, whom, the Commission had concluded, had grounds to appeal his conviction. At an early stage in his subsequent High Court appeal, Megrahi was released from prison on compassionate grounds, leading him to abandon the appeal. Whilst his appeal was live, some of the material contained in the Statement of Reasons was heard in open court. However, the vast majority of the Statement remains undisclosed and cannot currently be lawfully disclosed.

Part 2 sets out a framework for the Commission to decide whether it is appropriate to disclose relevant information relating to an abandoned or fallen appeal. Express provision is made for circumstances where it would not be appropriate for the Commission to disclose relevant information, for instance where information has been obtained from a foreign power, which has not subsequently consented to its disclosure. The Scottish Government’s police memorandum accompanying the Bill makes clear however, that over and above restrictions set out on the Bill, there may be other legal rules that would make disclosure unlawful. Paragraph 58 of the memorandum refers to the Data Protection Act 1998, the Official Secrets Acts and the ECHR as potentially having this restrictive effect, but indicates that this list may not be exhaustive. You will appreciate that the Scottish Parliament does not have the power to legislate to remove these potential legal obstructions to full disclosure.

The Committee considers it very important that, in scrutinising Part 2, we gain a proper understanding of what effect laws such as those mentioned in paragraph 58 may have on the functioning of Part 2, if the Scottish Parliament were to agree to the Bill. Without wishing to express a preliminary view on whether the Committee

intends to endorse the general principles of the Bill, the Committee would also be interested to know whether, if the Bill became law, the UK Government would be in a position to help ensure that as much information as possible that is in the public interest can be disclosed. Accordingly, the Committee has agreed to invite you, as UK Minister responsible for freedom of information, data protection and data sharing, to discuss issues around Part 2 of the Bill. We would be delighted if you were able to accept.

Justice Committee meetings take place weekly on Tuesday mornings here at the Parliament, starting at 10am and usually finishing no later than 12.30. We would be very pleased if you were able to appear before the Committee in person but if pressures of business understandably prevent you from coming to Edinburgh, the clerks would be very happy to work with your officials to facilitate a video-conferenced session. Dates on which it would be possible to hear from you would be **17, 24 and 31 January, and 7 and 21 February**.

I note that the Cabinet Secretary for Justice wrote to the Justice Secretary on 1 December, in relation to Part 2 and that the Justice Secretary has since replied, although that response is not currently in the public domain. For information, I also annexe to this letter my letter of 20 December to the Cabinet Secretary, seeking further clarification on related matters.

I am very happy to discuss any of the above further, whilst the clerk to the Committee (contact details above) would be very happy to provide any further practical information you or your officials require.

Christine Grahame MSP  
Convener  
22 December 2011
Letter from the Cabinet Secretary for Justice to the Rt Hon Kenneth Clarke MP, Secretary of State for Justice

I refer to previous correspondence in relation to our Criminal Cases (Punishment and Review) (Scotland) Bill and issues surrounding data protection.

The Justice Committee of the Scottish Parliament have asked for your letter of 13 December to be made publicly available. They have suggested that, in the interests of transparency, it would be helpful for members of the Committee be given sight of your letter as they scrutinise our Bill so as to assist them in understanding the data protection issues that arise in the context of the Bill.

I would be grateful if you could advise whether you are content that we pass your letter of 13 December to the Justice Committee. If we were to pass the letter in this way, the Justice Committee would publish the letter on their website and so the letter would, for practical purposes, be in the public domain. We would also publish the letter on our website along my letter of 1 December to you.

I look forward to hearing from you in early course. A copy of this letter goes to Christine Grahame MSP, Convener of the Justice Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice
12 January 2012
Christine Grahame MSP  
Convenor  
Justice Committee  
c/o Justice Committee Clerks  
Room TG.01  
The Scottish Parliament  
Edinburgh  
EH99 1SP

Our reference: 319264

January 2012

Dear Christine,

Criminal Cases (Punishment and Review) (Scotland) Bill

Thank you for your letter of 22 December 2011, inviting me to give evidence to the Justice Committee in the Scottish Parliament on Part 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill. Unfortunately, due to Parliamentary commitments in Westminster, I am unable to attend to provide evidence during January or February 2012. However, I recognise the importance of thorough scrutiny of draft Bills. Therefore, as Minister for Information policy and Human Rights please find attached some written evidence on considerations in relation to the Data Protection Act 1998 and the European Convention on Human Rights. I hope this is helpful. If you have any further questions, please do not hesitate to get in touch.

Yours Sincerely,

TOM McNALLY
Written evidence for the Scottish Parliament Justice Committee from the Ministry of Justice on the Criminal Cases (Punishment and Review) (Scotland) Bill in relation to data protection and ECHR issues

The Convener of the Scottish Parliament’s Justice Committee, Christine Grahame MSP, wrote to the Minister of State for Justice, the Rt Hon Lord McNally, on 22 December seeking evidence from the UK Government on the effect of overarching statutory requirements, for example the Data Protection Act 1998 (DPA), the Official Secrets Acts and the European Convention on Human Rights (ECHR) in relation to Part 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill. This written evidence deals with considerations in relation to the DPA and ECHR, which are the policy responsibilities of the Ministry of Justice.

Considerations in relation to the DPA
Paragraph 58 of the Scottish Government’s policy memorandum sets out clearly that ‘in considering whether it would be appropriate to disclose information in relation to a case, the Commission will be required to ensure that the disclosure of the information did not contravene any relevant statute applying in the situation. Statutory requirements contained in legislation such as the Data Protection Act 1998 ... are not affected by the provisions in this Bill and these statutory requirements are likely to be relevant in considering the disclosure of information’.

The DPA gives effect to the European Union’s Data Protection Directive 1995. The DPA and the underlying Directive applies to the processing of personal data, unless there is a relevant exemption. Personal data is data from which a living individual is identifiable. There is no provision in either the DPA or the Directive to create a general exception to data protection legislation.

The DPA neither encourages nor prohibits the sharing of personal data, including disclosure of personal data to the public. However, any disclosure must be compliant with the DPA’s eight data protection principles. The first data protection principle requires personal data to be processed fairly and lawfully. In order to meet the requirements of the first data protection principle a condition must also be met in Schedule 2 to the DPA. In the case of sensitive personal data (which is defined in Section 2 of the DPA and includes information relating to physical or mental health or condition and any proceedings for any offence committed or alleged to have been committed by a data subject) a condition must also be met in Schedule 3 to the DPA. A number of the Schedule conditions require the processing in question to be “necessary” for a particular purpose. “Necessary” in the context of the DPA does not mean that the processing has to be essential, but that it must be proportionate to the legitimate aim pursued.

Consideration of whether any disclosure of personal data would be in compliance with the DPA is an issue for the organisation (known as a data controller in data protection legislation) that decides how to process any personal data. In the same way liability for any breach of the DPA would rest with the data controller. In relation to the Statement of Reasons in the case of Abdelbaset Al-Megrahi, the data controller is, as you know, the SCCRC. For any case that would be covered by the clauses in this Bill, the SCCRC would also likely be the data controller. It is therefore for the SCCRC to decide whether disclosure would be in compliance with the DPA. The Ministry of Justice is unable to provide a view on whether disclosure would be in compliance with the DPA in this specific case or any other relevant case that would be covered by the clauses in Part 2 of this Bill because it would depend on the specific details of the case and the personal data contained in the Statement of
Reasons for each case. The UK Government has however indicated to the Scottish Government that it would be happy to discuss directly with the SCCRC data protection implications. The relevant letter from the Lord Chancellor and Secretary of State for Justice to the Scottish Cabinet Secretary for Justice is attached for information.

Considerations in relation to the European Convention on Human Rights (the Convention)
The Convention applies to all public authorities in the UK. Therefore, consideration would need to be given as to whether disclosure of the information concerned complies with the Convention. In particular, relevant consideration would need to be given to Article 8 of the Convention, the Right to respect for a private life.

The European Convention on Human Rights (the Convention) outlines 16 basic rights or freedoms, together with any permitted exceptions, which apply to everyone in the states that have signed the Convention.

The Human Rights Act 1998 (HRA), which came into effect in October 2000, incorporated the Convention rights into UK law, enabling individuals in the UK to take cases about their human rights to a UK court (whereas previously they had to take such complaints to the European Court of Human Rights in Strasbourg).

The HRA also obliges public authorities, which would include the Scottish Parliament or any authority carrying out a public function under the aegis of its legislation, to treat people in accordance with their Convention rights and must apply legislation in a way that is compatible with the Convention rights. The Scottish Parliament is also obliged to comply with the Convention through the Scotland Act 1998.

Article 8 of the Convention guarantees individuals’ right to respect for private and family life, their home and correspondence. This right can be restricted only where any such restriction has a proper legal basis, and pursues a legitimate aim in a proportionate manner.

The disclosure of personal data is likely to engage Article 8 of the ECHR. The relevant provisions in the Bill and the subsequent correct application of them would need to meet the criteria outlined above for any restriction of an individual’s Article 8 rights. The principles underlying the DPA ultimately derive from Article 8 of the Convention, so if the data are processed in a way that complies with the DPA then it is very likely that the processing would also comply with Article 8.
Letter from the Cabinet Secretary for Justice to the Convener

Thank you for your letter of 20 December in relation to the Criminal Cases (Punishment and Review) (Scotland) Bill (“the Bill”).

For ease of reference, the Committee’s comments are copied below followed by our response to each of the points raised.

Justice Committee comments
First, the Committee would welcome clarification on what you and your advisers understand those data protection obstacles to be. We make this request in the awareness that data protection law is complicated, and that some further pointers as to the precise legal factors potentially preventing disclosure of information would help us understand the underlying issues and interrogate the evidence more effectively.

Scottish Government response
As you’ll be aware, the Scottish Government has not seen the contents of the Statement of Reasons (“SoR”) produced by the Scottish Criminal Cases Review Commission (“the Commission”) in the Al-Megrahi case. However, based on discussions with the Commission, our understanding is that the data protection obstacles that currently exist, and that would not be affected by the Bill (and therefore will continue to exist even if the Bill is passed), relate to what is known as, under data protection legislation, ‘personal data’ and ‘sensitive personal data’.

As you note, data protection legislation is complex, but hopefully the following information is helpful in understanding the relevant issues. Under section 1(1) of the Data Protection Act 1998 (“the DPA”), personal data is defined as data which relate to a living individual who can be identified –

- from those data, or
- from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

The definition of personal data includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Sensitive personal data is defined by section 2 of the DPA as personal data consisting of information as to –

- the racial or ethnic origin of the data subject,
- his political opinions,
- his religious beliefs or other beliefs of a similar nature,
- whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- his physical or mental health or condition,
• his sexual life,
• the commission or alleged commission by him of any offence, or
• any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Processing, in relation to information or data, is defined in section 1 of the DPA as obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including –

• organisation, adaptation or alteration of the information or data,
• retrieval, consultation or use of the information or data,
• disclosure of the information or data by transmission, dissemination or otherwise making available, or
• alignment, combination, blocking, erasure or destruction of the information or data.

In the context of the Commission and the Bill, processing would refer to the potential disclosure of the information.

The conditions for processing of information are set out in Schedules 2 and 3 to the DPA. Unless a relevant exemption applies, at least one of the following conditions must be met whenever personal data is processed:

• The individual who the personal data is about has consented to the processing.
• The processing is necessary:
  - in relation to a contract which the individual has entered into; or
  - because the individual has asked for something to be done so they can enter into a contract.
• The processing is necessary because of a legal obligation that applies to you (except an obligation imposed by a contract).
• The processing is necessary to protect the individual’s “vital interests”. This condition only applies in cases of life or death, such as where an individual’s medical history is disclosed to a hospital’s A&E department treating them after a serious road accident.
• The processing is necessary for administering justice, or for exercising statutory, governmental, or other public functions.
• The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

In addition, if the information is sensitive personal data, at least one of several other conditions must also be met before the processing can comply with data protection legislation. These other conditions are as follows:
• The individual who the sensitive personal data is about has given explicit consent to the processing.
• The processing is necessary so that you can comply with employment law.
• The processing is necessary to protect the vital interests of:
  - the individual (in a case where the individual’s consent cannot be given or reasonably obtained), or
  - another person (in a case where the individual’s consent has been unreasonably withheld).
• The processing is carried out by a not-for-profit organisation and does not involve disclosing personal data to a third party, unless the individual consents. Extra limitations apply to this condition.
• The individual has deliberately made the information public.
• The processing is necessary in relation to legal proceedings; for obtaining legal advice; or otherwise for establishing, exercising or defending legal rights.
• The processing is necessary for administering justice, or for exercising statutory or governmental functions.
• The processing is necessary for medical purposes, and is undertaken by a health professional or by someone who is subject to an equivalent duty of confidentiality.
• The processing is necessary for monitoring equality of opportunity, and is carried out with appropriate safeguards for the rights of individuals.

We understand from the Commission that there are a significant number of items of both personal data and sensitive personal data contained throughout the SoR in the Al-Megrahi case. Before disclosing personal data, the Commission would require to ensure that they have met at least one of the conditions contained in the relevant list above. Before disclosing sensitive personal data, the Commission would require to ensure that they have met at least one of the conditions contained in each of the two lists of conditions above.

When processing personal data, it should be noted that in order to comply with the sixth condition in Schedule 2 (the “legitimate interest” condition) the data controller is required to balance that legitimate interest with the rights and freedoms, or legitimate interests, of the data subject(s) in question.

It should also be noted that compliance with a condition of Schedule 2, or as the case may be, Schedule 3, does not absolve the data controller of their obligation to comply with the first principle, that data should be processed fairly and lawfully. In other words, it is still possible to contravene the first principle even where the processing has an otherwise lawful basis under Schedules 2 and 3.

We understand from the Commission that they consider that obtaining consent (i.e. the first condition on both lists) is the only realistic means of meeting the requirements of data protection legislation to allow disclosure of information which consists of personal data or sensitive personal data. This runs counter to the intention of the Bill which is intended to provide discretion to the Commission to decide whether it is appropriate in the whole circumstances of a case to disclose information. With the exception of information obtained under international obligations, the Bill does not require the Commission to obtain content from either those who provided information or who are mentioned.
In summary, without steps being taken to remove data protection obstacles as outlined above, our understanding is that it will be very difficult for the Commission to be able to disclose information in the Al-Megrahi case, even if the Commission decided it was appropriate to do so under the terms of the Bill, without being in breach of the DPA.

Part V of the DPA deals with enforcement. There is no stand-alone offence within the Act for a failure to comply with the data protection principles, however, section 55A provides the Information Commissioner with the power to serve a civil monetary penalty notice on a data controller who is in contravention of the data protection principles, where that contravention is of a kind likely to cause serious damage or distress to the data subject. The maximum monetary penalty is £500,000.

**Justice Committee comments**

Secondly, the Committee appreciates that much of data protection law derives in turn from European law, which sets out key principles of data protection that must generally be adhered to within all member states. Again, we would welcome clarification on what you and your advisors understand to be the areas where the UK Government would have a discretion to permit derogation from the rules ordinarily restricting the disclosure of the relevant information.

**Scottish Government response**

The Data Protection Directive (95/46/EC) ("the Directive")

This Directive is the principal instrument regulating data protection within the European Union. The DPA was passed by the U.K. Government in order to fulfil its obligations under the Directive. For that reason, the DPA follows the Directive fairly closely. For example, the conditions contained in Schedules 2 and 3 of the DPA transpose the conditions contained in Articles 7 and 8 of the Directive. The Directive therefore also recognises that there are occasions where the processing of personal data and sensitive personal data has a legitimate basis.

The question of the extent of harmonisation of the Directive (that is, the extent to which member states have the ability to implement its obligations in different ways) has been considered in the case of *Lindqvist*. In that case, the question was whether the Directive was designed to achieve "maximum" harmonisation within member states. If so, this would require member states to implement the Directive exactly, by providing national protection that was neither stronger nor weaker than that in the Directive.

The European Court of Justice’s response was that it was open to member states to meet the requirements of the Directive but also to exceed them, suggesting that maximum harmonisation was not required. The court did not address a derogation from the Directive. Whether or not such derogations are possible is a matter for the UK Government to consider.

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1 Data Protection (Monetary Penalties (Maximum Penalty and Notices) Regulations 2010 (SI 2010/31), reg 2
2 *Lindqvist* (C-101/01) [2003] ECR I-1297 at para [99]
Order making power - DPA

Under paragraph 10 of Schedule 3 of the DPA, the UK Government has an order-making power to specify further circumstances in which sensitive personal data can be processed.

The use of such an order-making power could potentially allow sensitive personal information to be disclosed without the consent of the data subject and without falling foul of data protection legislation. In asking the UK Government to consider whether they think it would be appropriate to disapply data protection legislation in this way, we are aware of a number of complex issues to be considered, including adhering to the requirements of the Data Protection Directive. These are matters for the U.K. Government to consider, however it is likely that any circumstances specified by such an order would require there to be evidence that the processing of the sensitive personal data is in “the substantial public interest”\(^3\).

Justice Committee comments

Thirdly, the Committee is not certain as to whether there are other legal rules than data protection law that might restrict the Commission’s ability to publicly disclose particular information relating to the Megrahi case. For instance, we are unclear whether the Official Secrets Acts might apply or whether there are any common law protections that might potentially be available to interested parties. It would be helpful to the Committee if you were able to set out your thoughts on this issue.

Scottish Government response

We would draw your attention to paragraph 24 of the explanatory notes for the Bill. This states:

‘Whether information is actually released turns principally on the appropriateness test under section 194M(1)(b). As well as the matters referred to in section 194M(3) though, it should be noted that the Commission’s ability to disclose information will be informed (and may be restricted) by the application of ECHR law and the operation of reserved statutes such as the Data Protection Act 1998 and the Official Secrets Acts 1911-1989.’

As noted previously, the Scottish Government has not seen the SoR produced by the Commission in the Al-Megrahi case. It is therefore difficult to say with any degree of absolute certainty that, for example, official secrets legislation will be relevant, but it is thought likely such legislation will, at the very least, need to be considered depending on the nature of the information in the SoR.

Under Article 8 of the ECHR, which is relevant to Scots law by virtue of section 1(2) of the Human Rights Act and section 57(2) of the Scotland Act 1998, everyone has a

\(^3\) This wording is used in the principal previous order made under this paragraph, the Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000/417). Four further orders have been made under this paragraph to date – SI 2002/2905, SI 2006/2068, SI 2009/1811 and SI 2010/2961.
right to respect for his private life and family life, his home and correspondence. Under section 6 of the Human Rights Act, it is unlawful for a public authority to act in a way that is incompatible with a Convention right.

In respect of any common law protections, breach of confidence and privacy rights may well be relevant considerations (though again this depends on the nature of the information in the SoR). It should be noted that common law actions for breach of confidence and privacy tend to arise in cases between private persons, because Article 8 has no direct horizontal effect (a human rights claim cannot be raised directly against a private body – in such a case there must be a prior cause which enables the claim to reach court).

There is unlikely to be a need for an affected person or interested party to raise a common law action for breach of privacy against the Commission, which is a public authority within the meaning of section 6 of the Human Rights Act, because they could raise a human rights claim directly.

I hope this information is helpful to the Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice
23 January 2012
The Justice Committee has recently completed evidence-taking at Stage 1 of the above Bill. As you may be aware, Part 2 of the Bill, although expressed in general terms, relates to the case of Abdelbaset al Megrahi, the man convicted of the bombing of Pan Am flight 103 over Lockerbie, and provides a framework to enable the Scottish Criminal Cases Review Commission to release information it holds about his case, referred to the High Court for reconsideration in 2007, but abandoned at an early stage of the appeal process.

Data protection has emerged as the key issue during Stage 1 scrutiny, with a number of witnesses, including representatives of the SCCRC itself, expressing concerns that the Data Protection Act 1998 may effectively block the disclosure of information relating to the Megrahi case held by the SCCRC, even if the Bill were agreed to. (This is on the assumption that the majority of interested parties would not consent to the disclosure of sensitive personal data, as proved to be the case on the last occasion that the SCCRC sought to make information about the case public in 2009.)

At its last evidence-taking session on the Bill on Tuesday,\(^1\) the Committee heard from the Cabinet Secretary for Justice, Mr McAskill. He noted that he had written to you requesting his assistance in removing “data protection obstacles” when the Bill was introduced, and that in your reply you indicated that you would be happy for officials in your department to speak to relevant officials in Scotland so as to get more clarity on what was being requested. I now understand that contact has been initiated between Justice Department and SCCRC officials and that there will be a meeting in early March. Again, my understanding is that discussion is likely to focus on whether an order by you under schedule 3, paragraph 10 of the Data Protection Act 1998 is likely to be necessary so as to provide the SCCRC with a relevant condition to make its decision about disclosure against all the data protection principles (alongside their other obligations).

Given the concerns that have been expressed about the impact of data protection law on the efficacy of Part 2 of the Bill, you will appreciate that the Committee considers it an important element of its scrutiny of Part 2 to ascertain whether a schedule 3 order is likely to be forthcoming. Accordingly, I would be very grateful if you could reply to me indicating whether you are minded to make such an order, and to state your reasons for being or, as the case may be, not being so minded. It would also be helpful to have an indication of when any order might be made.

I appreciate that you may not be in a position to reply until the conclusion of discussions between Justice Department and SCCRC officials. If so, it would be helpful to receive a response as soon as possible after that. I am also aware that if you propose to make a schedule 3 order, you would be required to consult the Information Commissioner before doing so.

With thanks in anticipation

Christine Grahame MSP
Convener
23 February 2012
Letter from the Scottish Human Rights Commission

Part 1

Thank you for your letter of 1 March 2012 in relation to the Committee’s consideration of the Criminal Cases (Punishment and Review) (Scotland) Bill: Part 1

The Commission notes the significant amount of work that the Committee has already undertaken on this Bill and addresses the specific questions raised as follows:

- whether Part 1 of the Bill is ECHR compliant;
- whether the alternative approaches suggested in evidence by the Law Society, the Faculty of Advocates, Sir Gerald Gordon QC and James Chalmers are ECHR compatible.

Human Rights Framework

A number of provisions of the European Convention of Human Rights (ECHR) are relevant to the issue of determining life sentences, including:

Article 3 - torture
Article 5 - liberty and security
Article 6 - fair trial
Article 7 – non retroactive application of the criminal law

Also of particular relevance is Article 9 of the International Covenant on Civil and Political Rights (which also relates to liberty).

In relation to Part 1 of the Bill, the key consideration is Article 5 of ECHR which guarantees the right to liberty and security and *inter alia* reads:

“(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court…”

Article 5(1)(a) permits the lawful detention of prisoners sentenced in accordance with the domestic law of a state. However, the continued detention of a prisoner may constitute a violation of Article 5(1)(a) if the proper procedures for the periodic review of that detention of the prisoner have not been put in place.

The review of the continued indeterminate detention of prisoners is governed by Article 5(4), which reads:
“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

The European Court of Human Rights (ECtHR) has explained that:

“According to the Court’s case-law on the scope of Article 5(1) and (4) of the Convention, in order to satisfy the requirements of the Convention such a review must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5, namely to protect the individual against arbitrariness. The latter condition implies not only that the competent courts must decide ‘speedily’...but also that their decisions must follow at reasonable intervals.”

Thus, an individual may be lawfully detained as long as this detention is in accordance with domestic law and is not deemed arbitrary. However, the continued indeterminate detention of prisoners beyond the punitive element of the sentence would constitute a violation of this provision.

In the context of life sentence prisoners a decision to continue their detention after the punishment part should not be taken arbitrarily. The required protection is achieved through the review mechanism prescribed by Article 5(4). Once the punitive element of the life sentence (as reflected in the tariff) has been served the continued detention of the prisoner can only be justified on the basis that he or she represents a continuing danger to the public, a matter that must be open to periodic review.

Article 6(1) ECHR inter alia states that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

This provision guarantees the right to a fair trial, which includes the sentencing process.

In *Eckle v Germany* the ECtHR explained that:

“As regards the end of the ‘time’, in criminal matters the period governed by Article 6(1) covers the whole of the proceedings in issue, including appeal proceedings....”

The Court went on to state that:

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2 (1983) 5 E.HRR 1 at para.76.
“In the event of conviction, there is no ‘determination . . . of any criminal charge’, within the meaning of Article 6(1), as long as the sentence is not definitively fixed.”

More recent cases have determined that the fixing of the tariff is part of the sentencing process and must be undertaken by a court rather than the Executive and that the setting of the tariff should be the same for all life prisoners.

Article 7(1) prohibits retrospective criminalisation and punishment in the following terms:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

Article 3 stipulates that

“[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”

In \textit{V v United Kingdom} the Court suggested that an unjustified and persistent failure to set a tariff, which leaves the detainee in a state of uncertainty over many years, might amount to a breach of Article 3, however in the recent cases of Vinter and Others v. the United Kingdom\textsuperscript{6} the Court held that the particular all-life sentences were not grossly disproportionate nor amounted to inhuman or degrading treatment.

Also relevant is ICCPR Article 9 which provides similar protection to those set out in Article 5 of ECHR.

\textbf{The position in Scotland and the current Bill}

The current legislation governing discretionary sentences of life imprisonment in Scotland is contained in Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) as amended.

As the Committee has discussed during evidence sessions, the 1993 Act was a response to the decision in \textit{Thynne, Wilson and Gunnell v United Kingdom}.\textsuperscript{7} The applicants in that case were convicted sex offenders serving discretionary life sentences but their continued post-tariff detention had not been periodically reviewed. They claimed that this state of affairs violated Article 5(4) ECHR due to the absence of a review procedure to determine the lawfulness of the continued detention of the prisoners after the tariff period of the sentence had been served. This was not a challenge to the lawfulness of the imposition of the original sentence but rather against their continued indeterminate post-tariff detention. The ECtHR held that since the circumstances that gave rise to the applicants’ initial detention

\textsuperscript{3} (1983) 5 EHRR 1 at para.77.
\textsuperscript{5} \textit{Stafford v United Kingdom} (2002) 35 EHRR 32.
\textsuperscript{6} Application nos. 66069/09, 130/10 and 3896/10
\textsuperscript{7} (1991) 13 EHRR 666.
may have since changed they were entitled to periodic reviews of their continued indeterminate detention after the punitive element of their respective life sentences had been served.

The ECtHR explained that:

“...the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at that phase in the execution of their sentences, the applicants were entitled under Article 5 para.4 (art. 5-4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court.”

The 1993 Act provided for this by drawing a distinction between the punishment part of the sentence and any additional period of custody for the purpose of public protection.

While at that stage the Court allowed a distinction between mandatory and discretionary life sentences, a series of cases culminating in *Stafford v United Kingdom*\(^9\), determined that such distinctions were no longer relevant. The Court concluded that mandatory life sentences contain a punitive element that is reflected in the tariff. Once that period had been served, the Court reasoned, the grounds for continued incarceration, “as in discretionary life and juvenile murder cases must be considerations of risk and dangerousness.”\(^10\) Since those elements are liable to change over time, as in the case of other life sentence prisoners, the continued lawfulness of a prisoner’s detention cannot be assumed. This decision had been anticipated in Scotland and amendments had been made to the 1993 Act by the Convention Rights (Compliance)(Scotland) Act 2001 which brought the sentencing and release of adult mandatory life prisoners into line with those of discretionary life prisoners.\(^11\)

The Convention Rights (Compliance)(Scotland) Act 2001 also enhanced the security and tenure of Parole Board members to ensure their independence from Scottish Ministers in compliance with the right to a fair hearing in Article 6.

The decision in *Petch & Foye v HM Advocate*\(^12\) related to the proper approach to the determination of the punishment part, for non-mandatory life sentences. The court recognised the complexity of the issue and the perceived anomaly that that would create, whereby an indeterminate sentence prisoner could become eligible for parole at an earlier stage than a determinate sentence prisoner sentenced for the same

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\(^8\) (1991) 13 EHRR 666, at para. 76.
\(^11\) The sentencing and release arrangements for children convicted of murder had already been brought into line with discretionary life prisoners following the decisions in *Hussain* and *Singh* – through the Crime and Punishment (Scotland) Act 1997.
\(^12\) 2011 JC 210.
crime, because of the need to strip out the element of public protection from the notional determinate sentence. However, the judgment did not find any breach of Convention rights in the current system.

The Bill that is before the Committee seeks to remedy the perceived anomaly. The Commission notes that the Faculty of Advocates and the Law Society of Scotland have raised concerns in relation to the complexity of procedure set out in the Bill. However, bearing in mind the principles considered above and in particular:

- a life sentence is not *per se* a breach of Convention rights;
- once the punitive element of the sentence has been served a life sentence prisoner is entitled to a speedy and frequent review by a court or quasi-judicial body of the lawfulness of his continued detention;
- whether a review is sufficiently speedy or frequent is to be determined in the light of the circumstances of the particular case;
- the permitted grounds for continued detention are risk and dangerousness;
- the body reviewing the detention must be invested with the power to determine the lawfulness of the prisoner’s detention rather than acting in a merely advisory capacity; the body must be independent of the executive and of the parties and must adopt appropriate procedures in its hearings.

The Commission considers that the proposal set out in the Bill is consistent with current ECHR jurisprudence.

The Commission’s understanding is that none of the alternative approaches suggested in evidence by the Law Society, the Faculty of Advocates, Sir Gerald Gordon QC and James Chalmers suggest any deviation from the principles set out above and therefore considers that they would also be consistent with current ECHR jurisprudence.

- Whether the apparent potential for “double-counting” (ie considering the same set of factors at two stages of the determination of a sentence) may raise ECHR concerns;

The Commission notes this concern raised by the Law Society of Scotland amongst others in relation to double counting and the submission from the Faculty of Advocates speculating on the approach that the courts might take. Given the complexity of the proposed procedure and the lack of clarity as to how the provisions would be interpreted, the Commission finds it difficult to address this issue without further investigation.

Scottish Human Rights Commission
9 March 2012
Letter from the Cabinet Secretary for Justice to the Convener

Further to the continuing and extensive media reporting of the contents of the Scottish Criminal Cases Review Commission’s Statement of Reasons (SoR) in the Al-Megrahi case (most recently in this week’s Herald newspaper), I am writing to update the Justice Committee with important discussions that have been held in relation to data protection considerations in the context of the Criminal Cases (Punishment and Review) Bill (the Bill).

The Scottish Government is committed to being as open and transparent as it can be in relation the Al-Megrahi case. In terms of the Bill’s framework for potential disclosure of information by the SCCRC, you are aware that the Scottish Government’s focus has been on ensuring that any appropriate steps that can be taken to enhance the ability of the SCCRC to comply with data protection legislation are taken.

As the Committee know, views have been offered to the Committee by the Information Commissioner’s Office, the UK Government and the SCCRC themselves on how the SCCRC may be able to comply with data protection legislation. Following a constructive meeting held on 7 March involving the SCCRC, the Information Commissioner, the UK Government and the Scottish Government, the SCCRC are now considering the issues discussed at that meeting. This includes the question of whether the processing of sensitive personal data under the framework provided for in the Bill can be said to be necessary for the administration of justice.

If the conclusion is that such processing could be necessary for the administration of justice (and the continuing and extensive publishing of the contents of the SoR is likely to be an important factor in this consideration), this would mean that compliance with one of the necessary conditions for the processing of sensitive personal data as provided for in Schedule 3 of the Data Protection Act 1998 could be achieved.

This would not mean the SCCRC did not need to consider other factors relevant to disclosure such as ECHR considerations, but it would mean that the SCCRC could be able to comply with data protection requirements without amendments to the Bill being made by the Scottish Government and without the need for an order under paragraph 10 of Schedule 3 to the Data Protection Act 1998 being made by the UK Government.

As the Committee has heard in evidence, it is ultimately for the SCCRC to be satisfied that they can comply with data protection legislation in terms of the framework in the Bill. With this in mind, the Scottish Government will be guided by the assessment of the SCCRC who, as noted above, are considering whether they may be able to comply with data protection legislation under the terms of our Bill.
With virtually every passing day, more and more of the content of the SCCRC’s Statement of Reasons in the Al-Megrahi case comes into the public domain. The Scottish Government firmly believes that this selective and partial reporting of the information only emphasises the importance of the SCCRC being able to decide to disclose information in the Al-Megrahi case.

I hope this update is helpful to the Committee as you deliberate over the drafting of your Stage 1 report.

Kenny MacAskill MSP
Cabinet Secretary for Justice
16 March 2012
Letter from the Lord Chancellor and Secretary of State for Justice to the Convener

Thank you for your letter of 23 February about the Criminal Cases (Punishment and Review) (Scotland) Bill and the data protection issues which emerged during the course of the Committee’s evidence-taking. I am sorry I was unable to reply in time for the Committee’s consideration earlier this month, but I hope the following will be useful in setting out the position.

The central issue in your letter is whether a condition exists under Schedule 3 to the Data Protection Act 1998 (DPA) which could provide for disclosure of sensitive personal data by the Scottish Criminal Cases Review Commission (SCCRC) in the case of Abdelbaset al Megrahi. My officials have considered the matter in detail with the SCCRC, the Scottish Government and the Information Commissioner’s Office. Following these discussions, there is a general agreement that disclosure of sensitive personal data by the SCCRC could satisfy the existing Schedule 3 condition that provides for processing where it is necessary for the administration of justice. To that extent, the DPA does not appear to be a barrier to disclosure of this information by the SCCRC.

However, I would stress that this is a matter for the SCCRC itself to decide, based on the facts of the case and subject to any other legal obligations or restrictions which may apply (for example, its legal vires and the Convention Rights).

I am copying this letter to the Foreign Secretary, Secretary of State for Scotland, the Home Secretary, the Attorney General, the Advocate General for Scotland, Sir Jeremy Heywood and Sir Bob Kerslake.

Rt Hon Kenneth Clarke QC MP

20 March 2012
Response from the Scottish Government to the Justice Committee’s Stage 1 report

Thank you for the recent publication of your Stage 1 report on the Criminal Cases (Punishment and Review) (Scotland) Bill. Ahead of the stage 1 plenary debate later this week, I am writing to provide the Scottish Government initial response to the various recommendations contained in your Committee’s report.

I hope this is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
17 April 2012

Annex – SG responses to the Stage 1 report recommendations

For ease of reference, the Committee’s comments are shown in **bold** and our responses are shown in *italics*.

37. **The Committee appreciates that the policy aims behind both Parts of the Bill are perhaps unusually narrow for an Executive Bill but still considers that the Scottish Government might have benefited from consulting more widely before introduction.**

*Scottish Government response*

In respect of Part 1 of the Bill, we were keen to quickly bring forward provisions to address the anomaly arising out of the Petch and Foye judgement, to ensure courts regain appropriate discretion in this important area of sentencing law. Whilst we acknowledge that a SG consultation may well have raised awareness of some of the matters that have been raised with the Committee during your Stage 1 scrutiny, we are not seeking to implement new policy in this area of sentencing law, but rather we are seeking in broad terms to give back to courts discretion that had been lost following the Petch and Foye judgement. As we are not seeking to implement new policy, we do not think the delay in introducing the provisions into Parliament that would have resulted from a SG consultation would have been outweighed by the benefits of views received on resolving the Petch and Foye anomaly.

Although the provisions are important, they are complex, highly technical and, as evidenced by the relatively low number of responses received to the Committee’s call for evidence, are only of direct interest to what appears to be a very limited range of stakeholders. We had confidence that the full proper Parliamentary scrutiny of the provisions would assist in quality assuring the approach we have taken and therefore we believe seeking to introduce the provisions as quickly as possible coupled with a commitment to respond to matters raised during Parliamentary
Stage 1 scrutiny has ensured an appropriate balance has been struck between the two competing aims of swiftness in resolving the anomaly and quality assuring the approach.

In respect of Part 2 of the Bill, we also were keen to quickly bring forward provisions to meet our overall policy aim of being as open and transparent as possible in all aspects of the Al-Megrahi case. We did consult with the SCCRC in respect of the provisions, though we do accept the assistance of the Information Commissioner’s Office prior to the introduction of the Bill may have assisted in clarifying how best the SCCRC would be able to comply with data protection requirements in the context of the framework we are providing in the Bill. We are however pleased that your Parliamentary Stage 1 scrutiny has assisted all parties with interests in understanding data protection compliance in the context of the Bill.

83. Putting to one side the merits of the legislative approach taken in Part 1 (discussed below), the Committee is supportive of the aim of Part 1 of the Bill in seeking to address the anomaly identified in Petch and Foye whereby a life prisoner is likely to have a parole hearing earlier than a non-life prisoner sentenced for a similar crime.

Scottish Government response
We note these comments.

94. The Committee accepts that the existing legislative framework on non-mandatory life sentences is already a complex area of law. However, we also note the difference of views between the Scottish Government, which considers the Bill to provide a clear framework for judges to use when calculating the punishment part of non-mandatory life sentences, and those expert witnesses who consider the legislation overly complex. These views are difficult to reconcile. It may be that the Bill is acceptable in the interim to rectify an anomaly that has arisen at short notice. To that extent the Committee is supportive of the general principles of Part 1 of the Bill. The Committee returns to possible long-term solutions later in this report.

Scottish Government response
We are pleased the Committee accepts that the provisions will rectify the Petch and Foye anomaly and are supportive of the general principles of Part 1 of the Bill. We will address the comments regarding complexity separately in response to recommendations below.

95. The Committee seeks an assurance from the Scottish Government that procedures are in place so that victims and witnesses are able to fully understand what the sentences handed down by the courts mean in practice.
**Scottish Government response**

We are committed to ensuring that those who are come into contact with the justice system are able to receive information that helps them understand decisions and processes, including sentencing decisions made the court.

We would note that it has been apparent that in the aftermath of the Petch and Foye judgement, sentencers have been clearly explaining what the effect of sentencing decisions made under the Petch and Foye judgement are actually in terms of the minimum period of time that will be spent in prison.

As part of the Crown Office and Procurator Fiscal Service, the Victim Information and Advice Service helps those victims, witnesses and nearest relatives eligible for the service by:

- providing information about the criminal justice system;
- keeping victims and others up-to-date on key developments in the case that affects them;
- helping victims and others get in touch with organisations that can offer practical and emotional support;
- discussing any additional support that might help victims and others, for example when giving evidence; and
- helping arrange a visit to court for victims and others so that they know what to expect if the case goes to trial and they are to give evidence.

We are keen to explore with stakeholders, in the context of developing a Victims and Witnesses Bill, whether further steps could be taken by those who operate our criminal justice system to enhance the ability of victims and witnesses to better understand the practical effect of decisions made.

103. On the basis of the evidence received, the Committee is generally satisfied that the proposals in Part 1 of the Bill are ECHR-compliant. However, we are not certain whether the possibility of double-counting (discussed further below) might give rise to difficulties in relating to the requirement for comparative justice under the ECHR.

109. The Committee invites the Scottish Government to consider whether the potential for “double counting” under section 2B(5) referred to by witnesses at Stage 1 give rise to any concerns. The Committee also notes the Faculty of Advocate’s views as to potential ambiguity in the drafting of section 2A(2).

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Scottish Government response

We note the comments, but we do not consider there is a difficulty with ‘double-counting’ under the provisions. The approach we have taken is that the seriousness of the offence, the previous convictions of the offender and other factors relevant to the specific case are factors which are relevant to each of two separate assessments required under our provisions. These factors are relevant in relation to assessing the nominal determinate sentence (new section 2A(1)(a) of the 1993 Act) and to calculating the ‘punishment element’ of that notional determinate sentence (new section 2A(1)(b) of the 1993 Act).

We consider these are two separate purposes and therefore we do not consider there is any ‘double-counting’ required under our provisions.

116. The Committee is attracted by the relative simplicity of alternative approaches to the drafting of Part 1 proposed by some witnesses at Stage 1. Following the assurance from the SHRC that it believes these approaches to be ECHR compliant, the Committee invites the Scottish Government to consider whether a less prescriptive approach would be clearer and more appropriate.

Scottish Government response

Our understanding of the alternative approaches suggested by witnesses who gave Stage 1 evidence is that they are predicated on a common acceptance that sentencers must still adhere to ECHR when setting the punishment part of a non-mandatory life sentence. As such, the alternative approaches do not appear to be alternative in the sense of being different in terms of policy, but rather alternative in the sense of not being as prescriptive in terms of laying down in the provisions the process the sentencer has to follow in setting the punishment part while ensuring adherence to ECHR considerations.

We have sympathy with those who consider the provisions are complex. We accept the provisions are complex, but we do not consider they are unnecessarily complex. This is an unavoidably difficult area of the law because there are many different factors necessarily in play for the sake of ensuring that the appropriate punishment part is determined by reference to the particular circumstances of any individual case.

In terms of understanding sentencing decisions, we think it is beneficial if all those involved in a case understand fully the basis upon which a sentencer will set the punishment part. This can be done by presenting to them the framework in Part 1 of the Bill. This framework should also assist the sentencer when explaining how the punishment part has been assessed. In terms of appeals being made against sentencing decisions, we think the most appropriate way of minimising the risk of appeals is for the sentencing framework to be laid out as in Part 1 of the Bill. Although it is possible (as with any law) that appeals will be made, we think more appeals are likely to be made if there is not a clear framework setting out the detail of the rules to be applied by the sentencer when assessing the punishment part. Our
view is that there will be more scope to challenge the punishment part if any important aspects are omitted from the statutory framework.

While we would be happy to consider the precise terms of any specific alternative approaches, we believe that providing the prescriptive framework in Part 1 of the Bill is the best way to resolve the Petch and Foye anomaly and (in doing so) achieve clarity and certainty of meaning and effect.

122. The Committee seeks an update from the Scottish Government on when the relevant sentencing provisions in the Custodial Sentencing and Weapons (Scotland) Act 2007 will be brought into force.

Scottish Government response

The report of the Scottish Prisons Commission recommended that the relevant provisions in the Custodial Sentencing and Weapons (Scotland) Act 2007 should be commenced only once certain criteria were met, including securing a reduction in the prison population. The Scottish Government is committed to ending automatic unconditional early release when it is feasible to do so and we legislated through the Criminal Justice and Licensing (Scotland) Act 2010 to provide greater flexibility to define the level of sentence above which more robust early release arrangements could be triggered. We have not yet met the criteria set out by the Scottish Prisons Commission and it is not considered that the prison population has reduced sufficiently to commence the provisions. Officials are working to address this and to ensure that any future commencement would be measured and proportionate.

132. The Committee recognises that publication of the statement of reasons in the Megrahi case might serve a relatively limited purpose as it is unlikely to resolve all outstanding issues. However, we are supportive in principle of there being as much openness as possible about the reasons why Megrahi was allowed to make his appeal.

133. The Committee also notes that the Bill is in general terms and may apply in future to cases other than that of Megrahi. However, the main policy aim behind the Bill has been to facilitate the publication of the statement of reasons pertaining to that case. The Committee invites the Scottish Government to consider whether recent events provide an opportunity to consider whether the Bill’s provisions are robust enough to apply in circumstances other than the Megrahi case.

134. Whilst the Committee notes that the intended main purpose of Part 2 appears to have been superseded, the Committee supports there being as much openness as possible in relation to abandoned appeals arising from a reference from the SCCRC, subject to there being a substantial public interest. The Committee therefore supports the general principles of Part 2 of the Bill, but recognises that there has been very little opportunity to take evidence on the general applicability of Part 2.
Scottish Government response

Although we acknowledge the provisions in Part 2 have been brought forward as a direct result of the situation that arose in the Al-Megrahi case, we have been clear that the framework we are providing for the SCCRC to consider disclosing information in cases they have referred is a framework for general application.

We were keen that the SCCRC would not be burdened with assessing, under the terms of the full framework provided in the Bill, whether to disclose information in other relevant cases where, for example, there was not a clear public interest. For that reason, we included in our Bill what will become new section 194Q of the 1995 Act so that where the SCCRC make a preliminary examination of whether it is appropriate to disclose information in a case and reach a view that it is manifestly inappropriate, the rest of the framework in terms of notifying affected and interested persons do not apply. New section 194Q(3) provides that if there is a material change to any significant factor, then it is open to the SCCRC to make a further preliminary examination of the question of whether it is appropriate to disclose the information. We believe this gives the SCCRC flexibility to deal with any changes in circumstances.

In general, we consider the framework provided in Part 2 of the Bill is robust and, as it has not been narrowly designed just for the Al-Megrahi case, it is able to be applied for a range of potentially relevant cases.

156. Following recent events, the Committee notes that the question whether the SCCRC is the appropriate body to undertake (a) the administrative process of preparing the Megrahi statement of reasons for publication and (b) the final decision whether to publish the statement (or a redacted version of it) may have been superseded by events.

157. However, the Committee is clear that the SCCRC would generally be the appropriate body to undertake the administrative process envisaged under Part 2 of the Bill.

158. In relation to the final decision-making process, the Committee notes the SCCRC’s evidence that it would have been willing to take the decision to publish the Megrahi statement given the appropriate legal tools. The Committee invites the Scottish Government to consider whether it would be of benefit, for future cases, if the factors the SCCRC should take into account in determining whether to disclose information should be expressly set out (whether in the Bill or, for instance, in guidance from the Scottish Ministers.) If so, it appears to the Committee that the public interest should be a key consideration.

Scottish Government response

We can understand why it may be considered beneficial to specifically lay out the factors the SCCRC will consider when deciding whether to disclose information. However, we consider the current approach of empowering the SCCRC so that disclosure of information can take place if, subject to requirements of the wider
framework, ‘... the Commission have determined that it is appropriate in the whole circumstances for the information to be disclosed’ is the most suitable approach.

We believe this ‘appropriateness’ test gives suitable discretion to the SCCRC to make the decision whether to disclose. We would expect that the public interest will be a key factor that the SCCRC will consider when applying the appropriateness test, but we do not consider it would be beneficial to seek to prescribe, even in a non-exhaustive list, factors that feature as part of the appropriateness test as that would potentially restrict the discretion we want to give to the SCCRC through the framework in deciding whether to disclose information.

169. The Committee broadly welcomes the provisions in Part 2 relating to the notification of interested and affected parties, and notes, in particular, the Information Commissioner’s view that they may help ensure that information is disclosed in compliance with data protection requirements.

170. In relation to information emanating from foreign authorities under international agreements, the Committee notes that the Bill in effect gives the authority a veto power over the disclosure of such information. This might be considered contrary to the principles underlying Part 2, but the Committee accepts that the inclusion of such a provision may be practically unavoidable.

171. The Committee notes that the Bill makes it possible for the SCCRC to publish an incomplete statement of reasons, but requires the SCCRC to make this expressly clear, as well as to explain the context in which information is being disclosed. This appears to be a measured approach. On the other hand, questions would be raised about the disclosure of a statement that has been substantially redacted, given the aim of openness and transparency that lies behind Part 2 of the Bill. We also note the SCCRC’s comments that they would be unlikely to publish the Megrahi statement if, following redaction, it had become “unbalanced” and recommend that similar reasoning should be applied in any future cases.

Scottish Government response

We note these comments.

209. The Committee notes the recent publication of a redacted version of the Megrahi statement of reasons by a Scottish newspaper, but considers it useful to set out our conclusions on the applicability of data protection law to the SCCRC.

210. The Committee is not persuaded by the argument that any data protection obstacles could have been avoided through the Cabinet Secretary for Justice exercising an order-making power rather than introducing a Bill. The legal position is clear: the Parliament does not have the power to override data protection law whether by primary or secondary legislation.

211. The Committee notes the emergence of an apparent consensus among key stakeholders that one of the conditions permitting the lawful disclosure of
personal data and sensitive personal data (that the processing is necessary for the administration of justice) may be applicable. This would permit the publication of information in the statement of reasons whether or not consent was obtained. If this is ultimately accepted, then an order enabling disclosure from the UK Secretary of State for Justice would not be necessary.

212. The Committee invites the Scottish Government to clarify whether it considers there would be any legal benefit or disbenefit, in terms of data protection law, in altering the current test to be applied by the SCCRC in determining whether to publish a statement of reasons (for instance by providing that this is, under certain circumstances, a duty rather a power).

Scottish Government response

As detailed in my letter to the Committee of 16 March 2012, discussions regarding how best the SCCRC could comply with data protection requirements under the framework provided for in the Bill have led to the emerging conclusion that the processing of sensitive personal data under the framework provided for in the Bill could be said to be necessary for the administration of justice. If the conclusion is that such processing could be necessary for the administration of justice, this would mean that compliance with one of the necessary conditions for the processing of sensitive personal data as provided for in Schedule 3 of the Data Protection Act 1998 could be achieved. As the Committee is aware, this would not mean the SCCRC did not need to consider other factors relevant to disclosure such as ECHR considerations, but it would mean that the SCCRC could be able to comply with data protection requirements without amendments to the Bill being made by the Scottish Government and without the need for an order under paragraph 10 of Schedule 3 to the Data Protection Act 1998 being made by the UK Government.

It is ultimately for the SCCRC to be satisfied that they can comply with data protection legislation in terms of the framework in the Bill.

Paragraph 7(b) of Schedule 3 to the Data Protection Act 1998 provides that one of the conditions for processing sensitive personal data is that the processing is “necessary for the exercise of any functions conferred on any person by or under an enactment”. It has been accepted in the course of discussions, that the meaning of “function” in this context can include either a power or a duty.

With that in mind, our view is that it does not seem necessary to create a duty to disclose purely in order to try and enhance SCCRC’s ability to meet data protection requirements under the framework in the Bill. We do not consider there would be any particular benefit by, for example, providing that it is, in certain circumstances, a duty for the SCCRC to publish information in cases they have referred rather than a power to publish information in cases they have referred. We believe it is preferable for the SCCRC to have flexibility in this regard.

219. The Committee notes that if the SCCRC acted in compliance with the data protection principles in releasing information, this does not necessarily mean that human rights considerations would not arise. This would need to be taken account of particularly in circumstances where the SCCRC disclosed sensitive
personal data without express consent. However, the Committee has no reason to believe that this is an insurmountable legal difficulty.

Scottish Government response

We note these comments.

223. The Committee invites the Scottish Government to consider the points raised by the SCCRC on legal professional privilege and on whether it would be possible to competently address this within the Bill.

Scottish Government response

In line with our overall policy aim of being as open and transparent as possible in all aspects of the Al-Megrahi case, we are considering this issue as we want to ensure the framework provided to the SCCRC appropriately empowers them to consider disclosing information.

229. The Committee notes that there are two competing views on the scope of section 2(2), which concerns the power to amend primary legislation on sentencing by subordinate legislation. The Committee recommends that the Scottish Government give further consideration to the drafting of this provision prior to Stage 2.

Scottish Government response

It is the Scottish Government’s position that regulations made under section 2 of the Bill will only be able to modify Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007.

Those Acts are mentioned expressly in section 2(2) because those are the ones the Bill is seeking to amend in the first place. The references to the two Acts are very specific. They refer to single Parts of those Acts, not the whole of each Act. Accordingly, our view is that such a narrow specificity would tend, on a normal reading, to exclude any other Act, or Part of an Act, from modification.

Further, the words “for the purposes of or in connection with section 1” in section 2(1) tie the power closely to the amendments already being made by the Bill. If another Act cannot be reasonably stated to relate sufficiently to that purpose, then in our view this would exclude modification, even if it could be argued theoretically that the specific references to single Parts in section 2(2) do not exclude modification of another Act or Part. In this regard, it is important to note that we do not consider that there is any further legislation in the relevant subject area that would ever require to be amended using this power.

Our view remains that it is clear from the present drafting approach that the powers contained in section 2 are limited in their scope.
236. The Committee would welcome a response from the Scottish Government to the financial concerns raised by the SCCRC, and on whether the Scottish Government considers that these have been superseded by recent events.

Scottish Government response

While it would appear that recent events have superseded the concerns expressed, we note the comments from the SCCRC and are happy to continue to discuss with the SCCRC steps that could be taken to enhance the ability of the SCCRC to meet the financial impact of the Bill's provisions.
Criminal Cases (Punishment and Review) (Scotland) Bill: The Cabinet Secretary for Justice (Kenny MacAskill) moved S4M-02617—That the Parliament agrees to the general principles of the Criminal Cases (Punishment and Review) (Scotland) Bill.

After debate, the motion was agreed to (DT).
Criminal Cases (Punishment and Review) (Scotland) Bill: Stage 1

The Presiding Officer (Tricia Marwick): The next item of business is a debate on motion S4M-02617, in the name of Kenny MacAskill, on the Criminal Cases (Punishment and Review) (Scotland) Bill.

I will give members a few moments to change their seats. [Interruption.]

The Deputy Presiding Officer (John Scott): It would appear that we have a problem with Mr MacAskill’s card. Can we do something about the sound? [Interruption.] Thank you.

I call Mr MacAskill to speak to and move the motion. You have 13 minutes, Mr MacAskill.

14:57

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you for your forbearance, Presiding Officer.

I thank the Justice Committee for its careful stage 1 scrutiny of the Criminal Cases (Punishment and Review) (Scotland) Bill and I welcome the committee’s support for the bill’s general principles.

The bill deals with two discrete topics. Part 1 addresses an anomaly that has arisen with regard to the setting of the punishment part of non-mandatory life sentences by the courts. Part 2 provides a framework within which the Scottish Criminal Cases Review Commission can consider whether it is appropriate to disclose information that it holds relating to cases that it has referred to the appeal court, where the appeal has subsequently been abandoned. Although there is not a direct link between the two parts of the bill, we are legislating in those two general areas for essentially the same underlying reason: so that the public can continue to have full confidence in the processes of Scotland’s justice system.

Whether it is ensuring that offenders convicted of serious crimes are able to be sentenced appropriately by the courts or being as open and transparent as possible about all aspects of the al-Meghrahi case, the Government is committed to doing everything that we can to ensure that the public can have confidence that we have a justice system that is fair, transparent and effective.

Part 1 is a direct response to a March 2011 appeal court judgment that concerned the setting of the punishment part of non-mandatory life sentences. The punishment part of a sentence is the length of time that a prisoner must serve before becoming eligible for parole. Although that judgment, known as the Petch and Foye case, affected only a small number of sentencing cases, with only around 75 offenders having been given non-mandatory life sentences in the past six years, the Government wanted to act quickly and appropriately to remedy the problem that the judgment raised.

As a result of the judgment, a number of offenders have successfully appealed and had the punishment part of their non-mandatory life sentence reduced. The judgment has produced what the appeal court noted was the anomalous result that some life prisoners may become eligible for parole at an earlier point in their sentence than would have been the case if they had been given a fixed or determinate sentence for the same offence.

It is important to emphasise that the Petch and Foye judgment did not and does not mean that serious offenders will be directly released early from prison. Any offender whose punishment part has been reduced will still need to satisfy the Parole Board for Scotland that they do not present a risk to public safety. If the Parole Board is not satisfied, the offender remains in prison and in custody.

Nonetheless, I am sure that we all agree that it is wrong in principle that our courts do not have sufficient discretion in law to avoid the anomalous result that some life prisoners may become eligible for parole at an earlier point in their sentence than would have been the case if they had been given a fixed sentence for the same offence. That is not what the law meant and it is, presumably, not what the sheriff who sentenced the offender meant.

Therefore, we are giving back to the courts appropriate discretion so that they can set a punishment part of a non-mandatory life sentence to satisfy the need for punishment of the offender.

We are aware that there has been some criticism of the provisions on the grounds that they are too complicated. We accept that the provisions are complex. That goes with the nature of the legislation and the terrain with which we are dealing. However, we do not think that they are unnecessarily complicated.

It is important to remember that our provisions exist within the context of European convention on human rights and domestic case law, as well as the framework of existing Scottish legislation.

Lewis Macdonald (North East Scotland) (Lab): I am interested in the cabinet secretary’s view on whether a less complex approach could have been taken had the bill been a bit more ambitious in scope. In other words, had there been more fundamental changes to the sentencing structures, it might have been possible to avoid an opaque proposal in part 1 of the bill.
Kenny MacAskill: That is not the case. There are two separate matters. The Petch and Foye judgment caused considerable concern and was commented on not only by me but by justice spokespeople from all parties. There was significant public concern that must be addressed.

In the bill, we address two specific matters: the Petch and Foye judgment, and a matter that relates to the Scottish Criminal Cases Review Commission. There is a time and a place for further legislation, and I have had discussions about that with Opposition members. The bill should not be viewed as an opportunity to make significant change; that will have to come in other legislation. Part 1 of the bill is about doing what is appropriate to resolve an issue that arose as a result of a court of appeal decision.

Although the matter is complex, the proposal is not unnecessarily so. We have been open to those who complain and suggest that there is an alternative and better position but, so far, we have received nothing. By providing a clear statutory framework within which judges must calculate the punishment part of a non-mandatory life sentence, we are making the law clearer and reducing the risk that sentencing decisions will be overturned on appeal.

Part 2 provides a framework within which the Scottish Criminal Cases Review Commission can consider whether it is appropriate to disclose information that it holds relating to cases that it has referred to the appeal court if the appeal is subsequently abandoned.

Although the provisions are general, members will be well aware that we introduced them to address the situation that had arisen with the statement of reasons in the al-Megrahi case.

The chamber will be aware that, late last month, the Sunday Herald published the commission's statement of reasons for referring Mr al-Megrahi's case to the appeal court. Although any urgency in passing these provisions might have diminished as a result, we are pleased that the Justice Committee supports our position that there should be as much openness as possible in relation to abandoned appeals arising from a reference from the SCCRC where there is a substantial public interest.

Notwithstanding recent events, we are proposing a general framework that might have application in other cases in future. To be fair, we should remember that, in the 13 years that it has been in existence, the commission has referred to court only three cases where an appeal has been abandoned, one of which is of course the al-Megrahi case. Although it is ultimately a matter for the commission, we understand from the commission that, in the other two cases, disclosure of information is not thought likely to be appropriate. However, we simply do not know whether other cases in future will give rise to the considerations that have occurred in the al-Megrahi case.

As our response to the stage 1 report makes clear, we consider that our framework for disclosure of information is robust and that, as it has not been narrowly designed simply for the circumstances of the al-Megrahi case, it can be applied in a range of relevant cases. We cannot speculate on such matters but at least we will have a framework to address any such case that might arise.

It is worth pausing to remind ourselves why the framework was thought necessary in the first place. In the normal course of events, the material in the commission's statement of reasons in the al-Megrahi case could have been tested in court. However, as members will be aware, Mr al-Megrahi chose to drop his appeal in February 2009. Given the exceptional level of wider public interest in the al-Megrahi case, we have consistently done all that we can within the devolved powers of the Scottish Parliament to facilitate the commission's release of the statement of reasons.

During stage 1, the question of how the commission could comply with data protection laws to help enable publication of the statement of reasons in the al-Megrahi case was discussed. Although events might have rendered the question moot in the case of Mr al-Megrahi, it would be helpful to explain how data protection will apply in the consideration of disclosure of information in future cases.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): Does the cabinet secretary accept that it would have been helpful to have consulted the information commissioner at a much earlier stage in order to resolve some of these issues more quickly?

Kenny MacAskill: It was not up to us to consult the information commissioner, because these matters have to be dealt with by the SCCRC. We have always sought to facilitate everything necessary for the commission to deal with such issues, but the commission itself is required to instigate them. As Mr Chisholm will be well aware, neither I nor the First Minister—nor, indeed, any other member of Government—had ever seen the statement of reasons, and I can only assume that, as the SCCRC has indicated, what it said in what has been published was correct.

We have gone out of our way to facilitate and assist the commission; indeed, I believe that the Information Commissioner's Office has met the SCCRC. We have certainly sought to facilitate
such an approach. As an Administration, we should always seek to facilitate matters, which is what we have done, but ultimately these are matters for the commission. I have already paid tribute to the assistance of the Lord Chancellor south of the border and pay tribute now to the information commissioner. People have been working together to ensure that we address these issues.

Following a constructive meeting in March between officials from the SCCRC, the Information Commissioner’s Office, the Scottish Government and the United Kingdom Government, the SCCRC is considering whether it would be able to comply with data protection requirements in publishing sensitive personal data contained in the statement of reasons on the basis that such processing could be said to be necessary for the administration of justice. As such, the commission could comply with a necessary data protection condition for publishing such information.

It is ultimately a matter for the commission to be satisfied that it can comply with data protection legislation. Notwithstanding recent events, it is carefully considering those matters.

We are committed to ensuring that the framework is as robust as it can be in enabling the commission to consider disclosing information. In particular, we are considering the point that was raised with the Justice Committee concerning information that is subject to legal professional privilege and whether further provision is necessary in that area.

We brought the bill forward quickly to ensure that appropriate action is taken to address concerns that have been expressed in two important areas of our justice system. If it is approved today at stage 1, we will continue to work with members and the Parliament through the rest of the parliamentary scrutiny process to ensure that it fully meets our policy aims.

I move,

That the Parliament agrees to the general principles of the Criminal Cases (Punishment and Review) (Scotland) Bill.

The Deputy Presiding Officer: I call Christine Grahame to speak to the motion on behalf of the Justice Committee.

15:11

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I welcome the opportunity to open the debate on behalf of the Justice Committee—at least, that is what it says here. I thank all those who gave evidence to the committee on what, is in football parlance—as I understand it—a bill of two halves. There could continue to be issues about conjoining distinctly separate pieces of legislation in one bill. The practice has an established history in that other legislature and we seem to have adopted it over the past 13 years, but it is perhaps not the best practice.

As a result, the evidence-taking sessions were in two distinct categories: the Petch and Foye group and the Megrahi group—I am using shorthand. I will therefore deal with the bill in those two distinct parts. I thank all the witnesses for their time and contributions

First, I will comment on part 1. I take a deep breath, because this is tricky stuff. I commend the committee members and indeed myself for struggling week in, week out to understand the solution to the Petch and Foye problem—I stress the solution, not the problem.

First, what is the problem? I know that my learned friend Rod Campbell will do a far better job than me of describing it, although he might kill me for saying that. I will repeat to some extent what the cabinet secretary said. In 2011, the appeal court by a majority ruled that convicted sex offenders Messrs Petch and Foye, because of an anomaly in the law, could become eligible for parole earlier than someone who was serving a mandatory life sentence.

By way of explanation, class, there is the mandatory life sentence for murder, and the determinate sentence and the discretionary sentence for other serious offences short of murder. The problem lies with the discretionary sentence, which comprises a punishment element and an element for protection of the public. Eligibility for parole relates only to the punishment part, and it kicks in after 50 per cent of the punishment part has been served. If a large chunk of the discretionary sentence is for protection of the public, we could have, as in Petch and Foye, serious sex offenders applying for parole earlier than someone on a determinate sentence.

The problem is the solution on offer to the committee, which we found overly complex and which is one big headache, not just for me and members of the public but, I have to say, for some practitioners, including a Queen’s counsel who gave evidence. Am I embarrassed to admit a degree of defeat? Not in the least. Although I am mindful that I speak for the committee, I think that it is fair to say that we all struggled with the bill. To be frank, some committee meetings had the flavour of a final-year law tutorial. Even the question-and-answer page on the bill on the Government’s website states:

“This is a very complex area of law.”

The Petch and Foye ruling was by a five to two majority and the appeal court was not able to
agree the terms of the judgment, so I am in good company.

I will take another deep breath. Sit up straight, class. Here are some working examples. For ease of consumption, I have colour coded them. Members will be tested later. The first example concerns the mandatory life sentence. John Black is convicted of murder following a fight outside a bar and, as required by law, he is given a mandatory life sentence. After taking into account the seriousness of the offence, any previous convictions and whether there has been an early guilty plea, the court says that John Black must serve at least 20 years in prison before he is eligible for parole. We know the score—it is 20 years.

Now I move to the determinate life sentence. John Brown is convicted of serious assault following a fight outside a bar. He escapes a murder charge simply because of the speed of the ambulance and the skills of the surgeon. He is therefore not charged with murder and is convicted of a serious assault to the danger of life, which does not attract a mandatory life sentence. He is given a determinate sentence of 20 years to reflect the gravity of the crime, but he will be eligible to apply for parole after 10 years, and he must be released after serving two thirds of his sentence. That is how determinate sentencing works, by the way: a 20-year sentence does not mean 20 years in prison; it means 16-ish years.

I hope that members are still with me as I move on to the non-mandatory life sentence. John Red is convicted of a similar crime of serious assault following a fight outside a bar. However, the court considers that the pattern of behaviour that he has demonstrated means that there is a likelihood that, if he is at liberty, he will be a danger to the public. He is therefore given a non-mandatory life sentence, which effectively means that, even when he is eligible to apply for parole halfway through his sentence, he will be released only if the Parole Board considers that he is no longer a risk to the public. He cannot be released automatically after he has served two thirds of his sentence.

It is when calculating the punishment part of John Green’s sentence that things get tricky. Let us say that Mr Green gets 20 years, but five of those are for public protection. We do not need a calculator—perhaps we do by this stage—to calculate that eligibility to apply for parole is at half of 15 years, not half of 20 years. Mr Green would be eligible for release after seven and a half years, not 10. That is the anomaly. I think that I am understanding this.

Members should remember John Black, John Brown and John Red—I will give members a test when they are leaving the chamber. For further working examples on the problem, I direct members to the Government’s website because I have run out of codeine. I do not, however, fault the Government, because the appeal court’s decision compelled legislative intervention.

To cut to the chase, why make a complex area more complex? I give the suggestion of the Law Society of Scotland and the Faculty of Advocates, on which the committee remarks in our conclusion at paragraph 94 of our report. We were attracted to the simplicity of a less prescriptive approach of enshrining in the proposed legislation a principle that a discretionary life prisoner, such as our Mr John Red, should never be able to apply for parole earlier than a non-mandatory lifer such as Mr Brown. I say gently to the cabinet secretary that if there had been a formal consultation on part 1—although I hear what he is saying about what has happened subsequently—simpler solutions would have been on offer such as those that were presented to us.

It is undeniable that, although part 2 was drafted in general terms, it was proposed to enable publication of the SCCRC’s statement of reasons in the case of Abdelbaset al-Megrahi. At this point, Presiding Officer, I declare an interest as a member of the Justice for Megrahi campaign.

Having exposed the difficulties of part 1, I now have to repeat the difficulties that arise with part 2 in particular because of the marriage of disparate pieces of legislation. This is not the first time that I have had to raise such issues.

Notwithstanding the fact that all the evidence that we took was directed at the al-Megrahi case and the fact that, on 25 March, the Sunday Herald published most of the statement of reasons, part 2 cannot now be detached from part 1, even if someone wanted to do so. Indeed, I give notice as convener of the Justice Committee that if an attempt was made to lodge an amendment to delete part 2, I would reject it as a wrecking amendment and therefore incompetent. Of course, such an amendment could be re-presented at stage 3, but that would be a matter for the Presiding Officer. To some extent, it is a fiction to say that part 2 will have general application, but there is an issue around whether it is robust enough to do its job in general circumstances and not just in relation to such a high-profile case.

There was a fair bit of to-ing and fro-ing, which might have looked like “Blankety Blank”, between the Scottish Government and the UK Government’s Information Commissioner’s Office with regard to the restrictions that the Data Protection Act 1998 might impose on publication of the statement of reasons. That turned out to be a bit of a red herring because, at the end of the day, the UK institutions appeared to be pretty relaxed about publication. I suggest that that
progress was made because of the pressure that the committee put on the Government. That approach might prove to be useful should such intergovernmental co-operation be required again, although this might have been a special case.

That was my executive summary. The bill has two parts: I can sum up by saying that part 1 is overcomplex and part 2 is perhaps redundant. That is not the cabinet secretary’s fault but, as has been said before and will no doubt be said again, we are where we are.

Now, as the tumbleweed gathers round my ankles, I leave the floor to the other committee members. I have run out of codeine, but I have spare supplies of aspirin.

Before I forget, I point out that, in spite of all the aforesaid, the committee supports the general principles of the bill. As a caveat, I remind the cabinet secretary that I speak as convener of the committee, not as a Scottish National Party back bencher—I am not looking to build a case for a by-election in my constituency.

15:20

Jenny Marra (North East Scotland) (Lab):
Alongside other committee members who are present, I had the opportunity to scrutinise the bill closely as it passed through the Justice Committee. I want to take some time to reflect on not just the principles of the bill, but its substance. A great range of views have been expressed on what is a complex bill, as the Justice Committee convener has set out. It is important that those views are aired in the chamber from the outset.

The most important thing in the scrutiny process is that we take the time to get the bill right, which means right for the victims of crime, for the courts and their procedures and for those who are sentenced in our courts. Our justice system is built on the foundations of justice, compassion and integrity, which are the benchmarks against which we as lawmakers should measure any bill that comes before the Parliament. On justice, does the bill get it right for the victims of crime? On compassion, will the bill ensure that justice is proportionate? On integrity, will the bill work effectively in our justice system?

In analysing the reasons behind the bill, we find that its principles go hand in hand with those that underpin our system. Part 1 seeks to rectify an anomaly in the law that has led to a method of sentencing that has been seen to jeopardise the principles of integrity and justice. As we have heard, through the case of Petch and Foye, sentencing in non-mandatory life sentences, including orders for lifelong restriction, have been subject to interpretation that has resulted in sentences being reduced to a point at which offenders will be considered by the Parole Board for Scotland earlier than they might otherwise have been. As a result, there is an element of doubt and confusion, not only among victims and the wider public, but among the legal profession, as the convener pointed out.

Put simply, the bill seeks to address the anomaly by reinstating to judges discretion to hand down sentences that are deemed appropriate in each case. In doing so, the bill seeks to restore integrity in the system as well as a sense of fairness and confidence in the eyes of victims and their families that offenders are being sentenced correctly for the crimes that they commit. Introducing legislation that ensures that courts can sentence dangerous and violent offenders appropriately and in compliance with human rights can only be a good thing. However, we can act on that principle only if the bill that is drafted to rectify the problem is clear, coherent and effective.

As the convener explained, the evidence sessions in the Justice Committee on part 1 of the bill were mired in uncertainty among committee members and witnesses. Most important, there is no consensus that the bill will build confidence in our justice system. There is still an opinion that people who come to the court to be sentenced as well as victims and their families are still confused by the sentencing rules in this country, and there is further confusion not just among committee members, but among qualified and experienced legal professionals.

I will give just one example. Back in January, when the committee first took evidence on the bill, James Wolffe QC stated:

"The approach that is taken in the amendments to existing legislation that are in the bill is to take an already complex piece of legislation and make it even more complex."

He went on to say:

"sentencing judges are expected to explain sentences in a way that will be intelligible not only to the accused who is being punished and sentenced, but to the victims of the crime, the public at large and, ultimately, the appeal court. It is open to question, at least, whether provisions of such complexity will be helpful to sentencing judges in the task that they must carry out".—[Official Report, Justice Committee, 31 January 2012; c 864-5.]

I share the concerns of Mr Wolffe and others who have given evidence on the bill and who have noted the wider implications for victims, the public and the appeal court, making a complex process even more so. At this stage of the parliamentary process on the bill, I urge the cabinet secretary to take evidence from other European countries on how they manage to integrate the ECHR compliance in this form of sentence. Perhaps
Scotland can learn lessons from other jurisdictions where there is more clarity.

There are similar concerns about part 2. While noting the good intention behind the bill, contributors to the Justice Committee’s evidence sessions have aired very different opinions on how effective part 2 will be in addressing the issues that it seeks to rectify. Len Murray from the Justice for Megrahi group described the bill as “a sledgehammer to crack a fairly small walnut.”—[Official Report, Justice Committee, 7 February 2012; c 900.]

That appears to have been substantiated by the publication in a well-known Sunday newspaper of the statement of reasons a couple of weeks ago. Although the convener of the Justice Committee and indeed the First Minister himself appeared on television to welcome its publication, questions were undoubtedly raised about the competence and necessity of part 2.

It is integral to public confidence that the Government should produce legislation that is necessary and effective. Although out of the Scottish Government’s hands, that process was undermined by a Sunday newspaper’s publication of the statement of reasons.

John Finnie (Highlands and Islands) (SNP): Does the member accept that part 2 of the bill has a wider application than just Mr al-Megrahi’s case?

Jenny Marra: John Finnie may, like me, hope that part 2 will have a wider implication in future, although it is difficult to predict when that might be. However, we will support the Government’s motion because we believe in the principles of the bill and that part 2 is necessary for transparency.

In committee, we heard the assistant commissioner from the ICO assert that data protection was no impediment to the statement’s release and there was correspondence from the justice minister, Ken Clarke, who asserted similarly, despite Mr MacAskill’s insistence to the contrary.

Of course, now superseded by the publication of the statement of reasons in the Sunday newspaper, this Government bill and the parliamentary process seem out of step with the public thirst for clarity and transparency on the Megrahi case, which is an important case for the Scottish judicial system.

Part of the problem with part 2 of the bill lies in the scope of the consultation that the Government chose to undertake prior to its drafting. Unusually, only one body, the Scottish Criminal Cases Review Commission, was consulted before the bill was given to the committee. Given the significant data protection issues that we explored, it might have been wiser for the Government to consult more widely to gain a fuller picture of the issues that subsequently arose in relation to part 2.

While we on the Labour benches are happy to support the Government’s motion, we do so with caution and a keen interest in the bill’s progress. The Government must ensure that both parts of the bill will work effectively when they are put into practice and that, in the eyes of the public, victims of crime and those within the legal system, the legislation meets the benchmarks of integrity, justice and compassion that underpin our legal system.

15:29

David McLetchie (Lothian) (Con): As other members have done, I speak as a member of the Justice Committee, which has had responsibility for scrutinising the bill, the first part of which was described to us as creating “a tortuous system which is barely intelligible to lawyers, let alone to the general public”, and the second part of which is now largely redundant due to the actions of a leading Scottish newspaper.

As we have heard, part 1 seeks to address a complex anomaly in sentencing law that was identified in the Petch and Foye case. As a result of that judgment, prisoners who are given a discretionary life sentence or order for lifelong restriction can apply to become eligible for parole at an earlier stage in their sentence than prisoners who are serving sentences that are of fixed length. That is clearly inappropriate.

In the case of Petch and Foye v Her Majesty’s Advocate, the High Court ruled that a sentencing court should adopt a three-step approach to calculating the punishment part for a non-mandatory life sentence—that is, the period after which a prisoner who is serving a life sentence can become eligible for parole. The court concluded that the result of that complex staged calculation was that an individual who has been given an indeterminate life sentence may become eligible for consideration for parole at an earlier stage in their sentence than if they had been given an equivalent determinate sentence. That is not as crystal clear as Christine Grahame’s exposition of the matter, but it is my poor and humble best shot.

I add two caveats to the support that we give to part 1. First, it became clear that this area of the law is complex. A number of witnesses raised concern that the Government’s solution to the Petch and Foye anomaly risked making an already complex set of rules even more complex. Joanna Cherry QC, who appeared as an advocate depute in the Petch and Foye case, said that analysis of the current rules
of her career, and there was clear concern among some witnesses that the bill could make matters less rather than more intelligible.

Secondly, much of this could have been avoided if the Scottish National Party was better at implementing its own manifesto commitments. The Petch and Foye case is yet further evidence of the need to end automatic early release from prison. The Parliament legislated, via the Custodial Sentences and Weapons (Scotland) Act 2007, to end automatic early release, but the act has yet to be implemented.

We and others have repeatedly called for the ending of automatic early release, and have for many years argued that the custodial sentence that is handed down should be the sentence that is served. In fairness, the SNP also claims to be in favour of abolishing automatic early release—indeed, it pledged to do so in both its 2007 and 2011 manifestos, but it has manifestly failed to take any meaningful action towards doing so. It appears that the Government’s fondness for delay in the implementation of its manifesto pledges is not restricted to the independence referendum.

**John Finnie:** Does the member accept that the Government’s position remains that the manifesto commitment will be implemented once the terms of the McLeish commission are met?

**David McLetchie:** Yes—I accept that that is the position, but that is a cover-up for not implementing anything, as Mr Finnie will realise, the longer he serves in this Parliament.

As members have said, part 2 has largely been superseded by events. Shortly before the publication of the committee’s stage 1 report, the statement of reasons was published in a leading Scottish newspaper. The newspaper said that it had published the statement because it had received al-Megrahi’s permission to do so and because it was in the public interest. That followed a letter from the Lord Advocate to the chief executive of the Scottish Criminal Cases Review Commission on 23 March confirming that no employee of the commission would be prosecuted if the statement were to be formally published. The Lord Advocate has since confirmed in a letter to me that there is no specific criminal offence applying to unauthorised publication of the statement of reasons by anyone.

It is now clear that al-Megrahi and his legal team could have published the statement of reasons at any time after the abandonment of his appeal in 2009—after he was safely tucked up in Libya courtesy of Mr MacAskill. The question is, why did he not do so? Why has it taken him and his advisers nearly three years to do something that was entirely within his power and for which he needed permission from no one?

Those developments raise an important point about the Scottish Government’s approach to the al-Megrahi case. The Government’s initial position was that publication of the statement of reasons would be impeded by data protection restrictions, which are a reserved matter. The cabinet secretary told us as recently as 29 February that he had written four times to Kenneth Clarke, the Secretary of State for Justice, demanding the removal of “data protection obstacles”. However, we now know that data protection did not represent an obstacle at all.

Written and oral evidence that the committee received from the Information Commissioner’s Office maintained that the bill would allow disclosure of the statement of reasons and that no data protection restrictions would prevent that. Once Scottish Government officials belatedly joined discussions on the matter with the Scottish Criminal Cases Review Commission and the UK Ministry of Justice, the Scottish Government was forced to acknowledge that what had been said was the case. For confirmation of that, I refer members to Mr MacAskill’s letter of 16 March to the committee, in which he meekly advised us that no Westminster legislation was needed.

It is fortunate for Mr MacAskill that part 2 is largely a dead letter because, as with his impetuous behaviour over the Supreme Court last year, he was far too quick to use the bill as an excuse to grandstand and demand from the UK Government something that ultimately turned out to be totally unnecessary. I am afraid that that tells us everything that we need to know about him and the SNP.

**John Finnie (Highlands and Islands) (SNP):** I will concentrate on part 1 of the bill—the easy bit. We know that part 1 resulted from the much-talked-about Petch and Foye case. As we have heard, part 1 relates to the time that prisoners who are given a discretionary life sentence or an order for lifelong restriction must serve before becoming eligible for parole.

We have heard from various sources that the bill is complex but not unintelligible. We need to bear in mind the practitioners who will use the act. The people who will impose discretionary life sentences and orders for lifelong restriction are perhaps better placed than I am to understand the complexities. We know that the subject is complex and that the appeal court did not reach agreement on the terms of the judgment in the Petch and
Foye case, which was decided by a majority of five to two.

Part 1 will introduce a clear framework for judges to calculate sentences and make the process easier to understand. Petch and Foye are two particularly unpleasant individuals. Petch was found guilty of two charges of rape and was given a discretionary life sentence. Foye pled guilty to a charge of rape and was given an order for lifelong restriction. Both appealed the punishment elements of the sentences. As we have heard on a number of occasions, the punishment part is the period that must be served before a prisoner is eligible for parole. In 2011, the appeal court ruled on the periods that Petch and Foye had to serve before being eligible for parole.

We have heard the situation being described as "an anomaly". I do not know whether it is a simple or a complex anomaly, but it has certainly required a complex solution.

We heard from the Cabinet Secretary for Justice that approximately 75 people have been given discretionary life sentences in the past six years. The important point to note is that such people could become eligible for parole earlier than prisoners who have been given determinate sentences for like crimes. That comparison is important. However, as the cabinet secretary confirmed, that has posed no risk to the public, because the requirement to satisfy the Parole Board for Scotland about safety has remained.

Given that, people might say, "So what?" and ask whether the issue is important. It is extremely important. We have heard about the sort of crimes that draw a life sentence—they include murder and a few others. Courts must have the discretion to impose significant penalties. Non-mandatory life sentences and orders for lifelong restriction are given to the most dangerous offenders, who will be subject to varying degrees of monitoring and supervisory regimes for the remainder of their lives.

A recipient is given a non-mandatory life sentence not as a more severe punishment for their crime or offence but because the judge believes that they are likely to pose a high risk to public safety in the future. Persons who do not pose a high risk would receive a fixed determinate sentence. Given that, the fact that someone who is deemed to pose a risk to the public and who has been sentenced accordingly can be eligible for release ahead of someone who has received a fixed sentence for a similar crime is clearly wrong. The committee heard no evidence to the contrary on that.

We have heard that the Petch and Foye ruling removed judicial discretion. Part 1 will return that discretion and reduce the risk that decisions will be overturned on appeal.

Perhaps predictably, Mr McLetchie brought up sentencing law. A rewrite is not required. The bill is a specific response to a specific problem. As we have heard, it draws on ECHR, domestic law and the framework of existing legislation. The committee supported the aims of part 1.

I will try to outline a very simple version of the solution; it will not be as complex as the convener’s explanation. ECHR laws decree that non-mandatory life sentences are different from other types of sentences because, as we have heard, they are imposed by courts based on the assessed risk to public safety. The bill addresses the problem through providing a framework for the court to set the punishment part of non-mandatory life sentences.

The court must first assess the period of imprisonment that it considers would have been appropriate for the offence had the prisoner not been sentenced to life imprisonment or been the subject of an order for lifelong restriction. That period of imprisonment must ignore any period of confinement that may be necessary for the protection of the public. The court must then assess the part of that period of imprisonment that would represent an appropriate period to satisfy the requirements of retribution and deterrence—I do not think that we have heard those terms in the debate, but they are a component part of the sentencing regime in Scotland. The bill requires that that part of the period of imprisonment, which will be the punishment part, is to be either one half or a greater portion of that period specified, up to the entire period of imprisonment.

That is where judicial discretion kicks in, because between 50 and 100 per cent can be levied, provided that certain criteria are satisfied. The criteria, which exist already, relate to the seriousness of the offence or the offence being combined with other offences of which the prisoner is convicted on the same indictment, the offence being committed when the prisoner was serving a period of imprisonment for another offence and, understandably, any previous convictions.

The situation arises out of an anomaly—no one is to blame for it. Part 1 of the bill will remedy the problem and should enjoy full support.

I do not think that victims needs to understand the minutiae of sentencing law. They receive support from the Crown Office and Procurator Fiscal Service and from the victim information and advice service. We can all look forward to the implications of the bill and, more important, to the victims and witnesses bill that will be introduced in the future.
Graeme Pearson (South Scotland) (Lab): I note John Finnie’s light touch in describing part 1 as “the easy bit”. On that basis, I look forward to his forthcoming book, “A Treatise on Scots Law”, because there is no doubt that if he found part 1 easy to understand, it would be a fascinating book to read.

The Criminal Cases (Punishment and Review) (Scotland) Bill is one piece of legislation with a title that trips off the tongue. Members who have followed the committee’s deliberations will know the torrid time that we faced together in trying to understand the complexities that are involved in simplifying the process at solemn procedure when judges calculate the punishment part of a non-mandatory life sentence, which is dealt with in part 1.

It is satisfying to note that, nonetheless, the committee came to support the aims of part 1 in seeking to address the anomaly that was identified through Petch and Foye v HM Advocate in 2011, whereby a life prisoner is likely to have a parole hearing earlier than a non-life prisoner who has been sentenced for a similar crime.

During our committee meetings, witnesses said much that evidenced the unsatisfactory nature of current sentencing guidelines; indeed, the cabinet secretary himself acknowledged that the bill was meant to be an immediate fix to the Petch and Foye challenge and did not seek to address the structure of custodial sentencing more broadly. To that extent, the bill is disappointing in its ambitions. I hope that, as was alluded to by the cabinet secretary, the Government will consider further procedures that are involved but—more importantly—that victims, witnesses and the general public can understand the structure of custodial sentencing more broadly. To that extent, the bill is disappointing in its ambitions. I hope that, as was alluded to by the cabinet secretary, the Government will consider further procedures that are involved but—more importantly—that victims, witnesses and the general public can understand the system. I hope that the cabinet secretary will be able to address that outstanding matter.

I would like to see in the future the delivery of sentences that not only leave no doubt in the mind of the public about how a sentence is arrived at, but which announce the earliest date of release for a prisoner. That will give clarity and some comfort to people who are affected because they will be safe in the knowledge that an offender will not be on the streets in a free capacity before the said date.

Joanna Cherry QC said in her evidence to the committee that

“It is not just lay people who find the legislation extremely difficult to understand ... I am sure that it is an issue for the Parliament that legislation should be readily understandable to the public, particularly legislation to do with ... sentencing ... That is a strong factor in our concern about the bill’s complexity.”—[Official Report, Justice Committee, 31 January 2012; c 865.]

Sir Gerald Gordon QC echoed those sentiments when he acknowledged that even legal experts and members of the judiciary would struggle to understand all the provisions. Michael Meehan added that

“The bill complicates matters by requiring judges not only to consider the sentence that they will impose but to conduct a parallel notional sentence exercise.”—[Official Report, Justice Committee, 31 January 2012; c 866.]

Despite those reservations, I accept the authorities’ need to take steps to respond to the identified problem. In connection with that, I suggest that the cabinet secretary encourage the authorities to draw up an aide mémoire, written in everyday language, that is designed to explain to members of the public who are attending court exactly what the sentencing procedure is and how judges decide sentences. Such documentation would—alongside Victim Support and other agencies—assist people to understand the processes.

With regard to part 2, events in respect of Megrahi have overtaken the import of our discussions on the matter. Part 2 seeks to establish a framework for the Scottish Criminal Cases Review Commission and, as other members have outlined, we have a greater understanding of some of the perceived hurdles and the real pathways forward. Nevertheless, it is troubling to acknowledge that a reporter who is based at The Herald newspaper in Glasgow has greater latitude to manoeuvre to allow publication of a report from the Scottish Criminal Cases Review Commission than is available to the First Minister and his Government.

A subsequent update to legal advice has indicated that previous reservations with regard to data protection and other issues were ill-founded. Although it is difficult to identify a purpose for that part of the bill now, the Government continues to press for its enactment. I well understand, with regard to Christine Grahame’s contribution, the wrecking impact of our committee seeking to interfere with that process.

Nevertheless, it is useful to acknowledge that, during conversations in committee and in taking evidence, Len Murray, who is a highly respected lawyer, said that in his view the bill could create as many difficulties as it might solve, and Ian McKie commented that the current legislation and the bill as drafted would inhibit rather than assist the release of information. Both appeared before the committee as members of the justice for Megrahi campaign. Whatever their view, and the outcome, the SCCRC raised one practical issue regarding its ability to deal with financial costs. I hope that
the Government will take account of that observation and respond to it in due course.

15:48

**Roderick Campbell (North East Fife) (SNP):** I refer members to my entry in the register of interests as a member of the Faculty of Advocates. One of the advantages of the recess is that it enables one to catch up with reading: I mean not light reading like Ian Rankin, but heavy reading of the decision in Petch and Foye.

It might help if we remind ourselves how we got here. A 1990 decision of the European Court of Human Rights held that discretionary life sentences that were imposed by English courts were composed of a punitive element and a security element. The ECHR concluded in that case that, once the punishment part had passed, an individual was entitled to regular reviews of his continued detention.

English legislation was passed in 1991 to deal with the situation, and contained in its provisions for the release of discretionary life prisoners a specific cross-reference to the provisions for release of long-term prisoners who had been sentenced to determinate terms. That is important in ECHR terms, but the 1993 legislation for Scotland did not—for whatever reason—contain that cross-reference.

However, in a 1999 High Court case—O’Neill v HM Advocate—the appeal court embarked on a clarification of the position by the exercise of constructing a notional determinate sentence that would be arrived at by deciding on the period of imprisonment that would have been appropriate purely for the purpose of punishment if a determinate sentence had been imposed, and then specifying a period of one half of that—or two thirds in exceptional circumstances—as the notional sentence that a prisoner would be required to serve before he could be released, if a determinate sentence had been imposed. That is in keeping with the statutory provisions for release on licence in the 1993 act. It is clear from the decision in the O’Neill case and, in particular, from the comments of the late Lord Rodger, that the court was aware of the potential difficulty that that posed, but the approach was arrived at with the overwhelming purpose of achieving comparative justice.

The Convention Rights (Compliance) (Scotland) Act 2001 was passed to give statutory force to the approach in the O’Neill case and makes it clear that no part of the punishment part should include any element that is necessary for protection of the public. The then Minister for Justice, Jim Wallace, indicated when moving an amendment to that bill that “the court is required to take into account the period that a prisoner sentenced to a determinate sentence of that duration would have served before becoming eligible for release under the early release provisions that are set out in ... section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993.”—[Official Report, 30 May 2001; c 1091.]

However, by definition, one half of the sentence for a determinate sentence may in some cases include an element for protection of the public. That was the problem that was brought to a head in Petch and Foye; Christine Grahame talked about the majority decision in that regard.

In relation to the 2001 act, Lord Clarke stated, in a typically robust manner:

“It cannot, in my opinion, be seriously argued that the legislature had not appreciated this possible anomaly in passing the legislation in the terms it did, when the Lord Justice General had spelt it out so clearly in the judgment which the legislature was seeking to enshrine in the provisions in question.”

Whatever the deficiencies of the 2001 act, the Scottish Government is today seeking to rectify the problem.

Are the provisions in the bill too complex? Insofar as the bill provides for the court to set a minimum period of imprisonment for the non-mandatory life sentence at between half and all of the notional stripped-down punitive period, the anomaly will be removed. The bill will give discretion to judges in sentencing, but will also require judges to engage in a difficult exercise. As Michael Meehan of the Law Society of Scotland said, judges will have to consider, in relation to what is a relatively rare form of disposal, not only the discretionary life sentence but what they might have done had they gone down a different route, and compare the two. He went on to say that

“The exercises are different because, of course, the paramount consideration in cases with a discretionary life sentence is protection of the public.”—[Official Report, 31 January 2012; c 866.]

The Law Society made the important point that, except in a situation in which an extended sentence is imposed, the issue of protection of the public is not generally considered discretely by a sentencing judge when passing a determinate sentence.

The Scottish Government’s response is to accept that the provisions are complex but not unnecessarily complex in an undoubtedly complex area of law.

I note the Government’s comments on the value of a framework setting out the details of the rules that are to be applied by the sentencer, but I am also pleased to note that it would be happy to consider the precise terms of any specified alternative. Given that we are in what the Law Society implies is an artificial situation, if the aim is
to give judges flexibility in sentencing in order to avoid the Petch and Foye anomaly, it seems paradoxical to do so in what has been described as a rigid, step-by-step way.

On double counting, the grounds on which the court may set a punishment part of a non-mandatory life sentence at more than one half of the notional equivalent determinate sentence, such as the seriousness of the offence and any previous convictions, are similar to the criteria that are used to determine the length of the overall notional determinate sentence. Is this double counting? Will it give rise to ECHR challenges? The Scottish Human Rights Commission sits on the fence. Although the Scottish Government’s position is that the criteria are to be applied for separate purposes—which I accept—there are two separate purposes within the overall sentencing framework.

The committee’s view was that the Government might have benefited from consulting more widely before introducing the proposals. Understandably, the Government has indicated that because this was not a new policy, and there was a need for swiftness in resolving the anomaly, it has got the balance right, particularly given the low response to the committee’s call for evidence. Again, it is hard to disagree, but I think that we have to accept that the scheme that is proposed has not generated much enthusiasm. Therefore, although I welcome this element of the bill, there remains scope for further consideration of its detail and for seeking help from stakeholders on consideration of whether there is any realistic alternative. Certainly, it is not helpful to criticize without alternatives.

Having perhaps been overly hasty in 2001, Parliament should endeavour to learn from that experience.

15:55

Humza Yousaf (Glasgow) (SNP): As a member of the Justice Committee, I, too, thank everybody who came forward and gave evidence on the bill.

There is a constant underlying theme in the debate. To say that members were at times bamboozled by part 1 would be an understatement. It was quite amusing to observe witnesses’ faces as members placed their hands in front of their faces and used their fingers to try to understand by way of practical example how sentencing was worked out. I am not looking at anyone in particular in the chamber, of course.

I am in the minority of Justice Committee members who do not have a legal or law-enforcement background.

John Mason (Glasgow Shettleston) (SNP): Hear, hear.

Humza Yousaf: Thank you. However, luckily, my wife studied law, which was very helpful to me. I have sympathy for Alison McInnes and for Colin Keir—who has disappeared from the chamber—who do not have such backgrounds either, but displayed a good grasp of the issues at hand. Perhaps they, too, chose their respective partners very well. I notice that there is no intervention, so I will assume that that is correct.

As we have heard, the bill has two main parts, each of which covers a different aspect of criminal case law. I will speak mainly about part 2, but will briefly touch on part 1, if I may.

People want and need confidence in our justice system. If that confidence is to be maintained, people—the victims of crime in particular—must understand at least the rationale behind offenders’ sentences. There is a much wider issue to be discussed to do with automatic early release, which the Scottish Government is committed to ending—alas, Mr McLetchie has had his moment.

It has been mentioned that it is extremely important that there is consistency in sentencing and that it is understood not only by the legal profession, but by the victims of crime. Part 1 was introduced to fix the anomaly that was highlighted by the Petch and Foye case. The majority of those who gave evidence commented on how complicated the legislation is, but it was also acknowledged that sentencing as a whole is a pretty complex business. The difficulty of understanding the task should not be a big enough factor alone to deter us from fixing an inconsistency in the system; after all, that is part of the job that we are mandated to do.

I accept that there is a difficult balance to strike. We must ensure that people understand sentencing procedure, but sentencing is inherently difficult. It is not a matter of simply having a prescriptive list of sentences to match specific crimes. As the Justice Committee report acknowledges, we must also look at putting in place measures to ensure that victims and witnesses fully understand the sentences that are handed down by the courts and how they apply in practice. Mr Pearson’s idea of an aide-mémoire is worthy of further consideration.

I turn to part 2. Although the bill was introduced specifically in response to the case of al-Megrahi and his abandoned appeal, it can be applied to similar cases that might arise, as John Finnie said. Therefore, it is not completely without purpose, but to pretend that it was not fundamentally driven by the unusual circumstances surrounding that particular case would, of course, be foolish. Many members are much better versed in the intricacies
and complexities of that case, but it is abundantly clear to all that serious questions remain over that tragedy. Primarily, we owe answers to the families of the victims who were killed in the Lockerbie tragedy, but the reputation of the Scottish legal system has a question mark—some may even say a stain—on it that will not be washed away until some serious questions are answered.

It seems to me that the Scottish Government is doing what it can to be as transparent as possible and to move the process forward. Now that the statement of reasons is in the public domain—I cannot confess to having read all 821 pages of it—we must ask: what now? Many of us wonder whether the truth will ever fully be revealed. Surely the only way to bring further clarity would be through an appeal. It was reassuring to hear the cabinet secretary say recently that the appropriate measures are in place for the family of al-Megrahi to pursue an appeal posthumously. It will, of course, be for them to determine whether to do so, but I hope that that opportunity is taken for the sake of the victims’ families if nothing else.

The whole tragic event has been mired in controversy and secrets, deals in the desert, and kissing dictators in Bedouin tents. The talk of oil contracts and secret documents all make for a conspiracy theorist's goldmine. The bill may not be the complete answer to the many outstanding questions that exist; the only thing that will put to bed such questions is the truth.

I am not accustomed to quoting Winston Churchill, and I do not intend to do so ever again, but he was undoubtedly right when he said:

“The truth is incontrovertible; malice may attack it, ignorance may deride it, but in the end, there it is.”

I hope that the bill will help us to take at least a small step towards discovering the whole truth of the deeply tragic al-Megrahi affair.

16:00

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): Presiding Officer, I think that I deserve full marks for bravery as the first non-member of the Justice Committee to venture into these choppy waters without the benefit of the committee tutorials. However, I have read the committee’s excellent report. I note the committee’s view, which was expressed near the beginning of the report, that the bill might have benefited from more consultation, and I agree with the emphasis that Jenny Marra put on the need for more consultation on data protection, in particular.

From my reading of the report, I agree that, in relation to part 1, there was a genuine problem that needed to be dealt with and that the judiciary should be given appropriate discretion. However, I noticed several quotations about the complexity of the proposed solution. As Jenny Marra said, James Wolffe QC told the committee that the Government had taken an extremely complex piece of legislation and made it more complex—and I award full marks to Christine Grahame for trying to unpick some of the complexities.

According to the Scottish Government, the bill is not unnecessarily complex but, as I listened to the cabinet secretary, the words went through my mind: “Explaining legal matters to the nation—I wish he would explain his explanation.” The committee was attracted by the relative simplicity of alternative approaches. Perhaps some of those could be investigated during stage 2.

It is not surprising that—like, I suspect, the general public—I am more interested in part 2. I have a general interest in the Megrahi case and I found several of the issues that the committee raised in its report interesting. For example, a former member of the Scottish Criminal Cases Review Commission suggested that the Government, rather than the commission, should make the decision to publish the statement of reasons. I note that the committee did not agree with the suggestion and I am happy to go along with the committee in that regard. However, I also noted a discussion about whether the factors to be taken into account by the commission should be spelled out in the bill. That certainly seems worthy of discussion at stages 2 and 3.

The report made clear that data protection was the main issue that was raised during discussions about part 2. I have been puzzled by the cabinet secretary’s insistence—until very recently—that data protection was an obstacle to publication of the statement of reasons and I hope that he will talk more about that when he winds up the debate, if he is doing so.

The Information Commissioner’s Office said in written evidence, which is quoted in the report:

“the Bill contains a robust legislative framework which will ensure that such disclosure is fair and lawful.”

I am sure that many members read Lucy Adams in the Sunday Herald on 1 April. She said:

“The Information Commissioner’s Office ... wrote to The Herald to deny claims that the report was held back by data-protection laws.”

She went on to say that the ICO had told the minister that, too. If that is not the case, the minister will no doubt want to say so. I am genuinely puzzled. David McLetchie has a particular political explanation for the Government’s approach. I do not particularly want to go down that route, but it is puzzling that data protection was for so long held to be the main obstacle to publication.
Having said that, I think that there are genuine data protection issues with regard to other aspects of the legal system. That is not the main subject for today’s debate, but perhaps the Presiding Officer will forgive me if I briefly refer to a constituent who came to see me during the past couple of weeks. She was most concerned that a full 20-page transcript of a protracted divorce proceeding that she had been involved in was published on the Scottish courts website. The document gave intimate personal details, as well as—believe it or not—details of specific bank accounts. I do not know whether that happened by accident or whether it is routine practice, although I believe that such reports are routinely put on the Scottish courts website at the discretion of sheriffs. I contacted the Scottish Information Commissioner and he told me that reports of court proceedings must comply with all eight data protection principles, so I think that there is a genuine data protection issue, which the Government, the Lord President and whoever else has an interest in the matter should address.

However, I do not think that that issue is relevant to the publication of the statement of reasons in the Megrahi case. That being the case, I hope that the SCCRC will officially publish the statement of reasons very soon, although many people will have already read it thanks to the Sunday Herald.

16:06

Mark McDonald (North East Scotland) (SNP): Where Malcolm Chisholm leads, I will boldly follow, as another non-member of the Justice Committee entering bravely into the fray. Never has the old quotation, “Laws are like sausages—it is better not to see them being made”, which is often attributed to Otto von Bismarck, been more apt.

The bill is a complex one that deals with complex issues. Christine Grahame, David McLetchie and Rod Campbell, who, unlike me, are all qualified legal professionals, have identified how difficult a bill it is. As a mere layman, I must be perfectly frank and admit that I have found a deal of the process and the technical content of part 1 extremely difficult to comprehend, and I am sure that many people on the street would do so, too.

The litmus test of any bill of this Parliament is whether it will deliver outcomes that are of benefit to wider Scottish society. That is the test that we must apply to any bill that is introduced. I do not think that it is unreasonable that the bill includes extremely complex and technical elements, given that it seeks to resolve a complex legal technicality. The question is whether, in passing the bill, we would deliver benefits. It is through that prism that I will view the bill. I want to assess whether it will have a beneficial impact for society as a whole.

Graeme Pearson rightly identified that, in that regard, a key consideration must be ensuring that victims, families of victims and witnesses understand the bill and benefit from it. In its response to paragraph 95 of the committee’s report, the Scottish Government states:

“We are keen to explore with stakeholders, in the context of developing a Victims and Witnesses Bill, whether further steps could be taken ... to enhance the ability of victims and witnesses to better understand the practical effect of decisions made.”

That is very much a live issue for the Government. It is clear that it is keen to ensure that victims, witnesses and, where appropriate, relatives of victims have an understanding of the process and how it affects them, and what the outcomes of it are likely to be. We should not expect such people to be legal experts, although many of them acquire a good understanding of the legal process as they go through the system. As someone who has spoken to a number of relatives of victims and witnesses, I know that they develop quite a strong understanding of the legal system as a result of their experiences and their exposure to it. As well as accepting the need for such people to understand the legal system, we should not dismiss the fact that many of them develop an acute understanding of how it works.

We should not lose sight of the fact that, although the two sections in part 1 of the bill have, in effect, been christened with the names of the cases that gave rise to their being necessary, those cases are not the only ones to which those two sections do or could apply. The cabinet secretary has identified that only a small number of cases that are in the system at the moment would fall into that category, but it is worth remembering that the cases in question are very serious criminal cases that give rise to significant public safety concerns. It is therefore important that any anomalies in the judicial process and the sentencing system are dealt with to ensure that cases like Petch and Foye do not arise in future.

It has been suggested that there should be a wider review of sentencing. The obvious drawback in that is that a quick fix might be required for a situation like that in the Petch and Foye cases. By definition, a wider review of sentencing would take a longer time and the length of time taken could mean that further anomalies would not be prevented. It was therefore perfectly appropriate for the Government to introduce the bill, particularly part 1, as a fix that is required for very serious criminal cases.
Part 2 was clearly driven by the al-Megrahi case, but we cannot rule out the possibility—that a similar case or another case with similar connotations will arise in future. It is entirely appropriate for the Government to put in place provisions that will allow some of the difficulties that were faced during the process of the al-Megrahi case to be ironed out so that they will not be an issue in future cases.

I support the bill's general principles. I merely observe that, although I do not possess my colleague Mr Finnie’s understanding of part 1, which he referred to as “the easy bit”, we will take up Mr Pearson’s suggestion—I have offered to draw the pictures for Mr Finnie’s book.

Mary Fee (West Scotland) (Lab): The Criminal Cases (Punishment and Review) (Scotland) Bill is needed to remedy the judgment handed down in Petch and Foye v Her Majesty’s Advocate. The bill seeks to deal successfully with an anomaly by which prisoners who are given a mandatory life sentence could apply to become eligible for parole earlier than those serving sentences of a fixed length. It is disappointing that we could have a loophole in our justice system today that would allow prisoners who have committed a crime so serious that it merits a life sentence to be eligible for parole earlier than those serving sentences of a fixed length.

I take this opportunity to thank Christine Grahame, who is not here just now, for her succinct examples earlier of sentencing and parole. Like some other speakers, I am not a member of the Justice Committee, so I found what she said quite helpful. However, I read diligently all the briefings for the debate and I am satisfied that the bill will successfully close the loophole, although I have some reservations about how it will do that.

I understand that part 1 is necessary because of the Petch and Foye judgment, but it only adds complexity to an already complicated area of the law. The current legislation has caused much debate and it has been subject to various interpretations by the courts. Although the bill remedies a loophole in the sentencing structure, it will not give a clear legislative solution, because what is being proposed is too similar to what has gone before.

In general, approaches to sentencing need to be less prescriptive and sentencing requirements need to be clearer and more appropriate. That would make it easier for the public and the victims of crime to understand how and why a sentence was given. I understand that the Justice Committee has asked the Scottish Government to ensure that victims and witnesses fully understand the sentences that are handed down by courts and how they are put into practice. I welcome that proposal, but the sentencing should also be made clearer to the families of the offenders and it should be put in such a way that they will be able to understand the sentence during what is a traumatic time.

The Law Society of Scotland made a valid point that proposed new section 2B(5) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 will give the sentencing judge discretion as to the length of the punishment part of a sentence. The Law Society is concerned that there is provision in the sentence calculation exercise for the sentencing judge to increase the punishment part period, having regard to the same features that could have been considered when that period was first identified. The Law Society feels that someone sentenced in that way might appeal on the basis that it leads to double counting. I feel that the Scottish Government should look into the potential for double counting in the bill.

I agree with the Justice Committee and the Law Society that the bill is acceptable as an interim measure that addresses the immediate concerns arising from the Petch and Foye judgment. However, the opportunity to simplify a complex part of our law has been missed. Indeed, our sentencing legislative framework should be reviewed in its entirety to make it clearer and easier to understand.

Part 2 was intended to allow the publication of the reasoning behind the decision to refer the case of Mr Abdelbaset al-Megrahi to the High Court as a possible miscarriage of justice. The reasons were originally not published because the Megrahi appeal was abandoned.

Arguably, part 2 is now redundant because, as members heard earlier, the reasons for the appeal being dropped were leaked and published in the press. I agree with the Justice Committee that the publication of the statement of reasons in the Megrahi case might serve a relatively limited purpose. However, there needs to be as much openness as possible about why Megrahi was allowed to make his appeal.

The main reason why part 2 was introduced was to facilitate disclosure in the Megrahi case. However, it is general in scope and can apply, in future, to cases other than that of Megrahi. That gives the Scottish Government an opportunity to consider whether the provisions are strong enough to apply in other cases.

If part 2 can apply to future cases, there will have to be a strong public interest in the case for publishing the reasons for appeal. There needs to be as much transparency as possible so that the
The general principles of the bill are decent. They set out to solve a couple of issues in our justice system. However, an opportunity has been missed to make the sentencing procedure more transparent and easier to understand. I also hope that part 2 is robust enough to apply to future cases.

Colin Keir (Edinburgh Western) (SNP): Over the past year, members of the Justice Committee have been faced with some complex material to digest in the course of their deliberations.

As we have heard from previous speakers, some of whom are legally trained, part 1—which deals with the consequences of sentencing post the Petch and Foye judgement—has been one of the most difficult pieces of legislation to deal with in terms of explaining clearly what has happened and what is required to happen to end the anomaly whereby life prisoners may have parole hearings earlier than non-life prisoners who were convicted of similar offences.

There are, of course, differences of opinion. The Scottish Government believes that the bill shows a clear way forward in calculating the punishment part for non-life sentences, while some witnesses believe that we are faced with an overly complicated system. However, I am sure that no one disagrees with the cabinet secretary that the public must have full confidence in the process of law.

We must have a system that is understandable to everyone who is involved in proceedings in a court of law, and it is vital that those who are involved but not legally trained—such as the accused—are able to understand the sentence that is handed down. Therefore, I am delighted that, in his initial response to the committee report, the cabinet secretary gives a clear indication of the most difficult pieces of legislation to deal with in terms of explaining clearly what has happened and what is required to happen to end the anomaly whereby life prisoners may have parole hearings earlier than non-life prisoners who were convicted of similar offences.

There is, of course, differences of opinion. The Scottish Government believes that the bill shows a clear way forward in calculating the punishment part for non-life sentences, while some witnesses believe that we are faced with an overly complicated system. However, I am sure that no one disagrees with the cabinet secretary that the public must have full confidence in the process of law.

Of course, the court must also be able to hand down a sentence that is appropriate to the crime that was committed. Judges must take into consideration comparative justice—or, indeed, comparative injustice—when handing down a sentence. That, on top of ECHR legislation, complicates matters.

I am sure that members will be delighted to know that I do not intend to go through the arithmetical permutations that are described in the committee report. Christine Grahame’s tutorial on sentencing was probably enough for all members.

However, the committee had some reservations about the provisions. As has been mentioned, perhaps a less prescriptive approach is required. I welcome the cabinet secretary’s earlier comments on that. Any effort to simplify the process appears to be worth while—a view that the Law Society and others share.

In his written ruling on cutting the punishment part of Morris Petch’s sentence, Lord Osborne said that it might be “some comfort” to those concerned to note that Petch would not necessarily be released after completing eight years. However, the public are rightly outraged by any cut in a convicted sex offender’s sentence. That is even more the case when it is perceived—rightly or wrongly—that the decision is made on a technicality. Of course, if we can end early release, these issues will be so much easier to deal with in and out of court. I therefore commend the cabinet secretary on his efforts to find a speedy solution to this problem, although I believe that some work still needs to be done.

I do not think that there will be anyone in the chamber who does not know that part 2, which deals with the disclosure of information obtained by the SCCRC, is based on the case of Abdelbaset al-Megrahi. One might argue that, now that events have overtaken us, there is no point in proceeding with this part of the bill but, like the cabinet secretary and Mark McDonald, I have to wonder what would happen if a similar atrocity were to occur on Scottish territory. I certainly support the principle behind part 2, because the bill has cast light on areas hidden in the darkness of secrecy, personal interest and the national interest of various nations. Just in case another case similar to Megrahi’s arises in future, we need to look at the possible data protection issues that Malcolm Chisholm highlighted, which are reserved, and permission to allow the publication of information from individuals, outside agencies and nation states.

Like my colleagues on the Justice Committee, I support the principle of openness whenever possible; indeed, in my opinion, the Megrahi case itself would have benefited from more of it. Of course, that leads us to ask, “What is the public interest?” but that is another question. I believe—and suspect that most people think—that the SCCRC should have been allowed to release the statement of reasons on this case years ago. I also agree with my Justice Committee colleagues that the SCCRC is the appropriate body to deal with the release of such information. It is ludicrous that a version of it was released by a Sunday newspaper and not through official channels; as far as the case of Megrahi is concerned, such a move cannot serve the public interest. However, we are where we are and I believe that, in an effort...
to discover a clear direction for the process, the bill should proceed.

I suspect that the bill has caused every member of the Justice Committee much frustration, but I agree with the principles behind both parts of it. I have to say that I found witnesses’ written and oral evidence fascinating and, as we have gone through stage 1, it has been amazing to hear the different sides of the argument from both the legal profession and groups such as Justice for Megrahi.

I fully support the principles of the bill and the Justice Committee’s report.

16:22

Alison McInnes (North East Scotland) (LD):

Like other committee members, I am grateful to everyone who submitted evidence on the bill, because they certainly helped us to get to grips with an extremely technical piece of legislation. First of all, I should say to Humza Yousaf that my husband does not have a legal background—he is, in fact, a documentary filmmaker—but what he offers me is endless patience. He certainly needed that patience when I tried over and over to explain to him what the bill was about; on this occasion, I might even have stretched it a bit.

During the evidence sessions, there was a great deal of to-ing and fro-ing, particularly with regard to part 2, as arguments about the interaction of data protection legislation and the proposals in front of us played out. Much of that could have been avoided had the Government carried out the usual formal consultation prior to the bill’s introduction.

Like other Justice Committee members, I support the bill’s general principles. As we have heard, it contains two very disparate pieces of legislation. Although not unprecedented, it is not a particularly sensible way to legislate as it ties Parliament’s hands. Although part 2 is couched in general terms, we all know that its overriding purpose was to facilitate the publication of the statement of reasons in the al-Megrahi case. Indeed, some might say that is no longer required, given that a national newspaper published that very document a few weeks ago. Such a development simply highlights how events can overtake us and exposes the dangers that are inherent in linking together two totally separate items in a bill. The fact that part 2 is tied to part 1 means that it cannot be dropped unless we are prepared to allow the whole bill to fall. Of course, that would not be sensible, so we must press on with part 2, however unnecessary it might be. Although it is highly unlikely, I accept that another abandoned appeal in the future might raise significant public interest. However, as the committee convener said, we had little time to take evidence on the general applicability of the provisions as, understandably, most of our evidence related to the Megrahi case.

I support the view that a full and detailed account of the events surrounding Lockerbie should be available to us all. For too long, there has been speculation about the case. As Humza Yousaf rightly pointed out, publication of the statement of reasons would never have resolved all the outstanding issues, but it is an important, if limited, step. Without a doubt, it is in the public interest to know why Mr Megrahi was allowed to appeal. It is vital for Scotland that our justice system is open and transparent and, if mistakes have been made, we must learn the lessons so that justice can be served.

I will focus the rest of my comments on part 1, which relates to the punishment part of non-mandatory life sentences, as we have heard. As the cabinet secretary outlined—the committee convener developed the point in her detailed seminar—it sets out to correct a situation that arose following the appeal court judgment in March 2011 in the case of Petch and Foye v Her Majesty’s Advocate, which meant that prisoners who are given a discretionary life sentence or an order for lifelong restriction can apply to become eligible for parole earlier than those who are serving sentences of a fixed length. The bill is intended to restore to the courts the discretion to set a punishment part of sentences when it considers that appropriate in the circumstances.

Yet again, the Scottish Government finds itself having to play catch-up in relation to ECHR compliance. It has had to get out the sticking plasters again. The fact that this is the latest in a string of such cases highlights the need to ECHR proof all our legislation rather than only responding after the fact. Indeed, the committee’s report draws attention to the interim nature of what is proposed. It is surely time that we looked closely at our body of law and reviewed exactly how it sits in relation to our ECHR responsibilities.

I support what the Government is trying to achieve with part 1, but I question whether it is going about it in the right way. Our committee report highlights concerns about the unnecessary complexity of the proposals. Public confidence in the law and ease of understanding ought to be central to our justice system. Sentencing is a crucial part of that, and it should be readily understood by all those who are involved as well as the wider public. The bill is intended to simplify the situation, yet the Law Society maintains that “the Bill will not give rise to a clear legislative solution”, because what is proposed by way of calculation and comparison exercises is similar to what has
gone before and may itself bring further confusion and uncertainty, which would give rise to its own complexities.

We heard in evidence from the Faculty of Advocates that this is complicating the issue significantly and interfering with judicial independence, and that there are questions about the extent to which it is appropriate to seek to restrict, control and direct the exercise of judgments. There is a danger that sentencing is becoming too formulaic and we are tying the hands of judges and interfering with their discretion.

I draw members’ attention to the paragraphs on pages 16 to 18 of our report on public confidence and clarity in sentencing. As Jenny Marra pointed out, James Wolffe QC characterised the approach of the bill as being

“to take an already complex piece of legislation and make it even more complex.”—[Official Report, Justice Committee, 31 January 2012; c 864.]

James Chalmers of the University of Edinburgh considered that the bill

“seeks to create a tortuous system which is barely intelligible to lawyers, let alone the general public”.

He went on to state that he had not spoken to anyone who had felt comfortable in reading it and working out what judges are required to do under it.

The committee is of the view that the Government should consider whether a less prescriptive approach would be clearer and more appropriate. I have considered the cabinet secretary’s response that the matter is necessarily complex, but I remain of the view that we ought to be doing everything possible to simplify it, and I ask the cabinet secretary to give further thought to that during stage 2.

I have some sympathy with the view that the sentencing legislative framework has become unduly complex and should be reviewed in its entirety to provide greater clarity. I urge the Government to give serious consideration to that in the longer term.

16:28

Dennis Robertson (Aberdeenshire West) (SNP): When I was given the task of being a member of the Rural Affairs, Climate Change and Environment Committee, I never thought that I would be grateful for that, but I am absolutely so. From what we have heard from the members of the Justice Committee this afternoon, it is not somewhere that I would have wished to be.

There is little point in my going over the statements that we have already heard from various members. Part 1 of the bill is indeed complex. However, the complexity is perhaps not in the sentencing itself, but in explaining it to members of the public. In my previous role as a social worker, people often asked me to explain the sentencing that was being done in the courts. As an MSP, I am being asked the same questions. I have found it very difficult to explain to former clients and my constituents in Aberdeenshire West the complexities of sentencing.

I am grateful to Christine Grahame for her explanation, but it had me slightly perplexed initially when she said that she was going to introduce colours to explain it. I thought, “I am finding it difficult enough to understand the legislation without having to understand colours as well.” However, I am grateful to Christine Grahame for introducing John Brown, John Black, John Red and, eventually, John Green into her explanation; I was confused at the end, because I think that she was trying to refer to John Red.

Christine Grahame: I have to say that I confused myself. John Green is an intruder.

Dennis Robertson: I thought that it was males who had the problem with reds and greens.

The matter that we are debating is very serious, and it needs to be resolved. I congratulate the Justice Committee on its efforts to scrutinise the bill and to tease out and highlight the anomaly in a very complex bill. At the end of the day, members would do well to remember that we are at stage 1 of the bill process and many things can happen at stages 2 and 3. I am sure that many of the questions that have been put to the cabinet secretary will be answered.

Let us ensure that, at the heart of where we end up in our deliberations on the bill, members of the public who are victims, witnesses, families and carers of victims, and those who are sentenced, all understand what has happened, why it has happened, and what the outcomes will be. We owe it to everyone who becomes involved in that procedure. People who come to our courts deserve a full and comprehensive understanding. I commend Graeme Pearson’s suggestion that we might need to do something to help people who are going through the court system to understand the complexities of sentencing.

There is much more work to be done and I hope that the Justice Committee and the cabinet secretary can work together to ensure that a very complex matter is explained so that people like me can go back to my constituents and explain it.

The Deputy Presiding Officer (Elaine Smith): That brings us to closing speeches. I remind members who were in the chamber for the debate that they should be here for closing speeches.
I have a little bit of time in hand for interventions. I call David McLetchie—I can give you up to seven minutes, Mr McLetchie.

16:33

David McLetchie: Thank you, Presiding Officer. Once again, you show your generous nature. I am most gratified. This has happened a couple of weeks in a row.

As I indicated in my opening remarks, the Scottish Conservatives will support the bill at stage 1. We welcome this afternoon’s debate, which has provided us with an opportunity to question and examine the Government’s handling of the legislation, and to hold the Government to account on a number of matters that go beyond the strict boundaries of the bill itself. We always welcome the opportunity to do so.

I welcome the sentencing provisions, however complex they might be, because they seek to address the Petch and Foye anomaly. It is clearly undesirable that prisoners who are given an indeterminate sentence can be eligible for release at an earlier date than if they had been sentenced to an equivalent fixed time in prison.

All parties and all commentators have recognised that point, as has Lord Justice General Hamilton in his opinion on the Petch and Foye case. He recognised that the outcome or conclusion that the court had come to was anomalous. He said:

“I have accordingly come, with regret, to the view that, however unsatisfactory it may appear as a matter of comparative justice, Parliament has given statutory effect to an arrangement under which an indeterminate prisoner will, or at least may, become first eligible for consideration for parole at an earlier stage in his sentence than an equivalent determinate prisoner.”

He went on to say:

“If this situation is to be remedied, it is for Parliament to remedy it.”

He was too charitable to say that, since we made a mess of it the first time, we should sort it out the second time, but there is an element of that in his comments. To the extent that the bill is a remedy and corrects the anomaly that the courts have identified, of course it should be welcomed.

We have created a tortuous system, as is apparent from the many comments to that effect. That is an important point, because a complex sentencing regime that is incomprehensible to the general public will serve only to further reduce the already low level of public confidence in sentencing policy. As members have said, Graeme Pearson made good points about trying to explain the mysteries of sentencing to people who are, however inadvertently, engaged in our court system. Of course, that is only part of the solution—simplification is the substantial answer.

That leads me back to the point that I made in my opening speech that the Petch and Foye case further highlights the need to abolish the system of automatic early release of prisoners. I make no apologies for returning to that proposition because, without the existence of such a scheme, the issue would have been avoided, as the custodial sentence that is handed down to convicted criminals would in all cases be the sentence that is served.

Dennis Robertson: Does Mr McLetchie acknowledge that our prisons are overcrowded and that we cannot just abolish the system that he is talking about? At the end of the day, we are trying to have robust community sentencing, as recommended by the McLeish report, which was mentioned earlier. Does Mr McLetchie agree that we should wait until we have the infrastructure in place to support that?

David McLetchie: I agree that our prisons are full. However, I think that that is a good thing and it is one reason why crime rates are at their lowest for 35 years. I am astonished that members of the Scottish National Party, who like to brag about that weekly, fail to see the fairly obvious and elementary connection between the two things. I say to Mr Robertson that people who are in prison are there because they have been convicted of a crime and our judges—whose judgment I respect and in whom I have confidence—have decided that they deserve to be there. That is down to the judgment of judges, not my judgment. Our function as legislators and the Government is to provide a framework to ensure that the crime and punishment system that we have put in place actually works.

Kenny MacAskill: I note Mr McLetchie’s great support for prisons as an institution. Can he remind me how many prisons were constructed in Scotland in the 18 years of Conservative Government? Was it zero?

David McLetchie: I do not know whether it was zero.

Kenny MacAskill: I believe that it was.

David McLetchie: Hang on. I am sorry, but I honestly do not know the answer to that question. I will look up the answer and I will write to the minister after the debate. [Laughter.] Right. I have kind of lost my thread.

The Deputy Presiding Officer: You have one minute left in which to find it.

David McLetchie: I shall have to stop debating that point and move on to part 2.
I continue to question whether part 2 is necessary in the changed circumstances in which we find ourselves. No one would dispute that the bill was drafted and scrutinised with the Megrahi case at the forefront of our minds. Now that the statement of reasons has been published, the primary purpose for part 2 no longer exists.

I take the point that other members have made that the bill is drafted in general terms, and therefore in theory is capable of applying to other cases in future. That is undoubtedly the case. However, I have serious doubts about whether part 2, drafted quite clearly with one specific case in mind, is robust enough to apply to other circumstances. Does the cabinet secretary have any intention of implementing part 2 immediately? I accept that for technical reasons, because of the structure of the bill, he cannot withdraw it without prejudicing part 1, but there seems to be no obvious reason why it should be commenced immediately. I suggest to the cabinet secretary that we might look at the commencement provisions at stage 2 or stage 3 and perhaps build in a bit of time to consider whether the measure is a sustainable one that we want on our statute book for the longer term.

16:41

Lewis Macdonald (North East Scotland) (Lab): The bill is not one of those pieces of legislation that attract outright opposition, but it is one of those that beg the question how else they might have been structured or what might have been done instead. There are few instances in the 13 years of this Parliament in which a stage 1 report has begun by noting that the purpose of the legislation has been overtaken by events even before the committee has met to agree its report. Those few instances have arisen where the legislation has been introduced on an emergency basis, typically because a court of law has interpreted statute in a new way that renders change in the law urgent and unavoidable.

This is not such a case. Part 1 responds to a specific judgment, in Petch and Foye, that invites statutory clarification, but that is not the same as those previous pieces of legislation that were introduced on an emergency basis, in which haste was really required. As we have heard, part 2 responds to one specific case in which the legal position has not changed in any fundamental way since the release of the convicted offender, on compassionate grounds, in August 2009, but in which the inadequate statutory provision has been exposed over time.

As the convener of the Justice Committee noted, parts 1 and 2 deal with quite different matters. That is reflected in the bill’s cumbersome title, to which Graeme Pearson referred. Given that one part responds to a High Court judgment from March 2011 and the other part follows the decision in the Megrahi case in August 2009, it is hard to identify any compelling reason why the two matters have had to be addressed in the same piece of legislation.

Although the bill is not emergency legislation, as Jenny Marra and Malcolm Chisholm noted there has been no pre-legislative consultation other than with the Scottish Criminal Cases Review Commission on part 2. Perhaps if some of those who gave evidence to the Justice Committee had been formally consulted first, some of their criticisms might have been pre-empted. Mr MacAskill has said today that he would welcome an alternative approach. Perhaps such an approach might have been easier to develop if consultation had happened before the bill was introduced.

The verdict of most expert witnesses on part 1 seems to be, at best, “not proven”. The Government’s intentions are laudable, but its solutions are not. Graeme Pearson argued that the measure should not provide just a short-term fix to a new interpretation that was reached by a majority of judges in one particular case. More needs to be done to make the whole sentencing process less opaque and more transparent and accessible for those affected. As Mary Fee said, that opportunity appears to have been missed. If so, that is a matter of regret.

Nonetheless, there may still be opportunities at future stages of the bill to address that challenge. Perhaps the cabinet secretary will indicate in closing whether there will be Government amendments at later stages to begin to provide a more rational structure to sentencing policy as a whole, or whether he will seek to discuss alternative schemes and approaches over coming weeks and months.

Given that part 1 is all about sentencing and touches on determinate and indeterminate sentences and other matters of that kind, ministers might have seen fit to do something more decisive about the whole area of early release from prison even if they did not go to the extent of seeking to meet their manifesto commitment, as David McLetchie suggested they could have done. A wider bill to address sentencing in general might have had more value than a short-term fix to Petch and Foye alone, and it would have made more sense than the current uneasy combination of two quite separate measures. I look forward to hearing more about the Government’s future intentions in those areas.

It was perhaps predictable that the statement of reasons on Megrahi’s grounds for appeal would be published, and it was published online a few days before the stage 1 report was agreed by the
Justice Committee. When the Sunday Herald made the decision to publish the statement in full, it simply stepped into the vacuum that had been left by ministers. The Justice Committee’s report describes publication as a hugely significant development given the policy intentions behind part 2 of the bill, and it certainly is. In effect, the newspaper’s decision to publish and the Crown’s intimation that it would not proseute rendered part 2 redundant in relation to its main objective, as Christine Grahame said.

We have heard that part 2 is drafted in general terms and may still be relied on in future cases. That is true at least in theory, although Christine Grahame and other members have raised doubts about whether it would be robust enough for that. Because of that theoretical position, we will support the general principles of part 2 today. However, devising provision for a past case and then making it available for possible future cases is surely not how good law is made. I would be interested to know whether the minister intends to lodge any amendments affecting the substance of part 2 to reflect the changes in circumstances.

Megrahi’s is not an obscure case that has been hauled into the limelight by its implications for human rights or for judicial procedures. It relates to the gravest crime that has ever been tried by a Scottish court, for which one man has been convicted, and part 2 would not be before us today if Megrahi had pursued his appeal. It appears that he did not pursue his appeal, in part, because Mr MacAskill repeatedly reminded him that he would not qualify for release under a prisoner transfer agreement as long as he had an appeal pending. However, Mr MacAskill does not appear to have explained to him that the same requirement did not apply to the option of release on compassionate grounds. That is unfortunate, as the abandoned appeal allows the inference to be drawn that the conviction was unsafe in the first place.

Kenny MacAskill: Is the member not aware that Mr al-Megrahi received significant legal advice? Some of that will be known to Mr Macdonald, given the nature of whom the advice came from. I cannot understand why Mr al-Megrahi would be in any doubt about the difference between a prisoner transfer agreement and compassionate release.

Lewis Macdonald: I am sure that the legal distinction was drawn to his attention. However, I am also sure that anyone facing a lengthy prison sentence who meets a Government minister who explains that one circumstance requires him to drop his appeal but does not address the other circumstance might draw his own inference from that.

Perhaps ministers will also reflect on why they decided that the bill was necessary but left it to the current parliamentary session to introduce the measure instead of acting more quickly. We have heard, for example, that the data protection grounds claim for caution on the part of ministers did not impede publication when the disclosure of information was in the interests of justice. It is clear that ministers could have laid an order at any time after the previous order was found wanting at the end of 2009. Had they done so, the commission might have been able to publish its statement of reasons at its own hand many months ago. A change in the law ahead of publication would have avoided the Parliament being reduced to the status of a rubber-stamp for decisions that have already been made in the offices of editors and publishers here and elsewhere.

We, on this side of the chamber, have always favoured openness and transparency in relation to the decisions that were taken in the Megrahi case. That is why we support the general principles of both part 1 and part 2—not in the belief that the Government has got it right, but recognising that it has tried. We invite ministers to try a bit harder when the bill gets to stage 2.
after we saw Lord Bracadale speak on television in the case of HMA v David Gilroy, so we recognise the willingness of the Scottish Court Service under the Lord President to be as open as possible. That move was welcomed as a way of making the process more understandable to the public, but we recognise that there must be limitations.

Malcolm Chisholm and Graeme Pearson raised matters that are not necessarily particular to the bill, although it was appropriate to raise them. We are happy to look at Graeme Pearson’s point, on which Dennis Robertson commented. The point is more one for the Scottish Court Service, but we would be happy to discuss it with Graeme Pearson. As we move towards producing a victims and witnesses bill, we must consider how we can build on developments such as that which involved Lord Bracadale.

Such matters involve a balance, and we have heard about a counterbalance. Malcolm Chisholm talked about the difficulties that a constituent of his has faced. I am happy to engage with him on that. As he said, the question is ultimately for the Lord President and the Scottish Court Service, but we can work together on it.

There is no doubt that stage 2 amendments will have to be lodged. We are happy to look at that. We have always said that, if people think that a better and simpler way exists, we will be happy to use it. Some members of the legal profession have criticised our proposals as inadequate. I have no doubt that, when a fee note is rendered and they consider matters, they might be prepared to put forward alternatives. As I say, the door is open and we are happy to take comments on board. However, as I said in my opening speech, no alternative proposals have been made so far.

That takes us on to why we are where we are with part 1. We must deal with victims and recognise the judiciary’s important role. In relation to victims, I must assure the public that, although sentences have been reduced, prisoners will not be released early and will be subject to parole requirements for public safety.

The situation was of deep concern. As members—including, in particular, Colin Keir, Dennis Robertson and John Finnie—said, we are talking about horrendous crimes. Petch and Foye perpetrated appalling crimes, and there has been great public concern. The issue might be viewed as more theoretical than practical, because I expect that the Parole Board would not have released them, but it was of significant concern and was commented on by politicians from all political parties, so it was appropriate that we took steps to address it.

We must support the judiciary, as has been said. The court referred the issue to us and the Lord Justice General made it clear that a legislative fix would be required. The matter divided the Scottish courts. As we heard from Christine Grahame and others, the Petch and Foye case was decided by a majority of five to two. The judiciary were split on what was correct and what should be done, but something must be done.

As David McLetchie and John Finnie said, orders for lifelong restriction and non-mandatory life sentences are not given out routinely. There have been only about 75 since the powers were introduced. However, I have made it clear that when a judge feels that an order for lifelong restriction is necessary or a life sentence appropriate—even for a crime that would not usually carry such a tariff—they will have the full support of this Government, because we are dealing with people who can be extremely dangerous and destructive to our communities.

As Jenny Marra said, when the intention behind the giving of an order for lifelong restriction or a non-mandatory life sentence is undermined, we must act to protect the integrity of the system. The measures in part 1 are being introduced to protect victims, to allay their understandable concerns and to support the judiciary by giving them the right to invoke orders for lifelong restriction and give non-mandatory life sentences. We hope that those will not be used routinely—that does not happen at present—but they will require to be used. Given that it takes a great deal of courage and, no doubt, thought, wisdom and reflection on the part of members of the judiciary to make such decisions, we must ensure that, when they choose to invoke their right, we enable them to do so.

I make it clear to Mr McLetchie and Mr Robertson that part 2 of the bill was drafted on a very general basis. Although it is clear that we are specifically talking about Mr al-Megrahi, because he is the only name in the frame—if I can put it that way—the legislation has been drafted in such a way as to allow it to be used in any circumstance that may arise in future. This is the third such situation that has arisen since the creation of the SCCRC, but the disclosure of information does not appear to be a relevant issue in the other two. I cannot specify the circumstances that might result in similar situations having to be addressed, but I can give members an absolute assurance that the bill is robust enough to deal with such situations in future.

If there is a requirement for stage 2 amendments, we will be happy to look at the issues and address them. I think that we will address some issues related to data protection in that way.
On the broader data protection issues, I make it clear that we obviously had to act appropriately. The Megrahi case was a matter of great public concern, but we ensured that we drafted the bill broadly to deal with general matters. Given that neither the First Minister nor, more important, I have ever seen the statement of reasons, we could not say what would be subject to data protection requirements or what would or would not require to be redacted. It is fair to say that the SCCRC still has to consider specific issues and that some material will have to be redacted. Indeed, irrespective of data protection issues, owing to public safety considerations there will have to be confidentiality measures to protect witnesses.

We have acted appropriately and the provisions in part 2 will be robust enough to deal with any unforeseen circumstances that may arise.

Yet again, Mr Macdonald took the opportunity to criticise the Government and, in particular, my stance on Mr al-Megrahi. I am prepared to answer for that decision. Mr Macdonald might care to reflect on the fact that it is neither myself nor the First Minister who is currently being pursued in a court action for having rendered somebody back to Libya. I stand responsible for having released Mr al-Megrahi under the compassionate release process. I saw him board a plane in Glasgow. However, I am certainly not responsible for having rendered anybody through any security services, on my say-so or that of anybody else.

To be fair to Mr McLetchie, I know that he will write to me about the number of prisons built by the Conservatives in 18 years. I look forward to getting confirmation that, during 18 years of Tory rule, despite the fact that the Conservatives seem to think that prison works—rather than the record number of police officers that we delivered—they built no prisons.

Mr McLetchie chose to disparage Henry McLeish and Dame Elish Angiolini. All I can say is that one is a former First Minister and the other is a former Lord Advocate; both have served their country and their offices well, and the record of the work that they contributed is much appreciated. Thankfully, we will not have to deal with any Tories in either of those offices.

I am happy to move the bill, as it will serve Scotland well. [Laughter.]

The Presiding Officer (Tricia Marwick): That concludes the debate on the Criminal Cases (Punishment and Review) (Scotland) Bill. I see that Mr MacAskill recognises that he has made a mistake.
Criminal Cases (Punishment and Review) (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 6 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 3

Kenny MacAskill

1 In section 3, page 5, line 5, at end insert—

<( ) Where the disclosure of information is excepted from section 194J by this section, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure arising otherwise than under that section—

(a) including any such obligation or limitation imposed by, under or by virtue of any enactment,

(b) excluding any such obligation or limitation imposed by any interdict or other court order applying in connection with this section.>

Kenny MacAskill

2 In section 3, page 5, line 7, leave out <caused to consider> and insert <considering>

Kenny MacAskill

3 In section 3, page 6, line 11, after <in> insert <direct or indirect>
Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. In this case, the information provided consists solely of the list of groupings (that is, the order in which the amendments will be debated). The text of the amendments set out in the order in which they will be debated is not attached on this occasion as the debating order is the same as the order in which the amendments appear in the Marshalled List.

Groupings of amendments

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Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 1, 2 and 3.

Sections 1, 2, 4, 5 and 6 and the long title were agreed to without amendment.

Section 3 was agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.
Criminal Cases (Punishment and Review) (Scotland) Bill: Stage 2

10:01

The Convener: Item 2 is stage 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill. The stage 2 proceedings today are the first and only such proceedings on the bill. I welcome the Cabinet Secretary for Justice and his officials.

Members should have copies of the bill, the marshalled list and the groupings of amendments for consideration.

Sections 1 and 2 agreed to.

Section 3—Exception to non-disclosure rule

The Convener: Amendment 1, in the name of the cabinet secretary, is in a group on its own.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 1 provides that, where the Scottish Criminal Cases Review Commission has determined under the framework in the bill that it is appropriate in the whole circumstances for information that relates to a case to be disclosed, that disclosure “is not prevented by any obligation of secrecy or other limitation on disclosure ... including any such obligation or limitation imposed by, under or by virtue of any enactment”.

The amendment explicitly provides that that general override does not apply to any court interdict or other court order. In other words, if a court's decision is that information should not be disclosed by the commission, that information cannot be disclosed, even if the commission considered that it was appropriate to disclose it. The amendment addresses a concern that the Scottish Criminal Cases Review Commission expressed in its evidence to the committee that the bill as introduced did not provide the necessary authority for it to disclose information that is covered by legal professional privilege.

It is important to note that the effect of amendment 1 is not that any such obligations will be treated as if they do not exist; rather, the amendment is intended to ensure that such obligations do not constitute an absolute bar to disclosure. The commission would have to consider those obligations and weigh them in the balance before it reached a conclusion on whether it was appropriate to disclose information. In doing so, the commission is required to take account of any representations that it receives from an affected person or another interested person regarding the decision to disclose information. The fact that information is covered by legal professional privilege or that a duty of confidentiality or a statutory duty of non-disclosure...
applies to the information may be considered by the commission to be a factor that argues against disclosure. However, amendment 1 ensures that that does not represent an absolute barrier to the release of information.

It is important to consider the effect of section 101 of the Scotland Act 1998. Amendment 1 does not affect any restriction or limitation on disclosure that is imposed by any reserved legislation. Members will be well aware that the Scottish Parliament cannot legislate on matters that are outside its competence. All acts of the Scottish Parliament require to be read in the context of section 101 of the Scotland Act 1998, which provides that they are to be read in a way that is consistent with the devolved competence of the Parliament. As such, amendment 1 does not affect any obligations of secrecy or other limitation on disclosure relating to reserved matters, such as the Official Secrets Acts.

I move amendment 1.

Amendment 1 agreed to.

Kenny MacAskill: Amendment 2 is a minor technical amendment that is intended to improve the drafting of new section 194N(1) of the Criminal Procedure (Scotland) Act 1995, on the framework for the consideration by the commission of the release of information. It is intended to avoid any inadvertent implication that a third party can cause—that is to say, require—the commission to consider the question whether it is appropriate to disclose information that relates to a particular case. The policy intent is to provide the commission with a power rather than a duty to consider disclosing information relating to a case that it has referred to the High Court and which has subsequently been abandoned.

During stage 1 scrutiny of the bill, it was noted that there have been only three commission cases in 13 years that would trigger the framework in the bill. We expect there to be only rarely a significant public interest in the disclosure of information that relates to triggered cases, and we do not wish to impose unnecessary costs on the commission by requiring it to consider the disclosure of information in cases in which there is no public interest in doing so.

The bill provides that, where the Lord Advocate has obtained information directly or indirectly from a foreign authority, the commission is required to obtain the consent of that authority before releasing that information. Such an approach will ensure that our international obligations are respected and that foreign authorities retain control over disclosure of their information.

Amendment 3 is a minor technical amendment that seeks to apply the same requirement that applies to foreign authority information obtained by the Lord Advocate to information obtained from foreign authorities by the commission in the course of its own investigations. Whether the commission obtains the information directly or indirectly, amendment 3 seeks to ensure that the foreign authority’s consent will be required. It is worth putting on the record that, with the United Kingdom Government, we are continuing to consider this area of the bill to ensure that we are satisfied that the bill fully respects our international obligations and that the commission will have to get consent from foreign authorities to disclose information received from them, irrespective of the route by which the commission obtains that information. If necessary, we might revisit this area at stage 3.

I move amendment 2.

Amendment 2 agreed to.

Amendment 3 moved—[Kenny MacAskill]—and agreed to.

Section 3, as amended, agreed to.

Sections 4 to 6 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the cabinet secretary for that rather swift performance.
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Criminal Cases (Punishment and Review) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to amend the rules about the punishment part of non-mandatory life sentences imposed in criminal cases and to amend the rules about the disclosure of information obtained by the Scottish Criminal Cases Review Commission.

PART 1

PUNISHMENT PART OF NON-MANDATORY LIFE SENTENCES

1 Setting the punishment part

(1) Part 1 (detention, transfer and release of offenders) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is amended as follows.

(2) In section 2 (duty to release discretionary life prisoners), in subsection (2)—

(a) in the opening text, the words “(ignoring the period of confinement, if any, which may be necessary for the protection of the public)” are repealed,

(b) paragraph (aa) and the word “and” immediately preceding paragraph (c) are repealed,

(c) after paragraph (c) there is inserted “; and

(d) in the case of a life prisoner to whom paragraph (a) or (ab) of subsection (1) above applies, the matters mentioned in section 2A(1),”;

(d) after subsection (2) there is inserted—

“(2A) The matters mentioned in subsection (2)(a) to (c) above (taken together) are for the case of a life prisoner to whom paragraph (aa) of subsection (1) above applies; and, as respects the punishment part in the case of such a prisoner, the court is to ignore any period of confinement which may be necessary for the protection of the public.”.

(3) After section 2 there is inserted—

“2A Rules for section 2(2)(d) cases

(1) For the purpose of section 2(2)(d), the matters are—
Part 1—Punishment part of non-mandatory life sentences

(a) any period of imprisonment which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to imprisonment for life, or (as the case may be) not made the order for lifelong restriction, for it,

(b) the part of that period of imprisonment which would represent an appropriate period to satisfy the requirements of retribution and deterrence, and

(c) where appropriate, the ones mentioned in paragraphs (a) and (b) of section 196(1) of the 1995 Act.

(2) But—

(a) in the application of subsection (1)(a), the court is to ignore any period of confinement which may be necessary for the protection of the public,

(b) subsection (1)(b) is subject to section 2B,

(c) subsection (1)(c) is inapplicable until the court has made the assessment required by virtue of subsection (1)(a) and (b).

2B Assessment under section 2A(1)(a) and (b)

(1) The part mentioned in subsection (1)(b) of section 2A in relation to the period mentioned in subsection (1)(a) of that section is—

(a) one-half of that period, or

(b) if subsection (2) applies, such greater proportion of that period as the court specifies.

(2) This subsection applies if, taking into account in particular the matters mentioned in subsection (5), the court considers that it would be appropriate to specify as that part a greater proportion of that period.

(3) In subsections (1)(b) and (2), the references to a greater proportion extend so as to include the whole of that period.

(4) In subsections (1) to (3), the references to the period mentioned in subsection (1)(a) of section 2A are to that period as informed by subsection (2)(a) of that section.

(5) For the purpose of subsection (2), the matters are (continuing to ignore any period of confinement which may be necessary for the protection of the public)—

(a) the seriousness of the offence, or of the offence combined with other offences of which the prisoner is convicted on the same indictment as that offence,

(b) where the offence was committed when the prisoner was serving a period of imprisonment for another offence, that fact, and

(c) any previous conviction of the prisoner.”.

(4) Part 2 (confinement and release of prisoners) of the Custodial Sentences and Weapons (Scotland) Act 2007 is amended as follows.

(5) In section 20 (setting of punishment part)—
Criminal Cases (Punishment and Review) (Scotland) Bill

Part I—Punishment part of non-mandatory life sentences

(a) in subsection (3), the words “(ignoring any period of confinement which may be necessary for the protection of the public)” are repealed,

(b) after subsection (4) there is inserted—

“(4A) As respects the punishment part in the case to which subsection (4) relates, the court is to ignore any period of confinement which may be necessary for the protection of the public.”,

(c) in subsection (5)—

(i) the word “and” immediately preceding paragraph (b) is repealed,

(ii) in paragraph (b), for the words “, by virtue of section 6, the court would have specified as the custody part.” there is substituted “would represent an appropriate period to satisfy the requirements of retribution and deterrence,”,

(iii) after paragraph (b) there is inserted “and

(c) where appropriate, the ones mentioned in paragraphs (a) and (b) of section 196(1) of the 1995 Act.”,

(d) after subsection (5) there is inserted—

“(5A) But—

(a) in the application of subsection (5)(a), the court is to ignore any period of confinement which may be necessary for the protection of the public,

(b) subsection (5)(b) is subject to section 20A,

(c) subsection (5)(c) is inapplicable until the court has made the assessment required by virtue of subsection (5)(a) and (b).”.

(6) After section 20 there is inserted—

“20A Assessment under section 20(5)(a) and (b)

(1) The part mentioned in subsection (5)(b) of section 20 in relation to the period mentioned in subsection (5)(a) of that section is—

(a) one-half of that period, or

(b) if subsection (2) applies, such greater proportion of that period as the court specifies.

(2) This subsection applies if, taking into account in particular the matters mentioned in subsection (5), the court considers that it would be appropriate to specify as that part a greater proportion of that period.

(3) In subsections (1)(b) and (2), the references to a greater proportion extend so as to include the whole of that period.

(4) In subsections (1) to (3), the references to the period mentioned in subsection (5)(a) of section 20 are to that period as informed by subsection (5A)(a) of that section.

(5) For the purpose of subsection (2), the matters are (continuing to ignore any period of confinement which may be necessary for the protection of the public)—
(a) the seriousness of the offence, or of the offence combined with other
offences of which the prisoner is convicted on the same indictment as
that offence,

(b) where the offence was committed when the prisoner was serving a
period of imprisonment for another offence, that fact, and

(c) any previous conviction of the prisoner.”.

2 Ancillary provision

(1) The Scottish Ministers may by regulations make such supplemental, incidental,
consequential, transitional, transitory or saving provision as they consider necessary or
expedient for the purposes of or in connection with section 1.

(2) Regulations under subsection (1) may (in particular) modify Part 1 of the Prisoners and
Criminal Proceedings (Scotland) Act 1993 or Part 2 of the Custodial Sentences and
Weapons (Scotland) Act 2007.

(3) Regulations under subsection (1) are subject to the affirmative procedure.

PART 2

DISCLOSURE OF INFORMATION OBTAINED BY SCCRC

3 Exception to non-disclosure rule

(1) Part XA (Scottish Criminal Cases Review Commission) of the Criminal Procedure
(Scotland) Act 1995 is amended as follows.

(2) In section 194J (offence of disclosure), in subsections (1) and (2), after the words
“section 194K” in each place where they occur there is inserted “or 194M”.

(3) After section 194L there is inserted—

“Special circumstances for disclosure

194M Further exception to section 194J

(1) The disclosure of information, or the authorisation of disclosure of
information, is excepted from section 194J by this section if—

(a) the conditions specified in subsection (2) are met, and

(b) the Commission have determined that it is appropriate in the whole
circumstances for the information to be disclosed.

(2) The conditions are that—

(a) the information relates to a case that has been referred to the High Court
under section 194B(1),

(b) the reference concerns—

(i) a conviction, or

(ii) a finding under section 55(2), and

(c) the case has fallen, or has been abandoned, under the provisions or other
rules applying by virtue of section 194B(1).

(3) However—
(a) subsection (1) is subject to (as they have effect in light of section 194Q)—

(i) section 194N(1) (for information generally),

(ii) section 194O(1) as read with section 194P (if foreign interest),

(b) see also section 194R (about certain final matters).

Where the disclosure of information is excepted from section 194J by this section, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure arising otherwise than under that section—

(a) including any such obligation or limitation imposed by, under or by virtue of any enactment,

(b) excluding any such obligation or limitation imposed by any interdict or other court order applying in connection with this section.

194N  Notification and representations etc.

(1) When considering for the purpose of section 194M(1) the question of whether it is appropriate for the information to be disclosed, the Commission have the following duties.

(2) The Commission must—

(a) so far as practicable, take reasonable measures to—

(i) notify each of the affected persons of the possibility that the information may be disclosed, and

(ii) seek the views of each of them on the question, and

(b) to such extent (and in such manner) as they think fit, consult the other interested persons.

(3) The Commission must—

(a) allow the prescribed period for each of the affected and other interested persons involved to take steps (including legal action) in their own favour in relation to the question, and

(b) have regard to any material representations made to them on the question by any of those affected and other interested persons within the prescribed period.

(4) The Commission must have regard to any other factors that they believe to be significant in relation to the question.

(5) In subsections (2) and (3)—

(a) the references to the affected persons are to the persons—

(i) to whom the information directly relates, or

(ii) from whom the information was obtained, whether directly or indirectly,

(b) the references to the other interested persons are to (so far as not among the affected persons)—

(i) the Lord Advocate, and
(ii) such additional persons (if any) as appear to the Commission to have a substantial interest in the question.

(6) In subsection (3), the references to the prescribed period in relation to a particular person are to—

(a) the period of 6 weeks, or

(b) such longer period as the Commission may set,

starting with the date on which the notification was sent to, or (as the case may be) consultation was initiated with respect to, the person.

(7) Subsections (3) and (6) are inapplicable in relation to a particular person if the Commission cannot reasonably ascertain the person’s whereabouts.

194O Consent if foreign interest

(1) Unless subsection (4) is complied with, section 194M(1) is of no effect in relation to any information obtained and supplied as mentioned in subsections (2) and (3) (taken together).

(2) That is, obtained—

(a) whether directly or indirectly, by the Lord Advocate at any time, or

(b) by the Commission in direct or indirect consequence of their own application.

(3) That is, supplied by a designated foreign authority under international assistance arrangements (whether or not through an intermediary).

(4) This subsection is complied with if the designated foreign authority has in connection with section 194M(1) given its consent to disclosure of the information by virtue of—

(a) international assistance arrangements, or

(b) subsection (5).

(5) Where not previously given by virtue of such arrangements, it is for the Commission to seek the designated foreign authority’s consent.

(6) The reference in subsection (1) to information includes information consisting of or deriving from evidence of any kind.

194P Terms used in section 194O

(1) The references in section 194O to international assistance arrangements are to arrangements falling within subsections (2) and (3) (both of them).

(2) That is, arrangements which are or were set by an enactment or agreement (present or past).

(3) That is, arrangements by means of which a prosecutorial, judicial or other authority within Scotland or another part of the United Kingdom is or was entitled to make a request—

(a) directed at a foreign authority of any type, and

(b) for assistance in relation to a criminal matter.
(4) It is immaterial in this regard how such a request is or was issuable by the authority within the United Kingdom or transmissible to the foreign authority (or how either of those authorities is described).

(5) The references in section 194O to the designated foreign authority are to the current or previous authority of any type which is or was—
  (a) within the other country or territory (including at any particular place in it), and
  (b) mentioned in the enactment or agreement concerned as the addressee or recipient (however described) of such a request.

(6) But, if in connection with subsection (5) of that section—
  (a) the Commission cannot reasonably identify or find the relevant foreign authority (as described in subsection (5)), or
  (b) they are unsuccessful in their reasonable attempts to communicate with it,
the references in subsections (4) and (5) of that section (ignoring paragraph (a) of that subsection (4)) to the designated foreign authority are to be read as if they were to the relevant foreign government.

(7) In subsection (6)—
  (a) the references to the Commission include their acting with the Lord Advocate’s help,
  (b) the reference to the relevant foreign government—
    (i) is to the government of the other country or territory,
    (ii) in the event of doubt as to the status or operation of a governmental system in the other country or territory, is to be regarded as being to the body described in subsection (8).

(8) That is, the principal body in it (for the time being (if any)) that is recognised by Her Majesty’s Government in the United Kingdom as having responsibility for exercising governmental control centrally.

194Q **Disapplication of sections 194N to 194P**

(1) Sections 194N to 194P (and section 194M(3)) cease to have effect if subsection (2) prevails.

(2) This subsection prevails where, on their preliminary examination of the question to which section 194N(1) relates, the Commission determine for the purpose of section 194M(1) that it is manifestly inappropriate for the information to be disclosed.

(3) But—
  (a) if there is a material change in any significant factor on which the determination depended, it is open to the Commission to re-examine the question (and this is to be regarded as another preliminary examination of the question),
b) where they choose to re-examine the question, the effect of sections 194N to 194P (and section 194M(3)) is restored unless subsection (2) again prevails.

194R Final disclosure-related matters

(1) If the Commission decide in pursuance of section 194M(1) to disclose the information—
   (a) subsection (2) applies initially, and
   (b) subsection (3) applies subsequently.

(2) Before disclosing the information, the Commission must—
   (a) so far as practicable, take reasonable measures to notify of the decision—
      (i) each of the affected persons, and
      (ii) to the same extent as they were consulted under section 194N(2)(b), the other interested persons, and
   (b) allow the prescribed period for each of the affected and other interested persons involved to take steps (including legal action) in their own favour in relation to the decision.

(3) In disclosing the information, the Commission must—
   (a) explain the context in which the information is being disclosed by them (including by describing the background to the case), and
   (b) where (for any reason) other information relating to the case remains undisclosed by them, explicitly state that fact, and do so along with the material by which the disclosure is made.

(4) In subsection (2), the references to the affected and other interested persons are to be construed in accordance with section 194N(5).

(5) In subsection (2)(b), the reference to the prescribed period in relation to a particular person is to—
   (a) the period of 6 weeks, or
   (b) such longer period as the Commission may set,
   starting with the date on which the notification was sent to the person.

(6) Subsections (2)(b) and (5) are inapplicable in relation to a particular person if the Commission cannot reasonably ascertain the person’s whereabouts.

(7) In subsection (3)(b), the reference to other information is to any other information obtained by the Commission in the exercise of their functions.”.

4 Consequential revocation

PART 3

COMMENCEMENT AND SHORT TITLE

5 Commencement

(1) This Part comes into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

6 Short title

The short title of this Act is the Criminal Cases (Punishment and Review) (Scotland) Act 2012.
Criminal Cases (Punishment and Review) (Scotland) Bill

An Act of the Scottish Parliament to amend the rules about the punishment part of non-mandatory life sentences imposed in criminal cases and to amend the rules about the disclosure of information obtained by the Scottish Criminal Cases Review Commission.

Introduced by: Kenny MacAskill
On: 30 November 2011
Bill type: Executive Bill
This document relates to the Criminal Cases (Punishment and Review) (Scotland) Bill as amended at Stage 2 (SP Bill 5A)

CRIMINAL CASES (PUNISHMENT AND REVIEW) (SCOTLAND) BILL

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Criminal Cases (Punishment and Review) (Scotland) Bill (introduced in the Scottish Parliament on 30 November 2011) as amended at Stage 2. Text has been added as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sideling in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW

4. The Criminal Cases (Punishment and Review) (Scotland) Bill makes provision in two specific areas. The Bill addresses an issue arising from the Appeal Court’s judgment in the Petch and Foye v. HMA case concerning the time those prisoners given a discretionary life sentence or an Order for Lifelong Restriction must serve before they become eligible to apply for parole. The Bill also provides a framework for the Scottish Criminal Cases Review Commission to decide whether it is appropriate to disclose information concerning cases it has referred to the High Court for appeal against conviction where such an appeal has subsequently been abandoned.
COMMENTARY ON SECTIONS

Part 1 – Punishment part of non-mandatory life sentences

Section 1 – Setting the punishment part

5. Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (‘the 1993 Act’) makes provision regarding the duty to release discretionary life prisoners. Section 1 of the Bill makes various amendments to section 2 of the 1993 Act.

6. At present, section 2(2)(aa) of the 1993 Act provides the existing framework that courts use in setting the ‘punishment part’ of discretionary life sentences and any Order for Lifelong Restriction (‘OLR’ – see section 210F of the Criminal Procedure (Scotland) Act 1995). The punishment part of non-mandatory life sentences (i.e. either a discretionary life sentence or an OLR) is the period of time an offender must spend in prison before they become eligible to apply for parole.

7. Section 1(2) of the Bill makes various changes to section 2(2) of the 1993 Act. Section 1(2)(b) and (c) of the Bill repeals section 2(2)(aa) of the 1993 Act and replaces it with new section 2(2)(d) providing that a court, when determining the punishment part of a non-mandatory life sentence, is to follow the rules laid out in new section 2A(1) of the 1993 Act (as being inserted by section 1(3) of the Bill).

8. Section 1(2)(a) and (d) of the Bill inserts (with a consequential change) new section 2A into the 1993 Act and this new section retains the matters mentioned in existing section 2(2)(a) to (c) of the 1993 Act for application in fixing the punishment part of a sentence of all offenders who receive mandatory sentences of life imprisonment i.e. for murder or any other offence for which life imprisonment is the sentence fixed by law.

9. Section 1(3) of the Bill inserts new section 2A into the 1993 Act. New section 2A provides the rules by which the court is to set the punishment part of non-mandatory life sentences.

10. New section 2A(1)(a) provides that the court must firstly assess the period of imprisonment which the court considers would have been appropriate for the offence had the prisoner not been sentenced to a non-mandatory life sentence. New section 2A(2)(a) provides that in considering the period of imprisonment under new section 2A(1)(a), the court must ignore any period of confinement which may be necessary for the protection of the public.

11. New section 2A(1)(b) provides that the court must then assess the part of that period of imprisonment which would represent an appropriate period to satisfy the requirements of retribution and deterrence. New section 2A(2)(b) provides that new section 2A(1)(b) is subject to the requirements of new section 2B.

12. New section 2B(1) provides that the part of the period of imprisonment is to either be one-half of the period specified under new section 2A(1)(a) or a greater proportion of the period specified under new section 2A(1)(a). However, a greater proportion than one-half can only be
specified if new section 2B(2) applies. New section 2B(2) provides that the court can specify a greater proportion of the period specified under new section 2A(1)(a) if it considers it appropriate to do so having considered, in particular, the matters specified in new section 2B(5).

13. New section 2B(5)(a) to (c) provides that the matters are:
   - the seriousness of the offence, or the offence combined with other offences of which the prisoner is convicted on the same indictment as that offence;
   - where the offence was committed where the prisoner was serving a period of imprisonment for another offence; and
   - any previous convictions of the prisoner.

   (In considering these matters, the court is still not to take into account any period of confinement which may be necessary for the protection of the public.)

14. New section 2B(3) provides that the court can specify a greater proportion of the period under new section 2A(1)(a) up to and including the whole of that period. New section 2B(4) provides that references in new sections 2B(1) to (3) to the period mentioned in new section 2A(1)(a) are references to that period as informed by new section 2A(2)(a) (i.e. ignoring any period of confinement which may be necessary for the protection of the public).

15. The combined effect of new sections 2A(1)(c) and 2A(2)(c) is to provide that the required consideration by the court as to whether and at what level any sentence discount for an early guilty plea is appropriate is to be left until after the court has made the assessment under new section 2A(1)(a) and (b).

16. Sections 1(4) to (6) of the Bill make a number of amendments to section 20 of the Custodial Sentences and Weapons (Scotland) Act 2007 (‘the 2007 Act’) and introduces new section 20A into the 2007 Act. Section 20 of the 2007 Act contains as yet uncommenced provisions relating to the setting of punishment part of life sentences. The purpose of sections 1(4) to (6) of the Bill is to make similar changes to the 2007 Act as are being made to the existing 1993 Act framework for the setting of punishment parts of life sentences by sections 1(1) to (3) of the Bill. When the provisions in Part 1 of the 2007 Act are brought into force, part 1 of the 1993 Act will be repealed. The changes contained in sections 1(4) to (6) make a number of necessary changes to the 2007 Act so that when they are commenced along with the rest of the as yet uncommenced provisions in the 2007 Act, the system for setting punishment parts of life sentences as provided for in the 1993 Act and amended by the Bill will continue in the same manner within the 2007 Act.

Section 2 – Ancillary provision

17. Section 2 of the Bill provides for a regulation-making power for the Scottish Ministers to make such supplemental, incidental, consequential, transitional, transitory or saving provisions as they consider necessary or expedient for the purpose of, or in connection with, section 1. The power covers modification to Part 1 of the 1993 Act or Part 2 of the 2007 Act for this purpose. Any regulations made under the power will be subject to the affirmative procedure.
Part 2 – Disclosure of information obtained by Scottish Criminal Cases Review Commission

Section 3 – Exception to non-disclosure rule

18. Part XA of the Criminal Procedure (Scotland) 1995 Act (‘the 1995 Act’) established the Scottish Criminal Cases Review Commission (‘the Commission’). Sections 194A to 194L and Schedule 9A of the 1995 Act provide for the operation of the Commission. Section 194J(1) of the 1995 Act provides for an offence in relation to either a member or employee of the Commission disclosing information obtained by the Commission in the exercise of any of their functions unless the disclosure of the information is excepted by virtue of section 194K of the 1995 Act. Section 194J(2) provides for an offence where a member of the Commission authorises the disclosure by an employee of the Commission of any information obtained by the Commission in the exercise of any of their functions unless the authorisation of the disclosure of the information is excepted by virtue of section 194K of the 1995 Act. This is the means by which disclosure of information is regulated. Section 3 of the Bill is described below in this context.

19. Section 3(2) adds two new references into section 194J of the 1995 Act. These new references are to new section 194M of the 1995 Act (added by section 3(3) of the Bill) and the effect of adding these references is to provide a further exception to the offence provision in section 194J of the 1995 Act.

20. Along with adding in new section 194M of the 1995 Act, section 3(3) adds a number of other new sections 194N to 194R into the 1995 Act which taken together constitute a framework for the Commission to determine whether it is appropriate to disclose information on certain cases they have referred to the High Court.

21. Section 194M(1) provides that the disclosure of information, or authorisation of disclosure of information, by the Commission is excepted from the offences listed in section 194J of the 1995 Act if the conditions specified in section 194M(2) are met and the Commission have determined in the whole circumstances of the case that it is appropriate for the information to be disclosed. The rule in section 194M(1)(b) may be called the ‘appropriateness test’.

22. Section 194M(2) sets out the conditions that require to be met for the Commission to determine that the disclosure of information, or authorisation of disclosure of information, is excepted from the offence of disclosure under section 194J. Section 194M(2)(a) provides the information must relate to a case that has been referred to the High Court by the Commission under their powers contained in section 194B(1). Section 194M(2)(b) provides that the reference made by the Commission under section 194B(1) must concern either a conviction or a finding under the examination of facts procedure under section 55(2) of the 1995 Act. Therefore, a reference made by the Commission under section 194B(1) which relates to a sentence is not included within the ambit of section 194M(2). Section 194M(2)(c) provides that the case (upon which the reference relates) must have fallen or been abandoned. A case may have fallen because, for example, the party has chosen not to proceed or has missed a time limit for lodging notice to proceed with the court. A case may have been abandoned through, for example, the lodging of a notice of abandonment under section 116 or 184 of the 1995 Act.
23. Section 194M(3)(a) provides that the disclosure of information under section 194M(1) is subject to sections 194N(1) and 194O(1) (as read with section 194P), noting that section 194Q informs their effect. Section 194M(3)(b) points to the requirements of section 194R.

24. Whether information is actually released turns principally on the appropriateness test under section 194M(1)(b). As well as the matters referred to in section 194M(3) though, it should be noted that the Commission’s ability to disclose information will be informed (and may be restricted) by the application of ECHR law and the operation of reserved statutes such as the Data Protection Act 1998 and the Official Secrets Acts 1911-1989.

25. Section 194M(4) provides that where the effect of section 194J of the 1995 Act (which prohibits the Commission from disclosing information about a case) is disapplied by new section 194M, the disclosure of that information is not prevented by any obligation of secrecy or other limitation on disclosure. By virtue of section 194M(4)(a), this includes any obligation of secrecy or other limitation on disclosure imposed by, under or by virtue of any enactment.

26. Section 194M(4) therefore provides that the fact that, for example, information is covered by legal professional privilege, or that a common law duty of confidentiality applies to the information, does not in itself represent an absolute barrier to disclosure. This does not mean that such obligations or limitations are treated as if they no longer exist, but rather they do not of themselves prevent disclosure. The Commission would be required to consider these other obligations and limitations and weigh them in the balance before reaching a conclusion as to whether it was appropriate, in all the circumstances, to disclose information.

27. Section 194M(4) requires to be read within the context of section 101 of the Scotland Act 1998 which provides that Acts of the Scottish Parliament are to be read and have effect in a way that is within the legislative competence of the Parliament. As such, section 194M(4) does not affect any obligations of secrecy or limitations on disclosure relating to reserved matters such as, for example, the Official Secrets Acts.

28. Section 194M(4)(b) provides that the effect of the general override on obligations of secrecy and limitations on disclosure does not apply in respect of any court interdict or other court order imposed to prevent the Commission from disclosing information under this section. Therefore, if a court reaches a decision that information should not be disclosed by the Commission, section 194M does not override that decision.

29. Section 194N sets out the duties that the Commission has in considering the question of whether it is appropriate for information to be disclosed under section 194M(1).

30. Section 194N(2)(a) requires the Commission (so far as practicable) to take reasonable measures to notify each of the affected persons of the possibility that the information may be disclosed and seek the views of each of them. Section 194N(2)(b) requires the Commission (to such an extent and such manner as they consider appropriate) to consult the other interested persons.

31. ‘Affected persons’ and ‘other interested persons’ are defined in section 194N(5). References to an ‘affected person’ are to a person to whom the information pertains (e.g. a
suspect or witness in the investigation) or from whom the information was obtained. References to ‘other interested persons’ are to the Lord Advocate, and to other persons (if any) who the Commission consider have a substantial interest in the question of whether the information should be disclosed and who do not fall within the definition of an ‘affected person’. The effect of including the Lord Advocate as an interested person is that in every case where the Commission is considering whether it is appropriate to disclose information under section 194M(1), the Lord Advocate will always be notified.

32. Section 194N(3)(a) requires the Commission to allow for the prescribed period for the affected persons and other interested persons to take steps (including legal action e.g. interim interdict) in their own favour, in relation to the question as to whether it would be appropriate for the Commission to disclose information. Section 194N(3)(b) requires that the Commission must have regard to any material representations made to them by the affected or other interested persons within the prescribed period on the question of whether it is appropriate for the information to be disclosed. The ‘prescribed period’ is defined in section 194N(6) as being a period of at least 6 weeks starting on the last date on which the notification or consultation period commenced. Section 194N(7) provides that where the Commission cannot reasonably ascertain the person’s whereabouts, sections 194N(3) and (6) do not apply.

33. Section 194N(4) provides that the Commission must have regard to any other factors that they consider to be significant in relation to the question of whether the information should be disclosed.

34. Section 194O applies in respect of information which has originally been obtained by the Lord Advocate or the Commission from a designated foreign authority under international assistance arrangements, whether directly or indirectly.

35. The effect of section 194O(1) is that an offence under section 194J would be committed if the Commission disclosed any information under section 194M(1) unless section 194O(4) has been complied with (because the exception to the offence would not stand).

36. Section 194O(4) is complied with where the designated foreign authority has given their consent to the disclosure of the information. Section 194O(4) provides that this consent may be given by virtue of international assistance arrangements or by section 194O(5), which provides that where such consent has not previously been given under international assistance arrangements it is for the Commission to seek the designated foreign authority’s agreement.

37. Section 194O(6) states (for the avoidance of doubt) that the reference to information includes, in the context of the section, information consisting of or deriving from evidence of any kind.

38. Section 194P defines important terms used in section 194O.
entitled to send to a foreign authority of any type a request for assistance in relation to a criminal matter. An example of another authority would be the police.

40. Statutory examples of such international assistance arrangements are sections 7, 8 and 9(1) to (3) and (6) of the Crime (International Co-operation) Act 2003, section 3(1) to (7) of the Criminal Justice (International Co-operation) Act 1990 as that section had effect until its repeal by that 2003 Act (see Schedule 6 to that Act) or the corresponding provisions of a previous Act (as they had effect at the relevant time). As regards the Commission, see existing section 1941A of the 1995 Act. The reference to an agreement is not restricted to statutory or formally-recognised agreements between states – it may also cover, for example, informal prosecutor to prosecutor assistance arrangements. Any such informal arrangement will naturally have an international sense in this context.

41. Section 194P(4) provides (for the avoidance of doubt) that it is irrelevant how such a request under section 194P(3) is or was made or how either the requesting authority or the foreign authority are described.

42. Section 194P(5) provides that references to the ‘designated foreign authority’ are to the current or previous authority which is or was responsible under international assistance arrangements for receiving such requests within that foreign country or territory and which are mentioned in the enactment or agreement concerned as the addressee or recipient of such a request. See paragraph 36 above for examples of relevant enactments and agreements.

43. Section 194P(6) provides that where the Commission is unable to locate the designated foreign authority for the purpose of section 194O, including where the Commission is being assisted by the Lord Advocate (section 194P(7)(a)), the references to the ‘designated foreign authority’ should be read as if they were to the government of the country or territory.

44. Section 194P(7)(b) provides the reference in section 194P(6) to relevant foreign government is a reference to the government of the other country or territory. In the event of any doubt as to the status or operation of a governmental system in the other country or territory (which is possible in times of political upheaval), section 194P(8) provides that the relevant foreign government is to be regarded as the principal body in the country or territory that is being recognised by the UK Government as having responsibility for exercising governmental control centrally within the country or territory.

45. Section 194Q provides that where, on their preliminary examination of whether it is appropriate to disclose information under new section 194M(1), the Commission determines that it is manifestly inappropriate for the information to be disclosed, they are not required to undertake the steps at new sections 194N to 194P. This is particularly relevant in the application of section 194N(1). The effect of section 194Q(3) is that where there is a material change in any significant factor on which the Commission made that determination, the Commission may re-examine the question and that, if (on doing so) it is concluded that it is no longer manifestly inappropriate that the information should be disclosed, the effect of sections 194N to 194P and section 194M(3) is restored.
Section 194R sets out the functions of the Commission when they decide under section 194M(1) it is appropriate to disclose information. Section 194R(1) provides that the Commission must initially meet the requirements of section 194R(2) and then subsequently section 194R(3).

Section 194R(2)(a) provides that before the Commission disclose information, they must (so far as practicable) take reasonable measures to notify their decision to disclose to each of the affected persons and any other interested persons. In the latter case, this is to the same extent as they were consulted under section 194N(2)(b). Section 194R(2)(b) provides that the Commission must allow the prescribed period pass in order to allow any of the affected persons and other interested persons to take steps (including legal action) in their own favour in relation to the decision to disclose information. Section 194R(4) attracts the earlier definition of the affected and other interested persons, and section 194R(5) provides that the prescribed period runs for at least 6 weeks and starts with the date notification was sent to the particular person (but subsection (6) negates this where the person’s whereabouts are unknown).

When the Commission disclose information under section 194M(1), section 194R(3) provides that the Commission are required to explain the context in which the information is being disclosed. This would include the Commission describing the background to the case and may include the reasons that it is considered appropriate to disclose the information. If the Commission decide it is appropriate to disclose information, but other information relating to the case remains undisclosed by them (for example, because it consists of information from a designated foreign authority where consent has not been obtained), the Commission are required to explicitly state this fact. Section 194R(7) ties the reference to other information in section 194R(3)(b) to the Commission’s exercise of their functions.

Section 4 – Consequential revocation

In consequence of section 3, section 4 of the Bill revokes the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 (SSI 2009/448). This Order contains a different approach to disclosure by the Commission (involving the seeking of consent) in a case of the type falling within section 194M(2) of the Bill.

Part 3 – Commencement and short title

Section 5 – Commencement

Section 5(1) confirms that the provisions in Part 3 of the Bill will come into force on the day after Royal Assent. Section 5(2) provides for the rest of the Bill to come into force by appointed-day order. Section 5(3) provides that a commencement order may include transitional, transitory or saving provision. Section 8 of the Interpretation and Legislative Reform (Scotland) Act 2010 allows for different days to be appointed for different purposes.

Section 6 gives the short title of the Bill.

Criminal Cases (Punishment and Review) (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 6 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 3

Kenny MacAskill

1 In section 3, page 4, line 38, leave out from beginning to end of line 5 on page 5

Kenny MacAskill

2 In section 3, page 5, leave out lines 6 to 13 and insert—

<194MA Effect of the exception

(1) Where the disclosure of information is excepted from section 194J by section 194M, the disclosure of the information is not prevented by any obligation of confidentiality or other limitation on disclosure arising otherwise than under section 194J.

(2) For the purpose of subsection (1), such an obligation or limitation does not include one imposed—

(a) by, under or by virtue of any enactment, or

(b) by any interdict or other court order applying in connection with this section.>

Kenny MacAskill

3 In section 3, page 6, line 10, at end insert—

<194NA Consent if UK interest

(1) Unless subsection (3) is complied with, section 194M(1) is of no effect in relation to any information falling within subsection (2).

(2) Information falls within this subsection if it—

(a) is held by the Commission, and

(b) at any time, has been supplied by the UK Government under arrangements of any kind.

(3) This subsection is complied with if, at any time, the UK Government has in connection with section 194M(1) given its consent to disclosure of the information.
(4) In this section, “the UK Government” means a Minister of the Crown or a department of the Government of the United Kingdom.

Kenny MacAskill

4 In section 3, page 6, line 13, leave out from <obtained> to end of line 20 and insert <falling within subsection (1A).

(1A) Information falls within this subsection if it—

(a) is held by the Commission, and

(b) at any time, has been supplied by a designated foreign authority under arrangements of any kind.

Kenny MacAskill

5 In section 3, page 6, leave out lines 24 to 27 and insert—

(a) the arrangements concerned, or

(b) subsection (5).

(5) Where not previously given by virtue of those arrangements, it is for the Commission to seek the designated foreign authority’s consent to disclosure of the information.

Kenny MacAskill

6 In section 3, page 6, leave out lines 28 and 29

Kenny MacAskill

7 In section 3, page 6, line 29, at end insert—

<( ) Subsection (1) does not apply if the information also falls within section 194NA(2).>

Kenny MacAskill

8 In section 3, page 6, line 30, leave out from beginning to end of line 3 on page 7 and insert—

<194P Designated foreign authority>

Kenny MacAskill

9 In section 3, page 7, line 4, leave out from first <the> to end of line 9 and insert <a designated foreign authority are to a current or previous authority of a prosecutorial, judicial or other character which is or was located within a country or territory outwith the United Kingdom.>

Kenny MacAskill

10 In section 3, page 7, line 11, leave out <relevant foreign authority (as described in subsection (5))> and insert <particular authority in question>

Kenny MacAskill

11 In section 3, page 7, line 15, leave out <(ignoring paragraph (a) of that subsection (4))>
Kenny MacAskill

12 In section 3, page 7, line 17, at end insert—

<( ) In the application of subsection (6), paragraph (a) of subsection (4) of that section is to be ignored.>

Kenny MacAskill

13 In section 3, page 7, line 27, leave out <Her Majesty’s Government in> and insert <the Government of>

Kenny MacAskill

14 In section 3, page 7, line 30, leave out <(and section 194M(3))>

Kenny MacAskill

15 In section 3, page 8, line 2, leave out <(and section 194M(3))>
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated at Stage 3, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

**Group 1: Effect of section 194M**
1, 2, 14, 15

**Group 2: UK interests**
3, 7

**Group 3: Foreign interests**
4, 5, 6, 8, 9, 10, 11, 12, 13

Debate to end no later than 30 minutes after proceedings begin
Criminal Cases (Punishment and Review) (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

Criminal Cases (Punishment and Review) (Scotland) Bill - Stage 3: The Cabinet Secretary for Justice (Kenny MacAskill) moved S4M-03369—That the Parliament agrees that the Criminal Cases (Punishment and Review) (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
The Deputy Presiding Officer (John Scott):
The next item of business is stage 3 proceedings on the Criminal Cases (Punishment and Review) (Scotland) Bill. In dealing with the amendments, members should have the bill as amended at stage 2, the marshalled list and the groupings. The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate.

Members who wish to speak in the debate on any group of amendments should press their request-to-speak button as soon as possible after I call the group.

Members should now refer to the marshalled list of amendments.

Section 3—Exception to non-disclosure rule

The Deputy Presiding Officer: Amendment 1, in the name of the Cabinet Secretary for Justice, is grouped with amendments 2, 14 and 15.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 1 is a technical amendment that deletes from the bill new section 194M(3) of the Criminal Procedure (Scotland) Act 1995. That provision was originally included to make clear that the Scottish Criminal Cases Review Commission’s power to decide to disclose information under new section 194M(1) of the 1995 act was subject to other provisions within the overall framework. However, new section 194M(3) is not essential to the operation of the framework, so amendment 1 deletes it to simplify the provisions in new section 194M. The result is that the natural context of the set of provisions in part 2 of the bill will mean that new section 194M(1) is qualified to the extent that is provided for in the other provisions, but without that having to be stated expressly.

Amendments 14 and 15 are consequential amendments that delete references to new section 194M(3) at new section 194Q(1) and (3)(b).

Amendment 2 is intended to address concerns that we have received from the United Kingdom Government that new section 194M could be read in such a way that it sought to override reserved legislation that would otherwise limit the disclosure of information. Notwithstanding that that has never been our intention, we have considered carefully the UK Government’s comments. We have always
been clear that the Scottish Government is committed to being as open and transparent as possible on the al-Megrahi case within the devolved competence of the Scottish Parliament.

Furthermore, we are satisfied that, as I said to the Justice Committee when the issue was debated at stage 2, the provision at new section 194M(4), which was inserted at stage 2, does not affect any restriction or limitation on disclosure that is imposed by reserved legislation.

As members will be well aware, the Scottish Parliament cannot legislate on matters that are outside its competence. All acts of the Scottish Parliament require to be read within the context of section 101 of the Scotland Act 1998, which provides that acts of the Scottish Parliament are to be read in a way that is consistent with the devolved competence of the Parliament.

However, following stage 2, we were asked by the UK Government to recast the provision, for two reasons. First, to make explicit that any limitation on disclosure imposed by an enactment is not overridden by new section 194M(1) of the 1995 act; and, secondly, to remove the reference to “any obligation of secrecy” that was contained in new section 194M(4) of the 1995 act.

In lodging amendment 2, we have kept our minds entirely focused on ensuring that our policy aims are met. We are satisfied that our recast provision continues to meet our policy aims, as it is sufficient to address the concern that was expressed by the Scottish Criminal Cases Review Commission in its evidence to the committee that the bill as introduced did not provide the necessary authority for it to disclose information that is covered by legal professional privilege or by any common-law duty of confidentiality.

If amendment 2 is agreed to, I can assure members that the commission will still have the necessary authority to decide whether it is appropriate to disclose information, even if that information is covered by legal professional privilege or by any common-law duty of confidentiality.

On that basis, I move amendment 1.

The Deputy Presiding Officer: As no other member has requested to speak—[Interruption.] Sorry. I call Lewis Macdonald—a late request.

Lewis Macdonald (North East Scotland) (Lab): I admit that it was a late bid to speak.

I simply want to reflect on the cabinet secretary’s comments that his inquiry in relation to this matter was raised following representations from the UK Government. Can he tell us whether, having recast the provision, he has had further discussion with the UK Government?

Kenny MacAskill: I had discussions with the secretary of state and the Lord Advocate had discussions with the Advocate General, from whom we received a communication this morning. I believe that there has been full and frank discussion and that the fears and alarms of the commission have been addressed. We think that we have struck the correct balance between doing what we have always said that we will do with regard to being as open and transparent as possible on the al-Megrahi case and obliging foreign Governments and the UK Government by acknowledging their requests in a way that has assured them that they feel that their rights are protected.

Amendment 1 agreed to.

Amendment 2 moved—[Kenny MacAskill]—and agreed to.

The Deputy Presiding Officer: Amendment 3, in the name of the cabinet secretary, is grouped with amendment 7.

Kenny MacAskill: Amendment 3 has been lodged to address concerns that have been expressed by the UK Government about the way in which the bill treats information that it has provided to the commission.

The UK Government has expressed concern that it does not have final control over the release of information that is held by the commission but which it provided.

We have explained that the bill enables any person who has provided information that is held by the commission to take legal action in their favour in respect of potential disclosure of information. That includes the UK Government. We had considered that that was sufficient to meet the balancing policy aims of relaxing the restrictions on the commission to facilitate the publication of information while protecting the interests of affected persons and interested persons in respect of the potential disclosure of their information. However, the UK Government has indicated that it is not satisfied with those protections.

As we have consistently made clear, the Scottish Government’s policy is to be as open and transparent as possible about all aspects of the Lockerbie atrocity. Taking into account the fact that the commission’s statement of reasons for referring al-Megrahi’s case to the appeal court has been published, and reflecting that that was the main reason why part 2 of the bill was brought forward, we accept the need to ensure that the provisions contained in the bill do not jeopardise future co-operation between the UK Government and Scottish police, the Crown Office and the commission.
Concern has been expressed that future cooperation between the UK Government and Scottish authorities may be put at risk if no change was made to the bill in this area. In view of that, we lodged amendment 3, which provides that consent of the UK Government is required for the disclosure of any information that
“is held by the Commission” and which
“has been supplied by the UK Government”.
That puts the UK Government on the same footing as foreign authorities, whose consent the commission must seek before disclosing information that they have supplied.

We accept that amendment 3 represents a very fine balance between being as open and transparent as possible and ensuring that there is no adverse impact on future co-operation in investigating serious cross-border crime.

Avoiding the risk of a lack of future co-operation between other countries and Scotland in criminal investigations led us to ensure that the bill provides that foreign authorities retain control over information that they have supplied. Such considerations also apply within the UK, which ultimately led us, after much reflection, to include a consent mechanism for the UK Government.

Amendment 7 is a minor consequential amendment following on from amendment 3. It makes it clear that there is no unnecessary double consent mechanism whereby consent from abroad is also needed in cases in which the UK Government’s consent is required.

I move amendment 3.

Amendment 3 agreed to.

The Deputy Presiding Officer: Amendment 4, in the name of the cabinet secretary, is grouped with amendments 5, 6 and 8 to 13.

Kenny MacAskill: Amendments 4 to 6 and 8 to 13 are minor technical amendments that are intended to clarify and simplify the provisions in the bill that require the commission to obtain the consent of foreign authorities before disclosing information that has at any time been supplied by them. The amendments do not seek to change the policy intent of the provisions, with consent still being required before the commission can consider disclosing information that it holds that has been provided by a foreign authority.

Overall, the amendments seek to remove the distinction between information that has been obtained from foreign authorities through international assistance arrangements through the Lord Advocate and information that has been obtained on the commission’s own application.

They instead make it clear that, quite simply, if the commission holds information that was supplied by a foreign authority, the commission must obtain that authority’s consent before disclosing that information.

I move amendment 4.

Amendment 4 agreed to.

Amendments 5 to 15 moved—[Kenny MacAskill]—and agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.
Criminal Cases (Punishment and Review) (Scotland) Bill

The Deputy Presiding Officer (John Scott): The next item of business is a debate on motion S4M-03369, in the name of Kenny MacAskill, on the Criminal Cases (Punishment and Review) (Scotland) Bill.

15:44
The Cabinet Secretary for Justice (Kenny MacAskill): I begin the formal stage 3 debate by thanking the members of and clerks to the Justice Committee for their careful consideration of the Criminal Cases (Punishment and Review) (Scotland) Bill. As I am sure members will highlight, this is a small, important but complex bit of legislation that takes some time to understand fully.

I also thank the external stakeholders who have taken the time to engage in the bill process and share their knowledge and views during scrutiny of the bill. In particular, the Scottish Criminal Cases Review Commission has been of great assistance throughout in offering views on how best to enable it to consider the release of information relating to cases that it has referred to the appeal court but which subsequently have been abandoned.

I thank, too, the Information Commissioner’s Office for its assistance in helping us to understand more fully the data protection issues relating to part 2 of the bill.

The bill deals with two distinct topics. Part 1 addresses an anomaly that has arisen with regard to the setting of the punishment part of non-mandatory life sentences. The bill sets out a clear framework that the courts must follow in future when sentencing prisoners to a non-mandatory life sentence.

Part 2 provides a framework within which the SCCRC can consider whether it is appropriate to disclose information that it holds relating to cases that it has referred to the appeal court where that appeal subsequently has been abandoned.

Part 1 is a direct response to an appeal court judgment in the case of Petch and Foye v Her Majesty’s Advocate in March 2011, concerning the setting of the punishment part of non-mandatory life sentences. The punishment part of a sentence is the length of time that a prisoner must serve before becoming eligible for parole. Following the judgment in Petch and Foye, a number of offenders have successfully appealed and had the punishment part of their non-mandatory life sentences reduced.

It is important to emphasise that the judgment did not and does not mean that serious offenders have directly been released early from prison. Since the judgment took effect, any offender who has had their punishment part reduced will continue to need to satisfy the Parole Board for Scotland that they do not present a risk to public safety. If the Parole Board is not satisfied, the offender remains in prison.

However, there is common agreement throughout the chamber that it is wrong that a person who is given a non-mandatory life sentence could become eligible to apply for parole earlier than if they had been given a fixed sentence for the same crime. The bill gives back to the courts the discretion to set the punishment part of a non-mandatory life sentence to satisfy the need for punishment of the offender.

We are aware that throughout the parliamentary process there has been some criticism of the provisions on the grounds that they are too complicated. We accept that the provisions are complex but we do not think they are unnecessarily complex. The provisions exist in a particular context and seek to address a very particular issue. The sentencing of non-mandatory life offenders is a complex area of law, with a fair amount of detail involved. However, the courts are used to following the statutory framework provided. In the bill, our task is solely to resolve the Petch and Foye anomaly. We believe that the somewhat prescriptive approach that we have taken is preferable to passing legislation that may be simpler to read but harder to apply.

We accept that the problem of how a judge should calculate the punishment part of a non-mandatory life sentence remains a difficult one, and we consider that it is important to set out the steps involved in legislation as clearly as possible, rather than placing the full onus on judges.

I am aware that some—the Law Society of Scotland, for example—have suggested that the problem could be addressed simply by removing the requirement to strip out the public protection element of the notional determinate sentence when calculating the punishment part of a non-mandatory life sentence. We accept that, on the face of it, that would remove the step in the present calculation that created the Petch and Foye anomaly. However, our solution to Petch and Foye has to be seen within the context of Scots law and case law, including European convention on human rights case law. In particular, previous case law has accepted that determinate sentences contain, or at least can contain, an element that relates to public protection, even though they are not expressly divided in that way.

Lewis Macdonald (North East Scotland) (Lab): Does the cabinet secretary recognise that
although that is the case, the matter is not one that is typically specified or separated out, and therefore there is at least some merit in the argument that a simpler approach might achieve the same objective in a way that is more comprehensible to the public?

**Kenny MacAskill:** I accept that argument, but—as I was about to say—life sentences are split into a punishment part, which is fixed, and an indeterminate public protection part. When calculating a punishment part, ECHR case law says that the punishment part cannot contain an element relating to public protection because it would be unfair to do so.

We therefore consider that removing the requirement to strip out the public protection element of the notional determinate sentence cannot be done, as the need to strip out any public protection elements from a punishment part is a clear obligation under ECHR in the context of the sentencing of life prisoners. Furthermore, the effect of the Law Society proposal alluded to would be to sweep away the existing framework for calculating the punishment part of sentences, with the aspects that it requires for certainty of effect and ECHR compliance, and leave nothing in its place.

Although the Petch and Foye judgment affected only a small number of sentencing cases—only around 80 offenders have been given non-mandatory life sentences in the past seven years—as a Government, we wanted to act quickly and appropriately to address the problem raised by the judgment and ensure that people have confidence in the sentencing of the most serious offenders. We have done that in part 1.

Part 2 provides a framework within which the Scottish Criminal Cases Review Commission can consider whether it is appropriate to disclose information that it holds relating to cases that it has referred to the appeal court where that appeal is subsequently abandoned.

We introduced the provisions as part of our commitment to be as open and transparent as possible about all aspects of the Lockerbie atrocity and, specifically, to address the situation that had arisen with regards to the commission’s statement of reasons for referring the al-Megrahi case to the appeal court.

Subsequent to the introduction of the bill, the commission’s statement of reasons has been published by a newspaper. However, our legislation is general, and we consider that it is in the interests of ensuring transparency and openness in the justice system that there is a framework in place to ensure that, in future cases, the commission is able to consider releasing information relating to abandoned appeals arising from a reference that it has made, where there is a substantial public interest.

We have been keen to ensure that the framework that we put in place is as robust as possible. The al-Megrahi case, given its international nature, is one of the most complex cases—if not the most complex case—that the commission has had to investigate. We are confident, therefore, that our framework can be applied in a range of possible future cases.

We have made a number of changes to the bill to ensure that the framework is as effective and appropriate as possible, and that has been commented on in terms of the amendments—indeed, I made such a comment in my response to Lewis Macdonald’s intervention in relation to the first group of amendments.

Specifically, we have made provision to address the commission’s concerns in relation to information to which legal professional privilege or a common-law duty of confidentiality applies.

We have improved the provisions requiring consent from foreign authorities to make it absolutely clear that, where information held by the commission originates from a foreign authority, the commission must obtain the consent of that foreign authority, irrespective of how the information came to the commission.

In response to United Kingdom Government concerns, we have extended the consent requirement to cover information provided to the commission by the UK Government. That is necessary to ensure that future co-operation between the UK Government and Scottish police, the Crown Office and the commission is not put at risk.

The bill addresses matters that have arisen in two important but distinct areas of our justice system. It meets our absolute commitment to do everything that we can to ensure that the public has confidence that our justice system is fair, transparent and effective.

I move,

That the Parliament agrees that the Criminal Cases (Punishment and Review) (Scotland) Bill be passed.

15:54

**Jenny Marra (North East Scotland) (Lab):** I welcome the opportunity to speak in the stage 3 proceedings on the Criminal Cases (Punishment and Review) (Scotland) Bill.

At stage 1, Scottish Labour pledged its support for the bill’s general principles, but we took the opportunity to highlight some of our concerns around the complexity and relevancy of the bill’s provisions. While we are still happy to support the
Both parts of the bill are commendable in principle. Part 1 addresses an anomaly in the law, which is that offenders serving non-mandatory life sentences are eligible to be considered for release by the Parole Board for Scotland earlier than those serving a comparable determinate sentence. Part 2 enhances transparency by allowing the Scottish Criminal Cases Review Commission to publish reports on cases that are abandoned subsequent to being brought to the appeal court. Both are positive steps. However, it is still difficult to tell whether either part 1 or part 2 will serve their stated purpose in practice as effectively as they ought to.

Throughout the Justice Committee’s evidence taking on the bill there was a feeling—even among members—that the bill was difficult to comprehend, as the cabinet secretary said, and that its outcomes were difficult to predict. It is questionable whether the Government has fully addressed those concerns.

The common concern of stakeholders about part 1 was that it sought to solve a complex problem by making it even more complex. We heard evidence from senior professionals in the justice system to that effect. David McLetchie, from the Conservative benches, pointed out the most striking example of that complexity when he said during the stage 1 debate that part 1 had been described as “a tortuous system which is barely intelligible to lawyers, let alone to the general public”. — [Official Report, 19 April 2012; c 8272.]

Although we accept that, in the absence of a simpler solution, part 1 is entirely necessary as a result of European law, I re-emphasise the important point that I made during stage 1, which is that our justice system must be, and must be seen to be, fair and comprehensible to not only those working within it but the victims of crime and the general public watching.

John Finnie (Highlands and Islands) (SNP): Does the member accept that we also heard evidence of the support that is provided to victims by the Crown Office and Procurator Fiscal Service, Victim Support Scotland and the like, and that it is not necessarily a requirement for victims to understand the minutiae of the legislation, as opposed to its intention?

Jenny Marra: In the evidence that the committee took, there was an acceptance that there is support in the courts for victims of and witnesses to crime, as John Finnie points out, but I think that there was also an acceptance that the understanding of sentencing generally was not perhaps as good as it could be and that further work might take place to aid that understanding among not only victims and witnesses but the general public.

In dealing with sentencing for serious crimes, part 1 applies to a sensitive area of our justice system that is often subject to extensive media coverage and public interest, so it is critical that the laws that we create around sentencing are clear and effective and that they achieve the desired outcomes. As I argued at stage 1, any other outcome could risk doing a great deal of damage to the integrity of our justice system. It is for that reason that I urge the Government to monitor closely part 1 as it comes into effect and to ensure that it not only addresses the anomaly that it seeks to address, but does so in a way that is seen to be fair and right.

As the Government is currently undertaking consultation to improve our justice system for victims of and witnesses to crime, I know that it is as keen as Labour is to ensure that sentencing laws are considered fair and right by those who have suffered at the hands of violent and dangerous offenders.

The exact function that part 2 will have in practice remains to be seen. Just before the stage 1 debate on the bill, a Sunday newspaper printed a redacted version of the Scottish Criminal Cases Review Commission’s statement of reasons in the Megrahi case. The publication of the statement of reasons seemed essentially to remove the need for part 2. It also appeared to answer many of the questions surrounding the impediment caused by existing data protection law.

Part 2 was devised in response to the Megrahi case. Although the power of publication will be on the statute book after the bill is passed, it is difficult to imagine a similar scenario to which it will be applicable. In the Megrahi case, widespread public and political interest pushed a desire for the publication of the statement of reasons in an appeal that was subsequently abandoned. The legislative process to provide transparency was overtaken by the actions of the media. Now the power will rest in law if circumstances arise in which it is needed again.

Although Labour is happy to support the passing of the bill, it is a difficult and complex piece of law that is still to prove its utility in practice. Part 1 still appears to offer a complex solution to a complex problem, and the relevancy and applicability of part 2 remain to be seen. Therefore I urge the Government to reflect on how the legislation was drafted and to commit to monitoring its application in our justice system.
Our justice system must be clear, comprehensible and relevant to those that it serves. Any law that falls short of those benchmarks must be questioned. I hope that the bill meets the high standards that are expected by victims and by all those with a stake in the success of our justice system.

Labour is happy to support the bill.

16:02

Margaret Mitchell (Central Scotland) (Con): Parts 1 and 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill deal with two distinct and unconnected areas of the law. I come late to scrutiny of the bill, but my colleague David McLetchie had the dubious pleasure of scrutinising it during its passage through the Justice Committee. I say “dubious” because part 1 of the bill deals with some extremely technical and complex issues involving punishment and sentencing. I will deal first with the less-technical part 2.

Despite its general wording, part 2 of the bill was drafted with a particular instance in mind—namely, the case of al-Megrahi. Part 2 seeks to provide a framework by which the Scottish Criminal Cases Review Commission may disclose information about cases that it has referred to the High Court of Justiciary when the relevant appeal has been subsequently abandoned. Given the publication of the statement of reasons in the al-Megrahi case by the Sunday Herald earlier this year, part 2 has become largely redundant. However, due to technical reasons and the structure of the bill, part 2 cannot be deleted without prejudicing the whole bill. That being the case, the Scottish Government has merely made the best of a bad job. It maintains that because part 2 is drafted in general terms, it could in theory apply to future cases and that—hey presto!—it should be retained.

Part 1 seeks to address an anomaly in our sentencing law as identified in Petch and Foye. As a result of that ruling, an individual who was given an indeterminate non-mandatory life sentence became eligible for consideration for parole at an earlier stage in their sentence than they would had they been given an equivalent determinate—or fixed—sentence. In order to correct that anomaly, it has been necessary to look at the statutory rules that courts use when they calculate the punishment part of a life sentence. The punishment part refers to the part of a life sentence that a prisoner must serve in custody before they are eligible to apply for release on parole, and it includes both the retribution and deterrence aspects of the sentence.

To give an idea of the complexity of the statutory rules, I highlight comments that were made by Joanna Cherry QC, who appeared as advocate depute in the Petch and Foye case. She stated that the analysis of the current rules “gave rise to the most difficult piece of statutory interpretation that I have had to engage in in my career”—[Official Report, Justice Committee, 31 January 2012; c 865.]

The sad—but true—fact is that the new rules will add to the complexity of the arrangements for sentencing, which, as Jenny Marra correctly stated, has been described as “a tortuous system which is barely intelligible to lawyers”.

Part 1 also raises another more fundamental point about our sentencing system. The bill’s approach involves identifying a determinate sentence that might notionally have been imposed. That is done by stripping out of the determinate sentence any element that is imposed for public protection, and significantly—this represents the nub of the problem—by applying the current rules on automatic early release. The pertinent point is that there would be no need for the bill if the SNP had acted on its 2007 and 2011 manifesto pledges to end automatic early release of prisoners.

The end of automatic early release was legislated for under the Custodial Sentences and Weapons (Scotland) Act 2007 but, despite the SNP’s promises, it has yet to be implemented. Furthermore, as far back as 1997, first the incoming UK Labour Government and then the Labour and Liberal coalition failed to enact the legislation to end automatic early release that the previous Conservative Government had ready to implement after the 1997 general election.

Usually, at this point, a member—

Mark McDonald (North East Scotland) (SNP): Will the member take an intervention?

Margaret Mitchell: Mark McDonald is on cue. Here we go.

Mark McDonald: I freely admit to not being a legal expert, but my understanding is that the bill is about eligibility for parole, and not about automatic early release. I am unsure where Margaret Mitchell’s train of thought is taking her, but I suspect that it is in the wrong direction.

Margaret Mitchell: Perhaps Mr McDonald has failed to grasp the complexity of the bill. It is the mandatory sentence part of it that is subject to automatic early release.

The previous Conservative Government introduced early release, but having quickly realised the error of the system, it left the legislation that I alluded to—for the repeal of early
release—on the statute book in 1997. Fifteen years have elapsed since then, and during that time nothing has been enacted in Scotland to tackle automatic early release.

Although the Scottish Government is seemingly committed to ending automatic early release, it has delayed and procrastinated. Rather than taking decisive action, it has dithered and has stated that it wants, before it acts, to be certain about the implications for the Scottish criminal justice system. Perhaps the cabinet secretary could, during the debate, shed some light on when the assessment of those implications will be completed.

At stage 1, the cabinet secretary said:

“The bill should not be viewed as an opportunity to make significant change; that will ... come in other legislation.”— [Official Report, 19 April 2012; c 8263.]

I merely ask when that further legislation will be introduced. Until then, on how many occasions will Parliament have to pass legislation that is akin to the Criminal Cases (Punishment and Review) (Scotland) Bill in order to correct other anomalies?

The Deputy Presiding Officer (Elaine Smith): We now move to the open debate. I can allow speeches of around five minutes, with some time in hand for interventions.

16:09

John Finnie (Highlands and Islands) (SNP): First, I say that the provisions in part 1 are vital to addressing an anomaly and that they remain—despite all the criticism we have heard—unamended.

Messrs Petch and Foye have a lot to answer for—not least their vile crimes. As we know, the background of their appeal was the time that those who have been given discretionary life sentences or orders of lifelong restriction must serve before becoming eligible for parole. Clearly, the anomaly was unforeseen. However, by way of reassuring the general public, the Cabinet Secretary for Justice made it clear that such individuals still had to satisfy the Parole Board for Scotland that they pose no risk to the public. The bill will reinstate the judicial discretion that was removed by the appeal court ruling and will reduce the risk of decisions being overturned on appeal.

ECHR law has decreed that non-mandatory life sentences are different from other types of sentences and are imposed by courts after an assessment of risk to the public. The bill sets a framework for the punishment part of non-mandatory life sentences. First, the court must assess the appropriate period of imprisonment had the prisoner not been sentenced to life imprisonment or been made the subject of an order of lifelong restriction. That period ignores any period of confinement that is necessary for protection of the public. The court must then assess the appropriate period for satisfying the requirements of retribution and deterrence.

Under the bill, that part of the period of imprisonment—known as the punishment part—must be either half or some greater proportion of the period specified, up to the entire period of imprisonment. At that point, judicial discretion kicks in. A greater proportion than half can be specified only if the court considers it appropriate after considering the seriousness of the offence, or of the offence combined with other offences of which the prisoner has been convicted on the same indictment as that offence; after its considering whether the offence was committed when the prisoner was serving a period of imprisonment for another offence; and after its considering the prisoner’s previous convictions.

Any legislation that closes a gap must be welcomed. There has been much discussion about the complexity of the bill; indeed, the Justice Committee debated whether or not it is ECHR compliant. However, it was very much assured by the Scottish Human Rights Commission’s response that the bill meets the specific terms of the convention.

No one said that this was going to be easy. In its response to the committee, the Scottish Government made it very clear that it would consider any alternatives that were offered, but none was forthcoming. There is no simple ready reckoner. As I have pointed out, judges will have to consider a range of factors, but we suggest at our peril that our High Court judges have neither the wisdom nor the guile to make their way through the legislation.

Proportionality is as important in our judicial system as it is in life and is certainly vital to our sentencing policy. The public rightly expect assurances that they will be protected. However, as I said to Ms Marra, I do not believe that victims need to understand the minutiae of sentencing law; after all, they receive support from the Crown Office and Procurator Fiscal Service and from the victim information and advice service. Moreover, a victims and witnesses bill is heading our way.

Jenny Marra: I agree that victims and witnesses do not need to understand the minutiae of sentencing law, but does John Finnie agree that the public—both victims and witnesses—need to be able to appreciate what sentence fits what crime and at what point someone who has been convicted will be released?

John Finnie: Jenny Marra highlights two different issues: the sentence itself and the release period. The public want to know the
bottom line: the judge will give it to them. Indeed, we heard in evidence that the advocate who is prosecuting a case will liaise closely with the family and victims throughout the process. Assurances already exist.

As for part 2, I could not disagree more with Margaret Mitchell; the provisions are not “redundant”. They were never about a specific case and, although they have been dressed around one case, they have further application.

That said, it is perhaps understandable that the bulk of the attention on the bill has been focused on part 2. There is an obligation for justice to be seen to be done and, as we have heard, the Scottish Government views the provisions as a commitment to openness and transparency in relation to the al-Megrahi case. The Justice Committee certainly viewed that the publication of the Sunday Herald on 20 March largely superseded the legislation, but the legislation still applies.

We heard comments about the Scotland Act 1998 and the reassurances that were given to the UK Government. I am certainly very happy for the bill to include terminology through which the UK Government is viewed as a foreign government and, if it is put on the same footing as foreign governments, I will be relaxed about that. Crime has to be fought across international borders and that requires co-operation, which is catered for by the bill. I will leave it at that.

16:15

Graeme Pearson (South Scotland) (Lab): I thank colleagues on the Justice Committee for the time and effort that they took to help me to understand some of the complexities of the bill. I also thank the witnesses who took the time to come to the committee and who patiently took us through the steps and explained the complexities and almost unfathomable detail of part 1 of the bill, and the critical part that it will play in the administration of justice.

It is important that sentencing be safely conducted in the knowledge that appeals against sentencing will be maintained at a minimum. I am sorry that Mr Finnie found Jenny Marr’s criticism to be slightly irksome, but it is important that we understand some of the shortcomings that still exist in the process, so that the next legislation can address them more competently.

John Finnie: My point was that no alternative was offered. If any alternatives had been forthcoming, they would have been considered.

Graeme Pearson: I accept that. As Mr Finnie knows, the sheer complexity of what the committee faced left us exhausted and without alternative solutions to consider in the timescales that were available to us. Additional victims legislation is due to come before Parliament, and one hopes that we could consider some unfinished business in the longer term.

Part 1 of the Criminal Cases (Punishment and Review) (Scotland) Bill seeks to address an inconsistency in the law, “whereby a life prisoner is likely to have a parole hearing earlier than a non-life prisoner sentenced for a similar crime”;

if the punishment part of the sentencing process of the non-mandatory life sentence is not properly considered and recorded. Although some evidence at stage 1 expressed concerns that the bill would add complexity to an already highly convoluted area of law, the area does require considerable attention.

Evidence from witnesses, in particular from Joanna Cherry QC, indicated that

“It is not just lay people who find the legislation extremely difficult to understand. I am sure that it is an issue for the Parliament that legislation should be readily understandable to the public, particularly legislation to do with ... sentencing.”—[Official Report, Justice Committee, 31 January 2012; c 865.]

That was a “strong factor” in her concern about the bill. It is important that witnesses and victims who come before our courts should leave them in the full knowledge that they have received the information that they deem to be necessary to understand the system. It is true that some witnesses want to know very little of the outcome, but others want to understand the rationale that lies behind it. There is a duty on Parliament to ensure that legislation provides for judges to offer sufficient information in the public courts.

Sir Gerald Gordon QC, who is the author of “The Criminal Law of Scotland”—a seminal document in terms of the application of criminal justice in Scotland—echoed Joanna Cherry’s sentiments in acknowledging that even legal experts and members of the judiciary would struggle to understand all the provisions. Michael Meehan added that

“The bill complicates matters by requiring judges not only to consider the sentence that they will impose but to conduct a parallel notional sentence exercise.”—[Official Report, Justice Committee, 31 January 2012; c 866.]

All that said, the challenges that were faced by the cabinet secretary in the circumstances of Petch and Foye were overwhelming and needed an immediate sensible response. To that extent, the bill puts us on a better footing and makes us able to defend, in any appeal, the processes that are administered by our judges.

As has been alluded to, part 2 of the bill has to some extent been superseded by the publication
in March in the Sunday Herald of the SCCRC report, and the subsequent death of al-Megrahi further weakens the need for the legislation. Although we were told that it could be applied in cases other than the al-Megrahi case, it has never been fully articulated in what other circumstances the legislation could be used.

In any case, it is useful that facts that are gathered by the SCCRC as part of its process, and which are subsequently abandoned for whatever reason, could be made public in a fair and worthwhile manner in the future. As a result, I support the proposals that are outlined in the bill and I support the motion. [Interruption.]

The Deputy Presiding Officer (Elaine Smith): I ask front-bench members to pay attention to members who are speaking in the debate.

16:22

Roderick Campbell (North East Fife) (SNP): I refer to my declaration of interests, as I am a member of the Faculty of Advocates.

It seems to have been a long time since we commenced consideration of the bill. In relation to part 1, we should remember that we are dealing with a bill that is designed to deal with the particular difficulties of the decision in Petch and Foye, and not a bill that is designed to deal with sentencing in general. As the policy memorandum states, the intention is to put back in place the policy that existed prior to the Petch and Foye judgment.

In essence, the aim is to give flexibility to judges in sentencing and to ensure compliance with the requirement, which arises from ECHR case law, to ensure that once the punishment part of a sentence has passed, a prisoner has the opportunity of regular reviews of his continued detention as well as the opportunity to identify properly the period that is required for punishment—or, as it also known, retribution and deterrence—as opposed to public protection.

The concerns that surfaced as a result of Petch and Foye were predominantly in relation to comparative justice, and to seeking to ensure that someone who has been sentenced to an indeterminate sentence is not released earlier than a prisoner on a determinate sentence whose situation might otherwise be the same. The bill seeks to correct that anomaly by giving a judge power, in specified circumstances, to apply a percentage that is higher than the normal 50 per cent—which equates to the normal early-release provisions for determinate sentences—to the stripped-down notional determinate sentence.

The proposed methodology has certainly caused concern, not only to the Law Society but to the Faculty of Advocates. There certainly seems to be an argument that, for the purposes of achieving comparative justice, the comparison should be with the actual determinate sentence that the prisoner would have received rather than with a notional stripped-out determinate sentence. That may, of course, raise issues about the extent to which, in a determinate sentence, there is an element for protection of the public, but that could give rise to a debate in itself and is a matter for another day.

The methodology in the bill is undoubtedly complex. Although I note the cabinet secretary’s comments that it is not unnecessarily complex, I believe that it will cause difficulties for the general public in understanding sentencing, even if it will provide a solution. However, it should not be forgotten that during the stage 1 debate the cabinet secretary invited alternative suggestions and, as John Finnie pointed out, no alternative was forthcoming. In the absence of working alternatives, we have what we have.

Nevertheless, I remain concerned about the overall complexity of the provisions and the degree to which they will be welcomed and accepted in the court system. I therefore ask the cabinet secretary to keep the operation of part 1 of the bill under review and to take on board comments about its operation in practice from interested parties and, perhaps, from the new Lord President.

Part 2 relates to disclosure of information that is obtained by the SCCRC. Since the Justice Committee embarked on consideration of the bill, the only person who was convicted in the Lockerbie investigation—Mr Megrahi—has died. Even before he passed away it might have been tempting to say that events had overtaken the bill, given the publication in the Sunday Herald of the statement of reasons for appealing his conviction. When that happened, it looked like part 2 of the bill was obsolete and redundant, as members have said. However, we must not forget that this is not all about Megrahi; part 2 has a wider general application and merited on-going consideration by the committee and the Parliament. I rather doubt that it will be much use in practice, but I hope that our deliberations will prove to have been helpful, particularly in relation to data-protection issues.

In relation to a posthumous appeal, if a member of Megrahi’s family wants to take matters further they should appreciate that in the first instance it is for the SCCRC to decide whether it is in the interests of justice that a reference to the High Court be made. In the circumstances of an abandoned appeal, that is likely to be far from straightforward.

I am pleased that the Government sought to clarify matters in relation to legal professional
Mary Fee (West Scotland) (Lab): As I said in the stage 2 debate, the bill is needed to remedy the judgment in Petch and Foye v Her Majesty's Advocate.

I do not have a legal background, so I welcomed members' input in assisting my somewhat limited understanding of a complicated bill. It is disappointing that there is a loophole in our justice system that means that a prisoner who has committed a crime that is so serious that it merits a life sentence could be eligible for parole earlier than people who are serving sentences of a fixed length. Many members talked at length about that.

I am satisfied that the bill will close the loophole, but I have reservations about how it will do that. It will remedy a loophole in the sentencing structure, but does not give a clear legislative solution, because what is being proposed is too similar to what has gone before. The new legislation will be every bit as difficult to understand and interpret as the existing legislation.

Sentencing needs to be less prescriptive and sentencing requirements need to be clearer and easier to understand in order to make it easier for the public and victims of crime to understand how and why a sentence has been given. Most of my Labour colleagues who are present were also in the chamber last week when we debated support for victims and witnesses. I agreed with the suggestion that victims and witnesses need to be given more information to help them to understand why decisions are made and why sentences are handed down. The provisions in the bill are unnecessary complex and will make it harder for victims, witnesses and offenders’ families to understand why a sentence has been given.

The addition of such a complex piece of legislation to our justice system will also make it harder for lawyers and judges to interpret the law. I agree with the Justice Committee and the Law Society of Scotland that the bill is acceptable as part of law. Our sentencing legislative framework is relatively limited purpose, but the main reason why part 2 was introduced was to facilitate the Megrahi case. That gives the Scottish Government an opportunity to consider whether the bill’s provisions are strong enough to apply in other cases. There needs to be as much transparency as possible so that the public can have a greater understanding of the appeals process.

The general principles of the bill are decent. They set out to solve a couple of issues in our justice system, and they will do that successfully, but I still think that the bill may add complexity to an already overly complicated area of law. However, I will support the bill, as will my colleagues in the Labour Party.

Mark McDonald (North East Scotland) (SNP): I spoke in the stage 1 debate on the bill and I am pleased to have been given the opportunity to speak in the stage 3 debate.

It appears that the bill will be passed this evening, given the comments that Opposition members have made.

At stage 1, I said in response to comments that David McLetchie made, which Jenny Marra raised, that the litmus test of any legislation is not that it makes easy bedtime reading, but that it delivers outcomes that can be seen to deliver benefits. That litmus test has been applied, and it has been passed in parts 1 and 2 of the bill.

Jenny Marra spoke about the need to make legislation more accessible to the public and the possibility that the legislation’s complexity might make it unintelligible to victims and witnesses who are involved in the legislative process. It will not have escaped members’ attention that, only last week, we discussed issues relating to victims and witnesses with a view to the Government’s proposed legislation on enhancing and improving support for victims and witnesses. I spoke in that debate and mentioned the pilot that Victim Support Scotland is running in the Tayside area. I think that there are pilots in a couple of other regions as well, but Tayside is, obviously, in North East Scotland, which I represent. In that pilot, "Victims and witnesses will be supported through, and gain speedier access to, case progress information".

The aim is also to ensure that information is given to them “in an understandable way.”

We should not necessarily believe that victims and witnesses must be able to read and published in the press. I agree with the Justice Committee that the publication of the statement of reasons in the Megrahi case might serve a relatively limited purpose, but the main reason why part 2 was introduced was to facilitate the Megrahi case. The bill’s scope is very general and can apply to cases in the future other than the Megrahi case. That gives the Scottish Government an opportunity to consider whether the bill’s provisions are strong enough to apply in other cases. There needs to be as much transparency as possible so that the public can have a greater understanding of the appeals process.

The general principles of the bill are decent. They set out to solve a couple of issues in our justice system, and they will do that successfully, but I still think that the bill may add complexity to an already overly complicated area of law. However, I will support the bill, as will my colleagues in the Labour Party.
understand legislation themselves; there is often a need for organisations such as Victim Support Scotland to offer such support to them. I think that the issue of how the Government can ensure that victims and witnesses have the support to be able to understand the complexities of the legislative process will be on the Government’s radar as matters progress. We recognise that the process is often complex for members of the public.

Jenny Marra: I thank the minister—or, rather, the member—for giving way. I have promoted him.

To clarify, it was certainly not my intention to say that the legislation should be bedtime reading for me, or that it is for victims or witnesses of crime to understand the legislation. Indeed, the legislation needs to be complex in this case, but the guidelines and information that are given to victims and witnesses of crime in court and the justice process should be legible and understandable, and they should aid their understanding of the process.

Mark McDonald: I welcome the member’s clarification. I think that we would all agree with that; indeed, that was the notion around which I framed my remarks during last week’s debate.

I turn to a point that was made by Margaret Mitchell and the introduction into the debate of automatic early release. That issue was surprisingly absent at stage 1, given how important it apparently is to understanding the reasons behind Petch and Foye. It was absent in the discussions at stage 1 because it is not relevant: the issue is comparative justice. Whether an offender is serving a full determinate sentence or is released early from a determinate sentence is irrelevant. The relevant issue is the need to strip out the element of public protection that gave rise to the anomaly that the Government has dealt with.

Mark McDonald: I understand entirely that Margaret Mitchell may think that I have misunderstood the complexities of the legislation, but I contend that perhaps she has misunderstood those complexities and has mistakenly brought automatic early release into the debate. She will have an opportunity to clarify and reflect on that in summing up, but I suggest to her that automatic early release is a red herring in the debate and ought not to have been brought into consideration at this stage.

Margaret Mitchell: Does the member accept that automatic early release was a factor in the calculation in the case that led to the anomaly?

Mark McDonald: We are talking about eligibility for parole, which in my understanding is not the same as automatic early release.

Although only a small number of cases are affected by the issue that was raised in Petch and Foye, we should not lose sight of the fact that those cases relate to significant and serious crimes, hence the application of a non-mandatory life sentence.

That is why it is extremely important to introduce legislation at this stage, rather than to examine some of the wider sentencing issues that Mary Fee raised in her speech. It is important that we close that loophole now, on the basis that it relates to extremely serious crimes and to the need to ensure that the public are appropriately protected from those individuals.

With regard to addressing anomalies, part 2 has been described as largely redundant. That would be a fair assumption if we were to assume that it related only to the al-Megrahi case, but—as has been mentioned—the general framing of the bill means that it can be applied in future cases.

Whether such cases arise is neither here nor there: the fact that they are now provided for is the important thing. It is better that we have those provisions and perhaps do not need them in future than that we might need them and do not have them on the statute book. That is why it is important that we pass the bill, regardless of whether part 2 is seen by some as irrelevant, which is not necessarily the case.

I look forward to the bill being passed.

16:37

Margaret Mitchell: The Scottish Conservatives will support the bill at stage 3, and I welcome this afternoon’s debate. My closing remarks will focus on the provisions in part 1, which seeks to address an anomaly in sentencing—as identified in Petch and Foye v HMA—that must be rectified.

A number of members have noted the complexity of part 1, and I make no apology for again highlighting the comment that was made at stage 1 by James Chalmers of the University of Edinburgh. He stated:

“the Bill seeks to create a tortuous system which is barely intelligible to lawyers, let alone to the general public”.

That point is important, not because lawyers might find the bill challenging to understand—although clarity of law for the benefit of those who advise their clients is to be welcomed—but, crucially,
because the public would struggle to understand it.

Despite Mark McDonald’s rather skewed view and bizarre comments, Parliament should aspire to produce legislation that is readily understandable to the public. The Scottish Government made that crystal clear in its recently published consultation on the proposed victims and witnesses bill. The consultation places great importance on the need for victims to understand how sentencing decisions are made. It states:

“The Government is considering ... what ... practical measures could be taken to try and improve public understanding of sentencing.”

That being the case, the obvious question is whether the Scottish Government gave the same consideration to the drafting of the complicated sentencing rules in the bill that is before us today.

Furthermore, the bill deals with two distinct and unconnected areas of the law, as the Justice Committee noted in its stage 1 report. Although that approach is not without precedent and can be justified on pragmatic grounds, it has the potential to create handling difficulties when legislation is considered. Perhaps more important, the combining of unconnected provisions in one bill makes finding the law on a specific matter more difficult for those who use the law. For both those reasons, the practice should not be encouraged. Just as the Parliament should aspire to the objective of producing clearly drafted legislation, it should aspire to that of ensuring that the law is not just easily understood, but easily identifiable.

In giving a custodial sentence as a disposal, the judiciary seeks to achieve public protection, retribution and deterrence. It is widely recognised and conceded that the bill will make an already complex sentencing process more complicated, which means that the desired retribution and deterrence are that much less likely to be achieved. In such circumstances, none of us, least of all the Scottish Government, whose responsibility it is to get things right, can take much comfort from or pride in the passing of the bill.

Lewis Macdonald (North East Scotland) (Lab): As we have heard, all parties recognise that part 1 of the bill is necessary, but Labour members also wish to acknowledge the views of those legal experts who gave evidence during the bill’s consideration who were concerned about the complexity of the new processes that are to be introduced and who believe, as Mr MacAskill has previously conceded, that further legislation may be needed in future to resolve the same issue.

As Graeme Pearson said, the anomaly that exists in the justice system is so serious that the issue must be addressed in a timely fashion. For that reason, although it is possible that more prolonged consideration might produce a different outcome, we will support the bill as it stands, but we are mindful of the warning that it may prove not to be fit for purpose.

The Law Society of Scotland said in its submission that part 1 would not give rise to a clear legislative solution, because the

“calculation and comparison exercises proposed by the Bill are similar to what has gone before.”

Although the bill will resolve the anomaly that was highlighted by the Petch and Foye case, it is unlikely to prove to be a long-term solution. It will provide the short-term fix that is required, but the processes that it puts in place may prove to be more complex, and perhaps even more problematic, than the status quo.

However, we agree that the status quo is not an option. An anomaly exists at the heart of the Scottish justice system, which has to be fixed to restore confidence in the fact that offenders are indeed serving the sentences that the courts have imposed on them.

John Finnie and Roderick Campbell rightly noted that no amendments were lodged to part 1. We considered and were sympathetic to the Law Society’s approach and its efforts to identify a simpler way of resolving the anomaly. Although, as the cabinet secretary highlighted, ECHR compliance is important, the jury is out on whether the Government’s approach will succeed in improving public confidence in the system. Having considered the alternative approaches, we will support the approach that the Government has favoured, but we think that it is important to keep in mind some of the criticisms.

The issue is one of public confidence. As Jenny Marra rightly highlighted, it is not just about lawyers being able to understand the minutiae of the legislation; it is about those who are affected by the justice system being able to understand its impact and its consequences for them and for those who are found guilty of offences against them.

Coverage of the Petch and Foye case gave many people the distinct impression that dangerous criminals were to be released earlier than the courts had intended. As has been said, the final decision on release rests with the Parole Board for Scotland. As the cabinet secretary said, a decision to release is made only when the board is satisfied that the offender poses no further threat to the public.
The bill will give the courts greater discretion when it comes to calculating indeterminate life sentences, but there are some risks attached to that. The complexity of the directions that are issued to judges on calculating indeterminate life sentences is an issue in itself. John Finnie said that we should not assume that High Court judges will not understand the bill; I do not think that anyone would assume that. The difficulty arises if the legislation is so complex that the public do not understand it. The fact that judges are obliged to go through the process to reach a conclusion runs the risk of reducing public confidence in the process and in the system.

Double counting in calculating the length of an indeterminate sentence might be a problem—that point has been highlighted. The seriousness of an offence should be counted once, not twice. If double counting occurred, the risk is that we might end up with a different result. That leads to another risk—that human rights concerns could leave the system open to further challenges and force us to address the issue again, whether or not we wish to do so.

As Jenny Marra and Roderick Campbell said, careful monitoring will be needed after the bill is passed. I would welcome the cabinet secretary’s response on monitoring the bill’s operation.

The bill will amend one small part of the process to solve one problem. The problem and the solution alike illustrate the need for Scotland’s sentencing system as a whole to be re-examined. James Chalmers of the University of Edinburgh’s school of law has been quoted. In his evidence, he made the point that the bill “serves as powerful evidence of a sentencing system in need of much more far reaching review and reform.”

Sentencing has been on the Parliament’s agenda for some time. The Criminal Justice and Licensing (Scotland) Act 2010 allowed for the creation of the Scottish sentencing council, which would have been ideally suited to the circumstances of the case that we have discussed. It is disappointing that ministers have yet to set in train a wider review of sentencing and have yet to act on the option of creating the Scottish sentencing council.

The language in part 2 of the bill is more straightforward, although it has caused its fair share of debate and controversy. We have heard views about whether part 2 has been rendered irrelevant by the fact that a newspaper made public the SCCRC’s report on Megrahi and by the subsequent death of Megrahi. However, the bill is in front of us. The circumstances in which part 2 would be called on are difficult—but not impossible—to imagine, although it is certainly difficult to imagine another appeal being abandoned by such a high-profile appellant in a way that attracted such attention and public concern. However, such circumstances might arise so, having come thus far, it is appropriate to proceed to put the measure on the statute book.

There is no great problem in making available the information that relates to an investigation, provided that doing so is appropriate and safe. The clarification of the data protection rules has been highlighted. Perhaps that was an unintended positive consequence of the bill. It is important that any such release of information should safeguard individuals and not breach legally enforceable human rights.

I was intrigued by John Finnie’s interpretation that the amendments to part 2, which were agreed to by all parties this afternoon, in some way place the UK Government on the same footing as a foreign Government. I invite the cabinet secretary to clarify that the amendments will protect the UK Government’s position in relation to the release of information rather than impinge on its prerogatives, as Mr Finnie might have wished to suggest.

If part 2 goes down in legal history, it will do so as a measure that was passed after it was no longer required. Only time will tell whether it will have any future use.

By contrast, part 1 might survive on the statute book for only a relatively short time. If the processes that it creates turn out to have made the wheels of justice grind in a way that is more complex, more cumbersome and less transparent, a future Government might decide on a simpler and more direct approach. Better still, the processes that part 1 covers could be addressed as part of a wider review and reform of our whole sentencing system. Such a process should start sooner rather than later.

With those caveats, we are content to support the bill.

16:50

Kenny MacAskill: There has been a great deal of unanimity in the chamber today. Starting with Jenny Marra and continuing thereafter, we have had a plea for the legislation to be as simple as possible and to be understandable to the general public. I fully appreciate that point. The great and the good and many others have been rolled out in support of that view and have pled in its favour.

I fully accept that, irrespective of whether we are dealing with criminal, commercial or consumer legislation, it should be as understandable as possible. Wherever possible, it should be understandable to the ordinary man and woman in the street, not just to those who are privileged...
enough to possess a degree in law. Sadly, that cannot always be the case. Some aspects of the law are by nature very complex, and that will always be true.

Equally, if we did not have complex law, we would not need lawyers; we would need only pleaders. In the past, Parliament has passed legislation that we thought was relatively straightforward. We thought that it was relatively straightforward to say that it was iniquitous that those who suffered from pleural plaques should not be given the opportunity to obtain recompense. Some lawyers, including some eminent lawyers, thought that that was contrary to the powers of the Parliament and took the case as far as the Supreme Court. It is not only that law should be, wherever possible, understandable; it can all be challenged equally. I fully accept all the points that were made about law being as understandable as possible. That is the Government’s desire and, to be fair, it is the desire of every Government, whether present or past, or north or south of the border. Sadly, however, some laws are, by their nature, very complex.

Jenny Marra: We should clarify the point. We have called not for the legislation to be simpler but for sentencing to be simpler and more easily understood by witnesses and victims of crime. That has been our call throughout the scrutiny process.

Kenny MacAskill: To be fair, that was the aspect that Ms Marra raised, but many other people, including some in her party, raised the question of the law being unnecessarily complex. Mr Pearson mentioned Sir Gerald Gordon, who lectured me and whose textbook I had back when I studied law. I appeared in trials in the sheriff court in Edinburgh and elsewhere along with Michael Meehan. I instructed Joanna Cherry QC when I was a practitioner. They were all cited, along with James Chalmers, as people who said that the law was unnecessarily complex.

I wish that it could be simpler, but it cannot, because it is a complex area of law. We should also remember that we are dealing with an appeal case in which the judge’s first decision was challenged, so one judge was accused of getting it wrong. The matter went to our highest court of criminal appeal, which was divided. The decision was a majority decision; there was no unanimity across the bench. We are talking about a case that challenged even our most esteemed senior judiciary. Some think that the decision was not right, which is why there was a majority judgment.

As John Finnie and others have said—and I do not wish to be churlish here—no one has come forward with an alternative. We believe that the legislation will address the position that was taken by the majority of the appeal court judges. I regret that the legislation is not simpler, but we are talking about a complex area of law. However, it is complex because judges apparently got it wrong the first time, other judges could not unite on the matter, and we have had to act to address the situation. That is where we are.

I assure Jenny Marra and Roderick Campbell that we will keep the matter under review. I am due to meet the Lord President tomorrow, which will be the first time since he was put into that esteemed office, and I assure members that I hope to be able to tell him that we have passed the bill. I will raise with him the issue of the complexity of the law and say that I hope that we can work with the appeal court that he, as Lord Justice General, will chair. When we appoint a new Lord Justice Clerk, we will also discuss the issue with him or her.

Part 2 of the bill is on the SCCRC. There was an issue that we had to address. The bill was drafted in a general way, although it was always clear that the driver was to ensure that the commission’s report on al-Megrahi was published. We believe that there is a gap in the law. I think that Lewis Macdonald said that it is difficult to speculate on circumstances that might arise, but they might arise. Some people have gone to the SCCRC and subsequently not proceeded with an appeal. Those were not matters of public interest, so I do not think that anybody is lamenting the fact that the information is not out there in public, but there might be such an instance in due course. It is therefore appropriate to have a legislative framework that allows for that.

It has been mentioned that the *Sunday Herald* published what are admitted to be the matters that have been referred to by the SCCRC. Something is fundamentally wrong if the SCCRC has to publish matters that it is precluded by law from publishing, resting on an assurance from the Lord Advocate that he will not prosecute. That cannot be right. It cannot be appropriate that something that is so important to our legislative framework as the SCCRC should have to rest on a nod and a wink from the Lord Advocate and an assurance that he will not prosecute if it publishes information. There is something fundamentally wrong with that.

The bill ensures that we deal with cases that might arise—although we cannot say what they may be—and not simply the al-Megrahi case, but it also deals with the fundamentally wrong situation that, in a case as important as the al-Megrahi one, the SCCRC would breach the law in publishing information, albeit that the Lord Advocate in his kindness and wisdom might say that he would not prosecute. That cannot be appropriate in our system. It is therefore appropriate to put the matter on a solid legal basis.
so that the commission can publish what it feels to be appropriate.

We have included measures dealing with foreign Governments and the United Kingdom Government. Mr Macdonald need have no doubts that the only reason why we included the United Kingdom Government was to satisfy the points that have been raised with me by Michael Moore, the Advocate General for Scotland and Foreign and Commonwealth Office ministers. However, let us be clear that what the *Sunday Herald* published could be superseded. Therefore, as well as ensuring that we give a legal basis and framework to the SCCRC, we must consider what would happen if we did not proceed and the United States Government said that it did not mind if more information was published, or if the UK Government said that the *Sunday Herald* or the commission could publish what it liked and it would not interfere.

The bill ensures that there is a legal or statutory basis for the commission to do what has simply been homologated by the Lord Advocate. We give the commission surety that, if anything should change, it would be doing nothing untoward.

**Lewis Macdonald:** Will the cabinet secretary confirm that the situation remains that, if another Government chooses not to give consent, important matters might be withheld?

**Kenny MacAskill:** Absolutely. The assurance that we have given in relation to foreign Governments and the United Kingdom Government, which was raised with us by the Lord Advocate, is fundamental. It would undermine the whole basis of co-operation on law enforcement if information would not be given—we would not provide information if such an approach were reciprocated. It is therefore important that we give that assurance.

The Tories continued their mantra chant on early automatic and unconditional release. The Tories have an opportunity to debate that in the Parliament tomorrow, although they have chosen not to do so. It is important that they make their point in debates, despite the fact that we continually point out that it was the Tories who invoked the automatic early release provisions. The learned Kenneth Clarke, who has held many offices of state and whom I meet and find personable, does not seem to think that it is necessary to proceed in that way. In many ways, he does things vastly differently from me, but he is sometimes much more liberal.

The bill is nothing to do with automatic early release; it is to do with comparative justice and ECHR cases. The Tories have a right to bring their points to the Parliament, but they bring the issue of automatic early release into every justice debate. It would have been more appropriate to have had a debate on the issue in their debating time in the Parliament, rather than raise it in a debate that has nothing to do with the issue.

The bill addresses a complex and difficult area of law. For those who know—as I think members know—what Petch and Foye were convicted of, there was something manifestly wrong in the situation and we had to sort it out. On that basis, I am grateful to members for their support for the bill. It is complex and it will be kept under review, but it provides the opportunity for the High Court and the SCCRC to deal with matters appropriately.
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Criminal Cases (Punishment and Review) (Scotland) Bill
AS PASSED

An Act of the Scottish Parliament to amend the rules about the punishment part of non-mandatory life sentences imposed in criminal cases and to amend the rules about the disclosure of information obtained by the Scottish Criminal Cases Review Commission.

PART 1
PUNISHMENT PART OF NON-MANDATORY LIFE SENTENCES

1 Setting the punishment part
(1) Part 1 (detention, transfer and release of offenders) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 is amended as follows.
(2) In section 2 (duty to release discretionary life prisoners), in subsection (2)—
   (a) in the opening text, the words “(ignoring the period of confinement, if any, which may be necessary for the protection of the public)” are repealed,
   (b) paragraph (aa) and the word “and” immediately preceding paragraph (c) are repealed,
   (c) after paragraph (c) there is inserted “; and
   (d) in the case of a life prisoner to whom paragraph (a) or (ab) of subsection (1) above applies, the matters mentioned in section 2A(1),”.
   (d) after subsection (2) there is inserted—
   “(2A) The matters mentioned in subsection (2)(a) to (c) above (taken together) are for the case of a life prisoner to whom paragraph (aa) of subsection (1) above applies; and, as respects the punishment part in the case of such a prisoner, the court is to ignore any period of confinement which may be necessary for the protection of the public.”.
(3) After section 2 there is inserted—
   “2A Rules for section 2(2)(d) cases
   (1) For the purpose of section 2(2)(d), the matters are—

SP Bill 5B Session 4 (2012)
(a) any period of imprisonment which the court considers would have been appropriate for the offence had the court not sentenced the prisoner to imprisonment for life, or (as the case may be) not made the order for lifelong restriction, for it,

(b) the part of that period of imprisonment which would represent an appropriate period to satisfy the requirements of retribution and deterrence, and

(c) where appropriate, the ones mentioned in paragraphs (a) and (b) of section 196(1) of the 1995 Act.

(2) But—

(a) in the application of subsection (1)(a), the court is to ignore any period of confinement which may be necessary for the protection of the public,

(b) subsection (1)(b) is subject to section 2B,

(c) subsection (1)(c) is inapplicable until the court has made the assessment required by virtue of subsection (1)(a) and (b).

2B Assessment under section 2A(1)(a) and (b)

(1) The part mentioned in subsection (1)(b) of section 2A in relation to the period mentioned in subsection (1)(a) of that section is—

(a) one-half of that period, or

(b) if subsection (2) applies, such greater proportion of that period as the court specifies.

(2) This subsection applies if, taking into account in particular the matters mentioned in subsection (5), the court considers that it would be appropriate to specify as that part a greater proportion of that period.

(3) In subsections (1)(b) and (2), the references to a greater proportion extend so as to include the whole of that period.

(4) In subsections (1) to (3), the references to the period mentioned in subsection (1)(a) of section 2A are to that period as informed by subsection (2)(a) of that section.

(5) For the purpose of subsection (2), the matters are (continuing to ignore any period of confinement which may be necessary for the protection of the public)—

(a) the seriousness of the offence, or of the offence combined with other offences of which the prisoner is convicted on the same indictment as that offence,

(b) where the offence was committed when the prisoner was serving a period of imprisonment for another offence, that fact, and

(c) any previous conviction of the prisoner.”.

(4) Part 2 (confinement and release of prisoners) of the Custodial Sentences and Weapons (Scotland) Act 2007 is amended as follows.

(5) In section 20 (setting of punishment part)—
(a) in subsection (3), the words “(ignoring any period of confinement which may be necessary for the protection of the public)” are repealed,

(b) after subsection (4) there is inserted—

“(4A) As respects the punishment part in the case to which subsection (4) relates, the court is to ignore any period of confinement which may be necessary for the protection of the public.”,

(c) in subsection (5)—

(i) the word “and” immediately preceding paragraph (b) is repealed,

(ii) in paragraph (b), for the words “, by virtue of section 6, the court would have specified as the custody part.” there is substituted “would represent an appropriate period to satisfy the requirements of retribution and deterrence,”,

(iii) after paragraph (b) there is inserted “and

(c) where appropriate, the ones mentioned in paragraphs (a) and (b) of section 196(1) of the 1995 Act.”,

(d) after subsection (5) there is inserted—

“(5A) But—

(a) in the application of subsection (5)(a), the court is to ignore any period of confinement which may be necessary for the protection of the public,

(b) subsection (5)(b) is subject to section 20A,

(c) subsection (5)(c) is inapplicable until the court has made the assessment required by virtue of subsection (5)(a) and (b).”.

(6) After section 20 there is inserted—

“20A Assessment under section 20(5)(a) and (b)

(1) The part mentioned in subsection (5)(b) of section 20 in relation to the period mentioned in subsection (5)(a) of that section is—

(a) one-half of that period, or

(b) if subsection (2) applies, such greater proportion of that period as the court specifies.

(2) This subsection applies if, taking into account in particular the matters mentioned in subsection (5), the court considers that it would be appropriate to specify as that part a greater proportion of that period.

(3) In subsections (1)(b) and (2), the references to a greater proportion extend so as to include the whole of that period.

(4) In subsections (1) to (3), the references to the period mentioned in subsection (5)(a) of section 20 are to that period as informed by subsection (5A)(a) of that section.

(5) For the purpose of subsection (2), the matters are (continuing to ignore any period of confinement which may be necessary for the protection of the public)—
(a) the seriousness of the offence, or of the offence combined with other offences of which the prisoner is convicted on the same indictment as that offence,

(b) where the offence was committed when the prisoner was serving a period of imprisonment for another offence, that fact, and

(c) any previous conviction of the prisoner.”.

2 Ancillary provision

(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with section 1.

(2) Regulations under subsection (1) may (in particular) modify Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 or Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007.

(3) Regulations under subsection (1) are subject to the affirmative procedure.

PART 2

DISCLOSURE OF INFORMATION OBTAINED BY SCCRC

3 Exception to non-disclosure rule

(1) Part XA (Scottish Criminal Cases Review Commission) of the Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 194J (offence of disclosure), in subsections (1) and (2), after the words “section 194K” in each place where they occur there is inserted “or 194M”.

(3) After section 194L there is inserted—

“Special circumstances for disclosure

194M Further exception to section 194J

(1) The disclosure of information, or the authorisation of disclosure of information, is excepted from section 194J by this section if—

(a) the conditions specified in subsection (2) are met, and

(b) the Commission have determined that it is appropriate in the whole circumstances for the information to be disclosed.

(2) The conditions are that—

(a) the information relates to a case that has been referred to the High Court under section 194B(1),

(b) the reference concerns—

(i) a conviction, or

(ii) a finding under section 55(2), and

(c) the case has fallen, or has been abandoned, under the provisions or other rules applying by virtue of section 194B(1).
194MA Effect of the exception

(1) Where the disclosure of information is excepted from section 194J by section 194M, the disclosure of the information is not prevented by any obligation of confidentiality or other limitation on disclosure arising otherwise than under section 194J.

(2) For the purpose of subsection (1), such an obligation or limitation does not include one imposed—

(a) by, under or by virtue of any enactment, or

(b) by any interdict or other court order applying in connection with this section.

194N Notification and representations etc.

(1) When considering for the purpose of section 194M(1) the question of whether it is appropriate for the information to be disclosed, the Commission have the following duties.

(2) The Commission must—

(a) so far as practicable, take reasonable measures to—

(i) notify each of the affected persons of the possibility that the information may be disclosed, and

(ii) seek the views of each of them on the question, and

(b) to such extent (and in such manner) as they think fit, consult the other interested persons.

(3) The Commission must—

(a) allow the prescribed period for each of the affected and other interested persons involved to take steps (including legal action) in their own favour in relation to the question, and

(b) have regard to any material representations made to them on the question by any of those affected and other interested persons within the prescribed period.

(4) The Commission must have regard to any other factors that they believe to be significant in relation to the question.

(5) In subsections (2) and (3)—

(a) the references to the affected persons are to the persons—

(i) to whom the information directly relates, or

(ii) from whom the information was obtained, whether directly or indirectly,

(b) the references to the other interested persons are to (so far as not among the affected persons)—

(i) the Lord Advocate, and

(ii) such additional persons (if any) as appear to the Commission to have a substantial interest in the question.
(6) In subsection (3), the references to the prescribed period in relation to a particular person are to—
   (a) the period of 6 weeks, or
   (b) such longer period as the Commission may set,
starting with the date on which the notification was sent to, or (as the case may be) consultation was initiated with respect to, the person.

(7) Subsections (3) and (6) are inapplicable in relation to a particular person if the Commission cannot reasonably ascertain the person’s whereabouts.

194NA Consent if UK interest

(1) Unless subsection (3) is complied with, section 194M(1) is of no effect in relation to any information falling within subsection (2).

(2) Information falls within this subsection if it—
   (a) is held by the Commission, and
   (b) at any time, has been supplied by the UK Government under arrangements of any kind.

(3) This subsection is complied with if, at any time, the UK Government has in connection with section 194M(1) given its consent to disclosure of the information.

(4) In this section, “the UK Government” means a Minister of the Crown or a department of the Government of the United Kingdom.

194O Consent if foreign interest

(1) Unless subsection (4) is complied with, section 194M(1) is of no effect in relation to any information falling within subsection (1A).

(1A) Information falls within this subsection if it—
   (a) is held by the Commission, and
   (b) at any time, has been supplied by a designated foreign authority under arrangements of any kind.

(4) This subsection is complied with if the designated foreign authority has in connection with section 194M(1) given its consent to disclosure of the information by virtue of—
   (a) the arrangements concerned, or
   (b) subsection (5).

(5) Where not previously given by virtue of those arrangements, it is for the Commission to seek the designated foreign authority’s consent to disclosure of the information.

(5A) Subsection (1) does not apply if the information also falls within section 194NA(2).
194P  Designated foreign authority

(5) The references in section 194O to a designated foreign authority are to a current or previous authority of a prosecutorial, judicial or other character which is or was located within a country or territory outwith the United Kingdom.

(6) But, if in connection with subsection (5) of that section—

(a) the Commission cannot reasonably identify or find the particular authority in question, or

(b) they are unsuccessful in their reasonable attempts to communicate with it,

the references in subsections (4) and (5) of that section to the designated foreign authority are to be read as if they were to the relevant foreign government.

(6A) In the application of subsection (6), paragraph (a) of subsection (4) of that section is to be ignored.

(7) In subsection (6)—

(a) the references to the Commission include their acting with the Lord Advocate’s help,

(b) the reference to the relevant foreign government—

(i) is to the government of the other country or territory,

(ii) in the event of doubt as to the status or operation of a governmental system in the other country or territory, is to be regarded as being to the body described in subsection (8).

(8) That is, the principal body in it (for the time being (if any)) that is recognised by the Government of the United Kingdom as having responsibility for exercising governmental control centrally.

194Q  Disapplication of sections 194N to 194P

(1) Sections 194N to 194P cease to have effect if subsection (2) prevails.

(2) This subsection prevails where, on their preliminary examination of the question to which section 194N(1) relates, the Commission determine for the purpose of section 194M(1) that it is manifestly inappropriate for the information to be disclosed.

(3) But—

(a) if there is a material change in any significant factor on which the determination depended, it is open to the Commission to re-examine the question (and this is to be regarded as another preliminary examination of the question),

(b) where they choose to re-examine the question, the effect of sections 194N to 194P is restored unless subsection (2) again prevails.
**Final disclosure-related matters**

1. If the Commission decide in pursuance of section 194M(1) to disclose the information—
   - (a) subsection (2) applies initially, and
   - (b) subsection (3) applies subsequently.

2. Before disclosing the information, the Commission must—
   - (a) so far as practicable, take reasonable measures to notify of the decision—
     - (i) each of the affected persons, and
     - (ii) to the same extent as they were consulted under section 194N(2)(b), the other interested persons, and
   - (b) allow the prescribed period for each of the affected and other interested persons involved to take steps (including legal action) in their own favour in relation to the decision.

3. In disclosing the information, the Commission must—
   - (a) explain the context in which the information is being disclosed by them (including by describing the background to the case), and
   - (b) where (for any reason) other information relating to the case remains undisclosed by them, explicitly state that fact,

and do so along with the material by which the disclosure is made.

4. In subsection (2), the references to the affected and other interested persons are to be construed in accordance with section 194N(5).

5. In subsection (2)(b), the reference to the prescribed period in relation to a particular person is to—
   - (a) the period of 6 weeks, or
   - (b) such longer period as the Commission may set, starting with the date on which the notification was sent to the person.

6. Subsections (2)(b) and (5) are inapplicable in relation to a particular person if the Commission cannot reasonably ascertain the person’s whereabouts.

7. In subsection (3)(b), the reference to other information is to any other information obtained by the Commission in the exercise of their functions.”.

**Consequential revocation**


**Part 3**

**Commencement**

1. This Part comes into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

6 **Short title**

The short title of this Act is the Criminal Cases (Punishment and Review) (Scotland) Act 2012.
Criminal Cases (Punishment and Review) (Scotland) Bill

AS PASSED

An Act of the Scottish Parliament to amend the rules about the punishment part of non-mandatory life sentences imposed in criminal cases and to amend the rules about the disclosure of information obtained by the Scottish Criminal Cases Review Commission.

Introduced by: Kenny MacAskill
On: 30 November 2011
Bill type: Executive Bill