Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

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:

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Mr Robert Forrester
Dr Morag Kerr
Mr Iain McKie
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