

Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

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 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