Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

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.

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The Information Commissioner’s Office  
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