Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

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 Mohmed 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 a 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.