Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

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