JUSTICE COMMITTEE

AGENDA

13th Meeting, 2011 (Session 4)

Tuesday 8 November 2011

The Committee will meet at 10.30 am in Committee Room 2.

1. **Decision on taking business in private**: The Committee will decide whether to consider in private at future meetings a draft report on the Terrorism Prevention and Investigation Measures Bill LCM.

2. **Terrorism Prevention and Investigation Measures Bill (UK Parliament legislation)**: The Committee will take evidence on legislative consent memorandum LCM(S4) 6.1 from—

   Kenny MacAskill MSP, Cabinet Secretary for Justice;

   Aileen Bearhop, Principal Policy Officer, Police Division, and Kevin Gibson, Scottish Government Legal Directorate, Scottish Government.

3. **Petitions**: The Committee will consider the following petitions—

   PE1063 by Robert Thomson on the apparent conflict of interest which exists between solicitors/advocates and clients in the present system of speculative fee arrangements (no win – no fee);

   PE1280 by Julie Love and Dr Kenneth Faulds on amending the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad;

   PE1370 by Dr Jim Swire, Professor Robert Black QC, Mr Robert Forrester, Father Patrick Keegans and Mr Iain McKie on behalf of Justice for Megrahi calling on the Scottish Parliament to urge the Scottish Government to open an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohmed al-Megrahi for the bombing of Pan Am flight 103 in December 1988.
4. **Subordinate legislation:** The Committee will consider the following instrument which is not subject to any parliamentary procedure—

   Act of Adjournal (Criminal Procedure Rules Amendment No.6) (Sexual Offences Prevention Order) 2011 (SSI 2011/355).

5. **Draft Budget 2012-13 and Spending Review 2011 Scrutiny (in private):** The Committee will consider the main themes arising from evidence received on the Scottish Government's Draft Budget 2012-13 and Spending Review 2011.

Peter McGrath  
Clerk to the Justice Committee  
Room TG.01  
The Scottish Parliament  
Edinburgh  
Tel: 0131 348 5195  
Email: peter.mcgrath@scottish.parliament.uk
The papers for this meeting are as follows—

**Agenda item 2**

Note by the Clerk J/S4/11/13/1

*Terrorism Prevention and Investigation Measures Bill (UK Parliament legislation) (LCM(S4) 6.1)*

**Agenda item 3**

Note by the Clerk J/S4/11/13/2

Note by the Clerk J/S4/11/13/3

Note by the Clerk J/S4/11/13/4

Written submission from Justice for Megrahi J/S4/11/13/5

**Agenda item 4**

SSI cover note J/S4/11/13/6

*Act of Adjournal (Criminal Procedure Rules Amendment No. 6) (Sexual Offences Prevention Order) 2011 (SSI 2011/355)*

**Agenda item 5**

Paper by the Clerk (private paper) J/S4/11/13/7 (P)

**Papers for information**

Letter from the Cabinet Secretary for Justice on recent EU initiatives on rights for accused or suspect J/S4/11/13/8
Background

1. The UK Terrorism Prevention and Investigation Measures Bill was introduced to the House of Commons on 23 May 2011. The Bill abolishes the system of control orders, established under the Prevention of Terrorism Act 2005, and replaces it with a new regime designed to protect the public from terrorism, called Terrorism Prevention and Investigation Measures (TPIMs).

2. When first introduced, none of the Bill related to devolved matters. However, subsequent amendments agreed during the passage of the Bill have meant that there are now three areas of the legislation which relate to devolved matters. These are as follows:
   - Power and seizure of evidence;
   - Use of forensic data; and
   - Temporary power for the imposition of enhanced measures1.

3. As elements of the Bill now relate to devolved matters, a Legislative Consent Memorandum (LCM(S4) 6.1) has been lodged by the Cabinet Secretary for Justice for consideration by the Parliament under rule 9B.3.1(c(ii) of standing orders.

4. While the Parliamentary Bureau has yet to designate a lead committee to consider the LCM, it is expected to be the Justice Committee. The matters being legislated on here are, in any case, within the remit of the Committee.

5. Scottish Government officials have informed the Committee clerks that the final amending stage in the UK Parliament (third reading in the House of Lords) is currently expected to take place on Wednesday 23 November. To enable the Legislative Consent Motion (a draft motion is included in the memorandum) to be considered by the Scottish Parliament in advance of the final amending stage, the Justice Committee is required to agree its report on the Legislative Consent Memorandum at its meeting on 15 November.

6. In order to inform the report, the Convener has agreed to invite the Cabinet Secretary for Justice to attend the meeting to give evidence on the memorandum.

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1 The amendment to provide for the consent of Scottish Ministers to be sought in cases where UK Ministers wish to make specific provisions for enhanced TPIM purposes should the provisions fall within the competence of the Scottish Parliament has yet to be agreed by the UK Parliament. However, Scottish Government officials have informed the Committee clerks that following discussions between themselves and the UK Government they expect such an amendment to be considered shortly.
7. A copy of the LCM is attached as an Annexe. This provides further detailed information on the Bill and the provisions with which the LCM is concerned.

**Procedure for dealing with legislative consent memoranda**

8. Chapter 9B of Standing Orders sets out the procedures for the consideration of a LCM. For any bill under consideration in the UK Parliament which makes provision applying to Scotland for any purpose within the legislative competence of the Parliament, the Scottish Government must lodge a legislative consent memorandum. The Parliamentary Bureau refers the memorandum to the relevant lead Committee and, if the relevant bill makes provisions for subordinate legislation, to the Subordinate Legislation Committee. The lead Committee must then consider the legislative consent memorandum and make a report on its views to the Parliament.

**For action**

9. Based on the evidence from the Cabinet Secretary, the clerks will prepare a short draft report for consideration at next week’s meeting.
LEGISLATIVE CONSENT MEMORANDUM

TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL

Draft Legislative Consent Motion

1. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:
   
   “That the Parliament agrees that the relevant provisions of the Terrorism Prevention and Investigation Measures Bill, introduced in the House of Commons on 23 May 2011, as amended, relating to powers of seizure of evidence and the use of forensic data, and the order making powers which would enable the imposition of enhanced measures in exceptional circumstances, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

Background

2. This memorandum has been lodged by Kenny MacAskill, Cabinet Secretary for Justice, under Rule 9.B.3.1(c)(ii) of the Parliament’s standing orders. The Terrorism Prevention and Investigation Measures Bill was introduced in the House of Commons on 23 May 2011. The latest version of the Bill can be found at:


Content of the Terrorism Prevention and Investigation Measures Bill

3. The Terrorism Prevention and Investigation Measures (TPIM) Bill will repeal control orders which were provided for in the Prevention of Terrorism Act 2005, and other provisions relating to control orders which were made in subsequent legislation, and replace them with a new system of Terrorism Prevention and Investigation Measures (TPIMs). TPIMs are intended to be a new form of civil preventative measure designed to protect the public from the risk posed by suspected terrorists. TPIMs will have some similarities to control orders. To date, control orders have not been used in Scotland.

4. The TPIM Bill also makes provision for the making of a temporary enhanced TPIM order in exceptional circumstances. Such an order would enable the Secretary of State to impose more stringent measures on individuals than is possible under standard TPIMs. Temporary enhanced measures could only be introduced during the period which begins with the dissolution of the UK Parliament and ends with the making of the first Queen’s Speech of the next Parliament, and could only last for a maximum of 90 days.

5. In all other circumstances, a separate Enhanced TPIM Emergency Bill would be introduced for the purpose of imposing enhanced TPIMs. Such an emergency Bill has been drafted by the Home Office and is currently subject to pre-legislative
scrutiny. There are no plans for introduction. That emergency Bill is not the subject of this Legislative Consent Memorandum.

Provisions Which Relate to Scotland

6. The TPIM Bill as introduced did not require the legislative consent of the Scottish Parliament. The Scottish Parliament was dissolved for the Parliamentary elections at that time and the provisions of the Bill which would have extended to Scotland were therefore disappplied. After the election the Scottish Government discussed the Bill’s provisions with the UK Government and the Scottish Ministers agreed in principle to seek the legislative consent of the Scottish Parliament for the relevant provisions. Amendments were subsequently tabled during the Commons Committee stages of the Bill. The relevant provisions fall within the legislative competence of the Scottish Parliament and extending those provisions to Scotland has made the Bill a relevant Bill under Standing Orders.

Police powers on entry, search and seizure (Schedule 5)

7. The majority of powers in the Bill relating to powers of entry, search and seizure are reserved, including powers of entry for the purpose of serving a TPIM notice, to check compliance with TPIM restrictions, to ascertain if an individual who is subject to a TPIM notice has absconded and to establish whether such an individual is in possession of anything that could be used to threaten or harm any person. Some of these powers of search and entry require a warrant to be obtained whereas others can be exercised without a warrant.

8. There are, however, further powers in the Bill for a constable to seize anything found in the course of a search of an individual or premises, for the purposes of a TPIM notice. These powers could be used if the police reasonably suspect that such items are either evidence or contain evidence in relation to an offence and it is necessary to seize them in order to prevent them from being concealed, lost, damaged, altered or destroyed. These powers of seizure apply to evidence in relation to any offence, not just terrorism offences and so includes offences falling under devolved areas.

Use of forensic data (Schedule 6)

9. Schedule 6 makes provision for the taking, retention and use of forensic data from individuals subject to a TPIM. Such forensic data must not be used other than in the interests of national security, for the purposes of a terrorist investigation, purposes related to the prevention and detection of crime, the investigation of an offence or the conduct of a prosecution, or the identification of a deceased person or of the person to whom the material relates.

10. The UK Government has decided broadly to adopt the “Scottish model” in relation to the general rules on destruction and retention of forensic data. The legislation governing the taking, retention and use of forensic data taken from suspects in Scotland is set out in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Provisions in the Bill relating to Scotland are generally in line with existing police procedures and legislation.
11. Further rules and time limits are also introduced in the Bill in relation to material taken from a person subject to a TPIM so that such material can be retained for a longer period if a national security determination is in place. A national security determination is made if a chief constable determines that it is necessary for the material to be retained for the purposes of national security. The taking and retention of material for national security purposes is a reserved matter.

Temporary power for the imposition of enhanced measures (clauses 26 and 27)

12. Clause 26 makes provision for the Secretary of State to make a temporary enhanced TPIM order, in exceptional circumstances, for the issue of enhanced TPIM notices to individuals. Such notices would include enhanced preventative or investigation measures in terms of a number of issues, such as the restriction of a person’s movements. The order would not automatically include any additional or more stringent measures in relation to search and seizure powers and use of data.

13. The power for UK Ministers to make a temporary enhanced TPIM includes power to make provision which is different from the TPIM Bill for enhanced TPIM purposes. Such provision may include:

- amending any enactment, including Acts of the Scottish Parliament and Scottish Statutory Instruments; and
- imposing functions on “any person”, including Scottish Ministers.

14. Although unlikely to be used, particularly given the time limited nature of temporary enhanced TPIM orders, these are potentially significant powers, the use of which could potentially stray in to devolved areas. The UK Government therefore intends to bring forward an amendment to ensure that the consent of Scottish Ministers is required in cases where UK Ministers wish to include additional measures in an enhanced TPIM order, where these measures would amend any enactment or impose functions on any person and these actions could fall within the competence of the Scottish Parliament. An amendment is expected to be tabled in early November, prior to Lords Committee Report stage and in time to allow consideration by the Scottish Parliament.

Reasons for seeking a legislative consent motion

Power of seizure of evidence

15. The powers of entry and search and some of the powers of seizure in the Bill are reserved but this is not the case for the power of seizure of evidence relating to devolved offences. The police already have powers under common law to seize evidence if they believe an offence has been committed. Whilst we could continue to rely on common law, we believe that there is merit in clarifying the powers of the police when exercising TPIM powers to seize evidence in relation to both devolved and reserved offences. It makes operational sense to do so and puts these powers beyond doubt.
Use of forensic data

16. If the relevant provisions in the Bill did not extend to Scotland then any samples obtained under the provisions in the Bill could only be used in the interests of national security, or for the purposes of a terrorist investigation. Extending the provisions to Scotland will mean that the data taken from individuals who are subject to a TPIM notice will be able to be used for devolved purposes, i.e. for the identification of deceased persons and for the prevention, detection and investigation of crime. It will also mean that this forensic data can be checked against any other forensic data (including that taken under the 1995 Act) for these purposes.

Temporary power for the imposition of enhanced measures (sections 26 and 27)

17. The order making power set out in clause 26 potentially allows the Secretary of State to make provision on devolved issues for the purposes of temporary enhanced TPIMs. The Bill, as amended, will provide for the consent of Scottish Ministers to be sought in cases where UK Ministers wish to make specific provisions for enhanced TPIM purposes if these provisions would fall within the competence of the Scottish Parliament. These powers are considered necessary in the interests of national security and public safety. It is sensible to include consent for the order making power in this Legislative Consent Motion.

Consultation

18. The powers set out in the Bill have been promoted by the Home Office following a detailed Review of Counter-Terrorism and Security Powers. The Review Findings and Recommendations were published in a Command Paper by the Home Secretary in January 2011 (CMD 8004). We have considered the issues from a Scottish perspective, and have sought the views of the Association of Chief Police Officers in Scotland (ACPOS) and the Crown Office.

Financial Implications

19. It is envisaged that there will not be additional direct costs to the Scottish Government or the Scottish Criminal Justice sector.

Conclusion

20. Extending the relevant provisions in the Bill to Scotland will put the powers of the police in Scotland, in relation to powers of seizure of evidence and the use of forensic data, beyond doubt. It will also ensure that the consent of Scottish Ministers is sought in cases where UK Ministers wish to make specific provisions for enhanced TPIM purposes, if these provisions would fall within the competence of the Scottish Parliament. It is therefore the view of the Scottish Government that it is in the interests of the Scottish people and good governance that the relevant provisions, as outlined above, which fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

Scottish Government
November 2011
Justice Committee

13th Meeting, 2011 (Session 4), Tuesday 8 November

Petition PE1063

Note by the Clerk

Background

Petition

1. Petition PE1063 by Robert Thomson calls for the Scottish Parliament to:

   “investigate the apparent conflict of interest which exists between solicitors / advocates and clients in the present system of speculative fee arrangements (no win – no fee) and urges the Scottish Government to overhaul the existing speculative fee arrangements framework and procedures in order to make solicitors/advocates more accountable to their clients.”

2. The petition was lodged in June 2007 and referred by the Public Petitions Committee (PPC) to the Justice Committee on 29 January 2008. The full text of PE1063, along with further information provided by the petitioner, can be found at Annex A. A SPICe briefing on the petition was published on 24 September 2007 and can be found in Annexe B.

Consideration by the Session 3 Justice Committee

3. A summary of the Session 3 Justice Committee's consideration of PE1063 is contained in its legacy paper:

   “The Cabinet Secretary initially advised the Committee that this issue would be covered in the Gill Review¹, but when Lord Gill’s report was published in 2009 it made no specific recommendations on this issue. It was then suggested that some provision with regard to contingency fees would be included in the Legal Services Bill. However, in December 2009 the Cabinet Secretary advised that instead the issue would be consulted on as part of a wider consultation of the regime covering fees dependant on success. The Scottish Government has recently confirmed that it does still intend to consult on this and other related matters but has not yet done so.”

4. Shortly before the Parliament was dissolved in March 2011, the Scottish Government announced the creation of a review of the costs and funding of litigation in Scotland which would be led by Sheriff Principal James Taylor (who was on the Project Board for the Scottish Civil Courts Review). As part of the review’s terms of reference, it would consider issues “in relation to the affordability of litigation; the recoverability and assessment of expenses; and different models of funding litigation (including contingency, speculative and

conditional fees [emphasis added], before and after the event insurance, referral fees and claims management)

5. Clerks have recently been in touch with the Secretary to the Taylor Review who confirmed that no win - no fee arrangements are being considered by the review group and that a formal consultation will be published before the end of the year with a report expected in late 2012.

For Decision

6. In terms of Standing Orders, where the PPC has referred a petition to another committee, that committee may take such action as it considers appropriate.2

7. Other than taking no action and closing the petition, the following options are open to the Committee:

   (a) to write to Sheriff Principal Taylor’s review group on expenses and funding of civil litigation in Scotland to inform it of the petitioner’s concerns and close the petition; or

   (b) take any other action the Committee thinks is appropriate (eg write to or take evidence from any appropriate person).

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2 The Scottish Parliament, Standing Orders, Rule 15.6.2(a)
Annexe A – Petition from Petitioner

Petition PE1063

1. Name of petitioner
Robert Thomson

2. Petition text
Calling for the Scottish Parliament to investigate the apparent conflict of interest which exists between solicitors/advocates and clients in the present system of speculative fee arrangements (no win - no fee) and to urge the Scottish Executive to overhaul the existing speculative fee arrangement framework and procedures in order to make solicitors/advocates more accountable to their clients.

3. Petition background information
Solicitors, being commercial entities, will, after initial investigations, only take cases they deem to have high success rates. When Legal Aid was available, solicitors sometimes tended to steer clients away from this facility, inferring that the procedures involved may not be beneficial to clients. It is, however, strongly suspected solicitors don’t want interference of the Legal Aid Board.

Solicitors can only take these cases to a certain level, then they employ the services of an advocate. Presently, solicitors have no control over advocates and can’t be held responsible to the client, for advocates actions or inactions.

One of the main conflicts arising from no win – no fee, is that the legal team will always take the easy option to secure a “win”. This SECURES THEIR FEES. There can be a significant difference between a “win” and the expectant results of the fee paying client. In my case, the large company, whose negligence caused my considerable injuries, were not sued, but my former employer, a small firm – the easy option – was. His contribution to my accident was minimal. It is common knowledge how easy it is to sue an employer.

Again, under the present system, it is not incumbent upon solicitors to explain in detail, at the initial stages, the full implications of raising such an action. Examples include, involvement of C.R.U. also estimating the possible value of the claim. Apparently, advocates also escape this vitally important element of quantifying a claim. Also, neither is it incumbent on solicitors to advise clients of potential pitfall in raising an action eg: The possibility of defender placing a TENDER, which prevents any further opportunity of negotiating a settlement out of court.

There is something radically wrong with a system which allows a legal team to refuse a client representation in court whilst still claiming their full fees, especially when such an incident takes place inside a court building, sheriff waiting to go to proof.
Complaints Procedure

1. Law Society of Scotland only have very restricted powers and can’t act if THEY consider solicitor acted within present framework, albeit on the fringes.
2. Advocates are supposed to be self regulating. Recent events vindicated my choice not to raise a complaint in this quarter.

One of the main components in assessing the value of a claim is the present earnings of the claimant. If this factor became widely known, I suspect there would be a public outcry for higher wages/salaries particularly from people on low incomes and employed in potentially dangerous jobs e.g. anyone working with any type of machinery or working in a rough environment. This situation would be particularly of interest to the middle aged, since age is also a prime contributory factor in evaluating a claim.

4. Action taken to resolve issues of concern before submitting the petition
During 2004, wrote to Ms. Jamieson explaining my request for change in system. Reply was to invite me to contribute to consultation document as debate on Scottish legal system was forthcoming – not encompassed.

Had chat with West Fife MSP – could not assist as I didn’t reside in her constituency. Interview with Sir Menzies Campbell – Advised me to contact relevant Justice Committee dealing with forthcoming debate.

Eventually found Mr David Davidson MSP. Was convenor of Justice 2 Committee dealing with legal debate – no joy here.

Interview with Mr Ian Smith MSP – asked him to intervene on my behalf. It was he who recommended I contact the Public Petitions Committee.
Annexe B

SPICe briefing for the Public Petitions Committee

Petition Number: PE1063

Main Petitioner: Robert Thomson

Subject: Calls on the Parliament to: (a) investigate a claimed conflict of interest existing between lawyers and clients as a result of speculative fee arrangements (‘no win no fee’); and (b) urge the Scottish Government to overhaul current arrangements for speculative fees in order to make lawyers more accountable to their clients

Background

Both solicitors and advocates may undertake work under speculative fee arrangements. Under such arrangements, lawyers only receive their fee if they are successful. If they are successful, they can receive a higher than normal fee. Speculative fee arrangements can only be used where the potential client is unable to obtain legal aid.

The petition raises a number of concerns, including a claim that lawyers operating under speculative fee arrangements may be tempted to take a course of action which is more likely to secure a small ‘win’ for their clients – thus securing their fee – rather than pressing for less certain but better outcomes for their clients.

As part of a discussion about solicitors’ fee, the Law Society of Scotland notes on its website that:

“Solicitors in Scotland may also act on a speculative basis – charging no fee unless the matter is successful. This is often referred to as acting on a ‘no win no fee’ basis. This is mainly relevant to court actions rather than other types of work, although it is also done regularly in house sales (no sale no fee).

If you raise a speculative action in court and you are unsuccessful you will usually be liable for your opponent's legal expenses, and your own solicitor's outlays, but not their fees. To protect against this risk you may take out insurance before commencing a ‘no win no fee’ case.”

Guidance on the Faculty of Advocates website (‘2002 Scheme for Accounting for and Recovery of Counsel’s Fees’) notes that:

“Counsel [ie advocates] may accept instructions on a speculative basis but are not bound to do so. A solicitor may only instruct Counsel to act on a speculative basis in any case where the solicitor is acting on such a basis.” (para 4(2))
On a section in its online advice guide dealing with the Scottish legal system, Citizens Advice Bureau states that:

“In some cases, for example, personal injury cases, you may be able to enter into a speculative fee agreement (no win, no fee) with the solicitor. This means that the amount you will pay will depend on whether you win or lose your case. If you lose your case, you will have to pay the costs of the other side and your own solicitor’s outlays. You will normally be asked to take out insurance to cover this situation. If you win your case, you will usually pay your solicitor’s fee plus a ‘success fee’ from the damages and expenses you receive from the other side. You cannot enter into a speculative fee agreement if you are receiving legal aid.

If you are considering entering into a speculative fee agreement, you must be clear about what the terms of the agreement will entail, and you should consult an experienced adviser, for example at a Citizens Advice Bureau. (…) The costs of the case will not be charged according to the result, unless you and the solicitor have previously agreed otherwise.

The solicitor should discuss how the costs are to be met and whether you are eligible for legal aid. If the solicitor does not do legal aid work, s/he should still explain the advantages of legal aid to you if you are eligible, and give you the opportunity of going to a solicitor who does do legal aid work.”

Research Reports
A number of recent reports include some consideration of speculative fee arrangements. They do not, however, focus on any potential for a conflict of interest.


“With conditional or ‘no win no fee’ arrangements, the party’s lawyer receives an uplift on the fee otherwise payable if the party is successful. This means that the person pays more than they otherwise would in order to encourage the lawyer to take the risk of a case that they might lose, and for which they may get no payment. While solicitors and advocates have long been able to offer their services on the basis of such ‘speculative fees’, it is only since 1992 that they have been permitted to charge an uplift on their fee of up to 100%. Such arrangements are now widely offered in Scotland in personal injury cases. The available research shows, however, that solicitors will offer such fees only if the risks of losing are very low and the benefits of winning the case are sufficiently high to counteract the possible risks of having to pay all the costs if the action is lost.” (p 76)
It should be noted that the research referred to in the above quotation was published in 1998.

A Research Working Group on the Legal Services Market in Scotland was established in 2004 to draw together and analyse evidence relating to the legal services market in Scotland. Its report was published by the Scottish Executive in 2006. Annex A of the report (p 182) lists the membership of the Working Group. In relation to speculative fees, it stated that:

“It could be argued that a speculative basis for litigation involving either solicitors or advocates improved access to justice for clients who could not otherwise afford legal fees or would not be eligible for legal aid. The purpose of the enhancement was to compensate the solicitor or advocate for the risk of receiving no fee at all if the action failed. The Group was not aware of any evidence that these rules had a negative impact on competition in the legal services market and noted that no win – no fee arrangements were commonplace in relation to personal injury work.” (p 128)

Frazer McCallum
Senior Research Specialist
SPICe Research
24 September 2007

SPICe research specialists are not able to discuss the content of petitions briefings with petitioners or other members of the public. However if you have any comments on any petitions briefing you can email us at spice@scottish.parliament.uk.

Every effort is made to ensure that the information contained in petitions briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.
Justice Committee
13th Meeting, 2011 (Session 4), Tuesday 8 November
Petition PE1280
Note by the Clerk

Background

1. Petition PE1280 by Julie Love and Dr Kenneth Faulds calls on the Scottish Parliament to:

   “urge the Scottish Government to give the same level of protection to the families of people from Scotland who die abroad as is currently in place for people from England by amending the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad.”

2. The full text of PE1280 along with further information provided by the petitioners can be found at Annex A. A SPICe briefing on the petition was published on 10 September 2009 and can be found in Annexe B.

3. The petition was lodged in September 2009 and referred by the Public Petitions Committee (PPC) to the Justice Committee on 28 June 2011.

Consideration by the Public Petitions Committee

4. The petition was first considered by the PPC at its meeting on 2 October 2009. At that meeting, the Committee agreed to suspend further consideration of the petition until the report on the Review of Fatal Accident Inquiry Legislation by Lord Cullen had been published. In the subsequent report, Lord Cullen recommended that the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 should be amended:

   “There should be an extension to the [1976] Act to make provision for the Lord Advocate to have a power to apply for an FAI into the deaths of persons normally resident in Scotland where the body is repatriated to Scotland, excluding cases for which provision is to be made in the Coroners and Justice Bill [i.e. Scottish service personnel who die abroad]. The power of the procurator fiscal to investigate such deaths should be clarified, if necessary by legislation.”

5. In its subsequent letter to the PPC (see Annexe C), the Scottish Government said that while it would carefully consider all the recommendations in Lord Cullen’s report it had no intention of making changes to the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 during the current parliamentary session (Session 3). In light of this response, the PPC agreed to again suspend consideration until the Scottish

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Government had responded to Lord Cullen's recommendations in full. The PPC did however agree to write to the Scottish Government and the Foreign and Commonwealth Office seeking responses to specific points. These responses can be found at Annexes D and E. The petitioner Ms Love later provided her views on the responses from the Scottish Government and the Foreign and Commonwealth Office (see Annexe F).

6. In its March 2011 legacy paper the Session 3 PPC agreed to invite the Session 4 PPC to give further consideration to PE1280. In June 2011 the new PPC agreed to refer the petition to the Justice Committee.

Additional information
7. In March 2011 the Scottish Government responded to all of Lord Cullen's recommendations. In relation to deaths outwith Scotland where the body is repatriated to Scotland, the Scottish Government said:

“The Scottish Government agrees in principle with this recommendation. However, we believe there will need to be strict criteria about the circumstances in which an FAI would be carried out by Scottish authorities.

As Lord Cullen recognised (para 4.41), such discretion might be exercised rarely, and there are significant practical and resource implications.

There would need to be consideration of the potential limitations on access to local resources, witnesses, languages and authorities, as well as the potentially contaminating effects on evidence of any locally conducted prior investigations. For these reasons, it is generally likely to be better for the investigation into a death to be held by the authorities in the country where the death occurred. For example, in contrast to deaths occurring in Scotland, Scottish investigating authorities would be unable to compel the attendance of relevant witnesses or the production of crucial evidence, and a locally conducted post-mortem may render fruitless any further investigations. Indeed, in many, if not most, cases a supplementary Scottish investigation would be unlikely to discover more facts or matters of substance than were discovered by an initial, local investigation, and may even extend the period of a grieving family's frustration and distress.

Nevertheless, we accept that, in the rare case where the Lord Advocate is satisfied that an FAI might be of value, it should be possible for it to be held.”

8. The response to Lord Cullen's recommendations did not provide a timetable for when an extension to the 1976 Act might be made and the Scottish Government has made no further announcement on the issue.

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For Decision

9. In terms of Standing Orders, where the PPC has referred a petition to another committee, that committee may take such action as it considers appropriate.³

10. Other than taking no action and closing the petition, the following options are open to the Committee:

   (a) to keep the petition open and write to the Cabinet Secretary for Justice requesting further details of when the Scottish Government intends to introduce legislation to amend the 1976 Act; or

   (b) take any other action the Committee thinks is appropriate (eg write to or take evidence from any appropriate person).

³ The Scottish Parliament, Standing Orders, Rule 15.6.2(a)
Annexe A – Petition from Petitioners

Petition PE1280

1. Name of petitioners
Dr Kenneth Faulds and Julie Love

2. Petition title
Requirement for fatal accident inquiry

3. Petition text
Calling on the Scottish Parliament to urge the Scottish Government to give the same level of protection to the families of people from Scotland who die abroad as is currently in place for people from England by amending the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad.

4. Action taken to resolve issues of concern before submitting the petition
I first raised my concerns with my local elected representatives for Glasgow City Council and went on to raise them with both my MP and MSP. I have also put in writing to Crown Office and the Scottish Youth Parliament.

5. Petition background information
Section 1 of the Fatal Accidents and Sudden Deaths (Scotland) Act 1976 excludes the operation of the Act from deaths furth of Scotland. This contrasts with the situation in England, where section 8 of the Coroners Act 1988 provides that the coroner must hold an inquiry where the final resting place of a repatriated body is England.

This lacuna in the law has meant that the sudden or unexpected death abroad of an English civilian will automatically trigger a coroner's inquiry upon the return of the corpse. This is in addition to any inquiry that may have taken place in the country in which the person died. Where there has been a robust inquiry already, it is arguable that the English system leads to wasteful reduplication. However, where there has been no such inquiry, the coroner plays a vital role.

In contrast, due to the operation of the 1976 Act, the sudden death of a person from Scotland in very many developing countries will never be the subject of a judicial inquiry. This situation is potentially dangerous for Scottish people abroad. The Scottish Government has a duty of care to ensure that the deaths of people from Scotland do not go uninvestigated and that families receive justice. At present, Crown Office and Procurator Fiscal Service does not know how many people from Scotland have died abroad in recent years. This is disquieting. Accordingly, my submission is that the 1976 Act ought to be amended to oblige the procurator fiscal of an individual's district of domicile to investigate the circumstances of a sudden or unexpected death abroad and to apply to the sheriff to hold a fatal accident inquiry unless he/she is satisfied
that the matter has already been fully investigated by competent judicial authorities.

This issue came to my attention when a close friend of mine - Colin Love, 23, from Glasgow – drowned while he was on a cruise when it docked in Margarita Island in the province of Venezuela. His mother, Julie, and the rest of her family were dismayed to discover that there would be no judicial inquiry into the circumstances surrounding Colin’s death. Colin’s family feel that he deserves at least this much. Like many young people with a life ahead of him in Scotland, Colin was embracing a chance that had been offered to him to travel abroad. He was using his trip to reflect on where he wanted to go in life. This tragedy has taken Colin’s life and blighted those of his family. The Scottish legal system should have afforded them the right to a judicial inquiry and the prospect of closure that that would bring.

I researched the issue further and discovered that the UK Government, with the permission of the Scottish Parliament, has put into place legislation that would require the COPFS to hold a fatal accident inquiry into the deaths of service personnel abroad. This is an important step forward but it does not help people in the same situation as Colin’s family.

I feel that it is vital for the law to be changed to protect Scots abroad. I therefore think it is important that the committee recommend the change to the law called for in this petition.

www.youtube.com/watch?v=IkJD4SIQbJQ
www.youtube.com/watch?v=NPeOgzmZvVM&feature=related
www.youtube.com/watch?v=CQQtHBoPjqk&feature=related
www.eveningtimes.co.uk/news/display.var.2525115.0.php
www.eveningtimes.co.uk/news/display.var.2527937.0.0.php

6. Do you wish your petition to be hosted on the Parliament’s website as an e-petition?
Yes

7. Closing date for e-petition
25 September 2009

8. Comments to stimulate on-line discussion
The families of Scottish people who die abroad deserve to know how and why they died. Should we not be afforded the same rights given to English families - an inquest into sudden or suspicious deaths abroad?
Annexe B

SPICe briefing for the Public Petitions Committee

Petition Number: PE1280

Main Petitioner: Kenneth Faulds

Subject: Calls on the Parliament to urge the Scottish Government to give the same level of protection to the families of people from Scotland who die abroad as is currently in place for people from England by amending the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad.

Background

There are important differences in the jurisdictions of the English coroner and the Scottish procurator fiscal in relation to which deaths they can or must investigate. The powers of the Scottish procurator fiscal to carry out inquiries into fatal accidents and sudden deaths (generally referred to as fatal accident inquiries or ‘FAIs’) are set out in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. The terms of section 1 of the 1976 Act mean that an FAI can only be held where the death occurred in Scotland. Section 9 of the 1976 Act does extend the power to carry out an FAI to a small degree – effectively providing that deaths occurring on North Sea oil rigs can be treated as if they occurred in Scotland.

The powers of coroners in England and Wales have developed in a different way and are set out in separate legislation. One significant difference is that their power to carry out an inquest is not restricted to deaths occurring in England and Wales. In fact, where the body of a person who died overseas is returned to England or Wales a coroner may in certain circumstances be legally required to investigate the death. The petitioner notes that it might be argued that this system can lead to wasteful duplication of effort – where a suitable inquiry has already taken place in the country of death. However, he points out that there may be cases where important issues were not investigated locally.

Arguments for allowing a Scottish procurator fiscal to instruct an FAI into a death occurring overseas have been considered in relation to the deaths of Scottish military personnel on active service. It may be noted that this is a situation where it might be anticipated that the ability of local authorities to carry out an inquiry will be limited. Provisions enabling FAIs to be held into such deaths, subject to the Lord Advocate’s discretion, are in the legislative pipeline, having been introduced in the Coroners and Justice Bill (UK legislation). The bill is, at the time of writing, being scrutinised by the House of Lords. Progress of the bill may be tracked on the UK Parliament website.

The provisions in the Coroners and Justice Bill would not allow the carrying out of FAIs in relation to the wider range of cases highlighted in the petition.
(eg in relation to the deaths of people from Scotland whilst holidaying abroad). However, the extension of the Scottish FAI regime to enable the investigation of deaths occurring abroad more generally is one of the matters under active consideration by Lord Cullen (at the invitation of the Scottish Government) as part of a Review of Fatal Accident Inquiry Legislation. A consultation paper (November 2008) produced for the review noted that:

"It is considered that it would be within the remit of this Review to make a recommendation that the Act should be extended to provide for FAIs into deaths of all Scots (ie including Scottish service personnel) abroad where the bodies are repatriated, on the basis that this would be covered by the retained functions of the Lord Advocate in regard to the investigations of deaths. For this purpose it would, of course, be necessary to have a workable definition of ‘Scots’, such as persons normally resident in Scotland.

However, such an extension of the Act could be problematic, because of its practical and resource implications, especially if FAIs into such deaths were to be mandatory. An added complication may be that it is not possible to compel witnesses from outside the UK to attend to give evidence.” (paras 2.16 – 2.17)

Government officials have advised that the Scottish Government currently has no plans for any further extension of the FAI regime to deaths occurring outwith Scotland (ie beyond that provided for in the Coroners and Justice Bill), but will consider the matter in the light of Lord Cullen’s recommendations. The Government expects to receive these recommendations before the end of this year.

Frazer McCallum
Senior Research Specialist
SPICe Research
10 September 2009

SPICe research specialists are not able to discuss the content of petitions briefings with petitioners or other members of the public. However if you have any comments on any petitions briefing you can email us at spice@scottish.parliament.uk.

Every effort is made to ensure that the information contained in petitions briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.
Annexe C

Letter from the Scottish Government to the Public Petitions Committee

Thank you for your letter dated 7 October 2009 in which you asked various detailed questions in connection to PE 1280, concerning the Government’s response to the review of fatal accident inquiry legislation conducted by Lord Cullen of Whitekirk.

At paragraph 4.43 of his report Lord Cullen recommends that there should be an extension to the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to make provision for the Lord Advocate to have a power to apply for a fatal accident inquiry into the deaths of persons normally resident in Scotland where the body is repatriated to Scotland. Lord Cullen makes it clear in his report that he envisages the need for such inquiries to be infrequent, and for the discretion to be exercised only where the relevant authorities of the country in which a death has occurred have failed to investigate a death adequately or appropriately.

This and the many other recommendations of Lord Cullen’s report will require the Government’s full and careful consideration. Lord Cullen published his report and recommendations only on 3 November 2009 and until such time as full consideration has been made possible, I am unable to answer your questions on the timetabling of a response or whether or not the Government will adopt this particular recommendation. I can however inform the Committee that at the time of writing the Government has no intention to introduce further changes to the current legislation in this Parliamentary session.

On the hypothetical question of preparing guidelines for circumstances in which overseas FAIs could be held, it is of course quite easy to envisage that such guidelines could be established, but also that they would not easily be established. Further, and more importantly, in the circumstances of a discretionary inquiry, the discretion in question is the Lord Advocate’s (in respect of retained functions within the meaning of Section 52(5) of the Scotland Act 1998), and not the Scottish Ministers’.

Section 48(5) of the Scotland Act 1998 requires the Lord Advocate to take such a decision independently of any other person and it would therefore be inappropriate for the other Scottish Ministers or their officials to prepare such guidelines.

Further questions on this subject should therefore be addressed to the Lord Advocate or the Crown Office and Procurator Fiscal Service. The question of whether a current system exist that liaises with and informs victims’ families at each stage following a death abroad is also best addressed to the Crown Office and Procurator Fiscal Service, for the same reasons.

Even if Lord Cullen’s recommendations were to be implemented, most cases of deaths occurring abroad would not be investigated by Scottish authorities.
Foreign affairs including relations with territories outside the United Kingdom are reserved under Schedule 5 of the 1998 Scotland Act and in those circumstances which are not being investigated by Scottish authorities, I understand that the appropriate authorities for liaison with the next of kin would be the Consular Services of the UK Foreign and Commonwealth Office (who are empowered to engage with foreign governments and local investigating authorities overseas).

Lachlan Stuart
Legal Systems Division
Constitution, Law and Courts
9 November 2009
Annexe D

Letter from the Scottish Government to the Public Petitions Committee

Thank you for your letter dated 11 February 2010 in which you sought responses to points raised in discussion by the Public Petitions Committee of Petition PE1280, concerning the Government’s response to the review of fatal accident inquiry legislation conducted by Lord Cullen of Whitekirk. You also asked specifically what the Government’s timetable was to respond to Lord Cullen’s report and how and when it would take forward the recommendations.

Many of Lord Cullen’s 36 recommendations have practical implications for the judicially-led Scottish Court Service (SCS) and the Crown Office and Procurator Fiscal Service (COPFS). All of the recommendations of Lord Cullen’s report will require careful consideration by the Government in conjunction with SCS and COPFS and the Government is liaising closely with these bodies in identifying how the recommendations should be implemented.

There is, however, no prospect of legislation being brought forward to implement Lord Cullen’s recommendations in time to be passed before the next Scottish election.

Petition PE 1280 advocates amending the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad.

Lord Cullen recommended, at paragraph 4.43 of his report, that there should be an extension to the 1976 Act to make provision for the Lord Advocate to have a power to apply for a fatal accident inquiry into the deaths of persons normally resident in Scotland where the body is repatriated to Scotland. Lord Cullen made it clear, however, in his report that he envisaged that the need for such inquiries would be infrequent, and for the discretion to be exercised only where the relevant authorities of the country in which a death has occurred have failed to investigate a death adequately or appropriately.

Ministers have yet to come to a view on this recommendation, but it remains to be seen how, in circumstances where the relevant authorities in a foreign country have failed to investigate a death adequately or appropriately, such an investigation may be effectively carried out in, or from, Scotland. COPFS and the court have no powers to require witnesses from the relevant country to attend an inquiry or to require the production of evidence such as documentation. Members of the Committee recognised during discussion that it would often be impossible to get the information that a fatal accident inquiry would want.

On the other hand, and as Lord Cullen clearly recognised, where a death has been adequately and appropriately investigated by the authorities in the country where the death took place, there seems no justification in holding a fatal accident inquiry in Scotland.
Even if Lord Cullen’s recommendation on deaths abroad were to be implemented, most cases of deaths occurring abroad would not be investigated by Scottish authorities. Foreign affairs including relations with territories outside the United Kingdom are reserved under Schedule 5 of the 1998 Scotland Act and, in those circumstances which are not being investigated by Scottish authorities, I understand that the appropriate authorities for liaison with the next of kin would be the Consular Services of the UK Foreign and Commonwealth Office (who are empowered to engage with foreign governments and local investigating authorities overseas).

I hope this reply is helpful.

Hamish Goodall  
Scottish Government Justice Directorate  
Legal System Division  
1 September 2010
Annexe E

Letter from the Foreign and Commonwealth Office to the Public Petitions Committee

Your reference: Petition PE1280

Frank McAveety MSP
Convener of the Committee
Public Petitions Committee
TG 01, The Scottish Parliament
Edinburgh
EH99 1SP

27/3/10

Thank you for your letter of 11 February regarding the petition by Dr Kenneth Faulds and Julie Love calling on the Scottish Parliament to urge the Scottish Executive to give the same level of protection to the families of people from Scotland who die abroad, as is currently in place for people from England. And to do so by amending the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to require the holding of a fatal accident inquiry when a person from Scotland dies abroad. You asked for information that might be of interest to you in relation to the role of consular services.

The role of local consular services does not differ when a person who dies abroad is from Scotland. We treat all British nationals the same. When we are aware of the death of any British national abroad we will try to contact their next of kin as soon as possible. If the next of kin is in the UK we will ask the UK police to inform them. If they are overseas, our staff will try to contact them. We can provide information about funeral options and on returning bodies and belongings to the UK. We can provide a list of local and international funeral directors. While we cannot pay expenses, we can help transfer money from the UK to pay any necessary costs. We can advise families how to register a death and put them in touch with other organisations that offer help and support.

We can also provide our publication ‘Guide for bereaved families’ [http://www.fco.gov.uk/resources/en/pdf/2855621/bereaved-families] which brings together information that may be useful to families and friends of British nationals who die overseas. In this guide, there is specific reference (page 6) to different procedures in Scotland, Northern Ireland, the Channel Islands and the Isle of Man in the role of the coroner. There is also reference (page 10) to authority needed for cremations in Scotland of a British National who dies abroad.

In the FCO publication ‘Support for British nationals abroad’, page 21, [http://www.fco.gov.uk/resources/en/pdf/2855621/english-summary], there is a specific reference to inquests in England and Wales. Since 1983, following an Appeal Court decision in the case of Helen Smith, coroners have been required to hold an inquest when they are informed that a body of a person who died overseas is lying in their district and the circumstances of the death are such that an inquest would have been held if the death had occurred in England and Wales. This is essentially where there is violent or unnatural death overseas.

Different procedures for investigating deaths apply in each part of the UK.

I trust you find this information helpful.

CHRIS BRYANT
Annexe F

Letter from the Petitioner to the Public Petitions Committee

Further to written submission returned by the Foreign and Commonwealth Office dated 29 March 2010, I submit my response as follows:

The information provided by the Foreign and Commonwealth Office to the Petitions Committee is basic information which can be easily accessed on the FCO website.

The content of paragraph 2 of the response details what the Foreign and Commonwealth Office "will do", what they "can do" and what they "can also do". I believe the actions they refer to should be automatic and is what most British nationals assume they do as a matter of course.

At such difficult times I believe the Guide for Bereaved Families SHOULD be sent as an automatic process without the need for a formal request. Grieving families are not made aware of this document's existence yet this would save them a lot of heartache and ultimately allow them more choice in dealing with such difficult decisions.

Paragraph 3 relates to the Guide for Bereaved Families. The introduction page of this guide states “You will be assigned a Caseworker with knowledge of the country in which your friend or relative died." I was never allocated a caseworker and neither did many of the other Scottish families I have been in touch with.

I would request that the Petitions Committee continue with this petition and that some of the issues raised above are again put to the FCO. There has been a change of government at Westminster and they may be minded to provide a more thoughtful response.

Further to written submission returned by the Scottish Government dated 1 September 2010, I submit my response as follows:

Whilst Lord Cullen's report is still being considered by departments within the Scottish Government, I request that Petition PE1280 remain open until the Scottish Government has concluded its deliberations. I understand that no final decisions have been reached and there is currently no prospect of changes to the existing legislation governing fatal accident inquiries being implemented before the next Scottish Parliamentary Election.

Lord Cullen recommended, at paragraph 4.43 of his report, that there should be an extension to the 1976 Act to make provision for the Lord Advocate to have the powers to apply for FAIs into the deaths of persons normally resident in Scotland, where the body is repatriated to Scotland. Currently, the sudden death of a Scottish citizen in many countries will NEVER be the subject of a judicial inquiry. Neither the Scottish nor UK Governments are able to provide statistics on how many Scots have died abroad in previous years.
I appreciate that foreign affairs, including relations with territories outwith the UK, are reserved under Section 5 of the Scotland Act 1988. I would, however, suggest that obligations under the Human Rights Convention may then be applicable. As a mother, I feel it is my right to ask for an explanation as to how my son died and why there was no Government intervention.

I welcome the publishing of the Certification of Death (Scotland) Bill, which is currently under parliamentary scrutiny. Had the provisions contain within the Bill been in place in January 2009 it may have allowed me to request public funding for a post mortem examination on the repatriation of my son.

The response from the Scottish Government indicated that the appropriate authorities for liaison with the next of kin would be the Consular Services of the UK Foreign and Commonwealth Office. The principle reason for bringing PE1280 to the Scottish Parliament was to highlight that the communication with this FCO was unacceptable and that processes must indeed be changed. In the past months, since the petition was raised and through Scottish Government intervention (presumably), the FCO have changed their website on Venezuela and now include a general section, as follows:

Visitors should be aware that the waters of the Caribbean can be deceptive. There are strong currents and undertows in some areas that can make swimming hazardous. lifeguards and warnings are not always in place. Caution is necessary.

I believe this is a positive step. However, I am disappointed that the FCO did not inform either the Clerk to the Petitions Committee or the Scottish Government that these changes had been made.

I request that the Committee consider the above and move for the petition to remain open until Lord Cullen's report is considered and all recommendations concluded. I ask that this petition forms part of the Petitions Committee legacy paper for 2011 in order to allow a future committee to request a progress update on these matters from the next Scottish Government.

Julie M Love
11 October 2010
Justice Committee

13th Meeting, 2011 (Session 4), Tuesday 8 November

Petition PE1370

Note by the Clerk

Background

1. Petition PE1370 by Dr Jim Swire, Professor Robert Black QC, Mr Robert Forrester, Father Patrick Keegans and Mr Iain McKie on behalf of 'Justice for Megrahi' calls on the Scottish Parliament to:

   “urge the Scottish Government to open an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohamed al-Megrahi for the bombing of Pan Am flight 103 in December 1988.”

2. The full text of PE1370, along with further information provided by the petitioners, can be found at Annex A. A SPICe briefing on the petition was published on 22 October 2010 and can be found in Annexe B.

3. The petition was lodged in November 2010 and referred by the Public Petitions Committee (PPC) to the Justice Committee on 28 June 2011.

Consideration by the Public Petitions Committee (PPC)

4. The petition was first considered by the PPC at its meeting on 9 November 20101. At that meeting, the Committee took evidence from the petitioners and agreed to write to the Scottish Government to ask:

   - Will you open an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohamed al-Megrahi for the bombing of Pan Am flight 103 in December 1988 as called for by the petitioner and for the reasons given in the petition?

   - If not, will you provide a detailed explanation why not, specifying whether there is any legislation which would prevent you from holding such an inquiry, what this legislation is and how it prevents?

   - Who would have the power to undertake an inquiry in the terms proposed in the petition?

5. The Scottish Government's response can be found in Annexe C. A letter from the petitioners to the PPC responding to the points raised by the Scottish Government can be found in Annexe D.

6. At a subsequent PPC meeting on 25 January 20112, the Committee considered the Scottish Government’s response and agreed to write to:

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• the Scottish Government to ask whether it will review the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 in light of concerns that the High Court can reject a reference from the Scottish Criminal Cases Review Commission (SCCRC);

• the SCCRC to ask if it can open an abandoned appeal and what were its views on the change brought about by the 2010 Act; and

• the Crown Office and Procurator Fiscal Service on whether it has any powers to investigate or reconsider an abandoned appeal.

7. The text of each reply can be found in Annexe E while a letter from the petitioners responding to the points raised can be found in Annexe F.

8. In its March 2011 legacy paper the Session 3 PPC agreed to invite the Session 4 PPC to give further consideration to PE1370. In June 2011 the new PPC agreed to refer the petition to the Justice Committee.3

Additional information
9. In September 2011 the Scottish Government announced its legislative programme for 2011-12. One of the proposed bills, which is expected to be introduced before the end of the year, is the Criminal Cases (Punishment and Review) (Scotland) Bill:

“The Scottish Government will introduce legislation which will give statutory authority to the Scottish Criminal Cases Review Commission (“the Commission”) to decide whether it is appropriate to publish a Statement of Reasons in cases they have investigated where an appeal has subsequently been abandoned. Under the current law the Commission is prohibited from disclosing information it holds relating to cases other than in very limited and restricted circumstances.

The Bill will:

• Put in place an appropriate legislative framework to facilitate, as far as possible, the release of a statement of reasons by the Commission in circumstances where an appeal has been abandoned

• Require the Commission, in determining whether it is appropriate to publish information, to consult with those affected by, or who otherwise have an interest in, the information

• Maintain appropriate provision for such matters as international obligations attaching to information provided by foreign authorities


so that where information is obtained under international assistance arrangements from a foreign authority, the consent of that foreign authority is required before the Commission can publish their information.4

10. It is expected that the proposed Criminal Cases (Punishment and Review) (Scotland) Bill would be referred to the Justice Committee for Stage 1 scrutiny.

11. Justice for Megrahi has provided a written submission to the Justice Committee prior to its consideration of the petition. This submission has been published as a separate paper.

For Decision

12. In terms of Standing Orders, where the PPC has referred a petition to another committee, that committee may take such action as it considers appropriate.5

13. Other than taking no action and closing the petition, the following options are open to the Committee:

   (a) to keep the petition open pending the Committee’s scrutiny of the expected Criminal Cases (Punishment & Review) (Scotland) Bill but to take no action in the interim; or

   (b) take any other action the Committee thinks is appropriate (eg write to or take evidence from any appropriate person).

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5 The Scottish Parliament, Standing Orders, Rule 15.6.2(a)
Annexe A – Petition from Petitioners

Petition PE1370

1. Name of petitioners
Dr Jim Swire, Professor Robert Black QC, Mr Robert Forrester, Father Patrick Keegans and Mr Iain McKie on behalf of ‘Justice for Megrahi’

2. Petition title
Justice for Megrahi

3. Petition text

4. Action taken to resolve issues of concern before submitting the petition
In support of Justice for Megrahi’s (JFM’s) call for a full and open public inquiry, the group has lobbied the following bodies and individuals:

- the President of the General Assembly of the United Nations Organisation
- all missions with a seat at the General Assembly of the UN
- the African Union the League of Arab States
- the Non-Aligned Movement
- the President of Egypt
- the governments of Libya, Malta, Cuba, Nicaragua, Venezuela, United States of America and Scotland

With the exception of the Maltese and Scottish governments, none of the above has responded to our advances.

In September 2010, JFM made representations to the First Minister, Mr Alex Salmond MSP, in the hope that the Scottish Government would establish an inquiry into the affair under its auspices citing the following reasons:

- the event occurred over and on Scottish territory.
- the case was investigated by a Scottish police force.
- the trial was conducted under Scots Law.
- Mr Al-Megrahi was convicted under Scots Law.
- Mr Al-Megrahi was imprisoned in a Scottish gaol.
- the Scottish Criminal Cases Review Commission referred the second appeal to the Scottish Court of Appeal.
- Mr Al-Megrahi was given compassionate release by the Scottish Cabinet Secretary for Justice.
In declining JFM’s submission, a Scottish Government spokesman stated the following as justification for the decision not to endorse the campaign’s request that Edinburgh set up an inquiry into the Lockerbie case:

“The Scottish Government do not doubt the safety of the conviction of al-Megrahi. Nevertheless, there remain concerns to some on the wider issues of the Lockerbie atrocity. The questions to be asked and answered in any such inquiry would be beyond the jurisdiction of Scots Law and the remit of the Scottish Government, and such an inquiry would, therefore, need to be initiated by those with the required power and authority to deal with an issue, international in its nature.”

JFM continues to maintain that more than adequate evidence required to establish whether there was a miscarriage of justice at Kamp van Zeist falls well within the jurisdiction of Scotland. Amongst other things, JFM points to all documents and testimony pertaining to the investigation, the trial and the referral of Mr al-Megrahi’s conviction back to the Court of Appeal, on no fewer than six grounds, by the SCCRC. Moreover JFM asserts that in accordance with “current UK legislation as expressed by the Inquiries Act 2005 (c12), which indicates, in sections 1, 27 and 32, that the Scottish Government possesses more than adequate powers to open an inquiry into the Lockerbie case under its own auspices.” (see: www.legislation.gov.uk/ukpga/2005/12/contents)

For the above reasons, JFM now wishes to petition the Scottish Parliament to urge the Scottish Government to support its call for an inquiry and through an e-petition to allow the general public at home and abroad to become signatories to that petition.

5. Petition background information

We invite the Scottish Parliament to request the Scottish Government to open an independent inquiry into all those matters pertaining to the downing of Pan Am flight 103 at Lockerbie on 21 December 1988 as lie within the jurisdiction of Scotland, and those pertaining to the Scottish criminal conviction of Abdelbaset Ali Mohamed al-Megrahi at Kamp van Zeist in January 2001 for the following reasons:

- the event occurred over and on Scottish territory.
- the case was investigated by a Scottish police force.
- the trial was conducted under Scots Law.
- the Zeist trial site itself was designated ‘Scottish territory’ throughout the trial and first appeal, patrolled and protected by armed Scottish police.
- Mr Al-Megrahi was convicted under Scots Law.
- Mr Al-Megrahi was imprisoned in a Scottish gaol.
- the Scottish Criminal Cases Review Commission referred the case to the Scottish Criminal Appeal Court on the basis that, on six grounds, the conviction may have been a miscarriage of justice and there is widespread public concern about the safety of the conviction.
• Mr Al-Megrahi was given compassionate release by the Scottish Cabinet Secretary for Justice.

Such an inquiry should be open, transparent, comprehensive, conducted under the auspices of the Scottish Government and take cognisance of the powers invested in the government under current UK legislation as expressed by the Inquiries Act 2005 and, furthermore, ought to cover:

• the Fatal Accident Inquiry into the downing of Pan Am 103
• the police investigation of the tragedy
• the subsequent Kamp van Zeist trial
• the acquittal of Mr Fhimah and conviction of Mr Al-Megrahi
• the Scottish Criminal Cases Review Commission’s (SCCRC) referral of Mr Al-Megrahi’s case to the Court of Appeal
• the dropping of this second appeal and the compassionate release of Mr Al-Megrahi.

We contend that the Scottish criminal justice system has suffered a severe blow to its reputation because of a number of factors resultant from what has come to be known generally as the ‘Lockerbie case’. Given that Mr al-Megrahi’s second appeal has been dropped, it appears unlikely that the concerns voiced by the SCCRC when referring Mr al-Megrahi’s conviction back to the Court of Appeal will now be heard in a court of law. It is, therefore, imperative that an inquiry be established in order to restore public confidence in the Scottish criminal justice system both at home and abroad. Whilst we accept the Scottish Government’s position that some of the international facets to the case are problematic, in that they may not fall under Scottish jurisdiction, we entirely reject this as being reason to refuse to open an inquiry. If sufficient evidence was available under Scottish jurisdiction for the SCCRC to conclude that there may have been a miscarriage of justice, it follows that the same sources would be available to an inquiry to arrive at the same conclusion. It is the duty of the Scottish Government to try its utmost to establish the truth of this highly contentious issue.

The petitioner and the JFM committee believe that the Scottish Government did not take all the facts into account when refusing their request to open an independent inquiry into all matters surrounding the Lockerbie tragedy. It is petitioning the Scottish Parliament to support the contention that even although that inquiry might not receive the co-operation of the UK and other governments, and therefore might be limited in scope, the government of Scotland has a duty to the people of Scotland and its justice system to do everything in its power to uncover the truth behind this unspeakable crime which has so damaged the reputation of the Scottish criminal justice system at home and abroad. JFM feels that it is vitally important that the people of Scotland and beyond are given the opportunity, by becoming signatories to this petition, to demonstrate to the Scottish Government that establishing the truth about Lockerbie is essential to re-establishing confidence in Scotland’s institutions of justice.
Justice for Megrahi

Justice for Megrahi (JFM) is a single issue justice campaign group comprising the committee and the signatories. It maintains that on the basis of the evidence laid by the Crown before the three judges of the High Court of Justiciary at Kamp van Zeist (Netherlands), the 2001 conviction of Abdelbaset Ali Mohamed al-Megrahi for the 1988 bombing of Pan Am flight 103 over Lockerbie (Scotland) was a miscarriage of justice. Although the central plank of JFM’s position is concerned with the contention that no reasonable court could have convicted on the basis of the evidence as presented to the court, it also acknowledges other factors beyond this relating to, amongst other things, the fact that whilst the Crown was aware of evidence of value to the defence case before the trial, this evidence did not become public knowledge until after the verdict had been passed. JFM exists to address issues surrounding the investigation of the destruction of the aircraft and the subsequent trial of Mr al-Megrahi and Mr Al Amin Khalifa Fhimah. Its main objective is to campaign to have Mr al-Megrahi’s conviction quashed.

History

Justice for Megrahi was founded in November 2008 following the judicial hearing which set out the arrangements for Mr al-Megrahi’s second appeal. The appeal had been referred back to the Court of Appeal on a total of six grounds (largely concerned with the quality of evidence provided by the Crown’s star witness at Kamp van Zeist, Maltese shopkeeper Mr Tony Gauci) by Scotland’s expert and independent legal authority, which has responsibility for referring cases to the Court of Appeal: the Scottish Criminal Cases Review Commission (SCCRC). The initial aim of JFM was to campaign, by means of a public petition to be submitted to Scottish Government ministers, for the compassionate release of Mr al-Megrahi in light of his terminal medical condition. In September 2009, following the prisoner’s release, JFM began its campaign to have the 2001 verdict overturned via a comprehensive independent inquiry, or other judicial means, into the Lockerbie case. JFM contends that the reputation of Scotland’s justice system has suffered a severe blow because of the Zeist verdict and that only through testing the validity of the verdict can this reputation be redeemed.

Structure

Justice for Megrahi comprises the committee, made up of its founding members, and the signatories who endorse the JFM campaign.

The current (August 2010) committee members:
Professor Robert Black QC
Mr Robert Forrester
Father Pat Keegans
Mr Iain McKie
Doctor Jim Swire

The current (August 2010) signatories:
Ms Kate Adie (Former Chief News Correspondent for BBC News)
Mr John Ashton (Co-author of: ‘Cover Up of Convenience’)
Mr David Benson (Actor/author of the play ‘Lockerbie: Unfinished Business’)
Mrs Jean Berkley (Mother of Alistair Berkley: victim of Pan Am 103)
Mr Peter Biddulph (Lockerbie tragedy researcher)
Professor Robert Black QC (‘Architect’ of the Kamp van Zeist Trial)
Professor Noam Chomsky (Human rights, social and political commentator)
Mr Ian Ferguson (Co-author of ‘Cover Up of Convenience’)
Mr Robert Forrester (Justice for Megrahi Committee)
Ms Christine Grahame MSP (Member of the Scottish Parliament)
Mr Ian Hislop (Editor of ‘Private Eye’)
Fr Pat Keegans (Lockerbie parish priest on 21st December 1988)
Ms A L Kennedy (Author)
Mr Adam Larson (Editor and proprietor of ‘The Lockerbie Divide’)
Mr Iain McKie (Retired police superintendent)
Ms Heather Mills (Reporter for ‘Private Eye’)
Rev’d John F Mosey (Father of Helga Mosey: victim of Pan Am 103)
Mr Charles Norrie (Brother of Tony Norrie: victim of UT 772)
Mr Denis Phipps (Aviation security expert)
Mr Steven Raeburn (Editor of ‘The Firm’)
Mr James Robertson (Author)
Dr Jim Swire (Father of Flora Swire: victim of Pan Am 103)
Sir Teddy Taylor (UK MP: 1964-2005. Shadow Secretary of State for Scotland)
Archbishop Desmond Tutu (Nobel Peace Prize Winner).

6. Do you wish your petition to be hosted on the Parliament’s website as an e-petition?
Yes

7. Closing date for e-petition
28 October 2010

8. Comments to stimulate on-line discussion
It is imperative that the Scottish Government open an inquiry under its own auspices to deal with the corrosive and deeply damaging effects ‘The Lockerbie Case’ has had upon the Scottish criminal justice system. It is abundantly clear that if the SCCRC found there to be a sufficiency of evidence falling under Scottish jurisdiction from which they could conclude that Mr al-Megrahi may have been the victim of a miscarriage of justice, these same grounds for appeal ought now to be placed, along with any other pertinent material which falls under Scottish jurisdiction, before an inquiry. Only in such a manner can Scotland demonstrate that it is making a sincere attempt to resolve this highly contentious issue.
Annexe B

**SPICe briefing for the Public Petitions Committee**

**Petition Number:** PE1370

**Main Petitioner:** Dr Jim Swire

**Subject:** Justice for Megrahi


It would not be possible in this short briefing to provide an in-depth analysis of the evidential and other considerations undertaken at Mr Al-Megrahi’s original trial at Kamp van Zeist in 2001. The briefing does provide relevant background information and includes details of the Scottish Government’s timeline of events leading up to Mr Al-Megrahi’s release from prison on compassionate grounds.

**Background**

Pan Am Flight 103 was blown up over the town of Lockerbie on its journey from London to New York on 21 December 1988. All 259 passengers and crew as well as 11 residents on the ground in Lockerbie were killed. In 1991, following a joint investigation between the Scottish police and US authorities, the UK and United States accused Abdelbaset Ali Mohmed Al-Megrahi and Al Amin Khalifa Fhima, both Libyan nationals, of involvement. In 1999, following protracted negotiations and the imposition of sanctions, Libya agreed to hand over both suspects to the Scottish courts. In order to facilitate the trial, a specially convened Scottish court was set up at Kamp van Zeist in the Netherlands. The trial, which commenced in May 2000 at the Scottish High Court of Justiciary at Kamp van Zeist, was presided over by Lords Sutherland, Coulsfield and MacLean.

The **Opinion of the Court** following the trial stated:

> It is not disputed, and was amply proved, that the cause of the disaster was indeed the explosion of a device within the aircraft. Nor is it disputed that the person or persons who were responsible for the deliberate introduction of the explosive device would be guilty of the crime of murder. The matter at issue in this trial therefore is whether or not the Crown have proved beyond reasonable doubt that one or other or both of the accused was responsible, actor or art and part 1, for the deliberate introduction of the device.

In January 2001, Mr Fhima was acquitted and Mr Al-Megrahi was found guilty of murder. The verdicts returned were by a unanimous decision of the three judges of the court. Mr Al-Megrahi immediately appealed his conviction. The
appeal hearing against conviction began at Kamp van Zeist on 23 January 2002 before a Bench of five judges chaired by the Lord Justice General for Scotland (The Right Honourable Lord Cullen), the other Judges being Lord Kirkwood, Lord Osborne, Lord Macfadyen and Lord Nimmo-Smith. Following the appeal hearing, Mr Al-Megrahi’s appeal against conviction was refused. (The Opinion of the Appeal Court is available here). Mr Megrahi was sentenced to life imprisonment with a punishment part of 27 years. This required that Mr Al-Megrahi must serve at least 27 years in custody before he would be eligible for early release.

At the request of Mr Al-Megrahi, the Scottish Criminal Cases Review Commission (“the Commission”) undertook to review his case. The review began in 2003. In June 2007, the Commission referred the case back to the High Court on the basis that there may have been a miscarriage of justice. On 28 June 2007, the Commission published an extended news release which sets out, amongst other things, the grounds of referral. The news release also provides a brief summary of the evidence on which Mr Megrahi’s original conviction was based. During its investigation of the case, the Commission had access to a wide range of materials including the following:

- the transcript of the evidence and submissions at trial;
- the Crown and defence productions at trial;
- all witness statements obtained by the police during its investigation including an electronic database of over 15,000 such statements;
- copies of all witness statements obtained by the Crown in preparation for the trial;
- the correspondence files prepared by the firm of solicitors which acted for the applicant at trial and in his appeal against conviction, and copies of all witness statements obtained by them from witnesses based in the United Kingdom;
- an electronic database consisting of all information held on the case by the firm of solicitors which acted for co-accused at trial.

The Commission’s news release points out that a reference is simply an indication to the court that a miscarriage of justice may have occurred and that it is in the interests of justice for the court to consider the case. Once a decision is made by the Commission to refer a case its role in the matter is at an end and it is the responsibility of the applicant or his legal representatives to decide upon and formulate the grounds of appeal and thereafter to present the appeal. The subsequent appeal commenced in 2009. Although the Commission had referred the case back to the High Court on six grounds, Mr 1 “Art and part” is a term used in Scots law to denote the aiding or abetting in the perpetration of a crime, or being an accessory before or at the perpetration of a crime.

Al-Megrahi successfully argued that all grounds of appeal should be heard, which amounted to over 48 grounds. Grounds 1 and 2 (Unreasonable Verdict and Insufficient Evidence) were heard in April and May 2009. No Opinion of the Court has been issued on these grounds. The next grounds were scheduled to be heard in November 2009.
In May 2009, the Scottish Government received an application from the Libyan Government requesting the transfer of Mr Al-Megrahi under the terms of the Prisoner Transfer Agreement (PTA) which was previously negotiated between the UK and Libyan Governments. A PTA, of which the UK has over 100, is an agreement with another country or nation to allow repatriation of prisoners to serve the remainder of their sentence in their home country.

When the prospect of a Prisoner Transfer Agreement was first raised, the Scottish Government expressed concern and requested to the UK Government that there be an exclusion in the agreement preventing anyone convicted of involvement in the Lockerbie Air Disaster from being considered for transfer. This exclusion was not included in the Prisoner Transfer Agreement, which was ratified by the UK Government in April 2009. Under provisions contained in the Repatriation of Prisoners Act 1984, it is for the Scottish Ministers to decide upon any application for prisoners in Scottish prisons - in practice it is the decision of the Cabinet Secretary for Justice.

In July 2009, the Scottish Government then received an application from Mr Al-Megrahi requesting compassionate release. Section 3 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 gives the Scottish Ministers the power to release prisoners on licence on compassionate grounds. Section 3 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) gives the Scottish Ministers the power to release prisoners on licence on compassionate grounds. This process is akin to the system of medical parole that exists in many other jurisdictions.

The 1993 Act requires that Ministers are satisfied that there are compassionate grounds justifying the release of a person serving a sentence of imprisonment. Although the Act does not specify what the grounds for compassionate release are, generally it encompasses:

- those suffering from a terminal illness and death is likely to occur soon. There are no fixed time limits but life expectancy of less than three months may be considered an appropriate period;
- where the prisoner is severely incapacitated; or
- where continued imprisonment would, in light of the conditions in which the prisoner is being held, endanger or shorten his or her life expectancy.

On 14 August 2009, Mr Al-Megrahi”s legal team announced that they had lodged a minute with the High Court seeking permission of the court to abandon both his appeal against conviction and his appeal against sentence.

On 18 August 2009, the court granted leave to Mr Al-Megrahi to abandon his appeal. On 20 August 2009, the Cabinet Secretary for Justice announced his decision to (a) reject the Libyan Government”s application for prisoner transfer; and (b) to release Mr Al-Megrahi on compassionate grounds.

On 24 August 2009 during a debate on the decision to release Mr Al-Megrahi, the Cabinet Secretary for Justice stated:
There remain concerns to some about the wider issues of the Lockerbie atrocity. This is a global issue, and international in its nature. The questions to be asked and answered are beyond the jurisdiction of Scots law and the restricted remit of the Scottish Government. If a further inquiry were felt to be appropriate, it should be initiated by those who have the required power and authority. The Scottish Government would be happy to co-operate fully in such an inquiry.

The Scottish Government website contains a dedicated page on the decision to release Mr Al-Megrahi: Lockerbie – Information relating to decision on Mr Abdelbaset Ali Mohmed Al-Megrahi.

Graham Ross
Senior Researcher
22 October 2010

SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However if you have any comments on any petition briefing you can email us at spice@scottish.parliament.uk

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.
Annexe C

Letter from the Scottish Government to the Public Petitions Committee

Thank you for your letter of 12 November 2010 which asks the Government the following three questions in respect of this petition. I apologise for the delay in replying.

1. Will you open an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohamed al-Megrahi for the bombing of Pan Am flight 103 in December 1988 as called for by the petitioner and for the reasons given in the petition?
2. If not, will you provide a detailed explanation why not, specifying whether there is any legislation which would prevent you from holding such an inquiry, what this legislation is and how it prevents?
3. Who would have the power to undertake an inquiry in the terms proposed in the petition?

The Government’s response to these questions is as follows:

1. The Cabinet Secretary for Justice made clear in his response of 16 September to a Parliamentary Question (S3W-35844) from George Foulkes on this issue that the Government have no plans to initiate an inquiry on this issue.

2. The Government does not doubt the safety of the conviction of Mr Al-Megrahi. He was tried and convicted by a Scottish court before three judges and his appeal against conviction, heard by a panel of five judges, was unsuccessful. A second appeal, following a referral from the Scottish Criminal Cases Review Commission, was abandoned by Mr Al-Megrahi. The conduct of his defence during his trial and the appeals, including his decision not to give evidence at trial and the decision to abandon the second appeal, was entirely a matter for Mr Al-Megrahi and his legal advisors.

The Government’s view is that the petition is inviting the Scottish Government to do something which falls properly to the criminal justice system i.e. inquire into whether a miscarriage of justice has taken place. The criminal justice system already provides a mechanism for that to happen. The fact that Mr Al-Megrahi chose to abandon his second appeal rather than pursue it is entirely a matter for him and it would not be appropriate for the Scottish Government to institute an inquiry as a result.

3. The Inquiries Act 2005 provides that, to the extent that the matters dealt with are devolved, and criminal justice is devolved, the Scottish Government would have the power to conduct an inquiry. However, the wide ranging and international nature of the issues involved (even if the inquiry is confined to the trial and does not concern itself with wider matters) means that there is every likelihood of issues arising which are not devolved, which would require either a joint inquiry with or a separate inquiry by the UK government.
Separately, the Scottish Government intends to bring forward legislation to allow the SCCRC to publish a statement of reasons in cases such as Mr Al-Megrahi's where an appeal is abandoned, subject of course to legal restrictions applying to the SCCRC such as data protection, the convention rights of individuals and international obligations attaching to information provided by foreign authorities.

Karen Rodger
Committee Liaison Officer
7 January 2011
Annexe D

Letter from Justice for Megrahi to the Public Petitions Committee

Response to the Scottish Government’s letter of 7 January 2011

On 7 January 2011, the Petitions Committee Clerk requested an early response from the ‘Justice for Megrahi’ (JFM) Committee following receipt of Scottish Government answers to questions posed by the Petition’s Committee.

At Para 4 of our petition we outlined how, in September of 2010, JFM first asked the Scottish Government to establish an inquiry into the matters raised in the petition.

The Scottish Government declined to mount an inquiry citing the following reasons.

1. “The questions to be asked and answered in any such inquiry would be beyond the jurisdiction of Scots law and the remit of the Scottish Government, and such an inquiry would therefore need to be initiated by those with the required power and authority to deal with an issue international in its nature.”

2. “The Scottish Justice Secretary made it clear that under the powers devolved to Holyrood no worthwhile scrutiny could be ordered here because there would be no powers to compel witnesses.”

http://www.eveningtimes.co.uk/macaskilltellsworldwhyhefreedmegrahi1.982718

In its most recent response however the Scottish Government has changed its position.

“The Inquiries Act 2005 provides that, to the extent that the matters dealt with are devolved, and criminal justice is devolved, the Scottish Government would have the power to conduct an inquiry. However, the wide ranging and international nature of the issues involved (even if the inquiry is confined to the trial and does not concern itself with wider matters) means that there is every likelihood of issues arising which are not devolved, which would require either a joint inquiry with or a separate inquiry by the UK government.”

This is an admission that the initial response was wrong in a number of important ways.

- The Scottish Government does have the power to initiate an inquiry and, under the Inquiries Act 2005, has the power to compel witnesses.
• The Scottish Government was in error in stating, ‘The questions to be asked and answered in any such inquiry would be beyond the jurisdiction of Scots law and the remit of the Scottish Government.’

• The Scottish Government is being disingenuous in stating that, ‘there is every likelihood of issues arising which are not devolved, which would require either a joint inquiry with or a separate inquiry by the UK government.’ This only means that certain issues might not be able to be fully investigated but clearly many would. As with all inquiries some evidence cannot be adduced for various reasons. This does not invalidate having an inquiry. This "reason" is nothing more that a wafer-thin pretext for inaction. The Scottish Criminal Cases Review Commission (SCCRC) has no jurisdiction and powers outwith Scotland. Yet it managed to conduct an investigation into the Megrahi conviction that enabled it to reach the conclusion that, on six separate grounds, that conviction might have amounted to a miscarriage of justice. There is no conceivable reason why a Scottish inquiry under the Inquiries Act 2005 should have less success in obtaining and uncovering evidence.

It is difficult to understand these errors given the Crown Office and civil service assistance that was available to the Scottish Government. At best this points to grossly inaccurate research and at worst to a deliberate effort to muddy the waters.

In its response the Scottish Government also states: ‘The Government does not doubt the safety of the conviction of Mr AlMegrahi.’ This is a circular argument and is not salient because it is this conviction which JFM is requesting be reviewed by an inquiry. To use such an argument is the same as saying ‘the Scottish Government does not doubt the conviction because he was convicted.’ No reason other than apparent blind faith in the justice system appears to underpin this conclusion.

Moreover, the Scottish Government's failure to take seriously the concerns expressed by the Scottish Criminal Cases Review Commission over Megrahi's conviction is a gross insult to that body. The SCCRC was established as an independent, expert body precisely in order to investigate possible miscarriages of justice. The Scottish Government is treating its findings in the Megrahi case with utter contempt.

While the government might not doubt the conviction, many politicians and commentators within Scotland and elsewhere clearly do. As shown at Para 5 of our petition many influential individuals across the world support our application for an inquiry and obviously doubt that the conviction is safe.

The response to the e-petition on the Parliament website made it clear that many people want the Government to initiate an inquiry.

http://epetitions.scottish.parliament.uk/view_petition.asp?PetitionID=417

There is not enough space to outline the international media storm that has raged around all aspects of Lockerbie and Mr Megrahi’s release for over 20
years. That it continues today is further evidence that not everyone shares our government’s complacency.

In its response, the government cite this reason for not granting an inquiry:

‘A second appeal, following a referral from the Scottish Criminal Cases Review Commission, was abandoned by Mr Al-Megrahi. The conduct of his defence during his trial and the appeals, including his decision not to give evidence at trial and the decision to abandon the second appeal, was entirely a matter for Mr Al-Megrahi and his legal advisers.’

Precisely why the appeal was dropped still remains unclear but the fact that it was cannot be used as an argument to deny an inquiry. If anything it supports the need for an inquiry on the grounds that the SCCRC’s reasons for appeal have not been fully tested in law in the interests of justice.

Given the political and media furore from home and abroad that surrounded the release of Mr Megrahi it is far from clear if pressure was put on the accused and his defence team to drop the appeal. Allegations have been made of pressure being brought to bear on the Scottish Government to release him and the visit by Kenny MacAskill to Greenock prison before his release is still the subject of conjecture. How much pressure was placed on Mr Megrahi and his advisers to throw in the towel in return for repatriation is a question that has never been satisfactorily answered. At any inquiry, it is assumed that both the SCCRC and Mr Megrahi’s defence team would be able to give evidence under oath and help clarify these important matters.

Further, the Scottish Government response states:

‘The Government’s view is that the petition is inviting the Scottish Government to do something which falls properly to the criminal justice system i.e. inquire into whether a miscarriage of justice has taken place. The criminal justice system already provides a mechanism for that to happen.’

As the Scottish Government accepts however, the criminal justice system is doing nothing that meets the needs of the petitioners. There is in fact little that the system can do as things stand unless the Crown Office acts or some other way is found of resurrecting Mr Megrahi’s appeal.

Further, the Criminal Procedure (Legal Assistance Detention and Appeals) (Scotland) Act 2010, which was rushed through Parliament on 27 October 2010, will if anything make it more difficult to challenge contentious judicial decisions like the Megrahi conviction. No less a person than the first chair of the ‘Scottish Human Rights Commission’ Professor Alan Miller wrote to all MSPs outlining the organisation’s “significant concerns” about the use of this emergency procedure.

“The extension to the powers of the High Court will undermine access to court for victims of miscarriage of justice. It will have a chilling effect
on the important function of the SCCRC to effectively review and address SCCRC alleged miscarriages of justice.”


Effectively, we are faced with a legal system that is unable to act, a Crown Office system that refuses to act and a political system apparently rendered incapable of acting. Despite this, and in the face of international clamour for action, the Scottish Government decides to sit on its hands and claim it can do nothing. We have a Scottish Government with the power and resources to mount an inquiry that could provide at least some of the answers and it chooses to fall back on well worn excuses and effectively abrogates responsibility for ascertaining the truth about one of the biggest terrorist outrage ever committed anywhere in the world.

We believe that the issues under consideration are as much political as legal affecting as they do the freedom of the individual, openness and accountability in Government and the individual’s right to justice. Not one single argument presented by the Scottish Government in its statement of 7 January 2011 holds water or is salient to JFM’s request for an independent inquiry. JFM has effectively demonstrated that its position vis-à-vis the both Scottish Government’s powers to institute such and their executive responsibility to do so are proven.

In circumstances where there is a perceived miscarriage of justice which has not been fully tested in law, and (see above discussion); where the executive accepts that it has adequate power to sanction the opening of an inquiry to address the situation; where the Scottish Government accepts that matter falls squarely under the jurisdiction of Scotland; where, given the new absolute power bestowed upon the judiciary in Scotland to accept or reject hearing appeals in the interest of justice, it appears almost certain that any application to reopen Mr al-Megrahi’s appeal will be rejected; where no declared cooperation from either Her Majesty’s Government or the UN is forthcoming (in fact, quite the opposite in the context of HMG), what alternative resolution to an independent inquiry held under the auspices of the Scottish Government is offered?

In the final analysis the Scottish Government has a duty to intervene where our justice system might have knowingly or unknowingly allowed a miscarriage of justice to occur and no other machinery exists for its resolution.

As Jim Swire said in his address to the Petitions Committee.

“The 270 victims of the Lockerbie atrocity their family and friends and the Scottish people have a right to demand that justice be done and be seen to be done.”

In conclusion, JFM wishes to thank the Public Petitions Committee for its on-going efforts on JFM’s behalf. JFM regards the institution of the public petitioning of government in Scotland as one of the most progressive
developments in recent UK political history. The Committee has shown courage in advancing this highly contentious and sensitive matter.

Robert Forrester and Jim Swire
On behalf of Justice for Megrahi Committee.
13 January 2011
Annexe E

Letter from the Scottish Government to the Public Petitions Committee

Criminal Procedure (Legal Assistance Detention and Appeals) (Scotland) Act 2010

Thank you for your letter of 25 January 2010. The letter requests "a written response to the specific issues during the discussion on the petition, in particular by Christine Grahame MSP and Bill Butler MSP (around the Criminal Procedure (Legal Assistance Detention and Appeals) (Scotland) Act 2010)." I have taken the questions to be those set out by Bill Butler MSP.

Mr Butler said, "First, we could, as Christine Grahame suggests, write to the cabinet secretary to ask whether he will review the application of the emergency legislation as he has promised. If that is his intention-which I do not doubt, because he told Christine Grahame, a member of the Parliament, that that was his intention-when will his review take place, and when and how will his decision in that respect be made known?"

I am happy to provide reassurance to the Committee about the commitment given to review the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. On 26 October I announced that Lord Carloway would lead an independent review of the impact of the Supreme Court decision in the case of Cadder v HMA. On the same day the Scottish Government introduced the Bill which led to that said Act. Item (d) on the terms of reference for Lord Carloway's review states "To consider the extent to which issues raised during the passage of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland Act) 2010 may need further consideration, and the extent to which the provisions of the Act may need amendment or replacement;"

Lord Carloway has appointed a reference group who met on 20 December 2010 and 3 February 2011 and will continue to meet regularly. A list of the members of that the reference group is attached. I note, in respect of the issues raised before the Committee, that the Chief Executive of the Scottish Criminal Cases Review Commission is a member of the reference group.

I have asked Lord Carloway to report as soon as is practicable and by late summer 2011.


Mr Butler went on to state "Secondly, on another point that Christine Grahame raised, can the SCCRC open an abandoned appeal?"

This question appears to be directed to the SCCRC and therefore I will leave it to them to answer. I note there was some discussion regarding section 7 of
the Act. The Scottish Government has indicated its view of the effect of that section. I repeat that view here as it may be helpful to the Committee.

"The SCCRC retains the discretion to refer cases to the High Court if it is in the interests of justice to do so. In making this judgement, the Commission must now consider the need for finality and certainty in criminal cases alongside other public interest issues. The UK Supreme Court was clear that the interests of justice were served by the courts offering certainty in convictions to avoid large numbers of cases constantly being cast in doubt. In the wake of the Cadder decision, there was a concern that the SCCRC route could become a "back channel" for criminal appeals on Cadder grounds, and as such the Scottish Government moved quickly to head off this possibility.

The High Court does have the power to reject a case referred to it, but this can only be done if the reference is not in the interests of justice. Scottish courts have a long and proud history of acting independently and impartially and this power has been entrusted to them in the certain knowledge this integrity will be maintained."

In due course Lord Carloway will have the opportunity to comment on any part of the Act as he sees fit.

Kenny MacAskill MSP
Cabinet Secretary for Justice
3 February 2011

Letter from the Scottish Criminal Cases Review Commission to the Public Petitions Committee

Thank you for your letter of 25 January 2011. I note that the Public Petitions Committee is seeking a response to the specific issues raised, in particular by Christine Grahame MSP and Bill Butler MSP, during the discussion on the above petition.

I note that Mr Butler identified two questions. My understanding is that the first was directed to the Cabinet Secretary and that it is the second question, ‘can the SCCRC open an abandoned appeal?’ to which the Committee seeks a response from the Commission.

The Commission’s position is that, in terms of its founding legislation (Part XA of the Criminal Procedure (Scotland) Act 1995 as amended), it is competent for the Commission to refer a case to the High Court in which a previous appeal was abandoned.

It may be helpful for me to add the following observations. If the Commission were to receive an application in respect of a case in which a previous appeal had been abandoned, before accepting the case for review the Commission would first consider the reasons for the abandonment of the appeal. Having considered those reasons, and any other relevant circumstances, the
Commission would accept the case for review only if it was satisfied that it was in the interests of justice to do so. This is because, in terms of the Commission’s statutory test, before the Commission may refer a case to the High Court, it must believe not only that a miscarriage of justice may have occurred in the case but also that it is in the interests of justice that a reference should be made (see section 194C of 1995 Act).

What I have said in the foregoing paragraph reflects what is contained in the ‘Frequently Asked Questions’ section of the Commission’s website (available at [http://www.sccrc.org.uk/frequentlyaskedquestions.aspx](http://www.sccrc.org.uk/frequentlyaskedquestions.aspx)). It may also be helpful to point out that it is competent for the Commission to refer to the High Court the conviction of a person who is deceased (see section 194B(4) of the 1995 Act), provided the Commission believes that the grounds set out in section 194C are met. Again, further information in that regard is available from the Commission’s website at the above link.

Finally, I note that, in addition to the question posed by Mr Butler, Christine Grahame also indicated that she would like to know the SCCRC’s views on the amendments to Part XA of the 1995 Act, as inserted by section 7 the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. The Commission’s Chairman, Jean Couper CBE, issued a statement on this matter on 23 November 2010. It is available from the Commission’s website at [http://www.sccrc.org.uk/ViewFile.aspx?id=486](http://www.sccrc.org.uk/ViewFile.aspx?id=486).

I trust that this is of assistance in addressing the issues raised.

Gerard Sinclair
Chief Executive
7 February 2011

**Letter from the Lord Advocate to the Public Petitions Committee**

**Criminal Procedure (Legal Assistance Detention and Appeals) (Scotland) Act 2010**

Thank you for your letter of 25 January 2011 in which you seek a written response to the specific issues during the discussion on the petition, in particular by Christine Grahame MSP and Bill Butler MSP around the Criminal Procedure (Legal Assistance Detention and Appeals) (Scotland) Act 2010).

Having considered the terms of the Official Record of the Committee I understand that the Committee wished me to address is the issue raised by Nigel Don MSP namely:

"Do the law officers have a residual power to investigate or reconsider a case in such circumstances? I would not even define the circumstances; we should just ask the Lord Advocate to think about what she might be able to do".
I understand the Committee to be asking if the Law Officers have a residual power to investigate or reconsider a case where there has been a referral by the Scottish Criminal Cases Review Commission to the Court of Appeal on the basis that a miscarriage of justice may have occurred and it is in the interests of justice to do so, and the appellant subsequently abandons his or her appeal before a judicial determination of the matter. There is no such specific power.

The Crown remains under a duty to review prosecution cases at all stages of criminal proceedings. Any decisions taken by the Crown must be impartial, fair and taken on an independent, objective and professional assessment of the evidence available and ensuring that proceedings are also fair to any accused person.

In considering any appeal the Crown investigates the grounds of appeal and whether it is appropriate to oppose the appeal or not. In any case which is the subject of appeal proceedings, where the Crown’s assessment is that the conviction is sound, and the appellant subsequently abandons the appeal proceedings, then that is an end to the criminal proceedings.

The Committee will be aware that there have been a number of investigations in relation to the tragic destruction of Pan Am flight 103 and the murder of 270 people and these are as follows:

- There was a Fatal Accident Inquiry conducted in Dumfries between October 1990 and February 1991
- The findings of the Air Accident Investigation Branch (AAIB) were published – these set out in detail the cause of the destruction of the plane and make a number of recommendations to improve aviation safety
- There was a criminal trial lasting nine months in a public forum, after which the trial judges released a written judgement to confirm their reasons for convicting the accused
- There has been an appeal in a public forum and again the appeal court released a written judgement to confirm their reasons for upholding that conviction
- After the referral of the case back to the Court of Appeal by the SCCRC the appellant's legal representatives argued two grounds of appeal (relating to the sufficiency of the evidence and the reasonableness of the verdict) before the court in a public forum after which, and before the court could issue its verdict, the appellant took the decision to abandon his appeal, thereby ending the criminal proceedings.

The Crown has defended Mr al-Megrahi’s conviction including the appeal proceedings resulting from the SCCRC referral. The decision to discontinue the appeal proceedings was taken by Mr al-Megrahi and his legal team. In
light of his abandonment of his appeal, the conviction for the murder of 270 people and the judicial determination of his guilt stand.

The only appropriate forum for the determination of guilt or innocence is the criminal court and the High Court of Justiciary sitting as the Court of Criminal Appeal is the only body with the power (as set out in the Criminal Procedure (Scotland) Act 1995) to quash this conviction. The Supreme Court has this power also on consideration of a devolution issue. Mr al-Megrahi was convicted unanimously by three senior judges following trial and his conviction was upheld unanimously by five judges in the Appeal Court presided over by the Lord Justice General, Scotland’s most senior judge.

Both of these courts subjected the evidence to a rigorous examination and concluded that it was proven beyond reasonable doubt that Mr al-Megrahi was responsible, while acting with others, for the bombing of Pan Am flight 103 and the murder of the passengers and crew, and 11 residents of the town of Lockerbie, and that the trial court's verdict did not amount to a miscarriage of justice.

The Committee will be aware that Mr al-Megrahi was charged with and convicted of acting with others who were named in the indictment. The High Court found, explicitly that "the conception, planning and execution of the plot which led to the planting of the explosive device was of Libyan origin." The criminal investigation in respect of others responsible for this crime remains open and the position remains as stated to the Scottish Parliament by my predecessor Lord Boyd of Duncansby on the day following Mr al-Megrahi’s conviction in 2001 - at present there is in Scots law insufficient evidence to justify further proceedings at this time. If new evidence about the involvement of others with Mr al-Megrahi in the murder of the 270 victims becomes available we will reassess that position.

I hope that this is helpful

The Right Honorable Elish Angiolini QC
Lord Advocate
9 February 2011
Annexe F

Letter from Justice for Megrahi to the Public Petitions Committee

Introduction

We refer to your e-mail letter of 8 February, 2011, requesting a response by the JFM Committee to letters from the Lord Advocate, the Scottish Government and Scottish Criminal Cases Review Commission (SCCRC).

The JFM Committee is extremely grateful to the committee for raising these issues and has pleasure in submitting its response. We would request that this letter be read in conjunction with our previous response of 13 January 2011 and the actual petition.

Lord Advocate Response – 9 February 2011

In her response to the Petitions Committee the Lord Advocate states.

‘Mr al-Megrahi was convicted unanimously by three senior judges following trial and his conviction was upheld unanimously by five judges in the Appeal Court presided over by the Lord Justice General, Scotland’s most senior judge. Both of these courts subjected the evidence to rigorous examination and concluded that it was proven beyond reasonable doubt that Mr al-Megrahi was responsible…’

This is simply not the case.

The evidence has not been tested and rejected in two court hearings (the original trial and the first appeal). The appeal court did not subject all of the evidence held in the original trial to ‘rigorous examination’. It did not need to because Mr Megrahi’s lawyers in making the appeal specifically refused to argue a) that there was insufficient evidence to convict or (b) that no reasonable court could have convicted on the evidence led.

The appeal court was expressing no view whatever on those issues. The only judges who have ever been satisfied beyond reasonable doubt of Megrahi’s guilt are the three judges at the original Zeist trial. It is incorrect for the Lord Advocate to imply otherwise.

As far as that appeal is concerned, the five judges stated in paragraph 369 of their Opinion:

“When opening the case for the appellant before this court Mr Taylor [senior counsel for Megrahi] stated that the appeal was not about sufficiency of evidence: he accepted that there was a sufficiency of evidence. He also stated that he was not seeking to found on section 106(3)(b) of the 1995 Act [verdict unreasonable on the evidence]. His position was that the trial court had misdirected itself in various respects. Accordingly in this appeal we have not required to consider whether the evidence before the trial court, apart from
the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the basis set out in its judgment. We have not had to consider whether the verdict of guilty was one which no reasonable trial court, properly directing itself, could have returned in the light of that evidence.”

As far as the outcome of the appeal is concerned the Lord Advocate has confidently opined that, in dismissing Megrahi’s appeal, the Appeal Court had effectively endorsed the evidence led at trial. This is not so. The Appeal Court repeatedly stresses that it is not its function to approve or disapprove of the trial court’s findings-in-fact, given that it was not contended on behalf of the appellant that there was insufficient evidence to warrant them or that no reasonable court could have made them. These findings-in-fact accordingly continue, as before the appeal, to have the authority only of the court which, and the three judges who, made them.

The Lord Advocate therefore is arguably being disingenuous in asserting that two courts, the trial and appeal, subjected the evidence we are challenging to a ‘rigorous examination’.

At this point can we remind the committee just what the JFM Committee petition stated.

‘Calling on the Scottish Parliament to urge the Scottish Government to open an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohamed al-Megrahi for the bombing of Pan Am flight 103 in December 1988.’

The Scottish Government in direct response stated.

‘The Government does not doubt the safety of the conviction of Mr Al-Megrahi.’

The central question therefore becomes.

‘How much did the Lord Advocate’s erroneous advice that the evidence which led to the conviction had being ‘rigorously’ examined by two courts affect their judgement?’

It is our submission that the effect would have been considerable and might even have swayed the Government in its belief in the conviction and subsequent statement.

On a more general point, Elish Angiolini is Scotland’s senior law officer and legal advisor to the government. What is certain is that her fingerprints can be seen all over the Government’s refusal of the JFM Petition to have an inquiry carried out. That the Lord Advocate should have played such a central role in the decision making and yet should issue such patently inaccurate and false information is extremely worrying and in our opinion demands an immediate investigation.
If, however, this was the only information error emanating from the Lord Advocate it would be bad enough but it is not. In our initial response to the Scottish Government, 13 January 2011 (page 1), we pointed out how the Government had erroneously stated that it did not have the power to establish a public enquiry.

We commented.

‘It is difficult to understand these errors given the Crown Office and civil service assistance that was available to the Scottish Government. At best this points to grossly inaccurate research and at worst to a deliberate effort to muddy the waters.’

Yet again we are forced to draw attention to the quality and accuracy of the advice and information being given to the Scottish Government by Scotland’s senior Law Officer. That there might have been serious flaws in the briefings the Scottish Government was receiving prior to our petition being turned down and also possibly prior to the release of Mr. Megrahi is, we believe, a matter of great concern. An important question to be asked is to what extent did this misinformation affect the Scottish Government’s decision making process?

Scottish Government Response - 3 February 2011

Before going on to address the latest Government response to the Petition’s Committee it is necessary to draw the committee’s attention to our above observations that we believe that the Lord Advocate, in her briefing of the Scottish Government in relation to our petition for a public inquiry, has delivered inaccurate and confusing information.

Firstly she was wrong in advising that the Government did not have the power to hold such an inquiry and also wrong in suggesting that all of the evidence heard at Mr Megrahi’s Zeist trial had been ‘rigorously’ re-examined by the appeal court. This of course begs the question to what extent this misinformation has affected the Government response that:

‘The Government does not doubt the safety of the conviction of Mr Al-Megrahi.’

It is stretching credibility to believe that such misinformation did not colour this most critical of decisions, and of course once made, it colours everything including their latest response. We would ask the committee to reconsider the initial government response in light of the new information. We would also re-iterate that in holding to the belief that this conviction was sound the Scottish Government has failed.

‘……… to take seriously the concerns expressed by the Scottish Criminal Cases Review Commission over Megrahi’s conviction is a gross insult to that body. The SCCRC was established as an independent, expert body precisely in order to investigate possible miscarriages of justice. The Scottish Government is treating its findings in the Megrahi case with utter contempt.’
In relation to the current responses we welcome the Justice Secretary’s statement.

‘I am happy to provide reassurance to the Committee about the commitment given to review the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.’

It is to be hoped that the ‘Carloway Review’ will address our concerns about the potential emasculation of the SCCRC by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. It should also be noted however that this legislation is subject to the SNP Government being elected and that there are still some doubts whether release will be limited by the Data Protection Act.

Once again we would wonder just what advice Mr MacAskill received from the Crown Office and elsewhere before this flawed legislation was rushed through parliament. As we show below, the Scottish Criminal Cases Review Commission strongly felt that the legislation did not serve the cause of justice.

Scottish Criminal Cases Review Commission Response - 7 February 2011

The SCCRC response must rank as the most helpful in that it addresses issues vital to JFM in a refreshing clear and unambiguous way. Your committee is to be commended for making these enquiries and the JFM Committee is examining ways of progressing appeal matters.

At the last Petition’s Committee hearing MSP Christine Grahame asked for enquiry to be made re the SCCRC views on the amendments to Part XA of the 1995 Act, as inserted by section 7 the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. Mr Sinclair directs your committee to a Press Release reproduced on the SCCRC website. It makes fascinating reading and should be required reading for the Scottish Government and particularly the Lord Advocate and Crown Office.

‘The Scottish Criminal Cases Review Commission has added its voice to the growing number of bodies expressing concerns publicly about the terms of the emergency legislation passed by the Scottish Parliament on Tuesday 26 October 2010…….’ Section 7 of the new Act, and in particular the creation of a new section 194DA of the Criminal Procedure (Scotland) Act 1995, creates a fundamental change in the relationship between the court and the Commission. The new legislative framework that gives authority to the High Court to reject a reference from the Commission at the outset risks undermining the role of the Commission as an independent arbiter of issues relating to alleged miscarriages of justice. The appropriate remedy for any aggrieved party, whether this be the applicant or the Crown, to challenge a decision made by the Commission, after it has considered the matter and reached a determination, is by way of judicial review. This, we feel, is the correct forum for the Commission’s application of our statutory test to be
considered and tested, and not by the High Court in terms of the new section 194DA(2).’

This powerful and measured rebuke is at odds with the complacent statements of self-interest emanating from the Scottish Government and Lord Advocate in their responses to you about the same issue.

Unfortunately for Scotland and those seeking the truth about Lockerbie, complacency and self interest lies behind their decision to deny us an inquiry. It also explains their support for Mr Megrahi’s conviction which flies in the face of SCCRC evidence, gained over a three year enquiry, that there might have been a miscarriage of justice.

It is clear to the JFM Committee that the misinformation from the Lord Advocate and Crown Office to the Scottish Government, which we refer to above, is symptomatic of a culture of self-interest where openness and accountability is seen as threatening that interest. It is against this background that the Government and Lord Advocate responses should be judged.

Recommendations

In light of these serious allegations we would urge the Petitions Committee to ensure that this petition is not closed down and to ensure a much closer examination of the part played by the Crown Office, Justice Dept and Civil Servants in their briefing of the Scottish Government before they turned down our petition for an independent inquiry and in any briefings given prior to Mr Megrahi’s release.

To allow this to happen we offer three solutions.

1. That the Petition’s Committee call the relevant officials before them with a view to clarifying the issues we have raised and assessing the accuracy of the briefings being supplied to the Scottish Government over this critical period.

If this is not thought to be a viable way forward, we note that the Petition’s Committee has considerable powers of referral.

‘Following consideration of the written and any oral evidence, a decision will be taken as to whether the issues raised merit further consideration. The PPC may also refer a petition to the relevant subject committee of the Parliament for further investigation. It can also bid for parliamentary time for a petition to be debated by the whole Parliament. Having considered a petition the PPC (or the relevant subject committee) may agree that no further action is required and close it. In all cases, the petitioner will be notified of any action.’


We would therefore further recommend that the following ways be explored of keeping the petition live.
2. That the Petitions Committee considers referring these matters to the Justice Committee for enquiry and report. Given that the remit of the committee is, ‘to consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (be) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.’, it would appear that these are legitimate matters for them to address.

As we have highlighted above we believe that there were two occasions on which erroneous information has been supplied to the Scottish Government by the Lord Advocate in respect of our petition and we conclude.

‘That their might have been serious flaws in the briefings the Scottish Government was receiving prior to our petition being turned down is we believe a matter of great concern. An important question to be asked is to what extent did this misinformation affect the Scottish Government’s decision making process?’

We would go further than this and suggest that in the light of these two errors how can we be confident that other misinformation has not been supplied regarding our petition and perhaps even in respect of the wider matter of Mr. Megrahi’s release and other issues related to Lockerbie?

We believe that these question marks over the accuracy of the Lord Advocate’s information and her motivation in issuing it have potentially serious implications for our justice system.

Given the Justice Committee has political responsibility for justice matters in Scotland and has already carried out a short inquiry related to the release of Mr. Megrahi it would seem totally legitimate that these matters be referred to the Justice Committee for full enquiry.

3. That the Petition’s Committee considers making a, ‘bid for parliamentary time for our petition to be debated by the whole Parliament’. The above reasons would also be relevant to such a decision.

Conclusion

We hope that the information and argument provided in this letter will convince the Petition’s Committee that it is in the interests of justice that this petition remains open. Despite promises from Alex Salmond and Kenny MacAskill that legislation will be enacted, if and when they are re-elected and that the Carloway Review will right any wrongs, the whole Lockerbie affair is littered with years of deceit and broken promises.
What is clear is that the more information that is revealed the murkier the whole affair becomes and it essential that these matters remain under active consideration in the Scottish Parliament.

‘The Lockerbie bombing and the trial of the only man convicted of the outrage remain a lasting stain on the Scottish legal system and without greater openness, one which will not easily be removed – even when Megrahi dies.’ (The Herald – Leader: 12 February 2011)

The JFM Committee
16 February 2011
Members of the Justice Committee will find here three documents:

1. The Justice for Megrahi written submission comprising a 6 page statement followed by 2 appendices (pages 2 to 13)
2. A supplementary document from Dr Jim Swire (pages 14 and 15)
3. A supplementary document from Mr John Ashton (pages 16 to 25)

Central in the above is the 6 page submission statement (pages 2 to 7). This statement is copiously annotated with URLs throughout in order to provide independent references. In the text of the statement, we also refer to material contained in email correspondence. In order to provide collateral for our claims therefore, we have supplied copies of the emails concerned in Appendix 1 (between Mr David Wolchover, barrister and Head of Chambers Emeritus, and the Scottish Government’s Lockerbie Team) and Appendix 2 (between Mr Robert Forrester, Secretary of Justice for Megrahi, and Mr Kenny MacAskill, Scottish Cabinet Secretary for Justice).

Because, at previous hearings, the Scottish Parliament Public Petitions Committee expressed gratitude to JFM for supplying supplementary back up material along with submission statements, we have included Supplement 1 and Supplement 2 for the benefit of those members of the Justice Committee who may wish further reading on the subject prior to the hearing on the 8th. Supplement 1 is from Dr Jim Swire and refers to and provides a brief summary of a new and as yet unpublished academic paper which has come into the possession of JFM. Supplement 2 is a note on the shortcomings of and concerns over the Zeist trial, written by author and investigative journalist Mr John Ashton especially for this submission.

JFM would like to offer its apologies to the Justice Committee for submitting a statement of 6 pages, somewhat more perhaps than that which would normally be required. However, in doing so, we have attempted to summarise, for the convenience of the Justice Committee, some of the salient developments pertinent to the case which have taken place over this last rather chaotic period. We hope that the above meets with the Justice Committee’s approval and we very much look forward to the hearing of the 8th of November.

Robert Forrester (Secretary, Justice for Megrahi) on behalf of the Committee and Membership of Justice for Megrahi
http://www.justiceformegrahi.com

31 October 2011
Justice for Megrahi submission to the Justice Committee of the Scottish Parliament in preparation for its consideration of PE1370 on the 8th of November 2011

Justice for Megrahi (JFM) is grateful to the Justice Committee of the Scottish Parliament for this opportunity to put its case for a full, independent, judicial inquiry into those matters falling under Scots jurisdiction covering the destruction of Pan Am flight 103 over Lockerbie in 1988 and the conviction of Abdelbaset Ali Mohmed al-Megrahi at Kamp van Zeist in 2001. The purpose of this submission is to update the Justice Committee on the current state of play and to offer any assistance JFM can to the Justice Committee in its deliberations.

Libya

The death of Colonel Gaddafi has closed another chapter in the Lockerbie/Zeist story and brought disappointment to some that he cannot be questioned on the subject of what Libya knew of the Lockerbie tragedy. Nevertheless, and despite many hollow claims, no evidence has emerged from the new National Transitional Council (NTC) Government of Libya that the country had any involvement in Lockerbie. The fact that Libya accepted responsibility for the actions of the one Libyan citizen convicted at Zeist at a time when it was suffering under the cosh of crippling international sanctions does not in any way equate with an admission of guilt for the act, as some would prefer to have it.

In the early days of the Libyan Civil War, the Chairman of the NTC, Mr Mustafa Abdel-Jalil (the former Libyan Justice Minister), claimed to possess evidence of his country’s involvement in Lockerbie. On April Fools’ Day, on the BBC’s Newsnight programme, we found his claims had no substance.


Around the same time, a British lawyer arrived in Libya on a mission to persuade the NTC to sign a document admitting to Libyan guilt for Lockerbie at a time when the NTC were desperately hoping that Libyan assets being held abroad would be unfrozen in their favour. No such signed document has entered the public domain.

http://www.guardian.co.uk/world/2011/apr/06/libya-rebels-lockerbie-apology

While this was taking place, defector Mr Moussa Koussa, (Col Gaddafi’s closest henchman and regime security chief) was being debriefed in London on Libyan involvement in Lockerbie by a delegation of representatives from the Crown and Dumfries and Galloway Constabulary (D&GC). This delegation’s only response afterwards was a firm ‘no comment’ stressing that this was a “live” and “open investigation” which they didn’t want to compromise. This “live” and “open investigation”, has been exposed as having had a grand total of only one solitary officer assigned to it prior to the Libyan conflict:

‘Correspondence I have received from the Chief Constable of Dumfries and Galloway Police has confirmed that only one full-time police officer is currently working on the case.’ Christine Grahame MSP 29/9/10.

In late September it was revealed that Scotland’s Lord Advocate, Mr Frank Mulholland, had requested evidence from the now established NTC Government of Libya.

‘A second Lockerbie bombing trial could be on the horizon after the Crown Office confirmed that Scotland’s Lord Advocate has made a formal request for evidence relating to the 1988 terrorist attack.’
http://www.holyrood.com/articles/tag/frank-mulholland/

It seems clear from the language used that the Crown Office instead of seeking any evidence that would secure the truth about Lockerbie is engaged in a selective exercise to unearth more evidence to support the apparent miscarriage of justice at Zeist. Can we take this fresh inquiry as an indication of the Crown’s insecurity over the safety of the original verdict? Moreover, this new request for evidence surely indicates that the Crown and D&GC debrief of Mr Koussa may have been less than productive. Whether one believes Mr Koussa or not, his statement issued following a BBC Panorama programme, 'Britain, Gaddafi and the Torture Trail' broadcast on the 24th of October, which sought to expose Mr Koussa’s villainy, may explain just why the Crown and D&GC have been less than forthcoming concerning any evidence he provided them with during their debrief of him in London:

“I also had no involvement of any kind or knowledge of the bombing of Pan Am Flight 103 over Lockerbie in 1988 or the murder of WPC Fletcher in 1984. I have voluntarily assisted the relevant investigatory authorities with their inquiries in relation to these matters.”

Given the astounding catalogue of allegations against Gaddafi’s right hand man Moussa Koussa, including complicity in torture and murder all enmeshed in secret negotiations with the UK government, the Justice committee, the Scottish Government and the relatives of those who perished in Lockerbie might also like to ponder this question:

‘Why in March 2011, when it was clear to the Her Majesty’s Government that Moussa Koussa’s hands were heavily stained with the blood of innocents at home and abroad, was he allowed to leave the UK unhindered to exile in Qatar’ a country which the US holds up as a beacon of Arab political reform, human rights and social issues?’
http://www.bbc.co.uk/news/world-middle-east-15415793

On the 3/10/11, Mr al-Megrahi, who is terminally ill and was caught up in the chaotic hell that Libya had become, consented to provide an interview with ‘Reuters’. One can only imagine the fear he and his family were living under as his property was looted, his medication stolen and news crews invaded his home.

So desperate are those who support the Zeist verdict for evidence of his and Libya’s guilt that a spectacular brouhaha ensued over his apparent use of the word “exaggerated” as it appeared in translation from the original Arabic by Reuters. A number of news outlets and commentators assessed this as a confession of involvement in Lockerbie.
What is stunning is that the Reuters translation of the Arabic should settle on an English word that had such inflammatory potential. Many informed alternatives have been offered by academics and others, ranging from: “I am a very simple man, and the West made a great deal more of me” to “The West has invented/fabricated/manufactured me”. How then do we suddenly corrupt this into a deathbed confession?

The sad fact is that the British and American governments and certain elements of the media have seized every opportunity to place the tragedy of Lockerbie centre stage as they have fought to justify their involvement in this vicious civil war.

Despite all the claims and counter claims, not one iota of evidence has emerged to support the scandalous miscarriage of justice at Zeist in 2001. In fact, the opposite has happened as the double dealing ‘deals in the desert’ of the UK and US governments have been revealed.

Zeist

It is plain that the Crown Office, the UK and US governments and arguably the Scottish Government hope that the public, under a barrage of soundbites and tabloid headlines, will forget the actual facts of the Crown case at Zeist. As the years pass, it is becoming clearer and clearer that Mr al-Megrahi’s conviction was based on the ability of three high court judges to believe the collective, overly imaginative, circumstantial evidence adduced by intelligence services, the police and the Crown Office.

The prosecution manufactured a chain of events in an effort to explain its conclusion that an invisible bomb suitcase managed to find its way from Malta to Lockerbie as unaccompanied luggage. There is no evidence that such an item ever left the tarmac at Malta or was transferred on to a flight bound for Heathrow at Frankfurt. It is fantasy.

The safety of the conviction is further fraught by: accusations, yet to be denied, that the Crown’s star witness was bribed for testimony and that the court was not informed of this; another key witness admitting, in a signed affidavit, to perjury under the statute of limitations; the forensic evidence being provided by individuals who had been discredited in previous terrorist bombing trials, and that they were unable to account for irregularities in their notes and claims that their testing of material evidence was negligent; the provenance of material evidence relating to a fragment of PCB being at best highly questionable; critically significant evidence being denied to the court until after the verdict was passed. The litany is staggering.

That the High Court of Justiciary managed to convict on the evidence laid by the Crown is the stuff of Hollywood film scripts. That this fiction has been sustained in the face of the Scottish Criminal Cases Review Commission (SCCRC) fears of a miscarriage of justice and in the face of no further evidence emerging from Libya seems attributable to the actions of vested interests desperate to prevent the real
truth emerging. How long can this scandal, which has riven the reputation of Scotland’s criminal justice system, be maintained simply on the grounds that the former Libyan ruler seems like a credible candidate? How long can our government ignore the ever increasing evidence that the conviction of Abdelbaset Ali Mohmed al-Megrahi in 2001 trial verdict was deeply flawed? And, how much longer must the electorate have to sit and watch as its executive panders to a Crown Office by granting it its every wish, whilst the Lord Advocate laudably trumpets that “There is no sell-by date on justice”*, restricting himself to cold cases only and studiously ignoring miscarriages of justice where the Crown might have to address its own judgements.


Justice Committee members desirous of more detail regarding the concerns lying at the heart of the Zeist judgement may find the summary written by investigative journalist Mr John Ashton contained in Supplement 2, which accompanies this statement, highly illuminating.

Scotland

On 4/9/11 the Scottish Sunday Express published an opinion poll which revealed that 52% of the sample of the Scottish population supported an inquiry into Lockerbie/Zeist. It would appear that, in spite of the best efforts of the Crown, the political elite and elements of the media, sufficient doubt exists in the minds of the Scottish people over the safety of Mr al-Megrahi’s conviction to warrant an inquiry into the matter.

http://www.express.co.uk/posts/view/269154/More-than-half-of-Scots-want-Lockerbie-probe

Sadly however, the message is taking rather more time to permeate through to some in the corridors of power in Edinburgh. In correspondence with a prominent London barrister, Mr David Wolchover (Head of Chambers Emeritus at 7 Bell Yard, Temple Bar, London) on 30/8/11, the Scottish Government wrongly persisted in the claim that it does not have the power to open an inquiry (see: Appendix 1). Previously, on 7/1/11, the Scottish Government had admitted, under pressure from the Public Petitions Committee (SPPPC) and JFM, that it did, in fact and in law, have this power to do so under the Inquiries Act of 2005.

http://www.scottish.parliament.uk/S3_PublicPetitionsCommittee/Submissions_11/11-PE1370A.pdf

Such evasion is not only an insult to Mr Wolchover but also an insult to the Scottish Parliament, the SPPPC, JFM and, above all, the people of Scotland.

Furthermore, the government is continuing to maintain that it requires to pursue an entirely unnecessary, time consuming and laborious process of passing primary legislation to allow the SCCRC’s statement of reasons for Mr al-Megrahi’s second appeal to be published. The truth is that all that is needed is to legislate to lift the statutory instrument preventing publication, which the government itself imposed, a process that would take a fraction of the time. When asked by JFM to explain why the immensely more cumbersome process of primary legislation was being opted for
in preference to the far simpler one, Mr MacAskill’s response was yet another example of meaningless circularity (see: Appendix 2).

Such continued evasion and obstruction does not bode well for any hope of the SCCRC’s statement of reasons being published either soon, or in unexpurgated form, or even at all. Indeed, Mr Gerard Sinclair, Chief Executive of the SCCRC, said on 26/10/11:

“I believe, however, that legislation passed by the Scottish Parliament cannot, by itself, guarantee publication of this document, as both the Scottish Parliament and the Commission must act at all times in compliance with their respective obligations under the Human Rights Act. In addition, the Commission would also still require to act lawfully and comply with the requirement of the Data Protection Act 1998 which is of course UK-wide legislation.”

Professor Robert Black QC said:

“They did not have to do it this way. It looks like they either had bad legal advice or they knew perfectly well what the end result would be. Why they would want to waste the Scottish Parliament’s time with this is an interesting question.”


Is this statement of reasons now in danger of becoming another political football to be kicked to and fro between Holyrood and Westminster and lost in the larger independence debate?

Conclusion

What must not be lost sight of here is the fact that JFM is urging the Scottish Government to open a full, independent, judicial inquiry into the safety of the Zeist conviction based on the evidence laid before the Zeist court by the Crown and in the light of the torrent of revelations that continue to emerge. Most significantly, given that the investigation and all the judicial processes involved fall under Scots jurisdiction, the Scottish Government is duty bound as the embodiment of the executive power of state (supported in this context by the Inquiries Act of 2005) to act.

For the government to reject this plea would be a dereliction of duty to the people of Scotland. It has now been over ten years since the court reached its verdict. If we are to face yet more procrastination, obstruction, obfuscation, Public Interest Immunity Certificates etc, it will only serve to increase the suspicions and doubts which hang over the entire saga. As yet, this case has not been fully tested in a court of law in the interests of justice. Given, therefore, the intransigence on the part of the Crown and others in authority, it demands an inquiry to resolve this parlous state of affairs. JFM, therefore, asks the Justice Committee of the Scottish Parliament to do all in its power to encourage the government to order such and inquiry and salvage the reputation of our criminal justice system at home and abroad.
It is time for the government of Scotland to show real independence by standing up to the UK and US governments and other vested interests and instituting an open and accountable judicial inquiry that would at last free the people of Scotland and the relatives of those lost in that terrible tragedy 22 years ago.

**Recommendations**

Parliamentary business can, even at the best of times, be a laborious and time consuming process, and obviously, having submitted PE1370 to parliament during a period which has had to accommodate a general election, JFM understands the pressures that committees have been under. Nevertheless, we feel that after a full year, encompassing four sessions of the Public Petitions Committee (SPPPC) and a fifth due before the Justice Committee on the 8th of this month, progress has been somewhat slower than might have been hoped in addressing the issue at hand. We do not in any way hold the SPPPC or the Justice Committee responsible, a sterling effort has been put in to maintain PE1370’s status as open. This situation has not been helped though by the fact that the government overshot a deadline to respond to questions set by the SPPPC, subsequent to the hearing of the 9th of November 2010, by a full month. Additionally, and much more significantly, we feel that the process of asking the government and the Crown Office to submit written responses to questions set by committee has resulted in evasive, unsatisfactory and misleading replies from these parties, which, in turn, have, regrettably, generated more questions than answers: the letter from former Lord Advocate Elish Angiolini to the SPPPC, dated 9/2/11, being a case in point*. Furthermore, much has taken place both at home and overseas regarding the Lockerbie/Zeist case in the last year. Clearly developments in Libya have played a significant role, however, factors affecting the case here in Scotland such as the new ‘Cadder’ legislation and the lifting of the prohibition on double jeopardy have also arisen and are of concern. Therefore, in order to speed this process up and allow committee members to get directly to the substance of the issue, cover new developments, deal with material arising from the supplements accompanying this submission (the academic paper summarised by Dr Jim Swire in Supplement 1 and the note on the shortcomings of and concerns over the Zeist trial written by author and investigative journalist Mr John Ashton contained in Supplement 2 and acknowledge recent history, JFM would like suggest to the Justice Committee that an evidence session, or sessions, may be beneficial. JFM would be most amenable to presenting evidence to the Justice Committee should the committee be in agreement to taking such an approach. Moreover, for the sake of balance and to avoid the delays which can arise by dealing with matters via written correspondence, JFM would also like to recommend that the Cabinet Secretary for Justice, the Lord Advocate, the Chief Constable of Dumfries and Galloway Constabulary and the Chief Executive of the SCCRC be called to present their perspectives on PE1370 and the Lockerbie/Zeist case in general at an evidence session too. If the committee wishes, for practical or other reasons, to call JFM and all the aforementioned parties together at one single evidence session, we, again, would be perfectly comfortable with such an arrangement.

On 30 August 2011 14:50, <Lockerbie@scotland.gsi.gov.uk> wrote:

Dear Mr Wolchover

Thank you for your e-mail of 1 August to Alex Salmond, First Minister. Regarding the conviction of Abdelbaset Ali Mohmed al-Megrahi for the bombing of Pan Am flight 103 in December 1988. I have been asked to reply.

An independent judiciary is a cornerstone of Scottish justice. It would not be appropriate for Government to cast doubt on the decisions taken by judges who have listened to all the evidence and reached a decision in a case. Mr Al-Megrahi was tried and convicted by a Scottish court before three judges and his appeal against conviction, heard by a panel of five judges, was unsuccessful. A second appeal, following a referral from the Scottish Criminal Cases Review Commission, was abandoned by Mr Al-Megrahi.

The Scottish Government has always been as open and transparent as possible in this matter which is why, following the announcement last December that the Scottish Criminal Cases Review Commission has been unable to secure the necessary consents to release its statement of reasons in the Megrahi case due to the constraints of the current legislation, we now intend to bring forward legislation to overcome the problems presented by the current consent provisions.

This will 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.

On the broader questions of an inquiry, the Scottish Government do not doubt the safety of the conviction of Mr Al-Megrahi. Nevertheless, there remain concerns with regard to some of the wider issues relating to the Lockerbie atrocity. The questions to be asked and answered in any such inquiry would be beyond the jurisdiction of Scots Law and the remit of the Scottish Government, and such an inquiry would therefore need to be initiated by those with the required power and authority to deal with an issue, international in its nature. The Scottish Government would be entirely happy to co-operate fully with any such properly constituted inquiry.
Thank you for contacting us with your views.

Lockerbie Team
Scottish Government

From: David Wolchover
Date: 2 September 2011 09:41
Subject: Re: Lockerbie
To: Lockerbie@scotland.gsi.gov.uk

Dear Sir or Madam

I find myself obliged to address you as such because, although your letter was expressed in the first person you omitted to identify yourself by name or position.

Suffixed to the text of your message was a notice that “[t]he views or opinions contained within this e-mail may not necessarily reflect those of the Scottish Government.” I shall take it that on this occasion you were writing on their behalf.

May I begin by thanking you – whoever you are – for your response to my e-mail of 1 August to Alex Salmond.

I further express my thanks to you for the time and effort which you have taken on behalf of the Government of Scotland in formulating their reply.

You will not be surprised to learn that as a commentator in depth on the Lockerbie case and a practising criminal advocate of some four decades standing I was well aware of the various procedural aspects of this matter to which you advert. However, I was particularly struck by one stark proposition contained in your letter and I am writing for clarification.

In your letter you state:

“An independent judiciary is a cornerstone of Scottish justice. It would not be appropriate for Government to cast doubt on the decisions taken by judges who have listened to all the evidence and reached a decision in a case.”

It might have been understandable if the Scottish Government had confined themselves to this position, albeit it is one which in the very special case of Lockerbie might be regarded as disappointing, not to say pusillanimous.

However, for the Scottish Government to declare, through your letter, that they “do not doubt the safety of the conviction of Mr Al-Megrahi” appears to be a very different proposition from tactfully abiding by a studied silence on the merits.

At the risk of being accused of pedantry, the self-effacing sentence “it is not for us to cast doubt” on such and such is qualitatively quite different from avowing “we do not doubt” that X is the case. On its most natural meaning the latter implies that the Government have formed a rational view of the case after due consideration of the relevant facts.
There will certainly have been no lack of opportunity to do so. The trial transcript, the trial and original appeal court judgements, and the court papers for the second, abandoned, appeal, are available for all to read and the Government’s copying arrangements will have facilitated easy access by cabinet members. It is difficult to believe that on such a vexed issue as Lockerbie some at least of the Scottish body politic have not made some effort to get to grips with the case details.

I would venture to claim that my two recent articles in Criminal Law and Justice Weekly (“Masking Justice with ‘Mercy’” and “Exploding Lockerbie”) which I attached with my August 1 e-mail, together offer a detailed, forensic, critique of the judgment warranting close attention. They will have been available to the Government for perusal for a whole month during the time that your response was in preparation. I must confess to some surprise therefore that your reply makes no reference whatsoever to either article. Criminal Law and Justice Weekly, formally known as Justice of the Peace, is one of England’s most venerable and distinguished law journals. The articles make serious and compelling points which surely deserve at the very least an acknowledgment.

For the purposes of this letter I shall assume that the phrase “do not doubt the safety of the conviction” was chosen with care and expresses a process of rational determination upon the facts. This provokes a number of questions, to which I would respectfully invite the Government’s response.

1. Are you able to indicate whether the expression “Scottish Government do not doubt” means:

(a) that all cabinet members individually studied the facts of the case, formed a view, and then came together to take a vote; or

(b) that only certain members of the cabinet, for example the First Minister, the Minister of Justice and the Lord Advocate (assuming the latter was for present purposes a member of the cabinet), studied the case, and then formulated a summary for their colleagues with a recommendation which was then collectively accepted; or

(c) that senior cabinet members dictated a view to their junior colleagues who then endorsed that view on command?

2. In either case are you able to indicate

(a) on what occasion the cabinet made their determination,

(b) how much discussion there was on the factual issues,

(c) whether any such discussion was minuted,

(d) without indicating the views of individual ministers, the general nature of the points taken,
(e) whether there was any conscientious dissent from expressing belief in the safety of the conviction,

(f) whether any dissenting cabinet members have been directed by the First Minister to avoid airing their views publicly.

3. If the answer to (1)(b) is in the affirmative the extent to which the First Minister, the Minister of Justice and the Lord Advocate have personally studied the evidence in the case.

For your information I am attaching the pdf of another article of mine, published in the current number of CL&JW, entitled “Lockerbie – The Crucial Loose Ends.” (Regrettably there are two typographical errors which were introduced at a late stage through an electronic communication problem.) I would argue that the novel exposé of the narrow but devastating point focused on in the final section is one which, standing quite alone and apart from all the other problems with al-Megrahi’s conviction, might be met by some very serious soul-searching indeed on the part of judges and ministers alike and might make some men with a conscience very hesitant about declaring they have no doubts as to the safety of al-Megrahi’s conviction.

Your message to me carried the following pro forma warning:

“This e-mail (and any files or other attachments transmitted with it) is intended solely for the attention of the addressee(s). Unauthorised use, disclosure, storage, copying or distribution of any part of this e-mail is not permitted.”

I am going to assume that this was a standard automatically generated appendage which was not intended to require the Government’s consent as a condition of quoting your message in any further excursus into journalism on which I might embark.

Yours faithfully
David Wolchover
Head of Chambers Emeritus

Appendix 2

From: Robert Forrester
Sent: 04 August 2011 13:29
To: Cabinet Secretary for Justice
Subject: Robert Forrester - Justice for Megrahi. FAO: Mr Kenny MacAskill, Cabinet Secretary for Justice

Dear Mr MacAskill,

On behalf of the Committee of Justice for Megrahi may I thank you kindly for your very prompt response to my email and, additionally, for supplying the link to Mr al-Megrahi's terms of release.
Forgive me for replying with yet another question, however, given that I am not legally trained and you are both a lawyer and Cabinet Secretary for Justice, could you explain the following conundrum to me? Why is it that the government is planning to pursue a programme for the introduction of primary legislation to remove the consent requirements that are impeding publication of the SCCRC’s statement of reasons relating to Mr al-Megrahi’s appeal? My understanding is that this process is not only very cumbersome and time consuming but also, on the face of it, appears to be unnecessary since the consent requirements blocking the document’s publication are covered by a statutory instrument imposed in 2009 by means of secondary legislation. It, therefore, seems to us that a far easier and less involved and time consuming course of action would simply be to introduce secondary legislation to remove this statutory instrument. Obviously we may be missing something in the detail of what is required regarding this problem and we would be most appreciative if you could shed some light on the situation.

Thank you again for your letter and we look forward to your response to the above puzzle.

Yours sincerely,
Robert Forrester (Secretary, Justice for Megrahi) on behalf of Justice for Megrahi
Rúnaíre a’ Chaibhneilt airson Ceartais
Cabinet Secretary for Justice
Connell MacAskill BPA
Kenny MacAskill MSP

F/T: 0845 774 1741
E: scottish.ministers@scotland.gov.uk

Mr Robert Forrasler
Justice for Megrahi

By email: forraslerrob@mizmail.com

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Ar fáidhle/Our ref: 2011/1013629

August 2011

Dear Mr Forrasler,

Thank you for your further email of 4 August on behalf of the Committee of Justice for Megrahi, asking why the Government intends to use primary legislation rather than secondary legislation to bring forward measures to facilitate the publication of the Scottish Criminal Cases Review Commission’s statement of reasons for referring Mr Al-Megrahi’s case to the Appeal Court.

As you will be aware, the Scottish Government made the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009, which provided that the SCCRC may publish information relating to a case it has referred to the Appeal Court which is subsequently abandoned, providing that persons who have provided information to the Commission have consented to its disclosure. In December 2010, the SCCRC announced that it had been unsuccessful in obtaining consent from all the relevant parties to the publication of the Statement of Reasons in the Megrahi case.

In light of this, primary legislation is needed to provide the flexibility required to ensure that an appropriate legislative framework is put in place. The proposed legislation will facilitate the release of a statement of reasons by the Commission in circumstances where an appeal has been abandoned.

Kenny MacAskill

Taigh Naomh Anndrais, Rathad Regent, Dùn Èideann EH1 3DG
St Andrew’s House, Regent Road, Edinburgh EH1 3DG
www.scotland.gov.uk

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Supplementary support 1

By Dr Jim Swire

The originators of petition **PE1370** are now in possession of a number of further documents which are directly relevant to their petition that the verdict against Baset al Megrahi requires a thorough review by means of a full inquiry.

The committee of JFM would greatly value the opportunity to present and discuss these materials with the justice committee at a time of the committee’s choice. In order to facilitate the committee’s reaction to these significant new sources of information, find here below an introductory statement concerning an academic paper by researchers at the University of Bradford department of peace studies (Supplement 2 deals with ‘Megrahi – You are My Jury’, a book soon to be published by investigative journalist Mr John Ashton in collaboration with Mr al-Megrahi).

**Who Knows About This?**
This paper is scheduled for publication in 'Defence and security analysis' magazine in December 2011, but has been cleared by the author for presentation by JFM to the Committee before publication, if the opportunity is offered. JFM feels that it would be advantageous for the committee to have sight of this remarkable paper before its publication allows the media to put their spin upon its contents. It would be appropriate if this paper and its contents could be protected from media incursion until the committee has had a fair chance to study it and its reference section, and the paper been published.

Title:
“Who Knows About This?”
Western Policy towards Iran: the Lockerbie case.
By
Davina Miller,
Department of Peace studies, University of Bradford BD7 1DP
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Synopsis of paper:
The committee may remember that the prosecution against Megrahi proposed that, acting as a Libyan intelligence agent, he had put a bomb aboard an Air Malta flight, and that the bomb had been transferred onto a Pan Am feeder flight at Frankfurt, and from that onto Pan Am's aircraft 'Maid of the Seas' at Heathrow airport, which had exploded over Lockerbie 38 minutes after taking off from Heathrow.

The evidence collected for the trial was heavily dependent upon US intelligence.

This paper is carefully researched, having a total of 65 references. It considers the question of Western and particularly US attitudes towards several Middle Eastern countries, and their 'Choice of enemies'. It goes on to summarize the prosecution case at Zeist and to point out some of the problems from which that narrative suffers, then looks at the defence case.
Next it discusses the investigation of the case, a combined effort led by the Scottish police, but deeply dependent upon the intelligence agencies of Britain and America. National imperatives, to which intelligence services must comply, are defined, as are the origins of certain payments of funds to terrorist groups mentioned in the Zeist court.

The alarming nature of the intelligence stance over this case are highlighted and supported by many references. The paper shows that even by the time of the issue of the indictments against the two Libyans by Scotland and America at the end of 1991, American intelligence still believed that the Lockerbie bomb had been provided by a Syrian terror group, and was aware that such a device could not have been launched from Malta without having to be intercepted at Heathrow in order to be primed. American intelligence also knew that the Syrian bombs could be kept at ground level indefinitely without exploding, but that once in an aircraft, they sensed the drop in air pressure following take-off and would then inevitably explode within 35-45 minutes after leaving the ground, this timing not being adjustable. The Lockerbie plane had flown for 38 minutes before being destroyed.

The paper records that throughout most of the intervening months America had therefore been pressing for the expulsion of the leader (Ahmed Jibril) of a Syrian terrorist group (the PFLP-GC) in the belief that they had supplied the bomb that destroyed the Lockerbie aircraft. Bombs of this type were unique to the Syrian PFLP-GC group.

The committee may remember that the Zeist court itself did appeal for information from the government of Syria, a request which was dismissed out of hand by the Syrian authorities, without credible reason being given.

The committee may also remember that the prosecution case in court relied upon the use of a very different type of bomb which was alleged to have been operated by a timer obtained from a Swiss firm, which, if true, could have allowed the bomb to survive flights between Malta, Frankfurt and Heathrow without premature explosion. Remarkable anomalies about the forensic evidence used at Zeist, particularly over an alleged piece of circuit board from this Swiss timer are detailed in this paper, together with observations concerning the records of the UK forensic officers, and the role of certain Scottish police officers.

This underlines JFM’s belief that there is sufficient material within Scotland to make a re-examination of the verdict effective. However it is clear that a full Scottish inquiry into the integrity of this verdict will require the power to ensure that certain evidence be given under oath.
Supplementary support 2

The following is a statement, summarising some of the critical concerns lying at the heart of the Zeist case, commissioned by Justice for Megrahi and written by Mr John Ashton, investigative journalist and author of ‘Megrahi: You are my Jury’.

Background

My role

From June 2006 until his return home in August 2009, I worked alongside Mr Megrahi’s legal team as a researcher. During that time I examined all of the important areas of the Crown case, in particular the evidence of Tony Gauci and the forensic evidence. Since his return to Libya, I have been writing a book with Mr Megrahi, provisionally entitled Megrahi: ‘You are my Jury’, which should be published in 2012. As the title implies, it will air all the significant evidence in the case, both for and against his conviction.

I have had access to all the disclosed Crown evidence; the Scottish Criminal Cases Review Commission’s statement of reasons, on the basis of which it granted him a second appeal against conviction; and all the evidence that would have been aired at Mr Megrahi’s second appeal. Uniquely, I have interviewed Mr Megrahi numerous times, both in prison and in Tripoli. On the basis of everything that I have learned, I am convinced, not only that Mr Megrahi was wrongly convicted, but, more importantly, that the case is a huge scandal for the Scottish criminal justice system.

The book comprehensively destroys the Crown case and in doing so presents a large amount of new evidence, much of which was previously withheld by the police and/or Crown. Until the book is published, I cannot reveal the most significant of the new evidence, so, for the most part, the information presented in this note is already in the public domain, although it has barely been reported and is only known to those few people who have taken a close interest in the case.

The case against Mr Megrahi

It is alleged that on the morning of the 21 December 1988 Mr Megrahi placed an unaccompanied brown Samsonite suitcase on board Air Malta flight KM180 from Malta to Frankfurt. The suitcase contained a bomb concealed within a Toshiba radio-cassette player and was said to be labelled for New York on PA103. At Frankfurt it was supposedly transferred to Pan Am feeder flight PA103A to London Heathrow, and at Heathrow to PA103.

The suitcase was packed with clothes that Mr Megrahi had allegedly bought in Malta two weeks before the bombing, on 7 December 1988. It’s claimed that he took the case to Malta on 20 December, while travelling on a coded passport under the name of Ahmed Khalifa Abdusamad. The following morning he flew back to Libya on a Libyan Arab Airlines (LAA) flight, which checked-in shortly before KM180. It was alleged that, prior to departure, he was able to get the suitcase on to KM180 with the help of a former LAA colleague Lamin Fhimah. Mr Fhimah was tried in The Netherlands with Mr Megrahi, but was acquitted.
Police enquiries in Malta traced bomb damaged clothes to a small shop called Mary’s House. Remarkably, the shopkeeper, Tony Gauci, remembered selling the clothes to an oddly behaved man shortly before Lockerbie. Later to become the star witness against Mr Megrahi, Mr Gauci said the mystery customer was Libyan. On 15 February 1991 he picked out a photograph of Mr Megrahi as resembling the clothes buyer.

The Malta link was confirmed by baggage records from Frankfurt airport, which appeared to show that a suitcase from the Air Malta flight KM180 had been sent to PA103A. There was no record of anyone having transferred from KM180 to flights PA103A and PA103 and none of the victims were known to own a brown Samsonite suitcase of the type in question. The police inferred from this that the suitcase was unaccompanied and that it must have evaded Pan Am’s security checks prior to being loaded onto PA103A.

The third key plank of the case was a fragment of electronic circuit board, which a British forensic expert found embedded within the collar of a blast damaged, Maltese-made shirt. In 1990 American investigators matched the fragment with a timer, known as an MST-13, which was eventually linked to a Swiss company called Mebo. The company’s co-owner, Edwin Bollier, said that the timers were designed and made to order for the Libyan intelligence service. He claimed that only 20 were produced, which he personally delivered to Libyan officials. He also revealed that the firm shared its offices with a Libyan company called ABH, in which Mr Megrahi was a shareholder.

Mr Megrahi was the common link between Mr Bollier and Malta. He had left Malta on the morning of the disaster and had visited the island on 7 December, which was roughly when Mr Gauci said he sold the clothes. It was speculated that, as former Head of Security for LAA, he knew how to smuggle a bomb on to an aircraft.

The case appeared to be sealed when, in July 1991, a Maltese-based LAA employee, Majid Gaika, told the FBI that, at round the time of the disaster, Mr Megrahi had arrived in Malta with a brown Samsonite suitcase like the one that contained the bomb.

On close scrutiny, the case was far weaker than it first appeared, in particular the claim that Mr Megrahi had bought the clothes for the bomb suitcase. According to the prosecution case, he must have made the purchase on 7 December 1988. However, a consistent element of Mr Gauci’s story was that, as he left the shop, the customer bought an umbrella as it had started to rain and meteorological records indicated that there was no rain on that date.

The identification evidence was equally problematic. Mr Gauci never positively identified Mr Megrahi, saying only that he resembled the shopper. Moreover, he consistently described the man as around 50, 6ft (183cm) tall, dark skinned and with a full head of hair, whereas Mr Megrahi was 36, 5ft 8in (173cm) tall, light skinned and had a receding hairline. Mr Gauci said he could distinguish between Libyans and Tunisians, but, as most Arabs in Malta were Libyan, the locals tended to describe them as ‘Libyanos’ regardless of their nationality. Even when he picked out Mr
Megrahi’s photograph, Mr Gauci maintained that the clothes buyer was considerably older.

Before outlining some of the areas of concern, I wish to address two frequently repeated claims. The first is that Mr Megrahi was a senior agent of the Libyan intelligence service the JSO (sometimes referred to as the ESO) and the second is that the Libyan government admitted its guilt – and, by extension, Mr Megrahi’s guilt.

The intelligence agent claim

Whether or not Mr Megrahi was a JSO agent is irrelevant to the safety of his conviction, but the assertion nevertheless renders him unworthy of justice in the eyes of many. In its original indictment, the Crown claimed that his job with Libyan Arab Airlines (LAA) and the Libyan Centre for Strategic Studies and his role in a small company called ABH, were all fronts for JSO activity.

The sole basis for the senior intelligence agent claim was the evidence of Majid Gaika, an acquaintance of Mr Megrahi’s, who was formerly a low level JSO agent and LAA’s deputy station chief at Malta’s Luqa airport. At Mr Megrahi’s trial it was revealed that Mr Gaika had been a paid CIA informant since four months before Lockerbie and that the CIA considered him so unreliable that it had threatened to stop paying him. It was not until three years later, when desperate for asylum in the US, that he finally implicated Mr Megrahi in the bomb plot. In their judgment the trial judges described much of his evidence as ‘at best grossly exaggerated, at worst simply untrue’, and noted: ‘Information provided by a paid informer is always open to the criticism that it may be invented in order to justify payment, and in our view this is a case where such criticism is more than usually justified.’ Yet, perversely, the judges accepted Mr Gaika’s unsubstantiated claim that Mr Megrahi was a JSO agent.

I cannot, of course, prove that Mr Megrahi was not an agent, however, I have seen no compelling evidence that he was. He maintains that his only involvement with the JSO came during his 12-month tenure as head of airline security when he was seconded to the organisation to oversee the training of some of its personnel for security positions within the airline. There is ample documentary evidence to support his claim that ABH was a legitimate trading company whose main business was the purchase of spares for LAA aircraft, often in breach of US sanctions. And there is no evidence that the Centre for Strategic Studies was not a legitimate research institute. He admits that he sometimes travelled on a false passport, but insists that it was issued to give him cover for his sanctions busting activities; unlike his regular passport, it did not betray his airline background (in contrast to his original passport, which gave his occupation as flight dispatcher, the Abdusamad passport gave it simply as ‘employee’). Crucially, he kept it for 11 years after the bombing and handed it over to the police prior to the trial - hardly the actions of an intelligence agent, let alone a terrorist. It should also be noted that, at the end of Mr Megrahi’s trial, the Crown substantially amended the indictment, dropping all the claims of a JSO conspiracy involving LAA, ABH and the Centre for Strategic Studies.

Libya’s ‘admission of guilt’

In 2004 Libya formally admitted responsibility for the bombing and agreed to
pay $2.7 billion in compensation. Although this is often cited as proof of Gaddafi’s guilt, it was, in fact, anything but. Libya had by then suffered 12 years of UN sanctions, which were imposed after Mr Megrahi and his co-accused Lamin Fhimah were first indicted in 1991. The corresponding UN Security Council resolutions allowed the sanctions to be lifted only if the country admitted responsibility and paid compensation. In February 2004 the Libyan Prime Minister, Shukri Ghanem, told the BBC that his government continued to protest its innocence, adding ‘We feel that we bought peace. After the sanctions and after the problems we faced because of the sanctions, the loss of money, we thought it was easier for us to buy peace and this is why we agreed on compensation.’ Gaddafi’s son Saif al-Islam later said: ‘we wrote a letter to the Security Council saying we are responsible for the acts of our employees ... but it doesn’t mean that we did it in fact. I admit that we played with words - we had to. What can you do? Without writing that letter we would not be able to get rid of sanctions.’

Flaws in the trial court judgment

Mr Megrahi’s trial verdict was delivered by three of Scotland’s most senior judges, however, their 80-page judgment is shockingly flawed in its reasoning. The three most glaring examples follow.

Joint enterprise

In his final submissions, the Advocate Depute Alastair Campbell QC submitted that, owing to the difficulties of smuggling a bomb onto an aircraft at Malta’s Luqa airport, Mr Megrahi must have been assisted in this task by his co-accused Mr Fhimah. This clearly meant that either both must be guilty, or both not guilty: there was no third way. However, the judges acquitted Mr Fhimah while convicting Mr Megrahi. In his report on the trial, UN Observer Professor Hans Köchler noted: ‘This is totally incomprehensible for any rational observer when one considers that the indictment in its very essence was based on the joint action of the two accused in Malta.’

Mr Gauci’s identification of Mr Megrahi

At trial Mr Gauci testified that his memory of events would have been fresher at the time he first spoke to the police than it was currently. When taken through his first and later police statements, he agreed that he had described the man as around 50. He also acknowledged that, when he picked out Mr Megrahi’s photo on 15 February 1991, he had said that the man was ten or more years older. Clearly then there was no good reason to believe that Mr Megrahi - who was around 14 years younger and 4 inches shorter than Mr Gauci’s description - was that customer.

In their judgment, the judges got around this problem with the following remarkable example of dissembling:

‘What did appear to us to be clear was that Mr Gauci applied his mind carefully to the problem of identification whenever he was shown photographs, and did not just pick someone out at random. Unlike many witnesses who express confidence in their identification when there is little justification for it, he was always careful to express any reservations he had and gave reasons why he thought that there was a resemblance. There are situations where a careful witness who will not
commit himself beyond saying that there is a close resemblance can be regarded as more reliable and convincing in his identification than a witness who maintains that his identification is 100% certain. From his general demeanour and his approach to the difficult problem of identification, we formed the view that when he picked out the first accused at the identification parade and in Court, he was doing so not just because it was comparatively easy to do so but because he genuinely felt that he was correct in picking him out as having a close resemblance to the purchaser, and we did regard him as a careful witness who would not commit himself to an absolutely positive identification when a substantial period had elapsed. We accept of course that he never made what could be described as an absolutely positive identification, but having regard to the lapse of time it would have been surprising if he had been able to do so. We have also not overlooked the difficulties in relation to his description of height and age. We are nevertheless satisfied that his identification so far as it went of the first accused as the purchaser was reliable’.vii

The date of the clothes purchase

Meteorological evidence adduced by the defence strongly suggested that the date of the clothes purchase was not Wednesday 7 December, which, according to the Crown evidence, was the only date upon which Mr Megrahi could have bought the clothes, but rather the other most likely date, 23 November. This evidence confirmed that there was no recorded rainfall at the main recording station, at Luqa airport, on 7 December, but there was rain at the relevant time on 23 November. When asked if it could have rained on 7 December at Mr Gauci’s shop, only 5km away, Malta’s former chief meteorologist, Major Joseph Mifsud, testified that there was a 90 per cent probability that it would not and a ten per cent possibility that there were ‘some drops of rain’.viii

The judges acknowledged that there was ‘no doubt that the weather on 23 November would be wholly consistent with a light shower between 6.30pm and 7.00pm,’ but added: ‘The possibility that there was a brief light shower on 7 December is not however ruled out by the evidence of Major Mifsud.’ What Major Mifsud had in fact said was that no rain had been recorded at the monitoring station on 7 December, but that there was – possibly - a 10 per cent chance of some drops falling 5 km away in Sliema. In other words a 90 per cent chance that an event did not occur did not give rise, in their minds, to reasonable doubt that it did occur.

It is important to note that this was one of the six grounds that the Scottish Criminal Cases Review Commission identified for referring Mr Megrahi’s case back to the appeal court. The strength of the Commission’s language in arguing this finding should also be noted:

‘Although the weather evidence did not necessarily exclude 7 December as the date of purchase, in any choice between that date and 23 November it strongly favoured the latter … In the absence of a reasonable foundation for the date of purchase accepted by the Trial Court, and bearing in mind the problems with Mr Gauci’s identification of the applicant, the Commission is of the view that no reasonable Trial Court could have drawn the inference that the applicant was the purchaser … Based on these conclusions the Commission is of the view that the verdict in the case is at least arguably one which no reasonable court, properly directed, could have returned.’
The words ‘properly directed’ clearly implied that the judges may have misdirected themselves, which, given their seniority, was a remarkable rebuke.\textsuperscript{x}
Concealment of evidence

The most disturbing element of Mr Megrahi’s conviction is the degree to which the Crown and/or the police (in many instances it is not clear which of the two was responsible) concealed evidence that could have been helpful to Mr Megrahi’s defence. Below I give a few examples. There are will be many more in my book.

The Gaika cables

This is the only matter on which the Crown was caught out at trial.

The Crown productions included numerous heavily redacted secret cables from Mr Gaika’s CIA handlers, in which they reported to their colleagues on their meetings with Mr Gaika. The defence asked the Crown for further information about the blanked out passages and the Crown confirmed that the redactions had been carried out by the CIA in consultation with attorneys from the US Department of Justice. In January 2000 Procurator Fiscal Norman McFadyen stated that the Crown had not seen the unedited cables and that the redacted material was either irrelevant or potentially damaging to US national security. The CIA then provided new copies of the cables in which the redactions were described using very general terms such as ‘Operational details’, ‘Electronic addressing’ and ‘Administrative marking’.

On 21 August 2000 during a meeting on an entirely different subject, Alastair Campbell QC revealed to defence counsel that Mr McFadyen and Advocate Depute Alan Turnbull QC had seen the unedited cables during a secret meeting at the US Embassy in The Hague on 1 June. Mr Turnbull confirmed that he had seen the cables with a view to establishing that the Crown had met its legal duty to disclose all relevant material to the defence.

The following day defence counsel Bill Taylor QC urged the Court to ask the Crown to obtain the complete copies from the CIA. In an unusual move the Lord Advocate, Colin Boyd QC, attended the Court to respond to the defence submissions in person. He confirmed that Mr McFadyen and Mr Turnbull had seen what he described as ‘largely unredacted cables’ and assured the Court: ‘it was clear from the context that they had no bearing at all on the cables themselves...While they may have been of significance to the Central Intelligence Agency, they had no significance whatsoever to the case.’ He explained that the purpose of the exercise was to consider whether the blanked out passages might reflect on Mr Gaika’s credibility or otherwise to undermine the Crown case. He said that Mr Turnbull had concluded ‘that there was nothing within the cables which bore on the defence case, either by undermining the Crown case or by advancing a positive case which was being made or may be made, having regard to the special case.’ Lord MacLean asked Mr Boyd if there was any reason why the defence should not be shown the complete Cables. He replied: ‘Well, my Lord, that is not a matter for me. I do not have control over these documents. They are in the control of the United States, and they are not here. So, I do not have authority to allow access to documents which are not documents which are under my control, or indeed in my jurisdiction.’ He then stated categorically, ‘there is nothing within these documents which relate to Lockerbie or the bombing of Pan Am 103 which could in any way impinge on the credibility of Mr [Mr Gaika] on these matters.’

vi
The reason the Lord Advocate had no control over the documents was that, at the CIA’s insistence, Mr McFadyen had signed a non-disclosure agreement, which read: ‘I understand that the US Government is providing me access to US national security information solely for the purpose of determining whether it contains any information which is exculpatory to the defendants in the case of the Lord Advocate v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah. Furthermore, I agree not to use this US national security information for lead purposes in furtherance of the Crown’s case without the consent of the proper US [Government] official.’xii (The wording of the non-disclosure agreement was only revealed years later following a freedom of information request.) The Crown had effectively, and secretly, ceded to the CIA the right to determine what information should, or should not, be disclosed in a Scottish court. This is, in itself, scandalous.

On 25 August the Crown handed over less redacted versions of the cables. The newly revealed passages included crucial information about Mr Gaika, including that he had requested sham surgery to avoid national service, that he had admitted to being a shirker who tended to dodge JSO assignments and that he had claimed to be a relative of Libya’s former monarch King Idris. The passages also revealed that his handlers harboured grave doubts about the value of his intelligence and that by the end of August 1989 they were considering ceasing all financial support unless he could demonstrate his worth by the end of the year.xiii

Mr Fhimah’s counsel Richard Keen QC told the Court it was ‘abundantly clear’ that much of the newly uncovered information was highly relevant to the defence and added, ‘I frankly find it inconceivable that it could have been thought otherwise...Some of the material which is now disclosed goes to the very heart of material aspects of this case, not just to issues of credibility and reliability, but beyond.’xiv

Despite the Lord Advocate having seriously misled the court, eleven years on, neither he, nor any Crown representative, has been held accountable.

Mr Gauci’s evidence
During its four-year investigation, the SCCRC uncovered much highly significant, previously undisclosed, evidence relating to Mr Gauci. This evidence was central to Mr Megrahi’s appeal and there can be no doubt that, had the appeal gone ahead, it would have left the police and Crown some very awkward questions to answer about why the evidence had not been provided to the defence pre-trial.

For full details of the evidence, see the grounds of appeal extracts of megrahimystery.net (downloadable pdf file no.5, entitled ‘pp60 to 231 grounds of appeal’ on the right-hand menu). For the committee’s benefit I shall give two examples:

1. Mr Gauci’s Crown precognition statement
In his defence precognition statement Mr Gauci stated that he believed the clothes purchase date was 29 November, which, if true, meant that Mr Megrahi could not have been the purchaser, which, in turn, was fatal to the Crown case. However, when asked by the precognoscer why he had this date in mind, he could say only, ‘all I can say is that is what I think.’xv However, in his Crown precognition statement,
he said that he believed it was that date because he had had a row with his girlfriend. The SCCRC observed that the statement ‘might have played a useful part in the preparation and presentation of the defence case,’ and concluded, ‘by withholding this information the Crown deprived the defence of the opportunity to take such steps as it might have deemed necessary. Given the importance which the Trial Court attached to the date of purchase in drawing the inference that the applicant was the purchaser, the Commission is unable to say that such measures might not have affected the verdict.’

2. Reward money

The SCCRC uncovered evidence that, prior to picking out Mr Megrahi’s photograph on 15 February 1991, Mr Gauci was aware that a large reward was on offer for information that might lead to the conviction of those responsible for the bombing, and that he had expressed an interest in receiving such a reward. Further documentation suggested that he was strongly under the influence of his brother Paul, who, according to a confidential police report: ‘has a clear desire to gain financial benefit from the position he and his brother are in relative to the case.’ The SCCRC also discovered that, subsequent to Mr Megrahi’s conviction the police lobbied the US Department of Justice to pay Tony and Paul Gauci a minimum of $2 million and $1 million respectively. It has never been denied that these amounts were awarded. Any such payments would be contrary to the Crown Office’s own rules, yet the police correspondence with the US DoJ indicates that the Crown Office were aware of the reward application and did not object to it.

The circuit board fragment and the bomb timer

According to the Crown case, the fragment, known as PT/35b, was the golden thread that linked Mr Megrahi and Libya to the Lockerbie bomb’s timer. At trial the defence highlighted a number of anomalies concerning the item, including the fact that the police evidence label for the piece of shirt, from which it was later extracted, had been changed in a manner that was contrary to police procedures.

Having studied the evidence relating to PT/35b and the timer in great detail, including much that was never revealed to the defence, I have come across many more such anomalies, some of the most important of which were missed by the SCCRC. Cumulatively, they place a huge cloud of doubt over the fragment.

I give here just one example, which concerns the testing of the fragment for explosive residues. Although by no means fool-proof, residue testing is the most obvious scientific means that can help determine whether or not an item has been close to an explosion. It was by conducting such tests, on pieces of aluminium from one of the aircraft’s luggage containers, that Crown scientists from the Royal Armaments Research and Development Establishment (RARDE) were able to establish that the plane had been destroyed by a bomb. However, at trial the lead RARDE scientist, Dr Thomas Hayes, said that such tests were not conducted on the fragment, because he could tell by looking at it that it was explosively damaged and the additional work would therefore have been unjustified. Furthermore, he said, the chances of finding explosive residues were ‘vanishingly small.’

A previously secret police memo contradicts Hayes’s evidence and suggests that the fragment was tested for residues and was found to be negative. Written by
Detective Constable Callum Entwistle, on 3 April 1990, ten years before Dr Hayes testified, it reported on a visit by a delegation of French police officers who were investigating the 1989 bombing of UTA flight 772 in Niger. It contained the following passage: ‘Mr [Stuart] Henderson explained [to the delegation] that the piece of PCB from the Toshiba RT-SF16 bore no trace of explosive contamination and that this was due to the total consummation of the explosive material. Similarly with PT/35, the item was negative in regard to explosive traces.’

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i Trial court opinion, paragraph 42.
ii BBC Conspiracy Files documentary 29 August 2008.
iii Alastair Campbell QC final submissions, January 10th 2001, trial transcript page 9504.
iv http://www.i-p-o.org/lockerbie-report.htm
v Tony Gauci trial evidence, July 11th 2000, trial transcript page 4782.
vi Tony Gauci trial evidence, July 11th 2000, trial transcript page 4797 to 4813.

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 xv Tony Gauci defence precognition statement October 8th 1999.
xvii SCCRC Statement of Reasons, para. 24.108.
xviii Strathclyde police report, June 10th 1999.
xix SIO Thomas McCulloch letter to US Department of Justice, April 19th 2002.
xx Hayes trial evidence June 7th 2000, trial transcript pages 2681 to 2684.
xxi Entwistle memo April 3rd 1990, police reference D8925.
Justice Committee
13th Meeting, 2011 (Session 4), Tuesday 8 November 2011

SSI cover note

SSI title and number: Act of Adjournal (Criminal Procedure Rules Amendment No. 6) (Sexual Offences Prevention Order) 2011 (SSI 2011/355)

Type of Instrument: Not subject to parliamentary procedure

Coming into force: 1 November 2011

Motion for annulment lodged: No

SSI drawn to Parliament’s attention by Sub Leg Committee: No

Purpose of Instrument:

1. The purpose of the instrument is to amend Form 48.2 contained in the appendix of the Criminal Procedure Rules 1996. This is in consequence of the commencement of section 100 of the Criminal Justice and Licensing (Scotland) Act 2010, which amended the Sexual Offences Act 2003.

2. An electronic copy of the instrument can be found at:


Justice Committee consideration:

3. The instrument was laid on 11 October 2011 and the Justice Committee has been designated as lead committee.

4. Under Rule 10.1.3 of Standing Orders, any instrument laid before the Parliament is to be referred to a lead committee for consideration. This includes instruments laid only but not subject to any parliamentary procedure, which prior to the 2010 Act were not previously considered by lead committees. This requirement is an unintended consequence of the recent rule changes and it is expected to be addressed in the next round of minor rule changes by the Standards, Procedures and Public Appointments Committee.

5. As the Subordinate Legislation Committee did not need to draw the attention of the Parliament to the instrument on any grounds within its remit, the Justice Committee may wish to simply note the instrument.
Justice Committee  
13th Meeting, 2011 (Session 4), Tuesday 8 November 2011  
EU Justice and Home Affairs  
Letter from the Cabinet Secretary for Justice

I write to update the Committee on recent EU initiatives in the field of procedural rights for accused or suspected persons.

On 30 November 2009, the Council of the European Union agreed a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. The Roadmap (attached at Annex A) has so far led to the adoption of one new EU Directive (on the Right to Interpretation and Translation in Criminal Proceedings) and a further two draft Directives which are currently under negotiation:

- The Right to Information in Criminal Proceedings.
- The Right of Access to a Lawyer in Criminal Proceedings and the Right to Communicate Upon Arrest

The Committee may wish to note that the latter draft Directive has merged Measures C and D in the Roadmap, but as against this the second part of Measure C, dealing with legal aid issues, has been excluded meantime. It is likely however that it will be the subject of a separate draft Directive at some later point. We await clarification from the Commission on this matter.

THE RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

This Directive was passed on 20 October 2010. The UK Government, with the support of the Scottish Government opted-in to the Directive.

The Directive lays down common minimum rules for interpretation and translation in criminal proceedings, ensures the right to interpretation and translation for an accused person, and ensures that such interpretation and translation is free and of an adequate standard.

The deadline for implementation of the Directive is 27 October 2013. An up to date implementation plan for the Directive is attached at Annex B.

THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

This Directive is still currently being negotiated, although negotiations are nearing conclusion. The UK Government, supported by Scottish Government, opted-in to the proposed Directive in October 2010.

The Directive sets out rules on the information to be provided to those suspected or accused of having committed a criminal offence (covering information about, rights, charges and disclosure). It requires information to be passed to suspected/accused persons in the form of a “Letter of Rights” upon entering custody.
Whilst a written letter of rights would be a new aspect to Scottish criminal procedure it is one which would sit comfortably with current procedures. The Scottish Government is already in discussion with Crown Office, ACPOS, SLAB, and the Law Society of Scotland about the possible workings and ramifications of such a letter.

The other main question that has arisen in negotiations is in relation to disclosure of information to suspected and accused persons. Together with the UK Government, Scottish officials have been keen to ensure that the terms of the Directive respect the newly established Scottish disclosure regime established in the Criminal Justice & Licensing (Scotland) Act 2010. It is expected that a final version of the Directive will be published by the end of the year. Transposition is likely to be required by 2014/15.

THE RIGHT OF ACCESS TO LAWYER IN CRIMINAL PROCEEDINGS AND THE RIGHT TO COMMUNICATE UPON ARREST

This draft Directive is currently under negotiation. As you may know from the report of the Minister for Community Safety to the Justice Committee on the September JHA Council, the UK Government, supported by the Scottish Government, has decided not to opt-in to the Directive at this stage.

Scottish Ministers consider the draft Directive to be a positive development in principle. It should ensure that suspected persons across the EU have a right of access to legal advice before being questioned. The Directive should clarify the law and reduce the uncertainty generated by successive judgements of the ECtHR on legal access. It is likely to ensure a level of provision across Member States, helping to ensure access to a fundamental right.

It was therefore with some reluctance that Scottish Ministers supported the UK Government's decision not to opt-in at this stage. This decision was reached because certain aspects of the draft Directive gave cause for significant concern.

As you know, following introduction of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 we now provide a right to legal advice ahead of questioning. However, the draft Directive expands this right significantly in a number of areas. Particular concerns arise in relation to the point at which legal access must be provided; the requirement for a lawyer to be present during certain evidence-gathering acts (e.g. searches); its operation for minor offences; inflexibility where access might permit destruction of evidence; and an absolute ban on admissibility of evidence obtained in breach of the Directive.

It is deeply unfortunate therefore that the draft Directive raises so many concerns. Although it is entirely possible that the Directive will end up in an acceptable form, there is no guarantee that all of the issues highlighted will be resolved and that is why the Scottish Government supported the decision not to opt-in at this stage. I am however hopeful that continued positive engagement in negotiations by the UK delegation, which includes Scottish Government officials, will result in a final version of the Directive that will be suitable to adopt.
I hope this update on the progress of the Roadmap has been of interest and assistance to the Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice
1 November 2011
ANNEX A

ROADMAP FOR STRENGTHENING PROCEDURAL RIGHTS OF SUSPECTED OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

The order of the rights indicated in this Roadmap is indicative. It is emphasised that the explanations provided below merely serve to give an indication of the proposed action, and do not aim to regulate the precise scope and content of the measures concerned in advance.

Measure A: Translation and Interpretation
Short explanation:
The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.

Measure B: Information on Rights and Information about the Charges
Short explanation:
A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings.

Measure C: Legal Advice and Legal Aid
Short explanation:
The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.

Measure D: Communication with Relatives, Employers and Consular Authorities
Short explanation:
A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.

Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable
Short explanation:
In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.

**Measure F: A Green Paper on Pre-Trial Detention**

**Short explanation:**

The time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper.
ANNEX B

IMPLEMENTATION PLAN


** Deadline for transposition - 27 October 2013 **
** Lead Cabinet Secretary/Minister - Cabinet Secretary for Justice **
** Lead Official - Iain Hockenhull, Criminal Justice and Parole Division, 0131 244 3317 **

Key aims and main objectives of the Directive:

- to lay down common minimum rules for interpretation and translation in criminal proceedings, enhancing mutual trust among Member States;
- to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial (and to provide this for those subject to a European Arrest Warrant (EAW); and
- to ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings.

Policy options and intended approach to transposition and implementation

1. The initial assessment of the Scottish Government, the Association of Chief Police Officers in Scotland (ACPOS), the Crown Office & Procurator Fiscal Service (COPFS) and the Scottish Court Service (SCS) is that in the main, the Scottish criminal justice system effectively already complies with the spirit of the Directive. Suspects and accused persons in Scottish criminal proceedings are given access to interpretation and translation as appropriate, in order to ensure that their right to a fair trial is not imperilled.

2. The intended approach is therefore to build upon existing practice by, for example, ensuring that all translators and interpreters can provide a service of an agreed standard. Legislation may be required to create a right of access to interpretation and translation and this is being considered. This is considered to be likely to involve secondary legislation, although primary legislation has not been ruled out.

3. Implementation will not go beyond what is necessary to implement the directive, although stakeholder bodies will explore the scope to approach interpretation and translation from a shared position, e.g. by creating a common ‘pool’ of interpreters and translators.
The reasons for policy approach, including any Scottish-specific interests that have been considered

4. The approach reflects the high level of interpretation/translation provision already in place for criminal proceedings in Scotland, as compared to a number of other EU Member States.

Specific measures planned for implementation (primary or secondary legislation)

5. The Directive applies to criminal proceedings and proceedings for the execution of EAWs. It applies at the point a person is suspected or accused of a criminal offence through until the conclusion of proceedings including sentencing and appeal.

Secondary legislation may be used in relation to enshrining the rights in Articles 2 (Right to interpretation) and 3 (right to translation). This is on the basis that it will be possible to use section 2(2) of the European Communities Act 1972 to implement this EU Directive by secondary legislation.

6. Specific areas where legislation appears to be needed include:
   (a) A right to interpretation in criminal proceedings from point of becoming a suspect to the resolution of any appeal. (Art. 1(2) and 2(1-2)). To include assistance for persons with hearing or speech impediments (Art. 2(2)).
   (b) Right to interpretation for persons subject to EAW proceedings (Art. 2(7))
   (c) Right to translation of essential documents, including any decision to deprive a person of their liberty, any charge/indictment and any judgement. (Art. 3(1-2))
   (d) Right to translation of a European Arrest Warrant (Art. 3(6)).
   (e) Right to challenge a decision that there is no need for interpretation/translation and/or to complain if quality is insufficient (Art. 2(5) and 3(5)).
   (f) All costs of interpretation & translation to be met by state. (Art. 4). Although most costs will be met by the state at present, there may be some solicitor-client consultations where the person is currently obliged to pay for interpretation/translation. This is principally where the person is not eligible for legal aid.
   (g) Interpretation and translation to be of sufficient quality (Art. 2(8) and 3(9))
   (h) All translators/interpreters to be obliged to respect confidentiality (Art. 5(3))

7. The provisions in Articles 5 (quality of interpretation) and 6 (training) of the Directive may involve secondary legislation, although they are largely issues of practice.

8. It is possible that some of the issues might require revised Rules of Court.

Any other measures that may be required to implement (e.g. administrative provisions)

9. The following non-legislative steps are likely to be required:
(a) A procedure or mechanism to establish whether persons speak and understand the language of the proceedings and whether an interpreter is required (Art. 2(4)).
(b) Any waiver of right to translation to be adequately informed (Art. 3(8)).
(c) Identification of the “essential documents” to be translated (Art. 3(1-3)).
(d) The taking of “concrete measures” to ensure interpretation/translation of sufficient quality (Art. 5(1)).
(e) The establishing of a register(s) of translators/interpreters (Member States are asked to endeavour to establish a register under Art. 5(2))
(f) Government to request trainers of judges, prosecutors and judicial staff pay special attention to communicating with an interpreter. (Art. 6)
(g) Recording keeping obligation where oral translation of essential documents has occurred (Art. 7)

Options or derogations from the directive (where applicable)
10. No derogation is envisaged. Article 1(3) of the Directive provides that where a sanction for minor offences may be imposed by an authority other than a court but that decision may be appealed to a court, the Directive only applies to proceedings before the court. This could, for example, mean that an offer to a suspect of an alternative to prosecution such as a procurator fiscal’s letter offering a fiscal fine might not necessarily have to be translated under the Directive. However, it is understood that Crown Office practice is already to provide a translation on request.

Key milestones and timescales throughout the implementation phase

- End summer 2011 - establish legislative steps/vehicle to be used for implementation
- Spring to Winter 2011 - cross-stakeholder discussions to agree implementation steps required
- Winter 2011 to mid 2013 - put in place structures to ensure implementation (potentially including: establishing an accreditation scheme for interpreters/translators, standardised training schemes and a ‘pooling’ arrangement to allow stakeholder bodies to access to a common body of accredited interpreters/translators).
- 27 October 2013 - Implementation deadline
- Post October 2013 - assess operation and compliance

Plans for engagement with stakeholders including legislative bodies, delivery agencies, regulatory bodies, key sectors and members of the public
11. Discussions are underway with key stakeholders (ACPOS, COPFS and SCS) on the measures needed to implement the Directive.