

Written submission from Carole Ewart, Director - Campaign for Freedom of Information in Scotland (CFoIS)

Freedom of Information Reform (Scotland) Bill and Section 48 of FoISA

At the oral evidence session on 27th November for Stage 1 of the Freedom of Information Reform (Scotland) Bill, the issue was raised as to why the Bill did not amend section 48 (b) and (c) of FoISA. CFoIS would welcome amendments at stage 2 to extend the power of the Commissioner to receive an application for review under 47(1) in respect of a procurator fiscal or the Lord Advocate but I wanted to share some of the issues we have identified on drafting a competent amendment. An amendment to the Bill is problematic if it allows the Commissioner to direct the Lord Advocate to disclose information that she holds in her capacity as the head of criminal prosecution and the investigation of deaths.

Currently under FoISA the Lord Advocate has duties to disclose information, but her compliance with those duties is not subject to supervision by any other person other than the court. Section 48(5) of the Scotland Act states that “*Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person.*” The Scottish Parliament cannot modify the legal effect of that provision and the effect of any amendment to section 48 (c) of FoISA must be within the legislative competence of the Scottish Parliament under section 29(2)(c) of the Scotland Act.

A decision by the Lord Advocate to refuse to disclose information that she holds as the head of criminal prosecution and the investigation of deaths systems cannot limit her ability to reach those decisions independently of any other person. An amendment to the Bill cannot modify the legal effect of the safeguard of the Lord Advocate’s ability to take entirely independent decisions to the extent that those decisions are taken in her capacity as head of the systems of criminal prosecution and investigation of deaths.

Although the Freedom of Information Act 2000 does not make corresponding provision in respect of decisions taken by the Crown Prosecution Service, that is an Act of the UK Parliament and is not subject to the same constraints as Acts of the Scottish Parliament.

I hope you find this explanation helpful and I wish the Committee well in its deliberations at Stage 1.