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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 31 January 2012

Session 4

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JUSTICE COMMITTEE
4th Meeting 2012, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Jenny Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (SNP)
Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
*David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Joanna Cherry QC (Faculty of Advocates)
Gordon MacDonald (Edinburgh Pentlands) (SNP) (Committee Substitute)
Michael Meehan (Law Society of Scotland)
Gerard Sinclair (Scottish Criminal Cases Review Commission)
Michael Walker (Scottish Criminal Cases Review Commission)
James Wolffe QC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 31 January 2012

[The Convener *opened the meeting at 10:01*]

Interests

The Convener (Christine Grahame): Good morning. I welcome everyone to the fourth meeting of the Justice Committee in 2012. I ask people to switch off their mobile phones and other electronic devices completely, as they interfere with the broadcasting system, even when they are switched to silent.

I have received apologies from Colin Keir, and I welcome Gordon MacDonald, who is substituting. Do you have any interests to declare that are relevant to the committee, Gordon?

Gordon MacDonald (Edinburgh Pentlands) (SNP): No, I have no interests to declare.

The Convener: I am glad to see Alison McInnes back again.

Alison McInnes (North East Scotland) (LD): Thank you.

The Convener: A bottle of Lucozade was being threatened. I am sure that that brought her back.

Criminal Cases (Punishment and Review) (Scotland) Bill: Stage 1

10:01

The Convener: The only item on the agenda is our first session on the Criminal Cases (Punishment and Review) (Scotland) Bill at stage 1. I welcome our first panel of witnesses. Brian Simpson is a law reform officer at the Law Society of Scotland; Michael Meehan is a member of the criminal law committee of the Law Society of Scotland; and James Wolffe QC and Joanna Cherry QC are here on behalf of the Faculty of Advocates. Thank you for your written submissions, which are helpful.

We will go straight to members' questions. I remind members to keep to part 1 of the bill first. If members wish to comment on part 2 thereafter, we will certainly proceed to it. The microphones will come on automatically. If someone indicates to me that they wish to comment, I will go straight to them.

Roderick Campbell (North East Fife) (SNP): Good morning. Could I just—

The Convener: Before you launch forth, perhaps you want to declare your position.

Roderick Campbell: Yes. I refer to my entry in the register of members' interests. I am a member of the Faculty of Advocates.

The Convener: That is appropriate, as we have people from the Faculty of Advocates in front of us.

Roderick Campbell: I address my question principally to the Law Society, whose submission mentions matters

"for the discretion of the sentencing judge",

and the bill basically providing for that. How far do you think that making matters

"for the discretion of the sentencing judge"

would help? Would that be quite complex? Is it likely to lead to greater clarity in sentencing, or just generally?

Michael Meehan (Law Society of Scotland): It is interesting to note Lord Hamilton's observations in the case of Petch and Foye v Her Majesty's Advocate. He referred to the fact that there was a time when there could have been that discretion, but that there is now a legislative framework.

Judges will often exercise discretion in sentencing. For example, there is no statutory guidance as such on how to deal with a co-accused in a case, but discretion is used. What became the complicating factor in the issue in

question was the view that something should be set in statute in order to deal with human rights legislation.

To answer the question, leaving matters to judicial discretion is one way of dealing with them, but if there is a statutory requirement, it is difficult to set out in detail what factors should be considered, what weight should be attached to them, how they should be considered, and how comparisons should be drawn with other parties. The exercise, which we see has been tried in the past, is complicated when one tries to set out in statute factors that are often left to the sentencer's judgment.

The Convener: Does anyone else wish to comment?

James Wolffe QC (Faculty of Advocates): I make two declarations at the outset. First, my colleague Joanna Cherry, who is a member of the faculty council, appeared in the Petch case as advocate depute. Secondly, in relation to part 2 of the bill, I appeared on behalf of Mr Megrahi and Mr Fhimah in proceedings that were brought by the BBC, which sought to televise the Lockerbie trial. Of course, we are here to give evidence on behalf of the Faculty of Advocates.

The fixing of an appropriate sentence in an individual case is ultimately a matter of judgment. The issue that the bill presents is the extent to which it is necessary and appropriate to seek to restrict, control and direct the exercise of judgment by the sentencing judge.

The purpose of the provisions in part 1 is to reintroduce an element of flexibility that interpretation of the current legislation has removed. The question that is presented in our written submission and, I believe, in that of the Law Society of Scotland is whether the element of flexibility can be introduced in a way that avoids the undoubted complexity of the provisions that we already have.

The other point on the question of the discretion of the individual sentencing judge is that the sentencing judge's decisions are ultimately subject to control by the criminal appeal court. If individual sentencing judges go wrong, either in the method that they apply or in the level of individual sentences, one would expect that to be corrected by the appeal court.

My final point on the question of discretion is that we are concerned only with sentences that are imposed in the High Court, so part 1 of the bill deals with the exercise of judgment and discretion by High Court judges.

John Finnie (Highlands and Islands) (SNP): Good morning, panel. It is reassuring to hear a Queen's counsel say that the issue is complex, because I feel that when I get a grasp of it, that then goes away from me. I am not sure of my present status.

The Convener: We will find out now, will we not?

John Finnie: We may well do.

One of the papers that we have in front of us states that

"the Bill would ... make changes to the provisions relating to non-mandatory life sentences with the intention of ensuring that—"

this quote is from the Scottish Government—

"'courts have the sentencing powers they need to make sure that punishment is always appropriate to the offender's crime'".

If that is correct, how would the bill alter the present situation—if, indeed, it does?

James Wolffe: That takes us back to the starting point, which is the nature of the necessary exercise that the court is required to undertake when imposing a discretionary life sentence or an order for lifelong restriction. For such sentences, it is essential that the court identifies the period that the prisoner must serve by way of punishment before they can be considered for parole. After that period has expired, the Parole Board for Scotland must review the case from time to time and decide whether the prisoner can be released. The court must therefore fix an appropriate punishment part.

It is recognised that in identifying the appropriate punishment part, which is to deal only with the issue of punishment, the court should take into account the fact that, if it were not for the purposes of public protection, the prisoner would have been sentenced to a certain number of years in prison. In that situation, the prisoner would have been entitled to consideration for early release under the statutory early release provision. So, simply as a matter of fairness and comparative justice, it is right that that be taken into account when the court fixes the punishment part. Those are the two policies that are in play here.

I suggest that it is then a matter of judgment for the legislator to determine how far it is necessary to prescribe a particular methodology for individual sentencing judges and, ultimately, for the appeal court as regards how they should go about the exercise of fixing a punishment part for retribution and deterrence, taking into account the needs of fairness and comparative justice.

The approach that is taken in the amendments to existing legislation that are in the bill is to take an already complex piece of legislation and make it even more complex. It is fair to say that that is at the root of the concern that is being expressed

because, after all, sentencing judges are expected to explain sentences in a way that will be intelligible not only to the accused who is being punished and sentenced, but to the victims of the crime, the public at large and, ultimately, the appeal court. It is open to question, at least, whether provisions of such complexity will be helpful to sentencing judges in the task that they must carry out, and I invite the committee to question those who are responsible for the bill about that.

Joanna Cherry QC (Faculty of Advocates): Can I add to what James Wolffe said?

The Convener: Certainly.

Joanna Cherry: If we look at the history of the existing legislation in the appeal court, we find that it has been the subject of one appeal before five judges and another appeal before seven judges. In both cases, judicial opinion on the proper interpretation of the legislation was divided.

Picking up on what Mr Frame said, it is not just laypeople who find the legislation extremely difficult to understand. It gave rise to the most difficult piece of statutory interpretation that I have had to engage in in my career—colleagues who were involved in the case in question would agree with me about that. I am sure that it is an issue for the Parliament that legislation should be readily understandable to the public, particularly legislation to do with the sentencing of prisoners who have been convicted of the most serious crimes—other than murder, of course. That is a strong factor in our concern about the bill's complexity.

To answer Mr Frame's question, I think that the courts would have the powers that they need, but there might be issues about how the proposed legislation would be interpreted. [*Interruption*.] I am terribly sorry—it is Mr Finnie. I read your name incorrectly; I think I might need new glasses.

Graeme Pearson (South Scotland) (Lab): You should have gone to Specsavers.

The Convener: We will have no advertising on the committee.

You have given us some comfort because, in trying to understand matters, I felt as if I was in some kind of legal tutorial and it was giving me a headache.

John Finnie: You have partly answered my next question, which is about how important it is that the public understand the provisions. That is important for confidence in the criminal justice system. However, I presume that a sentencing judge would not need to go into the technicalities of the proposed legislation, as the rationale for a particular sentence could be expressed in general terms.

How might that apply to a co-accused? Some of the submissions refer to the variation in sentences that sometimes occurs, in which public protection is a factor.

Michael Meehan: With regard to a co-accused, although the reason for the difference in sentencing may not be articulated when the sentence is delivered—in other words, a sentencing judge may not explain why they have given the co-accused a different type of disposal—if an appeal was marked, those details would be set out in a report to the appeal court, so that it could assess whether a sentence was excessive, having regard to issues such as comparative justice. Although the reason would not necessarily be given in open court at the time, if the sentence was appealed, that would happen.

Touching on the issue of public confidence, it can cause some difficulty if a disposal is given in court that is hard to understand or for which there is no apparent reasoning.

10:15

As for complainers and victims, the Procurator Fiscal Service has in the High Court and sheriff courts a victim information service, which can explain to persons affected by crime what has happened. Having been advocate deputes at various times, all three of us—Joanna Cherry, James Wolffe and myself—have made a point of explaining things to family members or complainers afterwards. Although that can be—and certainly is—done, the question is whether it would be better simply to deliver sentences in an understandable way.

The bill complicates matters by requiring judges not only to consider the sentence that they will impose but to conduct a parallel notional sentence exercise. In other words, they will almost have to be like computers with dual processors: they will have to consider not only the discretionary life sentence but what they might have done had they gone down another route. That is where things begin to get complicated. First of all, they will have to work out a different type of disposal and then try to compare the two. The exercises are different because, of course, the paramount consideration in cases with a discretionary life sentence element is protection of the public. No matter whether we are talking about a discretionary life sentence or an order for lifelong restriction, that is what is at the forefront of one's mind with regard to what is a relatively rare disposal.

James Wolffe: I want to make two points, the first of which relates to what the sentencing judge is expected to do. Generally, sentencing judges seek to explain, at least in general terms, their process of reasoning in identifying a particular

sentence. If a methodology were to be prescribed by statute, one would not be surprised to find judges finding it necessary to explain how they have applied it.

Secondly, a parallel exercise is to some extent inherent in the requirement that the sentencing judge must take into account the way in which the early release provisions would have applied had it not been for the public protection imperative. In that respect, such an exercise is necessary. However, we are questioning the extent to which it is necessary for that to be prescribed in a relatively rigid, step-by-step way instead of leaving it to experienced judges to do anyway. After all, if they get it wrong, they will be corrected by the appeal court.

The Convener: Thank you for that. I am still in the tunnel, but I think that I see light at the end of it. Graeme, are you seeing any light?

Graeme Pearson: I thought that I had seen some, but it escaped me for a while. Nevertheless, I am very pleased to have listened to the discussion and to realise that I am not alone in the darkness.

I have two questions that are connected to the issue of the public's confidence in and understanding of the processes that are being administered on their behalf. I have no doubt that at the completion of a trial the professionals in the court would explain to victims' families and so forth what had just occurred but, as you will agree, those are not always the best circumstances in which to receive and try to understand that information. As we have all found, it is a real challenge just to try to read all this stuff in the cold light of day.

As far as understanding the process is concerned, do you have any knowledge of other jurisdictions that have dealt with such matters? Have they had to face the same challenge or have they found a different approach?

Michael Meehan: I cannot assist you with regard to how other professionals explain to those affected by crime what has happened—

Graeme Pearson: I am thinking more of the court process and the administration of justice.

Michael Meehan: No doubt others who were involved in the Petch and Foye case are better placed to answer, but I know from my knowledge of that judgment that regard was had to the English provisions, although it is pointed out that there are some distinctions in England. That is perhaps part of the difficulty. In Scotland, one looks at what would be imposed in a discretionary life sentence and takes into account what one might impose by way of parallel consideration. When we start to look to other jurisdictions as well, it further complicates the matter.

However, the general exercise that has been conducted by the English courts has been similar. In the O'Neill case, which was one of the first cases in which the courts interpreted this type of scenario, regard was had to the English principles, albeit that there was recognition that the statute in England was slightly different in some respects.

Joanna Cherry: In the case of Petch and Foye, the court was addressed about the position in England. Put briefly, similar problems have been encountered in England in relation to attempts to achieve comparative justice between prisoners who get a discretionary life sentence and those who are given a determinate sentence.

Graeme Pearson: My second question is probably one of the daft-laddie questions that I often come up with at our meetings. Is it not possible that the judge could indicate an earliest date of release at the point of judgment and sentencing? At present, there is a notional sentence, but everybody in the system discounts it, because they presume that everything will go well with the sentence and that, although the person gets eight years, they will only do four or five. There is then the other add-on, as you rehearse in your written submissions.

Is it not feasible that the judge, at the point of judgment, could let the witnesses know what the individual's earliest release date will be? They could then be informed that, if other conditions are not met during the sentence, it will go beyond that date and the other dates will kick in. From the public's viewpoint, people see someone who has been sentenced to 10 years appearing on the public highways long before that time is up. That does not make sense to people.

Is it impossible to look towards such a system? Would it be too complex? Should I leave it alone and go and lie down in a dark room for a while? What is the answer?

James Wolffe: It is perhaps necessary to think separately about determinate sentences and the kind of sentences that we are discussing, which are essentially life sentences. In creating orders for lifelong restriction and discretionary life sentences, the judge is required to specify the punishment part. In so far as it goes, my experience is that judges are at pains to explain that that is the period that the prisoner must serve in prison. Thereafter, whether they will be released is a matter for the Parole Board. It is not the case that the prisoner will be released at the end of that period. The issue that the bill seeks to address is how the judge fixes on the right period for the punishment part.

There is a separate issue in relation to determinate sentences. The Parliament has decided that, irrespective of the considerations that go to make up the determinate sentence, the statutory early release provisions will kick in. After half the sentence has been served, if it is a long-term sentence, the prisoner will be eligible for parole, although they will not necessarily get it. The problem that the bill seeks to address is how, when fixing the punishment part of a life sentence, one should take into account the early release provisions, which statute has provided and which cut across the sentences that judges have imposed. I would not want to underestimate the difficulties of that exercise. I recognise them, and the legislation perhaps reflects them.

The question that we are putting on the table is whether it is helpful or useful for the method by which that number is obtained to be laid down in the prescriptive way in which the bill lays it down. To answer the question directly, certainly in the cases that we are discussing, it would not be at all out of order for the sentencing judge to say to the public and to those in court, "This is the minimum period that this person will serve in prison. After that, it'll be a matter for the Parole Board."

David McLetchie (Lothian) (Con): If I understood correctly, it was said earlier that the bill will make a complex situation even more complex. As we have just heard, a lot of this is bound up with the present provisions on the statute book in relation to the automatic early release of prisoners who are on determinate sentences. Rather than have a patchwork piece of legislation such as the bill, which will make a complex situation more complex, would it make sense to review sentencing in general, and in particular the existence of that feature on the statute book, which the Government repeatedly says that it is committed to ending?

Michael Meehan: The point that you have raised very much ties in with the previous point: when one is dealing with a discretionary life sentence, the punishment part is fixed, so there is clarity about how long the person must serve in prison. The victims of the crime will be aware of that. With fixed-period sentences, there is not that clarity. If one had an overall review and removed that provision, there would be parity within the legislation.

In short, if someone was sentenced to two years or four years and it was made clear that that is the length of time that would be served, that would result in a system in which there was consistency in what was announced in court. People sitting in the public benches would know how long the person would serve by way of punishment part.

The point that you raise applies to the more common sentence, which is the determinate sentence, in which a proportion is served before a person is eligible for parole. With the punishment part, on the other hand, the entire period must be served before a person is eligible for parole.

James Wolffe: One can have an interesting debate about whether in the long run there needs to be a more thoroughgoing review of sentencing. A particular issue was raised by the case of Petch last year regarding the way in which this particular piece of legislation applies and is being interpreted. Although the Faculty of Advocates takes no position on the underlying policy question, it recognises that the Government has identified a particular issue arising in relation to this legislation, which it sees the need to address now rather than in the long run.

David McLetchie: Is the issue of protection of the public not meant to be about protecting the public in the future? The public are already protected in the present because the prisoner is in the jail. The idea that within a determinate sentence there is an element of protection of the public seems to me somewhat bizarre. Protection of the public should be about whether it is safe to let the man out. In other words, it looks forward rather than back.

Would it be fair to say that the sentence should by and large reflect an aspect of the sentencing system, such as the punishment element, the deterrent element—retribution, if you like—or the declaratory or condemnatory element? Protection of the public is about whether the prisoner is safe to be released in the future. Am I missing something, or is that a logical statement on how the system should work?

James Wolffe: With regard to those types of sentences, you are absolutely right. First, there is the question of what period is required for punishment, and secondly, after the punishment part has been served, there is the question of whether the prisoner can safely be released. That is an issue for the Parole Board, looking forward. The challenging problem is to identify the right period that is to be served by the prisoner for the purpose purely of punishment, and to strip out from that the questions of protection, risk and so on, which will ultimately be a matter for the Parole Board to consider once the punishment part has been served.

10:30

David McLetchie: Indeed. I was struck by the Law Society of Scotland's comments in its submission about the notional stripping out of notional discrete elements from notional fixed sentences. It concludes:

"if this stripping out exercise was removed, then as a matter of law, an indeterminate prisoner would not in any

circumstances be eligible for parole at an earlier stage than a comparable determinate prisoner."

It strikes me that that is what the bill is designed to achieve in order to remove the Petch and Foye anomaly.

What is the objection to stripping out or abandoning all those notionals, as the Law Society suggests? Why do we not get rid of those and concentrate on the real world? Instead of having a complex piece of legislation that makes things more complex, we would have a piece of legislation that one would hope would make things a bit simpler. Can someone explain why the route that the bill proposes is preferable to what seems to be the comparative simplicity and elegance of the Law Society's suggested solution?

The Convener: Does Rod Campbell want to come in on the same point?

Roderick Campbell: I was going to ask a very similar question to the one that David McLetchie raised. Moving on from that—

The Convener: I think that we should have an answer to that one first. Is your question connected?

Roderick Campbell: It is connected—I just wanted to add something. Neither the Law Society nor the Faculty of Advocates has commented specifically on the European dimension, but from my limited understanding the decision in the case of Thynne, Wilson and Gunnell v United Kingdom was about the requirement to review the position where someone had passed the punishment part of their case and was being held for custody purposes, and the need to ensure that there are regular reviews in that regard.

If the notional element of protection of the public was stripped out, what implications would that have in terms of compatibility with the European convention on human rights?

James Wolffe: I will take the two questions sequentially. You will have to raise the question of why that particular approach has been taken in the bill with those who are responsible for it, but perhaps I can offer what I take to be the explanation.

There is a statutory framework—which has been considered in the case of Ansari v Her Majesty's Advocate and the Petch case—that requires the court to go through three stages: to identify the notional determinate sentence, to strip out from that the risk element and to apply the appropriate percentage. In the Ansari case, the majority of the court took the view that there was a flexibility in the appropriate percentage, while in the Petch case, the court said that the percentage is ordinarily to be 50 per cent.

Essentially, the bill seeks to focus on that final element and reintroduce the flexibility that the Ansari case suggested was—or should be—there. I can understand why that approach has been taken. However, we suggest that perhaps the opportunity is being missed to stand back and look again at the structure of the legislation as a whole, and to ask whether the problem may be at least at one stage further back, where the court is asked to carry out an artificial exercise of stripping out from the determinate sentence an element that is notionally for public protection before applying the percentage.

I suggest that there are two separate questions here. One concerns the period that requires to be fixed for the purposes of retribution and deterrence—that is the overarching aim. As part of that exercise, it must also be borne in mind that, had the prisoner been sentenced to a determinate sentence, he or she would have had the benefit of the early release provisions. Going back to the case of O'Neill v Her Majesty's Advocate, one can understand why, particularly given the historical development of this area of law, the legislator has felt it necessary that one should try to exclude rigorously from the second exercise any questions of public protection. However, standing back from that, one is entitled to ask why that should be, as the issue of fairness and comparative justice must surely be related to the actual determinate sentence that would have been imposed, not to the stripped-out determinate sentence. I do not know whether that helps to answer Mr McLetchie's question.

On Mr Campbell's question, as I understand it, the key convention requirement is to fix the period after which there must be a regular review by the Parole Board. There may or may not be convention issues around the parity of treatment of prisoners who are sentenced to life sentences and those who receive determinate sentences as a matter of convention law. However, it has clearly been recognised as a policy matter by the court in the case of O'Neill v Her Majesty's Advocate, by the Scottish Parliament in the legislation that already exists and by the Government in its policy memorandum that the court ought to have regard to the significance of the early release provisions when it fixes the punishment part.

Roderick Campbell: I am still a little unclear. If we were to go down the route that has been suggested by the Law Society and remove the stripping-out for the protection of the public, would that give rise to convention issues? [*Interruption*.]

The Convener: This is a bit like "University Challenge": you may confer. I was beginning to wonder where I was.

James Wolffe: Sorry, convener.

The Convener: No, it is fine.

James Wolffe: I would not exclude the possibility that people might seek to raise points under the convention, so it might be rash of me to give you an off-the-cuff opinion on the matter. No doubt those who are responsible for the bill will want to consider that carefully. I invite you and them to consider whether there really is a problem, ultimately, in leaving it to the court to make the relevant comparison, taking into account the early release provisions as required and referring to the real determinate sentence rather than the stripped-down determinate sentence. The proposition that that would run into insuperable convention problems invites scrutiny, if I can put it that way.

Roderick Campbell: Do the Law Society witnesses want to comment?

The Convener: I am leaving it to them to self-nominate if they want to answer.

Michael Meehan: The answer to the question whether it would offend convention jurisprudence would have to be, "It depends." It would depend on how the sentencer articulated what he or she did. If the sentencer were to say, "I have apportioned a discrete element to protection of the public," that could offend the convention, albeit that the convention requires comparative sentences as opposed to absolute parity. However, in the Law Society's submission, we make the point that protection of the public is an issue that runs through the sentencing exercise and is not regarded as some minority or discrete element.

It is informative for one to have regard to the case of Petch and Foye v Her Majesty's Advocate. According to the report, Petch pled guilty to the rape of two girls aged between eight and 11. Looking at it realistically, we might find it somewhat odd for the issue of protection of the public to be considered later on as some kind of minority element.

With regard to Mr McLetchie's comments, while a prisoner is in jail, the public are protected. In my respectful submission to the committee on behalf of the Law Society, I point out that, if the sentencer takes the view that some additional requirement is needed, that can be dealt with in an extended sentence. If there is no such sentence, one can work on the basis that although protection of the public is a paramount consideration it has not resulted in a separate, discrete and consecutive disposal. As the Law Society's submission makes clear, as long as one does not conflate issues of consideration for a sentencer as necessarily resulting in a discrete element of sentence one does not need to strip out this notional element from a notional sentence.

The Convener: Crumbs. To continue the metaphor, I fear that the light is fading again.

I take from your comments that, in attempting to cure something, the bill is simply making things even more complicated and that we should not be doing it this way. There are other ways of addressing the issue.

James Wolffe: Precisely. As I understand it, the legislative purpose is to reintroduce an element of flexibility for sentencers. However, the Faculty of Advocates questions whether there are not other ways of achieving flexibility in the system and whether it is really necessary for the legislation to take this highly prescriptive approach—particularly given, as Joanna Cherry observed, the courts have found the existing prescriptive approach difficult.

The Convener: The bill is certainly written in a difficult way. You might well say that it is not for you to draft legislation but, by golly, I would certainly like to see an amendment from our witnesses to clarify things. I appreciate that the bill seeks to correct an existing flaw but we need something that makes it easier to understand not just for us but for the public. Believe you me, the committee is not stupid but every time that something gets explained the more complex I feel it becomes. We got up early this morning and are bright as buttons but the whole thing is still too complicated.

You have made your point about the bill. If you wish to suggest any amendments, you may do so to committee members or any MSP—or, indeed, the Cabinet Secretary for Justice. Do you wish to say anything about part 2, which relates to the Scottish Criminal Cases Review Commission?

James Wolffe: I have nothing to add to the very brief comment in our written submission.

The Convener: In that case, I end this evidence session. I thank the witnesses for their evidence. They tried their hardest and almost got us there; however, we got the most important point—the bill is too complicated the way it is.

I suspend the meeting for five minutes.

10:43

Meeting suspended.

10:48

On resuming—

The Convener: I welcome the second panel of witnesses to the meeting. Gerard Sinclair is chief executive of, and Michael Walker is senior legal officer at, the Scottish Criminal Cases Review

Commission. I thank you very much for your written submission.

I refer to paragraph 6 of that submission. In response to the question

"Is the framework provided in the Bill appropriate for the purpose of the SCCRC's determining whether it is appropriate to disclose information?"

you say "Yes", but you go on to say:

"in relation to the information the SCCRC obtained from foreign authorities, the determination for the SCCRC is not whether it considers it to be appropriate to disclose that information. Rather, if it does not receive the relevant consent from each designated foreign authority, the SCCRC is not entitled to disclose the information."

Forgive me, but you seem to see that as an unnecessary impediment being put into the bill. Have I read that wrongly?

Gerard Sinclair (Scottish Criminal Cases Review Commission): I think that the "Yes" is very much a qualified yes. We sought to outline in our written submission what the qualifications are.

In considering the bill overall, it is helpful to recognise that there are different requirements for the different types of data with which the bill deals. As we outlined in our written submission, they can probably be summarised as information that has been received or provided by foreign authorities—as the convener has already identified—information that is subject to legal or professional privilege, and information that is subject to consideration under the Data Protection Act 1998, which is the core type that the bill addresses. Information that has been provided by foreign authorities is not covered by data protection legislation; in fact, there is no requirement under our legislation or under data protection legislation to seek the views of foreign authorities.

However, it is right that the Government considers that in order to maintain mutual co-operation and mutual arrangements for the exchange of information, it should be required to get foreign authorities' permission for release of any information that they have provided before it can consent to the commission's releasing it. That is why it is not the "appropriate" test that is applied in that case but the "entitlement" test. In effect, if the foreign authorities from whom the information was obtained were to refuse, that would be an end to the matter; the commission would be unable to release that information, because it would not come within the remit of the Secretary of State for Justice's consent or of the bill's consent.

The Convener: I would challenge that. What you said is quite right, but that is where politics might come straight up to the face of justice. You will forgive me asking whether, if it is in the interests of justice to disclose information from foreign authorities that are not bound by data protection legislation, it would be appropriate for the SCCRC to consider that it should be disclosed, as opposed to its not being disclosed for what might be political reasons.

Gerard Sinclair: I take your point, but the difficulty is that that is merely an interesting debate. At the end of the day, the bill will place a restriction on the commission's disclosing information without its having explicit consent, so we would not be able to disclose the information. Whether we believe the restriction is appropriate is a separate matter. As you said, convener, it is perhaps a political rather than a legal matter. However, the bill as it stands contains that restriction.

The Convener: The bill is subject to amendment.

Michael Walker (Scottish Criminal Cases Review Commission): It is our understanding that the provision is included so that the Government or the commission complies with international obligations.

The Convener: What international obligations do you mean?

Michael Walker: I mean the obligations under which we, but not the commission directly, would have got information; the terms under which information has been given by a foreign authority to the Crown Office. That is our understanding of the position.

The Convener: How would we find out what those obligations are?

Michael Walker: The Crown Office would be the best people to ask.

The Convener: I may return to that. Do any members want to ask questions on this issue? It is one of my interests.

John Finnie: We talked with the previous panel about public confidence in the criminal—

The Convener: I am sorry, John, but as I asked other people to declare their interests, I should have declared an interest at the beginning, which is that I am a member of the Justice for Megrahi campaign.

John Finnie: Will public confidence in the criminal justice system be enhanced by the bill's proposal, or will it remain the same?

Gerard Sinclair: Clearly, one consideration is whether the disclosure of information might give the public a fuller understanding of the level of investigation that the commission had carried out and the reasoning behind the commission's decision to refer a case.

On the national and international interest in the Megrahi case, the commission is on the record as saying that it feels that publication of the statement of reasons document would benefit the public's understanding of the commission's role. Clearly, a number of considerations must be addressed before that can happen. I think that the bill is part of the process that would go towards addressing those considerations.

John Finnie: Referring to cases generally, rather than just to Mr al-Megrahi's case, if any information that was disclosed indicated criminality on the part of a foreign authority—for example, the involvement of the United States in rendition—would there be a conflict for your body between disclosure and the public interest?

Gerard Sinclair: Disclosure of criminality depends on whether it relates to an individual or an organisation. If the allegations of criminality relate to an individual, the case clearly falls within the ambit of sensitive personal data and would come under the auspices of the Data Protection Act 1998. The information can be released only with the individual's consent or—as we state in our written submission—under an order under paragraph 10 of schedule 3 to that act.

John Finnie: To stick with the example of rendition, if that was a feature—I am talking in the most general sense—would you be comfortable as an organisation and as individuals that it was within your knowledge but you were unable to disclose it?

Gerard Sinclair: You prefaced your question by suggesting that we ignore Mr Megrahi's case for the moment. His case is perhaps unique. Given that the vast majority of the commission's cases involve, for example, housebreaking in Giffnock or serious assaults on Princes Street, rendition does not usually come within our remit.

John Finnie: With the greatest respect, I say that you cannot predict what cases will come to you in the future.

Gerard Sinclair: That is true.

John Finnie: I am giving you an entirely hypothetical example.

Michael Walker: Under the provisions in the bill, we would have to refer such a case to the High Court and the applicant would have to abandon his case. If a case fell into that category, I see no reason why we would not disclose that, although the obvious encumbrance would be that we would perhaps need the consent of the foreign state that was involved. The restrictions would be that it would have to be a case that we referred to the High Court, and that the applicant would not proceed with an appeal, as Mr Megrahi did not.

The number of such cases so far is three in the 12 years for which the commission has existed, so I do not predict that there would be a lot more.

John Finnie: Would you require the permission of the United Kingdom Government? If so, who would seek it, and from whom?

Michael Walker: I do not think that we would require such permission under the bill.

The Convener: So, the UK is not designated as a foreign legislature or country for the purposes of disclosing material.

Gerard Sinclair: We would not have thought so.

The Convener: You are able, in the case of the UK, to exercise discretion to disclose more, if you wish, than you would, were a foreign country to be involved.

Gerard Sinclair: Yes.

The Convener: It is useful to have established that.

Jenny Marra (North East Scotland) (Lab): Mr Sinclair, when you talked about criminal behaviour in your response to Mr Finnie, you drew a distinction between individuals and authorities, and you said that individuals fall under the jurisdiction of the Data Protection Act 1998. Will you clarify the position for bodies, Governments or institutions?

Gerard Sinclair: I suspect that the commission, in obtaining information, whether on rendition or any other criminality that was alleged against a national Government, would be required to obtain it through some form of mutual assistance arrangement, which would have to be Government to Government. I suspect that such an arrangement would come with conditions and that the material would be provided for the commission's use in its considerations, but that it would not be provided for the purposes of public consumption or publication. We would have to abide by that. It is a hypothetical question, but I suspect that that would be the scenario. We would not get that type of material unencumbered by conditions.

Graeme Pearson: I have a question on gathering of information. Let us suppose that the people who are party to a case have agreed that you can have the information. The bill seems to state that you must not, thereafter, automatically disclose it to the public in releasing your case analysis. In what circumstances would the commission decide that it was not appropriate to disclose fully the information that it had gathered?

Gerard Sinclair: Application of the intended appropriateness test that the bill includes would be a question of examining the material that was

available for disclosure and then deciding whether disclosure of that material would provide a balanced and fair reflection of the commission's work and reasoning.

11:00

It is a matter of public record that the statement of reasons is some 800 pages long. If we had to redact the document and delete parts of it, and if that got to the stage where we felt that the document was becoming unbalanced and did not reflect the commission's views, we may well decide that it would not be appropriate to publish that edited document and we would give reasons for that.

Graeme Pearson: You have answered my supplementary question. Thank you.

Humza Yousaf (Glasgow) (SNP): I thank the witnesses for coming along. My question relates to the fact that their submission mentioned that they were having discussions with the Ministry of Justice about how they may release sensitive personal data without the need for a schedule 3 order under the 1998 act. What route do you envisage those discussions taking? How else do you envisage releasing the data? If they were to come to a successful conclusion, would that set a dangerous precedent for data protection?

Gerard Sinclair: We think that it would not. As indicated in our written submission, our starting position is that we will require an order under paragraph 10 of schedule 3 to the 1998 act, because we believe that the only other method that we could use legitimately to publish the sensitive personal data that are contained in the documentation would be to obtain the consent of the parties. We consider that that would be unlikely, given our previous experiences.

I note that there is some suggestion in the information commissioner's response that paragraphs 7(1)(a) and (b) of schedule 3 might be a route for the commission to overcome consent. Our view is that that is not an appropriate route, but we have indicated that we are happy to meet the Information Commissioner's Office and the Ministry of Justice to tease out why we believe that. If we persuade them of our views, we will be left with the paragraph 10 order.

You asked whether that would breach the dam for data protection. We do not believe so, because the circumstances are unique and the Ministry of Justice does not give out such orders lightly. It has given out some, but the numbers are few and they have been given out for limited purposes. We envisage that the order would be drafted for a restricted and limited purpose that would not cover all the cases with which the commission deals.

Humza Yousaf: I agree that the al-Megrahi case is entirely unique and that the circumstances are not likely to occur often. It is difficult to see how you could negotiate a route with the Ministry of Justice and the information commissioner that could not be argued to have set a precedent for cases further down the line.

Michael Walker: If the view is taken that we require an order, we would expect it to be written in such a way that it would apply only to the Megrahi case. It would probably have to pass a test of substantial public interest.

Humza Yousaf: If there was a test of substantial public interest, that alone would give a hook to a case further down the line.

Michael Walker: It would not do that if the order was written such that it applied only to the Megrahi case and the other cases to which the bill applies. As I stated earlier, those are very few. As Gerry Sinclair said, it would not bust the dam open for the release of sensitive data in the future.

If you look at how the other orders have been written, you will see that, besides the test of substantial public interest, the order would require that the disclosure of the data did not cause substantial distress to the individuals concerned. It would be very limited.

Humza Yousaf: Okay. Thank you.

I would like a clarification. Mr Sinclair said that getting the consent of the parties involved would be extremely difficult and, in fact, unlikely. Do you mean that Mr Megrahi and his parties do not want the sensitive information to be released?

Gerard Sinclair: As far as the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009 is concerned, we tasked ourselves with seeking, in the first instance, the consent of what we considered to be the major parties, because it was clear that, if we did not get consent from the main parties on the matter, there did not appear to be any point in going down the line to the more minor individuals who were involved in the document. We did not get unqualified consent from any of the major parties, including Mr Megrahi. As a consequence, we do not anticipate that his position will have changed materially.

The Convener: Even if you had his consent, I take it that the statement of reasons would be redacted considerably—or would it be published in full?

Gerard Sinclair: If we had consent, that would overcome all the data protection issues, and the data protection matters could be published in full. However, as I indicated at the outset, there are two other aspects: the international aspect and the legal professional privilege aspect.

The Convener: So, such information would be left out.

Gerard Sinclair: It would not necessarily be left out because, clearly, were Mr Megrahi to provide his consent on the data protection matters, it would be rather perverse of him not to provide his consent under legal professional privilege. I would expect one to go along with the other.

The Convener: Would the foreign part remain redacted?

Gerard Sinclair: It could remain redacted, but that presupposes that the foreign and international Governments objected to publication. They may not object to publication of the matters on which they have provided material.

The Convener: Under the bill, if the information regarding foreign authorities had come via the UK Government, whether to publish it would be at the discretion of the SCCRC. You would not have to seek the consent of each designated foreign country, because the information had come from another party. Is that correct?

Gerard Sinclair: Presently, that is not correct, because the bill requires us to seek such consent. If the bill were amended and that requirement was taken out, we would not require to seek such consent.

The Convener: I am sorry, but you say in your submission that

"if it does not receive the relevant consent from each designated foreign authority, the SCCRC is not entitled to disclose the information",

but if the information from foreign authorities came via the UK Foreign and Commonwealth Office, you would not need the consent of the FCO because—as you have told me—it is not a foreign authority.

Gerard Sinclair: I think that the definition of "affected persons" would extend to those foreign authorities.

Michael Walker: If you are asking whether, if the information had come via the UK Government, we would still require the consent of the foreign authorities—

The Convener: I am.

Michael Walker: Our view is that we would still require that consent, because the bill is worded such that, whether we received the information directly or indirectly, we would still have to seek consent. Ultimately, the issue is where the information has come from, not the route by which it has come.

The Convener: The UK Government might be where you had got it from.

Michael Walker: We are working on the basis that the bill is meant to catch information that has come from foreign authorities. It does not matter whether it has come via the Lord Advocate or the UK Government.

The Convener: Okay.

David McLetchie is waiting. Is your question a supplementary, Rod?

Roderick Campbell: It is to do with legal professional privilege.

The Convener: That is a separate issue.

David McLetchie: I would like you to clarify something. If the al-Megrahi appeal had proceeded, is it the case that everything in the 800-plus pages of the statement of reasons and the 13 volumes of evidence would have been published?

Gerard Sinclair: No.

Michael Walker: No.

David McLetchie: What would not have been published if the appeal had proceeded?

Gerard Sinclair: The commission would still not have published anything. There have been a number of commission referrals, some of which have led to successful appeals and some of which have led to unsuccessful appeals. Under section 194J of the Criminal Procedure (Scotland) Act 1995, the commission is still obliged to withhold publication until such time as an order is made under section 194K(1). We never publish, even if the matter has proceeded to appeal.

That does not mean to say that the information will not come into the public domain because, as is evident from previous referrals, the defence and the Crown make copious use of the materials that the commission provides. Those are addressed directly in the court, which is a public forum, so they can be reported by the press. However, the commission would not go on to publish its statement of reasons.

David McLetchie: Right, so the commission would not publish the statement of reasons, but is all the material not public, in the sense that it is available to other parties, such as prosecutors and the defence? I am trying to get a handle on what difference the bill would have made as regards publication of all the material that you have gathered.

Michael Walker: If the appeal went to court, the information in the document would be available to the parties to the appeal and the court. However, it would not necessarily be available to the general public.

David McLetchie: But one of the parties that held it could make it available to the general public.

Michael Walker: That would be a matter for the party involved.

David McLetchie: What I am trying to get at is that, if the appeal had proceeded, all this evidence that you had garnered and all this material—all 13 volumes and 800 pages of it—would have been made available to the parties to the appeal. Is that right?

Michael Walker: Yes.

Gerard Sinclair: Yes.

David McLetchie: Therefore your control of that information or data would no longer be absolute. The parties to the appeal would have it and could decide whether to publish and make it public.

Gerard Sinclair: That is right.

David McLetchie: Did all the people who provided you with evidence know when they did so that that would be a possibility?

Gerard Sinclair: Yes.

David McLetchie: When they gave you the evidence, they knew that, had al-Megrahi proceeded with his appeal, any piece of evidence contained in those 800 pages and 13 volumes could be published because it would no longer have been held in any confidential forum.

Michael Walker: I do not think that that is correct—

David McLetchie: Please tell me, then, what would not have been published. I am trying to get to the bottom of this.

Michael Walker: All the information in the statement of reasons and appendices would be with the parties to the appeal. However, as I understand it, the Crown Office would still have to comply with data protection rules and perhaps consents from the foreign authorities. Because it would have to overcome the same obstacles that we face, the Crown would not be in a position simply to publish the document—indeed, it has never done so.

As for the defence, what it did with the document would be a matter for it. Again, I think that its agents could not just publish it because of the sensitive data that it contained. I do not think that it is correct to say that, after we gave it to all the parties, one or other party could simply put it on the internet.

David McLetchie: I am not quite sure—

The Convener: I am sorry but, in an appeal at which new facts had emerged, could the defence not refer to the evidence in court, name people and cite them as witnesses?

Gerard Sinclair: Yes.

The Convener: Which is publication.

Gerard Sinclair: Perhaps I can slightly nuance Michael Walker's previous answer. No matter whether it is a refusal or a referral that either proceeds to appeal and is concluded or is abandoned, when a decision is made, every applicant gets a full copy of it and may choose to do what they wish with it. Theoretically, there is no restriction on them. As a public organisation, we have our non-disclosure obligations, but we cannot bind an applicant to them.

As for those who give us information, we tell them that we will retain their confidentiality but that, if the matter is referred, it is possible that the information might be placed in the public domain.

David McLetchie: Which is really the point that I am making. Everyone who provides you with evidence does so in the knowledge that every single piece of it might come into the public domain because, at that point, your organisation no longer has control over it and cannot guarantee to protect its confidentiality. Is that the case?

Gerard Sinclair: That is correct. However, if there were a particularly sensitive piece of information that the commission needed to know in order to reach its deliberation but which might put someone's life at risk, the commission could accept it on the understanding that it would not place it in the statement of reasons.

David McLetchie: But what if that information were material to the person's guilt or innocence?

Gerard Sinclair: At the end of the day, the commission has to give reasons for its decisions—it does not have to expose all the information that it obtained to reach them. Of course, such circumstances would be very exceptional; indeed, I cannot, off the top of my head, think of any times when we have chosen to exercise that power. However, I know that the English commission occasionally issues to the applicant a slightly redacted statement of reasons and gives the court a full statement. We have never gone down that road. The situation could arise in which we would take evidence and give an undertaking that it would remain confidential, but the normal procedure is that we say that we retain confidentiality but that there is always a possibility that the evidence will become public if the matter is referred.

11:15

David McLetchie: So, there are two groups of evidence. First, there is the 800-plus pages and 13

volumes, which might have come into the public domain had the appeal proceeded, as you would no longer have had control over it. Secondly, there may be another group of evidence that you may have chosen not to incorporate because you did not think that it was material to your statement of reasons or your justification as to why the matter should be re-examined. There may be another body of evidence, which would not be released in this context—is that correct?

Gerard Sinclair: Yes.

The Convener: Sorry—I thought that you said that, in this particular case, you have never withheld evidence. Was that just for the protection of individuals' safety? You said earlier that you have never kept a piece of evidence outwith the other, publicised—

Gerard Sinclair: Sorry—I have misrepresented the position. We have done that on occasion.

The Convener: Oh.

Gerard Sinclair: I do not think that that is a great surprise. It is a matter of record that, in this particular case, we referred to a piece of evidence in the statement of reasons but indicated that we would not disclose the detail of it. That became part of the debate at the appeal.

The Convener: That is fine—you have clarified that. I heard you say earlier that you had never done that although it had been done in England.

I want to clarify something that you have said in order to get my head round it. We have heard that some evidence is not there.

Gerard Sinclair: Yes.

The Convener: It is separate. David McLetchie has established that with you. The material that is out there, including that on third parties, could all have been referred to in court and cited, as witnesses have said. The issue of data protection would not have arisen then, as that information would simply have had to be in the public domain.

Gerard Sinclair: Yes.

The Convener: In considering personal data protection issues in your negotiations with the cabinet secretary, was it taken into account that, had the appeal proceeded to its second stage with the new evidence, that evidence would all have been out there in the public domain? Is it not a bit artificial to say now that we have to protect people because the appeal did not proceed?

Michael Walker: There is some guidance from the Information Commissioner's Office to the effect that the fact that something has been debated in court does not equate to the information having been put online. Those two situations are not like for like. As you say, the appeal did not proceed, so we are not in the position of the evidence having been debated in open court anyway. I do not know whether that is a hypothetical point.

The Convener: It is useful to have that on the record for when we address the Cabinet Secretary for Justice.

John Finnie: I have a point that relates specifically to that. One area in which there would be no disclosure of either documentation or information arising from that documentation—indeed, witness statements—is information that is covered by the Official Secrets Acts.

Michael Walker: Yes, but in our written submissions we state that we do not perceive the Official Secrets Acts as being relevant. There is no information in the statement of reasons that would be covered by the Official Secrets Acts.

John Finnie: But such information would not be disclosed in a statement of reasons.

Michael Walker: Do you mean in general, not just in the Megrahi case?

John Finnie: Yes, in a case generally.

Michael Walker: We would be bound by the Official Secrets Acts, but they do not apply in this case.

John Finnie: That would not relate simply to documentation; it could relate to witnesses connected with the documentation.

Michael Walker: Potentially, but the issue has never arisen to date, so it is not something that we have had great discussions about.

John Finnie: Is it fair to say that, for any case that involved official secrets, the statement of reasons would not mention them?

Gerard Sinclair: Yes, unless we got consent to disclose the information. If we were given material that was covered by the Official Secrets Acts, we would not disclose it. We might go back to the providers of the information to ask for it to be made exempt or for a dispensation. If we were told that we could have the information to assist us in reaching a decision but that it was not to be placed in the public domain or appear in the body of the statement of reasons, we could choose not to accept the information under those terms or to accept it and abide by them.

John Finnie: Who would you go back to? Would it be the person who provided the information or some other central body?

Gerard Sinclair: Information that was covered by the Official Secrets Acts would probably come from a Government body. We would go back to the Government body that provided us with the information.

The Convener: Paragraph 8 of your submission states:

"The SCCRC does not consider that the information in the SOR is covered by the Official Secrets Acts."

You have repeated that today. However, given that there is other evidence that is hived off somewhere and we will not see, is that covered by the Official Secrets Acts?

Gerard Sinclair: Some of it is—a very limited amount.

Roderick Campbell: I have a short question. Your submission points out:

"there is no indication in the Explanatory Notes accompanying the Bill that the purpose of the Bill is to override"

legal professional privilege. Have you had discussions with the Scottish Government or any other parties about legal professional privilege?

Michael Walker: In discussions before Christmas, we notified the Government that we felt that there was an issue. An earlier draft of the bill had a provision that might be interpreted as providing the necessary authority to overcome the privilege. However, that is not in the bill that is before the committee. Our view is that there must be an express provision that deals with legal professional privilege. There will then be an issue about whether that provision is human rights compliant, but there certainly has to be an express provision in the bill.

Roderick Campbell: So that is needed if we seek to override legal professional privilege.

Michael Walker: Yes. Case law is clear that the privilege can be overridden only by the express authority of primary legislation.

Roderick Campbell: Therefore, there might be an indication that there is no intention to override legal professional privilege.

Gerard Sinclair: My recollection is that our discussions with the Scottish Government related mainly to data protection issues. In our initial response to the pre-introduced or draft bill, we did not focus on the issues of foreign authorities or legal professional privilege. I suspect that on-going discussion might elucidate the thinking behind the issue.

The Convener: Your submission states that you

"might have some difficulty in identifying the relevant designated foreign authority for each State, and that it will require the assistance of the Lord Advocate in order to do so."

Just for the record, is there a conflict of interest when you seek assistance from the Crown Office on something that might show—I do not know because I have not seen it, although you have—that the Crown Office got it wrong? I am not impugning your reputation. I am just saying that there might be a conflict of interest.

Gerard Sinclair: Our statutory powers entitle us to seek assistance from a number of organisations, including the Crown Office and the police. The Crown Office tends to be the first port of call, simply because the vast majority of information is filtered through there. On the practicalities, it probably speeds up the process if we liaise with the Crown Office to ask from whom it obtained the information and to ask it either to effect an introduction or to give us contact details. That is probably quicker than our seeking to discover the information with our limited resources. That is the thinking behind that.

The Convener: There is an argument that, if the measures that we have discussed are in the bill, we will make it pretty well impossible to get something that is worth the paper it is written on. Will there be much left if we have to get the consents and deal with data protection issues and foreign powers, and given that there is stuff that is not in the statement of reasons?

Gerard Sinclair: It depends on what the act that is passed allows for. If, based on the submissions that we have made, the act specifically addresses the idea of legal professional privilege and provides a specific and explicit authorisation in somewhat unique circumstances, if the UK ministers provide the order under paragraph 10 of schedule 3 to the 1998 act, and if the commission can deal with the other data protection issues and get permission from the foreign authorities, there is no reason why virtually all of the statement of reasons could not be published. However, there are a lot of ifs and buts.

The Convener: Indeed. Unless there are any other questions, we will leave that issue.

David McLetchie: Can I just clarify a couple of points? Notwithstanding the release of the information, the question of guilt or innocence is not going to be adjudicated on anywhere, is it?

Gerard Sinclair: Not based on the release of the information.

David McLetchie: No—exactly. And there is no indication that any court anywhere will, on the basis of that information, ever adjudicate on the guilt or innocence of al-Megrahi.

Gerard Sinclair: I would not expect so.

The Convener: I do not know whether that is a matter for—

David McLetchie: I just want to know—that is what I am trying to establish.

From what you said, Mr Sinclair, with regard to the 2009 order—if I understand this correctly—al-

Megrahi certainly never gave unqualified consent for the release of all that material, and I think that you indicated to the committee that he was highly unlikely to do so in the current context if one decision was consistent with the other. Is that right?

Gerard Sinclair: I would expect so.

David McLetchie: And I would not have thought that many lawyers would encourage Mr Fhimah, who was acquitted, to release a lot of information that might cast doubt on the security of his acquittal.

Gerard Sinclair: Mr Fhimah failed to respond to us.

David McLetchie: Right. One is therefore tempted to ask what the point of all this is.

The Convener: I am not giving evidence, but I say to Mr McLetchie that I think that the commission currently has powers, if an appeal is abandoned in very specific circumstances, to publish a statement. Am I wrong about that?

Gerard Sinclair: No, we do not at present have any powers to publish a statement.

The Convener: So you do not.

Gerard Sinclair: No.

The Convener: Is it possible for another party to step into the shoes of a deceased party who has been the subject of a statement of reasons and who has abandoned an appeal, and return to court? There is a process for that, as I understand it.

Gerard Sinclair: Yes. If an applicant is deceased, there is a procedure whereby a family member or whoever can continue with an appeal. However, with regard to obtaining consent, one consideration is that consents in relation to data protection are required only from a living person.

The Convener: That is an interesting point. I just wanted to clear that up. There is a judicial process if someone wished to take up an appeal if the legislation proceeds.

I thank you very much for your attendance and your evidence.

Meeting closed at 11:28.

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