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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 7 February 2012

Session 4

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JUSTICE COMMITTEE
5th 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:

James Chalmers (University of Edinburgh)
Robert Forrester (Justice for Megrahi)
Sir Gerald Gordon QC
Ken Macdonald (Information Commissioner's Office)
Iain McKie (Justice for Megrahi)
Len Murray (Justice for Megrahi)
Dr Jim Swire (Justice for Megrahi)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 7 February 2012

[The Convener *opened the meeting at 10:02*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the fifth meeting of the Justice Committee in 2012. I ask everyone 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.

No apologies for absence have been received.

Agenda item 1 is a decision on taking business in private. Do members agree to take item 3 in private?

Members *indicated agreement.*

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

10:02

The Convener: Agenda item 2 is our second evidence session on the Criminal Cases (Punishment and Review) (Scotland) Bill at stage 1. I declare an interest as a member of the Justice for Megrahi campaign.

I welcome the first panel, which consists of Robert Forrester, Iain McKie, Len Murray and Dr Jim Swire. I thank them for their written submission and invite Len Murray to make an opening statement.

Len Murray (Justice for Megrahi): Thank you, convener. I do not propose to take long, as it seems to me that the submission that has been lodged on behalf of JFM amply sets out our position.

Section 1.02 of our submission refers to the Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009. We submit that, in the first instance, the quickest and surest way of dealing with the matter is by the Parliament altering that statutory instrument by removing article 2(b). We believe that the bill could create as many difficulties as it could solve. The committee will be aware that the bill directs the Scottish Criminal Cases Review Commission to notify and seek the views of not only the person who supplied information, but any person who is directly affected by it. It could be argued that Mr Gauci, without whose evidence a conviction could never have taken place and who was described by the Lord Advocate of the day as “not the full shilling”, could even prevent publication. We submit that the quickest way of dealing with the matter is by removing article 2(b) from the 2009 order.

The Convener: I seek questions from members.

John Finnie (Highlands and Islands) (SNP): When, last week, I asked Michael Walker of the review group about the Official Secrets Acts he replied:

> “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.”

Len Murray: Who said that?

John Finnie: That was from Mr Walker, who is a member of—

The Convener: The Scottish Criminal Cases Review Commission.

Len Murray: Ah, the SCCRC. What did he say?

John Finnie: He said that he did not perceive the Official Secrets Acts as being relevant and that, in any case,

"There is no information in the statement of reasons that would be covered by the Official Secrets Acts."—[*Official Report*, *Justice Committee*, 31 January 2012; c 886.]

Is that your understanding?

Len Murray: It is new to me, let me put it that way. We have not touched on the issue in our submission. Did we get a copy of that?

Robert Forrester (Justice for Megrahi): What—of Walker's statement?

Len Murray: Yes.

Robert Forrester: I have only the *Official Report*. It would take me a while to—

The Convener: Please indicate your wish to speak through the chair.

Robert Forrester: My apologies, convener.

The Convener: I will take Mr McKie first and then Mr Forrester.

Iain McKie (Justice for Megrahi): I noted that comment when I read the SCCRC submission and we should accept its view that the Official Secrets Acts are not relevant. I do not think that we had formed an opinion on whether they were or were not relevant.

However, what is clear is that the SCCRC and Justice for Megrahi submissions are very similar and are pushing the same way: the present legislation and the bill as framed in fact inhibit rather than assist the release of information. We note the specific point and have nothing to say in that respect but, more generally, I suggest that, if you read the SCCRC submission and ours, you will notice a similar train of thought being expressed. The SCCRC is saying that the bill will inhibit the release of information, and we are saying exactly the same thing. Why go to the bother of introducing legislation when a simple order that already exists can be used?

The Convener: Whether we take your suggested route or the route that the Government has taken in the bill, would data protection considerations not still prevail with regard to individuals' names?

Len Murray: As the second paragraph of section 1.06 of our written submission makes clear,

"The reference to data protection is a complete red herring"

because of section 194K(4) of the Criminal Procedure (Scotland) Act 1995.

The Convener: We will need to put that argument to the witnesses from the Information Commissioner's Office, who will be giving evidence later.

Len Murray: I understand that.

The Convener: My simple understanding of your argument, then, is that subordinate legislation made here prevails over United Kingdom data protection legislation but primary legislation does not.

Len Murray: The simple solution is to remove article 2(b) from the 2009 order; indeed, that is the primary part of our submission. If I may say so respectfully, the bill seems to be a sledgehammer to crack a fairly small walnut.

Roderick Campbell (North East Fife) (SNP): Last week, Mr Sinclair said that any information that disclosed criminality in relation to an individual or organisation would clearly be

"sensitive personal data and would come under the auspices of the Data Protection Act 1998."—[*Official Report, Justice Committee*, 31 January 2012; c 877.]

If any such information disclosed criminality in those terms, do you agree that the 1998 act would be relevant?

Len Murray: I come back to Professor Black's comment—to which I referred previously and which is mentioned in section 1.06 of our submission—that data protection is a "red herring" because of section 194K of the Criminal Procedure (Scotland) Act 1995.

Roderick Campbell: I hear your views, but we will need to put that point to the Information Commissioner's Office.

Humza Yousaf (Glasgow) (SNP): This question might be for the next panel, but have the witnesses considered the wider implications of altering article 2(b) of the 2009 order or the precedent that alteration might set for the protection of other people's data?

Len Murray: At the moment, the question with which we are concerning ourselves is our submission on the bill in so far as it relates to Megrahi and his conviction. As far as we are concerned, the object of the exercise is for the information that the SCCRC is in possession of to be made available. If it is the Scottish Parliament's desire for that information to be available, which appears to be the object of part 2 of the bill, we say that there is an easier way of achieving that, which is to remove article 2(b) from the 2009 order. If there is a difficulty with removing that article, I would be interested in hearing what it is. However, so far, no difficulty has been raised.

Robert Forrester: I speak as a layman in legal matters and, to be honest, I find the whole

situation rather perverse—please stop me if you think that I am wandering off the point.

The Convener: I cannot do that to committee members if they wander off the point, so just go for it, Mr Forrester.

Robert Forrester: The commission's informants supplied it with evidence. Are we saying that they did not expect that evidence to come into the public domain? Presumably, they were fully aware of the fact that the Crown and the defence could have used it in open court in the second appeal. As we know, that appeal was dropped.

To extend the argument, one could say that that evidence should, by rights, have been brought up at the trial in Zeist. However, it was not. If it had been, we would not be talking about quashing Mr al-Megrahi's conviction, because he might have been acquitted some 11 years and seven days ago. What is more, the evidence that we all find so difficult to present to the public would have been in the public domain for the past 11 years and seven days.

Speaking as a layman, I am somewhat bamboozled by what is going on. I agree entirely with what Mr Murray said and with Professor Black's comments in our submission. From my simplistic perspective, the simplest route is probably the best one: to dispose of the consent requirement in the 2009 order and to dispense with part 2 of the bill.

Dr Jim Swire (Justice for Megrahi): I speak as a layman who was convinced by what he heard at Zeist that Megrahi was not involved. However, that is not the point of today's discussion; the point is about 2(b) in the bill. I have had the benefit of extremely expert advice from a number of people in the high echelons of law in Scotland, who say that 2(b) will not meet the requirements that we seek and that it is a cumbersome delaying tactic.

As a layman and as someone who watched not only what happened at Camp Zeist, but the second appeal in the High Court in this city, I feel that there has been an orchestrated attempt to delay the resolution of this dreadful case.

10:15

Without wishing to sound in any way aggressive about it, I advise the committee that it should be aware that extensive information relating to the case will emerge in the public sphere in the not-far-distant future. It would be a very sad day if the Administration of this country and, in particular, the administration of law were not the leading lights in making information publicly available before people have to fall back on the media and have their day producing it by that means. I think that anything that tends to delay official routes to making information public must be deemed to be bad, and I think that 2(b) seems to be a means by which the establishment has achieved an apparent desire to delay resolution of this case. That is how I, as a layman, see it, and the professional advice that I have received points in the same direction.

The Convener: For the record, I clarify that you are referring to article 2(b) of the 2009 order, not the bill that is before us.

Dr Swire: That is a layman for you.

The Convener: It is fine.

The issue of whether data protection legislation impacts is a separate issue. I think that your proposition is that it would impact on the bill, but it would not impact on the statutory instrument. Mr Forrester made the separate point that, in any event, even if the data protection legislation were to prevail, the information in question would have been available in the public domain, so the data protection office should perhaps set aside any data protection issues, because the information was going to be disclosed anyway. Was that your point?

Robert Forrester: Yes.

The Convener: I think that that point was made in evidence last week, as well. The information would have been aired in public in court, and people would have been cited and so on.

Humza Yousaf: Thank you for that clarification, convener.

In your opinion, from the work that you do and the way in which you have approached Mr Megrahi's case over the past 11-plus years, how will Mr Megrahi's death impact on the disclosure of the information in question?

Dr Swire: Thank you very much for that question, which I think was aimed at me because I am probably the person who has met Megrahi the most recently. He has not got much longer to run—he is a desperately sick man.

However, the committee should be aware that the case will not disappear with the death of Megrahi. There is his family's position to consider, and the position of those who, like me, unfortunately, are also involved in the repercussions of the case. Therefore, this will be an on-going problem unless it is resolved in some way. The death of Megrahi will be hardly more than an incident along the way, because of the amount of time that has elapsed following the original conviction. Does that answer your question, sir?

Humza Yousaf: Partly, but I wonder whether there would be any specific data protection implications. I think that Mr Murray would like to comment.

Len Murray: I was about to say that what is much more important than whether Megrahi is alive is the fact that we have a sore—the cancer of a conviction that should never have taken place. Until such time as that conviction is taken out of the way, there are a number of us who will not rest. It is an affront; it was described by the United Nations observer at the trial as being—

Robert Forrester: —a spectacular miscarriage of justice.

Len Murray: That spectacular miscarriage of justice still obtains, and it will do so regardless of whether Mr Megrahi is alive.

The Convener: I want to return to the question of what the point would be of releasing the information if the appeal were not to proceed and a process were not to be gone through whereby, if it were the case that Mr Megrahi was wrongly convicted, the conviction could be overturned. Is there any indication that anyone is prepared to pick up the case on the death of Mr Megrahi? Is there any indication that there is someone who could be in his shoes, as it were, in legal terms?

Dr Swire: Yes, there are indications that the case will be taken up in the event of the death of Megrahi. First, his family tell me that they would be likely to take up the cudgels; and, secondly, people such as me would also seek to do so. The professional advice that we have received says that the family would have the first option on continuing the proceedings. At the beginning, when I tried everything I knew to bring these two men to Scottish justice, I expected to see a fair court try Megrahi and two murderers brought to justice.

By the end of the first, main court proceedings, I was convinced that Megrahi had nothing to do with it, and that conviction has spread through many legal minds since then. I think that it is selfish to consider that this is a problem for people such as me, because it is not—it is a problem for Scotland and for Scotland's people, and I hope that the committee will take that into account when it is considering how best to handle this. The question is of supreme importance in the present day, with the changes in relationships between countries, which are—shall I say?—evolving. No community can function properly without a criminal justice system that people can trust.

Iain McKie: None of us around this table is here to fight with the committee, the Government or the Crown Office, but we are mystified by the bill because we believe that it is not needed. There is a danger that there is a lack of political will in this Parliament to resolve the Lockerbie crisis, and the bill is part of that. Why, otherwise, should we be taking through legislation that, according to the SCCRC, is really intended to confuse matters and to put disclosure away, not attract it? I am a lay person, but it is my personal opinion, formed over 14 years of fighting for justice for my daughter and for other people at Lockerbie, that the Crown Office and civil servants put these arguments forward and create these bills, and politicians follow them. The politicians should stop following the Crown Office and the civil servants, who do not want the information to be released and will do anything to prevent that. It seems that the bill, as framed, would suit the Crown Office and the civil service down to the ground.

As Jim Swire has said, we are calling for political will in Scotland to sort this out. I am Scots and I want it sorted out; I do not want to wait until a book comes out, or something else happens, for the truth to be revealed. You in this Parliament have the power to resolve the whole issue, but the bill is taking us away from that. I hope that you can point out to your colleagues that we do not need such legislation because the necessary power already exists; there needs to be the political will to use it, as the Cabinet Secretary for Justice is able to do. The Government's heart is in the right place, but sometimes it listens too much to the Crown Office, the civil service and the Justice Department, and the time has come to pick up the baton and run with it.

The Convener: I am sure that the cabinet secretary is listening to what you are saying, and we will certainly put those issues to him.

Roderick Campbell: I want to follow up on the distinctions between people who supply information. The panel has made the position clear: you say that if people supply the information initially, it is in the public domain. The bill seeks to make a wider distinction in referring not only to people who supply information but to people who are directly affected by that information, and so to that extent it goes beyond the 2009 order.

Robert Forrester: I think that Mr Murray has dealt with that, in a way, by giving us the example of Mr Tony Gauci. The bill refers not only to people who are directly affected by the information but to those who are directly or indirectly affected. It does not single out any individuals or specify anything more than that. However, it would be extremely disturbing if, for example, Mr Tony Gauci, whose evidence, as Mr Murray said, was so instrumental in the conviction, were provided with a red card by our own Government.

Roderick Campbell: It seems to me that the distinction goes wider than people who may have given evidence and includes people who would be affected by the disclosure of evidence but who may not have provided any information to date.

Robert Forrester: It is indistinct, the way that the bill has been drafted. I cannot speak for the

people who drafted it—I cannot say exactly what they were getting at when they were thinking of inserting that. I do not know whether Len Murray wants to say anything on that.

Len Murray: I do not think so. Frankly, I do not see the problem.

The Convener: I take it that your general proposition is that the bill is a barrier to information but the statutory instrument is not.

Len Murray: The bill could be a barrier—I would prefer to express it in that way, although there are those who go further than I, who say that the bill is a barrier. I am bound to say that I am concerned at the prospect of Mr Gauci—if he ever reappears from his hidey-hole, wherever the CIA has plonked him—saying, "I do not want that information to be disclosed." That he, of all people, should have the right to prevent that information from being made available strikes me as totally absurd.

The Convener: But Mr McKie's position is that this is political with a small "p", if I may put it like that.

Iain McKie: If the bill were taken away, that would affect individuals, and the right of individuals not to have information released is an important right. However, there needs to be political will in this. To put it bluntly, given the way in which the bill is framed, you will be sitting here arguing next year and the year after until the Parliament finishes—the debate will go on and on. There will be test cases in court and objections will be made. Someone must stop this—that is all that we are saying—and the easy option is to use the existing legislation. I do not care what you do, but someone somewhere must make decisions. They will have to say that, unfortunately, Mr Gauci's rights are not as important as the rights of the Lockerbie deceased and their families and the good name of Scotland. Somebody will have to make difficult decisions; the matter is not going to be decided in the law courts. They are political decisions and I am appealing to the Government to make those political decisions.

David McLetchie (Lothian) (Con): Good morning, gentlemen. I want to explore the issue of how a resolution of the case could be achieved. There have been a couple of references to that, but it is not clear to me what the mechanism is for achieving a resolution of the case. We have had a trial, an appeal has been rejected and a second appeal, following the SCCRC's recommendation, was withdrawn by the convicted person. Where and in what forum is the matter going to be resolved? Mr McKie said that we should wait until a book comes out, but we do not decide guilt or innocence on the basis of the speculations of book writers.

Len Murray: Not yet.

David McLetchie: Megrahi has been convicted in a court and his appeal has been rejected by a court. What body—what forum—is going to adjudicate that that conviction was unsafe?

Iain McKie: I have a question for you, Mr McLetchie. Would you like to know what the SCCRC's conclusions were? Would you like to know what it said to the appeal court?

The Convener: It is not for Mr McLetchie to answer questions.

David McLetchie: I might have been informed of that if Mr Megrahi had not withdrawn his appeal.

Iain McKie: You are following a fair line: there has been a trial, there has been an appeal and another appeal was withdrawn. However, what we are saying—and what seems to have been said many times—is that there is other information out there. Sometimes, in dealing with injustice, we cannot see the wood for the trees, and this is one of those cases. We need to stand back from it and see that there is evidence that injustice was done—we do not know who did it or where it was done, but it was done. You are legally right to follow the line that you are following but, from a moral point of view, I do not think that you are going to get to the truth. We know that a book is coming out this year that is likely to reveal a lot of the truth, but is it not a pity that we must wait for books to do that? Why do we not do it?

10:30

The Convener: Dr Swire, I think that you explained a possible route through the courts when I pursued with you whether there is a way for the appeal to continue. I think that your explanation was that a member of the Megrahi family or, indeed, you could so proceed. I point out to David McLetchie that there is therefore a way through the courts.

David McLetchie: I want to be clear about what that way is.

The Convener: Can you explain again, Dr Swire?

Dr Swire: I thank you for the opportunity to do so, convener, and I thank Mr McLetchie as well.

Reading between the lines, we know that this is a case in which not only law but politics with a small "p" is deeply involved. We should put in a word of support for our domestic politicians, because we have no idea what international politics may be impacting on their decision making in this case.

To answer your question directly, one of the possibilities is a further appeal. The reason for the withdrawal of Megrahi's appeal appears to have been that he was ill. He certainly is ill, but there

may have been other underlying reasons for the withdrawal. I do not think that this is the place in which to try to define them. The professional advice that I have received is that it would be perfectly possible for other individuals affected by the case to approach the SCCRC to request that a further appeal be granted. In that event, I understand that number 1 in the pecking order, as it were, would be Megrahi's family, to whom I have spoken. In the event that they did not wish to pursue an appeal, it would perhaps fall to other people affected by the case—such as me, unfortunately, and those who support what we have been trying to do—to do so.

One way forward would therefore be a request that a further appeal be heard in the High Court in this city. That may not be the only way; there may be ways in which we could fire our politicians to set up a forum. However, a forum to examine this case would have to have powers of investigation and the power to take evidence under oath, because it seems that some aspects of the investigation were not quite what one would hope for in a criminal justice investigation.

In order to invoke as far as we can the truth, which is what I am after, we need to have the power to extract as much of the truth as possible from anyone who might give evidence in such a forum. I cannot tell you what the forum would be called; I merely say that, as in the petition, to which we seem to be reverting rather than the bill, the request would be for a fully empowered inquiry. In my layman's mind, that would mean an inquiry that has the power to obtain evidence under oath and ensure that its impact on the Scottish criminal justice system will be decisive. I do not know how you do that, but we ought to have done it long ago. Twelve years since before the start of the trial, when I believed that the two accused were guilty, is far too long to wait to see my country, of which in many ways I am so proud, resolve what so many people hold was a miscarriage of justice.

Len Murray: Convener, I am reminded of a saying that you, Mr McLetchie and I—and I am sure everybody else in our profession—are aware of: today we will worry about the flea that bites us today and tomorrow we will worry about tomorrow's.

Mr McLetchie asks where we go from here. There are as many answers to that question as there are people in the legal profession. If, as a result of the SCCRC information being made available, it seems to be generally accepted that there has been a miscarriage of justice, I have no doubt that a solution will appear. Our High Court has the power of nobile officium, so I refuse to believe that, if a miscarriage is discovered, there is no mechanism in our system to deal with it. However, that is not the issue that is before us today.

Dr Swire: To build on what has just been said, the flea that bites you today may give you the black death from which you die tomorrow. We need to do something about that flea.

David McLetchie: The issue today is the point of the bill. From different perspectives, we may be coming to a similar conclusion in that you regard the bill as unnecessary and, in some respects, for entirely different reasons, I might regard it as unnecessary. I would not necessarily say that our objectives are at odds.

However, what I find slightly difficult to understand is that your evidence implies that we do not need to bother with consent from anyone and that, in fact, the requirement for consent is a barrier to getting at the truth, as you put it. You imply that the bill is just another example of that, as was the previous statutory instrument and so on. You said how wrong it is that the requirement for consent from Mr Gauci should become a barrier to getting at the truth, but what about Mr Fhimah, who was acquitted? We heard in evidence last week from the SCCRC that when Mr Fhimah was approached for consent under the 2009 order, he could not be contacted and that his consent was therefore unobtainable.

I was surprised to hear that Megrahi would agree only to a partial release. Is that true? Is it true that Megrahi was not prepared to consent to an unconditional release of information, as the SCCRC told us last week?

Dr Swire: One of the objections that the UN observer had to the conduct of the Zeist trial was the fact that, in his view, the prosecution had failed to pass on to the defence a substantial amount of information, so making the playing field uneven, against the interests of the defence. That material resides with the Crown Office and some of it has not been made public. I do not see why we should expect the Crown Office to try to protect that information by preventing its being let out in the way that we are talking about. Surely at least the information that the Crown Office has ought to be made public, too. Surely there are ways in which that can be done without having to revert to the likes of Mr Gauci and his brother.

David McLetchie: Yes, I know, but I am not talking about that. I am talking about evidence from the SCCRC last week that Megrahi refused to consent to the release of certain information and was therefore willing to give consent only to the partial release of information—presumably information favourable to his case. One would conclude that the information that he was not so keen on releasing might have been unfavourable to his case.

Robert Forrester: If memory serves, Mr al-Megrahi is on record as saying that he refused to give consent unless all the other informers to the commission agreed to put their cards on the table. That is my understanding.

David McLetchie: I find it rather puzzling that they should get into a game of "I'll show you mine if you show me yours".

Robert Forrester: I cannot speak for Mr al-Megrahi.

David McLetchie: If we are talking about someone who claims that he is innocent and has the power to consent to the release of information, why are we getting into the area of partial disclosure?

Robert Forrester: You would have to address your question to Mr al-Megrahi. However, that is my understanding—

David McLetchie: Megrahi, who has a campaign called Justice for Megrahi, wants justice only on the basis of a partial release of information. That seems rather perverse to me.

Robert Forrester: Not at all.

Len Murray: That has never been part of our submission.

The Convener: Excuse me a minute, gentlemen. There is no problem with questions and answers but, so that we can hear them clearly, they should not be made over each other. Who is responding next? Mr Murray, do you wish to say something?

Len Murray: Mr McLetchie seems to be saying that we are advancing on the basis of "We'll disclose information only if you do", but that has never been our position.

David McLetchie: I am not saying that. My question—

Len Murray: With respect, it sounded like it.

David McLetchie: No. I think that you have misheard me. What I am putting to you is the evidence that we received last week from the SCCRC, which I am sure all the other committee members will recall. When we asked about issues relating to consent, we were informed that Megrahi did not consent to the release of all the information whose release it was within his province to consent to. That was the evidence that we were given last week. I am simply asking you whether, from your knowledge of Megrahi and your campaign, that is correct.

Dr Swire: When I met Megrahi in December, he assured me that on his death all the information available to his defence team would be passed to me.

David McLetchie: Why are we waiting for his death?

Dr Swire: It is his decision. He is the client of the defence solicitors who currently, at least in theory, run his defence. The defence solicitors tell me that they are bound by their client's wishes and that his wish is that the information should not be made public until his death and that when he dies the information should be passed on intact to others who might pursue the case.

That may or may not be true, but I think that we are nit-picking slightly, because the case does not revolve only around people such as Gauci and information that Megrahi may or may not have; it also revolves around bigger questions, such as the mode of conduct of the original Zeist trial. International observers have said that it was not a fair trial and the SCCRC has said that there may have been a miscarriage of justice. We should try to mobilise all aspects that are available to try to resolve the doubts that remain about the case before it does terrible and even worse injury to our criminal justice system.

Robert Forrester: The fact that the appeal was dropped does not eradicate the problem. There is still a problem with the interests of justice. The case is a stain on our justice system. The SCCRC was satisfied that the case that it had laid out in the statement of reasons for Mr al-Megrahi's second appeal passed the statutory tests that, first, he may have suffered a miscarriage of justice and, secondly, it was in the interests of justice to proceed. The fact that, for whatever reason—on health grounds or for other reasons; this is not the time or place to discuss that—the appeal was dropped does not solve the problem. We are not addressing the issue of the interests of justice and the reputation of the Scottish criminal justice system.

When the report on Shirley McKie's case was published in December, Mr MacAskill—all dues to him—said that the Scottish criminal justice system is a pillar in our society and that it is paramount that the Scottish public have faith in that system. Quite apart from what Hans Köchler and other luminaries have said, the Scottish *Sunday Express* ran a poll last September that asked whether people thought that there ought to be an inquiry into the case; I admit that it is only one opinion poll, but 52 per cent of the sample of 500 said yes, compared with something like 32 per cent who said no.

The Convener: I accept that. I want to stop you on that track, because we have had a fair whack at it. We are looking at the bill and the contrast with the subordinate legislation. I want to round this up.

David McLetchie: Whether the witnesses like it or not, we are looking at the bill and at issues relating to data protection. As currently constructed, the bill will require the consent of persons for the release of information. My point—I find this inexplicable—is that the person convicted of this offence seems to want to control the release of information on a selective basis during his lifetime. I find that bizarre, to say the least. If I was terminally ill and I had a stain on my reputation, I would want it removed during my lifetime. I would not want to wait until I met my maker and then be judged in my absence. That seems to be the proposition.

The Convener: I do not think that we are going to make any further progress on the point, as only Mr Megrahi could answer that, so I want to move on. Humza, is your question on something else?

Humza Yousaf: I have a minor point, but if other members who have not asked a question want to come in, I am more than happy for them to do that.

The Convener: Nobody is indicating that they want to come in.

10:45

Humza Yousaf: The SCCRC states in its written submission that it wants to release the statement of reasons but that it can do so only with the co-operation of the Scottish Government, the UK Government and certain foreign authorities. Has there been any discussion about that between the Libyan transitional council and your campaign? Mr McKie correctly mentioned that political will is needed if we are to resolve the case. Do you see much of that political will from the new transitional council?

Dr Swire: Thank you for that question. What I found in Libya under the new transitional Government was a country that has been transformed from fear to euphoria because it has got rid of a monster in Gaddafi. In its euphoria, it wishes to place on the shoulders of the previous regime as much blame as it can. My view—as a layman, again—is that any information that is obtained from Libya at present is extremely suspect simply because it comes from an area where the atmosphere is one in which blame is attributed to Gaddafi no matter what.

Those who saw the recent broadcast will have noticed that members of the transitional Government were absolutely sure that Megrahi was involved. The reason for that is that they do not have time to look at the details of the Lockerbie case. They are trying to set up a country that has been ravaged by the previous dictatorship and by war, so they are far too busy to do that. From outside the case, the obvious position to take is, "Well, Megrahi was found guilty by a court, so obviously he was involved." Underneath that, we immediately detect the thought, "And because he was involved, Gaddafi must have been involved. Oh, goody—we can pin this on Gaddafi as well." That is the thinking that is going on.

This was not broadcast, but I spent a lot of my time with those people trying to explain to them that there are doubts about the verdict. They are only doubts. The SCCRC has said that there may have been a miscarriage of justice, and that is what we must all say as well, but the evidence against the verdict is building up pressure all the time, and that evidence is waiting to be heard. It does not just depend on Megrahi, on Gauci or on anybody else, as there is also the question of the way in which the court was run.

We should spare a thought for their lordships—the judges who ran the trial. They tried to run it in a situation in which the evidence was essentially assembled by the intelligence services of a number of countries, and they had no jury to apply common sense to their decisions. Those two circumstances are very atypical. It has never been part of my remit to blame the judges for the verdict that they reached. I do not think that it was the right verdict, but that is just my opinion. What we need is a national means for getting to the bottom of the case before it is eroded any more by media attempts to intrude on what should be the province of the properly constituted political and legal authorities within a proud country like ours. We have to get on with it.

I have no control over who does what and when. To revert to the very good question, "Why should the convicted man dictate what happens?", I note that only three westerners are trusted by Megrahi. One is me, and I am in conversation with the other two, but I do not have control over them. The other two will be publishing a lot of information that pertains to what the SCCRC knows, probably within the next two months. I would love to see an official stance taken that will lead the way instead of the system being plastered with innuendos from outside, from the media—through people like me, I admit, and others who know just as much as me, or much more. That is not the way in which to put things right. Surely the way to do that is through an official, strong intervention, which has to be a political decision to set up a venue where the case can be properly reviewed. I beseech the committee to do what it can to further that purpose.

The Convener: Please be brief, Mr McKie, as I want to wind this up.

Iain McKie: The political will does not exist anywhere else. It does not exist in Libya, in America, in Europe or in England. The only place for the political will to be shown is in Scotland. I

agree with Mr McLetchie on many of the points that he made, and there are many factors to be considered, but we need the political will. If we wait for the Crown Office, the lawyers and the civil servants to sort this out, it will never be sorted out.

The Convener: Mr Murray, do you wish to sum up the panel's position on the bill, the statutory instrument that has been referred to and the processes by which one might or might not come to a conclusion about al-Megrahi's conviction? It would be useful to us in considering our position in our stage 1 report.

Len Murray: With respect, I think that we have strayed quite a bit from the main concern, which is that the bill's proposals will not help to make the SCCRC information available. My primary submission is that that can be achieved by removing article 2(b) from the 2009 order. A lot of other terribly interesting points have been made this morning—and would that we had time to discuss them all. However, the immediate concern relates to that fairly short point.

On behalf of my colleagues, I thank you and your committee for affording us the opportunity of addressing you this morning. We are very grateful.

The Convener: Thank you for attending.

10:51

Meeting suspended.

10:55

On resuming—

The Convener: I welcome the second panel of witnesses, which consists of Sir Gerald Gordon QC and James Chalmers, who is a senior lecturer at the University of Edinburgh school of law. I thank both of you for your written submissions. Feel free to speak to both of the main parts of the bill, if you wish to do so. If you indicate to me that you wish to speak, I will call on you to respond.

We always feel that there is a tutorial when we are dealing with part 1 of the bill. I need a little theatrical scene in which two accused people are in front of me, one of whom is on a mandatory life sentence and one of whom is on a non-mandatory life sentence. If things were acted out, I might begin to follow the provisions, but I am simple. I hope that the witnesses can help us through a very difficult part of the bill.

Roderick Campbell: Mr Chalmers has made some not very flattering comments about the nature of determinate sentences. Last week, we wrestled quite a bit with the parts of sentences that are imposed for the protection of the public. I am not quite clear from paragraph 5 of your submission, Mr Chalmers, whether you believe that determinate sentences should be split between a part for retribution and deterrence and a part for the protection of the public, and whether that should be explicitly stated in determinate sentences. Will you expand on that?

James Chalmers (University of Edinburgh): I am not sure that I would advocate that as a system, although it might be worth considering. In effect, what currently happens with prisoners who are eligible to apply for parole is that the halfway point in the determinate sentence becomes the period that has been imposed for retribution and deterrence, because the prisoner is entitled to apply for parole at that point. The courts have concluded that the Parole Board for Scotland will operate on the basis that it will release the prisoner if it is no longer necessary to detain them for the protection of the public. By default therefore, although this is in no way set out in the statutory provisions, when a determinate sentence of some length is imposed, the halfway point becomes the retribution and deterrence point, and the remaining time that the prisoner can spend in jail if they are not released by the Parole Board becomes the period for protection of the public. The system was not designed in that way, but it has developed in that way.

Roderick Campbell: In the final paragraph of your submission, you say:

> "The Bill is, I think, tolerable as an interim means of addressing the difficulty identified in Petch and Foye."

What do you mean by the word "tolerable"?

James Chalmers: I mean "tolerable" in the sense that the bill is extremely difficult to understand. I have not spoken to anyone who feels comfortable in reading it and in working out what exercise the judges are required to take.

The Convener: You are cheering us up.

James Chalmers: It has taken me some time to work out—with the help of colleagues and friends with whom I have discussed the provisions—exactly what the provisions mean. Even now, I would not claim with 100 per cent confidence that I entirely understand them. The problem is that they are tortuously complex.

Roderick Campbell: I agree with that.

The Convener: I think that that will sum up our report. I think that we will say that the bill is "tortuously complex" and we do not understand it. Perhaps that will be at the end of the committee's stage 1 report on part 1 of the bill, unless we are enlightened. Is Graeme Pearson going to enlighten us?

Graeme Pearson (South Scotland) (Lab): Unfortunately, I am not.

In our previous discussions, we were concerned about public confidence in our system and about trying to understand some of the issues to which James Chalmers has alluded. Individually, we have repeatedly acknowledged around the table that the process is very difficult to understand. Having grasped the idea, moved away from it for a while and gone back to it, we have to think it through again.

James Chalmers said that the bill is an "interim" solution. Does either witness, having thought things through and with your years of experience in the administering of punishment, have a better alternative?

11:00

Sir Gerald Gordon QC: I am not disputing James Chalmers's analysis of where we have reached with determinate sentences. However, when, with indeterminate sentences, the courts set themselves to calculating the public protection portion of the sentence, they simply—as far as I can see and with all due respect—pluck a figure out of the air. I am not aware that there is any authority of any description on assessing such matters and I think that it is, as I suggest in my submission, a totally spurious exercise that the courts are forced to undertake. I keep on changing my views on this, but I think that they might be forced to undertake it as a result of European Court of Human Rights phraseology, which followed the kind of language that had been used in English cases that had been brought before it. The idea is that in every sentence there is an element of retribution and deterrence and—perhaps—an element of public protection.

However, to take that approach is to forget other elements that may be required to be taken into account. Basically, an order for lifelong restriction—which is much the same as a discretionary life sentence—is imposed for public protection. As I say in my submission, I am not at all happy with that notion, but let us leave that to one side. In addition, there is a sentence. When an order for lifelong restriction is imposed, the court is expected to think of the sentence that it would have imposed had it not imposed the OLR. Given the seriousness in such cases, one might think that the sentence would normally be quite long. However, in one case, the punishment part of the sentence was fixed at 12 months and, in another, at 18 months.

The courts are supposed to fix the punishment period, which is what the individual has to serve as if that were the period to which they had been sentenced. However, they are supposed to take off that sentence the element of public protection. In other words, we think of what an individual would have been given if an order for lifelong restriction had not been imposed and then, in a new exercise, determine the proportion of the sentence that is meant for public protection. That gives a second notional sentence; when other discounts for guilty pleas and the rest are taken into account, what is left is the punishment part. There is no remission in that period; as I have said, it is one of the few instances—if not the only instance—when a sentence always means what it says. At the end of that period, the individual has done their time and all that is left is the period that relates to public protection.

The main thrust of the point about the European convention on human rights is that within that public protection period the prisoner should have an opportunity to have his case reviewed by a judicial body, and the Parole Board for Scotland counts as such a body for that purpose.

This is not the place to start criticising drafting, but this is all tied up in a lot of subsections and cross-references between subsections that make the bill rather difficult to read. I do not know whether my explanation has made it any clearer, but the basic idea is the distinction between the sentence for the offence and the right of the state to keep you for as long as it likes, provided the parole board thinks that you are still a danger to the public.

The Convener: I should correct you, Sir Gerald: this is certainly the place to criticise the drafting of legislation. That is what we, with your help, are here to do. If a bill is flawed, our job is to point out that flaw to the Government and to see whether it is amendable. Can you give us any pointers in that regard?

Sir Gerald Gordon: It is a technical exercise, but my feeling is that rather than have all the cross-referenced subsections it would be better to hope that members and the public are capable of reading sentences and paragraphs longer than those that appear in *The Sun*. However, this is the modern way of drafting.

The Convener: What you are saying is—I think—that even practitioners would have difficulty reading the provisions.

Sir Gerald Gordon: Judges would have difficulty reading the provisions.

The Convener: You are—without impugning people's intellectual capabilities—saying that not just humble solicitors and advocates but the judiciary would have difficulty following the bill.

Sir Gerald Gordon: Yes.

James Chalmers: When the committee took evidence from the Faculty of Advocates, Joanna Cherry said that the current provisions

"gave rise to the most difficult piece of statutory interpretation that I have had to engage in in my career".—[*Official Report*, *Justice Committee*, 31 January 2012; c 865.]

The solution that has been adopted is to make the statutory provisions somewhat more complex, by adding provisions. That might introduce clarity, and the courts have had some practice at working through that area of law, but the provisions will still present difficulty.

Roderick Campbell: The Law Society of Scotland said that one way of simplifying the exercise would be to remove the current statutory requirement to identify and strip out from the notional fixed sentence a notional or discrete element for protection of the public. What is Sir Gerald's view on that? Would such an approach give rise to convention issues?

Sir Gerald Gordon: That approach would be much simpler. I have tried to discover what the English do and I am still not terribly sure, but I have not been able to find similar provisions about stripping out the public protection element. I am not an expert on European law and it might well be that the Parliament's experts take the view—and took the view when the Convention Rights (Compliance) (Scotland) Act 2001 was passed—that it is necessary to make that split, in order to comply with the ECHR.

The Convener: I think that that is probably correct.

Roderick Campbell: In paragraph 34 of the policy memorandum, the Government said:

"We consider this 'stripping out' exercise does have to remain in order to satisfy the requirements that the ECHR has specified need to take place in respect of a discretionary life sentence."

I am still struggling with what precise convention requirements the Government has in mind, but that is a question that I must put to the Government.

Sir Gerald Gordon: Part of the problem is that the leading European Court of Human Rights case—Thynne, Wilson and Gunnell v United Kingdom—proceeded on a number of English cases in which the English courts had talked about sentences being composed of different parts, although they had not actually done any stripping out.

James Chalmers: Even if the ECHR were not in play, there would be a need to achieve what the court called "comparative justice" between prisoners who are sentenced to a determinate sentence and who will be entitled to be released halfway through the period, and prisoners who receive a punishment element but who will not be entitled to release until the period has expired. The lack of comparative justice where it should be exercised could, in turn, create an ECHR problem, because a distinction would have been drawn between two groups of people without a clear reason for doing so other than because it was simpler, which is probably not a good basis for proceeding.

Roderick Campbell: Do you have suggestions on how to make the bill less complex?

James Chalmers: If the legislation simply said—and did no more than say—that the sentencing judge was required to set a punishment part, that would be sufficient in terms of ECHR compliance. The judge would still be required to conduct the exercise of comparative justice and comply with convention requirements, but they might not have to jump through so many hoops to get there.

The Convener: May I ask for a working example that uses the case of A, who is on a mandatory sentence, and B, who is not, so that I can understand how the situation works?

Sir Gerald Gordon: You said "mandatory"; the whole point is that the sentence is mandatory. The view—the theoretical view, I take it—is that in any mandatory life sentence, the life sentence is simply punitive.

The Convener: I beg your pardon.

Sir Gerald Gordon: The life sentence is simply punitive: that is the punishment, on the basis that the offence itself is serious enough to merit life imprisonment.

Parliament has decided that murder is always serious enough to merit life imprisonment. It is, of course, possible to impose life imprisonment simply as a sentence in other cases, but that is called a discretionary life sentence and is now treated in the same way as the order for lifelong restriction. As I have said, the offence itself may be worth 12 months but if, for one reason or another, the risk assessment people say that the man presents a risk to the public and an order for lifelong restriction is imposed, only after he has served his 12 months—or, rather, his six months, as 12-month sentences involve only six months in prison—is he entitled to apply for parole, as though he has been given a 12-month sentence. If he had been given a 12-month sentence, after six months he would have got out unconditionally—but let us not get into too much detail.

The Convener: I understand that. You are saying that the punishment part could be small but the protection of the public could be substantial.

Sir Gerald Gordon: That would depend on the Parole Board.

The Convener: Yes—but in certain cases the protection of the public could be a much longer part of the sentence.

Sir Gerald Gordon: Yes. Well,—

The Convener: I am not going to ask any more questions. I abdicate responsibility for asking questions because the more I ask, the more confused I get about this. I am sorry to say this, but I must rely on other members of the committee to take me through this—and there is silence.

David McLetchie: Can I ask a question, convener?

The Convener: Of course you can, David. Please do.

David McLetchie: The root of all the complexity seems to be the interrelationship between the different types of sentences and the operation of the rules in relation to early release—particularly automatic early release, which the Parliament is supposed to have been getting around to abolishing for the best part of five years. Would it be preferable to get back to first principles and to determine what our sentencing structure should be: release or no release; automatic review or review on a discretionary basis? I ask for your observations on that. Should we return to first principles and have a relatively simplified situation in which an offender serves a punishment part and then, in certain instances, gets out at the discretion of the Parole Board?

Sir Gerald Gordon: First principles have always said that a convicted person was entitled to some remission for good conduct.

David McLetchie: Yes.

Sir Gerald Gordon: The current situation is that they get their remission or unconditional/conditional release whatever their conduct has been, unless it has been such as to get them a consecutive sentence. I do not know how far back you want to go.

David McLetchie: Most people would say, in a simplistic way, that if someone was sentenced to 12 years, they should serve eight of those years and the Parole Board, on a discretionary basis, should determine how much of the remaining four years they would serve on the basis of estimations predominantly about protection of the public. Even with OLRs, it would be possible to have a relatively simplified system in which there would be a fixed element and a review period. It seems to me that we are just heaping complexity upon complexity in this instance and that we might be better placed to take the matter forward if we decided the principles of sentencing that we wanted in the first place.

Sir Gerald Gordon: With respect, that is crying for the moon. People have been trying to discover the principles of sentencing for a very long time, but without any marked success because the exercise is so multifaceted. As I said, I am not sure how this would fit in with Europe, but I would like to see something equivalent to what we get in extended sentences; I would like the judge to fix the sentence that he would have fixed had he not been giving an order for lifelong restriction, and we would take it from there. At whatever would have been the release point in that sentence, the Parole Board would take over. That would be a simple way of doing it, although it may not fit with the convention.

David McLetchie: How does that deal with the comparative justice issue and the issue of early release? That is what I was coming to. In an ideal situation, how would you fit that in?

Sir Gerald Gordon: I think that we move from the punishment area to the Parole Board area when we get to the early-release point—whenever that is. That is virtually what happens now, but the problem at present is that when a court says that the punishment part is 10 years, that means 10 years, whereas if it gives a sentence of 10 years, the person can get out conditionally after half that time and unconditionally after two thirds of it.

11:15

David McLetchie: Would it be possible to reconcile those two things relatively straightforwardly, assuming that you wanted to persist with that? Would it be possible for someone to say “Right. Your punishment part is 10 years, but of course that’s subject to the standing early-release provisions or the review provisions”? Would it offend the idea of comparative justice if you said “Your punishment part is 12 years and it will be treated exactly the same as it would had you been given a determinate sentence of 12 years”?

Sir Gerald Gordon: That is what I would like to see. My only problem is that at the moment I bow to the greater knowledge and experience of the parliamentary counsel which says that that would not fit in with the convention. It might—dare I say it?—be worth having a look at how they work it in England.

James Chalmers: There might be difficulty in applying what Mr McLetchie suggested. The first difficulty is that it would involve judges saying at the sentencing stage more things that do not reflect reality. For example, a judge might impose a life sentence, which does not, of course, mean that someone will spend their entire life in jail. With a punishment part of 20 years, that would not mean 20 years in jail, because the individual

would be entitled to apply for release at an earlier date. So, there would be the difficulty that that might not help with public confidence in the system.

It would also be a difficult exercise because there would still be the problem of the extent to which risk factors are involved in the punishment part. A judge might decide on the basis of risk that a life sentence was required, then decide on the basis of risk that a sentence of a particular length was required. I am not sure what the judge is then meant to do if they conclude that the offence discloses such a high level of risk that only a life sentence would be appropriate. In that event, any determinate sentence that was imposed that had regard to risk would become an entirely fictional exercise, so judges might not feel able to do that.

David McLetchie: Right. Carry on.

The Convener: You understand now, Mr McLetchie.

David McLetchie: Oh, yes.

The Convener: You have seen the light.

David McLetchie: I will explore that point with the Government.

The Convener: I will attend your tutorial later, David.

Jenny Marra (North East Scotland) (Lab): Have you done, or are you aware of, any academic research that takes account of the public's confidence in sentencing, in particular for life sentences?

Sir Gerald Gordon: I have never done sociological research. It is not my area, and I am not aware of research of the kind that you mention.

James Chalmers: I have never done any, but I am sure that there is a body of such research. However, I am not in a position just now to state in general terms what the academic research on public confidence in sentencing says.

Sir Gerald Gordon: You must remember that, leaving aside OLRs, post the Prisoners and Criminal Proceedings (Scotland) Act 1993 a determinate sentence did not and does not mean what it said—and that is apart from any question of executive prerogative in giving home leave and so on.

Jenny Marra: At the end of his written submission Mr Chalmers says that the system is

"in need of much more far reaching review and reform."

I think that my colleagues touched on this, but do you have any suggestions in that regard?

James Chalmers: I do not have any easy solutions. For example, it is strange—if not ludicrous—that we have a situation where a sentence of, say, nine years is imposed but it means four and a half to six years because of the entitlement to early release after half to two thirds of the sentence has been served. It seems peculiar that a system of sentencing should require judges to pronounce a figure in open court which will not, unless one is familiar with the provisions on early release, reflect the time that the individual will spend in jail.

John Finnie: I have a question for Sir Gerald Gordon concerning something that he touched on earlier when referring to the other aims of sentencing. We have heard a lot about retribution, deterrence and public protection. In your written submission you also talk about denunciation and rehabilitation, which seem to be important elements. Do you think that the bill accommodates those elements in any way?

Sir Gerald Gordon: I suppose that, in some ways, the OLR is a denunciation. Many years ago when, as a professor, I was thinking about such things, I favoured the denunciatory theory, and I probably still favour it. It is the theory that one of the bases of sentencing is simply to send out a signal that this is the sort of thing that the public will not tolerate. The idea is that the higher the sentence, the stronger the signal.

On combining that with early-release provisions, there was a penal philosopher—I think it was Jeremy Bentham, but I am not absolutely sure—who envisaged a penal system in which the prison had a very large front gate and a high wall on a public street, as with Strangeways in Manchester. The public could see the prisoner going in and would know that his sentence was 20 years or whatever. The prison would also have a little garden, at the back of which was a tiny wicker gate that no one looked at, through which the prisoner would just walk back out again. That would provide denunciation, but I am not sure that it would satisfy the public on many of the other aims of sentencing.

John Finnie: You are not formally proposing that, though, are you?

Sir Gerald Gordon: I am not formally proposing it.

However, I think that the issue of marking is important. That is why offences that would not normally go to the High Court will sometimes go to the High Court when they involve a public figure. Sending a message has always been part of the system.

Rehabilitation is more difficult. I suppose that it might be said that the point of the life sentence is to enable rehabilitation. In fact, the suggestion was made in a recent High Court case that a person cannot be kept under the OLR unless it can be

shown that there are facilities for dealing with his problems. That has yet to be talked over, but it is a thought.

The Convener: Something is coming up from the depths of my memory about the case of Noel Ruddle v the Secretary of State for Scotland, in which the prisoner had not been given medication or treatment and so had to be released. We had to introduce emergency legislation to deal with such situations. That connects with what you are saying.

John Finnie: I would like to ask Mr Chalmers about rehabilitation, which the public sees as being hugely important to our criminal justice system. Do you think that the bill will facilitate rehabilitation more readily, or is it neutral in that regard?

James Chalmers: I think that the bill is neutral in that regard, because it deals particularly with life sentences.

To go back to the point that Sir Gerald made earlier, the courts and the legislature have not articulated what the purposes of sentencing are. In any case, that would be an extremely difficult exercise. In case law and in similar legislation, we have seen reference to protection of the public and to retribution and deterrence, but there are other aims of sentencing. In any case, aside from the notional exercise that judges are required to conduct in respect of discretionary life sentences, judges do not, and have never, parcelled up sentences into the element for retribution and deterrence, the element for denunciation, the element for protection of the public and so on. I doubt that judges would feel comfortable doing that and, in most cases, I doubt that it would be possible.

Sir Gerald Gordon: My fear about rehabilitation is that it means that prison is good for you and that, if it is good for you, the more you get, the better. We are seeing enough of an increase in general sentencing without that.

On the increase in general sentencing, nowadays the punishment part for murder is not normally less than 13 or 14 years. I recollect being told many years ago that most unhanged murderers—that was the vast majority of murderers, not that we had many murderers then—would get out in about nine years.

John Finnie: I have a further question that relates to part 2 of the bill.

The Convener: I want to deal with part 2 separately. I am going to go to David McLetchie's tutorial, which I am sure will explain everything about part 1 of the bill. I will pay for the tea and coffee. Members are bound to attend now.

I turn to part 2 of the bill, which I know Mr Chalmers may not want to comment on—that is fine. Sir Gerald has commented on it. Will you explain to me the rather breathtaking idea that it should be up to politicians, not the SCCRC, to decide whether information should be published? I can see the point of that, but I can also see a whole lot of elephant traps and difficulties that would come into play if there were political—with a capital P rather than a small P—decisions. Will you explain why you favour that approach?

Sir Gerald Gordon: It is not part of the commission's function to decide whether publication of its reports is appropriate or to decide to publish them. The argument is political. There are political—I use that word in a very broad sense—pressures about the public wanting to know and having a right to know. That is fair enough.

I accept that there are international problems and that the matter has to be dealt with at Westminster, but the easy way to achieve publication is to get the Secretary of State for Justice to agree to the necessary order to enable publication. With all due respect, I do not see why the commission should be expected to take the decision, which, of course, would mean bearing the brunt of the decision. I do not mean to be discourteous, but that looks rather like the politicians passing the buck, just as sometimes—

I will leave that aside. Taking that decision is not part of the commission's function. It would take up its time and resources. It has done its job.

The Convener: I do not know whether you heard the previous panel's evidence, which was that the bill is, in fact, an impediment to disclosure, but that using a statutory instrument instead could circumvent data protection prohibitions or censorship—whatever word one wants to use. Is that right?

Sir Gerald Gordon: It is difficult to see how a statutory instrument could be more effective than a bill. The problem is that the bill runs up against data protection legislation, which is a reserved matter. As I understand it, it is totally reserved, which raises some questions. I have no doubt that your lawyers have provided a satisfactory answer to the point, but I have some doubts as to whether the Parliament can make any provisions that affect the Data Protection Act 1998.

James Chalmers: The 1995 act requires the SCCRC to refrain from disclosing information and creates a criminal offence that applies if information is improperly disclosed. The bill creates an exception to that in certain circumstances. I think that that is what the 2009 order does as well—I do not have the text in front

of me—but broadening the exception will not solve the problem.

The Parliament could repeal the criminal offence altogether—the prohibition on disclosure—but it would not follow from that that the commission would be free to hand out to anyone that it wished any material that was in its possession, because there would be other legal restraints. Chief among those would be the data protection legislation and, as I understand it, the Parliament has no power to do anything about that.

The Convener: So with regard to the argument that has been presented to us that a statutory instrument would be more robust in tackling data protection issues, your position is that that is not the case.

James Chalmers: After this meeting, I will certainly read the statutory instrument again and consider the argument more fully, but I cannot see how the Parliament could circumvent data protection legislation by a bill or an order and I cannot see how data protection is a red herring, as was suggested earlier.

The Convener: It is perhaps not what you set out to do, but it would be helpful to the committee if you could give that matter some thought and revert to us, as that was the prime argument that the previous panel of witnesses put to us on the bill.

John Finnie: Sir Gerald, in the last sentence of your written submission, you say:

"members and staff of SCCRC"

should be

"entitled to a formal immunity from prosecution and indemnity in respect of any civil proceedings that might be brought against them, in the wake of publication."

Why would that be necessary if an employee or member had acted in good faith?

Sir Gerald Gordon: I do not know. I was just trying to suggest that total formal protection for my former colleagues would not do any harm and might do some good.

John Finnie: From where would any civil proceedings arise in such a case?

Sir Gerald Gordon: Persons whose sensitive personal data had been made public without their consent.

John Finnie: Is that a decision for politicians as well?

Sir Gerald Gordon: The SCCRC's purpose is quite clear and set out in statute. It does not include deciding whether to make things public or whether to override the Data Protection Act 1998. It has done its job; it is, as they say in law, functus.

11:30

David McLetchie: My understanding of the normal procedure when an appeal proceeds is that the commission does not publish anything at all. It simply makes its recommendations and hands over its material. What is or is not published is down to what happens in the ensuing court proceedings and might or might not be disclosed by the prosecution or defence.

Sir Gerald Gordon: A statement of referral is given to the Crown and the accused. Technically, there is—subject to data protection—nothing to stop the accused publishing the information; after all, he is not covered by the criminal provisions. Only the commission is affected by those provisions.

David McLetchie: Going back to the question whether it is appropriate for the commission to decide whether to publish, I understand that when an appeal proceeds the commission itself does not decide to publish anything. Whether information comes into the public domain is down to what happens in the ensuing appellate procedure. The commission does not make any decision about publication.

Sir Gerald Gordon: That is right. All that it does is issue a short press statement—which, however, has become slightly longer than it used to be.

David McLetchie: So, as you point out in your submission, the bill will give the commission a responsibility with regard to publication that it does not have under the primary legislation that governs its operations at present.

Sir Gerald Gordon: If the High Court refers to any part of the referral document in its judgment, which it does from time to time, that information will become public. My view is that when a document is produced and used in court proceedings it becomes public, which therefore overrides data protection considerations. As I understand it, however, that is not the general view and certainly dicta in England suggest that there is a big difference between that kind of publication and simply putting something on the airwaves or publishing it at large. Whether or not appeal proceedings resulted in the publication of any part of a reference would seem to depend on the terms of the opinions issued.

David McLetchie: Can the Data Protection Act 1998 therefore determine or restrict what is or is not produced in evidence in a court appeal that might be relevant to the guilt or innocence of one of the parties?

Sir Gerald Gordon: That is disputable but, as I have said, a distinction has been drawn between publication at large and publication within the context of court proceedings.

David McLetchie: So, rather than all the information being out there for anyone to pick whichever bits and pieces they choose, the court becomes the filter of what is published in the context of court proceedings.

Sir Gerald Gordon: It is not my idea. I accept that the situation is not very satisfactory because there is not much to prevent the press from reporting what is said in court and revealing various things that would otherwise have been covered by the Data Protection Act 1998. However, although a document might be lodged and produced—at least in part—in court, it is still covered by the 1998 act, except to the extent that it appears in the judge's opinions. Another exception might be if the document itself is read out in court with the press present, but I am not sure about that.

David McLetchie: That is interesting.

Roderick Campbell: Do you have any comment on the bill's proposal to extend the requirement on the SCCRC to get the views of not only the person who supplied the information but those who are directly affected by the disclosure of such information?

James Chalmers: Any such move has to be appropriate because the source of the information might not be the person who would be affected by its disclosure. In fact, the source might be entirely unaffected by disclosure; it might be almost accidental who passes that information to the commission. If the commission is trying to establish whether it is complying with data protection provisions or whether it has a case to ask the Ministry of Justice for an order allowing it to dispense with the data protection requirements, it will have to consult as far as is possible with the data subject.

The Convener: Members have no further questions. I am tantalised by the fact that while we dance around the edges of the Megrahi report, the only person in the room who knows what is in it is Sir Gerald Gordon—who is, as is absolutely appropriate, sworn to secrecy.

I thank the witnesses for their evidence. I suspend the meeting for five minutes so that members can have a little tea break before the next panel.

11:35

Meeting suspended.

11:41

On resuming—

The Convener: We are now on to our third and final panel of witnesses. I thank them for their patience while we had a slight break. We were weary from part 1 of the bill. I welcome Ken Macdonald, assistant commissioner for Scotland and Northern Ireland, and Sheila Logan, operations and policy manager, both from the Information Commissioner's Office—I take it that that is a UK body.

Ken Macdonald (Information Commissioner's Office): Yes.

The Convener: Thank you for your written submission. I invite committee members to ask questions.

Roderick Campbell: Good morning. Have you seen the Scottish Criminal Cases Review Commission's written submission?

Ken Macdonald: Yes, we have read that, and the *Official Report* of last week's meeting.

Roderick Campbell: Page 6 of the SCCRC's submission states:

> "unless each data subject has given his explicit consent ... to disclose his sensitive personal data, or unless the UK Secretary of State for Justice has made the relevant order under condition 10, the SCCRC is not entitled to disclose the sensitive personal data of that data subject: it would be, in terms of DPA and the Human Rights Act 1998 (HRA), section 6, unlawful for the SCCRC to do so."

Do you agree?

Ken Macdonald: That is slightly against the view that we put in our submission, but we are looking at two ends of the spectrum. We suggest that the conditions that permit processing for the purpose of administration of justice can be satisfied, which would allow the SCCRC to do the processing that is proposed without the need to seek consent. The SCCRC's view is that that would be outwith its legal powers so it would have to revert to a consent-based approach.

The potential solution is to review the proposed amendments in the bill and include a more explicit statement that the SCCRC has the power to produce reports and release information on appeals that are not proceeding.

Humza Yousaf: Good morning. You were here for the earlier evidence today. It was perhaps conveyed by the Justice for Megrahi panel that to alter article 2(b) of the 2009 order would, by the stroke of a pen, be enough to somewhat circumvent the Data Protection Act 1998 and consent would no longer be required. What are your views on that?

11:45

Ken Macdonald: We are rather concerned about the terminology that is being used, such as disapplying or circumventing the 1998 act. That is not the case. Anything has to comply with the

1998 act, and our role as regulator is to assist organisations to comply. We think that the provisions of the bill would assist the SCCRC in ensuring that any disclosures that it made were lawful and fair. Those two conditions—fair processing and lawful processing—are the primary ones that the SCCRC should meet. As we have suggested, there may be some debate about the legality of the processing under the current powers of the SCCRC, but the Parliament could alter that.

Humza Yousaf: If the bill were passed, what would be the obstacle to releasing the information? The Scottish Government and the Westminster Government knocking their heads together, plus the defence—well, Mr Megrahi—and foreign authorities—

Ken Macdonald: To clarify issues that were raised in previous evidence sessions, while it is true that the 1998 act is reserved and can be amended only by the UK Parliament, the conditions for processing can be defined by, among other things, acts of any of the legislatures in the UK. If the Scottish Parliament passed an act that allowed the SCCRC to disclose, under the circumstances that the Parliament so wishes, it would allow—or partly allow—such disclosure to comply with the 1998 act.

The Parliament would have to recognise other principles of data protection and take cognisance of other, umbrella pieces of legislation, primarily the Human Rights Act 1998, and the ECHR as a whole. There are also some duties of confidentiality under common law.

Humza Yousaf: Thank you for that clarification.

The Convener: I think that what you are saying is that the 1998 act is not God-like—it cannot say, "Thus. No further"—and that the Scottish Parliament could, in primary legislation, intrude quite far into data protection by saying, "In these specific circumstances, we require the disclosure of X, Y and Z." The application of data protection by the UK would then be limited. That is what I thought you were saying. If primary legislation of the Scottish Parliament said, specifically, "In relation to certain proceedings—or X, Y and Z", that would temper the application of data protection.

Ken Macdonald: The 1998 act provides a framework in which it gives conditions for processing, among which are

"the exercise of any functions of the Crown ... or a government department".

However, the functions of Government departments are also defined by their founding statutes. If the founding legislation for the SCCRC, as amended, included the ability for it to release information under certain circumstances, determined by itself or by politicians, that would allow the SCCRC to conform with the 1998 act, as regards the general principle of disclosure. As I said, the SCCRC would still have to consider aspects of human rights legislation and, in certain cases, it would have to respect third-party confidentiality.

The Convener: If primary legislation in Scotland said that the SCCRC was required to disclose information in X, Y and Z circumstances, that process would be necessary because of a legal obligation—imposed by the Scottish Parliament—and you would have to comply.

Ken Macdonald: Yes. The function would be set in law by the Scottish Parliament. It would be a function of the SCCRC and therefore the SCCRC would have to undertake the processing to comply with it.

The Convener: So, if the legislation were to put to one side all that stuff about third parties giving consent and people who may be connected to those who have given evidence to the SCCRC but are at arm's length, there would be no data protection inhibitions.

Ken Macdonald: It would allow processing because those conditions would be met. One of the witnesses spoke about data protection being the red herring; that is right, but not in the way that they meant it.

Humza Yousaf: There would be other obligations in relation to sensitive personal data. Even if conditions X, Y and Z were met, there would be obstacles such as international and human rights obligations, and third parties.

Ken Macdonald: There are human rights and common law of confidence obligations that would have to be taken into consideration. The Parliament must of course ensure that the human rights obligations are met in the legislation that it passes.

With regard to foreign obligations, there is an exemption from disclosure where national security is involved, but the SCCRC would have to discuss that with UK authorities.

The Convener: I return to pursuing the point about proposed section 194M, under section 3 in part 2. Subsection (1) of proposed section 194M states that there is an exception if

"(a) the conditions specified in subsection (2) are met, and

(b) the Commission have determined that it is appropriate in the whole circumstances for the information to be disclosed."

If the commission said that it is necessary in the whole circumstances that the information should be disclosed, data protection could not prevent that information from being disclosed.

Ken Macdonald: Yes.

The Convener: So we could change the wording from "it is appropriate" to "it is necessary", or insert the word "must".

Ken Macdonald: Sorry, convener—I will have to look at the precise wording that you are reading out.

The Convener: It is the proposed section on "Special circumstances for disclosure", at line 28 on page 4 of the bill. That is the red herring bit, but in a different way. It states:

"The Commission have determined that it is appropriate".

If that wording read, "it is necessary" or "The Commission have determined that the information must be disclosed", data protection would fly off for those particular facts.

Ken Macdonald: From reading it just now, it appears that it would give the commission the power. We would always say that the SCCRC commissioners would have to satisfy themselves that it was within their power and that it met their vires, but it would appear to be so.

The Convener: You have brought me to silence with that. I feel an amendment coming on that the Government may or may not like.

Ken Macdonald: I will just add that what we are discussing gives the legal basis for the power of the commission. We still have to look at the fairness of the processing. There are proposed sections—section 194N in particular—that help to satisfy that aspect of the 1998 act.

The Convener: What would that be?

Ken Macdonald: It would involve notifying those whose personal information may be disclosed. In the specific case that we are discussing, disclosure would apply not only to al-Megrahi but to other individuals, and in a wider sense, other people—not just the person who is the subject of the appeal—will have their information included in statements of reasons, so they should be notified that that information may well be disclosed.

Under the Data Protection Act 1998, such people would have the right to make representations—the bill specifically provides for them to do so—on why their personal information should not be disclosed, but it would be up to the commission to determine whether the public interest overruled that. A further step that the 1998 act allows such individuals to take is to go to court and ask the court to cease the processing.

The Convener: However, at the end of the day there is a tension between the commission saying, "This must be disclosed" and those with responsibility for data protection saying that they have to agree such a move. If the commission says that this or that must be disclosed, no one can object. An individual might apply to the commission, citing data protection and asking for certain information not to be disclosed, but the commission can simply say, "We don't care about that. We're going to disclose it in the statement of reasons." I guess that the final stop then will be court proceedings.

Ken Macdonald: Yes, that is a reasonable summary.

Alison McInnes (North East Scotland) (LD): Returning to what we discussed earlier, I assume that third parties and those affected cannot have a final veto.

Ken Macdonald: That is right.

The Convener: If we were to go down this route, they could successfully veto things from publication only through court order, interdict or whatever the procedure might be. Is that correct?

Ken Macdonald: Yes.

Alison McInnes: Would it be good practice to phrase the provision in such a way as to ensure, for example, that their agreement was sought?

The Convener: You do not have to do that.

Alison McInnes: Or could we merely notify third parties that the information is likely to be disclosed?

Ken Macdonald: The bill refers to the commission seeking representations. As the regulator, we feel that that is a fairer way to go about all this.

David McLetchie: I wonder whether, having dealt successfully with the Data Protection Act 1998, we can move on to the other barriers or non-barriers to disclosure. Will you elaborate for our benefit the ECHR issues that might act as a barrier to the release of certain information that we have been considering in a data protection context?

Ken Macdonald: Broadly, the barriers would come under article 8, which relates to the right to private life. Again, however, the Parliament and its officials would have to be satisfied that the legislation as framed met HRA requirements.

David McLetchie: But that would be only for the purposes of certification of competence at the outset. It would not preclude an individual relying upon that right to assert, at some later stage, that the legislation, this particular provision or whatever was ultra vires.

Ken Macdonald: Indeed. The individual would always have the right to make an application if they felt that the HRA or the ECHR had been

breached. However, that would be outwith our role as regulators of the 1998 act.

David McLetchie: How does the issue that was raised last week of privileged information between lawyer and client fit into this framework?

Ken Macdonald: The 1998 act contains an exemption for legal professional privilege. However, I would have to take my own legal advice as to whether that exemption applied at this stage in the proceedings, which, after all, would be rather beyond the initial court proceedings. Of course, the commission's own review might include advice from its own advisers that might also be covered by an exemption.

The Convener: As there are no further questions, I give you the opportunity to comment on or draw our attention to anything that we have not asked about.

Ken Macdonald: With regard to a question that was asked in the first evidence session on what will happen when Mr al-Megrahi dies, I point out that the Data Protection Act 1998 applies only to living individuals. When someone dies, it falls. However, that does not mean that everything can be disclosed on Mr al-Megrahi's death; for example, there would still be personal information about third parties who might still be alive and, with regard to Mr al-Megrahi himself, there might still be duties of confidentiality with regard to certain aspects of the information. Just because the 1998 act might have fallen in relation to Mr al-Megrahi's information, that does not mean that we can push everything out. There are other legal considerations that the Parliament would have to take account of and which we would not be able to advise on because, of course, we can look only at the DPA itself.

12:00

The Convener: What duties of confidentiality would remain if Mr Megrahi were to be deceased?

Ken Macdonald: It is not really possible to say without knowing much more about what is in the papers held by the SCCRC. However, if anything had been passed to the commission on a confidential basis, it would have to take cognisance of that if he were deceased.

The Convener: I do not know whether that helps me.

Jenny Marra: Just for clarification, are you saying that you would have to look at the information to determine whether it was confidential? Would that be determined by the lawyer-client privilege that you have referred to?

Ken Macdonald: That is an issue. However, if information is given on the understanding that it is confidential, common-law duties will still apply. Of course, confidentiality can fall away over time and the commissioners as data controllers would have to take a view on that.

Jenny Marra: So on Mr Megrahi's death the Data Protection Act 1998 might fall but his lawyer-client privilege would remain.

Ken Macdonald: There are certain overarching issues that would still have to be taken cognisance of.

The Convener: I thank the witnesses for waiting. I draw this session to a close and we move into private session.

12:01

Meeting continued in private until 12:19.

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