

**PE1370/F**  
**Fergus D Cochrane**  
**Clerk**  
**Public Petitions Committee**  
**TG.01**  
**The Scottish Parliament**  
**Edinburgh**  
**EH99 1SP**

**15 February 2011**

**Dear Mr Cochrane**

## **CONSIDERATION OF PETITION PE1370**

### **Introduction**

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

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

### **Lord Advocate Response – 9 February 2011**

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

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

This is simply not the case.

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

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

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

*“When opening the case for the appellant before this court Mr Taylor [senior counsel for Megrahi] stated that the appeal was not about sufficiency of evidence: he accepted that there was a sufficiency of evidence. He also stated that he was not seeking to found on section 106(3)(b) of the 1995 Act [verdict unreasonable on the evidence]. His position was that the trial court had misdirected itself in various respects. Accordingly in this appeal we have not required to consider whether the evidence before the trial court, apart from the evidence which it rejected, was sufficient as a matter of law to entitle it to convict the appellant on the basis set out in its judgment. We have not had to*

*consider whether the verdict of guilty was one which no reasonable trial court, properly directing itself, could have returned in the light of that evidence."*

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

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

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

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

The Scottish Government in direct response stated.

*'The Government does not doubt the safety of the conviction of Mr Al-Megrahi.'*

The central question therefore becomes.

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

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

On a more general point, Elish Angiolini is Scotland's senior law officer and legal advisor to the government. What is certain is that her fingerprints can be seen all over the Government's refusal of the JFM Petition to have an inquiry carried out. That the Lord Advocate should have played such a central role in the decision making and yet should issue such patently inaccurate and false information is extremely worrying and in our opinion demands an immediate investigation.

If, however, this was the only information error emanating from the Lord Advocate it would be bad enough but it is not. In our initial response to the Scottish Government, 13 January 2011 (page 1), we pointed out how the Government had erroneously stated that it did not have the power to establish a public enquiry.

We commented.

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

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

### **Scottish Government Response - 3 February 2011**

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

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

*'The Government does not doubt the safety of the conviction of Mr Al-Megrahi.'*

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

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

In relation to the current responses we welcome the Justice Secretary's statement.

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

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

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

### **Scottish Criminal Cases Review Commission Response - 7 February 2011**

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

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

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

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

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

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

## **RECOMMENDATIONS**

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

**To allow this to happen we offer three solutions.**

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

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

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

**<http://www.scottish.parliament.uk/vli/publicInfo/htsapp/documents/Howtosubmitapublicpetition.pdf>**

We would therefore further recommend that the following ways be explored of keeping the petition live.

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

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

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

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

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

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

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

## CONCLUSION

We hope that the information and argument provided in this letter will convince the Petition's Committee that it is in the interests of justice that this petition remains open. Despite promises from Alex Salmond and Kenny MacAskill that legislation will be enacted, if and when they are re-elected and that the Carloway Review will right any wrongs, the whole Lockerbie affair is littered with years of deceit and broken promises.

What is clear is that the more information that is revealed the murkier the whole affair becomes and it essential that these matters remain under active consideration in the Scottish Parliament.

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

Yours sincerely

The 'JFM Committee'