

**Scottish Criminal Cases Review Commission 10th
Anniversary Research**

**Final Report
30 April 2009**

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ACKNOWLEDGEMENTS

Many thanks are due to the following people who helped us in undertaking the research:

Robin Johnston and Chris Reddick of the Scottish Criminal Cases Review Commission for their considerable assistance in transferring data, project management and answering queries.

Ian Horne and the Justiciary Office staff who gave up their time to look out files for us and their office space to allow us to read them.

Craig Harris for retrieving records held by Crown Office of relevance to the research.

All the criminal justice professionals who gave up their time to take part in interviews.

CONTENTS

EXECUTIVE SUMMARY	Page 5
CHAPTER 1: INTRODUCTION	Page 6
1.1 PURPOSE OF THE REPORT	Page 6
1.2 RESEARCH AIMS	Page 6
1.3 A NOTE ON TERMINOLOGY	Page 8
CHAPTER 2: BACKGROUND	Page 2
2.1 THE LEGAL BACKGROUND TO THE COMMISSION'S POWER TO REFER	Page 9
2.2 THE LEGAL BACKGROUND TO THE SUBSEQUENT APPEAL PROCESS	Page 11
2.3 THE COMMISSION'S POWERS OF INVESTIGATION	Page 14
CHAPTER 3: RESEARCH METHODS	Page 16
3.1 ANALYSIS OF DOCUMENTARY MATERIAL	Page 16
3.2 INTERVIEWS WITH CRIMINAL JUSTICE PRACTITIONERS	Page 21
CHAPTER 4: ANALYSIS OF THE COMMISSION'S REFERRALS	Page 22
4.1 THE SAMPLE	Page 22
4.2 THE GROUNDS FOR REFERRALS	Page 23
4.3 REFERRAL GROUNDS RAISED BY THE COMMISSION INDEPENDENTLY	Page 25
4.4 TIME TAKEN TO COMPLETE REFERRAL CASES	Page 26
4.5 SUMMARY OF MAIN FINDINGS	Page 27
CHAPTER 5: ANALYSIS OF THE APPEAL COURT'S DETERMINATIONS	Page 29
5.1 EXTENT TO WHICH APPEALS HAVE BEEN BASED ON GROUNDS OTHER THAN THE COMMISSION REFERENCE GROUNDS	Page 29
5.2 SUCCESS RATE OF DETERMINED APPEALS IN REFERRED CASES	Page 32
5.3 SUCCESS RATE OF REFERAL GROUNDS IDENTIFIED INDEPENDENTLY BY THE COMMISSION	Page 34
5.4 SUCCESS RATE OF COMMISSION REFERRAL GROUNDS VS APPLICANT IDENTIFIED GROUNDS	Page 35
5.5 CROWN CONCESSIONS	Page 43
5.6 DEVOLUTION MINUTES	Page 45
5.7 ABANDONED APPEALS	Page 45
5.8 TIME TAKEN TO DETERMINE REFERRED CASES	Page 47
5.9 SUMMARY OF MAIN FINDINGS	Page 48
CHAPTER 6: INTERVIEWS WITH CRIMINAL JUSTICE PRACTITIONERS	Page 50
6.1 INTERVIEWEES' BACKGROUND AND EXPERIENCE	Page 50
6.2 THE COMMISSION'S REMIT AND CASELOAD	Page 51
6.3 THE COMMISSION'S INVESTIGATION AND DECISION MAKING FUNCTIONS	Page 52
6.4 COMMISSION-REFERRED APPEALS	Page 53
6.5 PERCEPTIONS OF THE COMMISSION BY STAKEHOLDERS.	Page 54
6.6 ABANDONMENTS	Page 55
6.7 SUGGESTIONS FOR IMPROVEMENT	Page 55
6.8 CONCLUSION	Page 57
CHAPTER 7: SUMMARY AND CONCLUSIONS	Page 58

7.1 THE NATURE OF CASES REFERRED TO THE APPEAL COURT	Page 58
7.2 GROUNDS OF REFERRAL AND GROUNDS OF APPEAL	Page 58
7.3 THE “SUCCESS” OF THE COMMISSION	Page 59
7.4 THE FUNCTION OF THE COMMISSION	Page 60
7.5 DELAY IN APPELLATE PROCEEDINGS	Page 61
BIBLIOGRAPHY	Page 62
APPENDIX 1: CONVICTION REFERRALS 1 APRIL 1999 TO 31 MARCH 2008	Page 63
APPENDIX 2: SENTENCE REFERRALS 1 APRIL 1999 TO 31 MARCH 2008	Page 64
APPENDIX 3: DISCUSSION GUIDE FOR INTERVIEWS WITH CRIMINAL JUSTICE PRACTITIONERS	Page 65

EXECUTIVE SUMMARY

The report presents the findings of research commissioned by the Scottish Criminal Cases Review Commission (“the Commission”) to mark the 10th anniversary of its establishment. The research commenced on 10 July 2008 and will conclude with the submission of a final report to the Commission by 30 April 2009. The research was undertaken by researchers working within the Scottish Centre for Crime and Justice Research, and reviewed the 75 cases referred by the Commission to the High Court of Justiciary sitting as a court of appeal (“the appeal court”) in the period 1 April 1999 to 31 March 2008. The research aimed to learn more about the references made by the Commission, how its statements of reasons in such cases have been received by the legal profession and the manner in which its grounds of reference have been determined by the court.

Chapters 1, 2 and 3 provide the background to the research, the legal framework governing the Commission’s work, and details of the research methods used.

Chapter 4 reviews the nature of the cases which were referred to the appeal court by the Commission, the grounds on which they were referred and the time taken by the Commission to refer cases. It notes that the majority of cases referred by the Commission involve serious crimes, but that the Commission’s work is not restricted to such cases. The most common ground for referring convictions to the appeal court is evidence not heard at the original trial, with the next most common grounds being a failure to disclose and defective representation. By far the most common ground for referring sentences was the improper calculation of the punishment part of a life sentence.

Chapter 5 reviews the treatment of referred cases by the appeal court, with particular reference to grounds of appeal which went beyond the Commission’s basis for referral. Such grounds were rarely successful, and where they were this was always in conjunction with other grounds. The chapter finds that 60% of conviction referrals and 92% of sentence referrals resulted in successful appeals. Of those referred cases which have been determined by the appeal court, the mean time taken from referral to determination was 631 days.

Chapter 6 reports the results of a programme of interviews with legal professionals (solicitors and advocates) regarding the Commission’s work. It finds that the work of the Commission, and the quality thereof, has been positively received. It notes various suggestions for improvement made by interviewees.

Chapter 7 draws together the results of the research, reviewing in particular the nature of cases referred to the appeal court, grounds of referral and grounds of appeal, the “success” of the Commission, the function of the Commission, and delay in proceedings before the appeal court.

CHAPTER 1: INTRODUCTION

1.1 PURPOSE OF THE REPORT

The purpose of this report is to present the findings of research commissioned by the Scottish Criminal Cases Review Commission (henceforth ‘the Commission’) to mark the 10th anniversary of its establishment. The research commenced on 10 July 2008 and will conclude with the submission of a final report to the Commission by 30 April 2009. The research was undertaken by Fiona Leverick, James Chalmers, Sarah Armstrong and Fergus McNeill of the Scottish Centre for Crime and Justice Research (henceforth ‘the research team’).

1.2 RESEARCH AIMS

The main aim of the research, as set out in the research specification and tender document,¹ was to “learn more about the references made by the Commission, how its statements of reasons in such cases have been received by the legal profession and the manner in which its grounds of reference have been determined by the court”.

The research had a number of specific objectives, as follows:²

- (a) Identification of the nature of the grounds on which Commission referrals are based and the proportion of cases referred on each ground.
- (b) Identification of the nature and number of referral grounds based on the Commission’s own enquiries or assessment of cases, as opposed to grounds raised by the applicants themselves (and the nature of the referral grounds where these differ from those raised by the applicant).
- (c) Establishment of the number of cases in which notes of appeal have included grounds other than those presented by the Commission, and the nature of those grounds.
- (d) Of the referral cases that have been successful at appeal, identification of:
 - (i) The number in which grounds other than those presented by the Commission have been argued at appeal, and the nature of those other grounds;
 - (ii) The number in which grounds presented by the Commission have formed the basis of the High Court’s decision to uphold the appeal, and the nature of those grounds;
 - (iii) The number in which grounds other than those presented by the Commission have formed the basis of the High Court’s decision to uphold the appeal, and the nature of those grounds;
 - (iv) The number conceded by the Crown and the reasons for those concessions; and
 - (v) The number based on grounds identified by the Commission as opposed to the applicant, and the nature of those grounds.

¹ All references in this report to ‘the tender document’ refer to the written tender submitted to the Commission by the research team on 30 June 2008.

² These have been re-numbered for purposes of clarity but otherwise are the same as those set out in the research specification and the tender document.

- (e) Of the referral cases that have not been successful at appeal, identification of:
 - (i) The number in which grounds other than those presented by the Commission have been argued at appeal, and the nature of those other grounds;
 - (ii) The number in which the rejection of the appeal was based on the rejection of grounds presented by the Commission, and the nature of those grounds; and
 - (iii) The number in which the rejection of the appeal was based on the rejection of grounds other than those presented by the Commission.
- (f) Of the appeals abandoned following references, identification of the reasons for abandonment.
- (g) Calculation of the average time to complete referral cases, from date of application to date of reference; together with a year on year analysis of this.
- (h) Calculation of the average time taken by the court to determine referral cases, from date of reference to date of determination by the court.
- (i) Identification of the reasons for any delays in the appeal process.
- (j) Investigation of the perceptions of counsel and solicitors instructed in completed referral-based appeals as to the quality of the Commission's legal and factual analysis, investigative work and decision-making.
- (k) Identification of themes, trends and conclusions to be drawn from the accumulated data.

In addition to these aims, it was subsequently agreed that the research would also examine two further issues: identification of the number of cases in which devolution minutes have been lodged and argued and identification of the number of cases in which an appellant, following rejection by the Commission of an allegation of defective representation, subsequently sought to argue such a ground on appeal and the court's decision on this. In fact, this latter issue was broadened out beyond solely defective representation. Whenever an appellant argued a ground on appeal other than a Commission reference ground, the researchers recorded whether or not this was a ground he had previously put to the Commission only for it to be rejected or whether it was an entirely new ground of appeal that had not been the subject of his application to the Commission.

The research bears some similarities to that undertaken by Laurie Elks into the first ten years of operation of the Criminal Cases Review Commission for England and Wales,³ although this aimed only to provide an account of the outcome of the English Commission's referrals during its first ten years of operation and did not undertake any research into the attitude of the legal profession towards the Commission.⁴ Its use is also somewhat limited for comparative purposes as, with the

³ See L Elks, *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (2008). Laurie Elks was a member of the Commission for all but the last three months of that ten year period.

⁴ For an early – and generally positive – assessment of the reception of the Commission by the legal profession in the context of England and Wales, see the Select Committee on Home Affairs, *The Work of the Criminal Cases Review Commission* (1999), at para 18 and the discussion in A James, “The Criminal Cases Review Commission: economy, effectiveness and justice” [2000] Crim LR 140-153.

exception of homicide cases, there is no overall classification of referred cases according to the ground(s) on which they were referred or were argued at appeal stage.

1.3 A NOTE ON TERMINOLOGY

In the remainder of this report, the following terminology will be used. The Scottish Criminal Cases Review Commission will be referred to as ‘the Commission’. Occasionally, for comparative purposes, reference will be made to the Criminal Cases Review Commission for England, Wales and Northern Ireland. Where this is necessary, it will be referred to as ‘the English Commission’ to distinguish it from the equivalent Scottish organisation. Strictly speaking, referred cases are determined by the High Court of Justiciary sitting as an appeal court. For simplicity, the court will be referred to as ‘the appeal court’. All references throughout the report to the ‘the 1995 Act’ are to the Criminal Procedure (Scotland) Act 1995.

CHAPTER 2: BACKGROUND

This chapter sets out the statutory and common law provisions relating to the Commission that are relevant to this research and which help to set the research findings in context.

2.1 The legal background to the Commission's power to refer

2.1.1 The establishment of the Commission and its power to refer cases

Following the recommendation of the Sutherland Committee on Appeals Criteria and Alleged Miscarriages of Justice,⁵ the Commission was established in April 1999 by section 24 of the Crime and Punishment (Scotland) Act 1997, which inserted a new Part XA into the 1995 Act. The establishment of the Scottish Commission came two years after the equivalent body in England and Wales, which also deals with the jurisdiction of Northern Ireland.⁶ The Commission began its work on 1 April 1999 and therefore at the time of writing had been in operation for ten years.

The Commission does not have the power to quash convictions or to adjust sentences, but merely to refer either a conviction or a sentence (or both) back to the appeal court for its consideration.⁷ Prior to the Commission's establishment, convicted persons who had exhausted the normal appeal process had to apply to the Secretary of State for Scotland if they wished to have their convictions or sentences reconsidered.⁸ The Commission is empowered to deal with both solemn and summary cases⁹ and there is no requirement that an applicant has previously appealed against his conviction or sentence.¹⁰ Whether or not the Commission decides to refer a case, it is required to issue a statement of reasons explaining its decision.¹¹ In referred cases, statements of reasons are provided to the applicant and any of his representatives, the High Court, the Lord Advocate and the Crown Agent.¹² By the end of its ninth year (31 March 2008), the Commission had received 939 applications, 75 of which resulted in references to the appeal court, a referral rate of eight per cent.¹³ It is these cases that form the main subject of this research and they will be discussed further in subsequent sections of the report.¹⁴

⁵ Sutherland Committee, *Criminal Appeals and Alleged Miscarriages of Justice* (Cm 3245, 1996), chapter five. The committee noted that “the arguments for and against change seemed fairly evenly balanced” (para 5.28). The government initially took the view that no new body needed to be established, but amended the Crime and Punishment (Scotland) Bill during its progress through Parliament “taking account of the views expressed in [the House of Lords] at Committee stage”: HL Deb 19 Mar 1997 col 944 (the Lord Advocate, Lord Mackay of Drumadoon).

⁶ For the legislative provisions relating to the English Commission, see Part 2 of the Criminal Appeal Act 1995.

⁷ 1995 Act, s194B.

⁸ For a brief history of the establishment of the Commission, see P Duff, “Criminal Cases Review Commissions and ‘deference’ to the courts: the evaluation of evidence and evidentiary rules” [2001] Crim LR 341-362.

⁹ The Commission is empowered to deal with solemn cases by s194B of the 1995 Act. The power to deal with summary cases was established by statutory instrument under s194E of the 1995 Act (see the Scottish Criminal Cases Review Commission (Application to Summary Proceeding) Order 1999/1181).

¹⁰ 1995 Act, s194B(1).

¹¹ 1995 Act, s194D(4) and (5).

¹² When a decision is taken not to refer a case, the statement of reasons is issued solely to the applicant and any of his representatives.

¹³ Scottish Criminal Cases Review Commission, *Annual Report and Accounts 2007-08* (2008), at 5.

¹⁴ See chapters 4 and 5.

2.1.2 The statutory test for referral

The grounds upon which the Commission may refer a case to the appeal court are that it believes (a) that a miscarriage of justice may have occurred; and (b) that it is in the interests of justice that a reference should be made.¹⁵ Much has been made of the apparent difference between this test and that which governs the English Commission, which, under section 13(1)(a) of the Criminal Appeal Act 1995, may not refer a case to the Court of Appeal unless it considers that “there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made”.¹⁶

The judgment required of the English Commission has been said to be “very unusual... because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take”.¹⁷ By contrast, it has been argued, the Scottish Commission is not required to “second-guess” the appeal court in this way.¹⁸ The correctness of this distinction is, however, doubtful. The reference to a “miscarriage of justice” in the statutory test is a reference to the sole ground of appeal against conviction or sentence in Scots law,¹⁹ and in *M, Petitioner*,²⁰ Lord Emslie stressed that the Commission was obliged to apply the “correct legal test” in taking a decision on whether to refer a case to the appeal court.²¹

The second limb of the statutory test makes it clear that the Commission is not *obliged* to refer a case where it believes that a miscarriage of justice may have occurred.²² However, it should be noted that the English legislation makes no absolutist demand of the English Commission either. The English legislation states only that the Commission “may” refer certain cases to the Court of Appeal, and that such a reference may not be made *unless* the “real possibility” referred to above is made out. The legislation does not state that the English Commission *must* refer the case where such a real possibility exists. In principle, this implies that the English Commission also has a discretion to decline to refer a case even where the section 13(1)(a) condition is satisfied, although it is not clear what criteria should govern the exercise of such a discretion. In practice, the English Commission appears to have made no claim to any such discretion, and applications for judicial review of that Commission’s decisions have turned purely on the question of whether the Commission was entitled to conclude that section 13(1)(a) was not satisfied.²³

¹⁵ 1995 Act, s194C.

¹⁶ Criminal Appeal Act 1995, s13(1)(a). A “real possibility” has been held to mean more than “an outside chance or a bare possibility” but less than a “probability or a likelihood or a racing certainty” (*R v Criminal Cases Review Commission ex p Pearson* [2000] 1 Cr App R 141 at 149 per Lord Bingham CJ).

¹⁷ *R v Criminal Cases Review Commission, ex p Pearson* [2000] 1 Cr App R 141 at 150 per Lord Bingham CJ.

¹⁸ Duff n 8 above at 344. See also P Duff, “Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner”, MLR, forthcoming.

¹⁹ 1995 Act, ss106(3) (solemn procedure) and 175(5) (summary procedure).

²⁰ 2006 SLT 907.

²¹ *M, Petitioner* at [43]. See also [40], where Lord Emslie was impliedly critical of the claim that the Commission was not required to “second guess” the appeal court.

²² See also *Raza v Scottish Criminal Cases Review Commission* 2007 SCCR 403 at [7] per Lord Malcolm, referring to the Commission’s “broad discretion”.

²³ *R v Criminal Cases Review Commission, ex p Pearson* [2000] 1 Cr App R 141; *R (on the application of A and C) v Criminal Cases Review Commission* [2002] EWHC 2644 (Admin); *Dowsett v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin); *R (on the application of Edwards) v Criminal Cases Review Commission* [2008] EWHC 2389 (Admin)

There is similarly no indication that the Scottish Commission, in practice, disregards the likely attitude of the appeal court²⁴ or places significant weight on the second limb of the statutory test. In *M, Petitioner*, in response to an argument that the Commission “had declined to make references irrespective of what view the court might be expected to take”, it was noted that “senior counsel [for the Commission] was at pains to affirm that this was not, and never had been, the respondents’ practice or policy, and that all applications were lawfully determined by applying the correct legal tests”.²⁵

It should, however, be noted that in deciding whether or not to refer a case, the Commission is not restricted to consideration of the issues raised by the applicant but can undertake independent investigations of its own. This was confirmed by the court in *Scottish Criminal Cases Review Commission v HM Advocate*,²⁶ where Lord Clarke observed that:

Parliament intended the petitioners to have the fullest investigative powers in reaching the decision whether or not a reference to the Court should be made in any particular case and that in exercising these powers, in the performance of their investigative duties, they are to act independently and to be seen to act independently. There can be no question ... of their powers of investigation being directed or circumscribed by any other person or body.²⁷

Thus the Commission can refer a case on a ground that was not raised by the applicant and has done so in a number of cases that formed part of this research. Indeed, one of the aims of the research was to establish the frequency with which this occurs.²⁸ Likewise, the Commission is empowered to refer a case even where an application has not been made by the person to whom the case relates²⁹ and has done so on at least one occasion.³⁰

2.2 The legal background to the subsequent appeal process

Once a case is referred to the appeal court by the Commission, it is dealt with by the court under the normal appeal process. At present, an appellant whose case is referred by the Commission does not have to apply separately for leave to appeal in order for his appeal to be determined by the appeal court.³¹

²⁴ For discussion of this issue, see the debate between Professor Peter Duff, one of the original Scottish Commissioners, and Peter Ferguson QC: Duff, n 8 above; PW Ferguson, “Letter: admissibility, criminal evidence, Scottish Criminal Cases Review Commission” [2001] Crim LR 761-762; P Duff, “Reply to Peter Ferguson” [2001] Crim LR 762-763.

²⁵ *M, Petitioner* at [28] per Lord Emslie.

²⁶ 2001 JC 36.

²⁷ At para 9.

²⁸ See section 4.3 for the results of this analysis.

²⁹ 1995 Act, s194D(1).

³⁰ See *Johnston v HM Advocate* 2006 SCCR 236, where the conviction of Billy Allison was referred by the Commission, despite Allison never having applied to the Commission (or indeed appealed his conviction at all), after it received an application from his co-accused, Steven Johnston.

³¹ Although this rule is likely to be changed: see section 2.2.3 below.

2.2.1 Grounds of appeal against conviction

Strictly speaking, in Scotland, there exists only a single ground of appeal against conviction: that there has been a “miscarriage of justice”.³² There are, however, a number of accepted factors on which such a miscarriage can be based (referred to here as ‘grounds’ for the sake of simplicity of terminology). Two are specified in the legislation itself: the existence of evidence that was not heard at the original proceedings³³ and an unreasonable jury verdict.³⁴ Others have emerged from case law. The categorisation of grounds of appeal against conviction will be considered in more detail in chapter 3.³⁵

At this point, one issue is worth noting as a matter of general background, which is that for an appeal against conviction to succeed in Scotland, it must be based on a recognised and specific ground, such as trial judge misdirection or defective representation. This was made clear in *Harper v HM Advocate*,³⁶ a Commission reference case, where it was stated that: “it has never been recognised by the court that some general concern, or unease, in relation to a particular conviction, with no further specification, could be a basis upon which a conviction could be disturbed.”³⁷ This is in contrast to England and Wales, where appeals can succeed on a residual element of “lurking doubt” as to the appellant’s guilt, whereby the court can:

... in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which can be produced by the general feel of the case as the Court experiences it.³⁸

2.2.2 Grounds of appeal against sentence

Like appeals against conviction, appeals against sentence are determined according to the statutory test of whether there has been a “miscarriage of justice”.³⁹ Unlike appeals against conviction, there is no established set of factors on which such a miscarriage of justice can be based. It has been said that appeals against sentence fall to be determined on the general ground that the sentence is “excessive”,⁴⁰ although it is insufficient for an appellant to aver merely that a sentence “is excessive”, and further specification must be given in order for the court to determine the appeal.⁴¹ The way in which grounds of appeals against sentence might be categorised is dealt with in chapter 3.⁴²

³² 1995 Act, ss106(3) (solemn procedure) and 175(5) (summary procedure).

³³ 1995 Act, ss106(3)(a) (solemn procedure) and 175(5) (summary procedure).

³⁴ 1995 Act, s106(3)(b) (solemn procedure only). It is also possible to appeal against a conviction under summary procedure on the basis that the decision of a sheriff or lay justice was unreasonable, although this is not specifically provided for in the 1995 Act.

³⁵ See section 3.1.2(i).

³⁶ [2005] HCJAC 23.

³⁷ At para 33.

³⁸ *R v Cooper* [1969] 1 QB 267, at 271. In practice, very few convictions have been quashed on this basis, but it is still available in principle as a ground of appeal (see e.g. *Dookran and Dookran* [2007] UKPC 15). For discussion, see LH Leigh, “Lurking doubt and the safety of convictions” [2006] Crim LR 809-816.

³⁹ 1995 Act, ss106(3) (solemn procedure) and 175(5) (summary procedure).

⁴⁰ Lord McCluskey and P McBride, *Criminal Appeals*, 2nd edn (2000) para 3.42.

⁴¹ *Campbell v MacDougall* 1991 SCCR 218.

⁴² See section 3.1.2(ii).

It is, at this point, worth commenting on appeals against sentence based on the inappropriate calculation of the punishment part of a sentence of life imprisonment.⁴³ By way of background, when an offender is sentenced to life imprisonment,⁴⁴ the sentencing judge sets a specific minimum period of time, commonly termed the ‘punishment part’, which the offender must serve before he is eligible to be considered for parole. The manner in which the punishment part should be calculated was the subject of two key cases: *O'Neill v HM Advocate*,⁴⁵ decided by the appeal court in 1999, shortly before the Commission began its operations, and *Flynn v HM Advocate (No 1)*,⁴⁶ decided by the Privy Council in 2004. In both cases, the court held that the manner in which the punishment part of life sentences had previously been calculated was incorrect and issued guidance on the way it should be calculated in future.

In *O'Neill*, it was held that in calculating the punishment part, in order to ensure comparative justice with those serving determinate sentences imposed in similar circumstances,⁴⁷ the sentencing judge should determine the length of time that should serve as punishment for the offence, leaving out issues of public protection from the calculation, and should normally set the punishment part at half of this figure. In some cases a higher proportion than half might be appropriate, but this should not exceed two thirds.⁴⁸

The decision in *Flynn* dealt with adult mandatory life prisoners who were serving such sentences when the transitional provisions of the Convention Rights (Compliance) (Scotland) Act 2001 came into force. Some such prisoners had already been formally notified of the date on which the parole board would review, or next review, their case. It was held in *Flynn* itself that it was inappropriate for the setting of a punishment part to have the effect of postponing the earliest competent review date, and the statutory provisions should be read as entitling the court to take account of the prisoner’s conduct to date. It was subsequently held that even where no review date had been formally notified, the prisoner’s conduct to date could still, in accordance with *Flynn*, be taken into account.⁴⁹

As will become apparent, the sample of referred cases that formed the basis for this research was dominated, on the sentencing side, by this type of appeal and thus it will be referred to frequently in subsequent chapters of the report.

2.2.3 Appeals based on grounds other than those identified by the Commission

During the time period covered by this research, it was possible for applicants whose cases had been referred to the appeal court to raise grounds of appeal for the court’s consideration other than those

⁴³ Punishment parts were formerly been termed “designated parts” and before that “relevant parts”. (For the statutory history, see J Chalmers, “Punishment parts and discretionary life sentences” 2003 SLT (News) 199-203 at 199-200.) Although some of the cases referred to the appeal court by the Commission involved “designated parts”, set before section 2 of the Convention Rights (Compliance) (Scotland) Act 2001 came into force, the term “punishment part” is used throughout this report for convenience.

⁴⁴ This is mandatory following a conviction for murder (see the 1995 Act, s201(5)), but is not limited to murder cases.

⁴⁵ 1999 SLT 958.

⁴⁶ 2004 SC (PC) 1, as applied in *Flynn v HM Advocate (No 2)* 2005 JC 271.

⁴⁷ *O'Neill*, at 962.

⁴⁸ *O'Neill*, at 963.

⁴⁹ *Christensen v HM Advocate* 2006 JC 152, where the point was conceded by the Crown.

on which the Commission referred the case. This was made clear in *Al Megrahi v HM Advocate*,⁵⁰ where the court held that the appellant, whose conviction was referred to the appeal court by the Commission, was not “constrained in framing his grounds of appeal to matters centred on or giving expression to the Commission’s reasons for making the reference”.⁵¹

This meant that not only could an appellant raise grounds that had not been considered by the Commission at all but he could also re-raise grounds that the Commission had considered and explicitly rejected.⁵²

In *Al Megrahi*, however, the court hinted that it found this practice less than desirable, given limited court and judicial resources, but made it clear that any change in the position was a matter for Parliament.⁵³ It now seems likely that legislation will be passed whereby an appeal, following a reference made by the Commission, can only be based on the grounds contained in the Commission’s statement of reasons unless permission is granted otherwise by the court.⁵⁴ In England and Wales, legislative provision to this effect has been in force since April 2005.⁵⁵

2.3 The Commission’s powers of investigation

One final matter of legal background concerns the Commission’s powers of investigation. Where it believes that a person or a public body has documents or materials that may assist in the performance of its functions, the Commission has the power, under section 194I of the 1995 Act, to apply to the High Court for an order requiring that access to such materials is granted. In its second year of operation, the Commission made such an application in relation to documentation held by the Crown Office and Procurator Fiscal service.⁵⁶ The application was successful and the court set out a number of general principles regarding the provision of information. Most importantly, it was held that the Crown has a duty to disclose materials held in its possession that relate to a case under investigation when requested to by the Commission and that it is a matter for the Commission to decide whether materials or documents are of assistance in any particular case. It is not required to specify reasons why access to particular materials is required.⁵⁷

This means that the Commission, in the exercise of its independent investigatory function, has a greater power to access information than does an appellant (or his representatives) and will sometimes hold information that may be of use to an appellant in the preparation of his appeal but

⁵⁰ 2008 SLT 1008.

⁵¹ At para 72.

⁵² See section 5.1 for details of how frequently this occurred in the sample of cases that formed the basis of this research.

⁵³ At para 80.

⁵⁴ See s61 of the Criminal Justice and Licensing (Scotland) Bill, as introduced on 6 March 2009 and Scottish Government, *Revitalising Justice: Proposals to Modernise and Improve the Criminal Justice System* (2009), at 22.

⁵⁵ See Criminal Appeal Act 1995, ss14(4A) and (4B), as amended by the Criminal Justice Act 2003 s315. Prior to this, appellants were able to argue grounds additional to those on which the Commission referred the case without needing to obtain leave to do so: see *R v Smith* [2002] EWCA Crim 2907. For discussion, see R Nobles and D Schiff, “The Criminal Cases Review Commission: establishing a workable relationship with the Court of Appeal” [2005] Crim LR 173-189.

⁵⁶ *Scottish Criminal Cases Review Commission v HM Advocate* 2001 JC 36.

⁵⁷ At para 24.

cannot be disclosed to him.⁵⁸ This issue was raised during interviews undertaken with legal professionals and, as such, is discussed in more detail in chapter six.⁵⁹

⁵⁸ Given the Commission's own strict rules on disclosure – see the 1995 Act, ss 194J-194L.

⁵⁹ See section 6.3.

CHAPTER 3: RESEARCH METHODS

This chapter sets out the research methods utilised. The research comprised two main components: the analysis of documentary material in relation to the cases that formed the subject of this research and interviews with criminal justice practitioners. Each is described in turn below.

3.1 Analysis of documentary material

The cases that formed the main subject of this research were the 75 cases that had been referred to the appeal court in the period 1 April 1999 to 31 March 2008 (subsequently ‘the 75 referred cases’), 42 of which were conviction referrals and 33 of which were sentence referrals. A list of these cases, along with the outcome of those determined by the appeal court, is contained in Appendices 1 (conviction referrals) and 2 (sentence referrals). The figure of 75 requires some brief explanation. One of the cases that was referred during this period was the case of Abdelbaset Ali Mohamed Al Megrahi, who was convicted of murder following the Lockerbie bombing. This case has been excluded from our analysis, primarily because it is an exceptional case that is not in any way typical of the Commission’s normal workload in terms of the detail and complexity of the issues considered and the international dimension involved.⁶⁰ Thus, strictly speaking, the research is concerned with only 74 cases, but in one of the referred cases in the sample (JH) the Commission referred both the applicant’s conviction and his sentence. For the purposes of the analysis, this has been treated as two separate cases, as the reasons for referral were different and therefore require to be analysed separately.

3.1.1 Data collection

In order to address the research objectives it was necessary to collect data from a number of sources on the 75 referred cases, namely the Commission’s statement of reasons, the applicant’s subsequent note of appeal and, for those cases that had been determined by the appeal court, the appeal court’s judgment. In addition, it was initially hoped that the researchers would be able to collect information on the reasons why the Crown sometimes concedes reference appeals from Crown Office records. In the event it did not prove possible to do this in time for such material to be taken into account in the final report. Each of these data sources is briefly discussed below.

(i) Statements of reasons

The statements of reasons for the 75 referred cases were supplied to the researchers by the Commission.

(ii) Notes of appeal

The researchers were granted permission by the Lord Justice-General to access the notes of appeal relating to the 75 referred cases and arrangements were made with Justiciary Office to collect this

⁶⁰ The statement of reasons extends to over 800 pages accompanied by 13 volumes of appendices. Its inclusion may also have delayed the research considerably as the researchers would have had to gain security clearance in order to examine the papers.

information. It was originally thought that it might be feasible to access notes of appeal via the electronic record system of the High Court. From discussions with Justiciary Office staff it soon became apparent that this would not be possible as many of the cases in the sample pre-date the establishment of the electronic record system and even for those which do not, notes of appeal are not routinely stored electronically. This meant that the information had to be collected via paper records. In the vast majority of cases the relevant file was accessed by the researchers, but there were two cases where it did not prove possible to locate the file within the timeframe of the research. This is a very small minority of the case sample overall did not pose any significant problems because for both cases it proved possible to obtain the information contained in the note of appeal from an alternative source.

Permission was also sought from the Lord Justice-General to collect information from case files held at Justiciary Office on the reasons for delays in reference based appeals. However, the Lord Justice-General explained that there was no established system for recording the reasons for delays in progressing the appeals process, particularly as an electronic case management system had only been introduced in 2003. For this reason, the research was limited in this respect to information obtained from other sources (primarily the interviews with criminal justice practitioners).

(iii) Appeal court judgments

At the time of writing of this report, 54⁶¹ of the 75 referred cases had been determined by the appeal court: 30 of the 42 conviction referrals and 24 of the 33 sentence referrals.⁶² In 29 of these 54 cases, a written judgment was available and was obtained by the researchers, either from the Commission or directly from the Scottish Courts Service searchable judgments database.

Written judgments were available for the vast majority of determined conviction referrals: 25 out of the 30 cases. In none of the five cases where a written judgment was not available, however, did this pose any problems for the research as the researchers were able to discover the grounds of appeal and outcome of the case from other sources (either the case records held at Justiciary Office or information held by the Commission).

It was less common for a written judgment to be available for sentence referrals – in only four of the 24 determined sentence referrals was there a written judgment. This was not unexpected. It is far less common for the appeal court to issue written judgments in appeals against sentence, with judgment usually being issued verbally. This did not pose any real difficulties for the research. In all 20 of the determined sentence referrals where a written judgment was not available, the research team were able to determine the outcome of the case and the grounds of appeal from the case records held at Justiciary Office.

⁶¹ This figure differs from that given in interim reports for this project because previously the research team had been including abandoned appeals as having been “determined”. While they are determined in the sense that the outcome is known, they are clearly not “determined by the appeal court” and therefore are not treated as such here.

⁶² In order to leave sufficient time for analysis and report writing, a cut off date of 23 February 2009 was set. Any referred cases determined by the appeal court after this date were not included in the analysis.

(iv) Crown Office records

In those cases where grounds of appeal were conceded by the Crown, the researchers sought to establish the reasons for the concession made. In some cases, this was evident from a written judgment issued by the appeal court, or was known to the Commission, but in other cases it was necessary to consult files held by Crown Office to establish this. The necessary access permissions were granted by Crown Office and copies of relevant documents exhibited to the research team.

3.1.2 Data analysis

Statistical information relevant to the research objectives was generated using the Statistical Package for the Social Sciences (SPSS) data analysis software. The information collected on the 75 referred cases was input into SPSS and a process of data analysis was undertaken. A preliminary task, however, was the classification of the ‘grounds’ of appeal utilised by the Commission and the appeal court in the 75 referred cases, both in relation to appeals against conviction and appeals against sentence. A tentative classification system was drawn up as part of the tendering process, but this needed to be refined over the course of the project. The classification scheme that was finally utilised is described below.

(i) Classification scheme for appeals against conviction

As noted earlier,⁶³ there exists only a single ground of appeal against conviction – that there has been a “miscarriage of justice” – but there are a number of accepted factors on which such a miscarriage can be based. Our classification system for appeals against conviction is shown in table 3.1 below. The classification draws heavily on that adopted by Peter Duff and Frazer McCallum in their research for the Sutherland Committee on Appeals Criteria and Alleged Miscarriages of Justice,⁶⁴ although some of their categories have been modified slightly to reflect developments in the law since their research was undertaken.

In addition to these minor modifications, two entirely new categories were added. The first of these was “failing to disclose” (ground 31 in table 3.1). This category did not feature in Duff and McCallum’s research, perhaps because there was limited support for such a ground of appeal in the case law at the time.⁶⁵ However, a duty of disclosure on the part of the Crown is now firmly established in the case law.⁶⁶ The second is “lurking doubt” (ground 32 in table 3.1). This was added to reflect the fact that one of the 75 referred cases (that of Jason Harper) was referred by the Commission on precisely this basis: that a collection of issues, none of which *in itself* was capable of

⁶³ See section 2.2.1.

⁶⁴ P Duff and F McCallum, *Grounds of Appeal in Criminal Cases* (1996).

⁶⁵ An appeal based on a failure to disclose failed in *Higgins v HM Advocate* 1990 SCCR 268, where the appeal court went so far as to assert that “there is no obligation on the Crown to disclose any information in its possession which would tend to exculpate the accused” (*per* Lord Cowie at 269). That proposition – asserted in a brief opinion following submissions by a party litigant – sits uneasily with earlier authority (*Slater v HM Advocate* 1928 JC 94; *Smith v HM Advocate* 1952 JC 77), and would no longer be regarded as good law.

⁶⁶ See the Privy Council decisions in *Holland v HM Advocate* [2005] UKPC D1 and *Sinclair v HM Advocate* [2005] UKPC D2 and the subsequent successful appeals against conviction in e.g. *Gair v HM Advocate* 2006 SCCR 419; *Johnston v HM Advocate* 2006 SCCR 236; and *Gilmour v HM Advocate* 2007 SLT 893. For discussion, see R Johnston, “*McInnes v HM Advocate*: Time for a(nother) definitive decision on disclosure” (2009) 13 Edin LR 108-112.

constituting a recognised factor for grounding a successful appeal, when taken together suggested an element of reasonable doubt as to the applicant's guilt. As chapter 2 has already noted,⁶⁷ however, unlike in England and Wales, such 'lurking doubt' is not a ground of appeal that has found favour with the appeal court in Scotland (a fact was made clear when Harper's case was determined by the appeal court, who declined to quash his conviction).⁶⁸

Table 3.1: Classification of grounds of appeal against conviction

Error of Law	Irregular Proceedings	Misdirection of Jury	Other
1. Incompetent proceedings: no jurisdiction	8. Judge: refusal to grant adjournment	16. Evidence: omission, value, weight	26. Ambiguous verdict
2. Incompetent proceedings: miscellaneous	9. Judge: partisan questioning of witnesses	17. Law: corroboration	27. Unreasonable verdict ⁶⁹
3. Evidence: wrongful admission	10. Judge: general oppressive behaviour	18. Law: definition of crime	28. Evidence not heard at original proceedings ⁷⁰
4. Evidence: wrongful exclusion	11. Judge: miscellaneous	19. Law: definition of defence	29. Defective representation ⁷¹
5. Refusal of no case to answer submission	12. Conduct of prosecutor (including abuse of process)	20. Law: onus of proof	30. Grounds unclear
6. Insufficient evidence	13. Jury	21. Law: evidence of accomplice / co-accused	31. Failure to disclose
7. Miscellaneous	14. Part of proceedings not in open court	22. Law: concert	32. Lurking doubt
	15. Miscellaneous	23. Law: explanation of verdicts	
		24. Law: miscellaneous	
		25. Withdrawal of defence	

By and large, it was relatively unproblematic to classify the 42 conviction referrals in terms of the grounds in table 3.1. It was occasionally difficult to categorise the Commission's reasons for referral,

⁶⁷ See section 2.2.1.

⁶⁸ *Harper v HM Advocate* [2005] HCJAC 23, at para 33.

⁶⁹ Duff and McCallum used the term "perverse verdict": here, the term "unreasonable verdict" is used to represent the statutory language inserted into s106(3)(b) of the 1995 Act by s17(1) of the Crime and Punishment (Scotland) Act 1997.

⁷⁰ This was termed "additional evidence" in Duff and McCallum's research, reflecting the statutory provisions then in place, since amended by s17 of the Crime and Punishment (Scotland) Act 1997.

⁷¹ This was termed "inadequate representation" in Duff and McCallum's research, reflecting the fact that no such basis for an appeal had at the time been recognised by the appeal court. (In the six cases where this ground was put forward in the cases studied by Duff and McCallum, it was done so by an appellant acting without legal advice.) It is now recognised as a basis for an appeal (see *Anderson v HM Advocate* 1996 JC 29) and is commonly referred to as "defective representation".

especially in one or two of the earlier statements of reasons analysed by the researchers, and it should be recognized that sometimes the research team did have to apply its own interpretation which might have differed from that of the original decision makers. In addition, one slightly problematic issue involved distinguishing between cases where fresh evidence emerged that had not been available at the original proceedings (ground 28) and cases involving a failure to disclose evidence (ground 31) as one often went hand in hand with the other if the Crown was in possession of the evidence at the time of the trial (but did not disclose it to the defence).⁷² Here the research team had to be careful that a mere difference in emphasis in the statement of reasons compared to the subsequent appeal court judgment did not result in the case being classified differently when, in fact, the basis for the decision was the same.

(ii) Classification scheme for appeals against sentence

Like appeals against conviction, appeals against sentence are determined according to the statutory test of whether there has been a “miscarriage of justice”.⁷³ Unlike appeals against conviction, there is no established set of factors on which such a miscarriage of justice can be based or any existing scheme of classification of sufficient detail that could be adopted by the research team for classifying the 33 sentence referrals.⁷⁴ As such, a classification scheme was drawn up over the course of the project and this is shown in table 3.2 below.

Table 3.2: Classification of grounds of appeal against sentence

1. Improper punishment part calculation
2. Inaccurate factual basis
3. Inappropriate weighting of certain factors
4. Incompetent sentence
5. Inconsistent with precedent
6. Insufficient or no discount for guilty plea
7. Irrelevant factor taken into account
8. Relevant factor not taken into account

Classifying the sentence referrals was, at times, a more difficult task than classifying the conviction referrals. Some cases were relatively easily classified – most notably those referred because the punishment part of a life sentence had been calculated inappropriately. However, it was not always easy to distinguish between, for example, cases in which a sentence was referred because certain factors were given too much or too little weight in arriving at the sentence (ground 3) or because the sentence was inconsistent with precedent (ground 5). Here, much depended on whether the Commission in its statement of reasons (or the appeal court in its judgment) made reference to precedent in justifying its decision. The research team did feel though that while there was sometimes a fine line between some of the different classification grounds, they were distinguishable,

⁷² This was not always the case. In some fresh evidence cases the evidence was genuinely unknown to any of the parties at the time of the trial.

⁷³ See section 2.2.2.

⁷⁴ Although some assistance was taken from Lord McCluskey and P McBride, *Criminal Appeals*, 2nd edn (2000) para 7.29.

and while any difficult decisions were referred to a second member of the team for verification, in no case did the conclusions of the two researchers differ.

The results of the analysis of documentary material are reported in chapters four and five of this report.

3.2 Interviews with criminal justice practitioners

In addition to the analysis of documentary material, a programme of interviews was undertaken with solicitors and advocates who have been involved in referral cases, both on the Crown side and the applicant side. The research team identified potential interviewees by an analysis of written judgments, and of case files, where the names of each side's legal representatives are recorded. Twelve legal practitioners were interviewed, primarily advocates whose practice was mostly or exclusively in criminal defence. Further details are given in section 6.1.

The formal interviews were semi-structured, guided (but not constrained) by a discussion guide, noting the key issues on which the opinion of the interviewee is sought. It is the experience of the research team that this semi-formal method is the most productive for this type of evaluative research as it ensures that key issues are discussed without rigidly constraining the interviewee. A copy of the discussion guide is contained in Appendix 3.

As well as the formal interviews with solicitors and counsel, informal discussions were undertaken with staff at the Justiciary Office, in order to determine the information held in their case files and to obtain their views on the factors affecting the speed with which referral cases are decided by the court.

The results of the interviews of criminal justice personnel are reported primarily in chapter six, although information gathered during the interviews and informal discussions also serves to supplement other chapters of the report.

CHAPTER 4: ANALYSIS OF THE COMMISSION'S REFERRALS

This chapter is the first of two chapters reporting the results of the analysis of the referred cases. It focuses on the nature of these cases, and in particular the grounds for referral and the extent to which these were grounds identified by applicants or independently by the Commission. It also examines the time taken to complete cases from application to referral.

4.1 The sample

The cases that form the main subject of this research are the 75 cases that have been referred to the appeal court by the Commission in the period between its establishment on 1 April 1999 to 31 March 2008. To put this figure in the context of the Commission's overall workload, during this nine year period, 939 applications were received by the Commission. The 75 cases that were referred represent a referral rate of eight per cent.⁷⁵ This can be contrasted to the referral rate of the English Commission, where in the period from its establishment on 31 March 1999 to 31 March 2008, 10,038 applications resulted in 384 referrals, a referral rate of 3.8%.⁷⁶

It is possible that the Scottish figure is skewed by the 20 referrals in respect of punishment parts following the series of cases on the proper approach to their calculation.⁷⁷ If these are left out of account (making the assumption that the Commission referred every such case in respect of which it received an application), the Commission's referral rate would be six per cent (55 of 919 applications), still noticeably higher than the English figure.

Of the 75 referred cases, 42 were conviction referrals and 33 were sentence referrals. The nature of the offences involved is shown in table 4.1 below. Some cases involved the referral of more than one offence. Where this was the case, table 4.1 shows the most serious of the offences involved.

Table 4.1: Offence categories

Offence category	All cases	Conviction referrals	Sentence referrals
Murder	33 (44%)	18 (43%)	15 (46%)
Attempted murder	2 (3%)	2 (5%)	-
Rape	6 (8%)	5 (12%)	1 (3%)
Other sexual offence	11 (15%)	4 (10%)	7 (21%)
Assault	6 (8%)	4 (10%)	2 (6%)
Robbery	2 (3%)	1 (2%)	1 (3%)
Drugs offences	5 (7%)	1 (2%)	4 (12%)
Firearms offences	2 (3%)	2 (5%)	-
Driving offences	3 (4%)	-	3 (9%)
Theft	2 (3%)	2 (5%)	-
Other ⁷⁸	3 (4%)	3 (7%)	-
Total	75	42	33

⁷⁵ Scottish Criminal Cases Review Commission, *Annual Report and Accounts 2007-08* (2008), at 5.

⁷⁶ Criminal Cases Review Commission, *Annual Report and Accounts 2007/08* (2008), at 14.

⁷⁷ See section 2.2.2.

⁷⁸ One case respectively of culpable homicide, evasion of betting duty and cruelty to an animal.

Of the 33 sentence referrals, the majority (20) were referrals of the punishment part of life sentences.⁷⁹ Of the remainder, ten were referrals of determinate sentences of imprisonment, two were fines and one was a referral of an absolute discharge where the applicant had been placed on the sex offenders register.

4.2 The grounds for referrals

An initial objective of the research was to identify the nature of the grounds on which Commission referrals are based and to calculate the proportion of cases referred on each ground. Table 4.2 displays the results of this exercise for the 42 conviction referrals. The total adds up to more than 42 because cases were often referred on more than one ground. The classification scheme used in the table is explained in chapter 3.⁸⁰

Table 4.2: Grounds of referral (convictions)

Ground	Number of cases	% of cases ⁸¹
Error of law	11	26
Insufficient evidence	6	14
Evidence: wrongful admission	2	5
Evidence: wrongful exclusion	2	5
Refusal of no case to answer submission	2	5
Irregular proceedings	8	19
Conduct of judge	2	5
Conduct of jury	2	5
Conduct of prosecutor	1	2
Other	3	7
Misdirection	7	17
On evidence: omission, value, weight	5	12
On law: corroboration	2	5
On law: other	1	2
Other	30	71
Evidence not heard at original proceedings	21	50
Failure to disclose	7	17
Defective representation	7	17
Unreasonable verdict	2	5
Lurking doubt	1	2
n=42		

As table 4.2 shows, by far the most common ground for referral of a conviction was the emergence of evidence that was not heard at the original trial, which featured as a ground of referral in half (21) of the 42 referred convictions. The next most common single grounds of referral were a failure to disclose (seven referrals) and defective representation (seven referrals).

⁷⁹ See section 2.2.2 for an explanation of the legal background to this and section 4.2 for a discussion of the impact that the dominance of such appeals might have had on the analysis.

⁸⁰ See section 3.1.2(i).

⁸¹ The total in this column is greater than 100% as cases were often referred on more than one ground.

As the table shows, the remaining referrals were categorised according to the general nature of the referral ground in question. Eleven cases were referred by the Commission due to some sort of error of law that had taken place at the applicant's trial: the conviction being based on insufficient evidence in law (six cases), the wrongful admission of evidence (two cases), the wrongful exclusion of evidence (two cases) or the refusal of a no case to answer submission (two cases).⁸² Eight cases were referred due to some sort of procedural irregularity at trial: the conduct of the judge (two cases), the conduct of the jury (two cases), the conduct of the prosecutor (one case) or some other sort of procedural irregularity (three cases). This last category comprised a guilty plea wrongly accepted by the court, a wrongly conducted dock identification and the defence being deprived of the opportunity to cross-examine a witness. Seven cases were referred on the basis of a misdirection by the original trial judge: on the weight or value that should have been attached to the evidence (five cases), on the law relating to corroboration (two cases) or in one case on some other aspect of the law, namely the law relating to the appropriate inferences to be drawn from silence.

Table 4.3 displays the grounds of referral used by the Commission in the 33 sentence referrals. As with the conviction referrals, the total adds up to more than 33 because cases were sometimes referred on more than one ground (although this was less common in relation to sentence referrals). The classification scheme used in the table is explained in chapter 3.⁸³

Table 4.3: Grounds of referral (sentences)

Ground	Number of cases	% of cases ⁸⁴
Improper punishment part calculation	20	61
Sentence inconsistent with precedent	6	18
Incompetent sentence	5	15
Relevant factor not taken into account	2	6
Sentence calculated on inaccurate factual basis	1	3
Inappropriate weighting of certain factors	1	3
n=33		

As table 4.3 shows, by far the most common reason for the Commission to refer a sentence was because the punishment part of a life sentence had been improperly calculated, this accounting for 20 of the 33 sentence referrals. Five of these cases were referred on the basis of *O'Neill v HM Advocate*⁸⁵ and the remaining 15 on the basis of *Flynn v HM Advocate (No 1)*.⁸⁶ It is unlikely that this will continue to be a common ground of referral. *O'Neill* was decided in 1999 and the five *O'Neill* referrals were all applications received between 2000 and 2002. No cases have been referred on this basis since 2002. *Flynn* was decided by the Privy Council in 2004 and of the 15 *Flynn* referrals, six were applications received in 2004, five were received in 2005, three were received in 2006 and only one was received in 2007. It is clear that this type of application is tailing off, if not ceasing

⁸² The total number of cases exceeds eleven because one case was referred due to two separate errors of law. This also applies to the misdirection category and the 'other' category.

⁸³ See section 3.1.2(ii).

⁸⁴ The total in this column is greater than 100% as cases were often referred on more than one ground.

⁸⁵ 1999 SLT 958.

⁸⁶ 2004 SC (PC) 1, as applied in *Flynn v HM Advocate (No 2)* 2005 JC 271. See section 2.2.2 for an explanation of both cases.

altogether, which will almost certainly have implications for the total caseload of the Commission in terms of sentence applications and referrals.

The next most common reasons for referral of sentences were that the sentence was inconsistent with precedent (six cases) and that the sentence was incompetent (five cases). This last category included, for example, a case where the applicant had, allegedly, wrongly been placed on the sex offenders register after an absolute discharge (JH), a case where the starting point for the sentence was higher than the statutory minimum (Jordan) and a case where an extended sentence was passed in circumstances where, in the opinion of the Commission, this was not legally permitted (Docherty, Floyd).

4.3 Referral grounds raised by the Commission independently

A second objective of the research was to identify the nature and number of referral grounds based on the Commission's own enquiries or assessment of cases, as opposed to grounds raised by the applicants themselves. As chapter two explained, the Commission is permitted to make its own independent enquiries and can refer a case on a ground (or grounds) that were not raised by the applicant. Likewise, the Commission is empowered to refer a case even where an application has not been made by the person to whom the case relates.⁸⁷

To take this latter category of referral first, this occurred only once in the sample of referred cases, in the case of Allison, whose murder conviction was referred despite Allison never having applied to the Commission (or indeed appealed his conviction at all), after an application was received from his co-accused, Steven Johnston.⁸⁸ This case is different in nature to those where the Commission has independently identified grounds of referral based on its own enquiries. Both of the Commission's grounds of referral of Allison's conviction (evidence not heard at the original proceedings and a failure to disclose by the police) were grounds identified in his co-accused's application, not by the Commission acting independently.

Moving on to the former type of case, the research indicated that eleven of the 75 referrals were referred on grounds identified independently by the Commission. In seven of these, the Commission identified ground was the sole ground for referral. In the remaining four, the case was referred on a combination of grounds identified by the Commission and by the applicant. Ten of the eleven cases were conviction referrals. Only one (JH) was a sentence referral. Table 4.4 summarises the eleven cases concerned. The success or otherwise of the cases when determined by the appeal court is considered in chapter 5.⁸⁹

⁸⁷ See section 4.3.

⁸⁸ And indeed Allison's conviction was subsequently quashed by the appeal court. See *Johnston v HM Advocate* 2006 SCCR 236.

⁸⁹ See section 5.3.

Table 4.4: Cases where Commission independently identified grounds for referral

Case	Commission's independently identified referral ground	Was this the sole ground for referral?
Campbell, Thomas	Fresh evidence (psychological studies)	Yes
Coubrough	Fresh evidence (evidence of memory expert)	No – also referred on one applicant identified ground
Falconer	Error of law (insufficient evidence in law to support conviction)	Yes
Fraser	Misdirection on law: corroboration	No – also referred on one applicant identified ground
Gibson	Error of law (insufficient evidence in law to support conviction)	Yes
Gordon	Fresh witness evidence	No – also referred on two applicant identified grounds
Harper	Lurking doubt	Yes
Kidd	Failure to disclose	Yes
McInnes	Failure to disclose	Yes
Steele	Fresh evidence (psychological studies)	No – also referred on one applicant identified ground
JH	Incompetent sentence (placed on sex offenders register following absolute discharge)	Yes ⁹⁰

4.4 Time taken to complete referral cases

Another objective of the research was to calculate the average time to complete referral cases, from date of application to date of reference. It should perhaps be said at this point that this calculation only provides a partial indication of the speed with which the Commission conducts its investigations, focussing as it does solely on those cases that end up being referred and not on those that do not. Setting this limitation aside, however, the average (mean) time taken to complete the 75 referred cases in the sample was 506 days (approximately one year and five months). The shortest period from date of application to date of reference was 71 days (Middler, a sentence referral relating to a punishment part) and the longest was 2274 days (Wilson, a murder conviction referral).

Unsurprisingly, given the relative complexity of the investigations involved, the average time taken to complete conviction referrals (728 days) was far longer than that taken to complete sentence referrals (223 days).

Table 4.5 addresses a further objective of the research, which was to provide a year on year analysis of the average time to complete referral cases.

⁹⁰ JH applied to the Commission requesting a review of his conviction for lewd and libidinous practices. The Commission referred his conviction (on the ground proposed by the applicant) but also independently referred his sentence, even though the applicant did not request this.

Table 4.5: Average time taken in days to complete referred cases

Year of application	All cases	Conviction referrals (days)	Sentence referrals
1999	895 (n=19)	895 (n=19) ⁹¹	-
2000	764 (n=7)	903 (n=5)	419 (n=2)
2001	524 (n=7)	789 (n=3)	326 (n=4)
2002	329 (n=3)	-	329 (n=3)
2003	733 (n=2)	733 (n=2)	-
2004	212 (n=10)	309 (n=3)	171 (n=7)
2005	304 (n=15)	455 (n=7)	173 (n=8)
2006	265 (n=8)	371 (n=3)	202 (n=5)
2007	167 (n=4)	-	167 (n=4)

Table 4.5 suggests a general trend for speedier case determination. However, the figures here should be treated with considerable caution. First, the number of cases in most years is small and the nature of the sample for each year could vary significantly. Secondly, these figures only take account of cases referred to the appeal court by 31 March 2008, and cannot take into account any cases currently under review which may be referred by the Commission in future. These figures would be significantly affected by any longstanding cases which have yet to be referred. For example, if the Commission were (hypothetically) to have in April 2008 referred a conviction to the appeal court which had taken the same length of time as Wilson's to review, the average time taken to complete referred cases for the relevant year of application (2002) would increase from 329 to 815 days.

4.5 Summary of main findings

The nature of cases referred to the appeal court. As might be expected, while the Commission's referrals to the appeal court encompass a broad range of offences, the most serious offences feature heavily. Murder and attempted murder cases account for 47% of cases referred by the Commission to the appeal court, with rape and other sexual offences making up a further 23%.

The grounds of referral in conviction appeals. By far the most common ground for referral of a conviction is evidence not heard at the original trial, featuring as a ground of appeal (although not necessarily the sole ground) in half of the referred convictions. The next most common single grounds of referral were a failure to disclose (seven referrals) and defective representation (seven referrals).

The grounds of referral in sentence appeals. By far the most common reason for the Commission to refer a sentence was because the punishment part of a life sentence had been improperly calculated, which accounted for 20 of 33 referrals. The next most common reasons were that the sentence was inconsistent with precedent (six referrals) or incompetent (five referrals).

⁹¹ This figure includes a number of cases that were passed on to the Commission from the Scottish Office, which previously exercised the function now exercised by the Commission. The date of application in respect of these inherited cases was deemed to be the date on which the Commission was established, but in reality the cases had been awaiting determination for longer than that.

Grounds of referral identified by the Commission independently. The Commission referred eleven cases to the appeal court on the basis of grounds identified by the Commission independently of the application which it had received. These grounds differed from case to case, but encompassed four cases of fresh evidence, two of a failure to disclose, two of insufficient evidence having been led at trial, one of a misdirection regarding corroboration, one of “lurking doubt” and one of an incompetent sentence. In seven of these cases these grounds were the sole ground of referral. Ten of these eleven cases were conviction referrals.

Time taken to complete referral cases. In those cases which formed part of this study, the average time taken to complete conviction referrals was 728 days, and the average time taken to complete sentence referrals 223 days.

CHAPTER 5: ANALYSIS OF GROUNDS OF APPEAL AND THE APPEAL COURT'S DETERMINATIONS

This chapter is the second of two chapters to report the results of the analysis of referred cases. In this chapter, the focus is on the grounds of appeal used by appellants following the referral of their case and the manner in which referred cases have been determined by the appeal court.

5.1 Extent to which appeals have been based on grounds other than the Commission reference grounds

As chapter two set out, during the period covered by the research, it was possible for appellants whose cases had been referred by the Commission to include grounds of appeal other than the Commission reference grounds without having to obtain the leave of the court to do so.⁹² One objective of the research was to identify how frequently this did, in fact, occur.

Table 5.1 displays the results of this analysis for all 75 referred cases. As such, given that not all of these cases have yet reached the stage of being presented in court, it is based primarily on the notes of appeal submitted by appellants (or, in the two cases in which we were unable to obtain the note of appeal, on an alternative source⁹³). It should be noted that the percentage figures in table 5.1 do not total 100 due to rounding.

Table 5.1: Did appellant raise grounds on appeal other than Commission reference grounds?

	Yes (number)	Yes (%)
All cases (n=75)	29	39
Conviction referrals (n=42)	20	48
Sentence referrals (n=33)	9	27

As table 5.1 shows, in 29 of the 75 referred cases (39 per cent) the appellant submitted grounds of appeal additional to the Commission reference grounds. As is also clear from the table, it was more common for appellants to submit grounds of appeal additional to the Commission reference grounds in appeals against conviction (48 per cent of cases) than it was in appeals against sentence (27 per cent of cases). It should be noted that the disproportionate representation of punishment part appeals in the sample of referred sentences may have skewed these figures, as in only four of the 20 punishment part appeals based on *O'Neill* or *Flynn* did the appellant argue anything but the Commission reference ground (i.e. that the approach to calculating the punishment part was incorrect).⁹⁴

⁹² This is likely to change as a result of s61 of the Criminal Justice and Licensing (Scotland) Bill, as introduced on 6 March 2009 (see section 2.1 above).

⁹³ See section 3.1.1(ii) above.

⁹⁴ The four punishment part cases in which the applicant added his own grounds of appeal were McCreadie and Nairne (inappropriate weighting of certain factors); Smith (inappropriate weighting of certain factors and insufficient discount for guilty plea); and Watson (insufficient discount for guilty plea). In a number of cases (McCaskill, McWilliam and Robertson), the note of appeal included a complex argument to the effect that the decision in *Ansari v HM Advocate* 2003 JC 105 was incorrect and that the provisions of s 2(2)(aa) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, as amended, were incompatible with Convention rights. The researchers did not treat this as a new ground of appeal, on

It should also be noted, though, that this does not mean that in all 29 of these cases the grounds added by the appellant were argued in court. Table 5.1 is based on information contained in the notes of appeal and some appellant identified grounds were abandoned prior to the appeal being argued. Of the 29 cases in which the appellant raised additional grounds of appeal, three appeals have been abandoned entirely and thus will never reach the stage of being argued in court and in six the appeal has yet to be heard. In four of the remaining 20 cases that have been determined, the appellant abandoned his own grounds and argued the appeal solely on the Commission grounds. Thus in only 16 cases have appellant identified grounds of appeal actually been argued in court. The success or otherwise of these grounds is considered later, in section 5.4.

A further objective of the research was to identify the extent to which appellants raised grounds on appeal that were not only additional to the Commission's reference grounds but had previously been considered and *rejected* by the Commission. In nine of the 75 referred cases, appellants presented grounds of appeal that had previously been rejected by the Commission (seven conviction referrals and two sentence referrals). Some appellants included multiple rejected grounds. Thus, across these nine cases, 15 individual grounds of appeal were raised that had previously been rejected by the Commission, 13 of which were grounds of appeal against conviction and two of which were grounds of appeal against sentence. Table 5.2 lists these cases.⁹⁵ The nature of the grounds of appeal themselves are shown in tables 5.3 and 5.4.

Table 5.2: Cases where appellants raised grounds previously rejected by Commission

Case	Number of grounds
Conviction referrals	
Campbell, Thomas	2
Coubrough	2
Gray, William	2
Harper	3
Neeson	2
Steele	1
Wilson	1
Sentence referrals	
Baillie	1
Leith	1

Tables 5.3 and 5.4 display the nature of the grounds of appeal where appellants raised grounds additional to those in the Commission's statements of reasons. Table 5.3 focuses on appeals against conviction and table 5.4 focuses on appeals against sentence. The analysis is at the level of the individual grounds of appeal, not at case level. The tables display the nature of these additional grounds, using the classification developed for this research, and also indicate whether or not these grounds had previously been rejected by the Commission.

the basis that it continued to amount to a claim that the punishment part had been incorrectly calculated, albeit that the claim was advanced on a different basis to that accepted by the Commission. Two of these three appeals (McCaskill and Robertson) were abandoned: the third (McWilliam) had not been determined by the cut off date set by the researchers, although it appears from the papers held by Justiciary Office that it is also likely to be abandoned.

⁹⁵ The success or otherwise of these grounds of appeal is summarized in table 5.8.

Table 5.3: Nature of additional grounds raised by appellants (convictions)

	Number raised	Of which, number previously rejected by Commission
All appeal grounds	49	13
Error of law, of which:	5	3
Insufficient evidence	2	1
Evidence: wrongful admission	2	1
Refusal of no case to answer submission	1	1
Irregular proceedings, of which:	8	1
Conduct of jury	3	1
Conduct of prosecutor	1	None
Part of proceedings not in open court	1	None
Other	3	None
Misdirection, of which:	17	3
On evidence: omission, value, weight	11	2
On law: onus, standard of proof	3	1
On law: definition of crime	2	None
On law: corroboration	1	None
Other:		
Evidence not heard at original proceedings	7	5
Failure to disclose	4	None
Defective representation	4	1
Unreasonable verdict	3	None
Ground unclear	1	None

Table 5.4: Nature of additional grounds raised by appellants (sentences)

Ground	Number raised	Of which, number previously rejected by Commission
All appeal grounds	9	2
Inappropriate weighting of certain factors	5	None
Insufficient or no discount for guilty plea	3	1
Inaccurate factual basis	1	1

As table 5.3 shows, the most common appeal grounds raised by appellants beyond the Commission reference grounds in conviction appeals related to misdirection and especially misdirection relating to the evidence (eleven grounds). It was also common for appellants to raise evidence not heard at the original proceedings as an additional appeal ground, frequently after this had been rejected by the Commission (five out of seven instances), as well as failure to disclose (four grounds) and defective representation (four grounds). In appeals against sentence, table 5.4 shows that the most commonly raised additional appeal ground was the inappropriate weighting of certain factors (five grounds), although it was also fairly common for appellants to raise the issue of insufficient or no discount for a guilty plea (three grounds), once after this had been rejected by the Commission.

The success or otherwise of the appellant identified grounds – including those that were previously rejected by the Commission – is examined in section 5.2 below.

5.2 Success rate of determined appeals in referred cases

This section of the report examines the success or otherwise of determined appeals in referred cases. At the time of writing, of the 75 referred cases, 54 had been determined (30 of the 42 conviction referrals and 24 of the 33 sentence referrals).⁹⁶ A further seven had been abandoned by the appellant (six of which were appeals against sentence but one of which was an appeal against conviction) and therefore will not reach the stage of being heard by the appeal court, the reasons for which are examined later in this chapter.⁹⁷ The remaining 14 cases (eleven conviction appeals and three sentence appeals) have yet to be determined. A list of individual case outcomes is contained in Appendix 1 (for conviction referrals) and Appendix 2 (for sentence referrals). It is the 54 determined cases that form the main basis for analysis in the remainder of this chapter.

As a preliminary point before examining success rates in detail, it must be noted that while it is relatively straightforward to determine whether or not an appeal against conviction has been successful, this is not always the case for an appeal against sentence. Appeals against conviction can have only two broad outcomes – the conviction is either quashed (classified here as a successful appeal) or it is not (classified here as an unsuccessful appeal). Even so, there are further possibilities in relation to the first of these outcomes in that where a conviction is quashed, the court may or may not decide to grant authority for a re-trial to take place or in certain circumstances they may substitute a conviction for a lesser included offence.⁹⁸ But the basic classification of an appeal against conviction for a particular offence as either ‘successful’ or ‘unsuccessful’ is relatively unproblematic.

Appeals against sentence are more problematic as it is possible for the appeal court to accept the appellant’s argument in principle (say, about the manner in which his sentence was calculated) but for the actual sentence to remain unchanged.⁹⁹ The best example of this in the sample of referred cases is Ansari. Ansari was convicted of rape and his case was referred by the Commission on the basis that the approach taken by the sentencing judge in calculating the punishment part of his life sentence was incorrect and should have followed the procedure set out in *O’Neill v HM Advocate*.¹⁰⁰ The court accepted this argument in principle but, in recalculating the sentence, selected a higher starting point than the original sentencing judge, so there was effectively no change to the sentence Ansari received.¹⁰¹ For the narrow purposes of this research, this was classified as a successful appeal, in that the appeal court agreed with the Commission’s reasons for referral, but it can probably be assumed that the appellant would not have regarded it as such. It is, however, successful in the same sense that an appeal against conviction which resulted in a retrial would be regarded as ‘successful’ notwithstanding a conviction at the retrial.

Table 5.5 summarises the outcome of the 54 cases that have been determined by the appeal court to date, as a whole and broken down into conviction and sentence appeals.

⁹⁶ As chapter 3 explained, a cut off date of 23 February 2009 was set for the inclusion of determined cases.

⁹⁷ See section 5.7.

⁹⁸ 1995 Act, s118(1).

⁹⁹ Or indeed to increase (see the 1995 Act, ss 118(4)(b) and 198(1)(b)), although this did not happen in any of the cases that were the subject of this research.

¹⁰⁰ 1999 SLT 958. See section 2.2.2 above.

¹⁰¹ See *Ansari v HM Advocate* 2003 JC 105.

Table 5.5: Success rate of determined appeals

	Success rate (number)	Success rate (%)
All cases	40/54	74
Conviction referrals	18/30	60
Sentence referrals	22/24	92

As table 5.1 shows, 40 of the 54 cases referred by the Commission have subsequently succeeded on appeal, a success rate of 74 per cent. The appeal court has quashed 18 of the 30 referred convictions (60 per cent) and 22 of the 24 referred sentences (92 per cent) have resulted in successful appeals. Thus an initial point to be made is that the level of agreement between the Commission and the appeal court is, at 74 per cent, reasonably high. This figure certainly does not suggest that the two bodies are at odds with each other in terms of the manner in which they are determining cases.

It is also worth comparing these figures to those relating to England and Wales. In the period from the inception of the English Commission to 31 March 2008, 357 referred cases were determined, either by the Court of Appeal or the House of Lords, this figure consisting of 313 convictions and 44 sentences. In total, 250 of the 357 referred cases were successful on appeal, an overall success rate of 70 per cent. Breaking this down by the type of case involved, 211 of the 313 referred convictions were quashed (67 per cent) and 39 of the referred sentences were varied (89 per cent).¹⁰² Thus the overall success rate of referred cases is slightly higher in Scotland than in England and Wales (74 per cent compared to 70 per cent).

It should be said, though, that this overall figure is perhaps not the best point of comparison, as the figures for referred convictions and referred sentences are quite different. In relation to referred convictions, the success rate of appeals is higher in England and Wales, at 67 per cent, than it is in Scotland, where it is 60 per cent. This is not an enormous difference and it is perhaps not wise to draw any firm conclusions on the basis of what is, after all, a fairly small sample of Scottish cases (only 30 referred convictions, compared to 313 in England and Wales). It is nonetheless interesting that although the Commission's referral rate (at eight per cent of applications received) is twice that of England and Wales (where it is 3.8 per cent),¹⁰³ the success rate of the Scottish Commission's referrals once they reach the stage of determination by the appeal court is somewhat lower.

In relation to referred sentences, the success rate of appeals is slightly higher in Scotland, at 92 per cent, compared to 89 per cent in England and Wales. One reason for the higher Scottish rate may well be the disproportionate number of appeals in the sample that are sentence referrals based on either *O'Neill* or *Flynn*, the two cases involving calculation of the punishment part of life sentences.¹⁰⁴ In the English sample, sentence referrals as a group account for only eleven per cent per cent of all determined cases. In the Scottish sample, the punishment part referrals *alone* account for 26 per cent of all determined cases (14 of the 54 referred cases that have been determined to date). As section 5.4.2 below notes, the success rate of "improper punishment part calculation" as an individual ground of appeal was 100 per cent, whereas the success rate for individual grounds of appeal against sentence other than this was considerably lower, at 50 per cent.

¹⁰² Criminal Cases Review Commission, *Annual Report and Accounts 2007/08* (2008), at 15.

¹⁰³ See section 4.1 above.

¹⁰⁴ See section 2.2.2 above.

5.3 Success rate of referral grounds identified independently by the Commission

A further objective of the research was to identify how often referral grounds that had been identified independently by the Commission (i.e. grounds that were not raised by the applicant) ultimately succeeded on appeal. Chapter four established that in eleven of the 75 referred cases the Commission referred the case on the basis of grounds it identified independently.¹⁰⁵ Four of these (Coubrough, Falconer, Gordon and JH) have yet to be determined. Table 5.6 displays the outcome of the remaining seven cases that have been determined.

As table 5.6 shows, the Commission identified grounds (which were the only grounds argued on appeal) were successful in five of the seven cases concerned, but did not meet with the approval of the appeal court in the other two cases. In at least one of these, Harper, this was perhaps not surprising. Harper was referred on the basis of the Commission's 'lurking doubt' about the conviction, where the Commission itself admitted that no single factor in the case was capable of constituting a recognised ground on which to base a successful appeal. On appeal, the case was argued on the basis of the Commission's 'lurking doubt' reference ground, but Harper also added several additional grounds of appeal of his own.¹⁰⁶ All were rejected by the appeal court, which declined to quash the conviction.

Table 5.6: Outcome of determined cases where Commission independently identified grounds for referral

Case	Commission's independently identified referral ground	Outcome
Campbell, Thomas	Fresh evidence (psychological studies)	Appeal succeeded on this and one other ground
Fraser	Misdirection on law: corroboration	Appeal succeeded on this ground alone – court therefore felt it unnecessary to address second ground of referral
Gibson	Error of law (insufficient evidence in law to support conviction)	Sole ground argued on appeal – appeal successful
Harper	Lurking doubt	Appeal refused
Kidd	Failure to disclose	Sole ground argued on appeal – appeal successful
McInnes	Failure to disclose	Appeal refused
Steele	Fresh evidence (psychological studies)	Appeal succeeded on this and one other ground

5.4 Success rates of Commission referral grounds vs appellant identified grounds

A further objective of the research was to establish the success or otherwise of appeals based solely on Commission reference grounds compared to appeals based on grounds added independently by

¹⁰⁵ See table 4.4.

¹⁰⁶ *Harper v HM Advocate* [2005] HCJAC 23.

appellants. As has already been noted, during the period covered by the research, it was possible for appellants to argue referred cases on grounds other than the Commission reference grounds without having to obtain the leave of the court to do so¹⁰⁷ and this was a common feature of appeals against conviction in particular.

This objective will be addressed here in two ways. First, a case level analysis will be presented, identifying the outcome of cases in which Commission/appellant grounds formed the basis for the appeal. However, this analysis does not tell the whole story, as many cases (appeals against conviction in particular) had multiple grounds of appeal and thus a second analysis will be undertaken at the level of each individual appeal ground.

5.4.1 Case level analysis

As was noted at the start of the chapter, 54 of the referred cases have been determined by the appeal court. In 34 of these 54 cases, the appeal was framed solely on the basis of grounds identified by the Commission. In the remaining 20 cases, additional appeal grounds were identified by the appellant, but in only 16 were these grounds argued in court, the remainder being included in the note of appeal but abandoned prior to the appeal hearing.¹⁰⁸ Thus the total number of cases that were argued in court solely on the basis of grounds identified by the Commission was 38.

Table 5.7 summarises the outcome of the 38 cases in which the appeal was ultimately presented solely on the basis of grounds identified by the Commission. As the table shows, these appeals had a relatively high success rate, with 27 of the 34 (76 per cent) being granted by the appeal court. As the table shows, in one of these successful cases (McGinty¹⁰⁹) the appeal succeeded on a combination of the Commission referral ground (evidence not heard at the original proceedings) and an additional ground identified independently by the appeal court (error of law: wrongful admission of expert evidence at trial). The success rate of appeals against *conviction* based solely on Commission reference grounds was 65 per cent and the success rate of appeals against *sentence* based solely on Commission reference grounds was 89 per cent, although in assessing the significance of these percentages it should be borne in mind that only very small numbers are involved here.

¹⁰⁷ This is likely to change as a result of s61 of the Criminal Justice and Licensing (Scotland) Bill, as introduced on 6 March 2009 (see section 2.2 above).

¹⁰⁸ See section 5.1.

¹⁰⁹ *McGinty v HM Advocate* [2006] HCJAC 8.

Table 5.7: Outcome of appeals based on Commission reference grounds only

	All cases	Conviction referrals	Sentence referrals
Appeal succeeded on Commission grounds only	28	12	16
Appeal succeeded partly on Commission grounds and partly on appeal court grounds	1	1	0
Appeal unsuccessful	9	7	2
Total	38	20	18
Success rate	76%	65%	89%

Table 5.8 summarises the outcome of the 16 cases in which the appellant argued grounds of appeal in court additional to the Commission reference grounds. As the table shows, it was rare for appeals to succeed on grounds identified by the appellant, as opposed to those identified by the Commission. In only two of the 16 cases did this happen and in both of them the appeal court also allowed the appeal on the basis of the Commission's referral grounds.

Table 5.8: Outcome of appeals where appellant argued grounds other than Commission reference grounds

	All cases	Conviction referrals	Sentence referrals
Appeal succeeded on Commission grounds only	8	4	4
Appeal succeeded partly on Commission grounds and partly on appellant grounds	2	1	1
Appeal succeeded partly on Commission grounds and partly on appeal court grounds	1	-	1
Appeal unsuccessful	5	5	-
Total	16	10	6

A further objective of the research was to identify whether any of the grounds argued by appellants that had previously been considered and rejected by the Commission ultimately succeeded on appeal. There were nine cases in which appellants tabled grounds of appeal that had previously been rejected by the Commission, seven appeals against conviction and two appeals against sentence. Two of these cases (Coubrough and Wilson, both appeals against conviction) have yet to be determined so have been left out of the analysis. Table 5.9 summarises the outcome of the remaining seven cases.

Table 5.9: Fate of appeal grounds previously rejected by the Commission

Case	Number of grounds argued that had been previously rejected by Commission	Nature of previously grounds	Outcome
Appeals against conviction			
Harper	3	2 x evidence not heard at original proceedings, 1 x error of law (refusal of no case to answer submission)	All rejected
Campbell, Thomas	2	Evidence not heard at original proceedings, defective representation	Both rejected (but appeal succeeded on other grounds)
Gray, William	2	Irregular proceedings (conduct of jury), evidence not heard at original proceedings	Both rejected
Neeson	2	Misdirection (evidence: omission, value, weight) and evidence not heard at original proceedings	Both rejected
Steele	1	Error of law (insufficient evidence)	Rejected (but appeal succeeded on other grounds)
Appeals against sentence			
Baillie	1	Insufficient discount for guilty plea	Rejected (but appeal succeeded on other grounds)
Leith	1	Sentence calculated on inaccurate factual basis	Successful

As table 5.9 shows, five appeals against *conviction* where the appellant argued grounds that had previously been rejected by the Commission have been determined. In total across the five appeals 10 such grounds were argued. None of them succeeded. One specific objective of the research was to identify the number of cases in which defective representation was argued on appeal when it had been previously rejected by the Commission and to determine whether or not this ever succeeded as an appeal ground in these circumstances. This can now be easily addressed as it only happened in one case (Thomas Campbell) and the defective representation argument did not succeed on appeal (although the appeal did succeed on other grounds).

Two appeals against sentence included grounds that had been previously rejected by the Commission. In one of them – Baillie – the ground itself was not successful, but the appeal did succeed overall. The other – Leith – was the only case in which it *might* be said that a ground of appeal previously rejected by the Commission was subsequently successful with the appeal court. However, this is not an entirely clear cut conclusion. Leith was convicted of the cultivation of cannabis and sentenced to 24 months imprisonment. In his application to the Commission, Leith argued that he was ‘defectively represented’, in that his solicitor did not properly put forward the extent to which he was using cannabis for ‘medical’ reasons. The Commission rejected this argument, but referred the case on the basis that the sentence was inconsistent with precedent.¹¹⁰ When the case was determined, the court granted the appeal on the basis of the Commission

¹¹⁰ The statement of reasons is unclear as to whether this was specifically argued by the applicant in his application to the Commission, but it is implicit that it was, at least in a general sense.

reference point, which was argued on behalf of the appellant. However, the court also stated in its judgment that they were satisfied “that the sheriff misdirected himself as a matter of fact as submitted by [the appellant] as to the reason why cannabis was being cultivated”.¹¹¹ This does appear effectively to be an argument that was previously rejected by the Commission, albeit one that was made in the guise of a defective representation claim. This is not an entirely obvious conclusion, though, and thus there are no cases determined to date in which the court has clearly and unambiguously accepted an argument on appeal that had been previously rejected by the Commission.

5.4.2 Analysis of individual grounds of appeal

A second analysis of Commission identified versus appellant identified grounds was undertaken at the level of individual grounds of appeal. In total, across the 54 determined cases, 102 individual grounds of appeal were argued in court – 69 grounds of appeal against conviction and 33 grounds of appeal against sentence. Table 5.10 displays the outcome of these individual grounds of appeal according to whether they were identified by the Commission or the appellant. It should also be noted that two of these grounds were grounds identified by neither the Commission nor the appellant but were grounds identified independently by the appeal court itself (so strictly speaking were not ‘argued in court’). This occurred twice in the sample of referred cases. One case – McGinty – was noted above.¹¹² The other case concerned was Baillie, a sentence referral, in which the appellant argued a Commission reference ground (sentence inconsistent with precedent) and an additional ground of his own (failure to give an adequate discount for a guilty plea) in court. The appeal succeeded on a combination of the Commission reference ground and an additional ground identified by the appeal court (irrelevant factor – general deterrence – taken into account in sentencing). The appellant’s ground was rejected by the court.¹¹³

¹¹¹ *Leith v HM Advocate* [2005] HCJAC 100, at para 9. A further element of confusion arises from the fact that the court appears to have misunderstood the Commission’s basis for referring the case. It states that the Commission “were particularly influenced by the view that the sheriff had misdirected himself as to the purpose for which the appellant was cultivating the drug in question” (at para 4), when, in fact, this was not the reason the Commission referred the case and the defective representation argument made on the basis of this point was rejected.

¹¹² See section 5.4.1.

¹¹³ See *Baillie v HM Advocate* 2007 JC 161.

Table 5.10: Outcome of grounds of appeal according to party who identified

	Successful	Rejected	Not determined	Success rate (%)
All cases				
Commission identified grounds (n=67)	42	17	8	63
Appellant identified grounds (n=33)	2	25	6	6
Appeal court identified grounds (n=2)	2	N/A	N/A	100
Appeals against conviction				
Commission identified grounds (n=41)	21	13	7	51
Appellant identified grounds (n=27)	1	24	2	4
Appeal court identified grounds (n=1)	1	N/A	N/A	100
Appeals against sentence				
Commission identified grounds (n=26)	21	4	1	81
Appellant identified grounds (n=6)	1	1	4	25
Appeal court identified grounds (n=1)	1	N/A	N/A	100

As table 5.10 shows, perhaps unsurprisingly, Commission identified grounds were far more successful on appeal than appellant identified grounds (63 per cent of grounds of appeal identified by the Commission were successful, compared to only six per cent of grounds added by appellants). Only two individual grounds of appeal added by applicants ultimately succeeded on appeal, one in an appeal against sentence and one in an appeal against conviction.

A further analysis was undertaken to examine the outcome of individual appeal grounds according to the nature of the ground in question. This was done separately for the grounds of appeal against conviction and the grounds of appeal against sentence.

(i) Appeals against conviction

Across the 30 referred convictions that have been determined by the appeal court, there were 69 individual appeal grounds. Table 5.11 displays the outcome of each of these according to the nature of the ground involved.

Table 5.11: Outcome of all appeal grounds (convictions)

	Successful	Rejected	Not determined	Success rate (%)
All appeal grounds	23	37	9	33
Error of law, of which:	5	3	1	56
Insufficient evidence	4	1	0	80
Evidence: wrongful admission	1	0	1	50
Evidence: wrongful exclusion	0	1	0	None
Refusal of no case to answer submission	0	1	0	None
Irregular proceedings, of which:	1	6	2	11
Conduct of judge	0	2	0	None
Conduct of jury	0	4	0	None
Conduct of prosecutor	0	0	1	None
Other	1	0	1	50
Misdirection, of which:	4	8	1	31
On evidence: omission, value, weight	2	5	0	29
On law: corroboration	2	1	0	67
On law: onus, standard of proof	0	2	0	None
On law: other	0	0	1	None
Other:				
Evidence not heard at original proceedings	8	11	2	38
Failure to disclose	5	2	0	71
Defective representation	0	5	2	None
Unreasonable verdict	0	1	1	None
Lurking doubt	0	1	0	None

As table 5.10 shows, the most successful individual appeal grounds in conviction appeals have been those based on an error of law (insufficient evidence) (an 80 per cent success rate) and a failure to disclose (a 71 per cent success rate). In general, appeal grounds relating to errors of law have been more successful (56 per cent succeeding) than those based on irregularities in proceedings (eleven per cent) or misdirections (31 per cent). At the other end of the scale, there are a number of individual grounds of appeal that have never succeeded in referred cases, namely the irregular conduct of the jury or judge; misdirections based on the onus or standard of proof; defective representation or an unreasonable verdict (whether returned by a jury or other adjudicator).¹¹⁴

Table 5.12 focuses solely on the outcome of the Commission identified appeal grounds in appeals against conviction. As the table shows, the success rates of the different types of appeal ground identified by the Commission have varied. The numbers involved are small, so it is difficult to draw any firm conclusions. However, it can be seen that the Commission reference grounds that have found the greatest favour with the appeal court have been those based on insufficient evidence, on misdirections concerning evidence and misdirections concerning corroboration (all of which have succeeded); those based on a failure to disclose (83 per cent success); and those based on evidence not heard at the original proceedings (57 per cent success). By contrast, there are some Commission reference grounds that have never been successful on appeal, namely the wrongful admission or exclusion of evidence; the conduct of the judge or jury; and defective representation.

Table 5.12: Outcome of appeal grounds identified by the Commission (convictions)

¹¹⁴ Those grounds of appeal that have only ever been argued once and did not succeed are not listed here.

	Successful	Rejected	Not determined	Success rate (%)
All appeal grounds	21	13	7	51
Error of law, of which:	4	1	2	57
Insufficient evidence	4	0	0	100
Evidence: wrongful admission	0	0	2	None
Evidence: wrongful exclusion	0	1	0	None
Irregular proceedings, of which:	2	3	2	29
Conduct of judge	0	2	0	None
Conduct of jury	0	1	0	None
Other	2	0	2	50
Misdirection, of which:	4	0	2	66
On evidence: omission, value, weight	2	0	0	100
On law: corroboration	2	0	0	100
On law: other	0	0	2	None
Other:				
Evidence not heard at original proceedings	8	4	2	57
Failure to disclose	5	1	0	83
Defective representation	0	3	1	None
Unreasonable verdict	0	0	2	None
Lurking doubt	0	1	0	None

(i) Appeals against sentence

Across the 24 determined sentence referrals, 33 separate grounds of appeal were argued in court. The vast majority (26) were simply the Commission reference grounds. As we have already seen, it was far less common for appellants to argue grounds of appeal other than the Commission reference grounds when appealing against sentence. Six of the 33 were grounds added by the appellant and the remaining ground was raised independently by the appeal court (so technically not argued in court as such).¹¹⁵ Table 5.13 displays the outcome of these individual appeal grounds for all cases. Table 5.14 focuses solely on the 26 Commission identified grounds.

Table 5.13: Outcome of individual appeal grounds (sentence)

	Successful	Rejected	Not determined	Success rate (%)
All grounds	23	6	4	70
Improper punishment part calculation	14	0	0	100
Inaccurate factual basis	1	0	0	100
Inappropriate weighting of certain factors	0	2	3	None
Incompetent sentence	2	1	0	67
Inconsistent with precedent	4	1	0	80
Insufficient or no discount for guilty plea	0	1	1	None
Irrelevant factor taken into account	1	0	0	100
Relevant factor not taken into account	1	1	0	50

¹¹⁵ See the discussion of Baillie in section 5.4.1.

Table 5.14: Outcome of individual appeal grounds identified by the Commission (sentence)

	Successful	Rejected	Not determined	Success rate (%)
Improper punishment part calculation	14	0	0	100
Inappropriate weighting of certain factors	0	2	0	None
Incompetent sentence	2	1	0	33
Inconsistent with precedent	4	1	0	80
Relevant factor not taken into account	1	1	0	50

The first point to make about tables 5.13 and 5.14 is that appeals against sentence generally have had a very high success rate, so the number of unsuccessful appeal grounds against sentence overall is small (only ten out of 33 grounds argued). Thus drawing meaningful conclusions about the relative success or otherwise of particular appeal grounds is a difficult exercise. The high success rate of grounds of appeal against sentence can, though, be attributed at least in part to the dominance of appeal grounds based on the improper calculation of the punishment part of a life sentence. As table 5.13 shows, this has not only been the most common individual ground of appeal, but has also been the most successful individual appeal ground, with a 100 per cent success rate. This can be contrasted to the success rate in relation to grounds of appeal *other than* improper punishment part calculations, the overall success rate of which is only 50 per cent.

In relation to other individual grounds of appeal, there is also a 100 per cent success rate for appeals based on an inaccurate factual basis and on an irrelevant factor being taken into account in sentencing, but little can be taken from this as only one case was involved in each instance. Appeals based on inconsistency with precedent have almost always succeeded (an 80 per cent success rate).

Focusing solely on the Commission identified appeal grounds in table 5.14, aside from the punishment part appeals, it is notable that the least successful ground of appeal against sentence has been the inappropriate weighting of certain factors, although as only two individual grounds were involved, again it is difficult to draw any meaningful conclusions from this.

As has already been noted, there were only six individual grounds of appeal raised independently by appellants. Only one of these was successful (the sentence was calculated on an inaccurate factual basis). Three of the remaining five were also that the sentence was calculated on an inaccurate factual basis and none of them were determined by the appeal court, the case in each instance being decided on a Commission identified ground. The two remaining appellant identified grounds were both that insufficient or no allowance was made for the appellant's guilty plea. One of these was rejected outright; the other was not determined.

5.5 Crown concessions

With regard to matters of sentence, the Crown does not see its role as being to advocate a particular sentence.¹¹⁶ In appeals against sentence generally, an advocate depute will be present to assist the court but will not routinely make submissions – except, perhaps, where there is a question as to the competency of a sentence. This means that appeals against sentence are not liable to be “conceded” by the Crown. This is evident from some of the interlocutors issued by the appeal court in disposing of appeals against sentence following Commission referrals, where it is narrated that the court disposed of the appeal “having heard Counsel for the appellant” (as opposed to “having heard Counsel for the appellant and the Advocate depute”). It follows that the Crown may simply express no view regarding appeals against sentence, and so the analysis of concessions presented here is restricted to appeals against conviction.

Although the Crown may concede an appeal against conviction, it does not follow that the court is bound to accept any such concession.¹¹⁷ Indeed, in one Commission referral (Freeburn), the Crown had indicated at the appellant’s *first* appeal that it did not oppose the appeal, but the court nevertheless refused that appeal. (Crown Office papers indicated that the Crown had taken the view that the sheriff’s stated case did not, in the Crown’s opinion, set out facts which would have entitled him to convict the appellant, and that the sheriff had refused adjustments proposed by the Crown, hence the concession both at the first appeal and at the appeal following the Commission’s reference.)

In summary proceedings, there is a formal procedure under section 188 of the Criminal Procedure (Scotland) Act 1995 whereby the Crown can consent by way of a minute to an appeal being allowed, or even (in the absence of an appeal) apply directly by minute for a conviction or sentence to be set aside. In such a case, the minute goes before a single judge of the High Court, who is empowered to set aside the conviction or sentence. The single judge is not, however, bound by the minute and can refuse it. In one of the Commission’s referrals (Colette Gilmour) the Crown lodged such a minute, although in the event (for reasons which are unclear and may simply have involved an oversight) the case was dealt with by the appeal court rather than a single judge, and the conviction quashed.

Of the 30 conviction references which were determined by the appeal court prior to the cut off date for inclusion in this report (18 of which resulted in convictions being quashed), eight were conceded by the Crown. In all eight cases, the conviction was quashed by the appeal court. It has been possible to establish details of each of these concessions by reference either to Crown Office papers, opinions issued by the appeal court, or material held by the Commission. Details of the cases where concessions were made by the Crown are set out in table 5.15.

¹¹⁶ Save that the Lord Advocate can appeal against a sentence imposed at first instance on a point of law or on the basis that it is “unduly lenient”: see ss 108 and 175(4) of the 1995 Act.

¹¹⁷ *Howitt v HM Advocate; Duffy v HM Advocate* 2000 SCCR 195 at 200 *per* the Lord Justice-Clerk (Cullen). In the context of a Commission referral, see eg *McPhee v HM Advocate* [2005] HCJAC 137 at para 6 *per* the Lord Justice-Clerk (Gill) (“The Crown has conceded that the conviction cannot stand. It is for this Court to decide whether that concession is well-founded...”)

Table 5.15 Appeals against conviction conceded by the Crown

Case	Crown concession
Ballingham	One ground of referral was a failure to disclose evidence. The trial sheriff's report to the appeal court said that if the witness concerned had given evidence in the terms suggested in the Commission's statement of reasons, he would have acquitted the appellant. Crown Office subsequently wrote to the Clerk of Justiciary stating that in view of this report, Crown counsel had taken the view that they could no longer argue that the non-disclosed statement was not material, and so the Crown would not oppose the appeal.
Fraser	The Crown conceded that the evidence led at the accused's trial in 1948 had not been sufficient to entitle the jury to convict, and that the trial judge had misdirected the jury in that respect.
Freeburn	The Crown maintained the concession it had made at the appellant's first appeal, to the effect that the sheriff's findings in fact did not set out a sufficient basis for conviction.
Fulton, Stewart	The Crown conceded that the trial judge had misdirected the jury and that there was insufficient evidence to convict the appellant.
Gibson	The law had changed as a result of a Full Bench decision subsequent to the appellant's first appeal, meaning that the basis on which he had been convicted was no longer good in law.
Gilmour, Colette	The ground of referral was that a letter written to the court was wrongly taken to be a plea of guilty. The appellant did not appeal her conviction at the relevant time on the basis that she was not aware she had been convicted of an offence. The Crown agreed with the Commission's view that the letter should not have been interpreted as a plea of guilty.
McPhee	The Crown conceded that opinion evidence relating to footprints ought not to have been presented or at least ought not to have been presented without disclosure of contradictory material. That concession, once accepted by the court, rendered other grounds of referral and appeal moot.
Orr	One ground of referral was fresh evidence. The evidence concerned was heard by the Sheriff Principal, and in light of his report Crown Office wrote to the Clerk of Justiciary to state that they would concede the fresh evidence ground of appeal. A second ground of referral and appeal, based on defective representation, was not conceded but was rendered moot by this concession.

This material is set out by way of narration: each case turns on its own specific facts and there are few, if any, general conclusions that can be drawn from this data.

It can be observed that the nature of these various concessions required little if any admission of fault on the part of the Crown, although given that prosecutorial error (or alleged error) was not frequently encountered in referred appeals, whether or not conceded by the Crown, this may be of little significance. In one case (Freeburn) the Crown was able to maintain the position it had taken at the first appeal and in two other cases (Gilmour and Orr), both of which arose from summary prosecutions, there had been no previous appeal, and so the concession involved no real change of position. Gibson involved a change in the law subsequent to Gibson's conviction and first appeal, and so no question of prosecutorial error. The concessions in Fraser and Fulton were based on misdirection by the trial judge (albeit that the Crown might, by implication, be criticised for having led insufficient evidence at the trials concerned).

Even in Ballingham, where the concession related to a failure to disclose evidence to the defence, that “failure” had taken place *before* the decisions of the Privy Council in *Holland v HM Advocate*¹¹⁸ and *Sinclair v HM Advocate*¹¹⁹ and so might have been argued to be consistent with the law as understood at the relevant time. In McPhee, where the Crown conceded that opinion evidence relating to footprints ought not to have been presented, at least without disclosure of contradictory material, the advocate depute made this concession on the basis that the contradictory material “was not known to the advocate depute who conducted the trial” (for reasons which were unclear some twenty years later) and that “had the advocate depute known of the material in question he would not have led the evidence in question”.¹²⁰

5.6 Devolution minutes

One aim of the research was the identification of the number of cases in which devolution minutes (essentially, notification that the appellant wishes to found on a right under the European Convention on Human Rights, as given effect by the Human Rights Act 1998 and the Scotland Act 1998) have been lodged and argued.

There were six cases in which the papers held by Justiciary Office indicated that such minutes had been lodged, and in only one of these cases (McInnes) was the minute (alleging that the accused’s right to a fair trial had been breached by a failure on the part of the Crown to disclose material to the defence) actually argued. In Neeson, a devolution minute was lodged elaborating on one of the accused’s grounds of appeal by reference to Convention rights, but no reference to it is made in either of the opinions issued by the court in disposing of the appeal.¹²¹ In three further cases (McCaskill, McWilliam and Robertson) lengthy devolution minutes were lodged – in largely identical terms – arguing that the manner in which the accused’s punishment part was not only inconsistent with precedent, but that the legal regime governing the calculation of punishment parts, as applied by the courts, was incompatible with articles 5, 6, 7, 14, 17 and 53 of the European Convention on Human Rights. Two of these appeals were abandoned, while the third (McWilliam) had not been determined by the time this report was written (although it appeared that this appeal might also be abandoned).

The sixth appeal in which a devolution minute appears to have been lodged was that of Young, but although a letter in the Justiciary Office papers referred to a devolution minute the researchers were unable to locate a copy in the case papers. The appeal had not been determined at the time of writing.

5.7 Abandoned appeals

Across the 75 referred cases, seven appeals were abandoned before reaching determination. Six were appeals against sentence (Docherty, Logue, McCaskill, Robertson, Smith and Williamson) and one was an appeal against conviction (Tonks). Five of the appeals against sentence were based on the

¹¹⁸ 2005 SC (PC) 3.

¹¹⁹ 2005 SC (PC) 28.

¹²⁰ *McPhee v HM Advocate* [2005] HCJAC 137 at para 33.

¹²¹ *Neeson v HM Advocate* [2005] HCJAC 64; *Neeson v HM Advocate* [2006] HCJAC 68.

improper calculation of the punishment part of a life sentence (Logue, McCaskill, Robertson, Smith and Williamson). Docherty was referred on the basis that an incompetent sentence had been passed. Tonks, the appeal against conviction, was referred on the basis of “irregular proceedings (role of judge)” and “defective representation”. One of the objectives of the research was to determine the reasons for the abandonment of these cases.

The case papers held by Justiciary Office did not disclose any express reasons for abandonment, except in the case of Williamson where the appellant wrote to the court personally stating that he wished to abandon his appeal because his sentence was “nearly ended anyway”. This letter was sent exactly four months after Williamson’s *application* to the Commission, exactly one week after the decision by the Commission to refer Williamson’s case, and slightly over three years before Williamson’s case was due to be reviewed by the parole board on the basis of his punishment part as he then stood.

Otherwise, possible reasons for abandonment are a matter for inference (and to some extent, speculation) from the available evidence. It may be noted that five of the seven abandoned appeals related to punishment parts, and appear to have been complicated by the fact that, first the law on the calculation of punishment parts was in a state of some uncertainty until the decision in *Christensen v HM Advocate*¹²² and secondly, that the appeal court was dealing with a considerable number of such appeals which required a degree of coordination. Both of these factors may have led to some delay in the hearing of appeals. Only one of the punishment part cases (Logue) was referred after the decision in *Christensen*.

Interviewees (see section 6.6) suggested that delay in the hearing of an appeal (at least one against sentence) might lead a client to choose to abandon the appeal on the basis that there was little or no benefit in continuing with it. It was observed in correspondence to Justiciary Office from the agents for one appellant that one issue to be considered at a parole review hearing was what had been undertaken by way of preparation for the appellant’s release. Because of this, a decision of the appeal court which brought forward the expiry of an appellant’s punishment part to a point in the near future might be of little or no benefit to the appellant.

Table 5.16 sets out the relevant dates for all abandoned appeals.

Table 5.16: Abandoned appeals

Case	Date of application	Date of referral	Date of abandonment	Punishment part expiry date
Docherty	23.5.07	4.10.07	27.5.08	Not applicable
Logue	29.8.07	25.1.08	8.10.08	June 2009
McCaskill	9.8.02	30.5.03	29.7.05	7/8/07 ¹²³
Robertson	16.7.02	30.5.03	25.7.07	10/3/05 ¹²⁴
Smith	27.7.01	26.7.02	2.11.07	15/6/05
Williamson	23.9.04	17.12.04	23.1.05	11/5/08
Tonks	25.3.03	25.2.05	17.11.05	Not applicable

¹²² 2006 JC 152.

¹²³ Assuming that the punishment part (here, a “designated part”) was not backdated. There is no reference to backdating in the material available to the researchers.

¹²⁴ Assuming that the punishment part (here, a “designated part”) was not backdated. There is no reference to backdating in the material available to the researchers.

It will be noted that in two of the punishment part appeals (Robertson and Smith), proceedings before the appeal court had continued *beyond* the expiry of the appellant's punishment part, meaning that there would be little if anything to be gained from continuing with the appeal. In a third case (Logue), where the appeal was abandoned within some months of the punishment part's expiry date, similar considerations may have been significant (as is borne out by a pre-abandonment letter from the appellant's agents to Justiciary Office urging that his appeal be heard as soon as possible because of the impending expiry of the punishment part). In McCaskill, there might have been some benefit in continuing with the appeal, but the delay in the case being heard after referral would have gradually diminished any possible gain to the appellant.

As regards the one abandoned sentence appeal not concerned with a punishment part (Docherty), no obvious explanation can be suggested for the abandonment of that appeal. However, it may be noted that the case was referred to the appeal court solely on the ground that the sentence imposed was incompetent. A successful appeal on this ground might have had little practical benefit if the appeal court had simply imposed an analogous, but competent, sentence in its place.

In the only abandoned appeal against conviction, that of Leo Tonks, the appellant did not appear at the appeal court hearing and the appeal was dismissed for want of insistence. At this point he was at liberty (a sentence of six years imprisonment having been imposed in September 2000 following conviction for theft by housebreaking and assault to injury).

5.8 Time taken to determine referred cases

A final objective of the research was to calculate the average time taken to determine referral cases, from date of reference to date of determination by the court. At the time of writing, 54 cases had been determined by the appeal court and the analysis focuses solely on these cases. However, it should be noted that this does provide only a partial picture, given that it does not include any of the cases that have yet to be determined, some of which have been awaiting determination for a considerable time.¹²⁵

Bearing this limitation in mind, the average (mean) time taken to determine the 54 cases in question was 631 days (approximately one year and nine months). The shortest period from date of reference to date of determination was 28 days (Ansari, a punishment part sentence referral) and the longest was 2434 days (Gair, a murder conviction referral). Two other determined cases took almost as long as Gair, namely Raymond Gilmour (2239 days, a murder conviction referral) and DS (2044 days, a rape conviction referral).

Unsurprisingly, given their relative lack of complexity, sentence referrals were more speedily determined by the appeal court than conviction referrals. The average (mean) time taken to determine conviction referrals was 986 days, compared to 187 days for sentence referrals. As with

¹²⁵ See, for example, the cases of McWilliam (referred on 26 June 2003) and Murray and Wilson (both referred on 28 June 2004). At the time of the cut off point for this analysis, the case that had been awaiting determination for the longest period of time was that of Beattie, which was referred on 13 July 2001. However, Beattie was finally determined (the appeal being refused) on 4 March 2009, unfortunately too late to be included in the analysis. Falconer (appeal allowed and conviction quashed on 24 March 2009) was similarly excluded. It is understood that a decision in respect of Murray and Wilson's appeals is expected on 15 April 2009. Justiciary Office papers seen by the researchers in February 2009 suggested that McWilliam's appeal was likely to be abandoned.

many aspects of this research, it may be that the figure for sentence referrals is artificially low, given the high proportion of punishment part calculation cases involved. These are likely to be particularly straightforward to determine, even compared to other appeals against sentence.

As noted earlier (section 3.1.1), permission was not granted to the researchers to collect information from case files held at Justiciary Office on the reasons for delays in reference based appeals. In the absence of such permission, there is little that the researchers can usefully say on this point, except to make some general observations. First, as noted above (section 5.7), some punishment part appeals may have been subject to delay pending the determination of other cases which were expected to clarify the law on the calculation of such periods. Secondly, it is apparent that criminal appellate work is a specialised area where a small number of counsel carry out a considerable proportion of the work, and the combination of limited judicial availability and limited availability of counsel may result in scheduling difficulties.

Thirdly, in the three appeals which took longest to determine (Gair, Gilmour (Raymond) and DS), there is some indication (albeit occasionally sketchy) of possible reasons for the delay in the opinions issued by the appeal court. In Gair's appeal, evidence was led from a number of witnesses, one of whom it was impossible to trace,¹²⁶ and this in itself presumably led to delay. In Gilmour's appeal, reliance was placed on evidence from the expert witness Professor Gisli H Gudjonsson, which may have taken some time to arrange given the many commitments of this particular expert. In DS's appeal, the court noted with some concern that the case had "limped forward" through the process because of investigations and attempts to secure medical records, and all to no avail given that none of these records were used at the appeal hearing and so the appeal "could have been advanced in substantially similar terms, at least four years earlier. The intervening procedural steps appear to have been a waste of time and resources."¹²⁷

5.9 Summary of main findings

Grounds of appeal raised other than those identified by the Commission in its referral. Appellants raised grounds of appeal other than those identified by the Commission in 48% of conviction appeals following referral and 27% of sentence appeals following referral. There were only two cases where an appeal succeeded on the basis of such grounds, and in both cases the appeal succeeded partly on Commission grounds and partly on the additional grounds raised by the appellant. There were two further cases where the appeal succeeded partly on Commission grounds and partly on a ground raised independently by the appeal court. Grounds of appeal identified by the Commission succeeded in 63% of cases, as against 6% of grounds of appeal raised independently by appellants.

Grounds of appeal raised on appeal despite having been rejected by the Commission. There were nine cases (seven conviction referrals and two sentence referrals) where appellants raised grounds which the Commission had previously considered and rejected. Where these grounds were argued before the appeal court, they were rejected in all bar one case. In that case, it appears that the appeal court *may* have given some weight to the ground of appeal in question, but this is not clear

¹²⁶ *Gair v HM Advocate* [2005] HCJAC 69 at para 3.

¹²⁷ *DS v HM Advocate* [2008] HCJAC 59 at para 27.

from the court's opinion, and the matter is complicated by the fact that the appeal court appears to have misconstrued the Commission's reasons for referral.

Success rate of determined appeals in referred cases. 60% of conviction referrals and 92% of sentence referrals resulted in successful appeals. These figures are broadly similar to the English Commission, which may be significant given that the Scottish Commission refers a higher percentage of cases in respect of which it receives applications (8% as against 3.8%).

Success rate of referral grounds identified independently by the Commission. Only four cases (all conviction appeals) which were referred on the basis of grounds identified by the Commission independently have been determined on appeal. In two cases, the Commission-identified ground was the sole ground of appeal and the appeal was successful; in two cases the appeal was refused.

Devolution minutes. Devolution minutes were identified in respect of six appeals. There is only one determined case where a devolution minute has been argued, and in that case it was unsuccessful.

Abandoned appeals. Seven appeals (all bar one against sentence) were abandoned before reaching determination. In most if not all of these cases, the abandonment seems likely to have been because the time taken for the appeal to be heard significantly diminished any benefit to the appellant which might have flown from a successful appeal.

Time taken to determine referred cases. Of those cases which have been determined by the appeal court, the mean time taken from referral to determination was 631 days. This encompasses a range of figures from 28 days in a sentence referral to 2434 days in a conviction referral.

CHAPTER 6: INTERVIEWS WITH CRIMINAL JUSTICE PRACTITIONERS

We interviewed 12 legal professionals (solicitors and advocates) in order to gain a sense of how the Commission is viewed by those who have worked on referred cases. The limited number of interviews conducted means this analysis does not provide a statistically representative account of views but rather offers a snapshot of professional perceptions that can provide some context for the case analysis. Interviews of professionals may also be useful for gathering issues that would generate an agenda for further research. There was remarkable consistency of views on many topics, suggesting consensus about key features of the Commission's work. Interviews were confidential and conducted in person or by telephone and consisted of an open-ended questionnaire of seven parts to solicit information about their experiences and more general views about the Commission's work, by asking interviewees about:

1. Their own experience working on referred appeals (how many, kinds of cases, success at appeal or not);
2. The grounds of applying to the Commission and its overall remit;
3. The nature and quality of the Commission's investigation and decision making processes;
4. Referral grounds and the appeal process;
5. Perceptions of the Commission held by key groups (Crown, courts, others);
6. Abandonments of appeal;
7. Suggestions for improving the SCCRC process.

The researchers independently identified potential interviewees from written records pertaining to referred cases, and were also referred to others with relevant experience in the course of interviews. In the discussion below, words and phrases in quotation marks are direct excerpts from interviews.

6.1 Interviewees' Background and Experience

Although the total number of interviews is relatively small compared to the total number of solicitors and advocates working on criminal cases in Scotland, it represents a much larger proportion of those who have experience working on Commission applications and referred appeals. The interviewees' backgrounds included divergences on a number of lines:

- gender
- type of legal practice
- length of professional experience
- SCCRC experience
- prosecution or defence specialists
- kinds of cases undertaken

The majority of our interviewees were advocates whose practice was mostly or exclusively in criminal defence. We did, however, conduct interviews with those who had assisted the Crown as well as defence solicitors, and issues identified below reflect these range of positions. Interviewees typically had worked on between three and five applications or referred cases, but a few had done substantially more than this (i.e. more than ten cases), and a few individuals had handled only one referred appeal. The professional legal experience of interviewees ranged from a minimum of five years to twenty years' or more experience, and both junior and senior counsel were interviewed. The solicitors we interviewed all had a decade or more experience practicing law and had handled more referred cases than the overall group average.

Both appeals of convictions and of sentences were among the cases handled by interviewees, though the group overall had more experience of conviction appeals (though those interviewees who had worked on referred sentence appeals typically had handled numerous such appeals). Additionally, cases tended towards the more serious end of the spectrum (i.e. murder and sexual offences and life sentences) but the lawyers we spoke with had also dealt with a number of lesser offences and sentences (ranging from appeal of a small fine sentence to appeal of conviction for driving without a licence).

6.2 The Commission's Remit and Caseload

There was a universal consensus among those we spoke with that the Commission provides a safeguard that improves the credibility and substantive justice of the criminal justice system. Without a single exception, interviewees believed the Commission to be a necessary and important element of the Scottish criminal legal process. This sentiment thus united people otherwise divided along lines of defence and prosecution, solicitors and advocates, and those with entirely positive opinions and those with more critical views. The Commission was often described in terms of creating a 'safety net' or providing 'added protection' that the legal system is getting it right. It was also felt that having such a body creates an incentive for professionals to fulfil their legal roles to the best of their ability.

A number of interviewees believed the success of appeals referred by the Commission to be sufficient proof of the need for its existence.¹²⁸ One interviewee who had been sceptical of its worth had 'become a fan' believing that where an appellant succeeded in a Commission referred appeal, it could 'show the flaws of the system' and allow improvements in the future.

There was also widespread and strong support for the broad remit of the Commission to pursue miscarriages of justice no matter the nature of the offence or sentence involved. One interviewee's simple statement exemplifies a shared view: 'wrong is wrong whether it happens in a District Court or a High Court'. A small number, however, felt the Commission's remit to address miscarriages of justice wherever they occur could be constrained by the additional requirement that it be 'in the interests of justice' to do so.¹²⁹ This latter specification was seen to introduce the possibility of a cost-benefit analysis element into decision-making that could, for example, tend to focus the Commission's work on high profile or serious offence cases at the expense of cases involving more minor offences, and in other ways place a limitation on redressing any miscarriage of justice

¹²⁸ As chapter five demonstrated, 74% of referred cases that have been determined by the appeal court were successful on appeal (see section 5.2).

¹²⁹ For discussion of the test for referral used by the Commission, see chapter two.

wherever and whenever it occurs. This concern was also linked to views on the time-frames of the Commission's work addressed below.

The perception of most interviewees is that the Commission largely deals in the most serious cases, an impression generally supported by our case analysis in Chapter 4.¹³⁰ While interviewees knew of self-referrals, some wondered whether awareness of the Commission extended to those convicted of minor offences.

Among referred sentence appeals, interviewees had a great deal of experience with appeals of life sentences where the designated punishment part (i.e. the minimum amount of a sentence to be served before consideration of parole) was argued to constitute a miscarriage of justice.¹³¹ Interviewees noted that a number of these referred appeals had been successful in reducing the minimum part of a life sentence served, but also that these kinds of appeals would necessarily decline over time thus contributing to an ever smaller amount of the Commission's 'business'. Again this perception appears to be borne out in the analysis of case data presented in Chapter 4.¹³²

The *Flynn* cases show how a change of law or procedure can generate the need for the kind of investigation made possible by the existence of the Commission. It might be expected that future statutory changes and legal decisions could create similar, time-limited surges in the Commission's caseload.

6.3 The Commission's Investigation and Decision Making Functions

Another point of universal consensus was about the quality of the Commission's investigations. The thoroughness of investigations was praised greatly and uniformly, with comments that the investigations are 'impressive', 'thorough' and 'professional' being common. Even where informants disagreed with the ultimate decision about whether to refer a case, all interviewees believed that the Commission assiduously pursued its investigation of applications, seeking out relevant witnesses, documents and lawyers involved in the trial.

An example given of the strength of the Commission's investigative work is when it uncovers new grounds of appeal not raised in an application. This was seen also to demonstrate the superior ability of the Commission, with its dedicated staffing and resources, to provide a systematic review and detail problems with a conviction where lawyers and the High Court are not in a position to do so given their time and resource constraints. One respondent noted that 'strange circumstances do arise' in cases 'where there's no straightforward ground of appeal, but you know something went wrong'. The need to investigate thoroughly claims of a miscarriage of justice also mean that the Commission gains access to materials not routinely available to the defence. This led to numerous comments from respondents about the implications of this for disclosure, discussed below.

There was a common sense among interviewees that Commission investigations take a long time, but that this was usually justified by the seriousness of the cases before them. A couple of respondents

¹³⁰ See section 4.1, which describes the sample of referred cases.

¹³¹ See *Flynn v HM Advocate* 2004 SC (PC) 1 (as applied in *Flynn v HM Advocate (No. 2)* 2005 JC 271) and *O'Neill v HM Advocate* 1999 SLT 958. See section 2.2.2 for an explanation of these cases.

¹³² See section 4.2.

did feel, however, that the time-frame of Commission investigations might deter people who feel they have suffered a miscarriage of justice but where the offence was minor or the sentence small. And there was a general sense that there might be opportunities to streamline investigation times. A greater concern emerged among respondents about the time it takes for an appeal to be heard once a case is referred.¹³³ Nearly all respondents mentioned appeal court time frames as a problem, but also noted that this was an issue for all appeals, not just ones referred by the Commission. This issue falls outside the scope of the research so is not pursued further except to flag up as a commonly identified topic, as it ties in to a frequent recommendation for improvement of the miscarriages of justice process, included below.

Where there was disagreement with the Commission's decision whether to refer a case, only a few interviewees identified examples where they felt the Commission had 'just got it wrong'. Most informants felt grounds of referral identified by the Commission were legitimate.

More critical comment and diversity of opinion emerged over the Commission's analysis to support its decisions. One respondent felt that at worst 'the reasoning can be weak' in statements of reason while a number of others used the word 'patchy' to describe the quality of analysis. A majority of respondents felt the quality of legal analysis in the Commission's work did not quite match the high level and thoroughness of its investigation. A small minority said the statements of reasons they had received missed a factual issue, but mainly criticism was reserved for issues of legal analysis. This led, according to interviewees, to the Commission occasionally missing, or missing the significance of, a possible ground of referral, or of putting emphasis on less well substantiated grounds of referral. Some felt any weakness in quality of analysis may be due to resource issues or staffing constraints, while others felt it reflected a lack of trial or 'front line' experience of criminal cases. A separate issue raised by several interviewees is a concern that in deciding whether to make a referral, the Commission occasionally blurs the distinction between determining that there is sufficient evidence to believe a miscarriage of justice *may* have occurred, and judging finally that a miscarriage in fact *did* occur. These interviewees felt such a blurring risks the Commission extending its remit inappropriately into the jurisdiction of the appeal court.

6.4 Commission-referred Appeals

All interviewees agreed that statements of reason are useful in the preparation of an appeal or in contesting an appeal. Less than a third of respondents said that in their cases the appeal had been limited to those grounds included in the statement of reasons. In one successfully appealed case, an interviewee noted raising only some of the grounds contained in the referral because they were sufficiently strong so that the additional ones seemed unnecessary.

Most interviewees' cases included grounds of appeal in addition to those made in the Commission's referral. Opinions on whether this should be allowed divided, perhaps predictably, according to whether respondents worked mainly for the prosecution or the defence. The smaller group of prosecution specialists noted that the English Criminal Cases Review Commission system limits appeals to those grounds contained in its statement of reasons, unless leave is obtained for further

¹³³ The average time between reference and appeal for the 54 determined cases in the sample was 631 days. For conviction referrals, it was 986 days (see section 5.8).

grounds to be added.¹³⁴ There was a concern among this group that allowing extra-statement grounds of appeal was unfair to ordinary appellants, whose appeals must go through ‘the sift’¹³⁵, a process that may deprive them of grounds they had hoped to raise. On this view, the Commission, whose referred cases are slotted straight into the appeal calendar, is acting as a proxy sift; their decision to refer on some grounds and not on others should, according to these respondents, be treated as having non-referred grounds sifted out of contention for appeal.

The majority of interviewees, though, strongly felt that the ability to raise grounds not in the statement of reasons is a necessary element of a system which aims to correct miscarriages of justice. For these interviewees, the identification by the Commission of a possible miscarriage of justice serves to identify in general terms a case which did not go as it ought to have done, and therefore should be opened up to general scrutiny. Sometimes a Commission referral identifies one or two grounds of appeal, but conveys, as one interviewee put it, ‘a general unease about the safety of a conviction’ that requires further consideration as the appeal is being readied for court during which a new ground may emerge. Some also pointed out that during the Commission’s investigation of a case, information could become available to lawyers involved that suggested other plausible grounds of appeal which would not have been apparent at the time of the Commission’s investigation.

An additional reason in the defence’s view necessitating introduction of grounds not in the statement of reasons relates to earlier comments about the weakness of analysis and subsequent decisions made in statements of reasons. For example, a number of interviewees felt the Commission chose to base its referral on the one or two grounds which it perceived to have the strongest support in law, and not to refer on other grounds which it perceived to have more tenuous support but support nonetheless. Interviewees, particularly those who are advocates (prosecution and defence), noted that sometimes what appeared to be a strong case on paper, would be weaker in the dynamic setting of the courtroom, where the legal suasion of a line of argument is affected not only by case law and statute but also by unreported cases and daily practice, two resources with which the Commission’s case officers may not have familiarity. These interviewees felt that the Commission subsequently may miss on occasion the significance, and tactically speaking, the greater likelihood of success on appeal, of those grounds where legal support may appear to be equivocal.

A slightly separate issue raised in pending cases is how the appeal court is to deal with appeals referred by the Commission on the exact same grounds as a previous appeal by the same appellant. This raised for a minority of interviewees a concern that the Commission risks exceeding its remit by reviewing appeal court decisions generally rather than narrowly focusing on decisions that amount to a miscarriage of justice. A question raised by a minority of interviewees was the reviewability of Commission decisions. It was believed that there was a case pending on this very issue.

6.5 Perceptions of the Commission by Stakeholders

All interviewees felt that stakeholders, including the judiciary and Crown Office, have come to accept the Commission as an important feature of the legal landscape. Some did point out recent criticisms in High Court opinions about the Commission’s work, but mainly felt these served to underline

¹³⁴ See chapter two. It is likely that in Scotland this will also shortly be the position – see s61 of the Criminal Justice and Licensing (Scotland) Bill, as introduced on 6 March 2009, and the discussion in section 2.2.3.

¹³⁵ The process where appeals in the standard appeal process are vetted.

rather than challenge the fact that it is now a fairly well-embedded institution. Interviewees felt that referrals at some level are a criticism of how the Court previously decided a case but that this did not generally affect the appeal court's behaviour in managing or deciding appeals fairly. Some said they sensed that the Court in a given appeal did not agree with the referral and this affected the courtroom ambience, but none claimed that the Court has ever summarily rejected an appeal because of such disagreement. A minority of respondents felt the Court may be 'clamping down' on referrals, though, and one interviewee felt that referred cases are sometimes not given the airing merited by the extensive investigative work undertaken by the Commission.

One issue to emerge quite consistently when we asked about stakeholder perceptions regards disclosure of evidence by the Crown. Defence interviewees were more likely to attribute to the prosecution a slightly negative or hostile attitude towards referred cases. This seemed to be linked to a feeling among the defence agents we spoke with that the Crown is resistant on issues of disclosure. One interviewee saw this less as wilful obstruction than a 'clash of cultures', and a possible perception by prosecutors that more extensive disclosure amounts to an increase in workload for them (copying and compiling information for the defence). Numerous interviewees queried the status of materials produced during the course of a Commission investigation, noting these would be useful in the preparation of appeals.

Two other stakeholders were identified in interviews – convicted persons and victims. The Commission was seen as especially useful and important to those convicted of sexual offences, where being placed on the sex offenders register is felt to be especially stigmatizing and long lasting. Finally, it was also pointed out that the Commission's work can affect victims, whose closure over the death or injury of a loved one may be delayed if a convicted person tactically pursues appeals and claims of miscarriage of justice.

6.6 Abandonments

Among our respondents, most experiences of abandonment (of an appeal after it is referred by the Commission) related to sentence appeals. In a few such cases, interviewees reported that the time taken to hear an appeal meant the client ended up completing or nearly completing the period of imprisonment being appealed and decided not to continue with it. One interviewee also mentioned a client who died in the middle of an appeal, by which point one ground had been thrown out but another one was yet to be determined. Another speculated that in sentence appeals there exists the possibility that a sentence can be extended as well as reduced, which may lead some appellants to abandon once the state of the case becomes clear. None were able to comment personally on the reason for abandonments of conviction appeals.

6.7 Suggestions for Improvement

Most of the suggested improvements relate to issues already raised in this discussion. A number of these recommendations lie outside the Commission's power, but we include them as they display what legal professionals felt were the main challenges overall to an effective system for correcting miscarriages of justice. The most common ideas mentioned were to (in no particular order):

1. Clarify minimum application requirements;
2. Maintain communication with lawyers and applicant during case investigations;
3. Improve and expand disclosure;
4. Fast-track Commission appeals in the High Court or otherwise address delays;
5. Address quality of analysis and decision making;
6. Shorten the time it takes to conduct investigations; consider a fast-track process for summary case applications; and,
7. Address problems of remuneration for legal work on Commission applications.

Clarification of minimum application requirements. Several interviewees wanted more clarity about the level of detail and proof needed for an application to trigger an investigation. A small minority felt there may be an excessive burden on applications to present a *prima facie* case for appeal. One suggested training or education events to improve awareness generally about the Commission's application and decision making processes.

Communication on progress of investigations. Both solicitors and advocates felt that once an application to the Commission had been accepted for investigation, there was little or no information about the progress or timing of it. One advocate interviewee said it felt like 'a black hole' from the point a client made an application to the moment he was informed the Commission had referred the case and he had to begin preparing immediately for the appeal. Interviewees who had called the Commission to check on progress said information provided was helpful but others wanted the Commission to be more proactive in checking in with them and their clients. Some felt this is essential in order to provide information about the case that would help streamline the investigation. There was recognition of the need to avoid prejudice in the conduct of investigations (e.g. by being directed in its work by counsel from one side) but there remained a desire to have regular progress updates both to provide relevant assistance and to anticipate appeal work.

Improve and expand disclosure. Concerns about disclosure arose again and again in interviews; these began as queries into the status and availability of material turned up by the Commission during the course of its investigation but spread out to complaints about the prosecution's resistance to disclosure of information during preparation of a case. A few interviewees pointed out that Commission referred appeals had raised problems of disclosure and led to improved practices, but that this was still not seen to be optimal.

Fast-track Commission appeals in the High Court or otherwise address delays. One informant argued that lengthy delays in having an appeal heard can itself amount to a miscarriage of justice. A commonly expressed view is that time delays in having appeals heard is a chronic and pervasive problem. This applies both to regular and referred appeals, but interviewees felt that cases where there was a suspected miscarriage of justice, and particularly where an appellant is in prison, required a special focus on assuring a timely hearing of the case.

Address quality of analysis and decision making. Many interviewees were aware of the appointment of new members to the Board of the Commission, and noted such appointments included those with a great deal of court experience. It was generally felt this would go some way towards strengthening analysis and decision making by bringing it into line with contemporary court

practice. A number of interviewees felt the quality of decision making will always be an important issue for the Commission and may involve regular review of the resources and career structure (adequate incentives and remuneration for such posts) of those preparing information for the Board to review.

Shorten the time it takes to conduct investigations; consider a fast-track process for summary case applications. Interviewees balanced their view that the Commission's work can take a long time with their unqualified support of the thoroughness of investigations. Most still felt it would be good if times could be streamlined. A smaller group mentioned the possibility of fast-tracking certain applications such as those relating to summary cases.

Address problems of remuneration for legal work on Commission applications. There was broad concern about Legal Aid cover for Commission cases during the investigation stage. Interviewees expressing this view felt that Legal Aid did not appreciate the time demands on defence agents in supporting and participating in an investigation. Those who had applied for Legal Aid cover noted the process is more burdensome than for obtaining cover for undertaking an appeal, and applications are not uncommonly denied. Numerous examples were given of denial of cover or minimal cover for complex cases. Some who raised this issue felt the process of obtaining cover for Commission cases should be similar as for doing the appeal once referred: one application submitted following which the case would be certified as under Commission investigation and eligible for cover hence avoiding the necessity of having to apply for every activity performed on a case in a piecemeal way.

6.8 Conclusion

When the Commission first came into being interviewees felt there were teething problems and scepticism. All respondents felt, however, that the Commission now has come to occupy an established position in the legal system. The quality of the Commission's investigations was universally praised. The key areas suggested for improvement relate to delays in adjudicating cases, disclosure issues, and ensuring consistent quality in the Commission's analysis and decision making. The overall impression from the interviewees is that, while there is the need to continually monitor its work, the Commission has become an essential feature of an effective Scottish justice system, the impact of which will be affected by the cooperation and strength of other elements of the system.

CHAPTER 7: SUMMARY AND CONCLUSIONS

This chapter summarises the main findings of the research and draws some conclusions.

7.1 The nature of cases referred to the appeal court.

As might be expected, while the Commission's referrals to the appeal court encompass a broad range of offences, the most serious offences feature heavily. Murder and attempted murder cases account for 47% of cases referred by the Commission to the appeal court, with rape and other sexual offences making up a further 23%. Interviewees expressed strong support for the Commission's remit extending across the full range of offences regardless of seriousness.

7.2 Grounds of referral and grounds of appeal

By far the most common ground for referral of a conviction is evidence not heard at the original trial, featuring as a ground of appeal (although not necessarily the sole ground) in half of the referred convictions. The next most common single grounds of referral were a failure to disclose (seven referrals) and defective representation (seven referrals). In sentence appeals, by far the most common ground of referral was that the punishment part of a life sentence had been improperly calculated, which accounted for 20 of 33 referrals. The next most common reasons were that the sentence was inconsistent with precedent (six referrals) or incompetent (five referrals).

The research paid particular attention to a number of specific categories of ground: (i) grounds of referral identified by the Commission independently (i.e. not raised in the application to the Commission); (ii) grounds of appeal raised after a referral in addition to those identified by the Commission in referring the case and (iii) grounds of appeal raised after a referral which had been *rejected* by the Commission (a subset of (ii)). The researchers found as follows:

(i) Grounds of referral identified by the Commission independently. The Commission referred eleven cases to the appeal court on the basis of grounds identified by the Commission independently of the application which it had received. These grounds differed from case to case, but encompassed four cases of fresh evidence, two of a failure to disclose, two of insufficient evidence having been led at trial, one of a misdirection regarding corroboration, one of "lurking doubt" and one of an incompetent sentence. In six of these cases these grounds were the sole ground of referral. Eight of these eleven cases were conviction referrals.

(ii) Grounds of appeal raised other than those identified by the Commission in its referral. Appellants raised grounds of appeal other than those identified by the Commission in 48% of conviction appeals following referral and 27% of sentence appeals following referral. There were only two cases where an appeal succeeded on the basis of such grounds, and in both cases the appeal succeeded partly on Commission grounds and partly on the additional grounds raised by the appellant. There were two further cases where the appeal succeeded partly on Commission grounds and partly on a ground raised independently by the

appeal court. Grounds of appeal identified by the Commission succeeded in 63% of cases, as against 6% of grounds of appeal raised independently by appellants.

(iii) Grounds of appeal raised on appeal despite having been rejected by the Commission. There were nine cases (seven conviction referrals and two sentence referrals) where appellants raised grounds which the Commission had previously considered and rejected. Where these grounds were argued before the appeal court, they were rejected in all bar one case. In that case, it appears that the appeal court *may* have given some weight to the ground of appeal in question, but this is not clear from the court's opinion, and the matter is complicated by the fact that the appeal court appears to have misconstrued the Commission's reasons for referral.

These data have some bearing on current proposals to restrict appellants in referred cases to the grounds of appeal identified by the Commission, except where the court grants permission to do otherwise.¹³⁶ Although such a proposal did not find favour among interviewees, it seems that such a proposal, had it been in place when the Commission was established, would have had little or no effect on referrals to date. If, under the proposed new regime, the court refused to grant leave to the appellant to raise a new ground of appeal, there would be no barrier to the Commission referring the case a second time on that ground if it felt this to be appropriate.

7.3 The “success” of the Commission

60% of conviction referrals and 92% of sentence referrals resulted in successful appeals. These figures are broadly similar to the English Commission, which may be significant given that the Scottish Commission refers a higher percentage of cases in respect of which it receives applications (8% as against 3.8%). This “referral rate” figure remains higher (6% as against 3.8%) even if referrals in respect of punishment parts are discounted from the Scottish figure.

The interviews with practitioners, as detailed in chapter 6, suggest that the Commission's work is positively received by participants in the criminal justice system. The success of the Commission's work is borne out by the fact that, as outlined in chapter 4, the clear majority of the Commission's referrals to the appeal court (and the overwhelming majority in sentence cases) result in successful appeals. It is important, however, that the success of the Commission is not measured purely in terms of outcome: that is, the percentage of referred cases which result in successful appeals. In refusing an appeal following a reference, the appeal court may nonetheless stress that the Commission was right to refer the case.¹³⁷ While the appeal court has occasionally expressed some implicit criticism of the Commission,¹³⁸ this has been rare, and the court has also made reference to the Commission's work being thorough and convincing.¹³⁹

It is clear that the Commission has, in practice, been more than simply a gatekeeper for the appeal court, receiving and filtering applications by convicted persons. This is borne out both by the comments of interviewees and by the existence of cases where convictions have been referred to the

¹³⁶ Section 61 of the Criminal Justice and Licensing (Scotland) Bill, as introduced on 6 March 2009.

¹³⁷ See *Gray v HM Advocate* 2005 JC 233 at para 1 per the Lord Justice-Clerk (Gill).

¹³⁸ See eg *Crombie v Clark* 2001 SLT 635; *DS v HM Advocate* [2008] HCJAC 59.

¹³⁹ See *McPhee v HM Advocate* [2005] HCJAC 137 at paras 7 and 20.

appeal court – and quashed – on the basis of grounds not raised by the appellant but identified by the Commission during the course of its investigations. In this sense, the Commission is proactive rather than reactive, and recognised as such.

7.4 The function of the Commission

The wide range of the grounds on which the Commission referred cases to the appeal court during the period under review sheds some light on the Commission’s function, which some commentators have occasionally sought to cast in narrow terms. For example, it has been argued that:¹⁴⁰

“The principal concern of all interested parties, when the proposed transfer [of the power to refer cases to the appeal court from the Secretary of State to the Commission] was mooted, was that in cases where fresh evidence came to light after trial and cast doubt on the (for want of a better word) safety of a conviction (see Sutherland Report, para. 5.11), a body independent of the former Scottish Office and (in particular) the police should investigate and assess the new evidence (Report, paras 5.50-5.53). While the first referral heard by the High Court (*Boncza-Tomaszewski v. HM Advocate* 2000 JC 586) was determined on the basis of misdirection of the jury (in a trial in 1948) and while it is likely that changes in the law (especially as a result of the Human Rights Act 1998) will generate a caseload which had not been expected from old convictions... the prime purpose of the Commission is to consider convictions in the light of fresh evidence and not to conduct a review of the trial proceedings generally.”

Although para 5.11 of the Sutherland Committee’s report noted that most cases which formed the subject of a petition to the Secretary of State fell into one of five broad categories, three of which involved fresh evidence,¹⁴¹ the Committee made no observations as to the relative frequency of petitions within each of these categories and did not treat them as being in any way exhaustive. Nor does the statutory framework, being constructed around the single “miscarriage of justice” ground of appeal, suggest any such “prime purpose” for the Commission.

Practice to date, moreover, suggests that such a characterisation is inapposite. Although fresh evidence is a ground of referral (not necessarily the sole ground) in half of all cases referred to the appeal court by the Commission, referred cases encompass a broad range of grounds of appeal.

Furthermore, such a rationale does not account for the Commission’s role in referring cases to the appeal court in respect of the sentence imposed. Here, although the Commission’s role is again not limited to any particular category of miscarriage of justice, in practice the majority of its referrals involve the remedying of a procedural irregularity at first instance. 61% of sentence referrals were based on the improper calculation of a punishment part, while a further 15% were based on a view that the sentence imposed at first instance was incompetent. The Commission therefore provides an

¹⁴⁰ PW Ferguson, “Letter: admissibility, criminal evidence, Scottish Criminal Cases Review Commission” [2001] Crim LR 761-762, citing Sutherland Committee, *Criminal Appeals and Alleged Miscarriages of Justice* (Cm 3245, 1996).

¹⁴¹ The categories were as follows: “complaints about conduct of the trial by the defence”, “alleged perjury by witnesses/alleged police malpractice”, “change of evidence by witnesses”, “complaints about identification evidence/conduct of an identification parade” and “alleged new evidence, such as a new witness statement”. No observations were made as to whether applications were more common in respect of any particular category or combination of categories. See para 5.11.

important route for the correction of such irregularities, which would otherwise be difficult to achieve.¹⁴²

7.5 Delay in appellate proceedings

In those cases which formed part of this study, the average time taken to complete conviction referrals was 728 days, and the average time taken to complete sentence referrals 223 days. In the absence of comparable data for “normal” appeals, the researchers are not in a position to draw conclusions as to whether this demonstrates any problem specific to Commission cases, as opposed to appellate proceedings in general. However, it is almost always¹⁴³ the case that Commission referrals come to the appeal court later – often very much later – than normal appeals, making problems caused by delay more acute than might otherwise be the case.

Seven appeals (all bar one against sentence) were abandoned before reaching determination. In most if not all of these cases, the abandonment seems likely to have been because the time taken for the appeal to be heard significantly diminished any benefit to the appellant which might have flown from a successful appeal.

Some interviewees did express the view that Commission referrals should be “fast-tracked” through the court process in some way. Beyond this, any measures which might address the problem of delay would seem to require changes which are not specific to Commission referrals¹⁴⁴ and are outwith the hands of the Commission (as, indeed, is any possibility of “fast-tracking”). One possible reform may be, as Sir Gerald Gordon has suggested, to require that criminal proceedings should always be continued to a fixed diet in the appeal court,¹⁴⁵ as is the case in proceedings at first instance.¹⁴⁶ This would avoid the situation where the court itself (as opposed to Justiciary Office) is unaware of the progress of an appeal. This could not, however, be expected entirely to remove the problem of delay – in one of the Commission referrals which took a particularly long time for the appeal court to determine, there had in fact been a series of procedural hearings, which required to be continued on each occasion because the parties were not in a position to proceed.¹⁴⁷ It is possible that the appeal court might be expected to take a more proactive approach to managing the progress of appeals, in

¹⁴² It might, however, formerly have been possible to deal with such cases by way of a petition to the *nobile officium*. In *McWilliam v HM Advocate*, 4 April 2002, unreported, where the petitioner sought unsuccessfully to bring his sentence under review by way of such a petition, the appeal court observed (at para 6) that “[w]here an original appeal has been finally disposed of, even where it has been deemed to have been dismissed by the court on abandonment rather than dismissed or refused following a hearing, the invocation of reference procedure appears to us to be the appropriate first step before any *nobile officium* jurisdiction is exercised”. McWilliam’s sentence was later referred to the appeal court by the Commission.

¹⁴³ Cf the exceptional case of *Reid v HM Advocate* [2007] HCJAC 70, an appeal brought against a sentence imposed forty years previously.

¹⁴⁴ The appeal court has recently expressed concern about delay

¹⁴⁵ See the commentary to *McDonald v HM Advocate* 2004 SCCR 161 at 172.

¹⁴⁶ *HM Advocate v Frasers* (1852) 1 Irv 66.

¹⁴⁷ *DS v HM Advocate* [2008] HCJAC 59. In the more recent case of *Johnston v HM Advocate; Woolard v HM Advocate* [2009] HCJAC 38, the appeal court expressed concern about a delay in the hearing of the appeal, noting that the introduction of procedural hearings to manage appeals had “succeeded in reducing the frequency with which appeal hearings do not proceed or require to be continued [but] have been attended by the introduction of new problems” (para 23). Reference was made to *DS* and *McCarthy v HM Advocate* 2008 SCCR 902, on the basis of which it was said that that it was apparent that the history of delay in *Johnston* “is not an isolated problem” (para 21).

line with the introduction of preliminary hearings at first instance, but this would involve significant procedural and cultural changes and is well beyond the scope of the report.

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Appendix 1: Conviction referrals 1 April 1999 to 31 March 2008

Applicant ¹⁴⁸	Main offence	Date of referral	Determination ¹⁴⁹
Allison	Murder	19.06.01	Successful
Ballingham	Assault	14.08.07	Successful
Beattie	Murder	13.07.01	Not yet determined
Bishop	Indecent assault	13.03.03	Unsuccessful
Campbell, Barry	Possession of a firearm	03.04.06	Successful
Campbell, Thomas	Murder	28.11.01	Successful
Coubrough	Murder	01.04.05	Not yet determined
Crombie	Evasion of betting duty	15.08.00	Unsuccessful
Falconer	Shameless indecency	09.10.06	Not yet determined
Fraser	Assault	22.09.99	Successful
Freeburn	Attempted theft	13.09.05	Successful
Fulton	Possession of a firearm	25.05.01	Successful
Gair	Murder	11.11.99	Successful
Gibson	Indecent assault	02.02.01	Successful
Gilmour, Colette	Theft by shoplifting	05.11.04	Successful
Gilmour, Raymond	Murder	13.07.01	Successful
Gordon	Rape	30.03.07	Not yet determined
Gray, Thomas	Attempted murder	30.11.01	Unsuccessful
Gray, William	Murder	31.01.03	Unsuccessful
Harper	Murder	24.01.03	Unsuccessful
JH	Lewd and libidinous practices	13.03.07	Not yet determined
Hunt	Assault	27.11.06	Unsuccessful
Johnston	Murder	19.06.01	Successful
Kelly	Rape	14.12.00	Successful
Kidd	Culpable homicide	14.10.02	Successful
Maguire	Assault and robbery	21.03.05	Not yet determined
McCormack	Murder	14.07.00	Unsuccessful
McGinty	Concern in supply of drugs	24.01.03	Successful
McInnes	Attempted murder	14.09.05	Unsuccessful
McPhee	Murder	24.01.03	Successful
Murray	Murder	28.06.04	Not yet determined
Neeson	Murder	29.11.02	Unsuccessful
O'Donnell	Murder	16.11.06	Not yet determined
O'Rourke	Murder	31.01.03	Unsuccessful
Orr	Cruelty to an animal	29.08.03	Successful
Steele	Murder	28.11.01	Successful
DS	Rape	11.03.03	Unsuccessful
Thomson	Rape	12.01.04	Unsuccessful
Thomson ¹⁵⁰	Rape	16.10.06	Not yet determined
Tonks	Assault	01.04.05	Abandoned
Wilson	Murder	28.06.05	Not yet determined
Young	Murder	09.11.07	Not yet determined

¹⁴⁸ Excluding the case of Al Megrahi, which did not form part of this research.

¹⁴⁹ As at the cut-off date of 23 February 2009 which was set for the purpose of data analysis. Beattie's appeal was subsequently unsuccessful (4 March 2009) while Falconer's appeal was successful (24 March 2009).

¹⁵⁰ This applicant made a second application to the Commission for review of his conviction after the appeal court refused his first reference based appeal.

Appendix 2: Sentence referrals 1 April 1999 to 31 March 2008

Applicant	Main offence	Date of referral	Determination
Adam	Concern in supply of drugs	11.10.07	Not yet determined
Angus	Assault	26.01.07	Successful
Ansari	Rape	04.04.02	Successful ¹⁵¹
Baillie	Indecent assault	28.03.06	Successful
Caldwell	Concern in supply of drugs	24.01.03	Unsuccessful
Crawford	Murder	16.01.05	Successful
Dalton	Dangerous driving	23.03.01	Successful
Docherty, Floyd	Lewd and libidinous practices	04.10.07	Abandoned
Docherty, John	Robbery	21.03.02	Successful
Elliott	Murder	16.01.05	Successful
Fulton	Murder	10.04.06	Successful
Greenhill	Murder	10.08.06	Successful
JH	Lewd and libidinous practices	13.03.07	Not yet determined
Hayman	Speeding	27.01.06	Successful
Jordan	Taking indecent photographs	20.09.07	Successful
King	Murder	16.01.05	Successful
Leith	Cultivation of cannabis	01.12.04	Successful
Logue	Murder	04.02.08	Abandoned
McCaskill	Indecent assault	26.06.03	Abandoned
McCreaddie	Murder	10.04.06	Successful
McWilliam	Indecent assault	26.06.03	Not yet determined
Middler	Murder	03.02.06	Successful
Millar	Speeding	22.09.05	Successful
Nairne	Murder	07.08.06	Successful
Ritchie	Assault	30.05.02	Unsuccessful
Robb	Murder	01.04.05	Successful
Robertson	Assault to danger of life	26.06.03	Abandoned
Simpson	Murder	08.07.05	Successful
Skidmore	Murder	25.05.07	Successful
Smith	Attempted abduction	31.01.02	Abandoned
Stewart	Murder	16.01.05	Successful
Watson	Murder	04.09.06	Successful
Williamson	Murder	16.01.05	Abandoned

¹⁵¹ Although technically successful in the sense that the appeal court accepted the appellant's argument that the punishment part of his life sentence had been calculated incorrectly, the sentence itself was not varied. See section 5.2.

Appendix 3: Discussion guide for interviews with criminal justice practitioners

Scottish Criminal Cases Review Commission
10th Anniversary Research Project
QUESTIONNAIRE

NB: *This questionnaire has seven parts. It should take between 30-45 minutes to complete. The questionnaire is designed to be a semi-structured tool to allow interviewees to reflect upon the Commission's work; sub-questions are not mandatory but intended only to stimulate reflection and provide some guidance.*

PART I: RESPONDENT'S ROLE

1. In how many cases and in what capacity have you had involvement with the SCCRC?
 - type of offence?
 - conviction and/or sentence appeal?

PART II: GROUNDS OF APPLYING TO THE COMMISSION

(How cases get to the Commission in the first place)

2. What kind of circumstances do you think justify making an application to the SCCRC?
[Exploring understanding/ definition of 'miscarriage of justice']
3. Do you think the SCCRC's remit is the right one? *[Views on the ability of SCCRC to refer any crime and any sentence – respondent awareness and opinion]*

PART III: CASE REVIEW AND DECISION MAKING PROCESSES

(How and how well the Commission manages investigation and decision making)

4. Please comment on the nature and quality of the SCCRC's:
 - *investigative work* (thoroughness, speed, etc.)
 - *decision making* (right cases getting referred, any really good cases rejected?)
 - *statements of reasons* (right reasons used to support decisions)

PART IV: REFERRAL GROUNDS AND THE APPEAL PROCESS

5. Please comment on the extent to which the SCCRC's statement of reasons are of assistance in the preparation of appeals?
 - Do they provide useful basis for preparing an appeal?
 - Can they be too limited/restrictive?

6. Please comment on the extent to which you included in your appeal grounds *other* than those identified by the SCCRC in reference based appeals?
 - Why? (e.g., *to provide as many possible grounds for decision; felt SCCRC grounds too limited or wrong choice, etc.*)
 - Why not? (e.g., *Didn't know I was allowed to include non-referred grounds; felt court would only seriously consider grounds referred by SCCRC; SCCRC included all the grounds I would have identified, etc.*)

PART V: PERCEPTIONS OF THE COMMISSION'S WORK

7. Please comment on how the SCCRC is perceived by key participants:
 - *High Court*: What is your sense of the High Court's attitude to reference-based appeals and to the SCCRC generally?
 - *Crown Office*: What is your sense of the Crown Office's effort and attitude towards the Commission's work?
 - *Others*: Attitudes and awareness of SCCRC work by accused/applicants, the bar, others?

PART VI: IMPROVEMENTS

8. Are there any improvements you would make to:
 - the Commission's consideration of cases?
 - the Commission's presentation of statements of reasons?
 - the time frames for SCCRC decisions or High Court appeals following a referral?
 - any other aspects of the criminal case review process or the Commission's work (including High Court processing, interaction with Crown Office, publicizing decisions, etc.)?

PART VII: ANY OTHER ISSUES

9. Abandonment: If you have ever been involved in a case that has been abandoned, at what stage did this happen and why?

10. Would you like to comment on any other issue about the Commission or the process of pursuing a miscarriage of justice?

-- END --