

**The Impact of Legal
Representation
on
Applications
to the
Scottish Criminal Cases Review
Commission**

August 2010

1. Introduction

This is a report of research carried out to examine the impact legal representation has on applications to the Scottish Criminal Cases Review Commission ('the Commission'). It was inspired by a study on a similar issue by the University of Warwick regarding the Criminal Cases Review Commission in England ('CCRC'),¹ although in a number of respects the scope and methodology used in the present study differs from the approach in the CCRC study. The work was done internally by the Commission, and was led by Gordon Newall, one of the Commission's senior legal officers.

A summary of the research and the principal findings derived from it was included in the Commission's Annual Report and Accounts for 2009/10, at pages 29 to 31 (available on the Commission's website at <http://www.sccrc.org.uk/ViewFile.aspx?id=444>).

The research in the present study comprised three separate parts. The first part involved the extraction of information from Solcase, the Commission's electronic case management system. The second part comprised a more detailed examination of the hard copy files in all those cases in which applicants were identified on Solcase as being legally represented, and assessment of the legal representatives' level of input into the applications. The third part of the research involved some consideration of data obtained from the Scottish Legal Aid Board ('SLAB'). The approach taken in the first and second parts of the research is described in the following

¹ Hodgson, Jacqueline S. and Horne, Juliet, 'The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC)' (October 6, 2009). Abstract available at <http://ssrn.com/abstract=1483721>. This was a much broader academic study.

section of this report, in which some of the initial results are also set out. The detailed results from the research are then summarised in section 3 (page 10). There is some consideration of those results in section 4 (page 19). The research conducted in the third part of the study, relating to SLAB data, is addressed in section 5 (page 21). Some conclusions are drawn in section 6 (page 29).

2. Scope, methodology and some initial findings

The first part of the research, the extraction of information from Solcase, involved the identification of, and collation of basic details in relation to, all cases that were concluded by the Commission in a 2 ³/₄ year period, from April 2007 to December 2009. This covered the Commission's reporting years 2007/08 and 2008/09 (the Commission's reporting year runs from 1 April to 31 March) and to the end of the calendar year in 2009/10.

This sample period comprised a quarter of the Commission's first 11 full years in operation, which was considered at the outset to be a suitably representative period from which to extract case related information. It was also considered that by the commencement of the sample period all members of the Commission's staff would have been thoroughly familiar with Solcase, thus reducing the likelihood that inaccurate or incomplete information was entered onto the system. The sample period also excluded the early years of the Commission when the procedures were developing e.g. in relation to the approach taken to the acceptance of cases for

review, which it was considered might have affected the reliability of any results obtained from the research.

The research examined those cases *concluded* during the sample period. For the purposes of the research ‘concluded’ cases comprised only those cases in which the Commission’s involvement had ended and the Commission had closed its file.

258 cases were identified during the first part of the research as having been concluded in the sample period. However, during the second part of the research (described further below) it was noted that one of those cases ought not to have been included in the sample as, contrary to what was suggested from the data extracted in the first part of the research, the case had not been concluded until after the end of the sample period. That case was therefore discounted from the sample, leaving 257 cases. It was also noted during the second part of the research that four of the cases in the sample were of co-accused from a single trial and that a single application had been made by a single legal representative in respect of these four applicants. The cases were effectively submitted to the Commission, and reviewed by it, as a single case. It was considered appropriate to treat these cases as a single case for the purposes of the present research. This reduced the number in the sample to (effectively) 254 cases, which is the number quoted in the summary of the research in the Commission’s Annual Report.

In the Commission’s first 11 full years in operation, 1136 cases were concluded (see the Commission’s Annual Report, at page

10). That number includes 19 cases in which a full review was conducted by the Commission and a statement of reasons issued, and which were therefore regarded as 'concluded' for the purposes of the Annual Report, but which had not yet proceeded to the 'final' stage (see below) i.e. the period of time the applicant or his representatives had been granted in order to make further submissions in response to the statement of reasons had not yet expired; or further submissions had been received but the Commission had not yet issued a supplementary statement of reasons. The Commission's involvement in those 19 cases was therefore ongoing, and the files had not been closed, so those cases were not regarded as 'concluded' for the purposes of the present research. Therefore, in the Commission's first 11 years, only 1117 cases were 'concluded' in the sense used in the present research. Those 1117 cases included the four cases referred to in the previous paragraph which, for the purposes of the research, have been treated as a single case. After making the necessary adjustment, the sample of cases in the research therefore comprised just less than a quarter (254/1114, 22.8%) of all the cases concluded by the Commission in its first 11 years.

The methodology in the first part of the research was to identify whether a legal representative was involved in each applicant's case at three critical stages: (1) the 'initial' stage, when the Commission decides whether to accept a case for review; (2) for those cases that the Commission accepts for review, the 'SOR' stage, when the Commission issues a statement of reasons ('SOR') either referring the case to the High Court or refusing to do so; and (3) for those cases which the Commission refuses to refer

to the court at SOR stage, the 'final' stage when, if any further submissions are received, these are considered and a supplementary statement of reasons ('SSOR') issued either referring the case to the High Court or finally deciding not to do so (where no further submissions are received within the period permitted after issuing of the SOR, a letter is issued which makes the decision in the SOR final).

In most cases the data for the research was obtained by an examination of the Solcase 'history' of the case (which contains the record of all correspondence, file notes etc in relation to the file) and in particular by identifying to whom the standard correspondence generated by Solcase at each of the three critical stages was sent: where a representative is listed in the application form, a letter acknowledging receipt is sent to that representative as well as the applicant, as is any letter intimating acceptance or rejection of the case; likewise at the SOR and final stages if representatives are involved a copy of the decisions at those stages is sent to them.

In collating this data in the first part of the research, the identity of any representative was noted for each stage (rather than just the fact that a representative existed), as were further details about the case including the applicant's name, the unique case number ascribed to the case, what the decision actually was at each stage and the date of the final decision. All the data extracted from Solcase was collated in a spreadsheet.

Based on the results of this first stage of the research, a representative was identified at the initial stage in 158 of the 254 cases in the sample. However, it was noted that three of the individuals named as representatives were lay representatives i.e. they were not solicitors. As the purpose of the research was to consider the impact of *legal* representation, those three cases were regarded for the purposes of the research as being unrepresented, leaving 155 represented cases and 99 unrepresented cases.

The mere fact that a legal representative was identified as representing an applicant in relation to the Commission's review, either by being named on the application form or otherwise, did not necessarily mean that the legal representative had had any actual input into the submissions made to the Commission or had made any other material contribution in that regard. The second part of the research therefore involved an in-depth examination of the Solcase history and hard copy files and papers in relation to each of the represented cases in the sample, to identify the extent, if any, of the legal representative's involvement in the submissions. During this research one case was identified in which a solicitor was erroneously recorded on Solcase as representing the applicant at the initial stage, when in fact the applicant was not, and had not claimed to be, legally represented at that stage. This reduced the number of cases with a legal representative at the initial stage to 154 and increased the number without legal representation at that stage to 100.

The 154 represented cases were then categorised to reflect the extent of involvement, if any, the legal representative appeared to have. The categories used were as follows:

- Category 1, in which there was no evidence from the Commission's files of any legal input by the applicant's solicitor. Principally this category was for cases in which the applicant had simply named a solicitor as a current representative on the application form, but had completed the application himself and there was no evidence of any involvement by the solicitor at all; or where the applicant had completed the form and the only involvement the solicitor had was to forward the application to the Commission.
- Category 2, for cases in which there was evidence of some input into the submissions by the solicitor. This category encompassed cases in which a precognition of the applicant was provided, or in which the solicitor otherwise completed the application form and simply conveyed the applicant's position. It also included cases in which the solicitor simply referred to or substantially repeated grounds that had been raised at appeal or in an opinion of counsel at the appeal; cases in which the application comprised a scant opinion from the solicitor or counsel in support of the application, but which contained no substantive analysis or argument or which simply rehashed grounds raised at appeal; and cases in which the solicitor referred to a change in the law which it was submitted was relevant to the applicant's case, but where little or no attempt was made to apply that law to the facts in the applicant's case

or to demonstrate how the change in law had caused a miscarriage of justice in the applicant's case.

- Category 3, for cases in which there was evidence of more substantial involvement by the solicitor than was evident in category 2 cases. This category included cases in which the solicitor had conducted or had attempted to conduct substantive enquiries in support of an application, such as obtaining precognitions or affidavits of witnesses or obtaining an expert report; and cases in which there were detailed legal submissions which did not simply repeat or rehash appeal grounds, but either contained substantive arguments expanding on appeal grounds or challenging a decision of the appeal court, or raised arguments that were new or different to those at appeal. Also included in this category were cases in which a change of law was relied upon and there was some attempt to apply this to the applicant's case and/or to conduct further investigations on this.

In practice the decision whether a particular case fell into category 2 or 3 tended to involve a greater degree of subjective assessment than a decision as to whether a case fell within category 1 or 2. However, it was not always straightforward to identify a case as category 1 rather than category 2. For example, in a small number of cases an application form was completed by hand which contained scant information and which appeared on first view most likely to have been completed by the applicant himself rather than the solicitor named as the representative. However, further examination of the file, discussion with the relevant legal officer,

and comparison with other application forms involving that solicitor, revealed that the form had in fact been completed by the solicitor.

For the purposes of the research the distinction between category 1 and category 2 was more significant than the distinction between category 2 and category 3: the Commission regarded those applicants who fell into category 1 as being effectively without representation and therefore those cases fell to be treated as unrepresented.

The second part of the research also involved the examination of files in which the applicant had not been represented by a solicitor at the initial stage, but had instructed a solicitor during the course of the Commission's review. In some of those cases the solicitor then made submissions on the applicant's behalf which elevated the case from category 1 at the initial stage, when the case was accepted for review, to category 2 by the SOR stage, when a statement of reasons was issued.

Similarly, representation at the 'final' stage was also considered in more detail in the second part of the research. Where a case is referred to the High Court at the SOR stage, the Commission's involvement in the case comes to an end and the file is closed. Where the Commission refuses to refer the case at the SOR stage, the case moves into the 'final' stage. In some cases in which an applicant is unrepresented up to the SOR stage, a solicitor may then make submissions on the applicant's behalf at the final stage. The reverse is also true: those represented at SOR stage may become unrepresented at the final stage. In all

cases in the sample in which a solicitor was identified from Solcase as being involved in a case at the final stage, an examination of the file was conducted to establish into which category the further submissions fell.

Further details of the findings of the research are contained in the following section.

3. Findings in detail

Representation at initial stage

As indicated, there were effectively 254 cases in the sample. Prior to categorisation, 154 were identified as having legal representation and 100 were unrepresented.

After part 2 of the research was completed it was found that 27 of the legally represented cases fell into category 1 at initial stage. 111 cases were classified as category 2 at the initial stage. 16 cases were classified as category 3.

As explained, category 1 cases were considered to be unrepresented cases. Coincidentally, this resulted in an equal number of 127 unrepresented applicants and 127 represented applicants at the initial stage.

Of the 254 cases, the total number that was accepted for review by the Commission at the initial stage was 173 (68.1% of the cases in

the sample). The remaining 81 cases (31.9%) were rejected at the initial stage. Those rejected cases were concluded at that stage and the Commission's file was closed. The cases are broken down by category in the following table.

Table 1: cases accepted for review

	Number of cases received	Number accepted for review	Percentage of cases accepted
Unrepresented			
No solicitor	100	58	58% (58/100)
Category 1	27	15	55.6% (15/27)
<u>Total</u>	<u>127</u>	<u>73</u>	<u>57.5% (73/127)</u>
Represented			
Category 2	111	85	85/111 (76.6%)
Category 3	16	15	93.8% (15/16)
<u>Total</u>	<u>127</u>	<u>100</u>	<u>78.7% (100/127)</u>
<u>Overall total</u>	<u>254</u>	<u>173</u>	<u>68.1% (173/254)</u>

From this it can be seen that of the 127 cases with no legal representation at the initial stage, 57.5% (73/127) were accepted for review.

The rate of acceptance of cases in which there was legal representation was higher: 78.7% (100/127) of represented cases were accepted for review.

Representation at SOR stage

Of the 173 cases accepted for review, only 164 cases proceeded to the SOR stage and the issuing of a statement of reasons to the applicant. The other nine cases were closed by the Commission after they had been accepted for review, but prior to a statement of reasons being issued. In the main this was either for want of insistence by the applicant or because it was discovered after the case was accepted that the applicant in fact still had an appeal outstanding.

In the period between the case being accepted and a SOR or decision to close the case being issued, 15 of the 58 unrepresented applicants instructed a solicitor. In only five of those cases did the solicitor then proceed to make any submissions to the Commission prior to a decision being made. All of those five cases were classified as category 2. The remaining ten cases became category 1 cases, so were still regarded as unrepresented. Therefore, at the time of a decision being made in each case, the 173 accepted cases comprised 43 cases with no representation (24.9%), 25 category 1 cases (14.5%), 90 category 2 cases (52.0%) and 15 category 3 cases (8.7%).

The foregoing includes the nine cases that were closed mid-review. Two of those cases had no legal representative listed, two were category 1 cases, four were category 2 cases and one was a category 3 case. The following table therefore breaks down the

164 cases in which a statement of reasons was issued at SOR stage either referring the case to the High Court or refusing to do so, by reference to the category at that stage.

Table 2: cases referred at SOR stage

	Number of cases in which SOR issued	Number referred at SOR stage	Percentage of cases referred
Unrepresented			
No solicitor	41	4	9.8% (4/41)
Category 1	23	2	8.7% (2/23)
<u>Total</u>	<u>64</u>	<u>6</u>	<u>9.4% (6/64)</u>
Represented			
Category 2	86	12	14.0% (12/86)
Category 3	14	5	35.7% (5/14)
<u>Total</u>	<u>100</u>	<u>17</u>	<u>17% (17/100)</u>
<u>Overall total</u>	<u>164</u>	<u>23</u>	<u>14.0% (23/164)</u>

From this it can be seen that, of the 64 unrepresented cases, 9.4% (6/64) were referred at the SOR stage, in the remaining 58 cases a SOR refusing to refer was issued.

Of the 100 represented cases, 17% (17/100) were referred at the SOR stage, in the remaining 83 cases a SOR refusing to refer was issued.

Representation at final stage

The final stage related only to those 141 cases in which a SOR refusing to refer the case to the High Court was issued at SOR stage. In 56 of those cases further submissions were received which sought to persuade the Commission to change its view, as broken down in the following table.

Table 3: cases in which further submissions received

	Number of cases refused at SOR stage	Number in which further submissions	Percentage in which further submissions
Unrepresented at SOR stage			
No solicitor	37	11	29.7% (11/37)
Category 1	21	8	38.1% (8/21)
<u>Total</u>	<u>58</u>	<u>19</u>	<u>32.8% (19/58)</u>
Represented at SOR stage			
Category 2	74	31	41.9% (31/74)
Category 3	9	6	66.7% (6/9)
<u>Total</u>	<u>83</u>	<u>37</u>	<u>44.6% (37/83)</u>
<u>Overall total</u>	<u>141</u>	<u>56</u>	<u>39.7% (56/141)</u>

On the basis of the foregoing, the percentage of applicants who were effectively unrepresented upon receipt of a SOR refusal and who went on to make further submissions was 32.8% (19/58).

The percentage of applicants who were represented upon receipt of a SOR refusal and who went on to make further submissions was higher: 44.6% (37/83).

However, it did not always follow that in cases which were category 2 or 3 at the SOR stage the further submissions were also category 2 or 3; nor did it follow that in all cases regarded as unrepresented at SOR stage, there was no input by a legal representative into the further submissions.

Of the 37 applicants with no representative at the SOR stage who received a SOR refusal, in none of the 11 cases in which further submissions were made was there any indication that the applicant consulted a solicitor, or that a solicitor had any input into those further submissions. (In 2 of the 26 cases in which no further submissions were made the files indicated that the applicant consulted a solicitor prior to the final decision letter being issued.)

Of the 21 cases in which a SOR refusal was issued and which were classified at the SOR stage as being category 1, in three of the eight cases in which further submissions were received those further submissions were classified as category 1 and in four cases the further submissions were classified as category 2. None of the further submissions were classified as category 3. In the one remaining case, the representative identified at SOR stage ceased to act for the applicant thereafter. Although the applicant instructed another firm, it was apparent that that firm had no involvement in the further submissions – the applicant made these

himself – and by the time the supplementary statement of reasons was issued the firm was no longer acting for the applicant. For the purposes of the research, given the apparent instruction of a solicitor for a period prior to the supplementary statement of reasons being issued, the further submissions of this applicant were classified as category 1.

Of the 74 cases in which a SOR refusal was issued and which were classified as category 2 cases at SOR stage, in four of the 31 cases in which further submissions were made those submissions were rated as category 1. In 18 cases the further submissions were rated as category 2. In nine cases further submissions were rated as category 3. In one of those nine category 3 cases the Commission referred the case to the High Court at final stage.

Of the nine cases in which a SOR refusal was issued and which were classified as category 3 cases at SOR stage, in one of the six cases in which further submissions were received, those further submissions were classified as category 1. In three cases the further submissions were classified as category 2 and in two cases they were classified as category 3. Two of those category 2 cases were referred to the High Court at the final stage.

Therefore, in five of the 37 cases that were category 2 or 3 at SOR stage and in which further submissions were received, examination of those files resulted in the further submissions being classified as category 1. Similarly, whilst the evidence suggested that none of the 37 applicants in the sample who had no legal representative at the SOR stage went on to instruct a solicitor who

then made further submissions at final stage, in four of the cases that were category 1 at the SOR stage the further submissions that were made were classified as category 2. The following table breaks these cases down.

Table 4: cases referred at final stage

	Number of cases in which further submissions made	Number referred at SOR stage	Percentage of cases referred
Unrepresented at final stage			
No solicitor	11	0	0%
Category 1	9	0	0%
<u>Total</u>	<u>20</u>	<u>0</u>	<u>0%</u>
Represented at final stage			
Category 2	25	2	8% (2/25)
Category 3	11	1	9.1% (1/11)
<u>Total</u>	<u>36</u>	<u>3</u>	<u>8.3% (3/36)</u>
<u>Overall total</u>	<u>56</u>	<u>3</u>	<u>5.4% (3/56)</u>

In effect, in 35.7% (20/56) of the cases in which further submissions were made, those further submissions were made by unrepresented applicants. In none of those cases did the applicant persuade the Commission to change what was a refusal at SOR stage into a referral at supplementary stage.

In the remaining 64.3% (36/56) of cases in which further submissions were made, there was some active input from legal representatives in those further submissions. In three of those cases (8.3% - 3/36) the Commission referred the case to the High Court at this final stage.

Overall statistics

The following is a breakdown of the outcomes of cases as a percentage of the overall sample:

- Unrepresented cases rejected at initial stage – 21.26% (54/254)
- Represented cases rejected at initial stage – 10.63% (27/254)

- Unrepresented cases closed mid-review – 1.57% (4/254)
- Represented cases closed mid-review – 1.97% (5/254)

- Unrepresented cases referred at SOR stage – 2.36% (6/254)
- Represented cases referred at SOR stage – 6.69% (17/254)

- Cases refused at SOR and final stage where no representation at any stage – 21.26% (54/254)
- Cases refused at SOR and final stage where representation at SOR or final stage or both – 33.07% (84/254)

- Cases refused at SOR stage but referred at final stage where no representation at any stage – none
- Cases refused at SOR stage but referred at final stage where representation at final stage – 1.18% (3/254).

4. Interpretation of results and limitations on findings

The findings of the research are that at each stage the percentage of 'successful' outcomes for an application (i.e. acceptance of the case for review at the initial stage; referral of the case to the High Court at the SOR stage or final stage) is higher where there has been input from a legal representative than where there is no evidence of involvement by a legal representative.

This may support the view that input of a legal representative into applications to the Commission improves the chances of the case being accepted for review, and improves the chances of the case being referred to the High Court. To some extent this may not be surprising, as one would expect in general that submissions made by a legal representative are more likely to be better presented and focussed upon relevant arguments than those submitted by an applicant.

However, the results must be treated with some caution for a number of reasons. Firstly, the number of cases studied is comparatively small, making the results inherently less reliable than a larger sample. Any small variation in the numbers of cases in any one category might have a significant impact overall. Also,

as a piece of research done internally by the Commission, the possibility of unintentional institutional bias must be acknowledged. There may also be errors in the data input into Solcase. The CCRC study suggested that the case management system used by the CCRC may have been only around 85% accurate in recording details of legal representatives there.² Whilst in the present study such errors would have been (and were) identified in relation to cases that were the subject of detailed examination, not every case in the sample was examined in detail: there was no such examination of cases in which no representative was listed on Solcase at any of the three critical stages.

Perhaps more importantly, it must be emphasised when considering the differences between represented and unrepresented cases that the populations in each may be different; it is foreseeable that unrepresented cases will be inherently weaker than represented cases. Applicants themselves may be aware that in certain cases they are unlikely to get legal support, but still wish to have their cases reviewed. One example of this might be where the application relates to a case that has been the subject of a previous review by the Commission and which on that previous occasion the Commission refused to refer to the High Court. In addition, legal representatives may in practice 'filter' incompetent or worthless applications and involve themselves directly in applications to the Commission only where they consider that, on the face of it, there may be some merit in the submissions. Some further research has been conducted, based on data provided by SLAB, to examine the possibility that solicitors

² Hodgson and Horne, note 1, at page 10, Table A.

do filter potential applications to the Commission. This is considered in the next section of this report.

5. Consideration of data from SLAB

It was considered appropriate to conduct some further research into the possibility that legal firms might 'filter' applications, and perhaps associate themselves only with those which are considered to have some merit, as this would be one obvious reason why represented applicants appear to achieve greater success in their dealings with the Commission than unrepresented applicants. It would seem neither surprising nor inappropriate if a certain amount of such 'filtering' was done by solicitors.

It was considered reasonable to assume that in the majority of cases in which solicitors are consulted by convicted persons about an application to the Commission, the solicitor will claim legal aid advice and assistance ('A&A') to cover the consideration of the case, advice to their client and, where appropriate, completion of an application to the Commission. If solicitors do in fact 'filter' a significant number of potential applications to the Commission one might expect the number of applications to SLAB for A&A in respect of Commission cases to be higher than the number of applications to the Commission by legally represented applicants.

The Commission approached SLAB for further information. SLAB helpfully provided data on the number of A&A applications for Commission related criminal work (i.e. under the A&A code

‘SCRC’, which identifies the work as relating to Commission) made in the three financial years 2007/08, 2008/09 and 2009/10, broken down by individual firms.

The data from SLAB indicated that 81 separate law firms made one or more A&A applications to SLAB for Commission related work in the three financial years in question i.e. from 5 April 2007 to 4 April 2010.

The total number of A&A applications received by SLAB in that period was 308. Over half of the firms listed made only one application for A&A in the period (42 firms). 17 firms each made two applications for A&A (34 applications in total), eight firms each made three applications (24 in total), five firms each made four applications (20 in total), two firms each made five applications (10 in total), one firm made six applications, one firm made 13 applications, one firm made 17 applications, one firm made 19 applications, one firm made 25 applications, one firm made 42 applications and one firm made 56 applications for A&A in the period in question.

In order to compare the SLAB data to the Commission’s cases it was not appropriate simply to use the sample of 254 cases concluded in the period 1 April 2007 to 31 December 2009. Firstly, the sample periods were different. Secondly, many of the 254 cases were accepted for review prior to 1 April 2007, so that in the normal course of events any application a legal representative made for A&A would have been made prior to the start of the financial year 2007/08. Therefore, a new sample of cases had to

be identified from the Commission's system to compare with the SLAB data. This new sample comprised all cases *received* during the same period as is covered by the SLAB data, 5 April 2007 to 4 April 2010. There were 300 applications in all. (NB the Commission's own accounting year runs from 1 April to 31 March; in the Commission's three reporting years 2007/08, 2008/09 and 2009/10 it received 299 cases. It did not receive any cases between 1 and 4 April 2007, but received one case between 1 and 4 April 2010, hence the total of 300 cases).

Of the 300 cases, the Commission's records on Solcase indicate that in 100 of them, there was no legal representative involved at any of the three key stages (i.e. the initial stage, SOR stage and final stage). Therefore, in the same period that SLAB received 308 applications for A&A, the indications are that the Commission received only 200 applications from convicted persons who had a legal representative involved at some stage during the review of their case. In other words, it appears on the face of it that SLAB may have received 1½ times as many applications for A&A in Commission related cases as the Commission received applications from solicitors or applications supported by solicitors.

Since the data provided by SLAB is broken down into the number of applications each of the 81 named firms made, some further analysis is possible.

In relation to 50 of the 81 firms listed as having applied for A&A, the number of applications for A&A that those firms made was less than the number of cases in the Commission sample in which

those firms were noted as being involved (indeed, 29 firms listed by SLAB as having made at least one A&A application did not appear on the Commission's system at all.) This might suggest that these firms 'filtered' out one or more of the cases in relation to which they had applied for A&A.

In relation to 26 of the 81 firms listed as having applied for A&A, the number of applications each firm made for A&A was equal to the number of cases in the Commission sample in which those firms were noted as being involved. It may be that each application for A&A corresponds to an application in the Commission sample, in which case none of these 26 firms could be considered to have 'filtered out' any applications. Alternatively, it may be that some of the A&A applications relate to cases that the solicitors did not then submit to the Commission, and some of the cases in the Commission sample were not funded by A&A (e.g. where the convicted person was not eligible for A&A, such as if they had sufficient means to fund the legal assistance privately).

In relation to the remaining five firms listed as having applied for A&A, the number of cases the Commission received that those firms were recorded as being involved in was higher than the number of A&A applications those firms made. As this was somewhat unexpected, it was considered appropriate to conduct some further investigation in relation to those cases:

- One firm made only one A&A application, but was listed as involved in three applications to the Commission during the period. Examination of the relevant files and discussion with

the relevant legal officers indicated that two of the cases in question may well have been privately funded.

- One firm made three A&A applications but was listed as being involved in four applications to the Commission during the period. Further examination of the Commission's files suggested that in relation to two of the four cases there was no evidence of the solicitor having done any substantive work i.e. the case was 'category 1'. If the solicitor did in fact do no substantive work, but was simply named on the form or simply posted the form for the applicant, then in these circumstances it might be expected that no application for A&A would be made and the Commission would not regard the applicant for the purposes of this research as being legally represented.
- Three firms were each listed as involved in two applications to the Commission but each made only one A&A application. In relation to one of these firms, one of the two cases that firm was recorded as being involved in was, upon inspection of the file, regarded as 'category 1'. Again, this might suggest that no A&A application was made in respect of that case. In relation to the other two firms which were involved in two applications to the Commission but submitted only one application each for A&A, there was no obvious reason why A&A had not been claimed in both the cases each firm was recorded as being involved in. This would be explained if, unbeknownst to the Commission, one or more of the cases each firm was involved in was privately funded. It would also

be explained if, in error, no application was made (or made timeously) for A&A. Another possibility would be if, although an application for A&A was made, the wrong identifier code was used on the A&A form e.g. 'Criminal – Other' rather than the 'SCRC' code used for Commission related work.

There were also a significant number of firms, 30 in total, which were noted by the Commission as being involved in one or more of the applications received by the Commission during the sample period but which were not recorded by SLAB as having made an application for A&A during that period. Those 30 firms were involved in 34 of the cases in the sample of 300. An examination of the files in relation to all the cases submitted by each of the 30 firms in question, and discussions with the legal officers involved in those cases, highlighted possible explanations in a number of the cases why the firm may not have applied for A&A:

- In relation to one case, the two firms that acted were English law firms and, although identified as the applicant's solicitor, would not have been eligible to claim A&A from SLAB. In any event they had no direct input in relation to the application to the Commission i.e. the case was 'category 1'.
- In a further three cases, it was known or strongly suspected that the legal assistance was funded privately by the convicted person.
- In relation to 22 of the cases examination of the files and discussion with the relevant legal officers suggested that the

cases were 'category 1' i.e. there was no evidence of any actual involvement by the named solicitor in the case, save in some cases that the solicitor had acted as a 'postman' by submitting the application form on the applicant's behalf. It might therefore be expected that no claim for A&A would be made in such cases.

- In the remaining eight cases there was no obvious reason why the firm did not claim A&A. Again, it may be, for example, that one or more of those cases was in fact privately funded, or that through error an application for A&A was not made (or not made timeously), or that the wrong A&A code was completed on the A&A form.

Although there may well be good reasons for the cases in which no obvious explanation could be found for the absence of an application for A&A, the existence of such cases highlights the need for caution in reading too much into comparisons between the available SLAB and Commission data. There are further possible complications in that regard. For example, whilst there is a time limit of 14 days for submission of an A&A application to SLAB, there is no specific time limit for completion of any work and submission of an application to the Commission, once an A&A application has been made. It is therefore possible that a number of the 308 A&A applications received in the three year period to 4 April 2010 relate to cases that the solicitor had not yet submitted to the Commission by that date. Likewise it is possible that in a number of the 300 cases received by the Commission the relevant A&A applications were made prior to 5 April 2007. SLAB may also

in some cases have accepted the A&A form late (i.e. beyond the 14 day limit in which such applications must be received), in which case a submission made to the Commission prior to 5 April 2007 would not be included in the sample of 300 but the application for A&A made in respect of that case, if submitted after 5 April 2007, would be included in the A&A data provided by SLAB. (Only one case was submitted to the Commission in the 14 day period prior to 5 April 2007, and it was clear from the date on the application form that it had been completed on 22 March 2007, outwith the 14 day period preceding 5 April 2007). It is therefore not certain that the two samples relate to the same group of cases, although it seems reasonable to expect that there must be at least a significant degree of overlap.

The caveats mentioned above limit the strength of the conclusions that can be drawn in relation to the data obtained. However, it does appear that the SLAB data offers some support for the suggestion that a number of solicitors 'filter' potential applications to the Commission. The data certainly adds some weight to this as a possible explanation for the apparently higher success rates of legally represented applicants to the Commission compared to unrepresented applicants.

6. Conclusions

Given the various limitations highlighted in this report, the results of the research that has been conducted must be treated as indicative only.

However, if the results do reflect the true picture, cases in which a legal representative takes some active involvement generally meet with greater success at the Commission than cases without such representation.

It seems likely that a combination of the factors mentioned in this report may account for the different success rates between represented and unrepresented cases. In light of the SLAB data, there is some support for the possibility that solicitors 'filter out' applications that appear to be unmeritorious. It would not be surprising if such filtering takes place, and this may well contribute to the differential in success rates. Connected to this is the possibility that the population of unrepresented cases in the sample may simply be different to the population of represented cases, in that the unrepresented cases may be inherently weaker. On the other hand, one must also expect that, in general, submissions made by a legal representative are more likely to be better presented and focussed upon relevant arguments than those submitted by an applicant, and that this too may well be a factor in the greater success rates for represented applicants.