

## RESEARCH & DEVELOPMENT – REFERRALS 01/04/2008 – 31/03/2013

### 1.0 Introduction

- 1.1 To mark the 10<sup>th</sup> anniversary of the Commission’s establishment independent research was commissioned from Dr Fiona Leverick, Mr James Chalmers, Dr Sarah Armstrong and Dr Fergus McNeill of the Scottish Centre for Crime & Justice Research. Their final report was issued on 30 April 2009 and considered the referrals made by the Commission between its establishment on 1 April 1999 and 31 March 2008.
- 1.2 The purpose of this report is to replicate some of the analysis of referrals for the next 5 year period (from 1 April 2008 to 31 March 2013) contained in chapters 4 and 5 of the above report.
- 1.3 There have been a number of significant changes since the earlier reporting period: With effect from 30 October 2010, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 introduced a new provision to s194C of the 1995 Act, which is in the following terms:

*“(2) In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings.”*

The same legislation also introduced s194DA, which granted a new power to the court to reject a Commission reference where it considers that it is not in the interest of justice that the appeal should proceed.

Also, with effect from 5 November 2010, the Criminal Justice and Licensing (Scotland) Act 2010 introduced new provisions (ss194D (4A) to (4F) to s194D restricting appeals following referrals to grounds contained within the reference, unless leave of the High Court for additional grounds is granted.

- 1.4 The High Court too has begun to comment upon the Commission’s determination of the question of interests of justice in the cases of *Hunt v Aitken* 2008 SCCR 919 and *Kelly v HMA* [2010] HCJAC. In both cases, the court expressed surprise that the Commission appeared to have paid little attention to the procedural history of the appellate stage when deciding whether or not to refer the case.
- 1.4 To reflect these changes, the Commission developed a stage 1 process whereby applications receive more detailed scrutiny prior to acceptance for full review (stage 2) to ensure that applications are only accepted where it is in the interest of justice to do so – i.e. where the normal routes of appeal are exhausted, where reasons are given as to how the appeal court erred in refusing the grounds or why the ground for review was not argued at appeal and where the ground raised is prima facie stateable. This process has been evolving since its introduction in January 2011 and means that only around a quarter of all applications are currently accepted for stage 2 review.

## 2.0 Analysis of the Commission's referrals (Chapter 4)

### 2.1 The sample

The cases that form the main subject of this report are the 43 cases that were referred to the appeal court by the Commission in the period from 1 April 2008 to 31 March 2013 (as detailed at appendices 1 and 2). To put this figure into the context of the Commission's overall workload, during this 5 year period, 703 applications were received by the Commission. The 43 cases that were referred represent a referral rate of 6 per cent. This can be contrasted to the referral rate of the English Commission, where in the same period, 5,449 applications resulted in 135 referrals, a referral rate of 2 per cent.

Of the 43 referred cases, 25 were conviction referrals and 18 were sentence referrals. The nature of the offences involved is shown in table 2.1 below. Some cases involved the referral of more than one offence. Where this was the case, table 2.1 shows the most serious offence involved.

Offence category	All cases	Conviction referrals	Sentence referrals
Murder	8	5	3
Attempted murder	1		1
Culpable homicide	3	2	1
Rape	2	1	1
Other sexual offence	11	6	5
Assault	4	2	2
Robbery	2	2	
Drugs offences	3	1	2
Driving offences	3	3	
Other	6	3	3
Total	43	25	18

**Table 2.1: Offence categories**

### 2.2 The grounds for referral

Applying the methodology and categories set out in the previous report the nature of the grounds and the proportion of cases referred on each ground were calculated. As before the totals add up to more than the 25 cases referred as some cases were referred on more than one ground. The results are contained in table 2.2.

Ground	Number of cases	% of cases
<b>Error of law</b>	7	28
Insufficient evidence	3	12
Evidence: wrongful admission	3	12
Evidence: wrongful exclusion	1	4
Refusal of no case to answer submission		
<b>Irregular proceedings</b>	2	8
Conduct of judge		
Conduct of jury	1	4
Conduct of prosecutor		
Other	1	4
<b>Misdirection</b>	5	20
On evidence: omission, value, weight	1	4
On law: corroboration	1	4
On law: other	3	12
<b>Other</b>	11	44
Evidence not heard at original proceedings	4	16
Failure to disclose	5	20
Defective representation	4	16
Unreasonable verdict	1	4
Lurking doubt		

**Table 2.2: Grounds of referral (convictions)**

As table 2.2 shows, the most common grounds for referral of a conviction were misdirection and failure to disclose, which each featured as a ground of referral in 5 of the 25 referred convictions. The next most common single grounds of referral were evidence not heard at original proceedings and defective representation. Error in law include the “Cadder” cases in which the evidence of the police interviews had been wrongfully admitted.

Table 2.3 displays the grounds for referral used by the Commission in the 18 sentence referrals:

Ground	Number of cases	% of cases
Improper punishment part calculation	3	17
Sentence inconsistent with precedent	9	50
Incompetent sentence	4	22
Relevant factor not taken into account		
Sentence calculated on inaccurate factual basis	1	6
Inappropriate weighting of certain factors	1	6

**Table 2.3: Grounds of referral (sentences)**

As table 2.3 shows, the most common reason for the Commission to refer a sentence in this period was because the sentence was inconsistent with precedent – this may be either in relation to co-accused (comparative justice) or sentencing practice for similar offences (consistency of sentence). An example of incompetent sentence is found in Sproat where an extension period was imposed for an offence which pre-dating the relevant legislation for imposing an extended sentence.

### 2.3 Referral grounds raised by the Commission independently

As before, work was undertaken to identify the nature and number of referral grounds based on the Commission’s own enquiries and assessment of cases, as opposed to grounds raised by the applicants themselves.

In the period in question fifteen of the 43 referrals were referred on grounds identified by the Commission. In twelve of these, the Commission identified the sole ground for referral. In the remaining three, the case was referred on a combination of grounds identified by the Commission and by the applicant. Ten of the fifteen cases were conviction referrals and five referrals on sentence. Table 2.4 below summarises the fifteen cases concerned. The success or otherwise of the cases when determined by the appeal court is considered at 3.3 below:

Case	Commission’s independently identified referral ground	Was this the sole ground of referral?
Affleck	Failure to disclose	Yes
Bremner	Incorrect calculation of punishment part	Yes
Casey	Fresh evidence	No – some fresh evidence identified by applicant
Chamberlain-Davidson	Misdirection	Yes
Ingram	Incompetent sentence	Yes
Kinsella	Failure to disclose	No – also referred on one applicant identified ground
Liehne	Misdirection	No – also referred on one applicant identified ground
McIntyre	Fresh evidence	Yes

Millar	Failure to disclose	Yes
Murray	Defective representation – newly accepted defence not led	Yes
Polland	Failure to disclose and fresh evidence	Yes
Rough	Error in sentence	Yes
Shannon	Excessive sentence	Yes
Sproat	Incompetent sentence	Yes
Wallace	Defective representation – failure to challenge lack of required notice	Yes

**Table 2.4: Cases where the Commission independently identified grounds for referral**

#### 2.4 Time taken to complete referral cases

As before work was undertaken to calculate the average time to complete referral cases, from date of application to date of reference. The case of Carberry is not included in this analysis as it was originally refused at interim and supplementary stages by the Commission in 2011, the applicant sought to judicially review that decision, the judicial review was settled, the case reopened and the case was finally referred in March 2013.

The average (mean) time taken to complete the remaining 42 of the 43 referred cases in the sample was 387 days (approximately 1 year and 1 month). The shortest period from the date of application to date of reference was 45 days (Sanderson, a sentence referral relating to a punishment part) and the longest was 1,177 days (Gage, a murder conviction referral).

The average time taken to complete conviction referrals (477 days compared to previous average of 728) was again considerably longer than that taken to complete sentence referrals (267 days compared to previous average of 223). In relation to sentence referrals two lengthy reviews which significantly impact upon the average time taken are Reid (a particularly complex 1967 sentence review which challenged a 2007 decision of the High Court) and Bremner (where the instruction and preparation of a risk assessment report was required) – if these were excluded the average time taken has reduced (marginally) to 214 days.

The following year on year analysis suggests that the trend for speedier case determination has not continued and the average time has settled at just over 400 days for conviction referrals (at 1 year and 2 months this time is outside of target time of 9 months).

Year of application	All cases	Conviction referrals	Sentence referrals
2008/09	311	344	284
2009/10	388	472	177
2010/11	411	423	371
2011/12	354	412	316
20012/13	173	-	173

**Table 2.5: Year on year analysis of time taken to complete referral cases**

#### 2.5 Summary of main findings

**The nature of cases referred to the appeal court.** There continues to be a broad range of offences encompassed within the Commission’s referrals to the appeal court. However, this period sees sexual offences “overtake” murder and attempted murder as offences to feature most heavily. While the numbers are low it is noted that of the 5 convictions referrals where the offence was murder, none of the referrals succeeded, and neither of the two robbery referrals succeeded. However, the 1 rape, 1 drugs offence and 3 driving convictions referred were all successful and in most other offence groups the picture was mixed.

**The grounds of referral in conviction appeals.** Failure to disclose and misdirection have overtaken evidence not heard at the original trial for featuring most frequently as a ground of referral.

**The grounds of referral in sentence appeals.** With only the last few of the “Flynn” referrals in respect of the calculation of the punishment part still requiring to be addressed in this period, issues of comparative justice and consistency of sentencing now dominate the reasons for referring sentence cases.

**Grounds of referral identified by the Commission independently.** The Commission referred fifteen cases to the appeal court in the basis of grounds identified by the Commission independently of the application which it had received. Most common in conviction cases were issues of non-disclosure which were identified, followed by issues relating to representation at trial. For sentence cases a technical error in sentencing was most commonly identified.

**Time taken to complete referral cases.** In those cases which formed part of this study, the average time taken to complete conviction referrals was 477 days (down from 728 days in the period to 31/03/2008), and the average time taken to complete sentence referrals 267 (up from 223 days). A notable improvement in average time taken in conviction cases is not reflected in the time taken for sentence cases (but bear in mind the aforementioned cases of Reid and Bremner).

### 3.0 Analysis of grounds of appeal and the appeal court’s determination

#### 3.1 Extent to which appeals have been based on grounds other than the Commission’s reference grounds

As set out at paragraph 1.3 above since 5 November 2010 leave of the High Court was required to argue grounds additional to those contained within the Commission’s referral. Anecdotally there has been only two occasions where such applications for leave were made (Chamberlain-Davidson & McIntyre). In each case leave was granted and the appeal allowed on a *Cadder* ground. In Chamberlain-Davidson the appeal court approved the Commission’s decision not to refer on that ground but held that its own discretion was wider (the Commission decided that there may have been a miscarriage of justice but that it was not in the interests of justice to refer on that ground as the applicant did not dispute the accuracy of the content of the police interview). In McIntyre the applicant did not raise the issue in the course of his review by the Commission.

No further analysis has been undertaken on the point.

#### Success rate of determined appeals in referred cases

3.2 This section examines the success or otherwise of determined appeals in referred cases. As the period under examination ends in March 2013, at the time of writing all 43 referrals had been determined (albeit two were abandoned by the applicant – Murray & Gallagher).

Table 3.1 summarises the outcome of the 41 cases that have been determined by the appeal court, as a whole and broken down into conviction and sentence appeals.

	Success rate (number)	Success rate (%)
All cases	27/41	66
Conviction referrals	12/24	50
Sentence referrals	15/17	88

**Table 3.1: Success rate of determined appeals**

27 of the 41 cases referred by the Commission and pursued by the applicant have subsequently succeeded at appeal, a success rate of 66%. This is down from a success rate of 74% in the period to 31/03/2008. The success rate in respect of conviction referrals

has reduced from 60% to 50% and sentence referrals from 92% to 88% between the two periods.

In the same period 123 cases referred by the English Commission were determined, this figure consisting of 105 convictions and 18 sentences. In total, 82 of the 123 referred cases were successful on appeal, an overall success rate of 67%. Breaking this down by type of case involved, 69 of the 105 referred convictions were quashed (66%) and 13 of the 18 sentences were varied 72%. Thus the overall success rate of referred cases is marginally lower in Scotland than in England and Wales (66% compared to 67%). The success rate for conviction referrals is appreciably lower (50% compared to 66%) but appreciably higher for sentence referrals (88% compared to 72%).

### Success rate of referral grounds identified independently by the Commission

3.3 Of the fifteen cases where the Commission independently identified referral grounds, one was abandoned, 4 were unsuccessful and 9 were successful (9/14 – a success rate of 64%).

It is however worthy of note that all 4 unsuccessful cases were referred in respect of conviction so only 5 out of the 9 cases referred on conviction were successful at appeal (i.e a success rate of 56% - higher than the overall success rate for conviction referrals). Meanwhile the success rate for sentence grounds identified by the Commission is lower than for those identified by the applicant (80% compared with 88%).

<b>Case</b>	<b>Commission's independently identified referral ground</b>	<b>Outcome</b>
Affleck	Failure to disclose	Appeal refused
Bremner	Incorrect calculation of punishment part	Appeal succeeded on this ground alone
Casey	Fresh evidence	Appeal refused
Chamberlain-Davidson	Misdirection	Appeal succeeded on this ground alone
Ingram	Incompetent sentence	Appeal succeeded on this ground alone
Kinsella	Failure to disclose	Appeal refused
Liehne	Misdirection	Appeal succeeded on this ground alone
McIntyre	Fresh evidence	Appeal succeeded on this ground alone
Millar	Failure to disclose	Appeal refused
Murray	Defective representation – newly accepted defence not led	N/A - abandoned
Polland	Failure to disclose, defective representation and fresh evidence	Appeal refused
Rough	Error in sentence	Appeal succeeded on this ground alone
Shannon	Excessive sentence	Appeal succeeded on this ground alone
Sproat	Incompetent sentence	Appeal succeeded on this ground alone
Wallace	Defective representation – failure to challenge lack of required notice	Appeal succeeded on this ground alone

**Table 3.2: Outcome of grounds of referral identified independently by the Commission**

3.4 Success rates of Commission referral grounds vs appellant identified grounds

No further analyses have been undertaken in this regard.

### 3.5 Crown concessions

No further analyses have been undertaken in this regard.

### 3.6 Devolution minutes

No further analyses have been undertaken in this regard.

### 3.7 Abandoned appeals

No further analyses have been undertaken in respect of the two cases abandoned.

### 3.8 Time taken to determine referred cases

The average time taken to determine the 41 cases (2 having been abandoned) was 326 days (approximately 11 months). The shortest period from date of reference to date of determination was 39 days (Sproat, an incompetent sentence referral) and the longest was 1,009 days (Kinsella, a defective representation and disclosure conviction referral). This represents a significant reduction in time taken to determine referrals since 2008. Within the previous research period 3 referrals took in excess of 2,000 days to determine, more than twice as long as Kinsella.

The average time taken to determine conviction referrals by the High Court was 409 days while for sentence referrals was 210 days. It is noted that this is less than half the average time taken for conviction referrals up to 2008 although the average time taken to determine sentence referrals has gone up slightly (from 187).

Furthermore, while Kinsella took 1,009 days and Gage took 959 days to determine, of the remaining conviction referrals the longest time for determination was 678 days. More significantly in respect of sentence referrals, the aforementioned Reid took some 897 days to determine (with a bench of five) and the next longest time was 319 days. If Reid is excluded from the calculation, the average time taken to determine a sentence referral falls to 167 days which would represent a reduction in average time taken to determine sentence referrals also.

### 3.9 Summary of main findings

**Success rate of determined appeals in referred cases.** The success rate of Commission referrals is down across all cases, conviction cases and sentence cases.

**Success rate of referral grounds identified independently by the Commission.** The success rate of referrals grounds identified independently by the Commission is slightly lower than referrals generally but higher in respect of conviction cases and lower for sentence ones.

**Time taken to determine referred cases.** The appeal court has successfully and significantly reduced the time take to determination over the period.

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## Appendix 1: Conviction referrals 1 April 2008 to 31 March 2013

<b>Applicant</b>	<b>Main Offence</b>	<b>Date of referral</b>	<b>Determination</b>
Affleck	Murder	06.08.2008	Unsuccessful
Beck	Robbery	07.09.2012	Unsuccessful
Brooks	Drugs offences	03.07.2012	Successful
Carberry	Other sexual offences	22/03/2013	Unsuccessful <sup>1</sup>
Casey	Murder	07.09.2009	Unsuccessful
Chamberlain-Davidson	Other sexual offences	16.01.2012	Successful
Ferrie	Murder	08.08.2008	Unsuccessful
Fitzpatrick	Road traffic offences	26.08.2011	Successful
Gage	Murder	12.06.2009	Unsuccessful
Gallacher	Other sexual offence	18.01.2012	Successful
Kalyanjee	Murder	07.12.2012	Unsuccessful
King	Other (racially aggravated)	09.05.2011	Successful
Kinsella	Robbery	09.09.2008	Unsuccessful
Kosinski	Driving offence	11.02.2010	Successful
Liehne	Culpable homicide	10.02.2010	Successful
McCallum	Rape	19.12.2011	Successful
McIntyre	Assault	25.03.2010	Successful
Millar	Breach of the peace	12.06.2009	Unsuccessful
Murray	Other sexual offence	07.10.2009	Abandoned
Paterson	Other sexual offence	10.07.2012	Successful
Patterson	Other sexual offence	09.09.2009	Successful
Polland	Assault to severe injury	13.10.2008	Unsuccessful
Russell	Breach of the peace	17.02.2010	Unsuccessful
Wallace	Driving offence	14.10.2010	Successful
Younas	Culpable homicide	04.02.2013	Unsuccessful

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<sup>1</sup> Rejected by the Court in terms of section 194DA of the 1995 Act.



## Appendix 2: Sentence referrals 1 April 2008 to 31 March 2013

<b>Applicant</b>	<b>Main Offence</b>	<b>Date of referral</b>	<b>Determination</b>
Adams	Drugs offences	30.10.2009	Successful
Beu	Drugs offences	26.02.2013	Successful
Bremner	Other sexual offences	12.10.2012	Successful
Collins	Other sexual offence	20.08.2012	Successful
Daffurn	Assault	16.10.2009	Unsuccessful
Gallagher	Rape	15.10.2008	Abandoned
Ingram	Failure to appear	15.10.2008`	Successful
Kelly	Assault	02.06.2009	Unsuccessful
Kergan	Murder	06.08.2008	Successful
Murray	Other sexual offence	07.05.2012	Successful
Nicolson	Other sexual offence	25.03.2011	Successful
Reid	Culpable homicide	14.06.2009	Successful
Ross	Attempted murder	21.12.2012	Successful
Rough	Other (possession of weapon)	24.08.2009	Successful
Sanderson	Murder	24.09.2009	Successful
Shannon	Other (breach SOPO)	26.03.2010	Successful
Sproat	Other sexual offences	03.02.2012	Successful
Young	Murder	07.12.2009	Successful