



## Position Paper

### Interviewing Jurors

## Introduction

1. One of the most troubling issues that has confronted the Commission is obtaining information that lies within the knowledge of one or more members of a trial jury. Concerned by the possibility that it might inadvertently find itself in contempt of court, the Commission has twice<sup>1</sup> in this regard exercised its power under s194D(3) of the Criminal Procedure (Scotland) Act 1995 to petition the court for an advisory opinion. On two occasions<sup>2</sup>, the Commission has referred convictions to the court on the basis of information arising from such an investigation. Neither appeal was successful<sup>3</sup>.
2. The issue is most likely to arise where there is an allegation that members of the jury have acted improperly. The modern archetype for such cases is the so-called “Googling juror”, the individual who disregards his oath to try the case according to the evidence by seeking information about the accused from the internet. Whilst this issue has arisen in the Commission’s case work, it has not achieved a level of prominence approaching that found in the rest of the United Kingdom.

## The Commission’s Position

### Scope of the Investigation

3. Section 8(1) of the Contempt of Court Act 1981 provides:

*“...it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.”*

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<sup>1</sup> *SCCRC Petrs* (2001) 2001 SCCR 775 and *SCCRC Petrs* (2010) 2010 SCCR 773

<sup>2</sup> *Gray & O’Rourke v HMA* 2005 SCCR 106 and *Carberry v HMA* 2013 SCCR 587

<sup>3</sup> The issue also arose in another reported case arising from a Commission review, *BM et al v SCCRC* [2006] CSOH 112, a judicial review of the Commission’s decision not to refer the petitioners’ cases to the court. That too was unsuccessful.

4. In *SCCRC Petrs (2001)* the Commission conceded that it was bound by this legislation. The Commission cannot conduct an investigation if to do so would amount to contempt of court. As to what would amount to a contempt of court within the terms of the 1981 Act, the court held that the word “deliberations” in s8(1) should be interpreted to mean any discussions occurring after the jury had been asked to retire to consider its verdict. The Commission proceeded to investigate and then refer the matter that was subsequently reported as *Gray & O’Rourke v HMA*.
5. In spite of this, the court in *Clow v HMA*<sup>4</sup>, which was not a Commission case, expressed the view, in a postscript to the judgment, that “any inquiry into the words or actions of serving jurors should be made only by the court or in furtherance of orders made by it.” In the course of the judgment, the court made reference to the decision of the House of Lords in *R v Mirza*<sup>5</sup> and that of the High Court in *Ready v HMA*<sup>6</sup>, in which it was held that a “common law of confidentiality” applies from the point at which the jury is empanelled, at the start of the trial. This led the Commission again to petition the court, seeking guidance as to the circumstances, if any, under which it might conduct investigations into the workings of a jury.
6. This led to the decision in *SCCRC Petrs (2010)*. In that case, the court clarified that the remarks that it had made in *Clow* about investigations into jury-related issues were not intended to apply to the Commission. The court considered itself entitled to have confidence that the Commission would act with circumspection in the conduct of such enquiries. Nevertheless, the court took the view that the “common law of confidentiality” does apply from empanelment of the jury. This, however, is applicable only to matters “intrinsic” to the deliberations<sup>7</sup> of the jury. It is permissible for the Commission to investigate “extrinsic” matters (such as independent research that a juror conducts on the internet.)
7. In summary, the Commission applies the following principles when determining the scope of any enquiry into the workings of the jury:

7.1. The Commission will not enquire into discussions between jury members taking place after the jury was asked to consider its verdict

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<sup>4</sup> 2007 SCCR 201

<sup>5</sup> [2004] 2 Cr App R 8

<sup>6</sup> 2007 SLT 340

<sup>7</sup> The restrictive interpretation of the word “deliberations” in the 1981 Act is thus not applicable in relation to the common law.

7.2. The Commission considers itself entitled to conduct investigations into matters said to have taken place before the jury was asked to retire to consider its verdict provided that they are extrinsic to the jury's deliberations.

### **Circumstances under Which the Commission Will Investigate**

8. Alleged jury impropriety is an issue that arises in ordinary criminal appeals as well as Commission business. Where appropriate, the court itself will instruct investigations. Before embarking upon such investigations, the court, following *McCadden v HMA*<sup>8</sup>, will consider whether or not the material before it is “*prima facie* sufficiently substantial, convincing and trustworthy to warrant an inquiry.” Whilst not, strictly speaking, directly bound by the restrictions that the court imposes upon its own prospective enquiries, the Commission will, nevertheless, apply the same standard in deciding whether or not to proceed with an investigation into a jury-related matter. To do otherwise would, the Commission believes, be to fail to display the degree of “circumspection” that the court in *SCCRC Petrs (2010)* expected from the Commission.

### **Specific Considerations**

9. The procedure to be adopted in cases in which the Commission seeks to interview jurors may be found in the Case Handling Procedures.

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<sup>8</sup> 1985 SCCR 282