



RESEARCH & DEVELOPMENT – THE IMPACT OF LEGAL REPRESENTATION ON APPLICATIONS TO THE COMMISSION - 01/01/2010 – 31/12/2015

1.0 Introduction

- 1.1 In August 2010, Gordon Newall, then SLO, reported on the impact of legal representation on applications to the Commission (hereinafter the “2010 report”). The methodology is as set out in chapter 2 of that report. The categories remain the same: cases categorised as category 1 are those where there was no evidence from the Commission’s files of input from the solicitor or where the solicitor had acted merely as a postbox forwarding the application; category 2 cases are those in which there was some evidence of legal input; and, category 3 those cases where there was evidence of more substantial involvement e.g. obtaining precognitions from witnesses, obtaining an expert report etc. The 2010 report is appended hereto for reference purposes.
- 1.2 The purpose of this report is to replicate the analysis for the 5 year period (from 1 January 2010 to 31 December 2015) contained in chapters 4 and 5 of the 2010 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 has 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.

- 1.5 While the Criminal Justice (Scotland) Act 2016 has since repealed the changes detailed at paragraph 1.3 above, this does not impact on the data considered herein.

2.0 Representation at initial stage (chapter 3)

- 2.1 The cases that form the main subject of this report are the 966 applications received by the SCCRC in the period 1 January 2010 to 31 December 2015.
- 2.2 Prior to categorisation 598 were identified as having legal representation and 368 were unrepresented.
- 2.3 After part 2 of the research was completed it was found that 60 of the legally represented cases fell into category 1 at initial stage. 165 cases were categorised as category 2 at the initial stage. 373 cases were classified as category 3.
- 2.4 As before, category 1 cases were considered to be unrepresented cases. This adjustment meant that 428 applications were considered to be from unrepresented applicants and 538 from represented applicants.
- 2.5 Of the 966 cases the total number that was accepted for review by the Commission at the initial stage was 319 cases (33% of the cases in the sample). The remaining 647 cases (67%) 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.

	Number of cases received	Number accepted for review	Percentage of cases accepted
Unrepresented			
No solicitor	368	76	20.7% (76/368)
Category 1	60	16	26.7% (16/60)
<u>Total</u>	<u>428</u>	<u>92</u>	<u>21.5% (92/428)</u>
Represented			
Category 2	165	66	40.0% (66/165)
Category 3	373	161	43.2% (161/373)
<u>Total</u>	<u>538</u>	<u>227</u>	<u>42.2% (227/538)</u>
<u>Overall total</u>	<u>966</u>	<u>319</u>	<u>33% (319/966)</u>

Table 1 :cases accepted for review

- 2.6 From this it can be seen that of the 428 cases with no legal representation at the initial stage, 92 were accepted for review: a rate of acceptance of 21.5%.
- 2.7 The rate of acceptance of cases in which there was legal representation was appreciably higher: 42.2% of represented cases were accepted for review.

3.0 Representation at SOR stage (chapter 3)

- 3.1 Of the 319 cases accepted for review, unlike the previous sample period (at page 12), all cases proceeded to the SOR stage and the issuing of a statement of reasons to the applicant.
- 3.2 In the period between the case being accepted and a SOR being issued, 16 of the 90 unrepresented applicants instructed a solicitor. In 15 of those cases the solicitor then proceeded to make submissions to the Commission prior to a decision being made. Of those

15 cases, 8 were classified as category 2 and 7 classified as category 3. The remaining 1 was classified as a category 1 case, so is treated as still unrepresented. NB the categorisation of other cases also changed between stage 1 and 2.

3.3 Therefore, at the time of a decision being made in each case, the 319 accepted cases comprised 61 cases with no representation (19.1%), 12 category 1 cases (3.8%), 93 category 2 cases (29%) and 153 category 3 cases (48%).

3.3 The following table breaks down the 319 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, be reference to the category at that stage.

	Number of cases in which SOR issued	Number referred at SOR stage	Percentage of cases referred
Unrepresented			
No solicitor	61	4	6.6% (4/61)
Category 1	12	0	0% (0/12)
<u>Total</u>	<u>73</u>	<u>4</u>	<u>5.5% (4/73)</u>
Represented			
Category 2	93	9	9.7% (9/93)
Category 3	153	13	8.5% (13/153)
<u>Total</u>	<u>246</u>	<u>22</u>	<u>8.9% (22/246)</u>
<u>Overall total</u>	<u>319</u>	<u>26</u>	<u>8.2% (26/319)</u>

Table 2: cases decided at SOR stage

3.4 From this it can be seen that, of the 73 unrepresented cases, 5.5% (4/73) were referred at the SOR stage, in the remaining 69 cases a SOR refusing to refer was issued.

3.5 Of the 246 represented cases, 8.9% (22/246) were referred at the SOR stage, in the remaining 224 cases a SOR refusing to refer was issued.

4.0 Representation at SOR stage (chapter 3)

4.1 The final stage related only to those 293 cases in which a SOR refusing to refer the case to the High Court was issued at SOR stage. In 150 of those cases further submissions were received which sought to persuade the Commission to change its view, as broken down in the following table.

	Number of cases refused at SOR stage	Number in which further submissions made	Percentage in which further submissions made
Unrepresented			
No solicitor	57	23	40.4% (23/57)
Category 1	12	6	50% (6/12)
<u>Total</u>	<u>69</u>	<u>29</u>	<u>42% (29/69)</u>
Represented			
Category 2	84	22	26% (22/84)
Category 3	140	99	71% (99/140)
<u>Total</u>	<u>224</u>	<u>121</u>	<u>54% (121/224)</u>
<u>Overall total</u>	<u>293</u>	<u>150</u>	<u>51.2% (150/293)</u>

Table 3: cases in which further submissions received

4.2 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 42%.

- 4.3 The percentage of applicants who were represented or became so upon receipt of a SOR refusal and who went on to make further submissions was 54%.
- 4.4 Table 4 is considered unnecessary for this period as there were only 6 occasions where the further submissions received caused the Commission to refer the case at the SSOR stage. In all 6 cases, the applicants were represented at category 3.

Overall statistics

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

- Unrepresented cases rejected at stage 1/ (initial stage) – 78.5% (336/428)
- Represented cases rejected at stage 1/ (initial stage) – 57.8% (311/538)
- Unrepresented cases referred at SOR stage – 5.5% (4/73)
- Represented cases referred at SOR stage – 8.9% (22/246)
- Further submissions were made in 150 cases: 29 cases were unrepresented (including category 1), 22 were category 2 and 99 were category 3.
- Cases refused at SOR stage but referred at final stage – 4% (6/150). The applicants in each of these 6 cases were represented at that stage.

Interpretation of results and limitations on findings

Subject to the caveats outlined in the original research report at pages 19 to 21, it appears that representation at stage 1 increases the likelihood of acceptance, at interim stage slightly increases the likelihood of referral and of further submissions being made where an interim SOR refusing is issued, and at SSOR stage provides the only (albeit very limited, possibility of a referral at that stage.

5.0 Consideration of data from SLAB

- 5.1 As before it was considered appropriate to conduct 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 applicant’s. It would seem neither surprising nor inappropriate if a certain amount of such “filtering” was done by solicitors.
- 5.2 For the reasons given in the earlier report, it was anticipated that the number of applications to SLAB for A&A in respect of Commission cases would be higher than the number of applications to the Commission by legally represented applicants.
- 5.3 Following a request from the Commission and the signing of a data sharing agreement, SLAB provided data on the number of A&A applications for Commission related work made in the same period (i.e. 1 January 2015 to 31 December 2015) broken down by individual firms.
- 5.4 The data from SLAB indicated that 135 separate law firms made one or more A&A applications to SLAB for Commission related work in the period in question.
- 5.5 The total number of A&A applications received by SLAB in that period was 948. 147 firms made applications in respect of advice on the Commission. 68 firms made a single application to the Commission and those firms are not detailed further. Table 5 below shows

the number of applications from all firms making ten or more applications to the Commission in descending number of applications.

Firm name	No of A&A applications
Turnbull McCarron	178
McGreevy & Co	68
George Mathers & Co	49
John Pryde & Co	44
Bruce Short & Co	33
Bridge Litigation	32
Bruce & Co	30
Callahan McKeown	27
McClure Collins	26
Rhodes & Co	24
Capital Defence Lawyers	17
McQuillan Glasser & Waughman	17
BCKM Solicitors	15
J C Hughes & Co	15
Black & Markie	14
Beaumont & Co	12
Ian Moir & Co	12
Anika Jethwa & Co	11
McCusker McElroy & Gallanagh	11
Blackwater Law	10
McKennas Solicitors	10
Judicial Factor for Robertson & Ross	10

Table 5: Applications for A&A from firms making ten or more such applications

- 5.6 Of the 966 cases, the Commission’s records on Solcase indicate that in 356 of them, there was no representative involved at any stage of the three key stages.
- 5.7 When the SLAB data was reconciled with the Commission’s own data it was noted that only 333 of the 948 applications resulted in an application to the Commission: only 35%. Meanwhile, 615 of the applications appear to have “filtered” out applications to the Commission (although it was noted that on some occasions the applicant then submitted an unrepresented application).
- 5.8 The reconciliation of the SLAB and Commission data also confirms that legally aided representation rarely falls below a standard categorised as 2 or 3. It is noted that the occasional 1 or even no representation may be attributed to the applicant using the firms details despite taking no advice or being advised not to apply. In all cases the highest categorisation has been used for this purpose.
- 5.9 Other observations from those results are as follows:
- A total of £120,726.91 was paid in respect of advice and assistance which resulted in applications to the Commission; a total of £104,812.91 was paid in respect of advice and assistance which did not result in an application to the Commission.
 - There is no clear relationship between amount claimed and the stage an application to the Commission progresses to. In 69 of the 333 applications for advice and assistance which did result in an application to the Commission, i.e. almost 21%, no claim was made. Of the 30 individual claims in excess of £1,000 (the highest claim was £3,651.18), 4 applications

to the Commission were rejected at stage 1, 6 at interim stage and 17 at SSOR stage. 2 of those claims resulted in a referral at interim stage and 1 a referral at SSOR stage.

- Of the 615 applications for A&A which did not result in an application to the Commission, no claim was made in 192 instances (31%), a further 132 claims were for less than £100 (21.5%) and only 9 were for more than £1,000 (1.5%).
- The average claim for those A&A applications which resulted in an application to the Commission was £452.16. The average claim for those A&A applications which did not result in an application to the Commission was £248.37.

6.0 Conclusions

- 6.1 While the pool is limited, all applications received by the Commission over a total period of almost 8 years, more than half the period of the Commission's existence as at 2015, have now been subject to this analysis.
- 6.2 Given the various limitations set out in the original report, the results of this further research continue to indicate that legal representation impacts upon the success rate particularly at stage 1 and at the further submission stages. Further support has been found too for the proposition that solicitors "filter out" applications that appear to be unmeritorious.

FIONA GOVAN

Senior Legal Officer – Training and Research & Development

21 February 2017