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The Scottish Criminal Cases Review Commission and the Appeal Court at 20 Years: Relationship Status – It's Complicated?

I. Introduction

The Scottish Criminal Cases Review Commission (SCCRC) was established in 1999 as an independent state funded body with the remit to review possible miscarriages of justice.¹ It remains one of only a very few such bodies worldwide – aside from the Scottish Commission, there is a Criminal Cases Review Commission for England, Wales and Northern Ireland² and similar commissions exist in Norway³ and North Carolina.⁴ At the time of writing, a Bill is progressing through Parliament in New Zealand that, if successful, would establish a Commission there.⁵

The SCCRC has now been in operation for 20 years. A review of the first ten years of its operation concluded that, while it was an independent institution, it enjoyed a mutually respectful relationship with the High Court of Justiciary.⁶ This paper revisits that analysis and re-assesses the relationship between the Commission and the appeal court in light of the criticism that has sometimes been made of criminal cases review commissions – that they are too cautious and should be less conservative in terms of making referral decisions.⁷ In this paper, we defend the SCCRC against such criticism. The Commission, to operate effectively, must maintain the respect of the appeal court. It would be detrimental to the system as a whole – and would cause unnecessary stress to applicants – for the Commission to refer cases that had no realistic possibility of success. We conclude that its relationship with the courts, while generally harmonious, is not overly deferential. The SCCRC strikes an appropriate balance between referring a pool of cases that have a genuine chance of success (albeit sometimes a remote one) and not flooding the system with unmeritorious appeals. If there is a problem with correcting miscarriages of justice, we argue, that problem lies with the system of criminal appeals more broadly and not with the Commission.

II. The History and Development of the SCCRC

What is the SCCRC?

Since its establishment in 1999, anyone who has been convicted of a criminal offence in Scotland can apply to the SCCRC to have their conviction reviewed. Before the SCCRC existed, convicted persons who had exhausted the normal appeal process had to apply to the Secretary of State for

¹ We refer to it interchangeably as “the Commission” and “the SCCRC” in the remainder of the paper.

² Which, for the sake of brevity, will be referred to as the “English Commission” (to distinguish it from the SCCRC), but that is not to neglect its work in Wales and Northern Ireland.

³ Ulf Stridbeck and Svein Magnussen, “Opening potentially wrongful convictions: look to Norway” (2012) 58(2) *Crim.L.Q.* 267.

⁴ Kent Roach, “An independent commission to review claims of wrongful convictions: lessons from North Carolina?” (2012) 58(2) *Crim.L.Q.* 283.

⁵ Criminal Cases Review Commission Bill introduced on 27 September 2018, available at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_80426/criminal-cases-review-commission-bill [Accessed 9 September 2019].

⁶ Fiona Leverick, James Chalmers, Sarah Armstrong and Fergus McNeill, *The Scottish Criminal Cases Review Commission: 10th Anniversary Research* (SCCRC, 2009).

⁷ This criticism has been made primarily in the context of the English Commission: see e.g. Michael Naughton, “The Criminal Cases Review Commission: innocence versus safety and the integrity of the criminal justice system” (2012) 58(2) *Crim.L.Q.* 207.

Scotland (a Government Minister). This changed following a series of notorious miscarriages of justice in England, Wales and Northern Ireland, mostly relating to terrorist cases. Concern over these led to the establishment of two criminal cases review commissions: one for England, Wales and Northern Ireland in 1997⁸ and one for Scotland two years later.⁹ The SCCRC considers applications in relation to convictions and sentences, although the bulk of its applications – 82 per cent – relate to convictions.¹⁰ It has no power to quash a conviction or to adjust a sentence – this must still be done by the appeal court.¹¹

The SCCRC has eight legal officers and a Head of Casework,¹² an annual budget of over £1 million to conduct investigations¹³ and extensive legal powers to compel other parties (both public bodies and private individuals) to provide information it deems necessary.¹⁴ One third of the SCCRC Commissioners must be solicitors or advocates of at least ten years standing and a further third must have knowledge or experience of the criminal justice system.¹⁵ In practice there have been between six and eight Commissioners and at least two have always been lay members, such as academics and figures from the church or medical profession.¹⁶

The test for referral

The SCCRC can refer a conviction to the appeal court if it believes (a) “a miscarriage of justice may have occurred”; and (b) “it is in the interests of justice that a reference should be made”.¹⁷ The term miscarriage of justice is one that can be understood in different ways – it is sometimes used in common parlance simply to describe the conviction of any factually innocent person.¹⁸ The reference to the term “miscarriage of justice” here, however, is a reference to the single ground of appeal against conviction that exists in Scotland.¹⁹ It is clear then that, like the English Commission,²⁰ the SCCRC is utilising the same test that the court applies when determining appeals against conviction, rather than operating a test independent of legal considerations.²¹

⁸ As recommended by the Royal Commission on Criminal Justice: The Royal Commission on Criminal Justice, *Report* (HMSO, 1993) Cm.2263, Ch.11.

⁹ As recommended by the Sutherland Committee: S Sutherland, *Criminal Appeals and Alleged Miscarriages of Justice: Report* (HMSO, 1996) Cm.3245.

¹⁰ SCCRC, *Annual Report 2018-2019* (SCCRC, 2019) p.21.

¹¹ Our interest in this paper is primarily in its role in conviction referral. For discussion of the SCCRC’s sentence review function, see James Chalmers and Fiona Leverick, “The Scottish Criminal Cases Review Commission and its referrals to the Appeal Court: the first ten years” [2010] *Crim.L.R.* 608, 615-620.

¹² SCCRC, *Annual Report 2018-2019* (2019) p.15.

¹³ SCCRC, *Annual Report 2018-2019* (2019) p.58.

¹⁴ Criminal Procedure (Scotland) Act 1995 ss.194H, 194I and 194IA (subsequently “the 1995 Act”)

¹⁵ 1995 Act s.194A.

¹⁶ Peter Duff, “Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner” (2009) 72(5) *M.L.R.* 693, 694.

¹⁷ 1995 Act s.194C.

¹⁸ Fiona Leverick, Kathryn Campbell and Isla Callander, “Post-conviction review: questions of innocence, independence, and necessity” (2017) 47(1) *Stetson Law Review* 45, 50.

¹⁹ 1995 Act ss.106(3) (solemn procedure) and 175(5) (summary procedure).

²⁰ Although their test for referral is phrased differently – by virtue of s.13 of the Criminal Appeal Act 1995 the English Commission can only refer a case where it is satisfied that there is a “real possibility” that the conviction will be quashed if the referral is made (or the sentence changed in the case of a sentence referral).

²¹ *M, Petitioner* [2006] CSOH 112; 2006 S.L.T. 907 at [30].

In order for a conviction to be quashed as a miscarriage of justice, it must be based on a legally recognised factor. Two factors are specified in legislation: the existence of evidence that was not heard at the original proceedings²² and an unreasonable jury verdict.²³ Others – all of which relate to some sort of procedural irregularity such as evidence wrongfully admitted or excluded, trial judge misdirection, or defective legal representation – are set out in case law.²⁴

The appeal court as a (brief) gatekeeper

The historical account would not be complete without noting two changes that were made in 2010 to the legislation governing the SCCRC. The impetus for these was the seminal case of *Cadder v HM Advocate*,²⁵ in which the UK Supreme Court held that Scots law violated the European Convention on Human Rights as detained suspects did not have a right to legal assistance. In response to *Cadder*, the Scottish Parliament immediately passed the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010,²⁶ giving suspects the right to a private consultation with a solicitor prior to and during police questioning. It also inserted two new provisions about the Commission into the 1995 Act. The first related to the SCCRC's test for referral, where the interests of justice test was expanded to require that the Commission "have regard to the need for finality and certainty in the determination of criminal proceedings".²⁷ The second introduced a gatekeeping role for the appeal court in relation to SCCRC references, giving the court the power to refuse to hear a reference if "it is not in the interests of justice that any appeal arising from the reference should proceed", having regard to "finality and certainty".²⁸ Prior to this, the court was obliged to grant any Commission reference case a full appeal hearing.

The provisions were inserted due to a fear that the *Cadder* ruling would lead to a flood of applications to the SCCRC from convicted persons who had not been offered legal assistance during their detention and that this might, in turn, lead to a flood of appeals that would swamp the courts.²⁹ The 2010 Act was passed as an emergency measure and the Scottish Government commissioned Lord Carloway to review the law in the light of *Cadder*, including the provisions affecting the SCCRC. By the time Lord Carloway reported,³⁰ it was clear that the feared 'flood' of references following *Cadder* had not materialised³¹ and he recommended that the High Court's gatekeeping provision be repealed.³² He did, however, recommend that the "finality and certainty" limb of the Commission's test should remain and that, in determining SCCRC appeals (and only SCCRC appeals), an additional

²² 1995 Act ss.106(3)(a) (solemn procedure) and 175(5) (summary procedure).

²³ 1995 Act s.106(3)(b) (solemn procedure only).

²⁴ See Leverick, Chalmers, Armstrong and McNeill, *The Scottish Criminal Cases Review Commission: 10th Anniversary Research* (2009) pp.18-20 for a comprehensive list.

²⁵ [2010] UKSC 43; 2010 S.L.T. 1125.

²⁶ Subsequently "the 2010 Act".

²⁷ 1995 Act s.194C(2).

²⁸ 1995 Act s.194DA.

²⁹ Scottish Parliament, *Official Report* (27 Oct 2010) (Session 3, Scottish Parliamentary Corporate Body 2011) col 29560.

³⁰ Lord Carloway, *The Carloway Review: Report and Recommendations* (Scottish Government, 2011) (subsequently "Carloway Report").

³¹ Carloway Report, para 8.2.23.

³² Carloway Report, para 8.0.3.

“interests of justice” limb should be added to the miscarriage of justice test used to determine appeals against conviction.³³ These recommendations were criticised as illogical and unnecessary.³⁴

The appeal court was not slow to utilise its gatekeeping provision – it rejected one case and stated that it came close to refusing to hear another, neither of which were *Cadder*-based appeals.³⁵ Its power to do so, however, has since been removed. Lord Carloway’s report started a protracted process of law reform that became dominated by his more controversial recommendation to abolish the requirement in Scots law for corroboration in criminal cases,³⁶ a proposal that was taken forward by the Scottish Government in the Criminal Justice (Scotland) Bill.³⁷ The political controversy this attracted led the government eventually to commission a second review, this time of the safeguards that would be necessary if the corroboration requirement was abolished.³⁸ This review recommended research into the Scottish jury system before any decisions about corroboration were made³⁹ and a two-year jury research project concluded in October 2019.⁴⁰ At the time of writing, the future of corroboration had yet to be announced. Most importantly for present purposes, the Criminal Justice (Scotland) Act 2016 – minus the provision on corroboration – was passed and, following an amendment proposed at Stage 2, the Act repealed the two provisions in the emergency legislation relating to the SCCRC.⁴¹ As such, the appeal court no longer has the power to reject SCCRC references and the SCCRC is no longer required to have regard to finality and certainty when determining whether a referral is in the interests of justice. This is not to say, however, that such interests are irrelevant – the Commission acknowledges that “in any modern justice system, legal finality must be valued”.⁴² But it also states that it “believes, as a rule, that the interests of justice are better served by righting substantial injustices than through an overly rigid application of the principle of finality”.⁴³

The value of the SCCRC

The SCCRC has two major advantages over the prior position whereby post-conviction review lay in the hands of a government minister: independence from government, and investigatory powers and resources. In relation to the first, any post-conviction review system that lacks independence may discourage potential applicants with genuine claims from applying, as they lack confidence that

³³ Carloway Report, para 8.0.3.

³⁴ James Chalmers and Fiona Leverick, “‘Substantial and radical change’: a new dawn for Scottish criminal procedure” (2012) 75(5) M.L.R. 837, 861-862.

³⁵ The court rejected the reference in *Carberry v HM Advocate* [2013] HJAC 101; 2013 S.C.C.R. 587 – for discussion see Section IV. The court also came close to doing so in *King v Webster* [2011] HJAC 109; 2011 S.L.T. 342 at [5].

³⁶ Carloway Report, para 7.2.55.

³⁷ Criminal Justice Scotland Bill ss.57-61, as introduced 20 June 2013.

³⁸ Lord Bony, *Post-Corroboration Safeguards Review: Final Report* (Scottish Government, 2015) (subsequently “Bony Review”).

³⁹ Bony Review, para 12.24.

⁴⁰ Rachel Ormston et al, *Scottish Jury Research: Findings from a Large-Scale Mock Jury Study* (Scottish Government, 2019).

⁴¹ Criminal Justice (Scotland) Act 2016 ss.94 and 96. As the report of proceedings indicates, there was very little discussion of this. One MSP spoke briefly against the amendment, but he did not put forward any substantive reasons against it. It was passed on a 5/3 majority. See Scottish Parliament, *Official Report* (8 Sept 2015) (Session 4, Scottish Parliamentary Corporate Body 2015) cols 36-40.

⁴² SCCRC, *Position Paper - Referrals to the High Court: The Commission’s Statutory Test* (SCCRC, 2014) para 17.

⁴³ SCCRC, *Position Paper - Referrals to the High Court: The Commission’s Statutory Test* (2014) para 17.

these will be impartially reviewed.⁴⁴ This has been proffered as the reason for the low numbers applying for post-conviction review in Canada, which retains a system similar to the prior position in Scotland.⁴⁵ This is especially so, as wrongful conviction can sometimes be the result of state malpractice and it is important that a post-conviction review body is free from political pressures in investigating such claims.⁴⁶ Indeed, the need for independence is the basis on which some have argued for the establishment of criminal cases review commissions in jurisdictions where they do not yet exist, such as Australia,⁴⁷ Canada,⁴⁸ all US states bar North Carolina⁴⁹ and South Africa.⁵⁰

The second advantage – investigatory powers and resources – is equally pertinent. This is illustrated by the example of South Australia, where the introduction of an independent criminal cases review commission was considered, but the decision was instead made to establish a new process for out of time appeals where additional evidence of innocence emerges. The convicted person, instead of applying to an independent body or to a government official, applies to the courts.⁵¹ But, as critics have pointed out,⁵² this ignores the difficulties, such as time and money, that convicted persons face in trying to obtain additional evidence of innocence, especially when they are incarcerated. It might be countered that such assistance can be provided by volunteer innocence projects, but that is to ignore the superior legal powers that criminal cases review commissions have to compel the production of evidence from individuals and organisations.⁵³

It is these advantages that mean that criminal cases review commissions are generally seen as a positive development – it is perhaps cost and political considerations that explain why they are not more widely established.⁵⁴ Where disagreement does lie is in relation to the manner in which they should operate.

⁴⁴ Clive Walker and Kathryn Campbell, “The CCRC as an option for Canada: forwards or backwards?” in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Basingstoke: Palgrave Macmillan, 2012).

⁴⁵ Leverick, Campbell and Callander, “Post-conviction review: questions of innocence, independence, and necessity” (2017) 47(1) *Stetson Law Review* 45, 65.

⁴⁶ Leverick, Campbell and Callander, “Post-conviction review: questions of innocence, independence, and necessity” (2017) 47(1) *Stetson Law Review* 45, 65.

⁴⁷ David Hamer, “Wrongful convictions, appeals, and the finality principle: the need for a Criminal Cases Review Commission” (2014) 37(1) *University of New South Wales Law Journal* 270, 311.

⁴⁸ Emma Cunliffe and Gary Edmond, “Reviewing wrongful convictions in Canada” (2017) 64(3-4) *Crim.L.Q.* 473.

⁴⁹ Brittany L Walter, “American criminal justice reform: human factor analysis in wrongful convictions and the need for an independent commission” (2019) 53(1) *University of San Francisco Law Review* 145.

⁵⁰ Tapiwa Shumba, “Litigating innocence: the problem of wrongful convictions and absence of effective post-conviction remedies in South Africa” (2017) 30(2) *South African Journal of Criminal Justice* 179.

⁵¹ The Statutes Amendment (Appeals) Act 2013 amended the Criminal Law Consolidation Act 1935 to give convicted persons a second or subsequent appeal in cases where there is “fresh and compelling” evidence of a wrongful conviction and it is in the interests of justice.

⁵² Lynne Weathered, “Wrongful conviction in Australia” (2012) 80(4) *University of Cincinnati L.R.* 1391, 1410.

⁵³ Barry C Scheck and Peter J Neufeld, “Towards the formation of Innocence Commissions in America” (2002) 86 *Judicature* 98, 104. It has been argued that the SCCRC has been particularly effective in this respect: see Lissa Griffin, “International perspectives on correcting wrongful convictions: the Scottish Criminal Cases Review Commission” (2013) 21(4) *William and Mary Bill of Rights Journal* 1153, 1212.

⁵⁴ Jessica A Roth, “The Institutions of innocence review: a comparative sociological perspective” (2018) 70 *Rutgers U. L. Rev.* 1143, 1147.

III. Criminal Cases Review Commissions and the Courts

As noted earlier, the SCCRC can refer a case if it believes a miscarriage of justice may have occurred and it is in the interests of justice that a reference should be made.⁵⁵ It is the first part of the test that we focus on here.⁵⁶ The term “miscarriage of justice” is, as we noted earlier, a reference to the legal test that the appeal court applies when deciding whether or not to quash a conviction.

It has sometimes been suggested that Commissions, when making referral decisions, play it ‘too safe’. The most radical proponent of this argument is Naughton, who has argued that post-conviction review bodies should not be “bound to the criteria of the appeal courts”⁵⁷ and should focus instead on factual innocence, and not the question of whether the applicant fulfils the legal criteria for a successful appeal. His argument is essentially that a different type of test should be used – one that places factual innocence at its heart – and he makes this point in the context of the English Commission which, he states, turns a “blind eye to potentially factually innocent victims who are unable to fulfil the real possibility test”.⁵⁸

As others have pointed out, Naughton does not explain how such a system would operate. The Commission itself cannot quash a conviction. There is little point in having a Commission that refers cases with no regard whatsoever to the legal test applied by the body that does have the power to do so. This could result in the vast majority of cases being rejected and such a body would quickly lose the confidence of the court itself and more widely. As Nobles and Schiff have argued,⁵⁹ criminal cases review commissions have a sub-ordinate role and a relationship of “deference” to the appeal court forming, as they do, part of the self-contained legal system within which the courts also operate.⁶⁰ In order to operate effectively – and actually get convictions quashed – they must talk the same language as the appeal court and present cases in the same terms, rather than utilising the language and arguments of, for example, the media or the general public.

It might also be said that a focus on factual innocence could be counter-productive. On one level it is appealing, because of the “clear injustice”⁶¹ of convicting the factually innocent. But factual innocence is notoriously difficult to demonstrate, requiring as it does proof of a negative,⁶² and might actually lead to fewer referrals. This is illustrated by the experience at the North Carolina Innocence Inquiry Commission (NCIIC), which refers cases on the basis of factual innocence and

⁵⁵ See section II.

⁵⁶ For discussion of the second part of the test, see SCCRC, *Position Paper - Referrals to the High Court: The Commission's Statutory Test* (2014) paras 11-18.

⁵⁷ Micheal Naughton, “The importance of innocence for the criminal justice system” in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Basingstoke: Palgrave Macmillan, 2012), p.25.

⁵⁸ Michael Naughton, “The Criminal Cases Review Commission: innocence versus safety and the integrity of the criminal justice system” (2012) 58(2) *Crim.L.Q.* 207, 211. The “real possibility” test is the test for referral used by the English Commission: see n 20.

⁵⁹ Richard Nobles and David Schiff, “Miscarriages of justice: a systems approach” (1995) 58(3) *M.L.R.* 299, 315.

⁶⁰ Although cf. Duff, “Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner” (2009) 72(5) *M.L.R.* 693, 718.

⁶¹ Roach, “An Independent Commission to review claims of wrongful convictions: lessons from North Carolina?” (2012) 58(2) *Crim.L.Q.* 283, 299.

⁶² Stephanie Roberts and Lynne Weathered, “Assisting the factually innocent: the contradictions and compatibility of Innocence Projects and the Criminal Cases Review Commission” (2009) 29(1) *O.J.L.S.* 43, 58.

where, as of August 2019, only 14 convictions had been referred since its inception in 2007.⁶³ It also neglects the fact that procedural errors, while not demonstrating factual innocence, can cast doubt over the guilt of the person concerned.⁶⁴

A less radical argument is to suggest that, while Commissions do and should operate in the context of the legal tests and standards used by appeal courts, they should, nonetheless, take a less conservative approach to referrals. This argument has been made by the House of Commons Justice Select Committee, in the context of the English Commission.⁶⁵ To place this in context, the English Commission can refer a case only where 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”.⁶⁶ “Real possibility” means more than “an outside chance or a bare possibility” but less than a “probability or a likelihood or a racing certainty”.⁶⁷ But, like the Scottish test and its use of “may”, this leaves some room for interpretation between these two extremes.

The Justice Committee noted that 70 per cent of cases referred by the English Commission were successful on appeal,⁶⁸ and that the English Commission – at the time – had a targeted success rate for referrals of between 60 and 80 per cent.⁶⁹ It concluded that:⁷⁰

where potential miscarriages of justice are concerned we consider that the CCRC should be willing to err on the side of making a referral. The Commission should definitely never fear disagreeing with, or being rebuked by, the Court of Appeal. If a bolder approach leads to five more failed appeals but one additional miscarriage being corrected, then that is of clear benefit. We recommend that the CCRC be less cautious in its approach to the ‘real possibility’ test.

Duff has gone further and suggests that there may even be grounds for referring cases where the conviction has little – or even no – chance of being quashed under the law as it stands.⁷¹ He suggests

⁶³ See <https://innocencecommission-nc.gov/about/> [Accessed 9 September 2019]

⁶⁴ Leverick, Campbell and Callander, “Post-conviction review: questions of innocence, independence, and necessity” (2017) 47(1) *Stetson Law Review* 45, 66-69.

⁶⁵ House of Commons Justice Select Committee, *Criminal Cases Review Commission: 12th Report of 2014-15* (2015) HC Paper No 850. See similarly Carolyn Hoyle, “Forensic science and expert testimony in wrongful convictions: a study of decision-making at the Criminal Cases Review Commission” (2019) 59(4) *B.J. Crim.* 919, 934-935; Marika Linnea Henneberg, “Post-conviction disclosure in England and Wales: could conviction integrity units (CIUs) modelled on those in the USA be the way forward?” (2019) *International Journal of Law, Crime and Justice* (in press).

⁶⁶ Criminal Appeal Act 1995 s.13(1)(a).

⁶⁷ *R v Criminal Cases Review Commission ex. p. Pearson* [2000] 1 Cr App R 141, at 149 per Lord Bingham CJ.

⁶⁸ House of Commons Justice Select Committee, *Criminal Cases Review Commission: 12th Report of 2014-15*, para 17.

⁶⁹ House of Commons Justice Select Committee, *Criminal Cases Review Commission: 12th Report of 2014-15*, para 17. This targeted success rate for referrals of between 60 and 80 per cent was previously listed as a Key Performance Indicator in the English Commission’s Annual Report: see CCRC, *Annual Report and Accounts 2014/15* (2015) HC 210, p.73. It is worth noting that, in the years since the Justice Committee report, a targeted success rate in terms of referral conclusions has disappeared from the English Commission’s listed Key Performance Indicators: see CCRC, *Annual Report and Accounts 2015/16* (2016) HC 244, p.87.

⁷⁰ House of Commons Justice Select Committee, *Criminal Cases Review Commission: 12th Report of 2014-15*, para 20.

⁷¹ Duff, “Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner” (2009) 72(5) *M.L.R.* 693, 719.

three reasons for doing this. First, a referral can help to clarify the law where it is conflicting or unclear.⁷² Duff gives as an example of this *Fulton v HM Advocate*,⁷³ where, following a reference by the Commission, a bench of five judges was assembled to overrule a decision on corroboration taken by the appeal court only nine months earlier and the conviction was quashed.⁷⁴

Second, such a referral might encourage the court to define particular grounds of appeal more broadly.⁷⁵ Duff uses as an example *Gilmour v HM Advocate*,⁷⁶ where the appeal court admitted evidence from Professor Gudjonsson, a forensic psychologist, to the effect that the appellant was abnormally suggestible and compliant, thus throwing the reliability of his confession into doubt. The legal practitioners among the Commissioners had, Duff notes, been dubious that this referral would succeed because this was the first time Professor Gudjonsson had given evidence to a Scottish court (although he had appeared in many English appeals) and the appeal court had previously been very reluctant to admit expert evidence as to the effect of the accused's personality on the reliability of a confession. Duff also cites *Campbell, Steele and Gray v HM Advocate*,⁷⁷ where the Crown tried to argue that evidence from two cognitive psychologists of four experimental studies they had carried out at the Commission's request was inadmissible as mere opinion evidence on the credibility and reliability of police witnesses. Admitting the evidence was contrary to the leading authority at the time, but the court admitted the evidence and quashed the convictions of two of the appellants on this basis.

Third, given that there is no legal limit on the number of times that the Commission might refer a case, the SCCRC can exert political pressure by re-referring cases multiple times if the court rejects them. The resulting publicity might, Duff suggests, bring pressure to bear on the court and/or the government to change the law.⁷⁸

Against these points, however, a number of counter-arguments can be made. The first is that there is a human cost to consider – referring a case that genuinely has no chance of success risks raising the hopes of the applicant only to have them cruelly dashed at a later stage. It also is not cost neutral. Referring cases with little chance of success adds to a court workload that is already busy and risks delaying more meritorious appeals. The point might also be made that such referrals could damage the relationship between the Commission and the courts. There exists a fine balance between pushing the boundaries of the law and a state of affairs where the court no longer takes the Commission's arguments seriously, which might risk the success of future appeals.

In the next section of the paper, we explore these issues by looking at the referrals that the SCCRC has made since its inception 20 years ago.

⁷² Duff, "Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner" (2009) 72(5) M.L.R. 693, 719.

⁷³ [2005] HCJAC 4.

⁷⁴ Duff, "Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner" (2009) 72(5) M.L.R. 693, 719.

⁷⁵ Duff, "Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner" (2009) 72(5) M.L.R. 693, 719.

⁷⁶ *Gilmour v HM Advocate* [2007] HCJAC 48; 2007 S.L.T. 893.

⁷⁷ *Campbell, Steele and Gray v HM Advocate* 2004 S.C.C.R. 220.

⁷⁸ Duff, "Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner" (2009) 72(5) M.L.R. 693, 720.

IV. The SCCRC and the Appeal Court

The success rate of SCCRC referrals

In its latest annual report, the SCCRC states that, as of 31 March 2019, it had received 2614 applications, 82 per cent of which were for review of a conviction and 18 per cent of which were for review of a sentence.⁷⁹ As of 31 March 2019, 1937 of the conviction review applications had concluded (the others were still under review).⁸⁰ The Commission had referred 80 of these 1937 concluded applications for conviction review to the court, a referral rate for convictions of 4.1 per cent.⁸¹

Our interest here is in the reception these referrals have received from the appeal court. Table 1 shows the fate of the convictions referred to the appeal court by the Commission since its establishment in 1999. Of these 80 referred convictions, only 77 reached the court as three of the appeals (one each in 2005, 2007 and 2009) were abandoned before this stage. Of the 77 cases where the court heard the case, the court quashed the conviction in 39 of these, an overall 'success rate' of 51 per cent.

Table 1: Outcome of Commission referrals 1999-2019 (convictions)

	Number of referrals	Successful referrals	Cumulative 'success rate' (per cent)
1999	2	2	100
2000	3	1	60
2001	9	7	71
2002	2	1	69
2003	8	3	58
2004	4	1	54
2005	4	2	53
2006	5	2	51
2007	4	1	49
2008	4	0	44
2009	4	1	43
2010	4	3	45
2011	4	4	49
2012	6	4	51
2013	4	0	48
2014	1	1	49
2015	1	1	49
2016	0 ⁸²	N/A	49
2017	4	1	49
2018	2	2	50
2019	2	2	51
Total	77	39	51

⁷⁹ SCCRC, *Annual Report 2018-2019* (2019) pp.20-21

⁸⁰ SCCRC, *Annual Report 2018-2019* (2019) p.30.

⁸¹ SCCRC, *Annual Report 2018-2019* (2019) p.30. The referred cases are listed on the Commission's website at <http://www.sccrc.co.uk/conviction> [Accessed 9 September 2019]

⁸² Although the Commission did not refer any convictions in 2016 it did refer a number of sentences.

What can we make of these figures? On one view, a ‘success rate’ of around 50 per cent might suggest that the Commission is referring cases with a limited chance of success. While one must be cautious about drawing patterns from such a small sample of cases, the success rate has declined from the level that it reached in the first few years of the SCCRC’s operation – the cumulative success rate in 2002 after four years of operation was almost 70 per cent. It is perhaps not surprising, though, that a newly established Commission would have a particularly high success rate in its first few years of operation. There is likely to be an initial batch of ‘pent up’ demand – relatively clear-cut cases that have until the establishment of the Commission, lacked an avenue for redress. For some time now, the success rate has been relatively stable at around 50 per cent.⁸³ This is higher than that for appeals against conviction generally, only around 25 per cent of which succeed.⁸⁴

The success rate also needs to be examined in the context of the proportion of cases referred in the first place. A 100 per cent success rate could be achieved by referring only a tiny number of cases in which a successful outcome was inevitable. If every single case that was referred succeeded, that suggests that there might be further cases that would have succeeded – and ought to have succeeded – if only a less cautious approach had been taken.⁸⁵ This is demonstrated by the NCIIC in North Carolina. As of 2017, the NCIIC had referred only 11 convictions over a ten-year period, a referral rate of 0.64 per cent, but all but one of its referrals resulted in the conviction being quashed.⁸⁶ The NCIIC has, however, been criticised on the basis that its test for referral – which requires evidence of actual innocence – sets the bar too high and excludes genuinely meritorious cases where positive evidence of actual innocence is near impossible to come by.⁸⁷

In the next section we go on to examine the cases that the Commission has referred but where the conviction was not quashed by the appeal court. Is the Commission referring cases that have next to no prospect of success? If so – was there any merit in making these referrals? Are cases being referred (and rejected) where there were genuine doubts over the appellant’s factual innocence? And what do these rejected cases tell us about the relationship between the two bodies? It is these questions that we attempt to address.

The relationship between the SCCRC and the courts – the rejected cases

In our sample, 38 referrals did not result in the conviction being quashed. Two of these involved multiple accused, so were heard together by the court. In one of the other (unsuccessful) cases included within Table 1,⁸⁸ the appeal was not argued on the basis identified by the Commission so

⁸³ A review of the Commission’s work at ten years put the success rate for conviction referrals at 60 per cent: Leverick, Chalmers, Armstrong and McNeill, *The Scottish Criminal Cases Review Commission: 10th Anniversary Research* (2009), p.33. The discrepancy between that figure and the cumulative success rate for the same period offered in this paper is attributable to the fact that, at the time of the previous study, there were a number of referred cases that had yet to be determined.

⁸⁴ Scottish Government, *Criminal Appeal Statistics, Scotland: 2008/09* (Scottish Government, 2009). This is the most recent period for which figures are available – the publication of criminal appeal statistics was discontinued in 2010.

⁸⁵ Richard Nobles and David Schiff, “After ten years: an investment in justice?” in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Basingstoke: Palgrave Macmillan, 2012), p.159.

⁸⁶ Leverick, Campbell and Callander, “Post-conviction review: questions of innocence, independence, and necessity” (2017) 47(1) *Stetson Law Review* 45, 59-61.

⁸⁷ Leverick, Campbell and Callander, “Post-conviction review: questions of innocence, independence, and necessity” (2017) 47(1) *Stetson Law Review* 45, 67-69.

⁸⁸ *Thomson (No. 1) v HM Advocate* [2005] HJAC 7.

is excluded from our analysis.⁸⁹ In 33 of the remaining cases, there is a judgment, so it is those cases that we focus on.

Table 2: The ‘routine’ rejections

Case	Basis for referral	Court response
<i>Gray (Thomas) v HM Advocate</i> 2004 S.L.T. 397	Defective representation.	Test for defective representation was not met.
<i>McCormack v HM Advocate</i> [2005] HCJAC 38	Additional scientific evidence relating to recovered memory.	Statutory test for additional evidence was not met.
<i>Bishop v Procurator Fiscal, Tain</i> [2005] HCJAC 40	Additional evidence – witness statement and a precognition on oath of another witness (relating to a previous allegation of sexual misconduct).	Statutory test for additional evidence was only partially met.
<i>Gray (William) and O’Rourke v HM Advocate</i> 2005 1 J.C. 233	Jury misconduct.	Court disagreed that this was material.
<i>Neeson v HM Advocate</i> [2006] HCJAC 68	Additional evidence from three witnesses (one in person and two affidavits from deceased witnesses).	Court agreed that it might meet statutory test for additional evidence and went as far as hearing the evidence, but ultimately concluded the test was only partially met.
<i>Coubrough v HM Advocate</i> [2008] HCJAC 13 ⁹⁰	Additional evidence.	Statutory test for additional evidence was not met.
<i>McInnes v HM Advocate</i> [2008] HCJAC 53	Failure to disclose.	Agreed there was a failure but held that this did not mean the appellant was denied a fair trial.
<i>Beattie v HM Advocate</i> [2009] HCJAC 22	Additional scientific evidence that appellant was highly suggestible.	Statutory test for additional evidence was only partially met.
<i>Thomson (No. 2)</i> ⁹¹ <i>v HM Advocate</i> [2010] HCJAC 11	Sexual history questioning should have been permitted.	Court applied the same test and concluded that it was rightly disallowed.
<i>Polland v HM Advocate</i> [2010] HCJAC 29	(1) Failure to disclose (2) Defective representation.	(1) Agreed material should have been disclosed but no real possibility of jury reaching different verdict. (2) Disagreed that the test for defective representation was met.

⁸⁹ It is no longer possible to argue a Commission referral on grounds other than those identified by the Commission unless the court gives its permission: 1995 Act s.194D(4A) and (4B).

⁹⁰ This dealt with the ground on which the Commission referred the case. See also *Coubrough’s Exectrix v HM Advocate* [2010] HCJAC 32; 2010 S.L.T. 577 (where they dealt with three grounds of appeal added by the applicant that were not identified by the SCCRC, after he died).

⁹¹ Note this is the second time the Commission referred the case. On the first occasion (excluded from this analysis) the Commission referred on the basis of fresh evidence, but on appeal counsel did not argue this ground, arguing it instead on the basis of the sexual history questioning that formed the basis of the second referral. The appeal was rejected.

<i>Gordon v HM Advocate</i> [2010] HCJAC 44	(1) Police investigation had been defective. (2) Additional evidence from a witness (that might support an alternative explanation for the complainer's distress). (3) Failure to disclose.	(1) No real possibility of jury reaching different verdict had additional lines of inquiry been pursued. (2) Statutory test for additional evidence partially met, but doubts over its admissibility and would not have assisted jury in their consideration of the issues. (3) Agreed material should have been disclosed but no real possibility of jury reaching different verdict.
<i>Affleck v HM Advocate</i> [2010] HCJAC 61	(1) Failure to disclose (outstanding drugs charges against a witness).	(1) A duty to disclose did arise but the non-disclosure of the outstanding charges did not, in the circumstances, render the trial unfair.
<i>Russell v Thomson</i> [2010] HCJAC 138	Conduct did not amount to a relevant charge of breach of the peace (so there was no case to answer).	Conduct did meet test for breach of the peace.
<i>Casey v HM Advocate</i> [2011] HCJAC 19	Additional DNA evidence.	Statutory test for additional evidence was only partially met.
<i>O'Donnell v HM Advocate</i> [2011] HCJAC 84	Misdirection on confession evidence.	Court disagreed this was a misdirection.
<i>Gage v HM Advocate</i> [2012] HCJAC 14	Dock ID made of the appellant in court (where no previous ID parade had taken place).	Did not amount to an unfair trial.
<i>Beck v HM Advocate</i> [2013] HCJAC 51	Trial judge misdirection on standard of proof.	Agreed there had been a misdirection in part but this was rectified after intervention of counsel so no miscarriage of justice.
<i>Young v HM Advocate</i> [2014] HCJAC 113	Additional scientific evidence of case linkage analysis.	Court disagreed that this met the admissibility test for expert evidence.
<i>Docherty v HM Advocate</i> [2014] HCJAC 94	(1) Failure to disclose (2) Misdirection on dock ID (3) <i>Cadder</i> ground.	(1) Failure to disclose/excluding confession would not have affected the outcome. (2) Agreed that there had been a misdirection on dock ID but this had not resulted in a miscarriage of justice. (3) Agreed interview should not have been admissible but no real possibility that the jury's verdict would have been different if the interview had not been before it.
<i>Lilburn v HM Advocate</i> [2015] HCJAC 50	Additional psychiatric evidence (relating to diminished responsibility).	Statutory test for additional evidence was only partially met.
<i>Kirk (No. 1) v Procurator Fiscal, Stirling</i> [2017] HCJAC 66	The trial judge had erred in concluding test for intention had been met.	Test for intention had been met.
<i>Rodger v HM Advocate</i> [2017] HCJAC 65	Defective representation.	Test for defective representation not met.

<i>Graham v HM Advocate</i> [2018] HCJAC 57	Additional evidence relating to the appellant's psychological state at the time of the killing.	Statutory test for additional evidence was not met.
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The defining feature of the cases in Table 2 is that in none of these cases were the Commission and court fundamentally at odds. They both arrived at not unreasonable conclusions based on the same legal tests. In fact, in some of the cases the appeal court was at pains to point out that the Commission was right to refer the case. So, for example, in *Neeson v HM Advocate*,⁹² an additional evidence case, the court made a point of stating that it agreed with the Commission that, on the basis of the affidavits of the new witnesses, the case should have been referred.⁹³ It was only after hearing the evidence and cross-examination of one of the witnesses⁹⁴ that the court decided that his evidence was unreliable and the appeal must be refused.⁹⁵ In other cases too, the court has stressed that, in its opinion, the Commission was right to refer the case even though the appeal ultimately did not succeed.⁹⁶

In the vast majority of these cases there was compelling evidence against the appellant. This does not necessarily mean that the Commission was 'wrong' to refer the case. As Griffin has pointed out, there may be some merit in bringing issues such as the performance of counsel and failures of disclosure to the court's attention.⁹⁷

One case where the evidence against the appellant was less than compelling is *Kirk (No. 1) v PF*,⁹⁸ where the appellant had been convicted of assault after an encounter with a fellow dog walker. The basis of the conviction was that the complainer had been struck repeatedly with a dog lead. This first (unsuccessful) appeal was argued on the question of whether the justice had erred in law in concluding that the appellant had the required intent for assault.⁹⁹ However, the Commission also referred the case on the basis that the presence of screaming on a recording of the incident played in court seemed to have been decisive to the justice's decision to convict, but when a DVD of the recording was obtained by the Commission no such screaming could be heard.¹⁰⁰ This was not argued at the first appeal¹⁰¹ – there appeared to be some doubts over the provenance of the recording obtained by the Commission. However, the court did comment obiter about the recording, but stated that its hands were tied in the absence of an agreement that the DVD made available to the SCCRC and copied to the court was a true copy of the dictaphone recording that was played in court.¹⁰² The applicant re-applied to the Commission with such an agreement and the case was referred for a second time.¹⁰³ This time it was successful and although no written judgment is

⁹² *Neeson v HM Advocate* [2005] HCJAC 64.

⁹³ *Neeson*, [2005] HCJAC 64 at [14].

⁹⁴ By the time the case was heard, the other one had died.

⁹⁵ *Neeson*, [2006] HCJAC 68 at [21]. The court also considered that the untested affidavits of the (by then) two deceased witnesses could not be regarded as credible or reliable so as to meet the test for additional evidence (at [23]).

⁹⁶ See e.g. *Gray v HM Advocate* 2005 J.C. 233 at [1].

⁹⁷ Griffin, "International perspectives on correcting wrongful convictions: the Scottish Criminal Cases Review Commission" (2013) 21(4) William and Mary Bill of Rights Journal 1153, 1184.

⁹⁸ *Kirk (No. 1) v PF* [2017] HCJAC 66; 2017 S.C.L. 982.

⁹⁹ *Kirk*, 2017 S.C.L. 982 at [6].

¹⁰⁰ See SCCRC, *News Release: Carol Kirk Referral* (SCCRC, 13 September 2018).

¹⁰¹ *Kirk*, 2017 S.C.L. 982 at [6].

¹⁰² *Kirk*, 2017 S.C.L. 982 at [18].

¹⁰³ SCCRC, *News Release: Carol Kirk Referral* (SCCRC, 13 September 2018).

available, it is a safe assumption that the court this time accepted the provenance of the recording and agreed with the Commission.

Table 3 displays the remaining ten cases where there was a more fundamental difference of opinion between the Commission and the court.

Table 3: Cases that involved more fundamental disagreement

Case	Basis for referral	Court response
<i>Crombie v Clark</i> 2001 S.L.T. 635	Solicitor should not have submitted guilty plea on appellant's behalf.	No miscarriage of justice as appellant did not dispute his guilt (merely the quantum of the fraud).
<i>Harper v HM Advocate</i> [2005] HCJAC 23	"Lurking doubt" over the conviction.	Not a recognised basis for establishing a miscarriage of justice has occurred.
<i>Swankie v HM Advocate</i> [2008] HCJAC 59	Defective representation.	Commission applied incorrect test for defective representation.
<i>Murray v HM Advocate</i> [2009] HCJAC 58	Additional evidence regarding the reliability of confession (expert evidence that Murray exhibited abnormally high levels of compliance).	Statutory test for additional evidence not met – court commented that Commission did not investigate the additional evidence thoroughly enough.
<i>Hunt v Aitken</i> [2008] HCJAC 57	(1) Basis on which justice convicted appellant unclear from stated case. (2) Justice made private assessment of evidence (by making own assessment of witness' view based on photo produced at trial).	(1) Stated case was only in draft and was not deficient. (2) Commission erred in equating the taking of evidence with the assessment of evidence.
<i>Ferrie v HM Advocate</i> [2010] HCJAC 62	(1) Insufficiency of evidence. (2) Unreasonable jury verdict.	(1) There was a sufficiency of evidence. (2) Court disagreed that the jury verdict was unreasonable, describing one of the Commission's suggestions as "fanciful".
<i>Kalyanjee v HM Advocate</i> [2014] HCJAC 44	Additional psychiatric evidence (which may have founded a plea of diminished responsibility).	Commission should not have treated additional evidence following a guilty plea being tendered in the same way as additional evidence following a conviction at trial.
<i>Carberry v HM Advocate</i> [2013] HCJAC 101	Evidence of jury impropriety.	Court refused to hear the appeal. ¹⁰⁴
<i>Younas v HM Advocate</i> [2014] HCJAC 114	(1) Trial judge did not adequately summarise evidence for jury. (2) Warning should have been given over the evidence of one of the witnesses.	Commission in error over the law on both points.
<i>Kinsella v HM Advocate</i> [2011] HCJAC 58	(1) Failure to disclose. (2) Police did not undertake adequate investigation.	(1) Test for disclosure not met (2) Commission's claim was without foundation.

The cases in Table 3 are all referrals in which the Commission and the appeal court had more fundamental disagreements. Many of these cases involved the court making implied or overt

¹⁰⁴ Under the now repealed provision that gave the court the power to do this – see section II.

criticism of the Commission for referring the case in the first place. So, for example, in *Crombie v Clark*,¹⁰⁵ the court stated that “it is necessary to make it clear that we cannot and do not associate ourselves with the reasoning which led [the Commission] to their conclusion”.¹⁰⁶ In *Swankie v HM Advocate*,¹⁰⁷ the court stated that if it had not been a Commission referral, it would have been “very fortunate to have passed the stage of the sift”.¹⁰⁸ In *Hunt v Aitken*,¹⁰⁹ the court stated that they were “unable to understand”¹¹⁰ one aspect of the way the Commission framed the case and described the Commission as “mistaken”¹¹¹ in its understanding of the case law. In *Younas v HM Advocate*¹¹² the court stated that there was a “significant defect”¹¹³ in the Commission’s understanding of the law and in *Kalyenjee v HM Advocate*¹¹⁴ the court referred to a “fundamental flaw” in the reference as the Commission had not understood the law in relation to additional evidence emerging after an appellant had pled guilty.¹¹⁵ In *Ferrie v HM Advocate*,¹¹⁶ the court referred to one of the Commission’s suggestions as “fanciful”.¹¹⁷ In *Kinsella v HM Advocate*,¹¹⁸ the court was critical of the Commission for setting the bar too low where an appeal is based on the disclosure of evidence.¹¹⁹

Perhaps the most acute example of the court and Commission being at odds, however, is in *Carberry v HM Advocate*,¹²⁰ where the court used its (then) power under s.194DA of the 1995 Act to refuse to hear a Commission reference.¹²¹ Carberry had been convicted of indecent assault and the Commission referred his conviction on the basis of jury impropriety (one juror had downloaded information about the appellant from the internet during the trial and certain jury members “may have had the impression that the applicant was a gangster”).¹²² The applicant had, however, already attempted to assert this as a ground of appeal at an earlier stage and this had been rejected by the court.¹²³ There was, it should be said, strong evidence against the appellant, something which the

¹⁰⁵ *Crombie v Clark* 2001 S.L.T. 635.

¹⁰⁶ *Crombie*, 2001 S.L.T. 635 at [14].

¹⁰⁷ *Swankie v HM Advocate* [2008] HCJAC 59; 2008 S.L.T. 1128.

¹⁰⁸ *Swankie*, 2008 S.L.T. 1128 at [44]. The sift is the stage in the criminal appeals process where all appeals are initially scrutinised by a single judge and thrown out if the appeal contains no arguable grounds (see 1995 Act s.107). Commission appeals are not subject to a sift.

¹⁰⁹ *Hunt v Aitken* [2008] HCJAC 57; 2008 S.C.C.R. 919.

¹¹⁰ *Hunt*, 2008 S.C.C.R. 919 at [14].

¹¹¹ *Hunt*, 2008 S.C.C.R. 919 at [15].

¹¹² *Younas v HM Advocate* [2014] HCJAC 114; 2014 S.L.T. 1043.

¹¹³ *Younas*, 2014 S.L.T. 1043 at [55]. See also further criticism of the Commission’s other reason for referring (that a warning was not given by the trial judge about the evidence of one of the witnesses) at [73].

¹¹⁴ *Kalyenjee v HM Advocate* [2014] HCJAC 44; 2014 S.L.T. 740.

¹¹⁵ *Kalyenjee*, 2014 S.L.T. 740 at [70].

¹¹⁶ *Ferrie v HM Advocate* [2010] HCJAC 62; 2011 S.C.L. 8.

¹¹⁷ *Ferrie*, 2011 S.C.L. 8. at [27].

¹¹⁸ *Kinsella v HM Advocate* [2011] HCJAC 58; 2011 S.C.C.R. 442.

¹¹⁹ *Kinsella*, [2011] HCJAC 58 at [13]. (The S.C.C.R. report does not contain the relevant paragraph.)

¹²⁰ *Carberry*, 2013 S.C.C.R. 587.

¹²¹ The power has since been removed – see section II.

¹²² *Carberry*, 2013 S.C.C.R. 587 at [12].

¹²³ The appellant was originally given permission to appeal on a ground unrelated to the jury impropriety ground. When a juror came forward and made a statement about the original trial, he applied to the court to have the jury impropriety ground added to his grounds for appeal. The court refused to add it and in the end the original appeal against conviction was abandoned, with the appellant appealing only his sentence (see *Carberry*, 2013 S.C.C.R. 587 at [1]-[6]).

Commission itself accepted, but it concluded in its statement of reasons¹²⁴ that if jury bias could be made out, this would be sufficient for the conviction to be quashed.

When the case reached the appeal court, the court started by stating that the gatekeeping power should only be exercised in an “exceptional case” where the Commission had:¹²⁵

demonstrably failed in its task; for example, by failing to apply the statutory test at all, by ignoring relevant factors; by considering irrelevant factors; by giving inadequate reasons, or by making a decision that is perverse.

Carberry, the court continued, was such a case. The Commission was criticised for the “less than ideal” way in which it interviewed the jurors;¹²⁶ for the (unwarranted) conclusions it drew from these interviews;¹²⁷ for the (un)persuasiveness of the case it presented;¹²⁸ for its failure (in the eyes of the court) to understand the law on jury bias;¹²⁹ and for failing to have regard to finality and certainty, as it was then obliged by the legislation to do.¹³⁰

It is clear, then, that the court and the Commission are sometimes at odds and that when this happens, the court is not slow to criticise what it regards as the Commission’s errors. These are, however, a minority of cases and do need to be balanced against those where the court and Commission disagreed but where the court was at pains to state that the Commission was, nonetheless, right to refer the case.

One thing that can be said about all of the cases in Table 3 that have been discussed so far, *Carberry* included, is that none of them were cases in which a clear claim of factual innocence could be made. Even in the cases referred on the basis of additional evidence, there was still convincing evidence on which a conviction could be based. They are not obvious cases of “miscarriage of justice” in the broad sense – they do not suggest that the Commission is referring cases that obviously ‘ought’ to succeed but the appeal court is rejecting them because they do not fit within the existing legal framework.

This cannot, however, be said for all of the cases in our sample. In *Harper v HM Advocate*,¹³¹ the Commission referred based on a “lurking doubt” it harboured about the guilt of the appellant, despite the fact that the additional evidence the appellant presented did not meet the statutory test in s.106 of the 1995 Act. The court refused the appeal, noting that:¹³²

¹²⁴ *Carberry*, 2013 S.C.C.R. 587 at [18].

¹²⁵ *Carberry*, 2013 S.C.C.R. 587 at [34].

¹²⁶ *Carberry*, 2013 S.C.C.R. 587 at [9].

¹²⁷ *Carberry*, 2013 S.C.C.R. 587 at [38].

¹²⁸ *Carberry*, 2013 S.C.C.R. 587 at [37].

¹²⁹ *Carberry*, 2013 S.C.C.R. 587 at [42].

¹³⁰ *Carberry*, 2013 S.C.C.R. 587 at [48]. In fact, the Commission did refer to the interests of certainty in referring the case, mentioning the need for an authoritative ruling from the appeal court on googling jurors, but the court was critical here too, stating that the terms finality and certainty “are references to the need for the particular case to be seen as concluded” and “do not constitute a direction to the SCCRC ... to have regard to the need for certainty in the substantive law” (at [50]).

¹³¹ *Harper v HM Advocate* [2005] H CJAC 23; 2005 S.C.C.R. 245.

¹³² *Harper*, 2005 S.C.C.R. 245 at [33].

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.

Harper makes it clear, then, that the court will not entertain any Commission references if they do not fit into the legally recognised bases of appeal. The Commission has not taken this to mean that the categories of potential miscarriage of justice are fixed, stating that where it “does consider a potentially innovative ground, it will be necessary to determine whether the argument has provided a basis upon which the court might conclude that justice has not been done”.¹³³ Nonetheless, since *Harper* the Commission has stuck firmly to recognised grounds of appeal in referring cases.

This is illustrated by a case where a lurking doubt referral might have been made – *Beck v HM Advocate*,¹³⁴ included in Table 2 above. Beck was convicted of assault, robbery and theft and has consistently disputed his conviction,¹³⁵ primarily on the basis of the reliability of the identification evidence involved, with his case being taken up by two University based Innocence Projects (Glasgow Caledonian and Bristol).¹³⁶ When the Commission finally referred the case it did so not on the basis of its own lurking doubt about the conviction, but on the basis that the trial judge’s directions on the standard of proof were inadequate, as he had failed to explain the phrase “beyond reasonable doubt” by reference to the modern formulation.¹³⁷ The appeal still failed,¹³⁸ but it is an illustration of the barriers that exist, forcing the Commission to frame cases in a way that fits the prevailing legal framework, rather than simply presenting cases in terms of doubts over the appellant’s guilt.

This would perhaps be of less concern if there was strong evidence pointing to the appellant’s guilt. However, in both *Harper* and *Beck* there would appear to be room for doubt. In *Harper*, the appellant was convicted of murder. He admitted to stealing a video recorder from the deceased on Friday night,¹³⁹ but not to killing him. On the basis of this – alongside witnesses who had seen the appellant on Friday night with a bag containing items from the deceased’s flat – the police proceeded on the basis that the deceased (whose body was found the following Monday) was killed on Friday. However, several reliable witnesses had seen the deceased on Saturday, and pathologists could not pinpoint the day of death,¹⁴⁰ so the Crown case was built on the deceased having been killed on Saturday and the witnesses who had seen the bag being mistaken about the date.¹⁴¹ A former Commissioner has stated, however, that “our investigations of these witnesses’ testimony did not leave us convinced that they had got the day wrong”.¹⁴² There was also evidence, from a potential witness who had not been called at trial, that the deceased was scared of a group of young people who were in the habit of visiting him and that he had previously been assaulted by one of

¹³³ SCCRC, *Position Paper - Referrals to the High Court: The Commission’s Statutory Test* (2014) para 10.

¹³⁴ *Beck v HM Advocate* [2013] HCJAC 51; 2013 J.C. 232.

¹³⁵ He was convicted in 1982 and had previously applied – unsuccessfully – to the Commission on four occasions.

¹³⁶ See *Beck*, 2013 J.C. 232 at [25] and [26].

¹³⁷ *Beck*, 2013 J.C. 232 at [26].

¹³⁸ *Beck*, 2013 J.C. 232 at [55].

¹³⁹ The confession was not used in evidence – the accused had intellectual disabilities and there were doubts over whether the confession had been fairly obtained.

¹⁴⁰ *Harper*, 2005 S.C.C.R. 245 at [3].

¹⁴¹ *Harper*, 2005 S.C.C.R. 245 at [34].

¹⁴² Duff, “Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner” (2009) 72(5) M.L.R. 693, 714.

them.¹⁴³ However, as the decision not to lead this evidence at trial had been a tactical one – the witness was a chronic alcoholic – it did not meet the test for an appeal based on additional evidence.¹⁴⁴

In *Beck*, the appellant was convicted of robbery on a majority verdict.¹⁴⁵ The only evidence against him was eyewitness identification evidence. There were two positive identifications. One was made by a police officer, who saw the perpetrators running down a path (although at this point they were wearing hoods) and jumping into a car, which then drove off. He claimed he was 18-20 feet away from the car and that the driver of the car had by then let his hood down.¹⁴⁶ The other was from a witness who had only a fleeting view of the car, but who stated that he had got “a good look at the driver”.¹⁴⁷ There were two other eyewitnesses led at trial. One was unable to identify anyone positively at an identification parade, but picked out the appellant as someone who “resembled the robbers”.¹⁴⁸ The other was not able to make any identification at the identification parade but said one of the robbers had been wearing a dark coloured jacket (an item of this description was recovered from the appellant’s home).¹⁴⁹ There was also some evidence that supported an alibi for the appellant at the time of the robbery.¹⁵⁰

Eyewitness identification is notoriously problematic and is known to be one of the leading causes of wrongful conviction.¹⁵¹ A leading study of known wrongful convictions based on DNA evidence contains numerous examples of cases where multiple eyewitnesses have been mistaken.¹⁵² With this in mind, the evidence against the appellant seems extremely thin. As the SCCRC put it in their referral, the jury’s verdicts:¹⁵³

which were by majority only, were based on the acceptance of two fleeting, stranger identifications made by eye witnesses who saw the getaway driver through the glass of the vehicle (in one case while the vehicle was in motion). ...those identifications were made against the background certainly of some evidence that the [appellant] resembled one of the perpetrators but also of various witnesses who failed to pick out the [appellant] at parade...

The court was clearly not unaware of the dangers of eyewitness misidentification,¹⁵⁴ but its response was less than convincing, with the issues being dismissed on the basis that the “practical

¹⁴³ *Harper*, 2005 S.C.C.R. 245 at [13].

¹⁴⁴ *Harper*, 2005 S.C.C.R. 245 at [36].

¹⁴⁵ *Beck*, 2013 J.C. 232 at [1].

¹⁴⁶ *Beck*, 2013 J.C. 232 at [7].

¹⁴⁷ *Beck*, 2013 J.C. 232 at [8].

¹⁴⁸ *Beck*, 2013 J.C. 232 at [4].

¹⁴⁹ *Beck*, 2013 J.C. 232 at [5].

¹⁵⁰ *Beck*, 2013 J.C. 232 at [10]-[11].

¹⁵¹ Fiona Leverick and James Chalmers, “Causes of wrongful conviction” in James Chalmers, Fiona Leverick and Alasdair Shaw (eds), *Post-Corroborator Safeguards Review: Report of the Academic Expert Group* (Scottish Government, 2014) pp.35-38.

¹⁵² Brandon L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge, Massachusetts: Harvard University Press, 2012), Ch.3 (based on the database of wrongful convictions held by the Innocence Project).

¹⁵³ *Beck*, 2013 J.C. 232 at [27].

¹⁵⁴ *Beck*, 2013 J.C. 232 at [49].

reality is that proof of guilt is daily reliant upon such testimony” and that the “system of criminal justice depends in large measure upon the testimony of eyewitnesses”.¹⁵⁵

That is not to say, of course, that the appellants in *Harper* and *Beck* are factually innocent. This simply cannot be known for sure.¹⁵⁶ But what is clear is that the Commission had genuine doubts about their guilt. And in cases such as these, the lesson of *Harper* is that a referral on this basis is not going to succeed, forcing the Commission to frame cases in a way that is not conducive to the genuine issues in the case being given due consideration.

V. Conclusion

The SCCRC has now been in operation for 20 years and there is little doubt that it is a vast improvement on the system that operated before that. The 39 successful conviction referrals are proof of this – these are cases that prior to the existence of the Commission would have been highly unlikely to have even reached the appeal court. In this paper, we examined the work of the Commission in the light of criticisms that have been made – primarily in the context of the English Commission – that review bodies such as these are too cautious when deciding whether or not to refer a case. On the basis of our analysis, we conclude that the Commission, while maintaining a generally harmonious relationship with the courts, has certainly not been overly deferential to them.

The success rate for SCCRC referrals has (after the initial period when there would have been a backlog of relatively strong cases) consistently been around 51 per cent – somewhat lower than the equivalent figure for the English Commission. While utilising the same test as the appeal court, the SCCRC has not been afraid to push the boundaries. This has sometimes resulted in criticism from the court. Such criticism is, however, rare and it is equally common for the court to make a point of stating that the Commission was right to refer a case, even when it did not ultimately succeed. This is important, as the Commission, to operate effectively, needs to retain the respect of the appeal court.

Most of the cases that we examined were ones where the Commission and the court were not fundamentally at odds. There have been occasions, though, where the Commission has referred cases that would – on the face of it – appear to have little chance of success. Duff, as we noted earlier, has suggested that there may be a number of good reasons for doing this. One is that a referral might provide an opportunity for the law to be clarified where it is conflicting or unclear. Duff’s own example – *Fulton* – is an illustration of this, with the appeal court over-ruling a previous decision on corroboration. The SCCRC has not been afraid to refer further case of this nature – *Carberry* is an example – but here the court took a different view and held that seeking an authoritative ruling on jurors who seek out information on social media was not an acceptable reason for referring a case.

Another of Duff’s reasons was that the referral might encourage the court to widen the criteria for a successful appeal. This too the Commission has done – with the referred cases of *Gilmour* and *Campbell, Steele and Gray* both resulting in changes to the admissibility of expert evidence.

¹⁵⁵ *Beck*, 2013 J.C. 232 at [49].

¹⁵⁶ In *Harper*, one of the Commissioners stated that “none of us were sure that he was innocent”: Duff, “Straddling two worlds: reflections of a retired Criminal Cases Review Commissioner” (2009) 72(5) M.L.R. 693, 722.

However, the case in which the Commission took the most daring approach – attempting in *Harper* to argue for a miscarriage of justice on the basis of a lurking doubt – was conclusively rejected by the court and the Commission has not attempted to make such a referral since. This meant that *Beck*, a case which might have been referred on that basis, was instead shoehorned into a recognised basis for appeal and failed, a state of affairs that should give us pause for thought, given the paucity of the identification evidence involved.

It is clear, then, that the Commission has not been overly deferential and has attempted to push the boundaries in cases where it felt this was merited. It has, as Griffin puts it, shown a “healthy independence”,¹⁵⁷ striking an appropriate balance between referring a pool of cases that have a genuine chance of success (albeit sometimes a remote one) and not flooding the system with unmeritorious appeals. However, there appears little point in it continuing to do so once a particular argument has been rejected and the Commission – sensibly – recognises this. Referring a case where there is literally no chance of success is a waste of time and resources and unjustifiably raises the hopes of the applicant.¹⁵⁸ If there is a problem with correcting wrongful convictions – and *Harper* and *Beck* suggest that there might be – that problem lies with the system of criminal appeals more broadly and not with the Commission.¹⁵⁹

¹⁵⁷ Griffin, “International perspectives on correcting wrongful convictions: the Scottish Criminal Cases Review Commission” (2013) 21(4) *William and Mary Bill of Rights Journal* 1153, 1222.

¹⁵⁸ Kevin Kerrigan, “Real possibility or fat chance?” in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Basingstoke: Palgrave Macmillan, 2012), p.174.

¹⁵⁹ See the similar point made in relation to the English Commission by e.g. Stephen Heaton, “The CCRC - is it fit for purpose?” (2015) 5 *Arch. Rev.* 6, 9.