

WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE

Second evidence session (part 1)

Scottish Criminal Cases Review Commission

Lord Garnier QC Could I begin by thanking you formally.

As you know, we are conducting an inquiry, essentially into the Criminal Cases Review Commission of England, Wales and Northern Ireland, but we'd be very interested to learn from you, your experience, lessons that you may give us in relation to your own Scottish Commission. And I wondered if you could start with, first of all, by introducing yourselves to the members of the public and to us so that we know who you are and what capacity you hold at your Commission.

Gerard Sinclair All right. Thank you. Firstly, can I thank you for the invitation. We're delighted to be here and to contribute to what should be very interesting investigation.

In relation to who we are, I'm Gerard Sinclair. I'm the Chief Executive of the Scottish Criminal Cases Review Commission. We were having a brief discussion with Baroness Stern about how we describe the various commissions earlier on. And I think for today's purposes we're happy to acknowledge the Birmingham Commission as the 'UK Commission' - it won't offend us - or just simply the CCRC, and we the SCCRC.

In terms of my background, I have been Chief Executive of the Commission since 2003 - sixteen years of our twenty year existence. Before that, I was a solicitor in private practice, a Senior Partner in my own legal firm with experience, all litigation experience, criminal, civil and commercial.

Since being with the Commission, I am full-time there, although I do do some part-time judiciary work as a Sheriff in Scotland, and also as a Chair of the Mental Health Tribunal. But the main focus of my work is working with the Commission.

As Chief Executive, my main role is as legal advisor to the board. I'm the Principal Solicitor of the Commission. We have a number of other solicitors which I'm sure we'll come on to discuss, but I'm the Principal Solicitor, and also, I'm the main advisor to legal officers who we employ, which are the Scottish equivalent of the CRMs [Case Review Managers] which I'm sure you've heard about in evidence earlier.

And in that relation I deal almost exclusively with the case-related matters within the Commission, although because of the title, I'm also, under the Scottish government auspices, the accountable officer for the

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finances of the Commission, but really, other than casework, almost everything else which is dealt with by the Commission, is dealt with by my colleague Chris Reddick, who is Director of Corporate Services, who I'm sure can tell you the extent of his role.

Chris Reddick

As Gerry introduced me, my name is Chris Reddick. I'm Director of Corporate Services with the Commission.

I've been there in that role since 2005, so again, quite a long period of time. Director of Corporate Services to the Commission really does pick up all of the, sort of, operational functionality, governance, finance, HR-related issues and oversees, I suppose, governance within the Board, how the Board operates and supporting the Board and their sub-committees, and it's really a role that, I suppose, I get my fingers in a lot of pies and I get to see how the organisation's running.

I am also responsible for a lot of the production of the annual reporting, from a transparency perspective, a lot of the accountancy, annual reporting, case statistics, all that side of stuff comes through myself. We do actually work very closely together with regards to running the organisation, but also reviewing cases.

Lord Garnier QC

Now, clearly, you're two very important members of the Commission in Scotland and you'll have a wider team both on the administrative side, I'm presuming, and on the investigatory and case review side?

Gerard Sinclair

Yes and no, I mean, we have a very small team. And I think that's one of the major differences, which again I'll come on to expand upon in relation to the CCRC and SCCRC. The staffing complement is currently twelve, of which we have nine who are a mixture of senior managerial and legal officers, and three admin staff.

So in terms of the other people who support us, we have, a slight pyramid structure, insofar as: it's Chris and I; we then have two senior legal officers, sorry, three senior legal officers, one of whom is Director of Casework, who assists us in carrying out the effective myriad functions that we have to deal with; and then we have a team of legal officers just below that level, who do the majority of the case review work, which we will come on to discuss; who are supported by a very small admin team. It's a very tight group. It just is the way that it evolved that the Chief Executive and Director of Corporate Services started with very precise, I think, roles but as the organisation grew, and as the requirements of the organisation grew and new requirements had to be fulfilled, it really sort of split the responsibilities up between the two of us.

So, Chris and I deal with the finances, deal with HR, mainly Chris and Lizzie, we deal with press, with the media. We don't have specific

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people who deal with all of these things simply because first, we can't afford them, and second, because we're not big enough to justify having someone in that role.

Lord Garnier QC

Can I just ask you some further questions, in regards to your particular role?

I'm interested to hear that you are a Sheriff, which is the equivalent of a Crown Court judge in our jurisdiction. Do you find that that is useful experience for when you come to consider cases which are referred to your Commission with a view to putting them to your Court? Do you find that the Court itself is listening to you with greater care when you put a case up to them, by virtue of being a lawyer and a part-time judge, and do you find that people who refer cases to you (be they firms of lawyers or individuals) find it an attractive addition to the role of the Commission that you are a former practising lawyer and a current judge, so that you are up to the moment with regards to the criminal law of Scotland?

Gerard Sinclair

Up to the moment is a very good point. I'll come back to that point.

Dealing with first of those questions, which was, do we find it useful for the purposes of the Court? We really don't know any different way of dealing with it, because the Scottish Commission and when it originally was started, it was started with a board on which is, I'm sure you know, is split pretty much fifty-fifty lay and legal people. But the legal people from the very outset included at that time, a retired judge - very recently retired who was Sir Gerald Gordon, who basically wrote the book on Scottish criminal law and is, effectively, known by everyone who deals with the Scots criminal justice system. So I think that was a very good first appointment. He had been on the Sutherland Committee, which had recommended the establishment of the Commission, but also we have always had as part of that legal complement barristers, or advocates, as we call them, QCs, senior solicitors who remain in practice, and we have certainly had, and continue to have, amongst the Commissioners, one or two board members who, as well as sitting part-time with the Commission, also operate in a part-time capacity in a judicial capacity.

As well as myself. Now, I'm not a decision maker within the Commission – it's only the board members who are – but we still have board members who are in that area. But is it useful from my own perspective? Yes, I think it is.

I think, assists us in maintaining a level of dialogue with our peers in the legal profession, with the judiciary and with practitioners: the defence practitioners who we deal with on a regular basis.

And therefore, one of the things I think that helps is the fact that they

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know us, hopefully if they know of our work, is of a quality that they are to some extent satisfied with, and in fact, in my own using my own case as an example having been someone who had spent a good part of his career in the courts, the main reason why I became a part-time judge was, after two or three years with the Commission, the Chair of the Commission. We've always had lay chairpersons, at that time it was Reverend Forbes, and my annual appraisal was asking me the good and the bad points about the job. And I said to him, there are many good points of the job, working with some very talented people, thoroughly enjoying the quality of the work, but one of the things I felt I missed, and in fact was perhaps going to become a problem as time went on, was the ability to, as principal adviser to the board, to be telling them what was happening on the ground.

By becoming more and more distant from what was happening on a day-to-day basis in the court, you became more detached, and also, one of the things that the Commission on a relatively regular basis has to do – and I'm sure it's the same with the CCRC – is to be critical, to some extent, in its decisions, of members of the judiciary, or to be critical of members of the bar, whether of the defence or at the prosecutorial level. And I think that one of the worries that we would have is for persons of whom we may have been making certain criticisms, the response would be 'what does he or she know about this: when was the last time they were ever in a court under the pressure that we have to work under in a day to day basis'.

And I think by having people, who perhaps, they can still see around and about, it allays some of those fears and concerns.

It's a long way of getting to the cons, I've told you the pros, and I'm sure you will find yourself already, is clearly where there are applicants who are unhappy with the decision-making process of the commission. We are conscious of the fact that they will obviously think, well, they're going to make that decision aren't they because they're just the same people who they've been critical of and it's the closed shop mentality. They're not going to speak against their colleagues, and we understand that – we're very alive to that being a concern – and therefore we're very stringent about explaining to our applicants and to members of the defence fraternity, the very strict conflict of interest rules we have within the Commission, and the separation of the casework to make sure that anyone who perhaps has had any involvement at any time with the case, or perhaps knows of anyone who has any involvement, would absent themselves from the decision making process.

Lord Garnier QC

Thank you. Just before Lady Stern comes in, to whom are you as a Commission responsible? Do you report to a minister; do you report to



the Scottish Parliament, do you report to the head of the judiciary, if you like, what is your reporting structure?

Gerard Sinclair

We are what we call an NDPB, a non-departmental public body who have a responsibility to, in this case, we're part of the Ministry of Justice remit, so we have responsibility to the Justice – the Cabinet Secretary for Justice - and to the Justice Directorate.

But having said that, our responsibility is in effectively in relation to how we effectively operate and use the finances that are provided to us, but not in relation to how we decide to deal with cases or how many cases we choose to refer or not refer. Of that we are very strictly, clear of the demarcation there and we are independent of any decision maker in relation to that.

Lord Garnier QC

Thank you. Do you have anything further to add?

Chris Reddick

No, I think I think Gerry covered that very well. And I would stress that the governance side of things, in terms of the Declarations of Interest, is a really important part of the process both inwards and outwards and it works very effectively. We produce a lot of information, minutes of meetings etc, obviously without the case review information being included. But it clearly stresses where an individual has been removed from the decision making process. And that's quite effective.

Baroness Stern

My question is about, the legislation under which you work and the differences between yours and that in our UK.

And your test is that a miscarriages of justice may have occurred, and that it's in the interests of justice that a reference should be made. Our CCRC has a very different test, which is that a referral should not be made unless there is a real possibility that conviction or sentence would not be upheld.

Could you, perhaps, just say something about how different you perceive those two are, and the implications of those two pieces of law under which you work and in which we work in our UK?

Gerard Sinclair

Well, they clearly sound different. On a personal level I'm not sure there is any substantive difference in the way that any Commission would approach what I class as a wrongful conviction, because a wrongful conviction is a wrongful conviction, no matter how you decide to define it.

And I, I think that most of us have a general of understanding of what would be the criteria of a wrongful conviction.

I think the difficulty can sometimes arise when, as one of my lay Commissioners used to describe it, solicitors and lawyers decide to



dance on the head of a pin as to defining what should be a wrongful conviction. And I think to some extent we see an element of that in the numerous academic theses seeking to discern and decipher what are the distinctive differences.

But I think, clearly, we, like the CCRC, are to some extent restricted to applying the test, not so much in terms of the words are used, but in terms of how those words are interpreted by the respective courts of appeal, and therefore, depending on how liberally or how conservatively a court may choose to interpret those words, will, I think, be a pretty direct effect on the number of cases that Commission will send to that court of appeal, and I don't care whether it's the Scotland, England, Norway or hopefully, a CCRC will soon be created in New Zealand. So I think there's a difficulty in getting too hung up over the precise terminology that's used.

Lord Garnier QC A court of appeal will look very carefully at the wording of the statute -

Gerard Sinclair Yes

Lord Garnier QC And they may interpret it in such a way that in disposing of the cases that they don't have much interest in.

Gerard Sinclair Correct.

Lord Garnier QC Do you find that you get an intellectually honest approach to the construction of the statute in your cases, and that all cases are always dealt on the merits of the allegations of miscarriages of justice rather than failing to get them through the filter of the wording of the statute?

Gerard Sinclair Well, I think that all of us who are lawyers tend to seek to look, to the precedents that are established and the manner in which the terminology is discerned and defined in the previous authorities, and sometimes that can lead to a difficulty of narrowing the ways in which cases can be looked at.

As I said, interestingly, if you don't mind I'll simply quote from something that I was reading in preparation for this because I wasn't aware of it. I was looking at the test in England in 1907, which I think was originally set out in Section 4 of the Criminal Appeal Act 1907, when the appeal court was set up.

The test for quashing a conviction, allowing an appeal at that time was "If the court think that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence or that the judgment of the court before whom that appellant was convicted should be set aside on the ground of a wrongful decision of any question of law, or that on any ground, there was a miscarriage of justice".



It strikes me, and again, this is just a personal comment. That is perhaps a wider test than the one currently being applied, and were that still to be the test, for miscarriages of justice, and wrongful convictions in the rest of the UK, I would wager that the UK Commission would be referring more cases to the Court of Appeal. So, if there is a difficulty, it may well be the difficulties in terms of how the legislatures have set the bar.

Erwin James

I'm sort of confused as to why there is such a difference in the remit of the Scottish Commission and the English Commission, English and Wales. I find yours more robust. And I guess the England and Wales CCRC is rather subject to subjectivity, more than yours is.

What are your thoughts about that? Why should there be any difference? As you just said, a miscarriage of justice is a miscarriage of justice.

Why should there be a difference in criteria for why it should be investigated?

Gerard Sinclair

That's a very good question. I can assure you it's one that I know, because I've been there long enough in various iterations of our UK Commission: CCRC have discussed with us long and hard.

And again, I can't speak for them. I can only speak for myself and looking at it to some extent from a distance, but my view is, it's because the cart was put before the horse. And again if you look at the way that the tests were set up. The tests were established before the Commissions, and then the Commissions were established, and the tests in respect of Commissions reflected the appeal court tests, so the only reason why our test is miscarriages of justice is because that was the test in the Scottish courts.

The reason why is a safe conviction is because that was a test in the English courts and therefore, it's a very crude analogy, but I'll make it anyway. If the Court of Appeal is the gatekeeper, or the goalkeeper, and the goals are eight feet wide by six feet high, you're going to score a lot more goals than if the goals are three feet wide by two feet high and as I see it, it may well be that the Scottish goals have been set wider than the English goals.

Erwin James

With respect, you score more goals, I have to say. Statistically, you score more goals.

Gerard Sinclair

Well, statistically, we have more referrals.

Yes, but you've asked me why I think that is. And I think that is because of the way that the test has been set and were the legislature, or the Court of Criminal Appeal in England, prepared to look at the test in a

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different way, I would anticipate that it would lead to a greater level of referrals because again, any Commission can only refer a case based upon the criteria which has been set down for it. And if the criteria is restrictive and narrow, the referrals will be restrictive and narrow.

If the criteria, is more liberal and wider the referrals will be more wider and wider. We have sat with our colleagues in England and looked long and hard at the type of cases we're dealing with and the type of evidence, the grounds and you know, again, it's a colloquialism: "If it looks like a duck, and quacks like a duck, and walks like a duck, it's usually a duck."

We're quite adept at spotting cases where it something looks like it has gone wrong. What's more difficult is formulating that into a ground of review, which becomes a successful ground of appeal.

It's not for the want of trying, but you know occasionally we just find that there's nothing we can do about it. And I know that that frustrates those who work in Birmingham as much as it frustrates us in Glasgow when it arises.

Erwin James Thank you very much.

Lord Garnier QC Michelle Nelson.

Michelle Nelson QC Thank you. Following on from what you've said about the court and decision making of the court, based on your experience, cases are referred by you to the High Court. Is that right, in Scotland?

Gerard Sinclair Yes

Michelle Nelson QC Could you tell us something of your relationship you have and have had with the High Court?

Gerard Sinclair It is a relationship which I hope is bound by mutual respect. It's a relationship in which we have the fortune of being a smaller jurisdiction. And again, those who work in areas where there is a smaller jurisdiction, in a particular field will know that you're much more likely to know of and have experience of the people on the other side. And you will know of their merits and perhaps of their weaknesses.

It's a relationship which, at times, has shared the fraughtness of perhaps the relationship down south insofar as the appeal court, we feel, has sent us a clear message of an area or a type of ground that we are seeking to widen or push, and the message is 'well, we don't feel it's necessary at this time, we feel the test is robust enough as it presently stands'.

And like, as I say, any other commission, we're obliged to take account



of that and to reflect that in our decision making. There will always be and there should always be a tension between an appellate body and a body which is tasked with reviewing cases and referring cases back to them. Because if there isn't that tension, somebody's not doing their job.

But it can be a tension that exists with mutual respect for the individual roles of the organisations. And we'd like to think that's what we've sought to establish in Scotland.

Michelle Nelson QC

You spoke before about the make-up of the board, I think you said 50% legal – 50% not – is that still the position? And it still has judges, members of the judiciary?

Gerard Sinclair

Yes. Currently, yes, it has part-time, it's never had a full-time member of the judiciary, but some of the board members and QCs and solicitor advocates and the like have sat as part-time members of the judiciary.

Dame Anne Owers

Can I take you to rather the mundane but very important question of money.

All throughout the UK we've had fiscal austerity which has made it quite hard for public bodies. Have you faced budget cuts that have made your work more difficult?

Gerard Sinclair

Yes, we have. Over the last five years, our budget has been reduced. Chris will assist me with the figures.

Chris Reddick

It has. It's been flatlining for the past six-seven years, but in real terms, that obviously represents quite a significant cut. Our budget is, and has been for around the past five or six years in and around £1 million.

Gerard Sinclair

£1.3 million four or five years ago.

Chris Reddick

Yeah, that's the figures, we're working with that, we've been working with that reduced figure now for approximately six or seven years.

We obviously have a good working relationship with our sponsor team through the Justice Directorate. The process of requesting funds has become probably a little less formal because we know that budgets are flatlining and there's very little we can do about that.

However I would say that the Justice Directorate are very receptive to requests from us. For instance, if we receive a case of exceptional nature that requires further investigation and cost, that we can actually go back to them. And they are quite receptive to additional funding in those areas. But in real terms, we have had to live with that reduced budget for quite some time.

Dame Anne Owers

And what sort of impact would you say that that's had on your work?

Chris Reddick

I think it's required us to be a lot cleverer in terms of how we undertake

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the work, which is not necessarily, obviously not a bad thing. We certainly focused in on our case review process: how we take forward to review, the operations side of it and the procedural side of it. We've looked to technology within the office to enhance how we do things, things like our case management system for instance, which helps to reduce the level of manual input into the, sort of, more operational, procedural side of case review and lets us focus on more on the investigation and decision making process, and so that's certainly been something that's been important with the reducing budget, where we've had to focus on that.

And we've also look to things like our case review targets and with reducing funds typically, I think the danger is that you start pushing back your review timescales. Again we've focused very heavily on trying to maintain them. We've got to a good turnaround level and again that's been assisted by using a lot more technology and case review and case management system.

**Dame Anne
Owers**
Chris Reddick

Have you had to have capital investment to improve your technology?

Not separately to our funding – the funding system works slightly different in Scotland to England and certainly, our capital budget is pretty much non-existent. We've had to put forward certain cases for any capital input with regards to technology and its development.

**Dame Anne
Owers**

Just looking at your budget though, it looks as though, from the CCRC's budget, if you divide the number they get by the number of cases they do, it comes out at around £3,500 a case. If you do the same with your budget it comes out at £7,500 per case.

Do you think that's a factor in the fact that you're referring more cases?

Gerard Sinclair

I wouldn't have thought so. I think that's a factor in the size and the scale of the organisation, because clearly in any organisation, the larger they are the more there could be cost savings on things like accommodation.

But I mean, if I tell you a little bit, in terms of our budget its £1.05 million of which we expend £727,000 on staff. £96,000 on board, and £105,000 on accommodation.

So that £1.05 million, £930k is on staff and accommodation.

So it doesn't leave that much for things like an investigative budget, a budget for legal actions and the like and I think it's just one of those factors that again, if you're running, for example, an HR department or finance department, you've got certain fixed costs whether you're running with twelve staff or 120 staff, it doesn't really mean that much of



a difference.

I don't think it's because we're expending more money, per case, that somehow or other, we are doing extra work on the cases.

Having said that, I'm not saying that CCRC would not benefit from an increase in budget because I think where they would benefit from an increase in budget is the fact that they have a difficulty, I'm sure they wouldn't mind me saying so, in dealing with the volume of cases they have in appropriate time scales, where they're constantly trying to reduce the time it takes to deal with cases. It's one of the complaints I see regularly about applicants and their supporters that their case is with the CCRC for months to years, it spends too long in a queue waiting to get dealt with etc, and therefore, I suspect, were they to be given increased funding, one of the first things that they would seek to do is to reduce those type of problems by increasing their staffing levels.

If we have an advantage in terms of our budget, it does, as was mentioned there, the staffing costs and the board costs, we certainly find that per head that allows us to have sufficient number of staff to deal with our cases efficiently and effectively and our average timescale for dealing with a case is 6.6 months.

We don't have any backlog – as soon as the case comes in, if it comes in today, it will be allocated tomorrow.

And we've got other time periods that we meet and that I think is where the benefit of that increased budget comes in, and not that we are somehow or other spending £x thousand or more on looking at the merits of the case.

**Dame Anne
Owers**

So timeliness and quality are two bits of the triangle, aren't they, and clearly there are economies of scale, but the numbers suggest you can't *just* explain that difference by economies of scale.

Gerard Sinclair

I think that's right. And I think that if you look at the number of cases that the Commission in Birmingham have and the number of CRMs as opposed to number cases we have and the number of legal officers. The CRMs are working with a far higher caseload, which will take them longer. And therefore it's not rocket science to say if they had more money and more CRMs, they would get through their cases more quickly.

Lord Garnier QC

Thank you very much. Philip.

Dr Philip Joseph

Just to introduce myself, I'm Dr Philip Joseph. I'm a consultant forensic psychiatrist at St Mary's Hospital in London and I've been providing psychiatric reports for the courts over the last 35 years or so, including

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instructions from the CCRC.

And I think, I just want to explore a little bit more about why the Scottish CCRC has probably double or, if not more, a greater referral back to the appeal court than the rest of the UK's CCRC.

One thing that we are aware of is that you have greater powers of investigation and enforcement than we have, or rather the CCRC has down here has.

These are the powers to compel witnesses and enforce production of documents. These powers, do you use them? Particularly, do you need to use them and do you think that by having these powers change the nature of your relationship with the other parts of the criminal justice system so that you seem to have more teeth, as it were.

Gerard Sinclair Well, I could clarify it for you and say that one of the reasons is because we always have a consultant psychiatrist as a member of the board, and that was a great assistance.

Certainly, in the last five or six years, we had Raj Darjee as one of our board members and when Raj got promoted to Australia, we then took on Dr Alex Quinn, and we find that essential.

Dr Philip Joseph I'd like to assist but your Scottish mental health legislation is completely different to ours -

Gerard Sinclair This is not a job offer to negotiate -

Dr Philip Joseph But it's interesting to know that.

Gerard Sinclair But to be more serious and to try and answer your question – two points that you made there and perhaps I will address both of them.

One is yes, on the face of it. And, I loathe to quote statistics. And the reason why I loathe to quote statistics is because on a day to day basis, both in Glasgow and in Birmingham, we're not focused on statistics. We're focused on the case that's in front of us.

I know it's trite to say, but every case that comes into the commission is dealt with on its own merits. And therefore, at the end of the year, the only reason why I suspect any of us look to statistics is because our pay masters expect us as a public sector organisation to produce *something* that provides some sort of measure of what we are doing.

But I mean, I think that you can drill down a lot of things within the statistics. But just to deal with the statistics our review referral rate is 5.4. The commission in Birmingham is 2.7. That's the headline figure that everyone jumps upon.

When you drill it down slightly further, if you split it between conviction

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and sentence our conviction referral rate is 4.1 as opposed to, I think, 2.5 in the rest of the UK.

Sentences is much higher at 9.1 as opposed to I think 2.8 in Birmingham,

Dr Philip Joseph 9 in Scotland?

Gerard Sinclair Yes, 9 in Scotland, 2.8, I think, in Birmingham, which does in the face of it, seem to again be a massive difference.

And, you know, there could be a whole myriad of reasons for that as to why that's the case.

If you were to ask me to guess why it might be, I would suggest that one of the reasons could be, that, of course, for a number of years in England and Wales and Northern Ireland, you have had the benefit of a sentencing commission, the Sentencing Council, which has set a whole raft of guidelines about the range of sentences that should be applied, in particular offences, about the aggravating factors and the mitigating factors. And, of course, we within the legal profession, know the arguments, the pros and cons against having such guidance.

One is that leads to rigidity of sentence, as a criticism. The other side of that coin is that it provides consistency of sentence across different courts. We have not had either the benefit – or the problem – of a Sentencing Council up until now.

Although we do currently know how one under the auspices of Lady Dorrian, and Lord Justice Clerk, who has produced a first set of principles.

So in terms of the Commission, when we get an application from an applicant who says we think that the sentence which has been posed as excessive, we have not been operating under the Sentencing Council guidelines and it may well be that by applying those guidelines that the Birmingham Commission has looked at them and said, 'oh no, this falls within the range and therefore we're not going to view it as excessive', or it might be because of the absence of that, the board members of our Commission have been prepared to take a bigger gamble, and be more flexible in relation to that. And we'll only know that for certain once we get our sentencing guidelines in place and run it for ten years and see if the numbers come down to make it more accurate. But that's the type of thing that can be a distinction.

Dr Philip Joseph But there has to be some concern about the low referral rate, and it seems to be dropping, as well, in the rest of the UK. And I quite liked your goalkeeping analogy. But I'm just wondering whether it may also be that you've got better goalscorers up in Scotland. Denis Law, people

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like that. Your people are better at surmounting the hurdles, and scoring the goals.

Gerard Sinclair If you don't mind, I certainly don't want to get into a footballing analogy if we're relying on the Scottish football team or any of the compatriots because we're not going to do very well with that...

Dr Philip Joseph You started it...

Gerard Sinclair What I would say, what I would say in relation to that -

I know that the figures in the CCRC have fallen over the last three or four years. I know the percentages. I know the criticism of that is, that well, that's because there are now cowed by the views of the Court of Criminal Appeal and in fact that they're only now prepared to refer cases that we know aren't just a real possibility, but are a dead cert, and going to be successful.

Now. If that was true, you would expect then the success rates of the English Commission referrals to go up. But in fact, if you look at the figures between 2006 and 2015, they had a 61–77% annual success rate of the cases referred.

In 2016, it was 53%, in 2017 it was 46%, in 2018, 66. So for the last three years has come down to approximately 50%. So, there is a dichotomy there as to why, when they are referring fewer cases, they aren't getting more success.

Dr Philip Joseph Which is lower than your success rate, I believe.

Gerard Sinclair It's currently, it's currently lower. But over the piece, the success rates of both organisations have been each... The overall figure for the CCRC in 22 years is 67%; the overall figure for the SCCRC in 20 years, is 66%. You could have a, you know, a paper between the two of them.

But as I say, if the issue is that the commission and the rest of the UK is simply being far too conservative and only sending up winners, why aren't they winning?

Sorry, can I just answer the last part of that question as well, which you did ask, was on the powers that we had. I just want to touch on that briefly. The answer to that, if you'd asked me that ten, five years ago, probably that could certainly be a factor. But as you probably know, in the last four or five years, the Commission in Birmingham has got, now, very similar powers to the ones we have had, and we have found him extremely useful.

We have the powers to precognosce anyone in Scotland before a judge. We have the powers, and have always had the powers, to recover material from *anyone* within our jurisdiction where it's a public

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body, or a private citizen, or a limited company, or a partnership, which, of course, our colleagues down south were always bitterly complaining that that tied one hand behind their back, particularly when a lot of the public organisations were going into the private sector.

My understanding, and again I'm doing it from a distance, is that that has been resolved by the changes to the legislation and introduction of section 18 [of the Criminal Appeal Act 1995] et cetera. And that, hopefully, will result matters going forward, maybe to increase referral figures. Well just have to wait and see in that matter.

Dr Philip Joseph Just finally, I'm struck by the small size of your organisation. Do you think that it might help the rest of the UK's CCRC, if it was perhaps split up into regional areas? I'm thinking, psychiatrically, we've got three special hospitals in the UK, one in Scotland. Perhaps three regional bodies rather than a single body, do you think that might make a difference?

Gerard Sinclair My answer to that is yes and no. Or maybe. The reason for that is because and again, I hope I'm not speaking out of turn, and, my colleagues in Birmingham know my view of this matter, is that I always felt that the structure that they operated under was a hindrance, not a help, to how they were dealing with cases. The answer I was always given by a number of Chairs and a number of Chief Executives within the Birmingham Commission is well, that's all very well, but you're a lot smaller than us, and we can't operate in the same way because of the volume and the size.

And I say, 'well, you can't operate in the same way, but you can regionalise the way that you're dealing with in terms of having smaller groups dealing with sections of the cases'.

Now, whether you have those geographically, regionally, whether just within the one organisation say 'we're setting up six teams of 8 CRMs or 9 CRMs, headed up by a group of the board, and they will operate independent of each other, and perhaps covering different parts of the country'.

It could have been replicated in a smaller way, because we felt, and it was probably pretty arrogant of us to say, but we did feel that the system that we were operating, was more effective and was producing better results in terms of getting through the cases we're dealing with.

I do know that the New Zealand Commission is planning to replicate quite a bit of the Scottish Commission's operations. But again, they are working with very similar demographics, and it may well suit them.

I'm not saying it would suit how it operates within England, Wales and

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Northern Ireland, but I do think it could be done better.

Having said that, I also think after the Tailored Review, and the changes that I understand they are implementing, that they *are* making a number of changes as to how they operate on a day-to-day basis. And I think the changes that they are making, I think, are improving, and will lead to improved – have already led to some improved figures – but will continue to lead to improved figures.

Erwin James

Just quickly, you mentioned earlier that you have difficulty, sometimes, in getting the media, and the press, to pick up on the work that you do. And that's interesting because I'm a journalist – I've been writing for the Guardian for a number of years, but I'm the editor of Inside Time (the national newspaper for people in prison) and we have a column every three months by the CCRC. We'd love something from you guys.

Chris Reddick

Happy to write it.

Erwin James

We have a Scottish section which is next month for prisoners in Scotland, and staff, it's not just prisoners.

But I wonder how, could you give us an idea of how the Scottish CCRC is viewed by the media – commentators, voluntary organisations, and various parts of the criminal justice system – how do you think you're viewed by those bodies?

Gerard Sinclair

Can I answer that in two parts.

Firstly, can I say that one of my big regrets about the creation of the Commission is the fact that, let's just say society, consider that they have sorted the problems of miscarriage of justice and wrongful convictions because we've created a Commission, so we can all go to bed and sleep safe at night.

And as a result of that, one of the unintended consequences has been the death of the what I used to consider were fantastic media campaigns and programmes like World in Action, Panorama, that really brought to the public attention some very heinous wrongful convictions, and by that nature, when the press campaign takes on a head of steam, you can see the wheels of justice moving that little bit quicker.

And I saw that quite recently, because it's very unusual to see it happening, in the Sergeant A case, where suddenly things seemed to move at a pace that perhaps they hadn't been moving up until then.

Erwin James

Because the media got involved?

Gerard Sinclair

Yes. But the problem now is that the media think that there's no mileage in this. They think the public isn't interested anymore because there's already a bureaucratic body that deals with all of these matters, and it's



not sexy anymore.

And therefore people like David Jessel, who was an original Commission member of the CCRC who I have a great deal of time for, and I know they currently have a journalist, David James Smith, are people, I think, again, are essential to be involved in this area of work because you still have to have public support in order to get anything done.

Erwin James And you have no mechanism for getting your, an interesting story, but you've got no mechanism to get your story out to the media, to get them to pick it up, to help you really? To sort of bolster -

Gerard Sinclair Correct

Erwin James When you feel there is something that really needs to be looked at. You don't have a mechanism for that.

Gerard Sinclair Correct. And, well, that's true. But you asked about how we are perceived in Scotland, and why we perhaps we don't attract the same level of criticism as sometimes can occur down south.

Erwin James Well not just criticism, but, you know, what is it? Is it just criticism? Or is it, what is it – how are you seen?

Gerard Sinclair Well, I think we get a fair press, if I put it that way. Are we subject to criticism? Yes, yes, we are. Do applicants think that we're not doing our job properly? Yes. Do they feel that we're not referring enough cases? Of course.

And I understand entirely why they feel that way. For every applicant, the case is personal to him or her, it is their *raison d'être* for really campaigning and keeping going and for those that support them, quite rightly, support them with their full vigour. And when they get sympathetic hearings in the press, then we would be the obvious, and I understand we are the obvious target.

Perhaps one of the reasons why we don't attract the same level of attention is, and again, this is just my own personal opinion, in terms of having looked at the figures, is because before we were established, the situation in Scotland, I would say, was even worse than it had been on the rest of the country, in terms of the lack of action that was taking place with regard to, particularly miscarriages of justice.

I know that everyone talks about the cases of the Birmingham Six and the Guildford Four as being the catalysts for the creation of the Commissions, and I think they certainly were a major factor, but actually one of the other catalysts was the complete inertia, that was, I think, occurring in terms of dealing with miscarriages.

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But looking at the figures, if you're talking about bad and less bad, in fact, in the rest of the UK, they seem to be slightly less bad. Again if I could just quote some figures to you in the Home Secretary's Department, for the 70-odd years before the creation of the Commission in Birmingham, and they dealt with about 700 cases a year. Now, the current caseload in Birmingham is 1400.

So that's been a 100% increase in cases, which I think in anyone's view is considered perhaps a success at least of getting the word out there that they're available to be approached for cases.

In terms of referrals, the Home Secretary's Department referred about ten cases a year and the average referral from the current CCRC is 30 cases a year. So again, a 300% increase in referrals is a success, you may say it's a qualified success, but if you compare that with the figures in Scotland, we had a Home Secretary under the Secretary of State's Department that was dealing with only 30 cases a year, as opposed to 150, so we've had a 500% increase.

And we referred only 19 cases in 73 years, as opposed to 140 in 20 years, which is a 2500% increase. But if you're starting from such a low number, it looks spectacular. So of course, when I'm speaking to people, defence solicitors, it's easy to tell them that in fact we're increasing by 2500%, what more do you want us to do?

But again, I say at the start and I say it again you can make anything of statistics. That doesn't really matter to me.

Lord Garnier QC

Sorry, what you have been saying is fascinating, and what Erwin wants to ask you is no doubt fascinating, but I must bring this session to a close, because you've been very generous with your time. We have some other witnesses who are waiting to give evidence. Can I thank you again. Thank you very much indeed for coming. If there are further points that have arisen in the course of our discussion which you want to tell us about, please do write, and we'd be very pleased to hear from you if you've got further things to say.

Gerard Sinclair

We're happy to do that, and if there's anything else that you want to ask of us, if we get questions, we will respond to them in writing.

